

Energy Development and Transmission Committee
Federal Regulatory Challenges to N.D. Energy Development

Kari Cutting

North Dakota Petroleum Council

October 14, 2015

Senator Wardner and members of the committee, my name is Kari Cutting, vice president of the North Dakota Petroleum Council. The North Dakota Petroleum Council (NDPC) represents more than 550 companies directly employing 65,000 employees in North Dakota in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I am here today to provide an update on some recent regulatory challenges to oil and gas development in North Dakota.

At yesterday's EmPower conference, many of you heard a significant amount of information about the impact of the Environmental Protection Agency's (EPA's) new Clean Power Plan and Attorney General Stenehjem's plans for litigation against the EPA as soon as the rule is published in the federal register. The Clean Power Plan is not the only EPA major action that will impact North Dakota.

On August 18, 2015, the EPA proposed three significant regulatory actions extending the reach of its controls over the oil and gas industry. A summary sheet is provided for your information. The Administration's suite of new regulations threatens to undermine state primacy over air quality. The Methane New Source Performance Standards (NSPS), has been dubbed Quad 0000 2.0 by the industry. When the first Quad 0000 was promulgated, it had far reaching provisions for oil and gas storage tanks across the country, requiring 95 percent emission control. The North Dakota Department of Health (NDDoH) reviewed the proposed rule, determined it would be manpower intensive, require filing of massive amounts of paperwork with little environmental benefit. For these reasons, the NDDoH decided not to administer the rule. This left a door open for EPA to attempt to circumvent North Dakota primacy and they have made several attempts. With Quad 0000 2.0 and the other pending EPA

regulations, NDDoH has another opportunity to adopt and administer these emissions requirements.

Dave Glatt is considering adopting QUAD 0000, recognizing the jurisdictional fight. At the same time, he has stated that the suite of EPA new rules will require at several additional resources for the department, including 2-3 new employees. We certainly hope that NDDoH will be able to maintain the state's primacy on private and state lands by making the decision to administer these new rules.

During the 2015 Legislative Session, HB1432 was passed, establishing the Federal Environmental Law Impact Review Committee. The charge for this committee is to review federal legislation and regulations that have the potential to detrimentally impact the State's agricultural, energy or oil production sectors and confer with the attorney general with respect to participation in administrative or judicial processes pertaining to such legislation or regulations. The first action of the committee was to vote to assist in paying for research and information gathering in support of the attorney general's litigation against EPA's Waters of the United States (WOTUS), which has now been successfully stayed nationwide. The success of the WOTUS litigation has given many citizens hope that there are ways to have their voices heard on the impacts of regulation imposed by federal agencies. NDPC would like to thank the legislature for being visionary in providing additional mechanism for citizen's voices to be heard.

The Bureau of Land Management's Hydraulic Fracturing (BLMHF) rule is also a challenge to the State of North Dakota's rights to regulate oil and gas development. This rule is duplicative and unnecessary, with many of the provisions in the rule identical to the Department of Mineral Resource rules.

At first blush, the BLMHF rule appeared to allow an exemption for states if provisions of the rule were identical to state's rule, but in reality the final interpretation was that if a state rule was more stringent than a provision in the BLM proposed rule, BLM would administer the more stringent rule. Adding this role to the duties of an already understaffed BLM would only serve to slow the permitting

process further. In fact, oil and gas companies under the new rule, would be required, in most instances, to obtain a separate permit for hydraulic fracturing in addition to the original permit to drill. Western Energy Alliance and the Independent Petroleum Association of America, along with several states were the first to litigate against BLM. The Attorney General intervened on behalf of the state of North Dakota. Because of this action, this rule is stayed until the court can review the BLM administrative record.

In addition to the HF rule, BLM has been busy re-writing Onshore Orders 3, 4, 5 and 9. Onshore Order 3 has many flaws but most egregious is BLM's attempt to extend its oil and gas permitting authority on federal and tribal lands to include state and fee minerals. When challenged, BLM said that this jurisdictional grab was a drafting error, however, they had no plans to publish a correction but rely on public comments to correct this error in the final rule. This is concerning for many reasons, but mainly because jurisdictional overreach appears to be the norm in the federal agency rulemaking process. Onshore Order 9, also called the BLM Venting and Flaring rule has the industry most concerned. The expectation is this will be another attempt to supercede the authority of the DMR to regulate flaring of natural gas with its gas capture plans and capture targets. Indications are that royalties will be required on any gas, including gas that cannot be transported to market for sale. NDPC along with its 550 plus member companies continue to offer robust comments but comments are only one form of pushback and generally will lead to language modifications but only litigation can postpone a rule and allow the courts to review the administrative record of how the agency defends its position.

In 2011, the U.S. Fish & Wildlife Service (USFWS) agreed to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act. Since January 1, 2014, the FWS has listed the following species that impact North Dakota agriculture and energy industries: Dakota Skipper, Poweshiek Skipperling and the Northern Long-Eared Bat. Recently, USFWS announced its designations for

critical habitat for Dakota Skipper with McKenzie County being ground zero for this critter. Critical habitat may include areas that were not occupied by the species at the time of listing but are considered essential to its conservation. The service exempted all tribal lands from critical habitat designation stating their relationship with the TAT leads to greater benefit of not designating critical habitat on the reservation.

Other upcoming listing decisions include the Monarch Butterfly, the Regal Fritillary Butterfly, Plains Spotted Skunk, Prairie Gray Fox and Little Brown Bat. The industry doesn't object to listing of species as threatened or endangered as long as the decision is based on sound science, but these listings were based on old science, old population studies and driven by environmental groups using sue and settle tactics. In the U.S., sue and settle cases and other lawsuits are effectively driving the regulatory agenda without time for peer review scientific research or scientific evaluation. Domestic Energy Producers Alliance has initiated litigation against sue and settle tactics. North Dakota has intervened.

There is more good news, through a massive and costly effort by several states, industry and interestingly, the Bureau of Land Management, USFWS recently determined that Greater Sage Grouse is not warranted for listing. This effort involved significant monetary support of mitigation efforts and scientific study to prevent this listing.

In the case of the Lesser Prairie Chicken, after five states and \$47 million dollars allocated to habitat conservation, FWS still listed the species last March. The listing was vacated on September 2, when a U.S. District Court said Fish and Wildlife Service did not properly consider active conservation efforts for the bird. Rep. Rob Bishop (Utah), chairman of the House Natural Resource Committee, said, "By Listing the Lesser Prairie Chicken as threatened, the U.S. Fish and Wildlife Service has been illegally steamrolling states by their own rules."

At the second meeting of the Federal Environmental Law Impact Review Committee, we reviewed and discussed potential scientific and peer review population studies on species of bats, butterflies and pollinators to be performed by researchers from NDSU. No action was taken at that meeting. Scientific information on candidate species is critical to preventing a listing, which ultimately would have a detrimental effect on agriculture and energy development in our state. Studies are very expensive, and funding for pre-listing work is an area that the legislature could assist.

In conclusion, I would again like to thank the Legislature for your efforts and your foresight to develop mechanisms that provide resources in manpower, resources to litigate, or provide good science, all designed to maintain North Dakota primacy and defend the rights of Agriculture, Energy, our state and its citizens. I stand for questions.

Administration's Methane "Suite" of Rules
Energy Development and Transmission Committee
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Methane NSPS/Quad O 2.0 Proposal: Proposes direct methane and VOC regulation for new and modified sources of oil and gas. http://www.epa.gov/airquality/oilandgas/pdfs/og_nsps_pr_081815.pdf

- Released August 18, 2015; awaiting Federal Register Publication
- 3 Public Hearings – Dallas & Denver on September 23rd; Pittsburgh on September 29th
<https://www.federalregister.gov/articles/2015/08/27/2015-21255/source-determination-for-certain-emission-units-in-the-oil-and-natural-gas-sector-oil-and-natural>
- Comment period: 60 days after publication (possibility of 30 day extension)
- EPA projects final rule 2016 Q1

Source Determination/Aggregation Proposal: Defines how sources are "aggregated" for Clean Air Act permitting purposes in the oil and gas industry. http://www.epa.gov/airquality/oilandgas/pdfs/sd_prop_081815.pdf

- Released August 18, 2015; awaiting Federal Register Publication
- Comment period: 60 days after publication (possibility of 30 day extension)
- EPA projects final rule 2016 Q1

VOC Control Technique Guidelines (CTG): Provides guidance to States for reducing VOC emissions from oil and gas sources in certain ozone nonattainment areas and states in the Ozone Transport Region.

http://www.epa.gov/airquality/oilandgas/pdfs/og_ctg_draft_081815.pdf

- Released August 18, 2015
- Comment period: 60 days after publication
- EPA projects final CTG in 2016 Q1

Tribal New Source Review Proposal: Federal Implementation Plan rule new, modified and existing minor sources in oil and gas production located in or expanding in Indian Country.

<http://epa.gov/air/tribal/pdfs/ONGFIPandAmendments.pdf>

- Released August 18, 2015; awaiting Federal Register Publication
- Comment Period: 60 days after publication
- EPA projects final rule March 2016

BLM Venting & Flaring: Regulates methane emissions from existing sources of oil and gas on Federal lands.

- Early outreach in 2015 http://www.blm.gov/live/pdfs/V&F_Outreach_04302014_public_FINAL.pdf
- Proposal expected Fall 2015
- BLM projects final rule June 2016

EPA's Methane Challenge Voluntary Program: Proposes voluntary methane reduction program for existing sources of methane from throughout the gas value chain and in onshore oil production.

http://www3.epa.gov/gasstar/documents/methane_challenge_proposal_072315.pdf

- Draft program released July 2015
- Comment period closes October 13, 2015
- Commitments from charter partners by end of 2015; Program launches January 2016

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This committee has been charged with studying impacts and costs of provisions contained within Environmental Protection Agency's (EPA's) new Clean Power Plan, specifically those designed to reduce carbon dioxide emissions. Since the end of the 2015 legislative session, the landscape in fossil fuels development in our state and all across the United States has been further impacted by additional regulations proposed by the EPA. On August 18, 2015, the EPA proposed three significant regulatory actions extending the reach of its controls over the energy sector by expanding regulations over the oil and gas industry. First, the agency issued a proposed New Source Performance Standards (NSPS) under Section 111 of the Clean Air Act (the Act) which would establish new restrictions on emissions of methane and volatile organic compounds (VOCs) from certain new, modified or reconstructed sources in the oil and gas industry. The impact of this new rule to the industry lies in its repair and retrofit requirement for existing infrastructure and the extension of EPA's reach into hydraulic fracture stimulation technology by requiring "green completions". Second, along with the proposed rule, EPA has also issued draft Control Techniques Guidelines (CTGs) for reducing VOC emissions from existing oil

and gas sources in certain ozone nonattainment areas, as well as in states in the Ozone Transport Region. This rule provides recommendations to state and local air agencies on establishing reasonably available control technology (RACT), and requires state implementation plans (SIPs) to include RACT for each category of VOC source covered in the document until the area reaches attainment. Third, EPA is proposing to change how it defines “adjacent” onshore oil and gas emissions points for purposes of aggregating them under the ACT into a single “stationary source” under the New Source Review Program (NSR) and as a “major source” under the Title V program. EPA previously had interpreted “adjacent” to include emissions points that were “functionally interrelated” even if several miles apart, such as a well pad, central tank battery and a gas processing plant. The Sixth Circuit rejected that interpretation, holding “adjacent” could only mean physical proximity. EPA has now proposed physical proximity of emission sources to be located within one-quarter mile of each other for aggregation. EPA continues to solicit comments on whether to reinstate the “functional interrelatedness” test. In addition, today is the comment deadline on EPA’s Methane Challenge Voluntary Program, which proposes voluntary methane reduction for existing sources throughout the gas value chain and in onshore oil production.

It is important to note that EPA’s cost-benefit analysis of the proposed rules rests, in part, on the calculation of “social cost of methane” similar to the controversial social cost of carbon which is a modeled estimate of monetized future damages.

The Bureau of Land Management (BLM) has also been active in revising its existing regulations, first with the Hydraulic Fracture Rule, which is currently stayed in the courts. Recently BLM released Onshore Orders 3 (Site Security) and 4 (Oil Measurement), with Onshore Orders 5 (Gas Measurement), and 9 (Venting and Flaring) expected before the end of the year. The comment period for Onshore Order 3 ended last Friday, October 9. There are many flaws to this order but most egregious is BLM’s attempt to extend its oil and gas permitting authority on federal and tribal lands to

include state and fee minerals. Onshore Order 4 is in the beginning of its comment period, Order 5 is currently at the U.S. Office of Management and Budget (OMB) and Onshore Order 9 is expected to require extensive royalty payment for flared natural gas, even for wells connected to pipelines that intermittently flare due to maintenance issues.

In 2011, the U.S. Fish & Wildlife Service (USFWS) agreed to two consent decrees with an environmental advocacy group, requiring the agency to propose adding more than 720 new candidates to the list of endangered species under the Endangered Species Act. Since January 1, 2014, the FWS has listed the following species that impact North Dakota agriculture and energy industries: Dakota Skipper, Poweshiek Skipperling and the Northern Long-Eared Bat. Proposed species including the Monarch Butterfly, the Regal Fritillary Butterfly, Plains Spotted Skunk, Prairie Gray Fox and Little Brown Bat are expected to have a FWS decision soon. The industry doesn't object to listing of species as threatened or endangered as long as the decision is based on sound science, but these listings were based on old science, old population studies and driven by environmental groups using sue and settle tactics. In the U.S., sue and settle cases and other lawsuits are effectively driving the regulatory agenda without time for peer review scientific research or scientific evaluation.

There is a little good news, through a massive and costly effort by several states, industry and interestingly, the Bureau of Land Management, USFWS recently determined that Greater Sage Grouse is not warranted for listing. This effort involved significant monetary support of mitigation efforts and scientific study to prevent this listing. This type of intensive and expensive effort may not be possible within the timeframe required for each species facing a USFWS decision. In the case of the Lesser Prairie Chicken, after five states and \$47 million dollars allocated to habitat conservation, FWS still listed the species last March. The listing was vacated on September 2, when a U.S. District Court said Fish and Wildlife Service did not properly consider active conservation efforts for the bird. Rep. Rob Bishop (Utah), chairman of the House Natural Resource Committee, said, "By Listing the Lesser Prairie Chicken

as threatened, the U.S. Fish and Wildlife Service has been illegally steamrolling states by their own rules.”

I would be remiss if I didn't mention EPA's Waters of the United States or WOTUS rule, the biggest federal government jurisdictional grab yet. Luckily the courts have agreed with North Dakota that the impact of this rule should not stand a legal challenge by individual states and the citizens of our nation. But this court battle to determine water jurisdiction, and others that will determine when a species should be protected or whether the state or the federal government should have jurisdiction on energy development, it appears that we will have our hands full in the coming years trying to be vigilant in watching what federal regulatory agencies are proposing.

SIDLEY UPDATE

EPA Proposes to Expand Its Regulation of the Oil and Gas Industry

On August 18, 2015, the Environmental Protection Agency (EPA) proposed three significant regulatory actions extending the reach of its controls over the energy sector by expanding regulations over the oil and gas industry. *First*, the agency issued a proposed New Source Performance Standards (NSPS) under Section 111 of the Clean Air Act (the Act) that would establish new restrictions on emissions of methane and volatile organic compounds (VOCs) from certain new, modified or reconstructed sources in the oil and gas industry. *Second*, along with the proposed rule, EPA has also issued draft Control Techniques Guidelines (CTGs) for reducing VOC emissions from existing oil and gas sources in certain ozone nonattainment areas as well as in states in the Ozone Transport Region. *Third*, EPA has proposed to change how it defines “adjacent” onshore oil and gas emission points for purposes of aggregating them under the Act into a single “stationary source” under the New Source Review (NSR) Program and as a “major source” under the Title V program. These regulatory actions are key components in achieving the Obama administration’s goal of reducing methane emissions from the oil and gas sector by up to 45 percent from 2012 levels by 2025, and its overall efforts to reduce greenhouse gas emissions by regulating the development and use of fossil fuels.

Comments on each action will be due 60 days after EPA publishes the formal notice of its action in the Federal Register.

Proposed NSPS: The NSPS would extend EPA’s regulatory reach into oil production that had not been covered by the agency’s 2012 NSPS for oil and gas sources, impose broad leak detection and repair requirements across the industry and extend restrictions on methane and VOC emissions from equipment currently used across industry downstream of production sites. Among the highlights:

1. *Regulation of both VOCs and methane.* In previous rules, EPA imposed restrictions on VOC emissions, which the agency found had the co-benefit of also reducing methane emissions. Now, EPA expressly proposes to regulate methane, in addition to VOCs. This includes adding methane standards to sources already regulated for VOC emissions, as well as new methane and VOC standards for additional emission sources. EPA is not, however, proposing to change current VOC standards for sources addressed in the 2012 NSPS.
2. *Inclusion of oil wells completed using hydraulic fracturing.* EPA would further seek to extend its reach into oil production and development by proposing to require hydraulically fractured oil wells to employ measures to reduce methane and VOC emissions. For production wells, owners/operators would have to employ

“reduced emissions completions” (RECs) in combination with a combustion device, except where technically infeasible. For exploratory and site delineation wells a combustion device would be required, but not REC.

3. *Expanded leak detection and repair program.* Under the proposal, oil and gas production well sites, natural gas transmission compressor stations and natural gas production gathering and boosting stations, would survey for fugitive emissions semi-annually using optical gas imaging (OGI) and promptly perform any needed repairs. At well sites, this covers ancillary equipment in the immediate vicinity of the well that are necessary for or used in production, including separators, storage vessels, heaters and dehydrators. However, EPA would exclude sites that only have wellheads, as well as certain lower production sites.

EPA is seeking comment on whether the survey should be done annually, as well as whether EPA Method 21 which uses a portable VOC monitor should be used instead of OGI technology. The proposal also overlaps with existing rules (Part 60, Subpart W) that require compressor stations with emissions that exceed 25,000 Metric Ton CO₂ equivalent to report fugitive emissions and EPA has asked for comment on how to address this. Also, some well owners/operators already have voluntary leak detection programs, and EPA has asked for comment on how those could satisfy or be integrated under a final rule.

4. *Additional restrictions on compressors, controllers and pumps.* EPA has also proposed restrictions on methane and VOC emissions from certain equipment located at oil and gas well sites, as well as at downstream natural gas operations, that generally match the types of restrictions that EPA imposed in its 2012 NSPS on VOC emissions from these equipment located at natural gas production sites. As proposed, new and modified wet seal centrifugal compressors, reciprocating compressors and natural gas-driven pneumatic controllers and pneumatic pumps would need to meet methane and VOC emission reductions or be subject to operating requirements. EPA would exclude compressors at oil and natural gas well sites, finding that they are typically small and low emitting.
5. *Issues raised in petitions for reconsideration.* EPA also proposes to address a number of issues raised in administrative reconsideration petitions on the 2012 NSPS (and subsequent amendments) including amended requirements for storage vessel control device monitoring and testing; recordkeeping for repair logs for control devices that fail a visible emissions test; clarification of the deadline for the initial annual report under the 2012 NSPS; flare design and operation standards; leak detection and repair (LDAR) for open-ended valves or lines; compliance period for LDAR for newly affected units, exemption to notification requirement for reconstruction, disposal of carbon from control devices; and the definition of capital expenditure for determining when a modification could occur.
6. *Application to existing sources.* EPA’s proposal would not apply automatically to existing sources, but it will be important to understand how an existing source could become subject to the new requirements. For example, EPA would consider a well site to be modified and subject to the proposed requirements when a new well is completed or an existing well is fractured, or refractured, after the effective date of the rule. The standards would not, however, apply to existing well sites where additional drilling activities were conducted on an existing well so long as those activities did not include fracturing or refracturing. How EPA interprets these triggers would inform when existing sites could face these requirements, if finalized.
7. *A social cost of methane.* EPA’s cost-benefit analysis of the proposal rests, in part, on the calculation of the “social cost of methane” (SC-CH₄). Similar to the controversial social cost of carbon, SC-CH₄ is a modeled

estimate of monetized future damages. Using the same suite of integrated assessment models and discount rates as the social cost of carbon, EPA estimates that the proposed rule would avoid between \$80 million and \$550 million in damages by 2020 through a reduction in methane emissions.

Control Techniques Guidelines: While the NSPS addresses new or modified sources, the CTGs provide guidance to states for reducing VOC emissions from *existing* equipment and processes in the oil and natural gas industry.

1. *CTGs are not binding regulations, but can lead to state rules.* CTGs do not impose legal requirements, but provide recommendations to state and local air agencies on establishing reasonably available control technology (RACT) for reducing emissions from covered processes and equipment. Moreover, in general, for ozone nonattainment areas and states in ozone transport regions, the Act requires state implementation plans (SIPs) to include RACT for each category of VOC sources covered by an EPA CTG document until the area reaches attainment.
2. *Based on EPA's 2012 NSPS and latest proposal.* The draft CTGs provide recommendations for storage tanks, pneumatic controllers and pumps, centrifugal and reciprocating compressors, equipment leaks from natural gas processing plants and other potential sources of fugitive emissions. The recommendations are similar to the 2012 NSPS, as well as EPA's new proposal. While the CTGs refer to VOCs, EPA's goal to address methane is clear, as the agency acknowledges that it based most of the VOC emission estimates presented in the CTGs on available methane emissions data.

The Definition of "Adjacent" for Aggregation: EPA is proposing to change how it aggregates upstream and midstream onshore oil and gas emission points for NSR and Title V permitting.

1. *EPA's preferred option relies on "proximity."* For multiple emission points to be "aggregated" into a single "stationary source" or "major source," they must be "contiguous or adjacent." EPA previously had interpreted "adjacent" to include emission points that were "functionally interrelated," even if several miles apart. The Sixth Circuit rejected that interpretation, holding "adjacent" could only mean physical proximity. EPA has now proposed as its "preferred option" to interpret "adjacent" to mean physical proximity, requiring emission points to be located on sites within one-quarter mile of each other before they can be aggregated. EPA requests comment on whether to use a different distance.
2. *"Functional Interrelatedness" test is still on the table.* EPA is also soliciting comments on whether to reinstate the "functional interrelatedness" test by amending its regulatory definitions of "stationary source" and "major source." The proposal states that factors that could contribute to a finding that emission points are "functionally interrelated" could include a connection by pipeline, the delivery of product from one emission point to another via train or truck or whether one type of emission point could operate when the other is not. The proposed rule also solicits comments on various additional factors that a permitting agency could use to determine that emission points are functionally interrelated.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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