



BLM's Final Methane and Waste Prevention Rule Creates Compliance Uncertainty

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On November 18, 2016, the Bureau of Land Management (BLM) [announced](#) that it has finalized a rule intended to reduce the waste of natural gas that results from onshore flaring, venting, and leaks by oil and gas production on federal and tribal lands. BLM has said that the Final Rule—which is entitled “Waste Prevention, Production Subject to Royalties, and Resource Conservation”—will modernize existing regulations to reflect advancements in oil and gas production in an attempt to reduce natural gas waste, curtail air pollution, and provide a beneficial return on public resources for states, tribes, and federal taxpayers. The Final Rule is expected to be published in the Federal Register in the near term, and is scheduled to take effect January 17, 2017. This alert provides a brief summary of the key regulatory and policy changes reflected in the Final Rule, and notes the uncertainty remaining with respect to its enforcement and validity under the Trump Administration.

Key Legal and Policy Changes in the Methane and Waste Prevention Rule

In announcing the BLM's Final Rule, Secretary of the Interior Sally Jewell highlighted the need for the rule in the context of reducing methane emissions that may contribute to climate change, and “moderniz[ing] decades-old standards to keep pace with industry and to ensure a fair return to the American taxpayers for use of a valuable resource that belongs to all of us.” To achieve these underlying goals, the Final Rule implements substantial changes to BLM regulations and policy, the more significant of which are described below.

Pre-Drilling Requirements

The Final Rule requires operators to evaluate opportunities for gas capture and prepare a waste minimization plan prior to drilling of a development oil well. The plan must be submitted with an Application for Permit to Drill (APD) and must be shared with midstream gas capture companies to facilitate timely pipeline development. While the Final Rule mandates submission of a waste minimization plan—and failure to do so could serve as an appropriate basis for BLM to deny an APD—subsequent deviation from that plan would be permitted.

Venting Requirements

The Final Rule prohibits operators from venting gas except in limited circumstances, such as during emergencies or when flaring is technically not feasible. In addition, the Final Rule also imposes new technical requirements on operators. These technical requirements include provisions requiring operators to: (1) replace “high bleed” continuous pneumatic controllers with low/zero bleed controllers; (2) replace pneumatic diaphragm pumps with solar pumps or route the pumps to a flare; and (3) capture or flare gas from storage tanks that vent more than six tons of volatile organic compounds annually. These requirements must be met within one year.

The Final Rule also requires operators to use best management practices when unloading liquids from wells. Likewise, operators must capture, flare, use, or re-inject gas released during well completions. An operator may request exemption from these requirements, but only where the operator is able to demonstrate that compliance would impose such costs as to cause it to cease production and abandon significant quantities of recoverable reserves under a lease.

Flaring Requirements

Under the Final Rule, BLM will require operators to capture most of their gas after accounting for specified volumes of allowed flaring. Capture targets will phase-in between 2018 and 2026, requiring operators to capture 85% to 98% of their adjusted total volume of gas produced each month. However, these targets do not apply to “flaring allowable” volumes, which will phase down from 5,400 Mcf/per well

in 2018 to 750 Mcf/per well by 2025. Capture targets can be achieved lease-by-lease or by averaging state-wide across all of an operator's operations on federal and tribal leases.

Leak Detection and Repair (LDAR)

The Final Rule requires leak detection to be conducted using an instrument-based system for identifying and repairing leaks. Allowable instruments include infrared cameras, portable analyzers assisted by radio, visual and olfactory inspection, or other methods approved by the BLM. Additionally, inspections must be conducted quarterly for compressor stations and semi-annually for all other sites. Compliance with the Environmental Protection Agency's (LDAR) requirements for new wells is satisfactory to achieve compliance with the BLM requirements.

Royalty Rate Revisions

The Final Rule amends existing royalty provisions for onshore oil and gas leases to be consistent with the BLM's statutory authority, which specifies a royalty rate of at least 12.5 percent for new competitive leases. This revision provides BLM with discretion to raise royalty rates as conditions change for leases issued after the Final Rule's effective date. However, the Final Rule makes clear that BLM is not currently raising royalty rates above 12.5 percent, and BLM has said that it anticipates engaging in additional regulatory process before raising rates in the future. Additionally, the Final Rule provides clarification regarding the applicability of royalties to gas flared from wells already connected to gas capture infrastructure and removes the requirement for operators to submit applications for approval to flare royalty-free.

State and Tribal Interaction

The Final Rule also allows BLM to grant variances to states or tribes, which would allow those entities to apply their own standards in lieu of BLM regulations. However, BLM has set a high threshold for variance, mandating that the petitioning state or tribe demonstrate that its rule will perform at least as well as the Final Rule in reducing waste and environmental impacts, and in ensuring safe production.

Uncertainty Under the Next Congress

The future of the BLM's Final Rule is uncertain. Already, several industry trade groups have initiated litigation seeking to enjoin implementation of the regulations. Moreover, some members of Congress—including the next Chairman of the Senate Environment & Public Works Committee, Sen. John Barrasso (R-WY)—have already suggested that they will work with the Administration of President-Elect Donald Trump to rescind the Final Rule, possibly through a Congressional Review Act (CRA) resolution of disapproval. Resolutions of disapproval under the CRA are not subject to the 60 vote threshold for cloture in the Senate and so can be enacted with the support of a majority in the House and 50 Senators. In addition, any rule rescinded by a resolution of disapproval "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." For more information on the CRA and other actions the Trump Administration and incoming Congress might take with respect to rules promulgated by the Obama Administration, please see our recent [alert](#) discussing presidential transition and executive actions.

Of course, it is by no means a given that opponents of the Final Rule will prevail in judicial and legislative fora. Operators, therefore, would be well served to familiarize themselves with the Final Rule to ensure that they are prepared to comply with the new requirements outlined above.

For more information

Van Ness Feldman is available to advise clients in understanding the requirements and implications of the BLM's Final Rule. For more information, please contact one of the authors at (202) 298-1800.

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