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Here We Go Again: BLM Issues Another Methane Rule

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This article is the first in a two-part series analyzing recent proposals by federal agencies to reduce methane emissions from oil and gas production. This first article will address the Bureau of Land Management's (BLM) Proposed Rule and the second article will address the Environmental Protection Agency's (EPA) proposed rule updates.

On November 29, 2022, BLM again issued a proposed rule (Proposed Rule) aimed at curtailing waste of methane that is flared, vented, or leaked from oil and gas production operations on federal and Tribal Lands. President Obama's prior rule, issued back in 2016, was shot down by a federal court because BLM exceeded its statutory authority by issuing a rule that, at least in part, was promulgated for the purpose of protecting *air* quality—which is expressly within the statutory authority of the Environmental Protection Agency (EPA)—rather than for the purpose of preventing the waste of oil and gas, which BLM is authorized to do. *Wyoming v. U.S. DOI*, 493 F. Supp. 3d 1046 (D. Wyo. 2020).

This administration's new Proposed Rule will likely face challenges and similar legal scrutiny as its predecessor rule. And now, in the wake of the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), BLM's obligation to identify clear, express statutory authority is heightened. Some might argue that any BLM rule that goes beyond exercising BLM's Mineral Leasing Act (MLA) authority to "use all reasonable precautions to prevent waste of oil or gas developed in the land," 30 U.S.C. § 225, may face a similar fate as Obama's rule.

But, importantly, BLM is now armed with authority under President Biden's Inflation Reduction Act (IRA), which includes a provision entitled, "Royalties on All Extracted Methane." *See* Pub. L. No. 117-169, Section 50263. Consistent with the MLA's authority to assess royalties on all gas "removed or sold from the lease" and the Federal Oil and Gas Royalty Management Act's requirement that lessees pay royalties on lost or wasted gas, Section 50263 of the IRA provides that, for leases issued after the date of enactment of the IRA, royalties are owed on all gas produced from federal land, including gas that is consumed or lost by venting, flaring, or negligent releases through any equipment during upstream operations. Section 50263 further provides three exceptions to the general obligation to pay royalties on produced gas, namely:

> (1) gas that is vented or flared for not longer than 48 hours in an emergency situation that poses a danger to human health, safety, or the environment;
> (2) gas used or consumed within a lease, unit, or communitized area

for the benefit of the lease, unit, or communitized area; and (3) gas that is "unavoidably lost."

As operators, states, and trade associations across the county sharpen their pencils on comments and potential legal challenges to the forthcoming final rule, here's what you need to know about the proposal:

- The Proposed Rule would establish the requirement that "operators must use all reasonable precautions to prevent the waste of oil or gas developed from the lease." This applies to both newly proposed operations and existing operations.
    - BLM may specify reasonable measures to prevent waste as conditions of approval of an Application for Permit to Drill (APD) and, after an APD is approved, BLM may order an operator to implement, within a reasonable time, additional reasonable measures to prevent waste at ongoing exploration and production operations.
    - Reasonable measures to prevent waste may reflect factors including, but not limited to, relevant advances in technology and changes in industry practice.
- The Proposed Rule would recognize, and clarify, that oil or gas can be "unavoidably lost"—and thus not royalty bearing—in connection with certain oil and gas operations, including during well completions, production testing, and emergencies.
    - It would place a 48-hour limit on the royalty-free emergency flaring and specify circumstances that would not constitute an emergency.
- The Proposed Rule also would establish a monthly volume limit on royalty-free flaring due to pipeline capacity constraints, midstream processing failures, or other similar events that may prevent produced gas from being transported to market.
    - In particular, where oil-well gas must be flared due to pipeline capacity constraints, midstream processing failures, or other similar events that prevent produced gas from being transported through the connected pipeline, the operator may report only up to 1,050 Mcf per month, per lease, unit, or agreement as "unavoidably lost" gas.
    - BLM explained that, after examining flaring data reported for years 2015-2019, it determined that a limit of 1,050 Mcf per month would impact the 20 percent of flaring operations responsible for 95 percent of the reported flaring volumes.
- The Proposed Rule would include a number of specific affirmative obligations that operators must take to avoid wasting oil or gas. In particular:
    - It would prohibit the use of natural-gas-activated pneumatic controllers or pneumatic diaphragm pumps with a bleed rate that exceeds 6 standard cubic feet

(scf)/hour.

- Where technically and economically feasible, it would require oil storage tanks on Federal or Indian leases to be equipped with a vapor recovery system or other mechanism that avoids the loss of natural gas from the tank.
- The Proposed Rule would require operators on Federal or Indian leases to maintain a leak detection and repair (LDAR) program designed to prevent the unreasonable and undue waste of Federal or Indian gas. An operator's LDAR program must provide for regular inspections of all oil and gas production, processing, treatment, storage, and measurement equipment on the lease site.
- BLM recognized that the EPA has promulgated emissions limitations for pneumatic equipment and storage tanks as well as LDAR requirements for new and modified sources in the oil and gas production sector pursuant to its authority under the Clean Air Act. In order to avoid unnecessary duplication or conflict, the Proposed Rule would allow operators to comply with the analogous EPA regulations as an alternative means of compliance with BLM's requirements.

- The Proposed Rule would require operators to submit a waste minimization plan with all APDs for oil wells. This plan would provide BLM with information on anticipated associated gas production, the operator's capacity to capture that gas production for sale or use, and other steps the operator commits to take to reduce or eliminate gas losses.
  - If the plan does not demonstrate reasonable steps to avoid wasting gas, BLM may delay action on the APD until the operator adequately addresses the plan's deficiencies to BLM's satisfaction.

As detailed in the Regulatory Impact Analysis prepared for this Proposed Rule, BLM estimates that the proposal would have the following economic impacts:

- Costs to industry of around $122 million per year (annualized at 7 percent);
- Benefits to industry in recovered gas of $55 million per year (annualized at 7 percent);
- Increases in royalty revenues from recovered and flared gas of $39 million per year; and
- Benefits to society of $427 million per year from reduced greenhouse gas emissions.

Comments on the Proposed Rule are due January 30, 2023.

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