Holland & Hart



**Utsarga Bhattarai**

Associate
303.295.8168
Denver
ubhattarai@hollandhart.com



**Tina Van Bockern**

Partner
303.295.8107
Denver
trvanbockern@hollandhart.com

# BLM Finalized New Waste Prevention Rule – What Does it Mean for Industry?

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The Bureau of Land Management (BLM) finally released its new Waste Prevention Rule ("Rule"), which was originally proposed back in November 2022. The new Rule, which will be published in the *Federal Register* soon, is aimed at (1) curtailing waste of natural gas that is flared, vented, or leaked from oil and gas operations on Federal and Indian leases, and (2) collecting royalties on the value of the gas that is wasted or "avoidably" lost.

Aware that its last rulemaking attempt was struck down because the agency exceeded its statutory authority by attempting to regulate air quality under the pretense of regulating waste from oil and gas operations, *see Wyoming v. DOI*, 493 F. Supp. 3d 1046 (D. Wyo. 2020), BLM is being careful this time around by repeatedly stating that this Rule "is not focused on achieving any ancillary effects on air quality or climate change." BLM also points to its newly created authority under the Inflation Reduction Act (IRA) to collect royalties on extracted methane. *See* 30 U.S.C. § 1727. Nonetheless, industry members, states, and trade associations are carefully reviewing BLM's Rule for instances of agency overreach. If found, another round of litigation is inevitable.

In the meantime, (1) the notable changes and new requirements that differ from the 2022 proposed rule and (2) the key obligations that will be phased in over the next few years are summarized below. Also, look for another Holland & Hart update in the coming weeks assessing the interplay between this BLM Rule and Colorado's and New Mexico's waste prevention rules.

## I. How does the Rule differ from the 2022 proposal?

**New Phased-Down Limits on Royalty-Free Flaring:** The Rule establishes a volumetric 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. The volumetric threshold in the Rule however is wholly different than the 1,050 Mcf per month per lease, unit participating area (PA), or communitization agreement (CA) limit that BLM originally proposed. Instead, the Rule's final volumetric limit is directly tied to the number of barrels of oil produced each month.

The new flaring thresholds begin at 0.08 Mcf of gas per barrel of oil produced in the first year of the Rule and then decrease to 0.07 Mcf per

barrel produced in the second year, 0.06 Mcf per barrel produced in the third year, and 0.05 Mcf per barrel produced afterwards. BLM claims that the starting “0.08 Mcf per barrel of oil produced is comparable to the proposed 1,050 Mcf per lease, unit PA, or CA.” BLM rejected commenters' suggestion to adopt an option to request approval to flare royalty-free above the thresholds. It also rejected the possibility of imposing time-based limits as being too “difficult to enforce.”

Because this aspect of the Rule never appeared in the proposal, there is a concern that BLM failed to comply with the basic tenets of notice-and-comment rulemaking, depriving the public of the opportunity to evaluate BLM's per-barrel approach or fact-check BLM's conclusion that the 0.08 Mcf per barrel limit is indeed equivalent to the 1,050 Mcf limit.

**State and Tribal Requests for Variances are No Longer Allowed:** The proposed rule would have allowed States and Tribes to request a variance under which analogous State or Tribal rules would have applied in place of some or all of the requirements of subpart 3179. But in the final Rule, BLM decided not to carry forward the proposal to allow for State and Tribal variances because, according to BLM, it could create significant administrative burdens. Instead, BLM is requiring operators in States or on Tribal lands that have more stringent standards than those contained in the final Rule to conform to the more stringent State or Tribal standards. Thus, a State or Tribe may effectively supplement the BLM's regulatory requirements by enacting stricter requirements.

**Submission of Self-Certification Statement in Lieu of Waste Minimization Plan:** The proposed rule called for operators to submit a waste minimization plan with all Applications for Permits to Drill (APD) oil wells. The Rule carries forward the requirement to submit a waste minimization plan (discussed further in detail below). But it also gives operators an option to instead submit a self-certification statement in which operators commit to (1) capture 100% of the associated gas produced from an oil well and (2) pay royalties on *all* lost gas except for gas lost through emergencies.

**Initial Well Testing Flaring No Longer Identified as Unavoidable Loss:** BLM's proposal had identified venting or flaring that occurred in connection with initial production testing as unavoidably lost. The Rule leaves that out. BLM explained that it “eliminated the concept of initial production testing and will regulate flaring following well completion or recompletion as a separate period in the lifecycle of a newly producing formation in a well.”

**Requirements for Pneumatic Controllers, Diaphragm Pumps, and Vapor Recovery Systems were Omitted:** The proposed rule had imposed specific equipment requirements for pneumatic controllers, pneumatic diaphragm pumps, and storage vessels (tanks). Concluding that the pneumatic controllers and pneumatic diaphragm pumps requirements imposed an excessive compliance burden on marginal wells, BLM did not include those requirements in the Rule. BLM also removed the requirement to install vapor recovery equipment on storage tanks, recognizing that such equipment would not increase royalties and thus

would not achieve the agency's waste prevention goals.

**II. Key Requirements Industry Needs to Know About.**

Here are the key takeaways from BLM's Rule, which become effective 60 days after publication of the Rule in the *Federal Register* unless otherwise noted. These requirements, BLM estimates, will cost industry about $19.3 million per year.

**Conditions of Approvals for APDs (43 C.F.R. §§ 3162.3-1 and 3179.40)**

Relying on the statutory requirement that "operators must use all reasonable precautions" to prevent waste, BLM is requiring operators to demonstrate such precautions *as a condition of approval* of new APDs.

- Operators must submit either a waste minimization plan with all APDs for oil wells, or a self-certification statement (as described above).
- The waste minimization plan must include: anticipated oil and associated-gas production; anticipated 3-year decline curves; certification that the operator has a valid gas sales contract to sell 100% of the oil-well gas; and other steps the operator commits to take to reduce or eliminate gas losses from any source, including from pneumatic equipment, storage tanks, and leaks.
- If BLM is unsatisfied with the plan, BLM may delay the APD approval until the operator adequately addresses the plan's deficiencies. BLM will give the operator two years to make corrections before disapproving the APD.
- After an APD is approved, BLM may order an operator to implement additional measures to prevent waste at ongoing exploration and production operations.
- Reasonable measures to prevent waste may include advances in technology and changes in industry practice.

**Recognized "Unavoidably Lost" Gas and Limits (43 C.F.R. §§ 3179.41, 3179.60, 3179.70 and 3179.81 through 3179.92)**

The Rule recognizes that oil or gas can be "unavoidably lost"—and thus not royalty bearing—in certain situations, subject to specific limits.

- Specifically, gas may be unavoidably lost if it is lost in connection with the following operations or sources:
    - well drilling, completions and recompletions (subject to limits);
    - subsequent well tests (subject to limits);
    - exploratory coalbed methane well dewatering;
    - emergencies (subject to limits);
    - normal operating losses from a natural-gas-activated pneumatic controller or pump or from an oil storage tank or other low-pressure production vessel;

  - well venting in the course of downhole well maintenance and/or liquids unloading;
  - leaks (when the operator has complied with the leak detection and repair requirements);
  - facility and pipeline maintenance;
  - pipeline capacity constraints, midstream processing failures, or other similar events (subject to limits);
  - flaring of gas from which at least 50 percent of natural gas liquids have been removed on-lease and captured for market, if the operator has notified the BLM; and
  - flaring of gas from a well that is not connected to a gas pipeline, to the extent that such flaring was authorized by the BLM.
- As for the royalty-free flaring during emergencies, BLM's Rule:
  - Carried forward the proposed 48-hour limit on the royalty-free emergency flaring. This 48-hour limit is mandated by the IRA, despite BLM's previously noted belief that time limits are difficult to enforce.
  - Defined an “emergency situation” as “a temporary, infrequent, and unavoidable situation in which the loss of gas is necessary to avoid a danger to human health, safety, or the environment.”
  - Clarified that the following are not emergencies:
    - Recurring failures of a single piece of equipment;
    - The operator's failure to install appropriate equipment of a sufficient capacity to accommodate production conditions;
    - Failure to limit production when the production rate exceeds the capacity of the related equipment, pipeline, or gas plant, or exceeds sales contract volumes of oil or gas;
    - Scheduled maintenance; or
    - A situation caused by operator negligence.

**Leak Detection and Repair (LDAR) Obligations (43 C.F.R. §§ 3179.100 through 3179.200)**

The Rule imposes specific obligations that operators must take to avoid waste. In particular:

- Operators must submit a statewide LDAR program for BLM's approval. The program must cover operations and production equipment located on Federal or Indian leases but not operations and production equipment located on State or private tracts, even though those tracts are committed to a federally approved unit PA or CA.
- Among other things, the LDAR program must identify:
  - leases, unit PAs, and CAs to which the LDAR program

applies;
    - the method and frequency of leak detection inspection used (quarterly audio, visual, and olfactory inspections; optical gas imaging leak detection; continuous monitoring; etc.); and
    - the operator's recordkeeping process for leak detection and repair.
- For existing leases, the operator must submit a statewide LDAR program for BLM's approval no later than 18 months after the effective date of the Rule. (The proposed rule would have required this no later than six months.)
- Operators must review and update a submitted LDAR program on an annual basis in the month in which the operator submitted the first LDAR program to ensure that leak detections methods and frequency are current.
- Operators must repair a leak no later than 30 days after discovery, unless good cause exists for taking a longer time. But in no case will BLM approve a delay of longer than two years.

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