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SOVEREIGN LANDS

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I. Introduction

Most activity in the oil and gas industry impacting sovereign lands has come in two forms. First, there have been several important amendments to existing federal regulations in light of a policy shift toward greater environmental protection. Second, there have been several cases issued by federal courts that impact sovereign lands with regard to various aspects of oil and gas development.

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II. Federal Regulatory Developments

A. Amendments and Policy Updates

Congress made multiple amendments to existing federal regulations and policies that impact the oil and gas industry. Most relevant to the industry are the changes that came in the wake of President Biden's executive order "Tackling the Climate Crisis at Home and Abroad" ("Climate Crisis Order").[1] Multiple federal agencies made amendments to existing regulations and rules and issued new policies in an attempt to abide by the Climate Crisis Order.

First, the Environmental Protection Agency ("EPA") has been extremely active this year in proposing and implementing rules and policies as a result of the Climate Crisis Order. In November 2021, the EPA issued a proposed rule titled "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review."[2] This proposed rule is intended to reduce methane emissions and other harmful pollutants from various oil and natural gas facilities, including natural gas processing plants, storage facilities, and compressor stations.[3] Primarily, the rule proposes two actions: first, to revise the New Source Performance Standards for greenhouse gases and volatile organic compounds for crude oil and natural gas and second, to set new greenhouse gas emissions guidelines for states.[4] The comment period for the rule was extended to January 31, 2022, and its status is still pending.[5] Second, the EPA amended 40 CFR § 372 to include natural gas processing facilities (also known as natural gas liquid extraction facilities) in the scope of the reporting requirements under the Emergency Planning and Community Right-to-Know Act (more commonly known as the Toxics Release Inventory or the Pollution Prevention Act). This amendment will require facilities that are primarily engaged in the recovery of liquid hydrocarbons from oil and gas fields to meet the reporting requirements in the act, which will increase the information available to the

1. Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021) (amending 32 CFR § 651.17). The specifics of this order were discussed more thoroughly in the 2021 issue.

2. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 FR 63110-0.1. (Nov. 15, 2021) (to be codified at 40 C.F.R. 40).

3. *Id*.

4. *Id.*

5. *Id.* ¶ 35.

public on releases and other waste management of regulated chemicals—including n-hexane, hydrogen sulfide, toluene, benzene, xylene, and methanol.[6]

The Federal Energy Regulatory Commission's ("FERC") issuance of one updated policy statement and one new policy statement on February 18, 2022, could also largely impact the oil and gas industry.[7] The Updated Policy Statement on Certification of New Interstate Natural Gas Facilities could replace the 1999 Policy Statement and provide updated guidance for future consideration of natural gas projects by FERC.[8] The Updated Policy Statement sets out FERC's new evaluation factors for whether new, modified, or expanded natural gas projects are required by public convenience and necessity. Under the updated policy, before issuing a certificate, FERC must consider all the benefits together with all the adverse impacts, including environmental impacts, specifically, potential impacts on climate change.[9] The new policy statement—Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews—sets out FERC's assessment of natural gas infrastructure on climate change in its review of these projects under the National Environmental Policy Act ("NEPA") and the Natural Gas Act.[10] The new policy provides that emissions that have a reasonably close causal relationship to the project (such as construction and operation emissions) will be considered in the process of quantifying emissions and determining whether those emissions are significant, i.e., whether they have greenhouse gas threshold of 100,000 metric tons per year of carbon dioxide equivalent.[11] Any project with an estimated greenhouse gas emission over the threshold will be presumed to have a significant impact on the environment, unless refuted by evidence on the record.[12] The new policy also contemplates including emissions resulting from the upstream and downstream processes in its evaluation.[13] On March 24, 2022, following significant criticism from the oil and gas

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6. *Id*. *See also*, Addition of Natural Gas Processing Facilities to the Toxics Release Inventory, 86 Fed. Reg. 66953-01. (Nov. 24, 2021).

7. Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022).

8. *Id.*

9. *Id.*

10. Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs., 178 FERC ¶ 61,108 (2022).

11. *Id*.

12. *Id.* ¶ 81.

13. *Id. See infra,* Section III (d) and the discussion of *Food & Water Watch v. FERC* for judicial application of this policy.

industry, FERC designated both of these policies as drafts and sought comment on them, with comments due April 25, 2022.[14] The draft policies are still under review, and they will not apply to pending project applications or applications filed before FERC issues a final guidance policy statement.[15]

Additionally, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") made changes to its rules that impact the oil and gas industry. In June 2021, the PHSMA sent an advisory to oil and gas pipeline operators directing them to update their inspection and maintenance plans for curbing the release of methane.[16] The advisory requires operators to have inspection and maintenance plans to minimize methane emission releases and repair or replace outdated leaking pipes.[17] Although issued in June 2021, these requirements went into effect in January 2022. Additionally, on November 15, 2021, PHMSA issued a final rule expanding federal oversight to all onshore gas gathering pipelines.[18] The final rule requires onshore gas gathering line operators to report incidents and file annual reports on gas gathering infrastructure, which was previously exempt from federal reporting requirements—adding approximately 425,000 miles of gas lines to reporting requirements.[19] The final rule also adopts minimum safety standards for larger gas gathering pipelines that were previously unregulated and operate at higher pressures posing risks to pipeline integrity and public safety.[20]

The Council on Environmental Quality ("CEQ") is another federal agency that implemented impactful changes. The CEQ's purpose is to improve, preserve, and protect America's public health and environment, and the CEQ oversees the implementation of NEPA by issuing guidance and interpreting regulations.[21] In 2020, the CEQ issued a rule to streamline and minimize the impact NEPA would have.[22] However, in light of the

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14. Certification of New Interstate Nat. Gas Facilities Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs., 178 FERC ¶ 61,197 (2022).

15. *Id.*

16. Statutory Mandate To Update Inspection and Maintenance Plans Regarding Pipeline Safety, 86 FR 31002 (June 10, 2021).

17. *Id.*

18. Updated Regulations Implementing the Procedural Provisions of NEPA, 85 Fed. Reg. 43304 (Sept. 16, 2020).

19. *Id.*

20. *Id*.

21. National Environmental Policy Act (NEPA), Practical Law Glossary Item 3-501-5844.

22. 85 Fed. Reg. 43304.

Climate Crisis Order, this rule is under review and changes will be proposed by September 2023.[23] To provide guidance on NEPA review in the interim, on October 6, 2021, the White House announced that the CEQ is taking steps to restore community safeguards during environment reviews for federal projects and decisions; first, the CEQ is restoring the requirement that federal agencies consider all relevant environmental impacts of their decisions; second, the CEQ is restoring the full authority of agencies to work with communities on alternative approaches to projects that would minimize environmental and public health costs.[24]

Lastly, minor amendments were made to 25 C.F.R. § 225.37 and § 226.42 to update the penalty amounts when lessees fail to comply with the regulations and leasing guidelines for leasing on tribal lands. The penalty for violation of a lease, agreement, or regulation when developing the lands or interests in lands of any Indian tribe, individual Indian or Alaska Native was changed from $1,741.00 to $1,849.00 per day for each violation.[25] The penalty for violation of the lease or regulations specifically on the Osage Reservation Lands was updated from $976.00 to $1,037.00 per day.[26]

B. New Rules

The development of new rules in the oil and gas sector took on a new and unique form this year. Another catalyst for significant development in the laws surrounding oil and gas was President Biden's announcement of the Global Methane Pledge at the United Nations Climate Change Conference in September 2021.[27] Countries that joined the Global Methane Pledge committed to a collective goal of reducing global methane emissions by at least 30% from 2020 levels by 2030.[28] In connection with the pledge, the National Climate Task Force launched an ambitious "whole-government" initiative to reduce emissions, focusing on the largest sources of methane emissions—oil and gas and agriculture. The first new rule promulgated through this initiative was the U.S. Methane Emissions

23. Deadline for Agencies To Propose Updates to NEPA Procedures, 86 FR 34154 (June 29, 2021) (to be codified in 40 CFR 1507).

24. CEQ proposes to restore basic community safeguards during federal environmental reviews, The White House, Oct. 6, 2021.

25. 25 C.F.R. §§ 225.1 & 225.37 (2019).

26. 25 C.F.R. § 226.42.

27. Joint US-EU Press Release on the Global Methane Pledge, The White House, Sept. 18, 2021.

28. *Id.*

Reduction Action Plan.[29] The action plan sets out multiple steps and courses of action to reduce methane emissions in multiple industries and practices; however, reducing methane emissions from the oil and gas sector is most prominently discussed.[30] The plan puts forth several areas where updated rules, regulations, and policies must change in order to reduce methane emissions including new emission limits for new and existing oil and gas sources; reducing amount of venting, flaring, and well leaks on public lands; stricter regulations and safety requirements for gathering and transmission pipelines; and funding to plug and abandon oil and gas wells.[31]

Additionally, in furtherance of the initiative, President Biden issued "Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability" ("Clean Energy Order") on December 8, 2021.[32] This order directs the federal government to take a whole-government approach to tackling the climate crisis by promoting clean energy industries and jobs.[33] The Clean Energy Order urges the federal government to achieve the following: 100% carbon pollution-free electricity by 2035; 100% zero-emission vehicle acquisitions by 2035; net-zero emissions from overall federal operations by 2050, including a 65% emissions reduction by 2030.[34] The order also directs the federal government to use its power and size to build climate resilient infrastructure, sustainable operations (including purchase of sustainable products for government projects), and a climate/sustainability-focused Federal workforce.[35]

Lastly, on January 18, 2022, the Department of Interior ("DOI") launched a multi-agency initiative with the Department of Agriculture, the Department of Energy, the EPA, and the Interstate Oil and Gas Compact Commission to implement the Orphaned Well Site Plugging, Remediation, and Restoration program.[36] The program was allocated $4.7 billion in funding to plug orphaned oil and gas wells to prevent the continued release

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29. U.S. Methane Emissions Reduction Action Plan, The White House Office of Domestic Climate Policy, Nov. 2021.

30. *Id*.

31. *Id.*

32. Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 FR 70935 (Dec. 8, 2021).

33. *Id.*

34. *Id.*

35. *Id.*

36. Memorandum of Understanding, Department of Interior, Jan. 14, 2022, https://www.doi.gov/sites/doi.gov/ files/orphan-well-mou-01-13-2022.pdf (last visited August 29, 2022).

of methane and other pollutants.[37] Under the initiative, an orphaned well on federal or tribal lands is defined as a well that is (a) not used for an authorized purpose, such as production, injection, or monitoring, and (b) either no operator can be located, the operator is unable to plug or reclaim the well, or the well is located in the National Petroleum Reserve in Alaska.[38] The DOI stated there are more than 130,000 documented orphaned wells in the US.

C. Looking Forward

In addition to the amendments and new rules outlined above, two other noteworthy government actions have or will impact the oil and gas industry. First, on May 5, 2022, Attorney General Merrick Garland and EPA Administrator Michael S. Regan announced the Comprehensive Environmental Justice Enforcement Strategy. The goal of this strategy is to implement environmental justice through the enforcement of federal laws and to assist in enforcement. The Department of Justice ("DOJ") established the new Office of Environmental Justice to serve as the central hub to advance this comprehensive environmental justice enforcement strategy.[39] Among other specific goals, the strategy offers the DOJ's civil and criminal enforcement authorities to advance environmental justice and provide remedies for systemic environmental violations and contaminations, injury to natural resources, and adverse impacts on underserved communities, including communities of color, low-income communities, and Tribal and indigenous communities.[40] It is not yet clear how this strategy and the Office of Environmental Justice will function practically or what the contemplated enforcement or remedies will be.

Second, following the Climate Crisis Order, the DOI released a report on the federal oil and gas leasing program, which found that the current program does not currently serve the public interest.[41] The report makes several recommendations, including increasing royalty rates and adding new restrictions on what lands are made available for oil and gas development to minimize leasing of lands with low potential for development. Over the past year, the DOI has been delaying or canceling

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37. *Id.*
38. *Id.*
39. Comprehensive Environmental Justice Enforcement Strategy, Office of the Associate Attorney General, May 5, 2022.
40. *Id.*
41. Report on the Federal Oil and Gas Leasing Program, U.S. Department of Interior, Nov. 2021.

new lease sales pending revision to the program and resolution of the litigation surrounding the federal leasing program. However, on April 15, 2022, the DOI announced that the Bureau of Land Management ("BLM") will post notices for significantly reformed onshore lease sales that "prioritize the American people's interests in public lands and moves forward with addressing deficiencies in the federal oil and gas leasing program."[42] The significant reform will include ensuring Tribal consultation and community input, reliance on the best available science for climate impacts, and an increased royalty rate for new competitive leases of 18.75%.[43] The DOI has instructed that the lease sales will also be conducted in compliance with the decisions rendered in the cases challenging President Biden's pause on federal leases. The lease sales were projected to take place in June 2022 in Colorado, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Utah, and Wyoming—covering more than 140,000 acres.[44]

III. Judicial Developments

A. Moratorium on Federal Leases

Following the issuance of President Biden's Climate Crisis Order—which required a pause on new oil and natural gas leases on public lands or in offshore waters pending revision of the federal leasing program—13 states filed a lawsuit against President Biden and federal agency officials in federal court in Louisiana challenging the actions taken under the order.[45] The states argued that actions implemented by this moratorium on leasing activities violated the Outer Continental Shelf Lands Act, the Mineral Leasing Act, and the Administrative Procedure Act ("APA").[46]

The Plaintiff states filed a motion for a preliminary injunction against the government's pause on new oil and gas leases on public lands and offshore waters.[47] On June 15, 2021, the Louisiana federal court granted the Plaintiff's motion and issued a nationwide preliminary injunction barring

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42. Interior Department Announces Significantly Reformed Onshore Oil and Gas Lease Sales, U.S. Department of Interior, April 15, 2022.

43. *Id.*

44. *Id.*

45. *State v. Biden*, 338 F.R.D. 219 (W.D. La. 2021).

46. *Id.*

47. *Louisiana v. Biden,* No. 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021).

the government from implementing the moratorium on federal leases.[48] On August 16, 2021, the federal Defendants appealed the decision regarding the injunction to the Fifth Circuit, and the appeal on that issue is still pending in front of the Fifth Circuit.

On September 22, 2021, the district court for the Western District of Louisiana denied the federal Defendant's motion to dismiss, and on November 17, 2021, the federal Defendants were required to provide the Plaintiff states with White House documents and other evidence relating to all lease sales impacted by the Climate Crisis Order.[49] Both parties filed for summary judgment in 2022, and those motions are still pending before the court.

A related case, *Friends of the Earth, et al. v. Haaland*, was decided on January 27, 2022, by the District Court for the District of Columbia.[50] The environmental advocacy organizations filed suit against the DOI and Bureau of Ocean Energy Management ("BOEM"), claiming violation of NEPA and the APA in the defendant's sales of federal lands in the Outer Continental Shelf for oil and gas leasing under the BOEM program, amounting to 80.8 million acres in the Gulf of Mexico, which was the largest offshore oil and gas lease sale in United States history.[51] The BOEM had issued a record of decision for the lease sale in the last days of the Trump administration under its 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program, a five-year program that proposed ten region-wide lease sales. This sale was supposed to be the last one under that program, and the BOEM's environmental statement assumed that foreign oil consumption and greenhouse gas emissions relating to the sale would remain static whether or not BOEM issued the lease.[52] The court determined the BOEM's exclusion of foreign consumption in greenhouse gas emissions calculation in its environmental statement was arbitrary and capricious.[53] As such, the court invalidated the lease, rather than considering injunctive relief, since there was nothing to be enjoined, as the

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48. *Id.*
49. *Id*.
50. Friends of the Earth v. Haaland, No. CV 21-2317 (RC), 2022 WL 254526 (D.D.C. Jan. 27, 2022). A similar decision was reached in *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt*., 555 F. Supp. 3d 739, 805 (D. Alaska 2021) (holding the BLM's exclusion of foreign greenhouse gas emissions in its alternatives analysis in its environmental statement was arbitrary and capricious).
51. *Id.*
52. *Id.*
53. *Id.*

leases had not become effective and no activity on them was taking place, due to the Climate Crisis Order.[54]

B. BLM Environmental Review

In *WildEarth Guardians v. Haaland*,[55] two non-profit conservation organizations, WildEarth Guardians and Physicians for Social Responsibility brought the first of these three cases in 2016 ("WildEarth 2016"), alleging that the BLM violated NEPA by not sufficiently considering climate change when authorizing oil and gas leasing on federal land in three states: Wyoming, Utah, and Colorado. The court divided the briefing into three parts for each state and began reviewing the merits of the claims for each state.[56] During that time, WildEarth filed another suit alleging the same claims for another group of oil and gas leases in Colorado, New Mexico, Montana, Utah, and Wyoming ("WildEarth 2020").[57] Then again in 2021, WildEarth challenged another group of leases in Colorado, New Mexico, Utah, and Wyoming ("WildEarth 2021").

The parties reached an agreement to settle all three cases when the BLM and other defendants agreed to conduct more robust environmental reviews of the applicable oil and gas leases and reconsider the cumulative climate effects of the leases.[58] On June 1, 2022, the District Court for the District of Columbia granted a motion for voluntary dismissal with prejudice of all three cases considering the settlement. However, if the BLM fails to complete its obligations under the settlement agreement, which covers approximately four million acres of land across Colorado, Wyoming, Utah, Montana, and New Mexico, WildEarth may reinstate the litigation.[59]

C. CO_2 Royalties Under Federal Leases

In *OXY USA Inc. v. United States Department of the Interior*, the Tenth Circuit reviewed the proper valuation of royalties to be paid on carbon dioxide produced from federal oil and gas leases.[60] Under the Mineral Leasing Act, federal lessees must pay royalties of at least 12.5% on the value of the CO2 removed or sold from their lease properties.[61] When

54. *Id*.
55. No. CV 20-56 (RC), 2022 WL 1773476 (D.D.C. June 1, 2022).
56. *Id*. at *1.
57. *Id*.
58. *Id*. at *3.
59. *Id.*
60. 32 F.4th 1032 (10th Cir. 2022).
61. *Id.*

lessees sell their gas in arm's-length transactions, the sales price can generally be used to determine the value for royalty purposes, but in *OXY*, the lessee used almost all of the CO2 produced within the unit for its purposes rather than selling it in an arm's length transaction.[62] Therefore, the formula used by the lessee to initially calculate the royalties—a unit average valuation methodology—was challenged, and an arbitration panel was used to calculate the value of the lessee's CO2 under a new formula.[63] The Office of Natural Resources Revenue ("ONRR") issued its decision that based on the formula they used, the lessee owed over one million dollars in royalty payments on the leases at issue.[64]

On appeal, the Tenth Circuit determined that the director's decision to reject the lessee's unit average valuation methodology to determine the valuation of carbon dioxide removed under federal oil and gas leases was not arbitrary or capricious, despite the lessee's contention that ONRR merely substituted its methodology for unit average to extract more royalty dollars without finding that the initial unit average valuation method was inconsistent with regulations.[65] The court affirmed that it was not arbitrary or capricious for the ONRR to consider valuation factors listed in federal leases, instead of only regulatory valuation factors, to determine the appropriate valuation formula.[66] Finally, the court held that a lessee could not deduct compression and dehydration costs in this case when calculating royalties on CO2.[67]

D. Pipeline Regulations

In *Food & Water Watch v. FERC*, environmental groups filed a petition for review of FERC orders approving a company's pipeline application for a new natural gas pipeline and compressor station.[68] FERC had issued approval of this expansion, and the Plaintiffs claimed that such a project violated multiple environmental rules and regulations.[69] Although in the opinion, the court generally rejected the Plaintiffs' claims, the court agreed with the contention that FERC's environmental assessment failed to account for the reasonably foreseeable indirect effects of the project—

62. *Id*.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. 28 F.4th 277 (D.C. Cir. 2022).
69. *Id.*

specifically, the greenhouse gas emissions attributable to burning gas to be carried in the pipeline.[70] As such, the court remanded the FERC orders back to FERC for further review. On remand, FERC is required to conduct further reviews and analyses of the project under NEPA, the APA, and the Natural Gas Act, and prepare a conforming environmental report including analyses of the project's greenhouse gas emissions.[71] According to the Court, NEPA requires agencies to "consider not only the direct effects but also the indirect environmental effects" of proposed actions that are "reasonably foreseeable."[72] Effects are "reasonably foreseeable" under NEPA if they are "sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision." The court's holding shows that downstream gas consumption and the resulting greenhouse gas emissions are reasonably foreseeable, and the court also made it clear that the downstream emissions from the project's new compressor station are also reasonably foreseeable when they feed a local distribution system for commercial and residential use.[73]

Similarly, in *Wild Virginia v. United States Forest Service*, several environmental advocacy organizations sought judicial review of renewed decisions of the United States Forest Service and BLM to allow the interstate natural gas pipeline system to cross three and a half miles of national forest.[74] This case was the Plaintiffs' second challenge to the agencies' approval of the pipeline. In the first challenge, the agencies' approvals were vacated due to failure to comply with the NEPA, the National Forest Management Act ("NFMA"), and the Mineral Leasing Act ("MLA"). The agencies were directed to re-evaluate the project's potential environmental impact before issuing new decisions or approvals.[75] The agencies issued new approvals, and the Plaintiffs challenged them again on the same grounds as the first challenge.

On January 25, 2022, the Fourth Circuit, partially agreeing with the Plaintiffs, vacated the record of decisions of the US Forest Service and the BLM allowing the pipeline to cross the Jefferson National Forest, and remanded the case to the agencies for another review and evaluation. The court held that the United States Forest Service and the BLM violated NEPA, NFMA, and the MLA by inadequately considering the natural gas

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70. *Id.*
71. *Id.*
72. *Id*.
73. *Id.*
74. 24 F.4th 915 (4th Cir. 2022).
75. *Id.*

pipeline's sediment and erosion impacts, by approving the use of the conventional bore method to cross four streams within the national forest without first analyzing the method's environmental effect.[76] The court's remand directed the agencies to once again, consider the potential environmental impacts before issuing approvals.

76. *Id.*