

FULL COURT PRESS: EPA ISSUES FINAL RULEMAKINGS AND A DRAFT INFORMATION COLLECTION REQUEST IN ITS ONGOING EFFORT TO REDUCE METHANE EMISSIONS FROM THE OIL AND GAS INDUSTRY

Date: 20 May 2016

Oil & Gas Alert

By: Anthony R. Holtzman, Tad J. Macfarlan

As part of President Obama's *Climate Action Plan: Strategy to Reduce Methane Emissions*, the U.S. Environmental Protection Agency ("EPA") on May 12, 2016 released a suite of final actions and a proposed action that are focused on methane and volatile organic compound ("VOC") emissions from the oil and natural gas industry. These developments significantly impact members of the industry, imposing new costs and compliance obligations on them and signaling that they will be saddled with even more costs and compliance obligations in the future.

The final actions include a rulemaking that establishes performance standards for methane and VOC emissions from **new and modified** sources and one that revises the agency's rules for "single source determinations." The proposed action is a draft Information Collection Request that would "require oil and natural gas companies to provide extensive information needed to develop regulations to reduce methane emissions from **existing** oil and gas sources." [1]

With these actions, EPA continues its efforts to address emissions of methane (a key contributor to global climate change) that occur during the production, processing, and transmission of oil and gas. According to the agency, the actions "keep the [Obama] Administration on track to achieve its goal of cutting methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025." [2]

PERFORMANCE STANDARDS FOR EMISSIONS FROM NEW AND MODIFIED SOURCES

In issuing its new performance standards for methane and VOC emissions from new and modified oil and gas sources, EPA built significantly on its prior actions in this field.

In 2012, under Section 111(b) of the Clean Air Act ("CAA"), EPA issued performance standards for VOC and sulfur dioxide emissions from various types of new and modified oil and gas sources. Those standards are codified at 40 C.F.R. Part 60, Subpart OOOO ("Quad-O") and address emissions from, in particular, the following sources: hydraulically fractured gas wells; certain fugitive equipment components at onshore gas processing plants; gas-sweetening units at those plants; and centrifugal compressors, reciprocating compressors,

continuous-bleed pneumatic controllers, and storage vessels to the extent that they are used in one or more industry segments. EPA designed the Quad-O standards to achieve reductions in methane emissions, but only as a co-benefit to reducing VOC and sulfur dioxide emissions.

As an expansion of the Quad-O standards, the agency's new standards directly regulate methane and VOC emissions from various types of new and modified oil and gas sources. Some of those sources are already regulated under Quad-O, while others – like hydraulically fractured oil wells, pneumatic pumps, and certain equipment and components at compressor stations –are covered for the first time.

The standard for fugitive emissions at gas well sites, as one example, requires a well operator to periodically use a leak detection device to survey the well site for leaks of methane and VOCs and then repair any leaks that it discovers as a result of that process. The survey needs to cover a wide variety of components, including valves, connectors, pressure-relief devices, open-ended lines, flanges, closed vent systems, compressors, and thief hatches on controlled storage tanks.

The final version of the new standards differs, in various and sometimes significant respects, from the proposed version, which EPA published for public comment in September of 2015. [3] Unlike the proposed version, for example, the final version:

- Does not exempt "low production" oil and gas wells [4] from leak detection and repair requirements.
- Does not call for operators to conduct leak detection surveys on a schedule that fluctuates over time, depending on the results of the surveys. Rather, it requires them to conduct the surveys on a fixed schedule – twice per year for well sites and quarterly for compressor stations.
- Allows an operator to conduct leak detection surveys by using not only "optical gas imaging" equipment, but also, as an alternative, either (i) "Method 21" (an approach that involves using a portable VOC monitoring instrument) or (ii) any emerging technology that is demonstrably as effective as Method 21 or optical gas imaging.
- Gives operators of hydraulically fractured oil wells a "phase-in" period, set at six months, before requiring them to use "green completion" technologies to capture emissions from those wells. [5]

According to EPA, its new standards, which will become effective 60 days after they are published in the Federal Register, will "reduce 510,000 short tons of methane in 2025, the equivalent of reducing 11 million metric tons of carbon dioxide." [6]

SINGLE SOURCE DETERMINATIONS: DEFINING "ADJACENT"

EPA also issued a regulatory definition of "adjacent" for purposes of making "single source determinations" in the oil and gas sector. Single source determinations are important to oil and gas operators because they can result in the "aggregation" of emissions from multiple sources, potentially triggering onerous "major source" air permit requirements. For a number of years, this issue has been a significant and evolving one. EPA has now brought some clarity to it, which should allow members of the industry to better plan their operations.

Under the CAA, a "stationary source" is defined as "any building, structure, facility, or installation" that emits air pollutants. [7] Longstanding EPA regulations provide that, in order for a group of air-pollutant-emitting units to be

considered part of a single "building, structure, facility or installation," three requirements must be satisfied: (1) the units must belong to the same industrial grouping (which is determined with reference to whether they have the **same primary Standard Industrial Classification code**); (2) the units must be under the **common control** of the same person or corporate entity; and (3) the units must be located on one or more contiguous or **adjacent** properties. [8] Ultimately, as the U.S. Court of Appeals for the D.C. Circuit explained in *Alabama Power Co. v. Costle* (1979), the "EPA cannot treat ... units as a single source unless they fit within the four permissible statutory terms." [9] In EPA's words, the units, taken together, must approximate the "common sense notion of 'plant'[" [10]

In the oil and gas context, the concept of "adjacency" has been interpreted in differing and evolving ways over time. The issue came to a head in 2012, when, in *Summit Petroleum Corp. v. EPA*, the United States Court of Appeals for the Sixth Circuit rejected EPA's broad interpretation of the concept, under which it had aggregated emissions from physically remote facilities because, in its view, they were "functionally interdependent." [11] The court directed the agency to apply the "ordinary, i.e., physical and geographical, meaning of" the term "adjacent." [12] Later, in 2014, the D.C. Circuit directed EPA to apply the Sixth Circuit's interpretation on a nationwide basis, unless and until it amended its single source determination rules or regional consistency rules. [13]

Against this backdrop, in September of 2015, EPA published for public comment two alternative options for a regulatory definition of "adjacent" in the oil and gas context:

- Define adjacent based solely on proximity by establishing that sources are adjacent only "if they are located on the same surface site, or on surface sites that are located within ¼ mile of one another." [14]
- Define adjacent with reference to both proximity **and** functional interrelatedness by establishing that sources are adjacent if they are **either** (1) separated by a distance of less than ¼ mile **or** (2) separated by a distance of ¼ mile or more, but have an "exclusive functional interrelatedness." [15]

In response to the oil and gas industry's substantial concerns, EPA has now declined to adopt the second option – which would have effectively codified its pre-*Summit* policy of aggregating distant sources based on "functional interrelatedness" – and adopted the first option, which reflects a more objective approach to the analysis. In doing so, moreover, it modified the first option by establishing that "emitting equipment located on separate surface sites within ¼ mile of each other would **only** be aggregated as a single stationary source if the emitting equipment **also** have a relationship that meets the 'common sense notion of a plant.'" [16] Pollutant-emitting units would have this relationship if they "share equipment" that is necessary for processing or storing oil or gas. [17] EPA explained that, as an example, if equipment that is used to process or store oil or gas is located within a ¼ mile of a commonly-owned well site, it is part of the same stationary source as the well site. [18] On the other hand, two well sites that feed a common pipeline are not part of the same stationary source if they do not share processing or storage equipment. [19] While this approach is not without its own ambiguities, it adds a degree of clarity and certainty to an area of law that has been in flux for many years.

EPA's new regulatory definition of "adjacent" will take effect 60 days after it is published in the Federal Register.

DRAFT INFORMATION COLLECTION REQUEST

EPA's draft Information Collection Request ("ICR") represents its first step towards issuing "comprehensive

regulations to reduce [methane and VOC] emissions from existing sources in the large and complex oil and gas industry." [20]

The draft ICR has two main components. The first one is an "operator survey," which would call for information about the number and types of equipment that exist at onshore oil and gas production facilities. The second part is a "facility survey," which would seek information about the methane emissions sources and emissions control devices and practices that are used at onshore production, gathering and boosting, processing, compression, transmission, pipeline, natural gas storage, liquefied natural gas ("LNG") storage, and LNG import and export facilities. Recipients of the ICR would have 30 days to respond to the operator survey and 120 days to respond to the facility survey. Under Section 114(a) of the CAA, the responses would be mandatory.

Through the ICR process, EPA seeks to better understand "what emission controls are being used in the field, how those are configured, whether electricity or generating capacity is available, and how often sites are staffed or visited" – with the ultimate goal of determining how to "best develop and apply standards to effectively reduce [methane and VOC] emissions from existing sources." [21]

As a corollary to issuing the draft ICR, EPA announced that, in the near future, it will issue a "voluntary Request for Information" that will invite members of the oil and gas industry, states, nongovernmental organizations, academicians, and others to "provide information on innovative strategies to accurately and cost-effectively locate, measure and mitigate methane emissions." [22]

EPA will accept public comments on the draft ICR until 60 days after it is published in the Federal Register.

CONCLUSION

EPA's final rules for methane and VOC emissions from new and modified oil and gas sources contain myriad requirements, which industry members will need to evaluate in detail, with the assistance of their technical and legal advisors, in order to ensure that they are complying with them by the effective date. Meanwhile, oil and gas operators who are, or will soon be, involved in state or federal air permitting processes (or related litigation) should carefully review the final "single source determination" rules to determine their affect, if any, on their projects.

Over the longer term, EPA's draft ICR portends a high-stakes rulemaking that could require significant, and potentially costly, reductions in methane emissions from existing oil and gas sources. While it seems possible that EPA will complete the ICR before the end of the year, the same cannot be said for any final rulemaking – the ultimate fate of which will therefore probably rest in the hands of the next presidential administration. As EPA works towards issuing standards for existing sources, industry members should carefully monitor and participate in the regulatory and political processes to ensure that any new requirements are grounded in science and EPA's regulatory authority.

Notes:

[1] EPA, *EPA's Actions to Reduce Methane Emissions from the Oil and Natural Gas Industry: Draft Information Collection Request for Existing Sources* ("Draft ICR Fact Sheet") at 1 (emphasis added), <https://www3.epa.gov/airquality/oilandgas/may2016/icr-fs.pdf>.

[2] EPA, *EPA's Actions to Reduce Methane Emissions from the Oil and Natural Gas Industry: Final Rules and Draft Information Collection Request* ("Overview Fact Sheet") at 1, <https://www3.epa.gov/airquality/oilandgas/may2016/nsps-overview-fs.pdf>.

[3] See 80 Fed. Reg. 56593 (Sept. 18, 2015).

[4] Low production wells are those for which, over the first 30 days of production, the average combined oil and gas production is less than 15 barrels of oil equivalent per day.

[5] EPA added the phase-in period "to give the industry time to ensure that a sufficient supply of green completion equipment and personnel is available." This development is therefore a positive one for the industry. EPA, *Summary of Requirements for Processes and Equipment at Oil Well Sites* at 1, <https://www3.epa.gov/airquality/oilandgas/may2016/nsps-oil-well-fs.pdf>.

[6] Overview Fact Sheet at 4.

[7] 42 U.S.C. § 7411(a)(3).

[8] See, e.g., 40 C.F.R. § 52.21(b)(6).

[9] 636 F.2d 323, 397 (D.C. Cir. 1979).

[10] 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980).

[11] 690 F.3d 733 (6th Cir. 2012).

[12] *Id.* at 735.

[13] See *National Env'tl. Dev. Association's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014). In August of 2015, EPA released proposed amendments to its regional consistency rules. See 80 Fed. Reg. 50250 (Aug. 19, 2015). The proposed amendments would allow the agency's regions to apply Clean Air Act requirements differently in different parts of the country as necessary to adhere to differing federal court decisions. *Id.*

[14] 80 Fed. Reg. 56579, 56590 (Sept. 18, 2015).

[15] *Id.*

[16] *Source Determination for Certain Emission Units in the Oil and Natural Gas Sector*, Pre-publication Rule at 8 (emphasis added), <https://www3.epa.gov/airquality/oilandgas/may2016/source-determination-finalrule.pdf>.

[17] *Id.* at 9-10, 43.

[18] *Id.* at 10.

[19] *Id.*

[20] Draft ICR Fact Sheet at 1.

[21] *Id.* at 2.

[22] *Id.*

KEY CONTACTS



ANTHONY R. HOLTZMAN
PARTNER
HARRISBURG
+1.717.231.4570
ANTHONY.HOLTZMAN@KLGATES.COM



TAD J. MACFARLAN
PARTNER
HARRISBURG
+1.717.231.4513
TAD.MACFARLAN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.