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Legal Sidebar

The Debate over Venting and Flaring on Federal Lands

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On November 30, 2022, the Bureau of Land Management (BLM) published a proposed rule intended to address the venting and flaring of natural gas by energy production operations on federal and tribal lands. Past agency attempts to promulgate a lasting rule on this issue have been affected by litigation (described further below), including questions over the authority that Congress has granted BLM to regulate such activities. This Legal Sidebar will briefly review the history of those attempts and describe the provisions that the Biden Administration has proposed.

Regulation and Litigation Under the Obama Administration

Drilling and extracting fossil fuels can result in the release of natural gas as part of the drilling process or due to leakage within the installed production systems. Operators vent (release directly into the atmosphere) or flare (burn) some natural gas that they captured for commercial use. Operators commonly use these practices for operational, safety, and economic reasons, and they trigger a number of concerns related to waste and environmental harm. In particular, vented methane is a powerful greenhouse gas, and flared methane releases carbon dioxide and other pollutants into the atmosphere.

The BLM, an agency within the Department of the Interior, is tasked with administering certain public lands under the control of the federal government and with administering the onshore federal mineral estate. The principal statute governing onshore oil and natural gas production on federal lands is the Mineral Leasing Act (MLA), which requires (among other things) that leases under the Act include a condition that the lessee will "use all reasonable precautions to prevent waste of oil or gas."

Under that statutory requirement, BLM published a set of regulations concerning venting and flaring on federal lands in late 2016 (Waste Prevention Rule). These regulations replaced BLM's previous standards for venting and flaring on federal lands as articulated in a 1980 Notice to Lessees. (NTL-4A). The NTL-4A had provided limited authorization to vent or flare only in certain circumstances and clarified that lessees would not owe royalties to the government on vented or flared gas. The 2016 regulations prohibited avoidable losses due to venting and flaring, condoning flaring only when such losses are unavoidable and prohibiting venting entirely except in certain narrow cases (e.g., where flaring is not an option for technical reasons, when there is an emergency, or during certain natural gas production processes). The regulations also obliged operators to "capture" a certain percentage of produced gas

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rather than venting or flaring it, effectively capping the quantity of gas that can be vented and flared at a site, and required operators to update certain outdated equipment. Operators were given a choice of satisfying either an overall capture requirement for all wells under their purview or case-by-case capture requirements.

Shortly after publication of the Waste Prevention Rule, the House of Representatives passed a resolution pursuant to its authority under the Congressional Review Act to negate retroactively the Waste Prevention Rule. The resolution did not pass the Senate.

Regulations and Litigation Under the Trump Administration

The newly elected Trump Administration issued Executive Order 13783, "Promoting Energy Independence and Economic Growth," in March 2017. Among other things, it directed BLM to review the Waste Prevention Rule and, if appropriate, to publish proposed and final rules suspending, revising, or rescinding it in whole or in part. In response to this directive, in June 2017, the BLM postponed indefinitely the scheduled effective date of a number of the requirements of the Waste Prevention Rule that had been set to go into effect in early 2018.

In addition, various parties, including Western states, initiated litigation challenging the Waste Prevention Rule. In January 2017 the U.S. District Court for the District of Wyoming denied requests for a preliminary injunction and directed the parties to initiate briefing on the merits of the case.

As this litigation continued, BLM published a new rule intended to revise and supersede the 2016 Waste Prevention Rule, starting with a December 2017 final rule that delayed or suspended a number of the requirements of the 2016 rule until January 2019. BLM also moved forward with a new proposed rule governing venting and flaring intended to supplant the Waste Prevention Rule. Responding to this administrative action, the U.S. District Court for the District of Wyoming stayed implementation of the 2016 rule pending completion of the new rulemaking.

The saga entered a new phase with the publication of the BLM's new final rule on Venting and Flaring in September 2018 (Rescission Rule). The BLM made two principal claims in support of its decision to reevaluate and revise these requirements. First, BLM claimed that it did not have the statutory authority to promulgate the Waste Prevention Rule, because that rule actually intended to regulate emissions of air pollutants rather than to prevent waste and therefore usurped the authority granted to the Environmental Protection Act (EPA) by the Clean Air Act. BLM also determined that the Obama Administration's cost-benefit calculations for certain operator requirements contained errors and that the costs imposed by that rule were in excess of the cost of the conserved gas in some cases. In BLM's view, this created problems for small-scale operators with slim profit margins. In an effort to address these concerns, the BLM eliminated the "capture" requirement and a number of the technical requirements found in the Waste Prevention Rule and reinstituted the guidelines for royalty relief for vented and flared gas found in NTL-4A.

A number of environmental groups quickly brought a legal challenge to the Rescission Rule. They alleged that the rule violated the MLA, in part because BLM actually did have authority to promulgate the Waste Prevention Rule. They also argued that BLM violated the National Environmental Policy Act and the Administrative Procedure Act in promulgating the rule.

The U.S. District of Court for the Northern District of California agreed with the environmental groups, and in July 2020, it issued a decision vacating the entirety of the Rescission Rule. The court found that "the rulemaking process resulting in the Rescission was wholly inadequate," because BLM "ignored its statutory mandate under the Mineral Leasing Act, repeatedly failed to justify numerous reversals in policy positions previously taken, and failed to consider scientific findings and institutions relied upon by both prior Republican and Democratic administrations." The court seemed to disagree with the narrow

interpretation of BLM's statutory authority to regulate venting and flaring under the MLA endorsed by the Wyoming court in its ruling on the Waste Prevention Rule, noting that "[t]he words of the statute require that it be read broadly. More specifically, the statute mandates that BLM act comprehensively to prevent the waste of public resources."

A week after the court in California vacated the Rescission Rule, the U.S. District Court for the District of Wyoming lifted the stay on the litigation challenging the Waste Prevention Rule. Less than three months later, in October 2020, the court vacated most of the Waste Prevention Rule, just as the U.S. District Court for the Northern District of California had done with the Rescission Rule. The court found that the Waste Prevention Rule was not intended to prevent waste during oil and gas production but to protect air quality, which the court held was "expressly within the 'substantive field' of the EPA and the States pursuant to the Clean Air Act."

The Biden Administration's Proposed Rule

As a result of these administrative and legal developments, neither the Waste Management Rule nor the Rescission Rule was in effect at the start of the Biden Administration, leaving NTL-4A as the framework in place for venting and flaring on federal land. On November 30, 2022, BLM published a new proposed rule. Among other things, the proposed rule would:

- place monthly time and volume caps on royalty-free flaring for oil wells (replacing case-by-case flaring authorizations under NTL-4A) while keeping in place the ban on flaring of gas from gas wells unless it is "unavoidably lost;"
- require operators to submit "waste minimization plans" with all drilling permit applications as well as "Leak Detection and Repair" programs for operations on federal or Native American lands; and
- mandate technological upgrades intended to reduce venting and flaring, including restricting the use of natural-gas-activated pneumatic controllers or pneumatic diaphragm pumps with high bleed rates and requiring oil storage tanks to install vapor recovery systems "where technically and economically feasible."

The comment period for the proposed rule closes on January 30, 2023.

Considerations for Congress

As noted above, BLM promulgates venting and flaring regulations pursuant to language in the MLA that obliges lessees to "use all reasonable precautions to prevent waste of oil or gas developed in the land." This language is the only explicit legislative guidance offered to BLM regarding venting and flaring on federal lands. Court decisions about the various rules described in this Sidebar have examined this language in the context of the MLA as a whole and other statutes that may apply, and they have reached different conclusions.

Congress can provide more detail on the meaning of *waste of oil or gas* and the practice of venting and flaring of federal land if it so chooses, and it has attempted to do so in the past. For example, in the 116th Congress, Senator Markey introduced S. 2818, which would have banned venting and flaring on federal lands except in certain circumstances. Earlier legislation introduced in the 114th Congress would have provided further detail regarding limitations on venting and flaring on federal lands. Congress could also choose to revise or clarify BLM authority in a number of other ways, including explicitly authorizing the agency to regulate emissions from drilling operators on federal lands. Even if Congress were satisfied with the way that BLM were interpreting its authority under the MLA, legislation could be relevant to judicial review of BLM's decisions.

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