

OCTOBER 2016

AS EPA PURSUES EXISTING SOURCES, COULD WELL AND PIPELINE BLOWDOWNS BE NEXT?: EPA'S PLAN TO EXPAND REGULATIONS OF GREENHOUSE GAS EMISSIONS FROM THE OIL AND GAS SECTOR

ENVIRONMENTAL LAW UPDATE

Although the clock will run out on the Obama Administration before it can issue any proposal to regulate additional sources of methane and volatile organic compounds (VOCs), the Administration is putting the building blocks in place for the next EPA to finalize a rule that could compel state regulation of older and, in some cases, marginally profitable well sites and other emission sources. These regulations may also cover maintenance activities, such as well and pipeline blowdowns, equipment malfunctions, and flashing emissions from storage tanks.

This past April, EPA began formulating an Information Collection Request (ICR) that requires companies operating existing oil and gas facilities to provide information that the Agency intends to use to develop comprehensive regulations requiring states to submit plans to reduce methane and VOC emissions from these older facilities. After receiving public comments on its initial draft of the ICR, EPA has published a second draft for additional comments and review by the White House Office of Management and Budget (OMB). EPA may begin sending out these mandatory information requests as soon as November 2016. Owners and operators who receive these letters will be required to complete the surveys within the time periods set by EPA. EPA estimates that 15,000 operators will have to fill out an [operator survey](#), and that the entities representing almost 4,000 facilities will have to complete an additional and more lengthy [facility survey](#) that could require sampling and analysis.

Background

In May 2016, EPA finalized the Subpart OOOOa New Source Performance Standards (Quad Oa) that require certain new facilities in the oil and gas industry to reduce their methane gas and VOCs emissions by using mandated equipment and practices, conducting periodic leak detection surveys, and repairing leaks. Both methane and VOCs are constituents of natural gas, and methane is considered to be a potent greenhouse gas. While these Quad Oa rules are expected to place a heavy financial burden on the oil and gas industry, they are at least limited to sources that are new, modified, or reconstructed after September 18, 2015, and do not impact existing (i.e., older) sources of emissions. But the EPA believes that the adoption of these NSPS for upstream and midstream sources under Section 111(b) of the Clean Air Act empowers it to develop an existing source performance standard program under Section 111(d). The impending ICR is EPA's effort to develop the record needed to support such Existing Source Performance Standards (ESPS). Once adopted, the ESPS would not be imposed directly on regulated entities; rather, they become guidelines that the states must consider in developing their own rules ("plans") for regulating the universe of regulated entities within their jurisdiction. It is through these state plans (subject to EPA approval) that the ESPS eventual would become enforceable. EPA has indicated that the collection of additional information also will support Agency efforts to develop standards for certain kinds of new and modified equipment and facilities not currently covered under Quad Oa.

As discussed in this [previous post](#), EPA originally requested public comment by August 2, 2016 on two proposed mandatory surveys to oil and gas facilities. The recently released second draft ICR includes changes based on those comments. EPA plans to begin sending these mandatory ICR letters, authorized under Section 114 of the Clean Air Act, to owners and operators as soon as it receives approval from OMB, which could be as early as early November 2016.

What additional sources might EPA regulate?

The second draft ICR and accompanying guidance documents signal the areas where the Agency might expand its regulations.

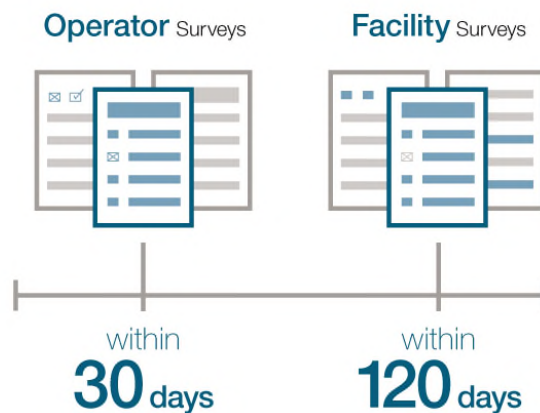
Currently, Quad Oa places requirements on new, modified, or reconstructed well sites, compressor stations, compressors, storage vessels, pneumatic pumps, and pneumatic controllers. EPA could use this information to support a decision to simply expand the current Quad Oa requirements to apply to existing (i.e. older) sources. The Agency's [guidance documents](#), however, suggest there are additional sources of emissions that EPA is considering regulating. Specifically, EPA is seeking information about natural gas venting that occurs as part of existing processes or maintenance activities, such as well and pipeline blowdowns, equipment malfunctions and flashing emissions from storage tanks. EPA also is seeking information on existing low-producing wells and underground storage facilities.

What is required by the new draft ICR?

The draft ICR consists of two separate parts: an "operator survey" for oil and gas production sources, and a lengthier "facility survey" for several segments of the onshore oil and gas sector—production, gathering and boosting, gas processing,

transmission, storage, and export/import facilities. These surveys will take the form of mandatory information requests issued under Section 114 of the Clean Air Act. In other words, owners and operators will be *required* to complete the operator surveys within 30 days and the facility surveys within 120 days of receiving them. EPA estimates that 15,000 operators will receive the operator survey, and 3,818 will receive the facility survey.

DAYS TO COMPLETE SURVEYS



Operator (Part 1) Survey: The proposed “operator survey” is designed to collect “comprehensive information from onshore petroleum and natural gas production facilities to better understand the number and types of equipment at production facilities.” The operator survey will collect parent-company information and detailed facility-level information, including: the number of producing wells, wells that have been hydraulically fractured or refractured, and capped or abandoned wells; all well identification numbers; the number of tanks and compressors; and whether there are flares or liquids unloading at the facility. EPA intends to send this survey to all operators of oil and gas production wells, allowing them only 30 days to complete the survey.

Facility (Part 2) Survey: The “facility survey” will be sent to a statistically significant sampling of facilities across each industry segment, including: production, gathering and boosting, processing, compression/transmission, pipeline, natural gas storage, and LNG storage and import/export facilities. The facility survey will collect detailed unit-specific information about existing emissions sources, emission controls being used in the field, and management practices used to reduce emissions. The facility survey will focus on randomly selected wells, asking for details on those specific wells, other wells and equipment at that same surface site as the randomly selected well(s), and the centralized production sites those wells feed.

It is likely that in its letters to these companies, EPA will specify the particular facilities it wants the companies to address in the facility survey. However, this may not hold true for gathering and boosting facilities, where the Agency has suggested it is less familiar with the total universe of sources and equipment involved. In these areas, EPA may ask companies themselves to randomly select gathering and boosting facilities to address in their facility surveys.

In order to ensure EPA receives information in the facility survey that fully represents the production segment of the oil and gas industry, the second draft ICR categorizes wells based on their gas-to-oil ratio (GOR). The GOR indicates whether the primary product of a well site is likely to be oil or gas. Because the definition of a facility varies greatly among upstream sources, the second draft ICR clarifies how owners/operators would report information on wells at surface sites and the centralized production areas those wells feed. Owners and operators will have 120 days to respond to this facility survey. EPA will use the Agency’s electronic Greenhouse Gas Reporting Tool (e-GGRT) to collect the data and information from the facility survey.

Estimated costs of compliance with the ICR: EPA anticipates that responding to the ICR alone (operator and facility parts) will take a collective 245,481 hours to complete, at an estimated cost of \$37,692,625 to the industry. EPA estimates that completing the operator survey will cost \$1,100 per operator, and that responding to the facility survey will cost around \$5,600 per facility. Any regulations resulting from the information EPA collects will almost certainly have a far more significant economic impact on the oil and gas industry.

EPA COST ESTIMATES FOR SURVEY RESPONSES

Operator Survey



\$1,100
per Operator

Facility Survey



\$5,600
per Facility

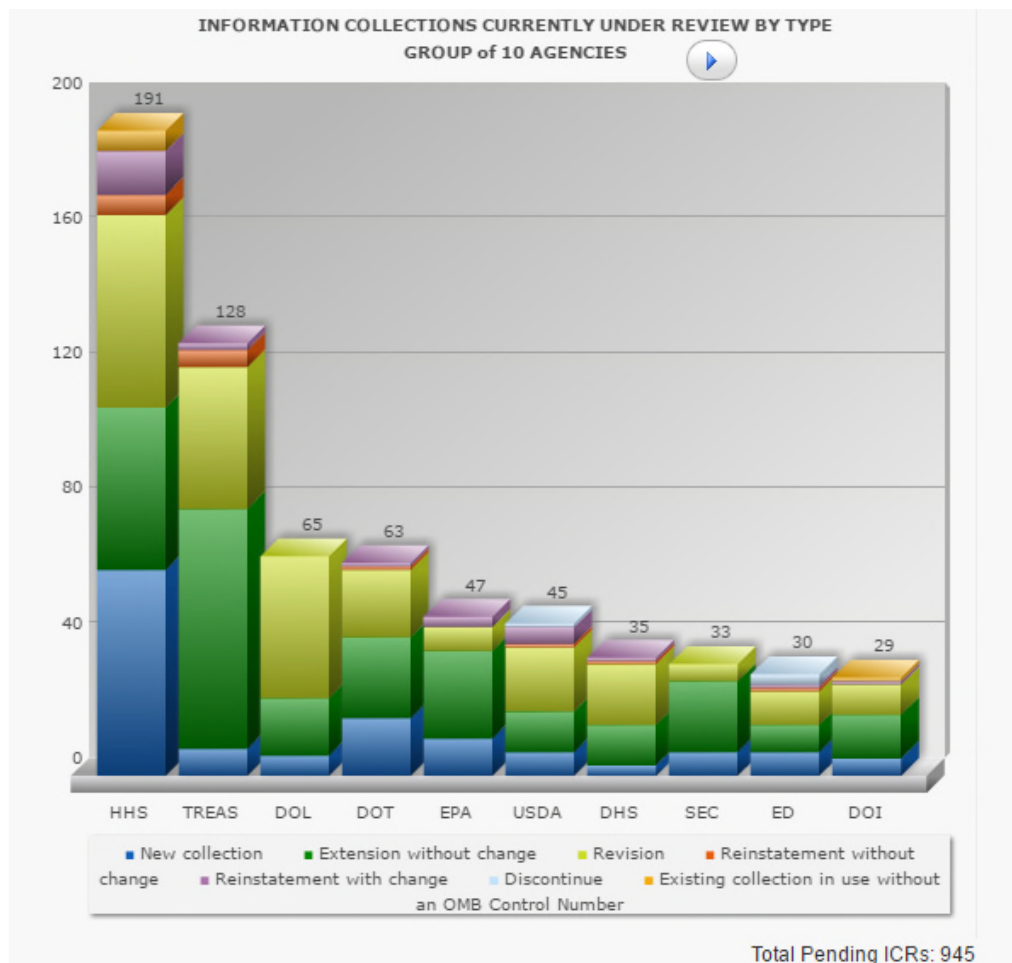
What Happens Next?

EPA has already accepted public comments on its previous ICR during a 60-day comment period. EPA will accept comments on the new ICR until October 31, 2016, and the ICR will be subject to up to 60 days of review by OMB. OMB can approve the ICR after as little as 30 days, meaning that EPA could start sending these letters out in early November. The 30- and 120-day deadlines for responding will not begin to run until operators receive the surveys.

OMB Process for ICRs: On September 29, 2016, EPA [announced](#) that it had sent its updated ICR to OMB for review and approval. A small office within OMB is responsible for determining whether the ICR is necessary, and whether it minimizes the burden on the public of collecting that information. After reviewing public comments, OMB will decide whether to approve the ICR. After an agency formally submits an ICR, OMB must provide at least [30 days](#) for the public to comment before making a decision about the ICR. OMB has 60 days to either approve or deny the Agency's ICR. If approved, EPA can collect information for up to 3 years. If OMB does not act within 60 days, its approval is presumed and the Agency may collect the information for up to 1 year. OMB's decision to approve or not act on an ICR cannot be reviewed by a court. If OMB disapproves an ICR, or instructs the Agency to make substantive or material changes to the ICR, then the decision must be made publicly available and include an explanation for the decision.

Before approving EPA's proposed ICR, the OMB must determine whether the collection of this information is necessary for the proper performance of EPA's functions, including whether the information has practical utility. Prior to making its decision, OMB may give EPA and other interested persons an opportunity to meet with OMB or to submit comments in writing. OMB encourages the public to provide comments on both the need for the ICR, and the burdens of completing the ICR.

This chart, produced by OMB, shows the 945 ICRs under review by OMB, by agency, as of October 12, 2016:



OMB Process for an Oil and Gas Rule: If OMB approves the ICR, then operators will begin to receive these mandatory requests. EPA could then use the resulting information to craft a proposed rule for existing sources of methane and VOC emissions in the oil and gas industry. In addition to making the proposed rule available for public comment, EPA must also submit any significant rulemakings to OMB, which would once again give OMB the opportunity for review of any rule proposed by EPA. OMB will also circulate the rule to a wide range of offices and departments, both within the Executive Office of the President and outside of it. OMB then makes recommendations to EPA about which comments the Agency should (and should not) accommodate.

Once a rule is submitted, OMB is available for meetings with the public and accepts meetings from “all comers.” These meetings have the potential to impact OMB’s recommendations to EPA. According to a former senior OMB official, many of the most useful meetings include specific and technical information and discuss specific potential unintended consequences, legal difficulties, unexpectedly high costs, or international trade implications of a proposed rule. Helpful meetings or comments also suggest a concrete way of handling the relevant problems, perhaps by changing one or two provisions while nonetheless achieving the Agency’s basic goals. OMB’s review frequently leads to changes in an Agency’s proposed rule, although some changes are relatively minor. OMB reviewed 2865 regulatory actions between January 1, 2011, and October 1, 2016. In that period, 277 actions, or about 10%, were approved without change; 136 actions, or about 5%, were withdrawn; and 2381 actions, or about 83%, were approved “consistent with change.”

As noted above, that EPA rule would rely on Section 111(d), which authorizes EPA to adopt rules that direct states to submit plans imposing standards of performance on sources within a category directly regulated by EPA under NSPS. Accordingly,

once any such EPA rule is adopted, the states would then have the same time frames accorded under Section 110 of the Act for state implementation plan revisions to submit and obtain EPA approval of their own plans (rules) imposing the standards of performance, with the ESPS adopted by EPA becoming the presumptive standards against which the state plans would be judged.

Peering into the crystal ball, what about the impact of the Clean Power Plan litigation and upcoming elections?

EPA also invoked Section 111(d) of the Clean Air Act in developing the Clean Power Plan, which is currently subject to judicial challenge in the D.C. Circuit. Because the Agency would be relying on Section 111(d) in developing an existing source rule for the oil and gas sector that results from information collected in this ICR, any decision on the Clean Power Plan and the scope of Section 111(d) could impact the legal support for EPA's attempt to develop an existing source oil and gas rule. On the other hand, a decision upholding the Clean Power Plan and EPA's reliance on Section 111(d) could embolden the next EPA regarding the development of an existing source regulation.

In any event, because the Obama Administration will wind down before the current EPA will be able to propose an existing source rule, the decision to develop an existing source rule and expand Quad Oa will fall entirely on the next Administration. The next EPA would have some latitude in determining whether and how to move forward with any regulatory measures for existing oil and gas sources—including a possible decision not to proceed with a regulation under Section 111(d) on the Clean Air Act—depending on the results of the ICRs and the regulatory record that is established by the Agency. Further, each state will have some freedom to craft plans that adjust performance standards to comport with their own expectations and preferences. But the process toward developing additional greenhouse gas requirements for the oil and gas sector will be well underway, should the next Administration decide to pick up the baton and run.

For more information, please contact Vinson & Elkins lawyers [Larry Nettles](#), [Eric Groten](#), [Andrew Stewart](#), or [Corinne Snow](#). Visit our website to learn more about V&E's [Environmental and Natural Resources](#) or [Climate Change](#) practices, or e-mail one of the practice [contacts](#).