Energy & Resources Notes

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The FAST Act Seeks to Expedite Multi-Agency NEPA Compliance for Large Infrastructure Projects

A new law offers the prospect of faster Federal approvals and limitations on judicial challenges for certain large infrastructure projects that must comply with the National Environmental Policy Act ("NEPA"). In December 2015, Congress enacted and President Obama signed into law the Fixing America's Surface Transportation ("FAST") Act.[1] This article summarizes the key provisions of the FAST Act and implications for targeted industries, including renewable and conventional energy, electric transmission, pipelines, transportation, broadband, and manufacturing.

Why It Matters: The FAST Act could result in faster decisions and greater predictability of the timing of Federal agency decisions for large infrastructure projects. For many years, applicants have complained that the NEPA process takes too long, particularly for projects that require approvals from multiple Federal agencies and that tend to be more complex and controversial. Title XLI of the FAST Act provides expedited timeframes and a more coordinated process under the ambit of a new interagency council to achieve speedier NEPA compliance and stricter limitations on judicial review for large infrastructure projects that involve multiple Federal agencies. However, the new interagency council could impose an additional bureaucratic layer upon an already administratively burdened process, and the FAST Act contains some loopholes that may or may not result in faster decisions.

What Projects Qualify: The FAST Act applies to projects that involve the construction of infrastructure for certain types of projects that are subject to NEPA and:

- are likely to require a total investment of more than $200 million, and do not qualify for abbreviated authorization or environmental review under NEPA; or
- the size and complexity of which make the project likely to benefit from enhanced oversight and coordination, including projects likely to require authorization from more than two Federal agencies, or likely to require preparation of an environmental impact statement ("EIS").

The types of projects that qualify include:

- renewable or conventional energy production
- electricity transmission
- surface transportation
- aviation
- ports and waterways
- water resource projects
- broadband
- pipelines
- manufacturing
- a project that is determined to be covered by vote of a newly formed interagency council.

A New Council: The FAST Act creates the Federal Infrastructure Permitting Improvement Steering Council ("Council") to oversee the agency coordination process for covered projects. The Council will be comprised of an Executive Director appointed by the President, and members from key Federal agencies.[2]

The Council will be responsible for:

- developing an inventory of covered projects, and categorizing covered projects based on sector and project type;
- developing performance schedules and completion dates for environmental reviews and authorizations most commonly required for each category of covered projects;
- recommending best practices for:
  - stakeholder engagement,

  - ensuring timely decisions,
  - improving coordination between Federal and non-Federal agencies,
  - increasing transparency,
  - reducing information collection and administrative burdens,
  - developing and making available geographic information systems tools, and
  - developing and distributing training materials; and
- developing and maintaining an online Permitting Dashboard.

The Dashboard: The online Permitting dashboard ("Dashboard") will track the status of Federal reviews of projects. The Dashboard will identify performance schedules and timeframes, and will include a hyperlink to a website with project documents. The FAST Act specifies short deadlines for posting updates following receipt of new information.

Agency Roles: A facilitating agency or lead agency will be identified to lead the coordination effort among Federal agencies. The lead agency will identify and invite other agencies to be participating or cooperating agencies, and will be generally responsible for coordinating the implementation of the project plan and setting the project timeline. Participating and cooperating agencies coordinate with the lead agency in setting and implementing the project plan, and are responsible for meeting deadlines.

Initiating the Process: The project sponsor initiates the process by submitting a notice to the Council's Executive Director and facilitating agency, with background information on the project. That notice triggers the Council's timeframes for entry on the Dashboard and succeeding deadlines.

Performance Schedules and Expedited Timeframes: The FAST Act establishes expedited timeframes which emphasize timely progress on agency reviews, including:

- The Council shall set expedited performance schedules and timeframes for NEPA compliance and agency decision making for projects by category, based on the most efficient applicable processes.
- The final completion dates for agency review of a project shall not exceed the average time to complete an environmental review or authorization for a project within the same category. The average time is based on data from the preceding two calendar years.
- An agency decision on a project must be issued not later than 180 days (six months) after the agency receives all information needed to complete the review. However, there are no provisions requiring an agency to identify within a particular timeframe the information needed for review, therefore this requirement may not be particularly effective in expediting agency reviews.
- Agencies with responsibilities regarding the project will be invited to become participating or cooperating agencies within 45 days after a project is entered on the Dashboard, and must respond by the deadline established by the lead agency.
- The lead or facilitating agency will establish a coordinated project plan within 60 days of project entry on the Dashboard, including agency roles and responsibilities, a comprehensive schedule, discussion of potential mitigation strategies, and a schedule and plan for public and tribal outreach.
- The lead or facilitating agency shall establish a timetable of intermediate and final completion dates

for action by each participating agency, taking into consideration the Council's performance schedules; the size, complexity, financing plan, and economic significance of the project; agency resources; the sensitivity of affected resources; and recent similar reviews.

- An established timetable shall not be modified unless the lead agency agrees and provides a written justification. A delay of the final completion date of more than 30 days requires consultation with the project sponsor and a decision on the record by the Council's Executive Director. The FAST Act provides for limitations on the length of modifications. Further modifications must be approved by the OMB Director who must explain the modification in a report to Congress, and require supplemental reports on progress by the lead agency. Although the opportunity to modify established timetables appears to be a loophole that may result in substantial agency delays, the FAST Act limits the extent of requested modifications, and requires agencies to explain requested modifications. It remains to be seen whether these provide sufficient deterrent to the prolonged delays that plague current NEPA reviews of large projects.
- Agencies are required to conform to the completion dates in the permitting timetable. Agencies that fail to conform must provide explanations, proposals for alternative completion dates, and ongoing status reports. Agencies may not perceive these consequences as particularly adverse.
- The FAST Act limits the period for comments on a draft EIS by agencies and the public to between 45 and 60 days, unless the project sponsor and the involved agencies agree to a longer deadline or the lead agency extends the deadline for good cause. The comment period for other review or comment processes shall be no more than 45 days.

Interagency Coordination of NEPA Reviews: The FAST Act provides explicit requirements for interagency coordination of NEPA reviews.

- **Concurrent Reviews**: The FAST Act requires concurrent NEPA reviews for covered projects where multiple agencies have NEPA compliance obligations.
- **Issue Identification**: The lead and cooperating agencies shall work to identify and resolve issues that could delay completion of the environmental review or authorization of the project, or result in the denial of approval under any law. The lead agency shall make available to each cooperating and participating agency information on impacts on environmental, historic and socioeconomic resources, which may be based on existing information. Cooperating and participating agencies must identify, as early as practicable, any issues of concern that could substantially delay or prevent an agency completing its environmental review or authorization.
- **Use of State NEPAs**: Where a State has a similar environmental review process, an agency may adopt, consider, and supplement the State's analysis and documentation if the State process provided for public participation, alternatives analysis, and impact assessment substantially similar to that under NEPA.

Alternatives Analysis: The FAST Act requires streamlining of decision-making on alternatives to be considered in the NEPA process:

- **Range of Reasonable Alternatives**: During the scoping process, the lead agency, in coordination with the participating agencies, shall consider and determine the range of reasonable alternatives to be considered for a covered project, including "all

alternatives to be considered by law." It remains to be seen how this provision will be implemented in situations where other laws require different standards to be applied in alternatives analyses (such as Section 404 of the Clean Water Act), and where the action agency under such law is not the lead agency.

- **Preferred Alternative**: The preferred alternative identified by the lead and participating agencies may be developed to a higher level of detail than other alternatives if doing so will not prevent impartial decision-making regarding other alternatives and will not prevent the public from commenting on the alternatives.

Limitations on Judicial Review: The FAST Act provides important limitations on claims for judicial review of covered projects.

- **Statute of Limitations**: Claims seeking judicial review of agency authorizations for covered projects under Federal law must be filed within two years, rather than the six years formerly applied under the default statute of limitations. The FAST Act further limits claims under NEPA to those by parties who submitted comments during the environmental review period, where the commenter filed a sufficiently detailed comment so as to put the agency on notice of the issue on which the party seeks judicial review or the lead agency did not provide a reasonable opportunity for such comment on that issue.
- **Preliminary Injunctive Relief**: In any action seeking a temporary restraining order or preliminary injunction against an agency or project sponsor in connection with review or authorization of a covered project, the court shall:
  - consider, in addition to other applicable equitable factors, the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from the order or injunction; and
  - not presume that the harms are reparable.

Conclusion: The FAST Act has potential to expedite the NEPA process for large infrastructure projects that require multiple Federal approvals. Tasking the lead agency with decision-making authority for timing and intermediate steps such as alternatives identification should help streamline the process. It remains to be seen if agencies will adhere to the performance schedules, timeframes, and project plans established by the Council and lead agencies, or whether extensions of time and variations for "good cause" become common practice. While the Council has one year from formation to establish recommended performance schedules, and it will likely take longer for agencies to become accustomed to the lines of authority and communication mandated by the Act, project proponents should consider discussing project plans and permitting needs with their Federal regulators to assess how the FAST Act may affect them.

For more information, please contact Joan Drake.

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[1] Pub. L. No. 114-94, to be codified at 42 U.S.C. Chapter 55.

[2] Council members include representatives at the deputy secretary level and above from the Departments of Agriculture, Army, Commerce, Interior, Energy, Transportation, Defense, Environmental Protection Agency, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Homeland Security, Housing and Urban Development, the Advisory Council on Historic Preservation, and any other agencies the Council's Executive Director invites to participate, as well as the Chairman of the Council on Environmental Quality ("CEQ") and the Office of Management and Budget ("OMB").

Endangered Species Act Issues Relevant to Public Lands

On March 1, 2016, the United States Court of Appeals for the District of Columbia Circuit upheld the United States Fish and Wildlife Service's ("Service") decision to not list the dunes sagebrush lizard.[1] The D.C. Circuit validated the Service's decision to rely on a Texas conservation plan, concluding that evaluating the adequacy of the plan implicated the Service's judgment and expertise and was entitled to deference.[2] In so doing, the court rejected the appellants' argument that the Texas plan could not be relied upon because it was not sufficiently certain to be implemented or effective.[3]

On February 26, 2016, the Ninth Circuit reversed a federal district court's decision vacating portions of the critical habitat designation for the polar bear.[4] The Ninth Circuit concluded, contrary to the lower court, that the Service properly relied on the constitutional elements standard to designate critical habitat, and that the Service was not required to establish current use by existing polar bears.[5] The Service argued, and the Ninth Circuit agreed, that the Endangered Species Act requires proof that an area "is critical to future recovery and conservation of the species." [6]

For more information, contact Deana M. Bennett.

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[1] *Defenders of Wildlife, v. Sally Jewell,* 2016 WL 790900 (D.C. Cir. March 1, 2016).
[2] *Id.*
[3] *Id.*
[4] *Alaska Oil & Gas Ass'n v. Sally Jewell,* 2016 WL 766855 (9th Cir. Feb. 29, 2016).
[5] *Id.*
[6] *Id.*

New Rules and Draft Policy on Critical Habitat Designations

On February 5, 2016, The U.S. Fish and Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NOAA") finalized two rules and a draft policy that renovate how the agencies implement critical habitat designation requirements under the Endangered Species Act, 16 U.S.C. § 1531 *et seq* ("ESA"). The rules address implementing Section 4—which establishes critical habitat requirements—and Section 7—which requires federal agencies to consult with the FWS and NOAA before carrying out an action that could adversely affect an endangered species—of the ESA. The FWS articulated that "[t]he objective of this effort is to ensure that key operational aspects of the ESA are up-to-date, clear, efficient and effective. We are not seeking any changes to the ESA statute because we believe that implementation can be significantly improved through rulemaking and policy formulation."[1]

One rule changes the definition of "destruction or adverse modifications" in 50 CFR 402 to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such feature." 81 Fed. Reg, 28, 7226.[2]

The other rule, which makes amendments to 50 CFR 424, seeks to clarify, interpret and implement portions of the ESA concerning the procedures and criteria used for adding species to the Endangered and Threatened Wildlife and Plants lists and designating and revising critical habitat. Specifically, the rule states that it is intended to make "minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria

and procedures for designating critical habitat."[3] The agencies' goals are to clarify expectations regarding critical habitat and to provide for a more predictable and transparent critical habitat designation process. The rule also responds to Executive Order 13563 (January 18, 2011), which directed agencies to review, modify and streamline their existing regulations.

The draft policy provides the agencies' positions on how they consider partnerships and conservation plans. It also addresses Tribal lands, military lands, Federal lands, and economic and national security and homeland impacts in the exclusion process. The policy is meant to compliment the agencies' implementing regulations on critical habitat designations and clarify expectations regarding critical habitat.[4]

For more information, contact Zoë E. Lees.

[1] Regulatory Reform Overview.
[2] http://www.fws.gov/policy/library/2016/2016-02675.pdf
[3] https://www.gpo.gov/fdsys/pkg/FR-2016-02-11/pdf/2016-02680.pdf
[4] http://www.fws.gov/policy/library/2016/2016-02675.pdf

CERCLA Claims against United States and Laguna Pueblo Entities Dismissed

I. Introduction

In a series of early 2016 decisions issued in *Atlantic Richfield Co. v. U.S., et. al.*, Case No. 1:15-cv-00056, the U.S. District Court for the District of New Mexico dismissed claims for cost recovery and contribution asserted by Atlantic Richfield Co. ("ARCO") against the United States, the Laguna Pueblo ("the Pueblo"), and Laguna Construction Company ("LCC"), a federally-chartered tribal corporation formed by the Pueblo. The claims resulting in the decisions arose from Environmental Protection Agency ("EPA") investigations into inadequate remediation efforts undertaken decades ago at the Jackpile Paguate uranium mine in the Grants Uranium Belt in west-central New Mexico. The decisions provide insights into the Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA") statute of limitations, certain potential pitfalls in pleading CERCLA claims, and the ability of an Indian Pueblo to assert a sovereign immunity defense in the context of CERCLA and contract claims.

II. Background

In the 1940s, the federal government was in the market for uranium concentrate for enrichment to weapons-grade materials, and encouraged private entities to mine and mill uranium for sale to the government at prices it set. Uranium was discovered on Laguna Pueblo lands in 1952, and Anaconda Copper Mining Company entered into mining leases for uranium approved by the Bureau of Indian Affairs ("BIA"), acting pursuant to its trust responsibility to the Pueblo. Productive operations occurred at the Jackpile Paguate mine under the leases until 1982.

In 1986, the Pueblo and ARCO, Anaconda's successor, entered into an agreement to terminate the leases and perform remediation. ARCO agreed to pay the Pueblo to perform remediation, and the Pueblo agreed to assume all liability and release ARCO. The United States Department of the Interior approved the agreement and, pursuant to proceedings under the National Environmental Policy Act, BIA and the Bureau of Land Management issued a Record of Decision that established requirements for the remediation. ARCO paid $43.6 million to the Pueblo to perform the remediation.

LCC, the Pueblo and the United States all were involved in varying degrees with the remediation. The BIA had responsibility to approve key remediation decisions according to a cooperative agreement with the Pueblo.

But the BIA and the Pueblo saw ARCO's $43.6 million payment as an economic development opportunity. The Pueblo formed LCC to conduct the remediation, and BIA ceded certain oversight of the remediation work to LCC. Beginning in 2007 the Pueblo, followed by the EPA, investigated the site and found inadequacies in the cleanup work. In 2012 the EPA proposed listing the site on the National Priorities List, and in 2014 it asserted that ARCO should fund the CERCLA Remedial Investigation/Feasibility Study. EPA has brought no litigation.

III. Summary of ARCO's Claims

Asserting that the remediation was mishandled, ARCO brought CERCLA claims against the United States, the Pueblo and LCC, seeking cost recovery, contribution, declaratory relief, and damages for breach of contract. ARCO sought to recover two categories of response costs: (1) the $43.6 million it paid to the Pueblo in 1986 in exchange for the Pueblo's agreeing to be responsible for the remediation and release ARCO from all responsibility for it; and (2) significant costs ARCO incurred in responding to the EPA's efforts to shift responsibility to ARCO.

IV. The Court's Decisions

Senior United States District Judge, James A. Parker, entered a trio of memorandum decisions and orders in February and March of this year. The Court dismissed all of ARCO's CERCLA and declaratory claims against the United States, the Pueblo and LCC. Breach of contract claims against the Pueblo survived motions to dismiss.

The dismissal of ARCO's claims against the United States was based in part on the CERCLA statute of limitations and in part because ARCO's pleadings were deficient. The Court dismissed ARCO's claims for cost recovery and contribution for the 1986 settlement payment as time-barred. The Court dismissed ARCO's cost recovery and contribution claims to recover the costs in responding to EPA and associated investigation as inadequately pled to establish that the expenditures constituted "necessary costs of response." Post-judgment contribution claims were dismissed as premature because ARCO has not been sued. Finally, the court ruled that claims against the United States for declaratory judgement warranted dismissal, finding that ARCO could not bring a claim for declaratory relief since it failed to establish a valid underlying contribution or cost recovery claim.

The dismissal of ARCO's claims against the Pueblo and LCC was somewhat more complicated as a result of sovereign immunity defenses raised by those entities. The Court considered the sovereign immunity defense asserted by both the Pueblo and LCC, the Pueblo's federally-chartered tribal corporation. The Court concluded that both the Pueblo and LCC are entitled to assert sovereign immunity as a bar to ARCO's CERCLA claims, but that the Pueblo and LCC each had separately waived sovereign immunity with regard to ARCO's breach of contract claims. The Court found that the Pueblo waived sovereign immunity as to the breach of contract claims in the 1986 Agreement to Terminate Leases, but determined that the waiver as constituted did not extend to the CERCLA claims. The Court found that LCC, meanwhile, waived immunity as to the breach of contract claims through Articles of Merger associated with the merger of LCC from a New Mexico corporation to a federal LCC to take advantage of the liability limiting provisions of 25 USC §477.

V. Takeaways

Although the facts of *Atlantic Richfield* are relatively unique, its lessons are broader. First, in pleading a CERCLA claim for cost recovery, care should be taken to allege in some detail facts which support all elements of

the claim, including facts showing that necessary response costs within CERCLA were incurred. Second, without adequate waiver of sovereign immunity, the settlement and payment in exchange for a release and commitment by a tribe or tribal corporation to assume full responsibility for clean-up may leave the door open for CERCLA liability in the future without recourse through CERCLA-based contribution and cost recovery claims. Finally, although the court's decision confirmed that the defense of sovereign immunity applies to CERCLA contribution and cost recovery claims brought by private parties against sovereign Indian tribes and their federally chartered corporations, the court's analysis confirms that under the right circumstances, a tribe may waive its sovereign immunity protections.

For more information, contact Stuart R. Butzier or Larry P. Ausherman.

New Mexico Mining Commission Narrowly Expands Minimal Impact Permitting Opportunities for Certain Mining Operations

On April 20, 2016, the New Mexico Mining Commission ("NMMC") conducted a hearing to consider a rule change to the New Mexico Mining Act Reclamation Program ("MARP") regulations. The New Mexico Mining Association ("NMMA") proposed the rule change to expand eligibility for permitting under the "Part 3" minimal impact mining operations regulations set forth in 19.10.3 NMAC. The NMMC orally approved the rule expansion at the hearing and subsequently confirmed it by a Final Order issued April 28, 2016.

The newly revised regulations allow existing and new mining operations involving any of five specified minerals (dolomite, garnet, humate, perlite and zeolite) to disturb up to 40 acres and still be eligible for permitting as a minimal impact mine, increasing four-fold the allowable disturbance that had previously applied in the case of such minerals, and that still applies to all other minerals. The rule change applies in all New Mexico counties except for the three most populated counties, Bernalillo, Doña Ana and Santa Fe Counties. This rule change, while fairly narrowly tailored in scope, likely is the most significant substantive change to the MARP regulations since their adoption in 1994 pursuant to the New Mexico Mining Act of 1993.

Under the MARP regulations, Part 3 permitting for a minimal impact mining operation is much more streamlined and less onerous than permitting for operations that do not qualify for minimal impact status. Permitting new mining operations under the separate "Part 6" MARP regulations at 19.10.6 NMAC is substantially more burdensome in terms of public participation requirements, application and reclamation planning specificity, and overall performance standards.

For example, the Part 6 permitting process includes an expectation for advance submission and approval of a sampling and analysis plan that then is used for the collection of twelve months of baseline data across a range of environmental media and site conditions before an application may be deemed complete and reviewable, much less approved. Further, the public participation and technical review requirements under Part 6 are extensive, and involve a formidable multiple-agency technical review process. Since the adoption of the MARP regulations in 1994, not one new mining operation has been permitted successfully under Part 6, a fact that has been a source of consternation for both the NMMA and the primary agency charged with administering the Mining Act's

permitting regimes, the New Mexico Mining and Minerals Division ("MMD").

Prior to the approved rule change, in order for a mining operation to qualify for minimal impact status, a mining operation (both new and existing) could not exceed 10 acres of disturbed land, except that a new or existing operation extracting humate could exceed 10 acres but not 20 acres of land if its approved closeout plan provided for concurrent reclamation of mined-out areas. Borrowing from this concept, the adopted rule change requires concurrent reclamation of minimal impact operations exceeding 10 acres of disturbance where practicable. The new rule change also requires MMD to conduct an on-site inspection of the proposed permit area prior to issuing a minimal impact mining operations permit, and to conduct annual inspections of minimal impact mining operations greater than 10 acres.

In adopting the rule change, the NMMC's April 28 Final Order included an express recognition of the need to enhance economic growth and development opportunities in rural areas of the State. The Commission also explicitly recognized that the expanded minimal impact rules do not erode, and in fact often may improve, environmental stewardship in New Mexico by encouraging the juxtaposition of mining and processing operations and concurrent, sensible reclamation practices.

The rule change will become effective once it is published in the New Mexico Registrar.

For more information, contact Stuart R. Butzier or Christina C. Sheehan.

Update on Challenge to U.S. EPA's Waters of the United States Rule

As we previously reported in our Fall 2015 ERN,[1] several industry and environmental groups have challenged the Environmental Protection Agency's Final Waters of the United States Rule. On February 22, 2016, the Sixth Circuit Court of Appeals decided a threshold issue in the various challenges, namely which court has jurisdiction over such a challenge, the circuit court of appeals or the federal district court.[2] In a 2-1 decision, two judges held that the challenge must be brought in a circuit court of appeals, although on different grounds, while the third judge concluded that the challenge must be brought in district court.[3] Given the fractured panel opinion, it is not surprising that, on February 29, 2016, several industry groups petitioned the Sixth Circuit for *en banc* review, which was denied on April 21, 2016.

For more information, contact Deana M. Bennett.

[1] *See* Joan Drake and Deana Bennett, *The Clean Water Rule: Troubled Waters Ahead for the EPA and Corps*, Energy Resources Notes, Fall 2015, at 2-6.

[2] *Murray Energy Corp. v. U.S. Dep't of Def. et al,* 2016 WL 723241 (6th Cir., February 22, 2016).

[3] *Id.*

BLM's Venting and Flaring Proposal

On February 8, 2016, the Bureau of Land Management ("BLM") published its proposed rule concerning Waste Prevention, Production Subject to Royalties, and Resource Conservation in the Federal Register (the "Proposed Rule" or "proposal"). *See* 81 Fed. Reg. 25, at 6616-6686, *available here*. While the Proposed Rule is more commonly referred to as the BLM's "Venting and Flaring Rule," the proposal contains several other

requirements will likely have significant impacts on operations on federal and Indian onshore oil and gas leases.

Notably, the proposal follows numerous other regulations proposed by the Obama Administration during 2015—many of which will require costly updates to existing well equipment, increased production monitoring, and impose significant regulatory burdens on industry. The Administration's piecemeal regulatory update for the oil and gas industry is difficult to analyze on a cumulative basis, especially when these proposals are being presented on a staggered basis. On March 10, 2016, the Environmental Protection Agency ("EPA") announced that it plans on instituting its own Information Collection Request concerning methane emissions from existing oil and gas wells. This comes at the tail end of the comment period on the BLM's Venting and Flaring Rule, and only shortly after the Administration issued proposed rules to update Onshore Orders 3, 4 and 5 and the EPA's regulation of methane emissions from newly drilled wells.

The comment period on the BLM's Proposed Rule has now expired. However, the agency may still take comments submitted after the deadline date into consideration. In addition, several members of Congress have taken an interest in BLM's proposal. Eleven United States Senators urged the agency for a 30-60 day extension to the comment period for the Rule, and on April 14, 2016, the U.S. Senate Energy Natural Resources Subcommittee on Public Lands, Forests and Mining held a hearing concerning the Proposed Rule.

The BLM's Proposals to Regulate Venting and Flaring

In regards to venting and flaring, the BLM's Proposed Rule seeks to:

1.) Require operators to phase in, over a period of three years, a flaring limit of an average of 1,800 Mcf/month/well. The BLM states that operators could comply with these limits by installing new compressors to increase pipeline capacity, or by connecting wells to existing infrastructure through gathering lines. Alternatively, operators can purchase and install alternative on-site capture technologies or temporarily slow production to minimize losses.
2.) Prohibit operators from venting gas in most situations.
3.) Require operators to replace any "high bleed" pneumatic controllers on the lease with "low bleed" controllers within one year.
4.) Require many operators to replace pneumatic pumps with solar pumps or alternatively route the pumps to flare.
5.) Require operators to capture or flare gas that currently vents from storage tanks whenever the tank vents more than six tons of volatile organic compounds/year.
6.) Prohibit operators of new wells from purging gas emissions into the atmosphere, and requiring operators to use best management practices when unloading liquids from existing wells.
7.) Require operators to capture, flare, use, or re-inject gas released during well completions.

While some of the above requirements are not as controversial as others, many of the requirements will impose substantial costs on industry members. Furthermore, not all of these requirements are feasible. For example, alternative on-site capture technologies may not be reliable or available to operators. Similarly, a 1,800 Mcf/month/well flare limit may not be realistic in every basin.

Additional Requirements that are Tangential to Venting and Flaring

The Proposed Rule additionally seeks to impose several other requirements on operators. First, the BLM proposes to require operators to prepare and submit a pre-drilling plan for gas capture which must be submitted along with the operator's Application for Permit to Drill ("APD"). Oddly, the regulations specify that this plan must contain many items of information which have nothing to do with venting and flaring. For example, the Proposed Rule asks operators to provide a gas pipeline system location map which contains the location and name of the operator of each gas pipeline within 20 miles of the proposed well. *See* § 3162.3-1(j)(3)(ii). The Proposal also requests the name and location of the gas processing plant(s) closest to the proposed well(s), and the intended destination processing plant, and the maximum current daily capacity, current throughput, and anticipated daily capacity of the gas pipeline to which the operator plans to connect, and any plans known to the operator for expansion of pipeline capacity for the area that includes the proposed well. *See* § 3162.3-1(j)(3)(i) and (j)(4). It is unclear why this information is necessary or even pertinent, or whether pipelines would be required to provide this information to operators under the rule. Other requirements seek to have operators provide their own confidential and proprietary information as a part of this pre-drilling plan. For example, the proposal would require that operators include a description of anticipated production from each well which includes the expected oil and gas production rates and duration, the expected production decline curve and the expected Btu value. *See* § 3162.3-1(j)(5).

Second, the BLM proposes to require operators to inspect all wells for natural gas leaks by using infrared cameras. Smaller operators (of fewer than 500 wells) could alternatively conduct these inspections using portable analyzers assisted by audio, visual and olfactory inspection. These inspections will impose additional burdens on industry, with minimal benefits. The inspections must initially be conducted semi-annually. However, if three or more leaks are discovered during two consecutive inspections at wellhead equipment, "facilities," or compressors, the operator must inspect that equipment quarterly for at least two subsequent inspections. All leaks that are detected must be fixed within 15 calendar days after discovery and the repairs must be verified and documented within 15 days using infrared cameras (or other approved leak detection equipment for smaller operators).

Third, the BLM proposes to include regulations which would allow increased royalty rates for new leases. These regulations are (at best) tangentially related to venting and flaring, and should have been proposed in a separate rulemaking. Indeed, the BLM notes in its own commentary to the Proposed Rule that it previously proposed changes to federal royalties in an Advance Notice of Proposed Rulemaking on April of 2015 and that it received *82,074 comments* to that proposal. Rather than moving forward with a separate proposal that already has been the subject of industry focus, it appears that BLM has instead buried proposed changes to its royalty regulations within the proposed Venting and Flaring Rule.

The BLM states in the Proposed Rule that it currently has no plans to modify the 12.5% royalty rates. However, the proposal provides absolutely no guidance concerning how royalty rates could or will be increased in the future. Instead, BLM requests comments from industry concerning how it should increase future royalty rates. In addition, BLM requests comments concerning the use of a fluctuating royalty rate for gas that is flared. It is

unclear how this would work. Without guidance from the agency, it is difficult for industry members to properly evaluate and respond to these requests.

Comments Submitted by Industry Members on the Proposal

Early on in the comment period, several parties submitted substantive comments to the Proposal. These comments mentioned the following issues:

1.) The BLM's failure to study the cumulative impact of its numerous proposed regulations on the oil and gas industry. In fact, eleven United States Senators have commented that they would like more time to understand how the Proposed Rule related to the EPA's proposed methane rule and the BLM's proposed updates to Onshore Orders 3, 4, and 5.
2.) The fact that the natural gas price relied on by the BLM for its economic analysis in the Proposed Rule is $4/Mcf. That price is based on 2014 price levels and unrealistic in today's market. BLM fails to articulate in the Proposed Rule how or why a $4/Mcf price should be utilized after there have been remarkable amounts of natural gas more recently discovered and that have come on line in the United States which have affected natural gas prices.
3.) The estimated costs of new equipment, reporting, and inspection requirements in comparison to the royalty benefits reported by the BLM. Notably, API recently commented that the BLM has incorrectly valued the federal government's royalty benefit by failing to properly calculate royalties under the existing federal gas royalty valuation regulations. API indicated that BLM may have overstated its purported royalty benefit by 4 times or more.
4.) Finally, many commenters note BLM's slow review of existing APDs and right-of-way applications. As a result, industry members are concerned about needing to obtain yet another approval from the BLM prior to drilling.

In addition, comments from industry members and testimony given at the Senate Subcommittee meeting questioned BLM's statutory authority to regulate methane emissions and highlight how the proposed rule is duplicative of the EPA's methane rule, and the EPA's recently announced goal to cut methane emissions from existing oil and gas sources. Due to public interest in both the EPA's and the BLM's proposals, there will likely be future legal challenges to one or both of these regulations.

In addition, midstream companies may want to pay special attention to the types of information the BLM is asking operators to provide in their pre-drilling plans. To the extent midstream companies deem the information confidential and proprietary, they may want to consider submitting comments to the proposal. This rule is notably being proposed shortly after the BLM sought to impose significant record keeping and reporting burdens on midstream companies in its proposals to update Onshore Orders 3, 4 and 5.

If you have questions about the Proposed Rule and how it may impact industry members, please contact Jennifer Bradfute.

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