

ALSTON & BIRD

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## A Direct Return to an Indirect Approach to Regulating Methane Emissions

The volatility of the EPA's regulatory approach for methane emissions is enough to make anyone's temperature rise, but companies in the oil and gas sector may want to consider how best to strengthen their regulatory resiliency.

According to the U.S. Environmental Protection Agency (EPA), methane accounted for 10% of the greenhouse gas emissions in 2017 and has a global warming potential 28 times higher than carbon dioxide when measured over 100 years. And yet, it was not until the 2016 New Source Performance Standards (NSPS) for the oil and gas sector that the EPA decided that it was necessary to regulate methane emissions directly under the Clean Air Act (CAA). Now, less than three years later, the EPA has issued a proposed rule that would end the direct regulation of methane emissions. As companies consider whether to comment, here are key things to know.

Before the 2016 NSPS, the EPA consistently concluded that direct regulation of methane emissions was unnecessary because methane emissions were already controlled by the emissions control equipment required to meet emission standards for volatile organic compounds (VOC). Scientifically, that makes sense since methane is a VOC—except in the EPA's regulatory definition of VOCs adopted under the CAA. When the EPA was defining VOCs in the CAA regulations, it was focused on those VOCs that contribute to ground-level ozone. Methane does not, and so was not included in the EPA's definition. The EPA's proposal would return to an approach that relies on indirect regulation of methane emissions through the regulation of VOC emissions.

While it may seem like methane emissions are being controlled either way, the EPA's decision whether to regulate methane emissions directly or indirectly has at least two meaningful consequences for sources in the oil and gas sector. First, direct regulation brings with it the obligation to comply with an additional standard and the threat of enforcement actions or citizen suits if someone believes you are out of compliance. If the EPA relies on indirect regulation of methane emissions through the VOC standards, there is no methane-specific standard to comply with—or to be sued over. Second, under the direct regulation approach, methane emissions are regulated everywhere in the U.S., while under an indirect regulation approach, that may not be the case. Locations where ground-level ozone is not a concern, for example, may not have VOC standards. In locations where there is no VOC standard, it is possible that methane emissions will not be regulated directly or indirectly.

The period for commenting on the EPA's proposed repeal of the NSPS for methane is open through November 25, 2019.

## California Enacts Package of Bills to Address State's Growing Housing Crisis

Governor Gavin Newsom signed 18 bills aimed at capping rents and reducing development costs to boost housing production, including bills that amend the state's Planning and Zoning Law.

Amid a growing housing crisis throughout California, the legislature and Governor Newsom enacted a variety of bills in October aimed at encouraging the construction of new housing units and capping rents for current renters. The new laws include:

- **Senate Bill 330:** Also known as the Housing Crisis Act of 2019, this bill restricts certain cities and counties from enacting development standards that may reduce density of certain housing developments and makes changes to local approval processes to further streamline the application process. The bill also aims to limit the application of local design standards and streamline the timing of applications in hopes of reducing barriers that drive up the cost of developing new housing. The bill will sunset on January 1, 2025, so that the legislature may evaluate its effectiveness.
- **Assembly Bill 1763:** This bill requires cities and counties to award developers with additional density, concessions, and incentives such as height increases if 100% of the units in a development are restricted to lower-income households. The bill aims to make housing projects with affordable units more financially feasible for developers.
- **Assembly Bill 1255:** This bill requires cities and counties to report an inventory of its surplus land in urbanized areas to the California Department of Housing Community Development (HCD) in hopes of identifying overlooked, underdeveloped areas with potential for local leaders and developers to build affordable housing in dense, transit-rich areas.
- **Assembly Bill 1483:** This bill requires local jurisdictions to share information about zoning ordinances, development standards, fees, exactions, and affordability requirements. This bill also requires the HCD to develop and update a 10-year housing data strategy. The bill aims to reduce risk and costs by increasing transparency and certainty to the housing development process.
- **Assembly Bill 1482:** Also known as the Tenant Protection Act of 2019, this bill caps annual rate increases at 5% plus inflation and requires landlords to state a just cause to evict tenants who have occupied the premises for a year. The bill provides for some exceptions, such as for housing built in the past 15 years. The bill does not preempt local rent-control ordinances, and its provisions sunset by January 1, 2030.

Time will tell how these changes may affect the development of new housing units, but the state has made clear that reducing barriers to affordable housing that may be imposed by local jurisdictions is a top priority.

## EPA Proposes Long-Awaited Changes to Lead and Copper Rule

The proposed Lead and Copper Rule promises big changes, but the EPA may still fall short of silencing critics.

The widely publicized water crisis in Flint, Michigan—where area residents have been exposed to dangerously high levels of lead—has prompted heightened and sustained criticism of the Environmental Protection Agency (EPA) and its Lead and Copper Rule (LCR). The LCR was promulgated in 1991 and has not been revised since. The LCR's goal is to promote public health by reducing lead and copper in drinking water.

On October 10, 2019—in connection with Children's Health Month—the EPA issued its proposed revisions to the LCR. A few notable changes include:

- The addition of a “trigger level” that requires water systems with lead levels of 10 parts per billion to increase monitoring and develop a plan for prompt mitigation if their lead levels exceed the longstanding “action level” of 15 parts per billion.
- A new requirement that water systems replace their portion of lead service lines if customers elect to replace their part of the lines.
- Disallowing partial lead service line replacement to qualify as replacement under the rule.
- Required water sampling for lead levels at schools and childcare facilities.
- The creation of public inventories of lead service lines by water systems and notification to residents with lead service lines.

The EPA hopes that these changes to the LCR will better eliminate lead and copper in drinking water across the U.S., with a focus on required inventorying and stricter sampling.

But the proposed changes are not without critics. One revision in particular has elicited especially negative feedback: the method and rate of replacing service lines with lead and copper in the water. Currently, the LCR requires water systems containing lead service lines with over 15 parts per billion of lead to replace those lines at a rate of 7% per year. If the modifications to the LCR are approved, that replacement rate would slow to only 3% annually. With the Flint crisis still looming large in American minds, the EPA's proposed changes may fall short in the court of public opinion.

The comparison is not so simple, however, and could have important implications for water service providers and consumers. The proposed changes would mean that water systems testing above 15 parts per billion would be required to replace lead service lines less often. However, affected systems would be newly required to (1) adhere to the annual rate of replacement for a longer duration than before; and (2) ensure lead service line replacements are complete, as opposed to partial. In addition, customers could still force water systems to replace their service lines—by electing to replace the portion of the line on their private property, customers would trigger water systems' duty to replace the rest. Water systems will need to navigate these multiple routes of replacement carefully to avoid unnecessary disruption in service and increased costs.

## Sweeping National Plastics Legislation Proposed

Legislators suggest a plan to reduce plastic waste nationwide.

On October 31, 2019 Senator Tom Udall (D-NM) and Representative Alan Lowenthal (D-CA) released a “discussion draft” of proposed legislation aimed at reducing plastic waste. The proposed bill creates “extended producer responsibility,” which aims to set the burden of reducing plastic waste with plastics producers rather than consumers.

The draft also includes the following:

- A 10- to 20-cent deposit on covered beverage containers.
- Prohibition of single-use plastic bags.
- An increasing scale for use of post-consumer recycled content in covered beverage containers, requiring a higher amount of recycled content over a scheduled period of years.
- A tax on carryout bags.
- Protection for local governments to enact tougher plastics laws.
- Updates to current environmental regulations to cover plastic pollution.

A congressional hearing addressed the subject just two days prior, showcasing a range of opinions. Opponents to national legislation to manage plastic waste underscore the relatively small amount of ocean plastics that are attributed to the U.S. compared to other countries and the lack of effective substitutes for many plastics uses. The availability of recycling operations is also likely to play a role. The U.S. exports approximately 50% of its plastic packaging waste; however, in 2018 China banned almost all plastic imports. Other countries like Vietnam and Malaysia are also cutting back on plastic waste imports. In addition, many recyclers in the U.S. are struggling to effectively deal with plastic waste. For example, rePlanet, a major collector of beverage containers, recently shut down, closing all 284 redemption centers in California.

Many states have already enacted some form of plastic waste legislation. California was the first state to ban single-use plastic bags in 2014. Hawaii, New York, Connecticut, Delaware, Maine, Oregon, and Vermont have all also enacted restrictions on single-use plastic bags or other products. Recently, the California legislature introduced a trio of bills aimed at reducing plastic waste by 75% by 2030. Two of the bills, however, never made it to a vote before the legislative session ended in mid-September. (These bills may be revived when the legislators return in January.) The third, calling for more recycled plastic in beverage bottles, was passed by the legislature but was ultimately vetoed by Governor Newsom in October, citing a burdensome waiver program included in the bill.

Udall and Lowenthal are soliciting feedback and comments on their discussion draft (available [here](#) for download) by Thursday, November 21, 2019.

## A New Era of RCRA Citizen Suits Has Begun

Over 50 years since its enactment, RCRA has a new lease on life—there’s been a considerable uptick in RCRA citizen suits in the past three years.

Many have attributed the explosion in Resource Conservation and Recovery Act (RCRA) citizen suits to a drop in federal funding and enforcement, swelling war chests for environmental groups, and new rules (such as the Coal Combustion Residual Rule) that can only be enforced via citizen suit. But that’s only part of the story.

Novel theories also explain the recent surge in RCRA citizen suits, particularly suits under RCRA’s so-called “endangerment” clause.

When drafting RCRA, Congress gave private litigants a broad and amorphous standard under which they could seek to hold entities responsible: “any person may commence a civil action ... against any person ... who has contributed or who is contributing to the ... disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” Historically, these endangerment claims were limited to improper disposal of waste. Recently, however, litigants have argued this provision also covers cases involving emissions, vapor, and climate change.

Depending on the nature of the suit, this amorphous standard may also allow litigants to plead a RCRA citizen suit as an alternative to a Clean Water Act (CWA) citizen suit. For example, in *Kentucky Waterways Alliance v. Kentucky Utilities* (E.D. Ky.), the plaintiffs asserted causes of action under the CWA for unpermitted discharge of pollutants and RCRA for imminent and substantial endangerment. Though the CWA claims were dismissed as a matter of law in 2017, the parties continue to litigate the RCRA claims today.

The increase in frequency of and novel theories for RCRA citizen suits poses significant risks to the regulated community. Strict compliance with regulatory requirements and robust public records will best position regulated entities for early success in these suits.

## Federal Standards Coming for Forever Chemicals

Congress may seek to act legislatively—before the EPA—in regulating PFAS at the federal level, which could generate significant uncertainty for regulated parties and litigants.

For the past several years, the U.S. Environmental Protection Agency (EPA) has been taking small steps toward regulating the class of emerging contaminants known as “perfluoroalkyl” or “polyfluoroalkyl” substances (PFAS). PFAS are a vast family of compounds that have been used in a myriad of industrial and consumer applications for decades throughout the country. PFAS are difficult to break down and are already ubiquitous in the environment. The EPA has taken some preliminary steps to address PFAS contamination: in May 2018, the EPA held a National Leadership Summit on PFAS, and in February 2019, the EPA announced its Comprehensive Nationwide PFAS Action Plan. But concrete action has been hard to come by.

It does not look like Congress plans to wait much longer. Instead of allowing the EPA to complete its analysis of potential PFAS regulations, Congress could jump ahead by requiring regulation through legislation. In this case, that legislation could be the 2020 National Defense Authorization Act (NDAA). While the NDAA is ostensibly about annual military funding, the need to pass the NDAA means the legislation is prone to amendments.

For the 2020 NDAA, the House and Senate have both passed amendments that would require new federal regulation of PFAS in the near-term, though Congress has not yet agreed on what that regulation should look like. The current House version would require the EPA to designate all forms of PFAS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) within one year. Such an approach could be mayhem for regulators and litigants alike, since thousands of new chemicals would suddenly be subject to CERCLA. The Senate has taken a different approach. That version would require the EPA to promulgate maximum contaminant levels (MCLs) under the Clean Water Act for two of the most common forms of PFAS within two years. Given the current regulatory trend toward setting MCLs for PFAS at detection limits—most recently with the California State Water Resources Control Board—companies across the country could soon be facing serious federal liabilities.

The deadline to pass the 2020 NDAA is November 21, 2019. Congressional leaders are working to reconcile different versions of the NDAA, though it is not clear what the final version will look like. The 2020 NDAA is especially contentious because of unrelated issues such as border wall funding. But given that both versions included PFAS regulations, it seems likely that federal PFAS regulation is coming soon—even if that regulation comes after the 2020 NDAA.

## EPA Reduces Regulatory Burdens by Adding Aerosol Cans to Its Universal Waste Regulations

These new, less onerous standards are a win for industry, but state implementation remains uncertain.

On November 15, 2019, the EPA issued a final rule adding aerosol cans to the universal waste regulations. Compared to the hazardous waste management standards under which aerosol cans are currently regulated, the EPA's universal waste regulations are a set of less burdensome, simpler standards for labeling and marking, storage, employee training, responses to releases, and, for large-quantity handlers of universal waste (those handling more than 5,000 kg of universal waste at a time), notification and tracking. The EPA currently regulates wastes such as batteries, lamps, some pesticides, and mercury-containing equipment as universal waste.

The aerosol-can final rule reduces compliance burdens and costs for entities, such as retailers, that generate hazardous waste aerosol cans. Aerosol cans make up nearly 40 percent of the hazardous waste stream at large retail facilities, primarily from customer returns and damaged merchandise. The mismanagement of aerosol cans is a hot-button issue for hazardous waste inspectors and a frequently cited violation. The less onerous labeling and storage requirements make compliance easier, minimizing enforcement risk. Aerosol cans can be easily consolidated in a central location under the new rule, making it easier to arrange for recycling or disposal. Further, management and recycling or disposal costs for universal waste is less costly than for traditional hazardous waste.

Additionally, the rule establishes standards for puncturing the cans with a commercial device and draining the cans. These standards facilitate recycling of the cans. Residuals from draining must be transferred to a tank or container, and a hazardous waste determination must be made on the residuals.

Another benefit to the final rule, which was not part of the proposed rule, is that leaking or damaged aerosol cans can be managed as universal waste. Leaking universal waste aerosol cans must merely be packaged in a separate closed container or overpacked with absorbents, or immediately punctured and drained in accordance with the aerosol-can universal waste requirements. These requirements are consistent with the DOT requirement that damaged aerosols be transported in an aerosol salvage drum.

Because universal waste requirements are less stringent than the current federal hazardous waste program under the Resource Conservation and Recovery Act (RCRA), states are not required to adopt the new rule. Five states, California, Colorado, New Mexico, Ohio, and Utah, already regulate aerosol cans as universal waste. Entities generating hazardous waste aerosol cans in other states should encourage their lawmakers to follow the EPA's lead and adopt the less onerous standards.

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