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Several critical legal issues emerge from comments on EPA's methane proposal

The U.S. Environmental Protection Agency's highly anticipated November 2021 Clean Air Act (CAA) proposal regulating methane and volatile organic compound (VOC) emissions from the oil and gas sector drew a reported 400,000 individual submissions. Through the methane proposal (*Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 86 Fed. Reg. 63,110 (Nov. 15, 2021)), EPA seeks to expand the current VOC and methane emissions regulations that apply to new, modified, and reconstructed sources within the crude oil and natural gas production sector that were promulgated by EPA in 2012 (40 C.F.R. Part 60, Subpart OOOO) and 2016 (40 C.F.R. Part 60, Subpart OOOOa). In addition, the methane proposal includes the first nationwide methane emissions guidelines for existing sources within the oil and gas sector.

It is no surprise that EPA received a significant number of comments on the methane proposal, especially considering the relatively brief and tumultuous history of the agency's regulation of methane emissions from the oil and gas sector under the CAA. The commenters' views

on the proposal differ considerably. Many commenters, primarily those representing the oil and gas industry and certain states, raised serious legal concerns and also questioned the technical aspects and propriety of several key components of issues with the proposal. On the other hand, commenters from other states, local governments and environmental groups urged EPA to impose even more stringent requirements, beyond those included in the methane proposal. Several key themes and legal issues emerged from these comments. This article highlights some of the potentially pivotal legal issues raised by commenters, including those related to EPA's proposed community-based monitoring program.

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Comments addressing legal issues related to EPA's methane proposal

Commenters raised numerous legal issues with the methane proposal, ranging from foundational issues on whether the CAA allows EPA to regulate methane emissions from the oil and gas in this manner to legal concerns about the way EPA is proposing to regulate specific sources in the proposal. In particular, several commenters assert that the methane proposal compounds EPA's previous error in failing to make the requisite findings required by the CAA to regulate methane emissions from the oil and gas sector and EPA's legal authority to regulate emissions from sources in the transmission and storage segment.

The legal issues surrounding EPA's addition of methane to Subpart OOOOa and the transmission and storage

segment to Subparts OOOO and OOOOa were raised previously when EPA promulgated Subpart OOOOa in 2016 and in subsequent legal challenges that are currently stayed. Notably, the Trump administration finalized a rule in September 2020 removing methane from Subpart OOOOa and the transmission and storage segment from Subparts OOOO and OOOOa, but in June 2021 Congress rescinded this rule using its Congressional Review Act authority. The House of Representatives issued a report that accompanied its disapproval of the Trump administration's rule. Notably, in the House's report, it openly disagreed with the interpretation of the CAA advanced by the Trump administration to support the removal of methane from Subpart OOOOa.

Commenters on the methane proposal, however, suggested that the House's report is of limited import and the sole effect of Congress' action was limited to rescinding the Trump administration's rule and preventing EPA from promulgating a substantially similar rule in the future. In other words, these commenters state that EPA must still meet the CAA requirements for regulating methane emissions from the oil and gas sector, suggesting that these long-standing legal issues are unlikely to resolve themselves.

Several commenters also raise three additional legal issues with the methane proposal that could prove to be critical:

- **Due process and fair notice.** Many commenters took issue with the listed applicability date of November 15, 2021, for the new CAA § 111(b) performance standards included in the methane proposal. When EPA published the methane proposal it did not provide proposed regulatory text for the proposed new CAA § 111(b) performance standards or CAA § 111(d) emission guidelines for existing sources. Therefore, several commenters questioned EPA's use of the *Federal Register* publication date as having any legal import, given the importance of the proposed regulatory text in understanding proposed legal obligations and governing statutory language.
- **Modification definitions.** Commenters also took issue with EPA's proposed source-specific definitions of "modification" for the new proposed requirements for centralized production facilities, tanks and tank batteries, and well liquids unloading. Section

111 of the CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a) (3). EPA, however, proposes to promulgate source-specific "modification" definitions for the above-referenced sources or facilities that, some commenters argue, are inconsistent with the CAA's definition of "modification."

- **"Legally and practicably enforceable limits."**

On page 92 of the 154-page methane proposal, EPA proposes to create a new definition to "clarify" the term "legally and practicably enforceable limits" as it relates to the regulation of storage vessels in the oil and gas sector. This term embodies the long-established and applied concept of allowing sources to account and take credit for emission reductions when assessing applicability of air regulatory requirements. This concept is used across several major CAA stationary source programs and is not specific to EPA's CAA regulations for the oil and gas sector. Several commenters urged EPA to issue a broad-based rulemaking should it wish to clarify this key term by regulation.

While many commenters have raised critical threshold legal concerns with EPA's methane proposal, other commenters, particularly those from certain states and environmental groups, not only expressed support for the underlying legal interpretations advanced by EPA in the proposal, but encouraged EPA to expand the proposal further to impose more stringent requirements and regulate additional sources of methane and VOC emissions.

Comments on the proposed community-based monitoring program

In the methane proposal, EPA directly solicits input and comments on how to design and implement a program through which communities could use methane detection systems to identify large emissions events and provide that information to facility owners and operators. According to EPA, data and information collected in this community-based monitoring program would be used to require

operators to investigate emissions events over a defined emissions threshold, conduct a root cause analysis and take appropriate action to mitigate the emissions. EPA's proposed community-based monitoring program is novel. We are unaware of any other CAA regulations that expressly allow and authorize third-parties to monitor and measure emissions and use this data and information to force action by the regulated facility.

While some states, including Pennsylvania, and environmental groups voiced support for the proposed program and offered implementation suggestions, industry group commenters in particular raised several legal concerns with the conceptual program. One industry group questioned EPA's authority to directly allow, by regulation, the proposed community-monitoring program, noting that the information-gathering authority provided to EPA in CAA § 114 is limited to certain types of entities, none of which would cover a third-party community-member. Other commenters noted that EPA's proposed community-monitoring program would encourage trespass and unsafe practices, as well as raise significant data validation concerns.

Conclusion

The widely divergent views on the legality of EPA's methane proposal suggest that future litigation is inevitable. Because EPA has indicated that it will release a supplemental proposal, which is expected to include the proposed regulatory text, stakeholders should know soon whether EPA will change or alter course in an effort to subdue potential challengers.