

## Will EPA Be Able to Avoid Regulating Existing Sources of Methane?

By Matthew W. Morrison and Nicholas M. Krohn

*The Obama administration recently announced plans to directly regulate methane gas emissions from oil and gas wells for the first time. A cornerstone of the regulations will be New Source Performance Standards (NSPS) for new and modified production sources. EPA has stated that it currently has no plans to regulate existing sources through Existing Source Performance Standards (ESPS). The Agency may soon discover, however, that certain legal and technical realities will force it to regulate existing sources earlier than it thinks.*

### NSPS as a Triggering Event to ESPS

Environmental groups argue, and industry groups fear, that EPA must regulate methane emissions with an ESPS under Section 111(d) of the Clean Air Act, if it regulates methane emissions with an NSPS under Section 111(b). This concern is derived from the language of Section 111(d), which states:

[EPA] shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the [EPA] a plan which

(A) establishes standards of performance for any existing source for any air pollutant

[. . .]

(ii) to which a standard of performance under this section would apply if such existing source were a new source.

42 U.S.C. § 7411(d) (emphasis added).

EPA has tacitly acknowledged that regulating a category of new sources under 111(b) means it must also regulate that same category of existing sources, but maintains that Section 111(d) does not set a deadline for an ESPS, giving it broad discretion in terms of when it needs to get around to regulating the existing sources. Stated differently, EPA believes it may legitimately and indefinitely delay an ESPS.

Commenters are sure to raise this issue when the regulations are proposed this summer. If the Agency decides to ignore this concern, judicial challenges are not unlikely. The Agency has in the past been accused of “sue and settle” collusion with environmental groups, and judicial challenges to the NSPS on this issue could set the stage for an ESPS that the Agency has to issue far sooner than it publicly predicted.

### It’s All in the Numbers

EPA hopes that the NSPS regulations will curb methane emissions from oil and gas wells as much as 40-45 percent by 2025. It remains to be seen whether the NSPS will suffice to reach that goal, and certain environmental groups have voiced skepticism in the absence of other accompanying measures.<sup>1</sup> The concerns seem valid—new source standards may halt the growth of methane emissions, but they are unlikely to dial back those emissions in the next ten years. Such substantial reductions almost inevitably require reductions from existing sources as well.

EPA Administrator Gina McCarthy is hoping that voluntary methane reductions at existing sources may obviate the need to regulate them: “If existing sources aggressively reduce their emissions, then it is not clear that there will be cost-effective reductions that will necessitate regulation on existing facilities,” McCarthy recently told reporters, according to *The Hill*. Voluntary measures and self-regulation at existing sources may help, but it is doubtful the necessary investments will take place, particularly in the petroleum sector, which is seeing discretionary funds evaporate.

### Preparing and Planning for Existing Source Regulation

While industry has focused its attention on the NSPS, it would be wise to also consider what could be an almost inevitable ESPS closely to follow. A concurrent discussion of reasonable ESPS limits could soften the impact of an ESPS, and meaningful interim, voluntary reductions at existing sources could also lessen the technological urgency to do more than regulate new and modified sources, at least for the foreseeable future.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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<sup>1</sup> In 2014, the EPA released a series of technical white papers that identify options for reducing methane emissions. It is not clear whether some or all of these options will be included in the regulations. The white papers are available at [this link](#).

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