

# KIRKLAND ALERT

March 20, 2018

## Recent Developments in the Regulation of Methane Venting and Flaring from Natural Gas Wells on Public and Tribal Lands and Potential Next Steps

More than a year after it was originally issued, an Obama-era rule limiting methane venting and flaring from natural gas wells on public and tribal lands (the “Waste Prevention Rule”<sup>1</sup>) may finally start being enforced, causing further uncertainty in a continuously shifting regulatory landscape. On February 22, 2018, a California federal judge ordered the U.S. Bureau of Land Management (“BLM”) to enforce the Waste Prevention Rule, in spite of a December 2017 BLM decision to suspend or delay certain requirements of the Waste Prevention Rule for one year until January 17, 2019 (the “Suspension Rule”<sup>2</sup>). In its decision, the California federal court found that parties that had filed legal challenges to the Suspension Rule were likely to succeed and ordered BLM to implement the Waste Prevention Rule along its original timeline.

In parallel to the pending implementation of the Waste Prevention Rule and the release of the Suspension Rule, BLM released a proposed rule that called for rescinding or revising certain requirements of the Waste Prevention Rule entirely (the “Rescission Rule”<sup>3</sup>). The Rescission Rule seeks to implement guidance contained in President Trump’s March 28, 2017, Executive Order 13783 (“Executive Order”), which directed BLM to review the Waste Prevention Rule in light of the stated policy of the Executive Order (to promote the “development or use of domestically produced energy resources”) and to subsequently propose rules to suspend, revise or rescind any part of the Waste Prevention Rule that BLM found to be inconsistent with the Executive Order.<sup>4</sup>

Investors and operators in the oil and gas market should actively monitor regulatory and legal activity with respect to methane venting and flaring from natural gas wells on public and tribal lands and engage in BLM’s Rescission Rule rulemaking process to determine potential regulatory impacts on their businesses.

### *Waste Prevention Rule (2016)*

On November 18, 2016, BLM published the final version of the Waste Prevention Rule to “reduce the waste of natural gas from flaring, venting, and leaks from oil and gas production operations on public and Indian lands.”<sup>5</sup>

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Among other things, the Waste Prevention Rule requires operators:

- To comply with flaring limits, such as by expanding gas-capture infrastructure, adopting alternative on-site capture technologies, or temporarily slowing production to minimize losses until capture infrastructure is installed;
- To evaluate opportunities for gas capture and prepare a waste minimization plan, which must be submitted with an Application for a Permit to Drill;
- To use an instrument-based leak detection program to find and repair leaks; and
- To not vent natural gas except in narrowly specified circumstances, such as in emergencies or venting from certain equipment subject to proposed limits.

In addition, the Waste Prevention Rule clarifies when operators owe royalties on flared gas and restores BLM's authority to set royalty rates at or above 12.5 percent of the value of the production.

The Waste Prevention Rule became effective on January 17, 2017, with many of its requirements to be phased in over time until full implementation on January 17, 2018.

### *Suspension Rule (2017)*

On December 8, 2017, BLM issued the Suspension Rule, which delayed or suspended certain requirements of the Waste Prevention Rule for one year until January 17, 2019, citing "concerns regarding the statutory authority, cost, complexity, feasibility, and other implications" of the Waste Prevention Rule. BLM stated that it wanted to "avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future."

The Suspension Rule suspended until January 17, 2019, many of the key provisions of the Waste Prevention Rule, including some for which compliance had already become mandatory. Some of the most significant provisions of the Waste Prevention Rule that were suspended until January 17, 2019, include those pertaining to: waste minimization plans; flaring and venting of gas during drilling and production operations, and during well completions and related operations; determining the emissions levels of storage vessels; and minimizing gas vented during downhole well maintenance and liquids unloading.

In addition, the Suspension Rule delayed until January 17, 2019, provisions of the Waste Prevention Rule relating to gas capture, measuring and reporting gas volumes vented and flared, existing approvals to flare royalty free, replacing pneumatic controllers, and leak detection and repair.

**The Waste Prevention Rule, designed to reduce the waste of natural gas from oil and gas operations on public and tribal lands, was scheduled to be fully implemented on January 17, 2018. The Suspension Rule (issued in December 2017) suspended many of the key provisions of the Waste Prevention Rule until January 17, 2019, including some for which compliance had already become mandatory.**

## *Ongoing Litigation*

### **Waste Prevention Rule**

In November 2016, immediately after issuance of the Waste Prevention Rule, two industry groups, together with Wyoming and Montana, separately filed lawsuits challenging, and seeking a preliminary injunction to enjoin BLM from implementation of the rule.<sup>6</sup> The court consolidated the lawsuits and denied the states' motion for a preliminary injunction on January 16, 2017 (as consolidated, the "Wyoming Cases").<sup>7</sup> In light of the lawsuit filed to challenge the Suspension Rule (see discussion below), on December 29, 2017, the court presiding over the Wyoming Cases stayed those cases, citing uncertainty about the outcome of the Suspension Rule litigation as well as BLM's continued efforts to revise the Waste Prevention Rule.<sup>8</sup>

### **Suspension Rule**

On December 19, 2017, California and, separately, the Sierra Club and 17 other environmental groups filed lawsuits against BLM and Secretary of the Interior Ryan Zinke, respectively, challenging the Suspension Rule; these cases were later consolidated.<sup>9</sup> Plaintiffs argued that the Suspension Rule was not supported by "a reasoned analysis and is therefore arbitrary and capricious."<sup>10</sup> On February 22, 2018, the U.S. District Court for the Northern District of California granted plaintiffs' motion to enjoin the implementation of the Suspension Rule, concluding that "the Suspension Rule is arbitrary and capricious, both for substantive reasons, as a result of the lack of a reasoned analysis, and procedural ones, due to the lack of meaningful notice and comment."<sup>11</sup> Significantly, the court did not consider the distinct legal issues raised in the Wyoming Cases, described above, in the challenge of the Waste Prevention Rule.<sup>12</sup>

### *Proposed Rescission Rule (2018)*

On February 22, 2018, BLM published for public comment the proposed version of the Rescission Rule.<sup>13</sup> According to BLM, the overall impact of the draft Rescission Rule will be to "reduce the cost, complexity, and other implications of the 2016 [Waste Prevention Rule]," especially with respect to compliance burdens. In addition, BLM has stated that the language of the proposed Rescission Rule is consistent with the domestic energy infrastructure development policy set forth in President Trump's Executive Order.<sup>14</sup>

With some exceptions, the proposed Rescission Rule returns the regulatory framework to the one in place prior to the implementation of the Waste Prevention Rule. BLM claims that aspects of the Waste Prevention Rule that will be completely revoked under the draft Rescission Rule are more appropriately regulated by the U.S. Environmental Protection Agency under the Clean Air Act. In particular, if approved after the public comment period, the Rescission Rule will rescind the following requirements that would have been implemented under the Waste Prevention Rule:

**In February 2018, a California federal court set aside the Suspension Rule and ordered BLM to enforce the Waste Prevention Rule. Also in February 2018, BLM issued the proposed Rescission Rule, which would return the regulatory framework to the one in place prior to the implementation of the Waste Prevention Rule.**

- The requirement to prepare waste minimization plans alongside an application for a permit to drill;
- Flaring limit requirements, such as expansion of gas-capture infrastructure, adopting alternative on-site capture technologies, or temporarily slowing production to minimize losses until capture infrastructure is installed; and
- Development of an instrument-based leak detection program to find and repair leaks.

The proposed Rescission Rule also modifies or replaces certain Waste Prevention Rule requirements to return to the pre-2016 regulatory framework, namely with respect to:

- The gas capture requirement;
- Well maintenance and liquids unloading requirements; and
- Measurement and reporting of volumes of vented and flared gas.

According to BLM, any remaining requirements of the Waste Prevention Rule would be retained, modified or removed, and the agency anticipates such removal to have very little impact when compared to the potential costs of implementation associated with the above-listed requirements.

BLM seeks public comment on the Rescission Rule, and the comment period will remain open until April 23, 2018.

### *Uncertainty for Oil and Gas Operators*

The litigation related to the Waste Prevention Rule and the Suspension Rule, coupled with the new draft Rescission Rule, has created uncertainty with respect to BLM's regulation of methane venting and flaring from natural gas wells on public and tribal lands. After the recent court decision reinstating the Waste Prevention Rule, oil and gas industry groups expressed concern that oil and gas operators cannot meet the standards of the Waste Prevention Rule. Specifically, industry groups claim that operators now face immediate compliance deadlines for which they have not made the necessary investment and preparation. On March 7, 2018, the court granted the motions of plaintiffs in the Wyoming Cases to lift the stay to the legal challenges to the Waste Prevention Rule.<sup>15</sup> Consequently, there remains a great deal of uncertainty as to what the regulation of methane venting and flaring from natural gas wells on public and tribal lands will look like in the immediate and long-term future.

### *Next Steps*

Investors and operators in the oil and gas market should monitor activity with respect to the regulation of methane venting and flaring from natural gas wells on

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public and tribal lands and actively participate in the rulemaking process for the draft Rescission Rule to promote favorable outcomes for their businesses. Next steps to consider include:

- Reviewing and commenting on the draft Rescission Rule on the Federal Register’s website<sup>16</sup> (including through industry trade groups). BLM is accepting comments until April 23, 2018. Comments addressing the draft Rescission Rule’s revisions to information collection requirements must also be submitted to the Office of Management and Budget (“OMB”) and should be sent to OMB by March 26, 2018, for full consideration.
- Working with legal counsel to track the Wyoming Cases and any other litigation surrounding the Waste Prevention Rule, the Suspension Rule or the Rescission Rule.
- Engaging legal counsel and technical environmental consultants to assess and compare the legal and technical/cost implications of the reinstatement of the Waste Prevention Rule and the draft Rescission Rule for ongoing and future operations.

**Investors and operators in the oil and gas market should monitor activity with respect to the regulation of methane venting and flaring from natural gas wells on public and tribal lands and actively participate in the rule-making process for the draft Rescission Rule to promote favorable outcomes for their businesses.**

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<sup>1</sup> “Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule,” 81 Fed. Reg. 83,008 (Nov. 18, 2016).

<sup>2</sup> “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements,” 82 Fed. Reg. 58,050 (Dec. 8, 2017).

<sup>3</sup> “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7,924 (Feb. 22, 2018).

<sup>4</sup> “Promoting Energy Independence and Economic Growth,” 82 FR 16093 (Mar. 28, 2017).

<sup>5</sup> U.S. BLM, “Fact Sheet – Methane Waste Prevention Rule,” November 15, 2016, [https://www.blm.gov/sites/blm.gov/files/documents/files/oilandgas\\_WastePreventionRuleFactsheetFinal.pdf](https://www.blm.gov/sites/blm.gov/files/documents/files/oilandgas_WastePreventionRuleFactsheetFinal.pdf).

<sup>6</sup> *See W. Energy All. v. Zinke*, No. 16-cv-0280 (D. Wyo. filed Nov. 15, 2016); *Wyoming v. U.S. Dept of Interior*, No. 16-cv-0285 (D. Wyo. filed Nov. 18, 2016).

<sup>7</sup> *See Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Dec. 29, 2017) [Dkt. Nos. 184, 189].

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *See California v. Bureau of Land Mngmt.*, No. 17-cv-07186 (N. Ca. filed Dec. 19, 2017); *Sierra Club v. Zinke*, 17-cv-07187 (N. Ca. filed Dec. 19, 2017).

<sup>10</sup> *Sierra Club*, 17-cv-07187, slip op. at 10 (N. Ca. Feb. 22, 2018).

<sup>11</sup> *Id.* at 29.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> 83 Fed. Reg. 7,924.

<sup>14</sup> 82 FR 16093.

<sup>15</sup> *See Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Mar. 7, 2018) [Dkt. No. 202].

<sup>16</sup> “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7,924 (Feb. 22, 2018), *available at* <https://www.federalregister.gov/documents/2018/02/22/2018-03144/waste-prevention-producti-on-subject-to-royalties-and-resource-conservation-rescission-or-revision-of>.

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