

## Energy Regulation And Legislation To Watch In 2016

By **Keith Goldberg**

*Law360, New York (December 24, 2015, 8:38 PM ET)* -- If you're eager to follow federal energy policymaking moves in 2016, look to the White House, not Capitol Hill.

A bitterly divided Congress and the upcoming presidential election amount to a one-two punch that will likely knock out any would-be legislative developments, experts say.

"As hugely dysfunctional as Congress is, and lay on top of that a presidential campaign, I can't see anything significant happening," Akin Gump Strauss Hauer & Feld LLP partner Paul Gutermann said.

However, the Obama administration has unveiled an ambitious regulatory agenda for its final year in Washington. It will roll out a host of significant regulations targeting the energy sector, specifically, the oil and gas sector.

"I think they're going to keep pushing the envelope," said Mickey Leibner, a Washington-based attorney and government affairs adviser at Mayer Brown LLP. "There's no real political downside for them to do so."

Here are five pieces of energy-related regulation and legislation attorneys will be watching closely this year:

### **The Oil and Gas Industry Methane Rule**

If there's one regulation the oil and gas sector is watching above all others this year, it's the U.S. Environmental Protection Agency's expected June 2016 finalization of its rule clamping down on methane emissions from new and modified oil and gas sources — including hydraulically fractured wells. The rule is the linchpin of the Obama administration's plan to reduce methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025.

Under the rule proposed in August, oil and gas companies will have to find and repair leaks, capture gas from the completion of fracked wells, limit emissions from new and modified pneumatic pumps, and limit emissions from several types of equipment used at gas transmission compressor stations, including compressors and pneumatic controllers.

The EPA's proposal would also require that industry reduce volatile organic compounds and methane emissions from hydraulically fracked and refracked oil wells, which the agency said can contain

significant amounts of natural gas along with oil. The proposed rule also means methane and VOC reductions downstream from wells and production sites, covering equipment in the natural gas transmission segment of the industry that was not previously regulated.

The agency will also clarify its Clean Air Act permitting requirements for the oil and gas sector as to the definition of “adjacent” sources of pollution, because the term could be used to group pieces of oil and gas infrastructure together to qualify them as a source subject to the EPA’s Prevention of Significant Deterioration and Title V permitting program.

“The methane rule itself, plus all of the emissions standards that we’re expecting from EPA, those are super-costly and they are certainly rules that have immediate impact on facilities and equipment that are already out in the field,” BakerHostetler attorney Mark Barron said.

An added wrinkle to the final rule could be the incorporation of recent steps taken by the EPA to beef up its oil and gas enforcement practices. Last year, the agency struck a deal with Noble Energy Inc. in which the driller agreed to use advanced monitoring technologies to detect air pollution problems in real time, and ensure proper operation and maintenance of pollution control equipment at its facilities in Colorado.

“The information that EPA gets from the next-generation enforcement tools and how that plays into the rulemaking and the the final structure of the methane proposal is going to be interesting to see,” Gutermann said.

### **Venting and Flaring Rule for Gas Wells**

It may not have as big an impact as the methane rule, but drillers are closely watching a rule that would reduce venting and flaring from gas wells on public lands that the U.S. Department of the Interior’s Bureau of Land Management expects to finalize by August 2016.

However, the BLM has indicated that the motivation for this rule is economic, not environmental. There may be a legal reason behind the agency’s choice of justification, according to Barron.

“They’re cautious about their jurisdictional authority to offer it as an environmental rule,” Barron said. “While certainly it will have environmental implications, the agency is pitching it as a prevention-of-waste regulation to protect taxpayers.”

The venting and flaring rule is the centerpiece of a suite of oil and gas royalty reforms being pursued by the DOI amid criticism from lawmakers and government watchdogs. Proposed reforms include an adjustment of royalty rates for federal oil and gas leases by the BLM, as well as a rule from the DOI’s Office of Natural Resources Revenue that would amend its civil penalty regulations relating to all mineral leases.

“I don’t think you can interpret that [venting and flaring] rule on its own,” Barron said. “All of the other standards that relate to royalty and waste collection are all part of the same regulatory program.”

### **Implementation of the Clean Power Plan**

The Clean Power Plan, the linchpin of the Obama administration’s efforts to combat climate change released last year, calls for existing power plants to slash their carbon emissions by 32 percent from

2005 levels by 2030. Dozens of states and industry groups are fighting the rule in the D.C. Circuit, and are pushing for a stay of the rule until their court challenges are completed.

But until — and unless — the appeals court issues a stay, federal and state regulators are faced with the massive task of putting the CPP into action. States must start submitting implementation plans by 2018 and start showing emissions reductions by 2022.

Gutermann said 2016 could begin to reveal how states will work with the EPA to craft acceptable implementation plans, or how the EPA develops a federal implementation plan for states that refuse to submit their own plans.

Essentially, it'll be about “how EPA interacts with those groups and starts to get flesh on the bones on what the Clean Power Plan really means on a state-by-state basis,” Gutermann said.

It won't just be the power sector that will be closely watching those developments, attorneys say.

“The Clean Power Plan, even though it seeks to regulate the power sector, has significant impacts on large consumers of power,” said Martin Booher, the co-leader of BakerHostetler's national energy team. “If I have a steel mill that uses 150 megawatts per day to run and I have a contract with a power provider that allows for increases in costs tied to environmental regulations, that has the potential to affect the profitability of the steel mill. [The plan] has these secondary impacts on users of power.”

### **FERC Connected Entities Rule**

The Federal Energy Regulatory Commission has made it a priority to detect and crack down on energy market manipulation, but the commission is drawing significant heat over a recent proposal to expand its market surveillance capabilities.

A rule proposed by FERC in September would require the regional grid operators that run wholesale electricity markets to collect information about so-called “connected entities” to market participants. That could include entities that have ownership, debt, employment or contractual relationships with those market participants.

“It seems like it's been totally driven by FERC enforcement,” said Ken Irvin, the co-leader of Sidley Austin LLP's global energy practice. “It represents an amazing amount of data collection.”

The proposal, which is expected to be finalized some time this year, has already received significant pushback from industry in the comment period. Even FERC Commissioner Cheryl LaFleur has expressed reservations, saying in a statement that the proposal “would create a significant new reporting regime for all market participants, as well as the regional transmission organizations and independent system operators.”

Vinson & Elkins LLP partner John Decker says FERC underestimated how big a burden the proposal would place on the electric industry, particularly on power generators that are owned by nonpower companies such as financial institutions or private equity funds.

“If FERC really overreaches, it has the potential to make investments in generation less attractive,” Decker said. “It would certainly make them more expensive, if financial institutions have to devote considerable time to compliance and telling passive investors that they'll have to turn over information

to the market operators.”

### **Congressional Energy Reform Legislation**

Congress hasn't enacted broad-based energy legislation since the Energy Policy Act of 2007, and a presidential election year would seem to be the least likely time for such legislation to make it through. Still, both the Senate and House have advanced reform bills that contain enough passable items that if they're acted on this year, they would represent a significant update to federal energy policy.

The Senate energy committee in July approved a sprawling, bipartisan bill that runs the gamut from energy efficiency to pipeline and electrical infrastructure and energy development. The House advanced similar legislation that focuses on speeding up energy infrastructure development, though divisive amendments added to the bills have threatened to derail them. The chamber passed the legislation largely along party lines in December under a veto threat from President Barack Obama.

If Republicans and Democrats were able to compromise on the recently passed \$1.1 trillion omnibus spending bill in which the 40-year-old ban on crude oil exports was lifted in exchange for a multiyear extension of the renewable production and investment tax credits, a compromise on energy reform legislation is possible, even in an election year, according to Leibner.

“The question is whether they can get it through the House, that remains to be seen,” Leibner said. “The content of the Senate bill, they should be able to find some way to get it done.”

--Additional reporting by Juan Carlos Rodriguez. Editing by John Quinn and Philip Shea.

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