

BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

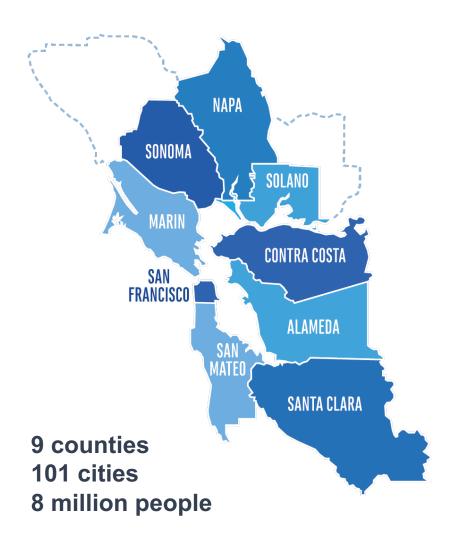
The Congressional Review Act (CRA)

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Alan Abbs Legislative Officer aabbs@baaqmd.gov

Introduction





Presenter: Alan Abbs, Legislative Officer

Bay Area Air Quality Management District

Established in 1955 by State Law
Delegated Authority to Implement Federal and State Laws
24-Member Board of Local Elected Officials

Mission Statement

The Air District aims to create a healthy breathing environment for every Bay Area resident while protecting and improving public health, air quality, and the global climate.

Presentation Outline



- What is the Congressional Review Act (CRA)?
- When was it enacted?
- How does the CRA work?
- When it is likely to be successful?
- Successful Attempts
- Unsuccessful Attempts
- Role of the Government Accountability Office (GAO)
- Final Thoughts
- Questions/Discussion

What is the CRA?



- Codified in <u>5 U.S.C. §§ 801-808</u>.
- Is a tool Congress can use to overturn certain federal agency actions.
- Requires agencies to report issuance of "rules" to Congress.
- Provides procedures to consider legislation to overturn that rule.

When Was it Enacted?



- Part of Newt Gingrich's "Contract with America" Advancement Act of 1996.
 - H.R. 3136 (Archer R-TX-7); Public Law No: 104-121
 - S. 942 (Bond R-MO)
- Signed into law by President Clinton on March 29, 1996.
 - Also, increased public debt limit from \$4.9 trillion (T) to \$5.5T
 - Votes: House (328-91) | Senate (100-0)

How Does the CRA Work?



- Agencies must report the issuance of "rules" to Congress.
- What is a "rule" for purposes of CRA?
 - Major rules, non-major rules, interim final rules.
 - May include agency actions not subject to traditional notice-andcomment rulemaking, such as guidance documents and policy memoranda.
 - Does not apply to presidential actions or to non-rule agency actions such as orders.
 - ***Members can ask Governmental Accountability Office (GAO) for legal opinion on whether something is a rule for purposes of CRA.

How Does the CRA Work? (cont.)



- Once a rule is submitted (or opined on by GAO), a 60-day clock starts.
- 60 days of continuous session, which does not include adjournments of 3 days or longer.
- Disapproval resolutions must be submitted before end of 60-day window.
- "Lookback" Mechanism for new sessions of Congress.

How Does the CRA Work? (cont.)



- Disapproval resolutions go through typical Committee referral and Floor vote process.
- Senate version can not be filibustered.
- Majority vote for both houses.
- Vice President can break a tie in the Senate.
- If passed in both houses, it is sent to President for signature.

How Does the CRA Work? (cont.)



- If enacted, the rule "shall be treated as though such rule had never taken effect."
- If the rule has not yet gone into effect, it will not take effect.
- Subject rule "may not be reissued in substantially the same form, and a new rule that is substantially the same ... may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution."
- Not subject to judicial review.

When is it Likely to be Successful?



- Changes in Administration to coincide with same party rule in Congress.
 - George W. Bush Administration (2001-2002)
 - Obama Administration (2009-2010)
 - Trump Administration (2017-2018)
 - Biden Administration (2021-2022)

Successful Attempts



How many times has the CRA been used successfully?

- One time in 2001
- Sixteen times in 2017
 - Surface mining rule related to stream protection.
 - Bureau of Land Management land use rules.
- Three times in 2021
 - Oil and gas emission standards for new, reconstructed, and modified sources.

Unsuccessful Attempts



How many times has the CRA unsuccessfully been attempted (i.e. vetoed)?

- Five vetoes in 2015-2016
 - Waters of U.S. rule.
 - Greenhouse gas performance standards for electric generating units (EGUs).
 - Carbon pollution emission guidelines for EGUs.
- One veto in 2020
- Five vetoes (so far) in 2023
 - Waters of U.S. rule.
 - Waivers and modifications of student loans.
 - Heavy-Duty Engine Standards.
- Four resolutions in process in 2023
 - Three endangered species rules.

Role of the Government Accounting Office (GAO)



- Known primarily for their role as an auditor in appropriations matters.
- Non-partisan
- With CRA, GAO role has expanded to include providing legal opinions on which agency actions are "rules."
 - CRA statute does not actually direct GAO to perform this function.
 - Legal opinion is just an opinion.
 - Legal opinions are made public and provide valuable body of knowledge to agencies, legislators, and public.

Final Thoughts



- Why else would a Congressmember attempt to use the CRA or ask for GAO opinion?
 - Genuine uncertainty about whether something is a rule.
 - Reach back and potentially make something vulnerable that has been determined to be a "rule" but not submitted to Federal Register.
 - Send a political "signal" to agency, public, or other lawmakers.
 - Protection of an agency action by getting a "no rule" opinion, or by starting the clock on a "rule" under favorable political conditions.

Final Thoughts, (cont.)



- Where's the balance?
 - Doesn't seem to be a statute of limitations on requesting GAO legal opinion.
 - Given Congress's ability to overturn/slow agency actions through laws or appropriations, can the CRA be abused?

 Prohibition on future rulemaking in same area may cause some administrations and Congress to be more inclined to use CRA, and some less inclined.



Questions / Discussion

CONTACT

Alan Abbs, Legislative Officer
Bay Area Air Quality Management District

(916) 769-7769 <u>aabbs@baaqmd.gov</u>