

Impact of a Congressional Review Act Joint Resolution of Disapproval of the Mercury and Air Toxics Standards (MATS) rule

1. A CRA Resolution of Disapproval could prevent the Agency from issuing any regulation of Hazardous Air Pollutants from Power Plants

An enacted CRA joint resolution of disapproval of an administrative rule makes it difficult for the implementing Agency to promulgate future regulations on the same subject because under the CRA, the implementing Agency is prevented from issuing new standards that are "substantially the same" as the disapproved standards.

- The text of the CRA *explicitly requires* future congressional authorization to issue a rule that is substantially the same.
- The text of the CRA does not direct Congress to raise "specific objections" to rules in the resolution – all that is needed is one sentence that nullifies the rule.

Prior CRA use confirms the damaging effects of a joint resolution of disapproval.

- Congress passed a CRA resolution eliminating the Occupational Safety and Health Administration's (OSHA) ergonomics rule in 2001.
- This resolution contained only one sentence:
 - o "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68261 (2000)), and such rule shall have no force or effect. P.L. 107-5 (Mar. 20. 2001)."
- OSHA has *not issued any rules relating to ergonomics* since this resolution passed Congress.

Based on the express terms of the CRA and EPA's precise statutory authority to regulate hazardous air pollutant (HAP) emissions under the Clean Air Act (CAA), an argument could be made that any new regulations for mercury and other HAP emissions from electric utility steam generating units (EGUs) issued after a CRA joint resolution would be "substantially the same" as the MATS rule.

Section 112 is a very precise statutory provision that requires MACT standards to be set in a very specific fashion. In addition, case law interpreting the MACT provision states that EPA must regulate all HAP from major sources. The challenge to reissue a MACT rule that is both legal under the Clean Air Act and not "substantially the same" as the original MATS rule would be great.

2. EPA could be prohibited from issuing a "Mercury-Only" standard for Power Plants

Some have argued that EPA could issue a mercury-only MACT for EGUs following a CRA disapproval of MATS. However, if the MATS rule is disapproved under the CRA, a new mercury-only MACT rule would be, at least arguably "substantially the same" as the MATS rule, and given the challenges to

the MATS rule to date, it is virtually certain that such a follow-up rule would be challenged as being prohibited by the CRA.

First, although some claim that the EPA could establish standards for only mercury under section 112(n)(1)(A), the Agency disagrees, as section 112(n)(1)(A) provides no framework for establishing emission standards. Indeed, the Agency rejected this very argument in responding to comments on the final MATS rule. Thus, any effort to establish standards pursuant to section 112(n)(1)(A) would be highly legally vulnerable.

Second, if EPA reissued the mercury-only portion of the MATS rule under section 112(d), the mercury limit would need to be calculated under the same statutory MACT formula as the disapproved rule and thus could be construed as being substantially the same.

Finally, section 112 contains an EGU-specific requirement that the EPA must find it “appropriate and necessary” to regulate EGUs under section 112 before such sources may be regulated. The MATS rule addresses the determination that it is appropriate and necessary to regulate utilities and discusses the factual underpinnings for that determination.

A CRA disapproval could be argued to negate the appropriate and necessary finding and therefore prevent EPA from regulating EGUs without new legislation. Some challengers may make an argument that an appropriate and necessary finding that relies on the same supporting information as discussed in the disapproved rule is substantially the same as the MATS rule such that the EPA may not rely on it.