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EPA Regulation of Greenhouse Gases: Congressional Responses and Options

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Summary

Both the Administration and Congress expect that regulation of greenhouse gases (GHGs) by the Environmental Protection Agency (EPA) will be an important issue in 2015. EPA has proposed standards to limit GHG emissions from both new and existing fossil-fueled electric power plants. The agency expects to issue final standards for these units by mid-summer of this year.

Because of the importance of electric power to the economy and its significance as a source of GHG emissions, the EPA standards have generated substantial interest. The economy and the health, safety, and well-being of the nation are affected by the availability of a reliable and affordable power supply. Many contend that that supply would be adversely impacted by controls on GHG emissions. At the same time, an overwhelming scientific consensus has formed around the need to slow long-term global climate change. The United States is the second largest emitter of greenhouse gases, behind only China, and power plants are the source of about one-third of the nation's anthropogenic GHG emissions. If the United States is to reduce its total GHG emissions, as the President has committed to do, it will be important to reduce emissions from these sources.

Leaders of both the House and Senate in the 114th Congress have stated their opposition to the proposed standards, so Congress is likely to consider legislation to prevent EPA from finalizing or implementing the proposed rules. Such legislation could take one of several forms:

1. a resolution (or resolutions) of disapproval under the Congressional Review Act;
2. freestanding legislation;
3. the use of appropriations bills as a vehicle to influence EPA activity; or
4. amendments to the Clean Air Act.

More than a dozen bills were introduced in the 112th and 113th Congresses that might serve as templates for such legislation in the 114th. Among the bills introduced in the 113th Congress, the most prominent were H.R. 3826 and S.J.Res. 30. The former, which passed the House in March 2014, would have prohibited EPA from promulgating or implementing GHG emission standards for fossil-fueled electric generating units until certain stringent requirements were met, and would have required that Congress enact new legislation setting an effective date before such standards could be implemented. The Senate bill, a resolution of disapproval under the Congressional Review Act, would have rendered EPA's proposed standards of no force or effect and would have prohibited EPA from promulgating similar standards unless Congress enacted new authorizing legislation.

This report discusses elements of the GHG controversy, providing background on stationary sources of GHG emissions and providing information regarding the options Congress has at its disposal to address GHG issues.

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Introduction

Since 2007, the Supreme Court has ruled on three separate occasions that the Clean Air Act authorizes the Environmental Protection Agency to set standards for emissions of greenhouse gases (GHGs). GHGs are a disparate group of pollutants¹—the most significant of them being carbon dioxide (CO₂). According to a widely held scientific consensus, these gases trap the sun's energy in the Earth's atmosphere and contribute to climate change.

In 2009, the House passed comprehensive legislation that would have limited numerous elements of EPA's existing authority over GHGs, substituting economy-wide cap-and-trade systems to reduce GHG emissions.² Companion legislation emerged from committee in the Senate, but failed to reach the floor.³ Since then, Congress has made no serious effort to revive the legislation. Instead, in the 112th and 113th Congresses, attention to the issue focused on various bills to repeal or limit EPA's authority over GHG emissions without providing a substitute.

Meanwhile, EPA has taken action, using its existing Clean Air Act (CAA) authority:

- In April 2010, then-EPA-Administrator Lisa Jackson signed final regulations that required auto manufacturers to limit emissions of GHGs from new Model Year (MY) 2012-2016 cars and light trucks.⁴
- Effective in January 2011, EPA began requiring new and modified major stationary sources to undergo pre-construction review under the Prevention of Significant Deterioration/New Source Review (PSD/NSR) program with respect to their GHG emissions in addition to any other pollutants subject to CAA regulation that they emit. This review requires affected new and modified sources to obtain permits and install Best Available Control Technology (BACT) to address their GHG emissions.
- At the same time, EPA began requiring large existing stationary sources of GHG emissions (in addition to new sources) to obtain operating permits under Title V of the Clean Air Act (or have existing permits modified to include their GHG emissions).
- In September 2011, EPA promulgated GHG emission standards for MY2014-2018 medium- and heavy-duty trucks.⁵
- In October 2012, EPA promulgated a second round of GHG emission standards for cars and light trucks, applicable to MY2017-2025 vehicles.⁶

¹ The six pollutants or groups of pollutants commonly identified as GHGs are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), hydrofluorocarbons (HFCs), and perfluorocarbons (PFCs).

² H.R. 2454, the American Clean Energy and Security Act.

³ S. 1733, the Clean Energy Jobs and American Power Act.

⁴ The regulations, which took effect with the 2012 model year, appeared in the *Federal Register* on May 7, 2010, at 75 *Federal Register* 25324. Related information is available on EPA's website at <http://www.epa.gov/otaq/climate/regulations.htm>.

⁵ U.S. Environmental Protection Agency, U.S. Department of Transportation, "Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Final Rules," 76 *Federal Register* 57106, September 15, 2011.

- In 2014, EPA proposed emission standards for new and existing fossil-fueled electric generating units (EGUs) under Section 111 of the Clean Air Act.

EPA's potential regulation of GHG emissions (particularly from stationary sources) has led many in Congress to suggest that the agency delay taking action or be stopped from proceeding. In each Congress since the 111th, bills have been introduced to rescind or limit EPA's greenhouse gas authority.

Early on, EPA attempted to respond to congressional and stakeholder concerns by clarifying the direction and schedule of its actions. The agency provided three clear responses to implementation issues as it was taking the first regulatory actions described above:

- The first came on March 29, 2010, when the Administrator reinterpreted a 2008 memorandum concerning the effective date of the stationary source permit requirements.⁷ Facing a possibility of having to begin the permitting process on April 1, 2010 (the date the first GHG standard for automobiles was finalized), the March 29 decision delayed for nine months (to January 2, 2011) the date on which EPA would consider stationary source GHGs to be subject to regulation, and thus subject to the permitting requirements of PSD/NSR and Title V.⁸
- On May 13, 2010, the Administrator signed the GHG "Tailoring" Rule, which provided for a phasing in of Title V and PSD/NSR permitting requirements, so that only a limited number of very large sources would initially have to meet requirements.
- On November 10, 2010, EPA released a package of guidance and technical information to assist local and state permitting authorities in implementing PSD and Title V permitting for greenhouse gas emissions.⁹

The EPA Administrator and the President also repeatedly expressed their preference for Congress to take the lead in designing a GHG regulatory system. However, EPA simultaneously stated that, in the absence of congressional action, it must proceed to regulate GHG emissions: the April 2007 Supreme Court decision in *Massachusetts v. EPA*¹⁰ compelled EPA to address whether GHGs were air pollutants that endanger public health and welfare, and if it found they were, to embark

(...continued)

⁶ U.S. Environmental Protection Agency and National Highway Traffic Safety Administration, DOT, "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards," Final Rule, 77 *Federal Register* 62624, October 15, 2012, at <http://www.epa.gov/otaq/climate/regs-light-duty.htm#new1>.

⁷ The reinterpretation memo appeared in the *Federal Register*, April 2, 2010, at 75 *Federal Register* 17004.

⁸ The term "subject to regulation" is the key Clean Air Act term that determines when affected sources would be subject to the permitting requirements of NSR and Title V. By interpreting the term to refer to January 2, 2011, rather than the date of the final regulations implementing the mobile source endangerment finding (April 1, 2010), EPA effectively delayed the impact of that rulemaking on stationary sources for nine months. For a further discussion of the term, "subject to regulation," see CRS Report R40984, *Legal Consequences of EPA's Endangerment Finding for New Motor Vehicle Greenhouse Gas Emissions*.

⁹ U.S. EPA, Office of Air and Radiation, "PSD and Title V Permitting Guidance for Greenhouse Gases," November 2010 (subsequently revised, March 2011), at <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.

¹⁰ 549 U.S. 497 (2007).

on a regulatory course prescribed by statute. Having made an affirmative decision in response to the endangerment question,¹¹ EPA proceeded with regulations.

Thus, EPA and many Members of Congress have been on a collision course. EPA is proceeding to regulate emissions of GHGs under the Clean Air Act, as it maintains it must. Opponents of this effort in Congress continue to explore approaches to alter the agency's course.

The President has made clear that he intends to take action to control GHG emissions. In his second inaugural address, he promised to “respond to the threat of climate change.” He reiterated his determination to address the issue in the last three State of the Union addresses. In June 2013, he directed EPA to propose¹² New Source Performance Standards for greenhouse gas emissions from new fossil-fueled power plants by September 20, 2013, and to propose guidelines for existing power plants by June 1, 2014. EPA met both of these deadlines¹³ and is moving forward to finalize the power plant rules by mid-summer 2015—leaving Congress to consider whether and how best to respond.

This report discusses elements of this controversy, providing background on stationary sources of greenhouse gas pollution and identifying options Congress has if it chooses to address the issue. The report discusses four sets of options: (1) resolutions of disapproval under the Congressional Review Act; (2) freestanding legislation directing, delaying, or prohibiting EPA action; (3) the use of appropriations bills as a vehicle to influence EPA activity; and (4) amendments to the Clean Air Act, including legislation to establish a new GHG control regime. The report considers each of these in turn, but first provides additional detail regarding the sources of GHG emissions, the requirements of the Clean Air Act, and a brief description of the proposed rules that would limit power plant GHG emissions.

Regulation of Stationary Source GHGs

Stationary sources are the major sources of the country's GHG emissions. As shown in **Figure 1**, 65% of U.S. emissions of greenhouse gases comes from stationary sources (the remainder comes from mobile sources, primarily cars and trucks). If EPA (or Congress) is to embark on a serious effort to reduce greenhouse gas emissions, stationary sources, and in particular large stationary sources such as power plants, will have to be included.

The substantial amount of greenhouse gas emissions emanating from stationary source categories is even more important from a policy standpoint: reducing greenhouse gas emissions from these

¹¹ 74 *Federal Register* 66496. The EPA decision is generally referred to as the “endangerment finding” (singular), but the *Federal Register* notice consists of two separate findings: a Finding That Greenhouse Gases Endanger Public Health and Welfare, and a Finding That Emissions of Greenhouse Gases from CAA Section 202(a) Sources Cause or Contribute to the Endangerment of Public Health and Welfare. [CAA Section 202(a) sources are new motor vehicles or new motor vehicle engines.]

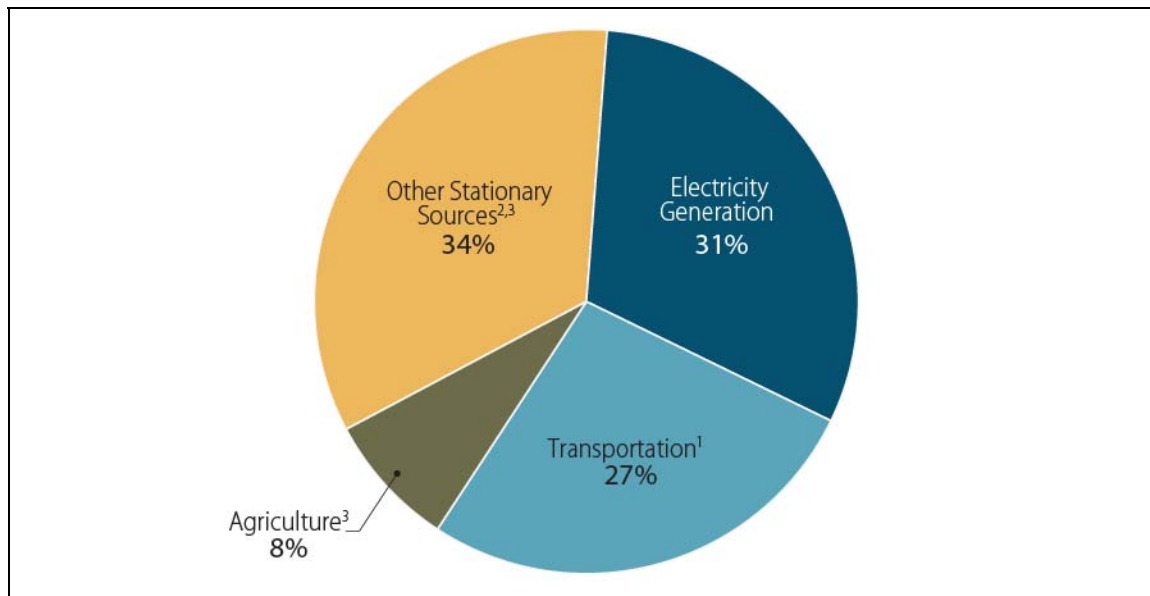
¹² Actually, he directed EPA to re-propose the standards. The NSPS were first proposed on April 13, 2012. As discussed below, EPA received more public comments on the rule than any rule in its 40-year history up to that time, and had not completed action on the original proposal.

¹³ The re-proposed standards were signed September 20, and were published in the *Federal Register*, January 8, 2014, at 79 *Federal Register* 1430. The guidelines for existing power plants were signed on June 2, 2014, and were published in the *Federal Register*, June 18, 2014, at 79 *Federal Register* 34830.

sources is likely to be more timely and cost-effective than attempts to reduce emissions from the transport sector. A relatively small number of stationary sources (a few thousand power plants, for example) account for a large percentage of total emissions, making regulation easier to administer and enforce. By contrast, there are more than 200 million sources in the fleet of cars and trucks. EPA has no legal authority to impose more stringent standards on these existing vehicles. Even for new vehicles, standards have to be phased in: the manufacturers can't be expected to develop new vehicle designs and engines for every model simultaneously. The fleet of vehicles turns over slowly. Thus, although new vehicles will be required to reduce GHG emissions by about 50% in Model Year 2025 and later vehicles, it will be 2040 or later before the full effect of that requirement is felt.

Existing power plants and other stationary sources—although not easily modified—are somewhat more amenable to changes than mobile sources: fuel sources can be switched; processes can be made more efficient, reducing fuel consumption; and demand for power can be modified through a variety of measures.

Figure I. Sources of U.S. Greenhouse Gas Emissions
(% of total anthropogenic emissions, 2012)



1. Of the 27% emitted by transportation sources, 62% came from light duty vehicles (cars, SUVs, vans, and pickups) and 22% came from medium- and heavy-duty trucks.

2. "Other" includes a wide variety of sources: industrial fuel combustion and processes (43% of the "Other" total); residential fuel combustion (13%); commercial fuel combustion (9%); natural gas systems (7%); phase-out of ozone depleting substances (7%); landfills (5%); coal mining (3%); and other (13%).

3. Estimates for oil and gas production and distribution and for agriculture are subject to substantial uncertainty.

Source: CRS, based on data from U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, April 2014.

Potential GHG Emission Standards Under Section 111

Because power plants and other stationary sources are the largest sources of GHG emissions, EPA has begun the process of regulating their emissions through New Source Performance Standards (NSPS), under Section 111 of the Clean Air Act.

NSPS are emission limitations imposed on designated categories of new (or substantially modified) stationary sources of air pollution. A new source is subject to NSPS regardless of its location or ambient air conditions. Section 111 provides authority for EPA to impose performance standards directly in the case of new (or modified) stationary sources (Section 111(b)), and through the states in the case of existing sources (Section 111(d)).¹⁴

The authority to impose performance standards on new and modified sources refers to any category of sources that the Administrator judges “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare” (Sec. 111(b)(1)(A))—language similar to the endangerment and cause-or-contribute findings EPA promulgated for new motor vehicles in December 2009.

In establishing these standards, Section 111 gives EPA considerable flexibility with respect to the source categories regulated, the size of the sources regulated, the particular gases regulated, along with the timing and phasing-in of regulations (Section 111(b)(2)). This flexibility extends to the stringency of the regulations with respect to costs, and secondary effects, such as non-air-quality, health and environmental impacts, along with energy requirements (Section 111(a)(1)). This flexibility is encompassed within the Administrator’s authority to determine what control systems have been “adequately demonstrated” (Section 111(a)(1)). (For discussion of what is meant by the term “adequately demonstrated,” see CRS Report R43127, *EPA Standards for Greenhouse Gas Emissions from New Power Plants*.) Standards of performance developed by the states for existing sources under Section 111(d) can be similarly flexible.

EPA proposed NSPS for fossil-fueled electric generating units (EGUs) on April 13, 2012.¹⁵ After receiving more than 2.5 million public comments, the most on any proposed rule in EPA’s 40-year history up to that time¹⁶—and in response to a Presidential directive¹⁷—the agency withdrew the 2012 proposal and proposed a somewhat modified version of the rule on January 8, 2014.¹⁸ The Clean Air Act requires the promulgation of a final NSPS within one year of proposal—thus, by January 8, 2015. In early January 2015, the agency stated that it would not do so until mid-summer 2015.

¹⁴ If a state fails to adopt a “satisfactory” plan to control emissions from existing sources, EPA may impose standards.

¹⁵ U.S. EPA, *Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units*, Proposed Rule, 77 *Federal Register* 22392, April 13, 2012.

¹⁶ The record for comments has since been eclipsed by the 3,826,230 comments EPA has received, as of January 21, 2015, on the Clean Power Plan, EPA’s GHG proposal for existing EGUs.

¹⁷ Office of the Press Secretary, The White House, “Power Sector Carbon Pollution Standards,” Memorandum for the Administrator of the Environmental Protection Agency, June 25, 2013, at <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

¹⁸ U.S. EPA, *Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units*, Proposed Rule, 79 *Federal Register* 1430, January 8, 2014.

In addition, the President directed the agency to propose guidelines for *existing* EGUs under Section 111(d) by June 1, 2014, with final action one year later.¹⁹ The agency expects to finalize this proposal by mid-summer 2015, as well.

The proposed standards for *new* sources would limit GHG emissions from both coal-fired and natural-gas-fired EGUs. Gas-fired plants would be able to meet the proposed standard without add-on emission controls, but coal-fired plants (which generate carbon dioxide (CO₂) at a rate at least double that of new combined cycle natural gas plants) would need to reduce CO₂ emissions by roughly 40% as compared to the best performing U.S. coal-fired power plants currently in operation in order to meet the proposed standard. Achieving this would require the installation of partial carbon capture and storage systems at new coal-fired plants, an expensive technology not yet commercially demonstrated on a large U.S. coal-fired EGU.

EPA states that this technology will soon be demonstrated by plants currently under construction, and that the rule will provide the certainty needed to stimulate the technology's further development; but many view EPA's rule as effectively prohibiting the construction of new coal-fired power plants, however. As a result, many in Congress have expressed interest in blocking this EPA regulatory action. (For additional information on the proposed rule for new power plants, see CRS Report R43127, *EPA Standards for Greenhouse Gas Emissions from New Power Plants*.)

The proposed standards for *existing* EGUs would set state-specific goals for CO₂ emissions from power generation. In the proposal, EPA established different goals for each state based on four "building blocks": improved efficiency at coal-fired power plants; substitution of natural gas combined cycle generation for coal-fired power; zero-emission power generation (from increased renewable or nuclear power); and demand-side energy efficiency. Two sets of goals were proposed: an interim set, which would apply to the average emissions rate in a state in the 2020-2029 time period; and a final set for the years 2030 and beyond. The states would be required to develop plans to reach their goal using whatever combination of measures they choose, but it would be difficult to reach the goals without reducing emissions from coal-fired power plants. (For additional information on the proposed rule for existing power plants, see CRS Report R43572, *EPA's Proposed Greenhouse Gas Regulations for Existing Power Plants: Frequently Asked Questions*.)

Congressional Options

As noted earlier, if Congress favors a different approach to GHG controls than those on which EPA has embarked, including stopping the agency in its tracks, at least four sets of options are available to change the agency's course: the Congressional Review Act; freestanding legislation; appropriations riders; and amendments to the Clean Air Act. Among the most widely discussed options has been the Congressional Review Act.

¹⁹ U.S. Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Proposed Rule, 79 *Federal Register* 34830, June 18, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf>.

Congressional Review Act²⁰

The Congressional Review Act (CRA, 5 U.S.C. §§801-808), enacted in 1996, establishes special congressional procedures for disapproving a broad range of regulatory rules issued by federal agencies.²¹ Before any rule covered by the act can take effect, the federal agency that promulgates the rule must submit it to both houses of Congress and the Government Accountability Office (GAO). If Congress passes a joint resolution disapproving the rule under procedures provided by the act, and the resolution becomes law,²² the rule cannot take effect or continue in effect. Also, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.

The CRA has been much discussed as a tool for overturning EPA's regulatory actions on GHG emissions. In the 111th Congress, on December 15, 2009, four identical resolutions were introduced to disapprove the first of EPA's GHG rules, the endangerment finding—one in the Senate (S.J.Res. 26) and three in the House (H.J.Res. 66, H.J.Res. 76, and H.J.Res. 77). Of the four, one (S.J.Res. 26) proceeded to a vote: on June 10, 2010, the Senate voted 47-53 not to take up the resolution.

The path to enactment of a CRA resolution is a steep one. In the nearly two decades since the CRA was enacted, only one resolution has ever been enacted.²³ The path is particularly steep if the President opposes the resolution's enactment, which would almost certainly be the case with a resolution disapproving an EPA rule for GHG emissions. The Obama Administration has made the reduction of GHG emissions one of its major goals; as a result, many have concluded that legislation restricting EPA's authority to act, if passed by Congress, would encounter a presidential veto. Overriding a veto requires a two-thirds majority in both the House and Senate.

The potential advantage of the Congressional Review Act lies primarily in the procedures under which a resolution of disapproval is to be considered in the Senate. Pursuant to the act, an expedited procedure for Senate consideration of a disapproval resolution may be used at any time within 60 days of Senate session after the rule in question has been published in the *Federal Register* and received by both houses of Congress. The expedited procedure provides that, if the committee to which a disapproval resolution has been referred has not reported it by 20 calendar days after the rule has been received by Congress and published in the *Federal Register*, the panel may be discharged if 30 Senators submit a petition for that purpose. The resolution is then placed on the Calendar.

Under the expedited procedure, once a disapproval resolution is on the Senate Calendar, a motion to proceed to consider it is in order. Several provisions of the expedited procedure protect against various potential obstacles to the Senate's ability to take up a disapproval resolution. The Senate

²⁰ This section of this report, discussing the effect of the Congressional Review Act, the procedures under which a disapproval resolution is taken up in the Senate, floor consideration in the Senate, and final congressional action, is adapted from CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth. Additional input to this section was provided by Alissa Dolan, Legislative Attorney, American Law Division of CRS.

²¹ The CRA applies to a "rule," as defined in 5 U.S.C. §804(3).

²² For the resolution to become law, the President must sign it or allow it to become law without his signature, or the Congress must override a presidential veto.

²³ See P.L. 107-5 (2001) (disapproving of an Occupational Safety and Health Administration Rule regarding ergonomics published at 65 *Federal Register* 68261).

has treated a motion to consider a disapproval resolution under the CRA as not debatable, so that this motion cannot be filibustered through extended debate. After the Senate takes up the disapproval resolution itself, the expedited procedure of the CRA protects the ability of the body to continue and complete that consideration. It limits debate to 10 hours and prohibits amendments.²⁴

The Congressional Review Act sets no deadline for final congressional action on a disapproval resolution, so a resolution could theoretically be brought to the Senate floor even after the expiration of the deadline for the use of the CRA's expedited procedures. To obtain floor consideration, the bill's supporters would then have to follow the Senate's normal procedures, however.

Similarly, a resolution could reach the House floor through its ordinary procedures, that is, generally by being reported by the committee of jurisdiction (in the case of CAA rules, the Energy and Commerce Committee). If the committee of jurisdiction does not report a disapproval resolution submitted in the House, a resolution could still reach the floor pursuant to a special rule reported by the Committee on Rules (and adopted by the House), by a motion to suspend the rules and pass it (requiring a two-thirds vote), or by discharge of the committee (requiring a majority of the House [218 Members] to sign a petition).

The CRA establishes no expedited procedure for further congressional action on a disapproval resolution if the President vetoes it. In such a case, Congress would need to attempt an override of a veto using its normal procedures for considering vetoed bills.

In the 113th Congress, Senator McConnell along with 41 cosponsors introduced S.J.Res. 30, to disapprove of the EPA proposed rule regarding New Source Performance Standards for electric generating units published in the *Federal Register* on January 8, 2014.²⁵ Although historically the CRA is considered not to apply to proposed rules,²⁶ Senator McConnell argued in a letter to GAO that the CRA should apply to this particular proposed rule based upon his interpretation of the immediate legal effect of the rule.²⁷

²⁴ These provisions help to ensure that the Senate disapproval resolution will remain identical, at least in substantive effect, to the House joint resolution disapproving the same rule, so that no filibuster is possible on the resolution itself. In addition, once the motion to proceed is adopted, the resolution becomes "the unfinished business of the Senate until disposed of," and a non-debatable motion may be offered to limit the time for debate further. Finally, the act provides that at the conclusion of debate, the Senate automatically proceeds to vote on the resolution.

²⁵ U.S. EPA, *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*, Proposed Rule, 79 *Federal Register* 1430, January 8, 2014.

²⁶ See, for example, GAO's Congressional Review Act FAQs, available at http://www.gao.gov/legal/congressact/cra_faqs.html.

²⁷ Letter of Senator Mitch McConnell to Hon. Gene L. Dodaro, Comptroller General of the United States, January 16, 2014, available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/01/16/National-Politics/Graphics/MM%20letter%20to%20GAO-CRA.pdf>. In the letter, Senator McConnell stated that he was "not asking the GAO to address the question of whether all proposed rules are eligible for CRA review.... Ordinarily, the publication of a proposed rule by EPA (or any other agency) does not have any immediate legal impact.... However, the Proposed GHG Rule was issued under Section 111(b) of the CAA, which contains a highly unusual 'applicability' provision. Any power plant whose construction is commenced 'after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance ... which will be applicable to such source' is considered to be a 'new source' subject to that standard," and, therefore, the proposed rule should be considered a rule under the CRA.

The CRA does not directly address the distinction between proposed and final rules, referring only to “a rule” or “the rule” as defined in Title 5, Section 551 of the U.S. Code (the Administrative Procedure Act), with specific exceptions.²⁸ Section 551 also does not directly address the definition of a proposed rule or the difference between a proposed and final rule, simply stating that a rule is “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy....”

There is no case law examining the applicability of the CRA to proposed rules; in fact, Section 805 of the CRA prohibits judicial review of determinations, findings, actions, or omissions under the act. Rather, Section 802 specifies that the CRA is “an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House,” presumably leaving it to the Senate Parliamentarian to decide whether or not the CRA would apply to a resolution disapproving of a proposed rule.

In practice, the Parliamentarian tends to defer to analysis on the applicability of the CRA requested by Members of Congress and conducted by GAO, which is also required under Section 801 of the CRA to submit a report on each major rule to the committees of jurisdiction in the House and Senate. Senator McConnell requested that the GAO “review and determine Congress’s authority to take up a resolution under the Congressional Review Act” in regards to the proposed rule.²⁹

GAO responded to Senator McConnell’s letter in May 2014. In its letter, GAO limited its analysis to three questions regarding GAO’s role in the CRA and its precedents analyzing whether specific agency actions are rules under the CRA.³⁰ It concluded that “the terms of [the] CRA, and its supporting legislative history, clearly do not provide a role for GAO with regard to proposed rules, and do not require agencies to submit proposed rules to GAO.”³¹ Furthermore, it stated that prior GAO decisions found “that an agency action constituted a rule for CRA purposes ... [if] the action imposed requirements that were both certain and final.”³² Since proposed rules “are proposals for future agency action that are subject to change ... and do not have a binding effect on the obligations of any party,”³³ GAO concluded they are “not a triggering event for CRA purposes.”³⁴ However, GAO also noted that because the CRA’s expedited procedure for review of

²⁸ The CRA definition of a rule does not include (1) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (2) any rule relating to agency management or personnel; or (3) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. §804(3).

²⁹ Letter of Senator Mitch McConnell to Hon. Gene L. Dodaro, Comptroller General of the United States, January 16, 2014, available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/01/16/National-Politics/Graphics/MM%20letter%20to%20GAO-CRA.pdf>.

³⁰ Letter from Susan A. Poling, General Counsel, Government Accountability Office, to the Honorable Harry Reid, Mitch McConnell, Barbara Boxer, and Thomas Carper, May 29, 2014 (regarding GAO’s Role and Responsibility Under the Congressional Review Act) at 1 [hereinafter GAO May 2014 CRA Letter], at <http://www.gao.gov/assets/670/663690.pdf>. Specifically, GAO “agreed to answer three questions: (1) what is GAO’s role under CRA and what type of agency action triggers that role; (2) what role does GAO play under CRA with regard to a proposed rule; and (3) do prior GAO opinions under CRA examining final agency actions outside of the rulemaking process provide precedent in answering these questions.” Ibid.

³¹ Ibid. at 5.

³² Ibid. at 8.

³³ Ibid.

³⁴ Ibid. at 6.

agency rules was enacted pursuant to Congress's constitutional authority to establish its own procedural rules,³⁵ it is for "Congress to decide whether [the] CRA would apply to a resolution disapproving a proposed rule."³⁶

For additional information on the Congressional Review Act, see CRS Report IF10023, *The Congressional Review Act (CRA)*, by Alissa M. Dolan, Maeve P. Carey, and Christopher M. Davis.

Freestanding/Targeted Legislation

To provide for a more nuanced response to the issue than permitted under the CRA, Members have introduced freestanding legislation or legislation that amends the Clean Air Act in a targeted way. More than a dozen bills (and several amendments) were introduced in the 113th Congresses that would have prohibited temporarily or permanently EPA's regulation of greenhouse gas emissions,³⁷ and more bills are likely to be considered in the 114th Congress. These bills face the same obstacle as a CRA resolution of disapproval (i.e., being subject to a presidential veto); in addition, they would likely need 60 votes to be considered on the Senate floor.

Among the bills introduced, attention in the 113th Congress focused on Representative Whitfield's H.R. 3826, the Electricity Security and Affordability Act, which passed the House, March 6, 2014, and was also included in House-passed H.R. 2.

H.R. 3826 in the 113th Congress

H.R. 3826 would have prohibited EPA from promulgating or implementing GHG emission standards for fossil-fueled power plants until at least six power plants representative of the operating characteristics of electric generation units at different locations across the United States have demonstrated compliance with proposed emission limits for a continuous period of 12 months on a commercial basis. Projects demonstrating the feasibility of carbon capture and storage that received government financial assistance could not be used in setting such standards, and the standards would not take effect unless Congress enacted new legislation setting an effective date. Given the role of the U.S. Department of Energy in financing demonstrations of clean coal technology and the cost of developing new emissions control technologies not required by regulation, the bill would effectively prohibit EPA from promulgating New Source Performance Standards for GHG emissions from EGUs. The agency's current NSPS proposal would set a standard that no coal-fired EGU in the United States currently meets, and it relies on technology that is being implemented with financial assistance from the Department of Energy.

Although the bill passed the House, it was not considered in the Senate.

³⁵ See U.S. CONST., art. I, §5, cl. 2.

³⁶ GAO May 2014 CRA Letter, *supra* note 65, at 9.

³⁷ Bills in the 113th Congress included H.R. 2, H.R. 621, H.R. 1881, H.R. 2081, H.R. 3033, H.R. 3702, H.R. 3826, H.R. 3895, H.R. 4286, H.R. 4813, H.R. 5300, H.R. 5360, S. 163, S. 1905, and S. 2170.

Bills in the 112th Congress

In the 112th Congress, attention focused on several bills that passed the House and/or were considered in the Senate. Several of these bills would have delayed any action by EPA under the Clean Air Act with regard to stationary sources for a period of two years. Three such bills were voted on in April 2011 (as amendments to other Senate legislation)—S.Amdt. 215, S.Amdt. 236, and S.Amdt. 277—and were not agreed to, by lopsided margins.

Legislation that received broader support in the 112th Congress, H.R. 910/S. 482, was introduced by Chairman Upton of the House Energy and Commerce Committee and Senator Inhofe, then-ranking Member of the Senate Environment and Public Works Committee. It would have permanently removed EPA's authority to regulate greenhouse gases. The House version passed, 255-177, April 7, 2011. In the Senate, Senator McConnell introduced language identical to the bill as an amendment to S. 493 (S.Amdt. 183). The amendment was not agreed to, on a vote of 50-50, April 6, 2011.

The Upton-Inhofe-McConnell bill would have repealed a dozen EPA greenhouse-gas-related regulations, including the Mandatory Greenhouse Gas Reporting rule, the Endangerment Finding, and the PSD and Title V permitting requirements. It would have redefined the term “air pollutant” to exclude greenhouse gases. And it stated that EPA may not “promulgate any regulation concerning, take action related to, or take into consideration the emission of a greenhouse gas to address climate change.” The bill would have had no effect on federal research, development, and demonstration programs. The already promulgated light-duty motor vehicle GHG standards and the GHG emission standards for Medium- and Heavy-Duty Engines and Vehicles would have been allowed to stay in effect, but no future mobile source rules for GHG emissions would have been allowed. Also, EPA would have been prohibited from granting another California waiver (under Section 209(b) of the Clean Air Act) for greenhouse gas controls from mobile sources.

Appropriations Bills

A third option that Congress has used to delay regulatory initiatives is to place an amendment, or “rider” on the agency's appropriation bill to prevent funds from being used for the targeted initiative. In comparison to a CRA resolution of disapproval or freestanding legislation, addressing the issue through an amendment to the EPA appropriation—an approach that has been discussed at some length since 2009—may be considered easier. The overall appropriation bill to which it would be attached would presumably contain other elements that would make it more difficult to veto.

This approach has been considered in every session of Congress since 2010. House appropriations riders considered during this time would have:

- prohibited EPA (during the one-year period following enactment) from proposing or promulgating New Source Performance Standards for GHG emissions from electric generating units and refineries;
- declared any statutory or regulatory GHG permit requirement to be of no legal effect;
- prohibited common law or civil tort actions related to greenhouse gases or climate change, including nuisance claims, from being brought or maintained;

- prohibited the preparation, proposal, promulgation, finalization, implementation, or enforcement of regulations governing GHG emissions from motor vehicles manufactured after model year 2016, or the granting of a waiver to California so that it might implement such standards; and
- prohibited EPA from requiring the issuance of permits for GHG emissions from livestock and prohibited requiring the reporting of GHG emissions from manure management systems.

Throughout this period, the only riders affecting EPA's GHG regulatory authority that have been enacted have dealt with the potential regulation of agricultural sources of GHGs. The FY2015 appropriation and every previous EPA appropriation since FY2010 have included such provisions: Section 419, in Title IV of Division F of P.L. 113-235 provides that "none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under title V of the Clean Air Act ... for carbon dioxide, nitrous oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production." Section 420 prohibits the use of funds to implement mandatory reporting of GHG emissions from manure management systems.

In the 114th Congress, beginning in January 2015, the fate of GHG riders could be different. With Republican majorities in both the House and Senate, there likely will be less resistance in Congress to an appropriations bill or CR with additional GHG riders. A bill would still need the President's signature, however, or the votes of two-thirds majorities in both chambers to override his veto.

Comprehensive Amendments to the Clean Air Act

The most comprehensive approach that Congress could take to alter EPA's course would be to amend the Clean Air Act to modify EPA's current regulatory authority as it pertains to GHGs or to provide alternative authority to address the GHG emissions issue. In the 111th Congress, this was the option chosen by the House in passing H.R. 2454, the American Clean Energy and Security Act (the Waxman-Markey bill) and by the Senate Environment and Public Works Committee in its reporting of S. 1733, the Clean Energy Jobs and American Power Act (the Kerry-Boxer bill). The bills would have

- amended the Clean Air Act to establish an economy-wide cap-and-trade program for GHGs,
- established a separate cap-and-trade program for hydrofluorocarbons (HFCs),
- preserved EPA's authority to regulate GHG emissions from mobile sources while setting deadlines for regulating specific mobile source categories, and
- required the setting of New Source Performance Standards for uncapped major sources of GHGs.

While giving EPA new authority, both bills contained provisions to limit EPA's authority to set GHG standards or regulate GHG emissions under Sections 108 (National Ambient Air Quality Standards), 112 (Hazardous Air Pollutants), 115 (International Air Pollution), 165 (PSD/NSR),

and Title V (Permits) because of the climate effects of these pollutants.³⁸ The bills would not have prevented EPA from acting under these authorities if one or more of these gases proved to have effects other than climate effects that endanger public health or welfare.

The bills differed in the extent of their exemptions from the permitting requirements of the PSD and Title V programs. H.R. 2454 would have prevented new or modified stationary sources from coming under the PSD/NSR program solely because they emit GHGs.³⁹ In contrast, the Senate bill would have simply raised the threshold for GHG regulation under PSD from the current 100 or 250 short tons to 25,000 metric tons with respect to any GHG, or combination of GHGs. Likewise, with respect to Title V permitting, H.R. 2454 would have prevented any source (large or small) from having to obtain a state permit under Title V solely because they emit GHGs. In contrast, the exemption under the Senate bill was restricted to sources that emit under 25,000 metric tons of any GHG or combination of GHGs.⁴⁰

Amending the Clean Air Act to revoke some existing regulatory authority as it pertains to GHGs while establishing new authority designed specifically to address their emissions is the approach that was advocated by the Administration and, indeed, by many participants in the climate debate regardless of their position on EPA's regulatory initiatives. However, the specifics of a bill acceptable to a majority would be challenging to craft.

Conclusion

In some respects, EPA's greenhouse gas decisions are similar to actions it has taken previously for other pollutants. Beginning in 1970, and reaffirmed by amendments in 1977 and 1990, Congress gave the agency broad authority to identify pollutants and to proceed with regulation. Congress did not itself identify the pollutants to be covered by National Ambient Air Quality Standards (NAAQS); rather, it told the agency to identify pollutants that are emitted by "numerous or diverse" sources, and the presence of which in ambient air "may reasonably be anticipated to endanger public health or welfare" (CAA Section 108(a)(1)). EPA has used this authority to regulate six pollutants or groups of pollutants, the so-called "criteria pollutants."⁴¹ EPA also has authority under other sections of the act—notably Sections 111 (New Source Performance Standards), 112 (Hazardous Air Pollutants), and 202 (Motor Vehicle Emission Standards)—to identify pollutants on its own initiative and promulgate emission standards for them.

Actions with regard to GHGs follow these precedents and can use the same statutory authorities. The differences are of scale and of degree. Greenhouse gases are global pollutants to a greater extent than most of the pollutants previously regulated under the act;⁴² reductions in U.S.

³⁸ The Clean Air Act exemption provisions under H.R. 2454 were in Part C, Sections 831-835; under S. 1733, the provisions were in Section 128(g).

³⁹ This is subsequently the approach adopted by the Supreme Court in deciding *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

⁴⁰ For further information, see CRS Report R40896, *Climate Change: Comparison of the Cap-and-Trade Provisions in H.R. 2454 and S. 1733*.

⁴¹ The six are ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead.

⁴² An exception would be chlorofluorocarbons, regulated under Title VI of the act to protect the stratospheric ozone layer. This also was a global problem, but in this case an international agreement, the Montreal Protocol, preceded EPA action and the enactment of Clean Air Act authority.

emissions without simultaneous reductions by other countries may somewhat diminish but will not solve the problems the emissions cause.⁴³ Also, GHGs are such pervasive pollutants, and arise from so many sources, that reducing the emissions may have broader effects on the economy than most previous EPA regulations. These and other considerations have led many in Congress to try to prevent EPA from using its general authority to control GHG emissions.

If the rules are to be overturned during the remainder of the Obama Administration, there are two arenas in which to do so: the courts and the Congress. Opponents of the regulations have not prevailed in either venue, thus far.

In the courts, several of EPA's early GHG-related actions, in 2009 and 2010, survived challenges in 95 consolidated petitions for review in the D.C. Circuit.⁴⁴ The Supreme Court agreed to review only a narrow question raised by this ruling—whether EPA's regulation of GHG emissions from motor vehicles triggered CAA permitting requirements for GHG emissions from stationary sources as well—leaving the remainder of the D.C. Circuit decision intact.⁴⁵ When the Supreme Court ruled on this one issue, in 2014, it gave EPA most of what it wanted, allowing it to require such permitting for major GHG emitters.⁴⁶ In contrast to this record, petitioners may have better chances in the litigation that almost certainly will be filed against EPA's *finalized* rules for new and existing power plants, promulgation of which is expected mid-summer 2015.

But the judicial process moves slowly. Until now, the agency's record defending its GHG regulations in the courts has been close to perfect. So, in the near term, and perhaps longer, industry opponents may not find relief in the courts from EPA GHG regulations.

That leaves Congress. Until now, opponents in Congress have also been unable to overturn most of EPA's GHG actions. With new congressional majorities this year, legislation to overturn EPA's rulemaking may have easier going in the 114th Congress. Such legislation will still face two potential obstacles: the filibuster rule in the Senate and the likelihood of presidential vetoes. Whether either can be overcome will depend on the specifics of the bills in question. While any action to overturn EPA's GHG regulations will face challenges, most analysts expect riders to appropriation bills to have the best odds of success.

⁴³ However, the Administration is working in parallel internationally to obtain commitments to global GHG reductions. Demonstrating timely and significant progress toward reduction of U.S. GHG emissions is considered essential by most experts for success internationally.

⁴⁴ Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012).

⁴⁵ The early GHG-related EPA actions attacked in this case were: (1) the agency's findings that GHGs in the atmosphere may reasonably be anticipated to endanger public health and welfare and that GHG emissions from new motor vehicles contribute to that threat; (2) the GHG emission standards for model year 2012-2016 light-duty vehicles; (3) the "timing rule," which required new and modified major stationary sources of GHGs to obtain permits as of the date when regulation of GHG emissions from new motor vehicles (see number 2) took effect; and (4) the "tailoring rule," under which EPA focused state and EPA GHG permitting efforts, at least initially, on the largest stationary source emitters of GHGs.

⁴⁶ Utility Air Regulatory Group, Inc. v. EPA, 134 S. Ct. 2427 (2014).

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