

HEATING UP AND COOLING DOWN – RECENT DEVELOPMENTS ON THE FLARING FRONT IN NORTH DAKOTA AND BEYOND

**Matthew Salzman
Ashley Dillon
Stinson Leonard Street LLP**

This paper was originally published by the Institute for Energy Law (part of the Center for American & International Law) in the materials for the 66th Annual Oil & Gas Law Conference February 19-20, 2015, Houston Texas

TABLE OF CONTENTS

	Page
I. BACKGROUND.....	2
A. WHY IS GAS FLARED?.....	2
B. HOW MUCH GAS IS FLARED?	4
C. WHO ARE THE STAKEHOLDERS?	5
II. FLARING IN THE BAKKEN.....	7
A. THE STATE AND FEDERAL COURT ROYALTY CLASS ACTION LAWSUITS	10
1. THE FLARING STATUTE, THE OIL AND GAS ACT, AND THE NDIC.....	11
2. THE PLAINTIFFS’ CLAIMS	13
3. THE DEFENDANTS’ INITIAL DEFENSES	14
4. THE COURT’S DISMISSAL ORDER AND SUBSEQUENT APPEAL	17
5. CONSEQUENCES OF THE LITIGATION AND THE NDIC PROCEEDINGS	19
B. PUBLIC PRESSURE, INDUSTRY’S RESPONSE, AND THE STATE’S FLARING REDUCTIONS	21
1. AWARENESS BUILDS AND ACTION BECOMES IMMINENT	21
2. REGULATORY GOALS, CAUSES OF FLARING, AND INDUSTRY RECOMMENDATIONS	23
3. REGULATORY RESTRICTIONS AND IMPLEMENTATION.....	26
C. FLARING TARGETS ARE BEING MET, BUT SEVERAL CHALLENGES REMAIN.....	31
1. FLARING ON THE FORT BERTHOLD RESERVATION	32
2. FALLING OIL PRICES	35
3. POLITICAL AND OTHER CHALLENGES	37
III. OTHER STATE AND FEDERAL LEGISLATION	39
A. FEDERAL FLARING LAWS AND REGULATIONS	39
1. ROYALTIES	40
2. LIMITS ON FLARING.....	42
B. STATE FLARING LAWS AND REGULATIONS	44
1. ALASKA	44
2. ARKANSAS	46
3. COLORADO	46
4. KANSAS	47
5. LOUISIANA.....	49
6. MONTANA.....	49

7.	OKLAHOMA	51
8.	PENNSYLVANIA.....	52
9.	TEXAS	53
10.	WYOMING.....	54
IV.	CONCLUSION.....	56

This paper was originally published by the Institute for Energy Law (part of the Center for American & International Law) in the materials for the 66th Annual Oil & Gas Law Conference February 19-20, 2015, Houston Texas

Heating Up and Cooling Down – Recent Developments on the Flaring Front in North Dakota and Beyond

Stinson Leonard Street LLP¹
Matthew Salzman²
Ashley Dillon³

A dramatic increase in the production of oil and gas in the United States has been driven by advances in production technology, such as directional drilling and hydraulic fracturing, which have helped unlock shale gas and other oil resources that were previously difficult and uneconomic to recover. This growth of unconventional oil production has led to a commensurate rise in the production of associated natural gas. However, a significant portion of this gas does not go to market; instead, it is vented or flared.

Although images of flaring lighting up the night recently have appeared in various news outlets, flaring has been conducted as long as the industry has been active.⁴ That said, largely

¹ This paper is designed to give general information only. It is not intended to be a comprehensive summary of the law or to treat exhaustively the subjects covered. This information does not constitute legal advice or opinion. Legal advice or opinions are provided by Stinson Leonard Street LLP only upon engagement with respect to specific factual situations.

² Matt Salzman is a partner at Stinson Leonard Street in the firm's litigation division. He specializes in contract-related litigation and class actions in the oil and gas, insurance and financial services industries. Matt has handled multiple antitrust oil and gas class actions, and over a dozen royalty interest owner class actions involving a total of well over a billion dollars of underpaid royalty claims. Recently, he obtained dismissal of a class action for one of the largest oil and gas producers in North Dakota concerning royalties on the value of the flared gas from its wells. Matt has litigated a variety of oil and gas disputes in several states, including Texas, Colorado, New Mexico, Kansas, North Dakota, and Montana. He recently took one of his class action to the U.S. Supreme Court and obtained a favorable decision on a removal issue.

³ Ashley Dillon is a litigation associate at Stinson Leonard Street LLP in Kansas City, Missouri. Her practice focuses on commercial litigation in a variety of industries, including oil and gas. Her experience in the field of oil and gas litigation covers a number of issues, including flaring, surface damage claims, oil field services disputes, pipeline operations, and royalty class actions. She earned her J.D. from the University of Kansas.

because shale development has been booming in areas where oil and gas production had not previously occurred on such a large scale, the amount of gas flared has spiked recently as flaring has been increasingly utilized during the various stages in the production process.

This paper focuses on flaring from producing oil wells. It will first examine the background of such flaring, addressing questions such as why is gas flared, how much is flared, and who are the stakeholders in the process. Next, this paper will turn to what is commonly referred to as “the Bakken,”⁵ focusing on North Dakota where the flaring issues once took center stage. The paper will explore the litigation involving fourteen royalty interest owner class actions, the parallel regulatory proceedings, the new flaring reduction/gas capture goals and certain remaining challenges towards meeting those goals. Then this paper will provide an overview of flaring laws and regulations in several oil and gas producing states.

I. Background

A. Why is gas flared?

Oil deposits often contain some portion of entrained natural gas. This gas is produced at the wellhead of oil wells as a byproduct of oil production. In certain fields the value of the oil produced has far exceeded the value of the associated gas, particularly before the recent drop in oil prices.⁶ Flaring is has been defined as the “burning of gas in the field as a means of disposal

⁴ John R Jacus & Eric Waeckerlin, “Coming to a Shale Basin Near You: Emerging Regulatory Frameworks for Controlling Methane Emissions and Flaring from Oil and Natural Gas Sources,” *Development Issues in Major Shale Plays: What’s on the Horizon?*, Paper 7, Page No. 22 (Rocky Mt. Min. L. Fdn. 2014) .

⁵ The Bakken Formation is located in western North Dakota, eastern Montana, and southern Saskatchewan, Canada, as a subsurface formation within the Williston Basin. The Williston Basin extends to southwestern Manitoba, east-central North Dakota, northwestern South Dakota, eastern Montana, and southern Saskatchewan. The Bakken Formation lies between the overlying Lodgepole Formation and the underlying Three Forks Formation. *Bakken Formation*, Energy & Environmental Research Center, <http://www.undeerc.org/Bakken/bakkenformation.aspx> (last visited Jan. 21, 2015). In this paper the phrase “Bakken” generally includes the Three Forks formation.

⁶ See, e.g., NDIC Order No. 24665, Case No. 22058, *In the matter of a hearing called on a motion of the Commission to consider amending the current Bakken/Three Forks, and/or Three Forks Pool field rules to restrict oil production and/or impose such provisions as deemed appropriate to reduce the amount of flared gas* (hereinafter NDIC Order 24665), at *3 (concerning production in North Dakota) .

when there is no market for the gas and the operator does not elect (or cannot) use the gas for a nonwasteful purpose.”⁷ Obviously, it is generally in the production company’s (as well as the royalty interest owners’) economic interest to sell that gas and generate revenue, rather than to burn that potential revenue-generating resource. Marketing the gas, however, is not always feasible for a variety of reasons.

Natural gas is not easily or cheaply transported. It usually requires a pipeline or gathering system that takes the gas to processing plants. Although natural gas is often sold at or near the wellhead, sometimes there is no pipeline infrastructure near the well, and the midstream purchasers of the gas are unwilling to construct lines out to the well. In other cases, the existing pipeline infrastructure may already be at capacity and not be able to take additional gas. Furthermore, even when a willing buyer is inclined to construct a line to a well, or the production company is inclined to construct its own line to a delivery point, sometimes that can be difficult due to the need to obtain rights-of-way for the new line. In short there are a number of issues that can render selling the produced associated gas uneconomic or impracticable.

The main byproduct of flaring or burning the associated gas is carbon dioxide.⁸ Instead of flaring, operators could release or vent the gas into the atmosphere. Venting, however, releases volatile organic compounds (“VOCs”) and greenhouse gases, such as methane. Methane is one of the most powerful greenhouse gases and is 84 times as potent as carbon dioxide over a 20-year period.⁹ In 2011, the oil and gas industry emerged as the largest emitter of methane in the

⁷ Patrick H. Martin and Bruce M. Kramer, Williams & Meyers, Oil and Gas Law, “Flaring of gas” (LexisNexis Matthew Bender 2014).

⁸ See Christopher Helman, *Some Perspectives on Gas Flaring in the Bakken*, FORBES (Dec. 18, 2013).

⁹ *Oil and Gas Companies Join Partnership to Capture Methane*, United Nations Environment Programme, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2796&ArticleID=11006&l=en> (last visited Jan. 25, 2015).

United States, but by 2013, it had fallen to second.¹⁰ Venting and incidental releases of natural gas during the various stages of the production process contributed to the eight million tons of methane released in 2014.¹¹ Although few commentators would describe flaring as “environmentally friendly,” it is well-recognized as an emissions-reduction technique.¹²

B. How much gas is flared?

According to the U.S. Energy Department, less than one percent of natural gas is flared from oil fields nationwide and less than three percent is flared worldwide.¹³ Although ranked fifth, the U.S. falls far behind Russia and Nigeria in the World Bank’s rankings of nations that flare the most natural gas.¹⁴

Nationally, the flaring discussion has largely focused on North Dakota and the Bakken, where the percentage of flared natural gas has recently been approximately one-third of all the gas produced, and the overall volume has dramatically increased during the past few years.¹⁵ Flaring in the Bakken peaked in 2011 when 36 percent of the gas produced was flared.¹⁶

However, flaring is certainly not limited to the Williston Basin. For example, producers operating in the Eagle Ford Shale play flared more than 20 billion cubic feet of natural gas in the

¹⁰ Gayarhri Vaidyanathan, *Who are the Big Ten in the carbon pollution business*, E&E NEWS (Oct. 6, 2014) .

¹¹ Christina Nunez, *Oil and Gas Industry Faces Its Methane Problem*, NATIONAL GEOGRAPHIC, Dec. 11, 2014.

¹² See, e.g., EPA PRO Fact Sheet No. 904, *Install Flares*, EPA, <http://www.epa.gov/gasstar/documents/installflares.pdf> (last visited Jan. 25, 2015) ; U.S. Forest Service, *Emissions Reduction Techniques for Oil & Gas Activities*, at 19 (2011) .

¹³ James MacPherson, *ND flaring rate drops below imposed threshold*, ASSOCIATED PRESS, Dec. 12, 2014.

¹⁴ Estimated flared volumes from satellite data, 2007-2011, Global Gas Flaring Reduction, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTGGFR/0,,contentMDK:22137498~menuPK:3077311~pagePK:64168445~piPK:64168309~theSitePK:578069,00.html>.

¹⁵ MacPherson, *supra* note 13.

¹⁶ Jacus & Waeckerlin, *supra* note 4, at 22.

first seven months of 2014, which has already exceeded levels for all gas flared in 2012 and was on pace to surpass the 2013 levels.¹⁷

Below is a sampling of some available flaring statistics from various producing states:

State	2008	2009	2010	2011	2012	2013
Alaska	10,023	6,481	10,173	10,966	11,769	7,219
California	2,127	2,501	2,790	2,424	0	N/A
Colorado	1,501	1,411	1,242	1,291	0	N/A
Kansas	373	353	323	307	0	N/A
Louisiana	4,021	4,336	4,587	6,320	0	3,912
Montana	6,863	7,001	5,722	4,878	0	N/A
New Mexico	803	481	1,586	4,360	12,259	21,053
North Dakota	25,700	26,876	24,582	49,652	79,564	102,855
South Dakota	2,073	2,160	2,136	2,120	0	N/A
Texas	42,541	41,234	39,569	35,248	47,530	76,113
Utah	1,285	1,398	2,080	1,755	0	N/A
Wyoming	42,346	42,530	42,101	57,711	45,429	34,622

Source: U.S. Energy Information Administration, Natural Gas Gross Withdrawals and Production, *available at* http://www.eia.gov/dnav/ng/ng_prod_sum_a_epg0_vgv_mmcf_a.htm. The use of “N/A” means that the data was not available.

C. Who are the Stakeholders?

Industry. As the parties doing the flaring at issue, industry participants are obvious stakeholders. Generally, upstream companies have an interest in selling the associated gas when possible and economical to maximize the beneficial economic impact for all interest owners in

¹⁷ *Gas flares in Eagle Ford Shale continue upward*, ASSOCIATED PRESS, Dec. 21, 2014, *available at* <http://www.kansascity.com/news/business/national-international/article4762935.html>.

the production. Midstream companies have an interest in purchasing, transporting, processing and reselling the gas. In general, industry participants are paying attention to and actively involved in the flaring issues, which have caught the broader public's attention as well as that of the policy makers and regulators.

Landowners. Some landowners or surface owners have grown accustomed to seeing wells dot their landscapes. But in newer plays, some landowners are seeing this development for the first time and often with flares that burn around the clock. Recently, landowners or surface owners have become more concerned about flaring, the number of flares, and the noise, vibrations and other side-effects.

Mineral Owners. In several instances, the surface estate is severed from the mineral estate. From a mineral interest owner's or royalty interest owner's perspective, flared gas is a waste to the extent it is not subject to royalty payments. Unlike the surface owners, however, the mineral owners presumably are receiving the benefit of royalties on the oil production. Mineral owners' concern has been so great as to result in several class action lawsuits in North Dakota state, federal and tribal courts.¹⁸ As mentioned above, producers have similar concerns, as they too are attempting to maximize the return on the production from each well.

Environmental Groups. Although flaring associated gas is less environmentally harmful than venting it, burning the gas releases nitrogen, carbon monoxide, and carbon dioxide.¹⁹ Some contend flaring also emits low levels of VOCs that remain after incomplete combustion.²⁰ Additionally, burning natural gas is often portrayed as being wasteful of our natural resources.

¹⁸ See *infra* Part X.

¹⁹ *Emissions Reduction Techniques for Oil & Gas Activities*, *supra* note 12, at 22; see also Clifford Krauss, *Oil Companies Are Sued for Waste of Natural Gas*, THE NEW YORK TIMES, Oct. 17, 2013, available at http://www.nytimes.com/2013/10/18/business/energy-environment/oil-companies-are-sued-over-natural-gas-flaring-in-north-dakota.html?_r=0.

²⁰ *Emissions Reduction Techniques for Oil & Gas Activities*, *supra* note 12, at 22.

Environmental groups, particularly those concerned with air quality and greenhouse gases, and conservationists have become increasingly interested in flaring issues in recent years.

Government. Government officials and regulators also have begun paying more attention to the flaring issues in recent year, in part to service their constituents and to be responsive to the concerns of the stakeholders mentioned above. In addition, the “cost” of flaring has increasingly drawn the attention of government officials. Like private mineral owners, state and federal government may have a royalty interest in the gas being flared to the extent it is from state or federal leases. One estimate shows that federal royalties “lost” from flaring amounted to more than \$50 million in 2013.²¹ Various governmental entities are also considering the potential “lost” revenue from taxes that might otherwise be paid if the gas were sold rather than flared. States have adopted differing approaches to taxation of flared gas. For example, Kansas, Texas, Louisiana, and Wyoming all provide exemptions from severance taxes for flared gas.²² In North Dakota, on the other hand, gas may be flared from an oil well for one year after first production before the gas is subject to taxation, although the NDIC may issue exemptions from taxation after the expiration of this one-year period if certain circumstances are shown.²³

II. Flaring in the Bakken

In 2006, shale oil development in the Bakken became economic following advances in directional drilling and hydraulic fracturing of horizontal wells.²⁴ The oil production in North Dakota rose from approximately 235,000 barrels per day (bbl/d) in January 2010 to more than 1,187,000 bbl/d in November 2014 (the most recent month for which the production data is

²¹ Nunez, *supra* note 11.

²² *See infra* Part III.

²³ *See infra* Part II.

²⁴ Jacus & Waeckerlin, *supra* note 4, at 25; Natural Gas Facts, North Dakota Pipeline Authority, <http://northdakotapipelines.com/natgasfacts/> (last visited Jan. 25, 2015).

currently available).²⁵ In January 2010, there were almost 4400 producing wells with an average production of 54 bbl/d.²⁶ By contrast, in November 2014, there were over 11,500 producing wells (an all-time high for North Dakota) with an average production of 103 bbl/d.²⁷ This rapid growth has contributed to a commensurate increase in volumes of associated gas. As the table below illustrates, a fair amount of that gas has been flared:

North Dakota	2008	2009	2010	2011	2012	2013	2014 ²⁸
Oil Production (bbl/yr)	62,761,222	79,796,387	113,072,427	153,059,263	243,287,285	313,801,706	358,766,503
Gas Production (mcf/yr)	87,190,520	91,704,441	11,4389,090	155,931,615	258,524,648	347,587,869	414,917,594
Flared Gas (mcf/yr)	26,839,443	23,829,153	30,975,630	53,773,560	83,587,511	106,647,736	118,911,139
%	30.78%	25.98%	27.08%	34.49%	32.33%	30.68%	28.66%

Sources: North Dakota Annual Oil Production, North Dakota Department of Mineral Resources, <https://www.dmr.nd.gov/oilgas/stats/annualprod.pdf> (last visited Jan. 25, 2015) ; Historical monthly oil production statistics, North Dakota Department of Mineral Resources, <https://www.dmr.nd.gov/oilgas/stats/historicaloilprodstats.pdf> (last visited Jan. 25, 2015) ; Historical monthly gas production and sales statistics, North Dakota Department of Mineral Resources, <https://www.dmr.nd.gov/oilgas/stats/Gas1990ToPresent.xls> (last visited Jan. 25, 2015) .

It is often estimated that approximately one-third of all the gas produced in the Bakken is flared. The percentage in North Dakota reached its peak in September 2011 at 36 percent.²⁹ On January 14, 2015, the NDIC reported the percentage of gas flared was 25 percent and that the

²⁵ North Dakota Department of Mineral Resources, ND Monthly Oil Production Statistics, *available at* <https://www.dmr.nd.gov/oilgas/stats/historicaloilprodstats.pdf>.

²⁶ *Id.*

²⁷ *Id.* Other sources cite even higher number of producing wells. *See e.g.*, Lynn Helms, *Director's Cut*, NDIC Department of Mineral Resources (Jan. 14, 2015), *available at* <https://www.dmr.nd.gov/oilgas/directorscut/directorscut-2015-01-14.pdf> (indicating that there were 11,942 producing wells in November 2014—8,640 of these wells, or 72 percent, are unconventional Bakken-Three Forks wells, and 95 percent of barrels of oil is produced from the Bakken and Three Forks pools) (hereinafter Helms, Jan. 14, 2015 Director's Cut) .

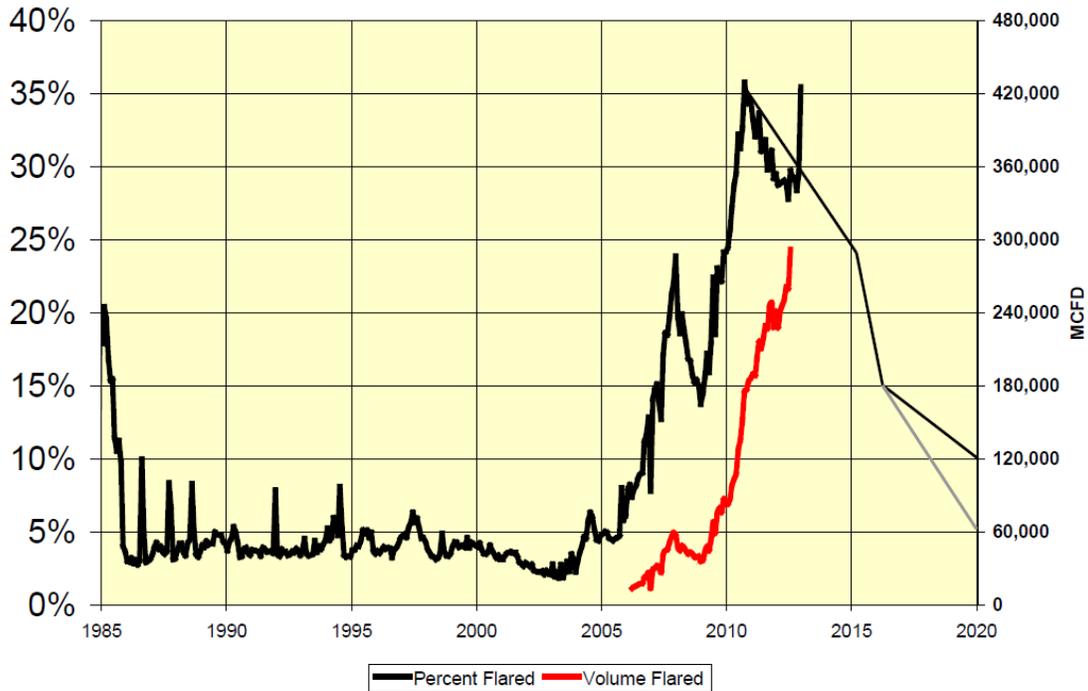
²⁸ The 2014 numbers include only January through November, as the totals for December 2014 are not yet available.

²⁹ Helms, Jan. 14, 2015 Director's Cut, *supra* note 27.

October 2014 statewide gas-capture percentage was 75 percent.³⁰ Prior to this recent downward trend resulting largely from efforts discussed more fully below, as the following chart shows, the amount of flared gas had increased dramatically over the past few years.



North Dakota Monthly Gas Flared



Source: NDIC, Presentation of the Department of Mineral Resources review of North Dakota Petroleum Council Flaring Task Force Report and Consideration of Implementation Steps, March 3, 2014 (hereinafter Presentation of the DMR), available at https://www.dmr.nd.gov/oilgas/presentations/NDIC030314_100.pdf.

While commentators discuss several causes for the increased flaring, generally they all seem to relate to one issue—the lack of adequate pipeline and related infrastructure. After all, production companies would generally much rather sell their gas to a midstream company or other gas purchaser rather than burn it. Yet, the lack of infrastructure often makes it uneconomic

³⁰ *Id.*

or impossible to do so. Flared gas in North Dakota has been valued at roughly \$100 million a month.³¹

A. The State and Federal Court Royalty Class Action Lawsuits

In October 2013, several owners of mineral interests in North Dakota oil wells filed ten separate putative class actions in North Dakota state court against ten different oil and gas producers seeking royalties on the value of gas flared allegedly in violation of North Dakota law.³² Each of these putative class actions was filed by a group of five law firms, from five separate states, including North Dakota, Montana, Texas, Wyoming and Colorado. In January 2014, these same law firms filed four additional putative class actions against four additional production companies.³³ Thirteen of the fourteen defendants removed the cases against them to the United States District Court for the District of North Dakota.³⁴

³¹ Krauss, *supra* note 19.

³² See *Border Farm Trust, et al. v. Samson Resources Company*, Divide County, Case No. 12-2013-CV-00067, removed Case No. 4:13-CV-00141 (D.N.D.); *Border Farm Trust, et al. v. SM Energy Company*, McKenzie County, Case No. 27-2013-CV-00245, removed Case No. 4:13-CV-00140 (D.N.D.); *Raymond Brooks Kummer, et al. v. Continental Resources, Inc.*, McKenzie County, Case No. 27-2013-CV-00244, removed Case No. 4:13-CV-00135 (D.N.D.); *Miller Family Partnership, et al. v. HRC Operating LLC*, Williams County, Case No. 53-2013-CV-01190, removed Case No. 4:13-CV-00137 (D.N.D.); *Sheri Johnson Singer, et al. v. Statoil Oil & Gas LP*, McKenzie County, Case No. 27-2013-CV-00243, removed Case No. 4:13-CV-00138 (D.N.D.); *Gary Sorenson, et al. v. Burlington Resources Oil & Gas Company LP*, McKenzie County, Case No. 27-2013-CV-00242, removed Case No. 4:13-CV-00132 (D.N.D.); *Sarah Vogel, et al. v. Marathon Oil Company*, Mountrail County, Case No. 31-2013-CV-00163; *Sarah Vogel, et al. v. WPX Energy Williston, LLC*, Mountrail County, Case No. 31-2013-CV-00162, removed Case No. 4:13-CV-00133 (D.N.D.); *Scott Wisdahl, et al. v. Crescent Point Energy U.S. Corp.*, Williams County, Case No. 53-2013-CV-01189, removed Case No. 4:13-CV-00139 (D.N.D.); *Scott Wisdahl, et al. v. XTO Energy, Inc.*, Williams County, Case No. 53-2013-CV-01188, removed Case No. 4:13-CV-00136 (D.N.D.) .

³³ See *Robert J. Hansen, et al. v. Hunt Oil Company*, Dunn County, Case No. 13-2014-CV-00008, removed Case No. 1:14-CV-00021 (D.N.D.); *Jeff Lawyer, et al. v. EOG Resources, Inc.*, Williams County, Case No. 53-2014-CV-00043, removed Case No. 4:14-cv-00009 (D.N.D.); *Jeff Lawyer, et al. v. Kodiak Oil & Gas Inc.*, Williams County, Case No. 53-2014-CV-00097, removed Case No. 4:14-CV-00014 (D.N.D.); *Sheryle J. Olson Family Mineral Trust, et al. v. Hess Corporation and Hess Bakken Investments II, LLC*, Dunn County, Case No. 13-2014-CV-00007, removed Case No. 1:14-CV-00020 (D.N.D.) .

³⁴ The one case that was not removed is *Sarah Vogel, et al. v. WPX Energy Williston, LLC*, Mountrail County, Case No. 31-2013-CV-00162.

1. The Flaring Statute, the Oil and Gas Act, and the NDIC

In North Dakota, there is a statute—section 38-08-06.4 of the North Dakota Century Code (the "Flaring Statute")—that contains certain allowances and places certain restriction on flaring gas. The Flaring Statute is one provision of the Control of Oil and Gas Resources Act, N.D.C.C. § 38-08-01, *et seq.* (the "Oil and Gas Act"), which was enacted to foster and encourage development of oil and gas in the state in such a manner as will prevent waste, protect the correlative rights of all owners, and yield the greatest possible economic recovery of oil and gas so that the landowners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these natural resources.³⁵ The North Dakota Industrial Commission ("NDIC") of the Oil and Gas Division of the Department of Mineral Resources is the state regulatory agency that "has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions" of the Oil and Gas Act.³⁶

Generally, the Flaring Statute provides that gas may be flared during the first year of production from a well.³⁷ After the one-year grace period, the well must be either connected to a pipeline or there must be some other beneficial use (such as to power an electrical generator) that captures between 60-75 percent of the gas.³⁸ Alternatively, producers can obtain exceptions from the NDIC for additional flaring if the producer presents evidence demonstrating the economic infeasibility of connecting the well to a gathering line.³⁹ It is economically infeasible to connect the well to a natural gas gathering line if the direct costs of connecting the well to the line plus

³⁵ N.D.C.C. § 38-08-01.

³⁶ *Id.* at § 38-08-04.

³⁷ *Id.* at § 38-08-06.4(1).

³⁸ *Id.* at § 38-08-06.4(2).

³⁹ *Id.* at § 38-08-06.4(6).

the direct costs of operating the facilities connecting the well to the line during the life of the well are greater than the amount of money the operator is likely to receive for the gas if it were connected, less production taxes and royalties.⁴⁰ To the extent gas is flared in violation of the statute, the producer may be responsible for paying royalties and taxes on the values of the flared gas.⁴¹ Specifically, the Flaring Statute provides:

1. As permitted under rules of the industrial commission, gas produced with crude oil from an oil well may be flared during a one-year period from the date of first production from the well.
2. After the time period in subsection 1, flaring of gas from the well must cease and the well must be:
 - a. Capped;
 - b. Connected to a gas gathering line;
 - c. Equipped with an electrical generator that consumes at least seventy-five percent of the gas from the well;
 - d. Equipped with a system that intakes at least seventy-five percent of the gas and natural gas liquids volume from the well for beneficial consumption by means of compression to liquid for use as fuel, transport to a processing facility, production of petrochemicals or fertilizer, conversion to liquid fuels, separating and collecting over fifty percent of the propane and heavier hydrocarbons; or
 - e. Equipped with other value-added processes as approved by the industrial commission which reduce the volume or intensity of the flare by more than sixty percent.
3. An electrical generator and its attachment units to produce electricity from gas and a collection system described in subdivision d of subsection 2 must be considered to be personal property for all purposes.
4. For a well operated in violation of this section, the producer shall pay royalties to royalty owners upon the value of the flared gas and shall also pay gross production tax on the flared gas at the rate imposed under section 57-51-02.2.
5. The industrial commission may enforce this section and, for each well operator found to be in violation of this section, may determine the value of flared gas for purposes of payment of royalties under this section and its determination is final.

⁴⁰ N.D. Admin. Code § 43-02-03-60.2.

⁴¹ N.D.C.C. § 38-08-06.4(4).

6. A producer may obtain an exemption from this section from the industrial commission upon application that shows to the satisfaction of the industrial commission that connection of the well to a natural gas gathering line is economically infeasible at the time of the application or in the foreseeable future or that a market for the gas is not available and that equipping the well with an electrical generator to produce electricity from gas or employing a collection system described in subdivision d of subsection 2 is economically infeasible.⁴²

2. The plaintiffs' claims

The plaintiffs' original complaints all alleged eight causes of action. The first four causes of action are asserted by the named plaintiffs individually, and the second four mirror the first four except they are asserted on behalf of the putative class. The first cause of action sought damages based on alleged violation of the Flaring Statute and certain NDIC orders pertaining to particular wells at issue in each particular case. The second cause of action sought declaratory relief for royalties on all past and future gas flared from the producers' wells in alleged violation of the Flaring Statute. The third cause of action asserted a claim for conversion of unpaid royalties attributable to the flared gas, and the fourth cause of action alleged the producers committed common law waste by flaring the gas.

Generally, the plaintiffs sought royalties on the value of all gas flared from every well each defendant operated in North Dakota. The plaintiffs acknowledged that the Flaring Statute allows gas to be flared during the first year of production, but they alleged that such allowance was conditional on compliance with other applicable NDIC orders. Based on allegations that the defendant-producers were not in compliance with particular orders, the plaintiffs sought royalties on the value of gas flared during the first year of production. The plaintiffs also generally took the position that all gas flared after the first year of production was a violation of the Flaring Statute for which they were entitled to royalties on the value of the flared gas.

⁴² *Id.* at § 38-08-06.4.

In each of the fourteen class actions, the plaintiffs filed an amended complaint asserting an additional cause of action, both individually and on behalf of a class, under the North Dakota Environmental Law Enforcement Act of 1975, N.D.C.C. § 32-40-01 *et seq.*, (the "ELEA"), which provides a private right of action for violation of environmental statutes, rules, or regulations.

3. The defendants' initial defenses

The defendants filed motions to dismiss. Certain of the defendants had unique defenses pertaining to the specific facts and circumstances related to the particular wells in which the named plaintiffs in the various cases had an interest. For example, certain defendants argued that the complaint failed to state a claim for royalties based on flaring within the first year of production because the alleged (and publically available) facts indicate that the operations were in compliance with the NDIC's orders and that the Flaring Statute's one-year grace period necessarily applied. Aside from these case-specific bases for dismissal, all of the defendants generally made a number of the same legal arguments in their respective motions to dismiss.

First, the defendants argued that the plaintiffs failed to exhaust their administrative remedies before the NDIC. Like most other states, North Dakota case law has consistently required plaintiffs to exhaust their administrative remedies before filing a court action.⁴³ The legislature created a comprehensive regulatory framework to address flaring and other issues under the Oil and Gas Act. This comprehensive regulatory scheme also includes an

⁴³ See, e.g., *Thompson v. Peterson*, 546 N.W.2d 856, 861 (N.D. 1996) (citing *Lapp v. Reeder Pub. Sch. Dist. No. 3*, 544 N.W.2d 164 (N.D. 1996) ; *Med. Arts Clinic v. Franciscan Initiatives*, 531 N.W.2d 289 (N.D. 1995) ; *Transp. Div. v. Sandstrom*, 337 N.W.2d 160 (N.D. 1983) ; *Shark Bros., Inc. v. Cass County*, 256 N.W.2d 701 (N.D. 1977)) .

administrative remedy and gives the NDIC broad authority to administer and enforce the provisions of the Act, including the Flaring Statute.⁴⁴

While the NDIC may act on its own motion, it is also required to address every "written complaint from any . . . royalty owner [or] mineral owner . . . alleging a violation of the oil and gas conservation statutes or any rule, regulation or order."⁴⁵ Any "interested person" may file a petition with the NDIC "concerning any matter within the jurisdiction of the [NDIC]," and the NDIC "must fix a date for a hearing and give notice."⁴⁶ The NDIC receives testimony and evidence at the hearings and "has the power to summon witnesses, to administer oaths, and to require the production of records, books, and documents for examination."⁴⁷ Furthermore, any party adversely affected by a NDIC order may file a petition for reconsideration and may appeal the decision to the district court.⁴⁸ Because no plaintiff invoked or exhausted the available administrative remedies, the defendants argued that the cases had to be dismissed for lack of jurisdiction.

Second, the producer-defendants argued that the plaintiffs did not have an express or implied private right of action for royalties under the Flaring Statute and, thus, failed to state a claim. Although there is an express private right of action under the Oil and Gas Act, the legislature chose to limit the right to an action solely seeking injunctive relief in situations where the NDIC has been specifically requested to enjoin a violation of the Act and has refused to do

⁴⁴ See N.D.C.C. § 38-08-04; see also N.D. Admin. Code § 43-02-03-05; *Continental Res., Inc. v. Farrar Oil Co.*, 559 N.W.2d 841, 845 (N.D. 1997) (the Act "equipped the [NDIC] with comprehensive powers to regulate oil and gas development"); *Amerada Hess Corp. v. Furlong Oil and Minerals Co.*, 348 N.W.2d 913, 916 (N.D. 1984) (the NDIC "has very broad, general jurisdiction and authority to regulate the production of oil and gas and the oil and gas industry in this State")

⁴⁵ See N.D. Admin. Code § 43-02-03-54.

⁴⁶ N.D.C.C. § 38-08-11(4).

⁴⁷ *Id.* at § 38-08-12(1).

⁴⁸ *Id.* at §§ 38-08-13, 28-32-40 (reconsideration); *Id.* at §§ 38-08-14(1), 28-32-42(1) (appeal).

so.⁴⁹ The defendants further argued that the omission of any claim for damages from the express private right of action was strong evidence that the legislature had no intent to create such a right.⁵⁰ Under North Dakota law, in the absence of an expressed private right of action for damages, the burden rests on a plaintiff to establish such a right, and "[t]his burden is a heavy one."⁵¹ The defendants argued that the comprehensive regulatory framework did not provide any basis for inferring the requisite legislative intent to create a private right of action, which would have been inconsistent with the available administrative remedies for the plaintiffs' claims.

Third, the producer-defendants argued that the ELEA did not provide the plaintiffs with the ability to go straight to court and circumvent the comprehensive regulatory framework of the Oil and Gas Act or its available administrative remedies. The defendants asserted several different arguments supporting this contention, including that the plaintiffs' claims sought solely monetary damages and not the sort of environmental enforcement contemplated by ELEA,⁵² that the more specific Oil and Gas Act governed, that the Oil and Gas Act provides the exclusive remedies for plaintiffs' claims,⁵³ and that allowing the plaintiffs to proceed directly to court under the ELEA would moot the administrative remedy provisions of the Oil and Gas Act.⁵⁴

Finally, the defendant producers argued that the plaintiffs' conversion and waste claims had to be dismissed on multiple grounds. Most of the defendants argued that, under North Dakota, law statutes preempt common law claims, and here the comprehensive statutory scheme

⁴⁹ See *id.* at § 38-08-17(2) .

⁵⁰ See *Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707, 713-14 (N.D. 2001) ; *DJ Coleman, Inc. v. Nufarm Ams., Inc.*, 693 F. Supp. 2d 1055, 1075 (D.N.D. 2010) .

⁵¹ See *Enderle v. Trautman*, Civil No. A3-01-22, 2001 U.S. Dist. LEXIS 20181, at * 6 (D.N.D. Dec. 3, 2001).

⁵² See N.D.C.C. § 32-40-01 *et seq.*

⁵³ See *Egeland v. Continental Res., Inc.*, 616 N.W.2d 861, 865 (N.D. 2000) ("The Commission's powers are continuous and are exclusive"); N.D.C.C. § 38-08-04(5) .

⁵⁴ See N.D.C.C. § 1-02-07.

of the Oil and Gas Act preempted the plaintiffs' common law waste and conversion claims. The defendants also pointed out that these common law claims were premised on alleged violations of the Flaring Statute and, thus, were also subject to dismissal for the plaintiffs' failure to exhaust their administrative remedies and their lack of a private right of action.

4. The court's dismissal order and subsequent appeal

On May 14, 2014, the United States District Court for the District of North Dakota granted the producers' motions to dismiss in all thirteen of the removed cases before it. As of the date of this paper, there was no ruling on the motion to dismiss filed in the lone remaining flaring class action case in state court.⁵⁵ While there necessarily is some variance in the federal court's orders based on the particular plaintiffs and wells involved in each case, the court employed the same legal analysis in all of the orders.

The court determined that the plaintiffs failed to exhaust their administrative remedies before the NDIC. The court examined the statutory and regulatory scheme and found that the NDIC has "very broad authority to regulate and administer oil and gas related activities in the State of North Dakota." This jurisdiction includes determining whether gas was flared in violation of the Oil and Gas Act and the Flaring Statute and, if so, determining the value and ordering the payment of royalties and taxes on the improperly flared gas. The court also found that a "clear and comprehensive administrative remedy is provided for any interested person who believes improper flaring is occurring." The court rejected plaintiffs' arguments that exhaustion was not required because the issue was a pure question of law, exhaustion would be futile, and the administrative remedy was inadequate because it did not provide for a class-wide claim.

⁵⁵ See *Sarah Vogel, et al. v. WPX Energy Williston, LLC*, Mountrail County, Case No. 31-2013-CV-00162.

Next, the court held that there was no express or implied private right of action for the plaintiffs to bring their claims directly in court. Instead, the language of the statutes and regulations authorize judicial review only after a party has exhausted its administrative remedies before the NDIC. The court further held that the existence of the clearly delineated administrative remedy coupled with the absence of any express private right of action was enough to conclude that there was no legislative intent implying a private right of action. Moreover, the court held that such a judicial remedy would be inconsistent with the comprehensive regulatory scheme and render the express administrative remedy moot.

With respect to the plaintiffs' creative attempt to invoke the ELEA, the court found that the plaintiffs did not seek damages resulting from an environmental harm; rather, they were attempting to invoke the ELEA to enforce the payment of royalties under the Flaring Statute. The court held that, while the ELEA may provide a cumulative remedy if the NDIC fails or refuses to act, the specific and comprehensive administrative remedies set out in the Oil and Gas Act must still be exhausted.

Finally, in North Dakota, it is well established that statutes trump common law. Relying on this premise and finding that the Flaring Statute "covers the entire field when it comes to flaring and is the controlling law on flared gas," the court held that the statutory framework preempted the common law conversion and waste claims and, therefore, dismissed them as well.

In June 2014, the plaintiffs in each of the thirteen dismissed federal court cases filed Notices of Appeal with the United States Court of Appeals for the Eighth Circuit. However, the plaintiffs dismissed their appeals in August 2014 before the appellate briefing commenced.

5. Consequences of the litigation and the NDIC proceedings

The federal court royalty class actions affirmed the role and the broad, primary jurisdiction and authority of the NDIC to regulate and address oil and gas issues under the Oil and Gas Act. Furthermore, the rulings suggest that the administrative remedies are the exclusive remedies under the Oil and Gas Act because the act supersedes or preempts common law claims. That said, the scope of this exclusive remedy is not so broad as to cover all oil and gas related activities, as most operators in the Bakken could attest based on their experience of being sued in courts in North Dakota. For example, North Dakota has a separate surface damage statute,⁵⁶ and lawsuits often arise following accidents that occur in the field.

After the federal district court dismissed the lawsuits but before the plaintiffs dismissed their appeals, the plaintiffs asked the NDIC in a May 23, 2014, letter to determine, upon its own motion and on a statewide basis, that the producers they named as defendants in their lawsuits flared gas in violation of North Dakota law. On June 3, 2014, the NDIC declined the plaintiffs' request to make such a statewide (*i.e.*, a quasi-class action) determination. According to the NDIC, the plaintiffs' request to conduct statewide proceedings was "beyond what they have standing to challenge." The NDIC reiterated the federal court's ruling that the plaintiffs have rights as mineral interest owners to petition the NDIC for relief concerning the wells in which they have an interest. Accordingly, the NDIC invited the plaintiffs to file petitions with the NDIC "on wells where they have standing."

The upshot of these proceedings is at least two-fold. First, aggrieved mineral interest owners have a defined administrative remedy if they believe they are entitled to royalties on the

⁵⁶ N.D.C.C. § 38-11.1-01 *et seq.*

value of gas flared from wells in which they have an interest. Second, royalty claims under the Flaring Statute presently cannot proceed on a class-wide basis in North Dakota.

As a side note, one issue that was not addressed in the federal lawsuits was the appropriateness of the class definition. In these cases, the facts, the applicable NDIC orders, and other circumstances varied from field to field and from well to well. Several of these facts, orders, and circumstances were alleged in the complaints as they related to the flaring from the particular wells in which the named plaintiffs had an interest. It appeared from the face of the complaints that there were several uncommon issues. The plaintiffs apparently attempted to address at least some of the uncommon issues by defining “Flared Gas” in a manner to exclude some of the uncommon issues, then incorporating Flared Gas into the class definition. In other cases, courts have found similar attempts to define away uncommon issues to be unavailing. Sometimes, as likely would have been the case here, they would have required a mini-trial to determine who was a member of the class. Nevertheless, the sufficiency of the class definition was not decided as the cases were dismissed prior to reaching this issue.

For several year before the lawsuits were commenced, the NDIC had held hearing and issued orders concerning the application of the Flaring Statute. In fact, some of the defendants’ most persuasive submissions beyond the statutory language were the multiple empirical examples of NDIC orders from other prior proceedings enforcing the Flaring Statute. While the lawsuits were pending, operators, including at least some of the defendants, filed or continued to file flaring exemption applications with the NDIC. The number of flaring applications increased in the 2014, but then fell to zero in November due in large part to the other flaring initiatives that were occurring on a parallel track during this same time.⁵⁷

⁵⁷ *ND flaring apps fall to zero in Nov.*, PETROLEUM NEWS BAKKEN, Nov. 23, 3014, at 1.

B. Public Pressure, Industry’s Response, and the State’s Flaring Reductions

1. Awareness builds and action becomes imminent

As mentioned above, the percentage of gas flared in North Dakota rose to 36% in September 2011.⁵⁸ This heightened gas flaring received broad media coverage, both locally and nationally. One of the most commonly publicized images was a picture from space showing the night sky in the oil fields of in western North Dakota lit up like a metropolis:



SOURCE: Source: Gas Flaring as Seen from Space, Ceres.org, <http://www.ceres.org/industry-initiatives/oil-and-gas/gas-flares-from-space>.

This image and others like it were often used to imply that the flares from the burning of the gas were so extensive as to rival the city lights of big cities. With respect to a similar image, the NASA website notes “[m]ost of the bright specks are lights associated with drilling equipment

⁵⁸ Helms, Jan. 14, 2015 Director’s Cut, *supra* note 27.

and temporary housing near drilling sites, though a few are evidence of gas flaring.”⁵⁹ Irrespective of this distinction, the volume of flaring in North Dakota was significant, and media coverage and photos like the one above captured the attention of several stakeholders before the lawsuits were commenced in the fall of 2013.

In North Dakota, the surface estate is often severed from the mineral estate, meaning that the owners of the land are often not the owners of the minerals.⁶⁰ Landowners, several of whom were not benefiting from the royalties on the oil production because they had no interest in the minerals, were not only reading more and more about the flaring issue, they were seeing it out their windows at night. Additionally, despite the fact that flaring gas is much more environmentally friendly than venting it, certain environmental groups began taking notice and getting involved. Elected representatives as well as regulators began contemplating action. It became apparent that something was going to happen.

Of course, the industry was not oblivious to the issue either. In fact, several production companies had already taken steps to try to reduce their own flaring percentages. Additionally, midstream companies were also taking notice. The market for their business seemed to be expanding, and the production was certainly outpacing the midstream infrastructure. The North Dakota Petroleum Council (NDPC), a group comprised of more than 550 companies involved in all aspects of the oil and gas industry, was also taking notice.

In September 2013, the members of the NDPC created a Flaring Task Force for the purpose of leading the industry’s efforts to reduce gas flaring in the Bakken.⁶¹ The NDPC

⁵⁹ *Gas Drilling, North Dakota,* NASA Earth Observatory, <http://earthobservatory.nasa.gov/NaturalHazards/view.php?id=79810>.

⁶⁰ *See Surface Owner Information Center, North Dakota Petroleum Council,* <http://www.northdakotaoilcan.com/NDenergyfacts/drilling/lease/SurfaceOwnerInfoCenter/>.

⁶¹ NDPC Flaring Task Force Proposal to NDIC (Jan. 29, 2014), *available at* http://www.ndoil.org/image/cache/ndpc_flaring_task_force_ndic_1-29-14_fnlv1.pdf.

Flaring Task Force included thirty-five industry experts and representatives from across the industry including both upstream and midstream companies.⁶² They met on several occasions in an effort to identify realistic and meaningful goals and action items to address the flaring issue, thereby serving the interests of all stakeholders.⁶³

2. Regulatory goals, causes of flaring, and industry recommendations

The NDIC identified three goals, with which the Task Force agreed,⁶⁴ namely: (1) reduce the volume of natural gas flared; (2) reduce the number of wells flaring; and (3) reduce the duration of flaring from wells.⁶⁵

The North Dakota Pipeline Authority estimated that more than one-third of the flared gas results from a lack of gathering pipelines.⁶⁶ There are several reasons for this. First, while there has been production in the area for several years, historically the production was a fraction of the current level, and thus there was not a significant pipeline infrastructure already in the field. Logically, the construction of the necessary infrastructure lagged behind the production, for midstream companies typically do not construct gathering lines until there is something to gather. Further, a number of other impediments were causing construction delays. One of the most significant impediments was securing rights-of-way from landowners. Other obstacles contributing to time delays include delays in zoning by counties and townships for midstream facilities, time required for obtaining necessary permits, a short construction season due to the weather conditions in North Dakota, and the limited number of available construction crews in

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *See* NDIC, Presentation of the Department of Mineral Resources review of North Dakota Petroleum Council Flaring Task Force Report and Consideration of Implementation Steps, March 3, 2014 (hereinafter Presentation of the DMR) , available at https://www.dmr.nd.gov/oilgas/presentations/NDIC030314_100.pdf.

⁶⁶ *North Dakota aims to reduce natural gas flaring*, U.S. Energy Information Administration, (Oct. 20, 2014) , available at <http://www.eia.gov/todayinenergy/detail.cfm?id=18451>.

the area.⁶⁷ Despite these challenges, industry had already invested over \$6 billion since 2006, adding over 9,500 miles of gas gathering pipelines and more than 1.2 BCFD gas processing capacity.⁶⁸

The majority of the remaining flared gas typically results from overburdening of the existing infrastructure. In 2013, over 57 percent of gas flared came from wells that were connected to a pipeline.⁶⁹ According to the NDPA, in July 2014, 25 percent of the associated gas was flared in North Dakota. Of that amount, 36 percent was flared due to a lack of pipelines, while 64 percent was flared from connected wells, indicating capacity challenges on existing pipeline capacity.⁷⁰ Even after wells are connected to gathering lines, those gathering systems often do not have the capacity or ability to take all of the produced gas.⁷¹ Various causes of this lack of capacity include the need for additional gathering-line pressure to offset higher pressure from newly drilled wells, additional gathering-pipeline capacity, and additional clearing of existing lines to remove natural gas liquid volumes.⁷² Some of the gathering systems in the area apparently underestimated the amount of gas that would be produced. According to the NDIC, most operators “are prudently attempting to connect their wells to a gas gathering system,” but due to the aforementioned constraints, much of the associated gas is not processed.⁷³

⁶⁷ NDPC Flaring Task Force Proposal to NDIC, *supra* note 61; *see also* Presentation of the DMR, *supra* note 65.

⁶⁸ NDPC Flaring Task Force Proposal to NDIC, *supra* note 61.

⁶⁹ *Flaring in Focus: A Close Look at Natural Gas Flaring in North Dakota*, Clean Air Task Force, June 2014, available at <http://www.catf.us/blogs/ahead/2014/06/26/flaring-in-focus-a-close-look-at-natural-gas-flaring-in-north-dakota/>.

⁷⁰ Justin J. Kringstad, *ND Oil & Gas Research Council Update*, North Dakota Pipeline Authority (Sept. 15, 2014), available at <https://ndpipelines.files.wordpress.com/2012/04/ndpa-september-15-2014-ogrc.pdf>.

⁷¹ NDIC Order 24665, *supra* note 6, at *3.

⁷² *North Dakota aims to reduce natural gas flaring*, U.S. Energy Information Administration, Oct. 20, 2014, available at <http://www.eia.gov/todayinenergy/detail.cfm?id=18451>.

⁷³ NDIC Order 24665, *supra* note 6, at *3.

Taking the NDIC's three goals and the other available information into account, the NDPC Flaring Task Force participants discussed a number of potential action items and benchmarks against which their progress could be measured. Ultimately, the Task Force came up with its recommendations in January 2014 and presented them to the NDIC.⁷⁴ Specifically, the Task Force proposed a series of gas capture goals, namely: 74% of the gas by fourth quarter 2014; 77% by first quarter 2015; 85% by first quarter 2016; and 90% by 2020 with potential for 95% capture.⁷⁵ To meet these targets, the NDPC Flaring Task Force made a number of recommended action items.

For example, the Task Force suggested implementing a "Gas Capture Plan" (GCP) requirement, which would force operators to consider and plan how the gas would be captured and report that plan to the NDIC. They suggested a staggered implementation of this requirement: June 1, 2014, as part of the process to obtain a permit for a new well, on September 1, 2014, for those existing wells that accounted for the majority of the current flaring (approximately half of which were already connected to a gathering line), and March 1, 2015, for all other wells flaring longer than 90 days.⁷⁶ The Task Force even proposed potential penalties for non-compliance, such as denial of a drilling permit and curtailing production.⁷⁷

In addition to the GCP, the NDPC Flaring Task Force recommended that midstream companies have regular meetings with the NDIC to discuss the status of operations and report information such as gathering systems gas capture and forecast, gathering and plant processing

⁷⁴ News Release: Industry to increase natural gas capture to 85 percent within two years and 90 percent in six years, North Dakota Petroleum Council (Jan. 29, 2014), available at <http://www.ndoil.org/latest-news/news-release-industry-to-increase-natural-gas-capture-to-85-percent-within-two-years-and-90-percent-in-six-years/>.

⁷⁵ NDPC Flaring Task Force Proposal to NDI, *supra* note 61.

⁷⁶ *Id.*

⁷⁷ *Id.*

capacity, future obligations and capture targets, and maintenance issues including downtime.⁷⁸ The Task Force also recommended establishing a “hotline” for reporting and addressing surface owner issues related to pipelines; establishing a right-of-way task force (including regulators, attorney general, counties, landowner groups, and industry) to consider “energy corridors” and legislation to improve access to reduce flaring; and creating incentives for build out of gas infrastructure and remote capture technologies.⁷⁹

In short, the NDPC Flaring Task Force made a number of recommendations involving the various stakeholders all of which were designed to meet the common goal of reducing flaring. The Task Force cautioned, however, that achieving the proposed gas capture goals would require “full engagement by the industry, state, counties, NDIC, tribe, and landowners to implement this plan.”⁸⁰

3. Regulatory restrictions and implementation

In March 2014, following consideration of the NDPC Flaring Task Force recommendations, the NDIC prepared its assessment of the proposal in light of its three goals to reduce the volume of flared gas, the number of wells flaring gas, and duration each of flaring from the wells.⁸¹ The NDIC announced six action items:

1. Require Gas Capture Plans for all future increased density, temporary spacing, and proper spacing cases
2. Require Gas Capture Plans for all application for permit to drill (APD) after June 1, 2014 [and a]dd requirement of affidavit that GCP has been provided to listed gathering companies in area
3. Meet semi-annually with gathering companies to gauge effect of Gas Capture Plans, production curtailments, contracts, and service interruptions

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ Presentation of the DMR, *supra* note 65.

4. Dedicate IT resources to develop a web based pipeline incident report form
5. Direct Pipeline Authority to track flaring on-off Fort Berthold and to track and report capture status vs goals
6. Docket for hearing a motion to review and revise all Bakken and Three Forks field rules governing production curtailment⁸²

Gas Capture Plans. With respect to the Gas Capture Plans (GCPs) , items 1 and 2 above, the NDIC essentially adopted a modified version of the recommendation. Among other things, the NDIC added the requirement that the GCP include an affidavit that the operator has provided the GCP to the gathering companies in the area, presumably to ensure that the upstream and midstream companies are communicating about their plans and objectives in an effort to facilitate achievement of the overall flaring reduction goals. The NDIC recognized that requiring the GCP as part of the application for a permit to drill (APD) would affect nearly 9,000 wells already approved for increased density drilling.⁸³ The NDIC began requiring GCPs effective June 25, 2014.⁸⁴

The NDIC initially set forth the required content of the GCPs in May 2014 and subsequently modified them in September 2014.⁸⁵ Specifically, a GCP must be submitted as an exhibit at all hearings in which an applicant intends to drill additional wells in the “Bakken-Three Forks Petroleum System” and must include the following information:

1. A statement made by a company representative indicating:
 - a. The name of the gas gatherer(s) the company met with,
 - b. That the company supplied the gas gatherer(s) with the following information:
 - i. Anticipated completion date of well(s) ,
 - ii. Anticipated production rates of well(s)

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Jacus & Waeckerlin, *supra* note 4, at 7-27 to 7-28.

⁸⁵ NDIC May 15, 2014, letter to hearing applicants re: Gas Capture Plan Required Hearing Exhibit; NDIC Sept. 16, 2014, revised letter to hearing applicants re: Gas Capture Plan Required Hearing Exhibit.

2. A detailed gas gathering pipeline system location map which depicts the following information:
 - a. Name and location of the destination processing plant,
 - b. Name of gas gatherer and location of lines for each gas gatherer in the map vicinity,
 - c. The existing gas line proposed to connect the subject well.
3. Information on the existing line, to which operator proposes to connect to, including:
 - a. Maximum current daily capacity of the existing gas line,
 - b. Current throughput of the existing gas line,
 - c. Gas gatherer issues or expansion plans for the area (if known) .
4. A detailed flowback strategy including:
 - a. Anticipated date of first production,
 - b. Anticipated oil and gas rates and duration. If well is on a multi-well pad, include total for all wells being completed.
5. Amount of gas applicant is currently flaring:
 - a. Statewide percentage of gas flared (total gas flared/total gas produced) for existing wells producing from the Bakken petroleum system. Note the Commission's approved gas capture goals are to reduce flaring to 26% by October 1, 2014; 23% by January 1, 2015; 15% by January 1, 2016; and 10% by October 1, 2020.
 - b. Fieldwide percentage of gas flared.
6. Alternatives to flaring:
 - a. Explain specific alternate systems available for consideration,
 - b. Detail expected flaring reductions if such plans are implemented.⁸⁶

Production Limitations and Gas Capture Targets. With respect to the hearing to review and revise all Bakken and Three Forks field rules governing production curtailment—item 6 from the NDIC's March 2014 action items—the NDIC scheduled a hearing on April 22, 2014. The NDIC issued a press release about the hearing and inviting comments from stakeholders.⁸⁷ The NDIC received both written comments in advance of and oral comments during the hearing from virtually all stakeholders.⁸⁸

⁸⁶ NDIC Sept. 16, 2014, revised letter to hearing applicants re: Gas Capture Plan Required Hearing Exhibit.

⁸⁷ News Release: Hearing Set on Gas Flaring Policy, North Dakota Industrial Commission, Oil & Gas Division (Apr. 1, 2014), available at <https://www.dmr.nd.gov/oilgas/pressreleases/PressRelease04012014.pdf>.

⁸⁸ See NDIC Order No. 24665, supra note 6, at *2-3.

Following the hearing, the NDIC issued Order No. 24665 on July 1, 2014. Among other things, the order essentially adopted the NDPC Flaring Task Force's proposed gas capture goals, determining that the restrictions imposed by the order would strive to meet the following targets:

- By October 1, 2014, capture 74% of the gas (flaring up to 26%)
- By January 1, 2015, capture 77% of the gas (flaring up to 23%)
- By January 1, 2016, capture 85% of the gas (flaring up to 15%)
- By October 1, 2020, capture 90% of the gas with the potential capture of 95% (flaring between 5-10% of the gas)⁸⁹

While the order allowed existing field rules and production allowance to remain in effect for a few more months, after September 30, 2014, the NDIC would evaluate that gas capture from all existing wells and all existing and future wells would be subject to the production allowances set forth in the order.⁹⁰

In terms of the production allowances, the order provides that all infill horizontal wells, including overlapping spacing units, are allowed to produce at a maximum efficient rate for a period of 90 days beginning on the first day oil is produced through the well-head equipment.⁹¹ After that 90-day period, such wells are allowed to continue to produce at a maximum efficient rate if the well or operator meets or exceeds the NDIC's gas capture goals.⁹² The gas capture percentage is calculated by "summing monthly gas sold plus monthly gas used on the lease plus monthly gas processed in a [NDIC] approved beneficial manner, divided by the total monthly

⁸⁹ *Id.* at *4-5.

⁹⁰ *Id.* at *5.

⁹¹ *Id.*

⁹² *Id.*

volume of associated gas produced by the operator.”⁹³ When making its monthly volume calculation, the operator may remove the initial 14 days of flowback from the calculation.⁹⁴

The NDIC recognizes the following means of using surplus gas as use in an approved beneficial manner: (1) wells equipped with an electrical generator that consumes surplus gas; (2) wells equipped with a system that takes in the surplus gas and natural gas liquids by means of compression to liquid for use as fuel, transport to a processing facility, production of petrochemicals or fertilizer, conversion to liquid fuels, separating and collecting the propane and heavier hydrocarbons; and (3) wells equipped with other value-added processes as approved by the Director that reduce the flare volume or intensity by more than 60 percent.⁹⁵

In addition, the order delineates certain exceptions to the production allowances. All wells completed in the Bakken that have received an exemption under N.D.C.C. Section 38-08-06.4 are allowed to produce at a maximum efficient rate.⁹⁶ Additionally, the first horizontal well completed in a Bakken pool non-overlapping spacing unit is allowed to produce at a maximum efficient rate.⁹⁷

When determining an operator’s compliance with the gas capture goals, the NDIC will accept compliance by well, field, county, or statewide.⁹⁸ However, failure to meet the gas capture goals will result in curtailment. If an operator does not attain the required gas capture percentage while the well is operating at maximum efficient rate, but at least 60 percent of the monthly volume of associated gas produced from the well is captured, production will be restricted to 200

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

barrels of oil per day; otherwise, oil production from the wells must not exceed 100 barrels of oil per day.⁹⁹

C. Flaring Targets Are Being Met, But Several Challenges Remain

While it may not work in every situation, the experience in North Dakota serves as a good template for the all stakeholders to keep in mind. In the midst of lawsuits and regulatory and political pressures, industry participants (despite being fierce competitors) came together to consider meaningful, yet obtainable goals. The regulators listened to all stakeholders and provided a forum for them to provide meaningful input in the process. The result of the process likely is not perfect from any individual stakeholder's perspective, but it embodies meaningful progress towards a common goal.

Moreover, the new restrictions are working. In general, operators seem to be complying with the submissions of the GCP, which is requiring them to plan for ways to capture the gas and communicate those plans with gathering companies. The industry has also exceeded the first gas capture benchmark. The percentage of flaring statewide was reduced from 30 percent in January 2014¹⁰⁰ to 26 percent in July 2014.¹⁰¹ The percentage of gas flared was 25 percent in October 2014, which exceeded the NDIC's initial benchmark of 74 percent gas capture.¹⁰² In October 2014, 60 of the 68 companies drilling in North Dakota were flaring below the new threshold.¹⁰³

While the industry as a whole has met the NDIC's gas capture goals, there have been instances of curtailment for particular operators. The new flaring rules do not change the

⁹⁹*Id.*

¹⁰⁰ Helms, Jan. 14, 2015 Director's Cut, *supra* note 27.

¹⁰¹ Historical monthly gas production and sales statistics, North Dakota Department of Mineral Resources, <https://www.dmr.nd.gov/oilgas/stats/Gas1990ToPresent.xls> (last visited Jan. 25, 2015).

¹⁰² Nick Smith, *Industry meets first benchmark in flaring requirements*, THE BISMARCK TRIBUNE, Dec. 12, 2014; James MacPherson, *supra* note 13.

¹⁰³ MacPherson, *supra* note 13.

requirements for an exemption as provided in the statute, and certain commentators have suggested that the NDIC rather routinely granted such exemption applications in the past.¹⁰⁴ The NDIC just recently considered and granted a temporary exemption from the new rules to Zavanna LLC, which, as part of a joint venture with Flatirons Field Services, is completing work on a natural gas processing plant and gas-gathering system.¹⁰⁵ Although the NDIC granted the exemption based on the particular circumstances concerning delays in the operations of the processing plant, the NDIC has cautioned that it will “need to be very careful about making exceptions to [the NDIC’s] new rules.”¹⁰⁶

While the industry is generally meeting and exceeding the gas capture goals, thereby reducing flaring, it is early in the process. All stakeholders would likely readily admit that obtaining the ultimate goal of 5 to 10 percent flared gas, 90 to 95 percent gas capture in 2020 is going to take a lot more work. And, there undoubtedly will be several challenges along the way.

1. Flaring on the Fort Berthold Reservation

At the time the NDPC Flaring Task Force made its recommendations in January 2014, the most recent available statistics showed that approximately 29 percent of all the produced associated gas was flared. Tellingly, however, the flaring rate on the Fort Berthold Reservation was approximately 40 percent.¹⁰⁷ In addition to the NDPC Flaring Task Force, various stakeholders formed another task force to address the particular circumstances involved with flaring associated gas on the Reservation. Following several meetings, the Three Affiliated

¹⁰⁴ Maxine Herr, *With a spotlight on flaring, operators request more exemptions*, PETROLEUM NEWS BAKKEN, Dec. 15, 2013; Josh Wood, *North Dakota governor warns on gas flaring*, ASSOCIATED PRESS, May 21, 2014.

¹⁰⁵ Nick Smith, *Temporary flaring exemption granted*, THE BISMARCK TRIBUNE, Jan. 9, 2014, available at http://bismarcktribune.com/bakken/temporary-flaring-exemption-granted/article_8f485073-682a-55e5-951c-4b32ac0b63c2.html.

¹⁰⁶ *Id.*

¹⁰⁷ NDPC Flaring Task Force Proposal to NDIC, *supra* note 61.

Tribes (“TAT”) Flaring Task Force issued its report and recommendations in February 2014.¹⁰⁸ The TAT Flaring Task Force reported that, from 2010-2012, 45-46 percent of all the associated gas produced on the Reservation was flared, and from January through November, 2013 that percentage rose to almost 48 percent.¹⁰⁹

Both flaring task forces noted several unique challenges to the flaring issue on the Reservation, including additional difficulty in obtaining rights-of-way, obtaining consent from landowners and the tribe for gathering line infrastructure, the need to have approvals from up to three federal agencies (the BLM, the BIA, and the USFWS), certain tribal policies (lengthy ROW application, and long setback requirements for all pipelines and compressors), and the unique topography of the land, including Lake Sakakawea.¹¹⁰ Furthermore, the TAT Flaring Task Force reported that 44% of the 48% flared gas for the first eleven months of 2013 was due to limited takeaway capacity.¹¹¹ The TAT Flaring Task Force made several recommendations to address these factors, including attempting to shorten the time to obtain ROW approval to 60-days.¹¹²

The task forces’ reference to the federal agencies highlights another complicating factor—competing governing bodies, namely, the federal agencies, state agencies, and the tribal agencies. For example, In May 2013, the Three Affiliated Tribes adopted Resolution No. 13-070-VJB, entitled “Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and

¹⁰⁸ Three Affiliated Tribes Flaring Task Force Report and Recommendations, Three Affiliated Tribes Flaring Task Force (Feb. 20, 2014).

¹⁰⁹ *Id.*; see also *Flaring in Focus: A Close Look at Natural Gas Flaring in North Dakota*, Clean Air Task Force, June 2014, available at <http://www.catf.us/blogs/ahead/2014/06/26/flaring-in-focus-a-close-look-at-natural-gas-flaring-in-north-dakota/> (estimating 2013 flaring on the Reservation to be 46 percent).

¹¹⁰ NDPC Flaring Task Force Proposal to NDIC, *supra* note 61; Three Affiliated Tribes Flaring Task Force Report and Recommendations, *supra* note 108.

¹¹¹ *Id.*

¹¹² *Id.*

Other Purposes.”¹¹³ This resolution purports to pass regulations similar to those in the Flaring Statute under the Oil and Gas Act administered and enforced by the NDIC; however, the resolution purports to empower the MHA Energy Department with the authority to enforce these tribal regulations against operators.¹¹⁴ The stated rationale for the adoption of the resolution and the decision of the MHA Nation¹¹⁵ to regulate the flaring of associated gas was its finding that the BLM had failed to adequately enforce NTL-4a “Notice to Lessees and Operators of Onshore federal and Indian Oil and Gas Leases: Royalty of Compensation for Oil and Gas Lost.”¹¹⁶

To complicate matters further, in February 2014, a class of enrolled and non-enrolled members of the Three Affiliated Tribes initiated a putative class action lawsuit in the Three Affiliated Tribes District Court of the Fort Berthold Indian Reservation against several production companies seeking royalties on the value of all past and future gas flared on the Reservation.¹¹⁷ The plaintiffs allege that the defendants have failed to comply with the MHA Nation resolution prohibiting flaring and have failed to follow either Tribal or North Dakota law (*i.e.*, the Flaring Statute) in capturing or marketing the gas or in paying royalties on flared gas. Thus, the plaintiffs seek to recover the royalties they allege are due on past, present, and future flared gas. Certain defendants have filed their own complaints in the United States District Court for the District of North Dakota challenging the tribal court’s jurisdiction and seeking a

¹¹³ Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes, Resolution of the Governing Body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, Resolution No. 13-070-VJB (May 9, 2013) .

¹¹⁴ *Id.*

¹¹⁵ The MHA Nation includes the three affiliated tribes, namely the Mandan, the Hidatsa and the Arikara.

¹¹⁶ Regulation of Flaring of Gas, Imposition of Tax, Payment of Royalties and Other Purposes, *supra* note 113.

¹¹⁷ *Burr, et al. v. XTO Energy, Inc., et al.*, Case No. CV-2014-0048.

declaratory judgment and injunctive relief.¹¹⁸ At the time of publication, the tribal royalty litigation had yet to be resolved.

Surprisingly, however, despite all of these unique obstacles and ongoing litigation, the industry has been able to significantly reduce the percentage of gas flared on the Reservation. The NDIC reported in January 2015 that the gas capture percentage on the Reservation was 74 percent, which was only one-percentage point lower than the gas captured off the Reservation.¹¹⁹ Whether the gas capture will be able to remain at this level or keep up with the increasing NDIC goals in coming years is yet to be seen.

2. Falling oil prices

The all-time high price for oil in North Dakota was \$136.29/barrel in July 2008. As of October 2014, the price was approximately half that high mark at \$68.94/barrel. The price dropped to \$40.74/barrel in December 2014 and fell further to \$29.25 as of January 14, 2015.¹²⁰ The fall in oil prices is sure to have an impact on the entire industry, not just in North Dakota. With respect to the flaring targets in North Dakota, it does not appear that the NDIC considered the drop in price when it established the regulatory gas capture goals. Nevertheless, the ability of the industry to achieve the gas capture goals is premised in part on continued investment and build out of the gathering systems and processing plants in North Dakota.

As mentioned above, the industry has already invested approximately \$6 billion in pipeline infrastructure since 2006.¹²¹ Midstream companies are already investing in additional pipelines to address existing capacity constraints that have developed alongside the rapid growth

¹¹⁸ See, e.g., *EOG Resources v. Johnson, et al.*, No. 4:14-cv-00087-DLH-CSM (D.N.D.).

¹¹⁹ Helms, Jan. 14, 2015 Director's Cut, *supra* note 27.

¹²⁰ Helms, Jan. 14, 2015 Director's Cut, *supra* note 27.

¹²¹ Jacus & Waeckerlin, *supra* note 4, at 7-26.

in production.¹²² The midstream segment has also been investing in the construction and operation of gas processing plants to capitalize on the value of extractable natural gas liquids produced from the Bakken.¹²³ There are also a number of other planned projects in the works for 2015 and 2016. For example, in 2014 ONEOK announced it has plan for two new gas processing facilities in North Dakota—the Demicks Lake Plant in McKenzie County and the Bear Creek plant in Dunn County.¹²⁴ In July 2014, ONEOK Partners announced in that between then and the end of the third quarter of 2016, it plans to invest between \$480 to \$680 million in North Dakota’s and Wyoming’s natural gas gathering, processing, and transportation infrastructure.¹²⁵

What effect the recently falling oil prices will have on this planned investment is not yet known. Already, however, there has been a decline in the drilling activity in the Bakken. In October 2014, the rig count in North Dakota was 191, and by mid-January 2015 it had dropped to 156.¹²⁶ If the drilling activity continues to slow, and the production declines for a sustained period of time, that may affect further investment to expand the gathering pipeline infrastructure and, thus, the ability to achieve the gas capture goals. Of course, if production slows, the amount of associated gas available for or needing to be captured would also decline, thereby requiring less additional infrastructure to attain the NDIC’s gas capture goals.

Working against the market or economic incentive to delay drilling and production expenses at a time when oil prices are low are the tax incentives in North Dakota that are

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Tie Shank, *ONEOK – A Year in Review*, THE ROUNDUP, Jan. 21, 2015, available at <http://www.roundupweb.com/story/2015/01/21/energy/oneok-a-year-in-review/5887.html>.

¹²⁵ *Oneok to add gas processing, transportation in North Dakota, Wyoming*, OIL & GAS JOURNAL, Sept. 22, 2014, available at <http://www.ogj.com/articles/2014/09/oneok-to-add-gas-processing-transportation-in-north-dakota-wyoming.html>.

¹²⁶ Helms, Jan. 14, 2015 Director’s Cut, *supra* note 27.

triggered when oil prices fall. Specifically, producers are taxed 5 percent on oil production,¹²⁷ plus an additional 6.5 percent oil extraction tax.¹²⁸ If the West Texas Intermediate (WTI) posted price falls below an average of \$57.50 for one month,¹²⁹ then the 6.5 percent tax is reduced to 2 percent on the first 75,000 barrels of production or for 18 months, whichever occurs first, for any well drilled after the reduction becomes effective.¹³⁰ If the WTI posted price falls below \$55.09 for five consecutive months, then there is a full exemption from the 6.5 percent oil extraction tax for all wells for the first 24 months of production.¹³¹ The lower taxes may incentivize additional drilling and production despite the low oil prices. The first incentive was triggered for the when the average WTI posted price in December 2014 was below the threshold.¹³² The preliminary rig count numbers would suggest there has not been an immediate impact of increased drilling activity, but it is likely too early to tell.

3. Political and other challenges

In addition to the tribal and economic challenges, political ones exist as well. North Dakota lawmakers have introduced several bills this session that could affect the state's efforts to reduce flaring.

¹²⁷ N.D.C.C. § 57-51-02.

¹²⁸ *Id.* at § 57-51.1-02.

¹²⁹ *Id.* at § 57-51.1-03; Emily Aasand, *ND Tax Commissioner Talks Bakken Oil Price Tax Triggers*, THE BAKKEN MAGAZINE, Jan. 14, 2015, available at <http://www.thebakken.com/articles/964/nd-tax-commissioner-talks-bakken-oil-price-tax-triggers>. N.D.C.C. § 57-51.1-01(2) defines the "average price" for a barrel of crude oil.

¹³⁰ *Id.* at § 57-51.1-03.

¹³¹ Aasand, *supra* note 128. N.D.C.C. § 57-51.1-01(12) defines the "trigger price," and allows indexing for inflation by the tax commissioner. The trigger price for the calendar year January 1, 2015, through December 21, 2015, is \$52.59. Office of State Tax Commissioner, Annual Oil Trigger Price Adjustment for Calendar Year 2015 (Dec. 18, 2014), available at <http://www.nd.gov/tax/oilgas/pubs/trigger.pdf>.

¹³² Aasand, *supra* note 128.

North Dakota lawmakers introduced a bill, HB 1187, that could void the gas-capture goals the NDIC adopted in July 2014.¹³³ The law would void “rules of general applicability” relating to matters within the NDIC’s authority that were put in place after June 30, 2014, without going through the administrative rules process.¹³⁴ However, the proposed law has an effective date of January 1, 2016, which would give the Commission time to subject the gas-capture order to the administrative rules process before it could become void.¹³⁵ A fiscal note prepared by the Legislative Council estimated that stopping progress on the gas-capture goals could cost the state \$19 million in lost revenue, assuming the current flaring rate of 24 percent holds steady.¹³⁶ Lynn Helms, Director of the North Dakota Department of Mineral Resources, disputes the characterization of the gas-capture order as a “rule of general applicability” given that it, along with another order that risks being voided by the bill, affect only 426 of the state’s 2,819 oil field-pool combinations, each with its own set of field rules.¹³⁷

Additionally, on January 19, 2015, a bill was introduced in the Senate that would amend and reenact N.D.C.C. § 38-08-16.¹³⁸ The bill mandates that civil penalties for violating rules or orders concerning the conservation of oil and gas would be no less than the cost of enforcement and remedying the violation.¹³⁹ The commission would be permitted to reduce or repeal the fine

¹³³ Mike Nowatzki, *Helms says tax revenue at risk if flaring, oil conditioning orders voided*, THE DICKINSON PRESS (Jan. 19, 2015), available at <http://www.thedickinsonpress.com/energy/oil/3659409-helms-says-tax-revenue-risk-if-flaring-oil-conditioning-orders-voided>; see H.B. 1187, 64th Leg. (N.D. 2015).

¹³⁴ See H.B. 1187, 64th Leg. (N.D. 2015).

¹³⁵ Nowatzki, *supra* note 133; see H.B. 1187, 64th Leg. (N.D. 2015).

¹³⁶ Nowatzki, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ S.B. 2251, 64th Leg. (N.D. 2015).

¹³⁹ *Id.*

only after the full amount of the fine has been paid and the violation is found to have been beyond the control of the violator.¹⁴⁰

The same day, another bill was introduced in the Senate that would amend N.D.C.C. § 38-08-06.4 to reduce the initial period of flaring allowed after first production to 90 days.¹⁴¹ It also prohibits exemptions unless the volumes of flared gas are less than or equal to 50,000 cubic feet per day.¹⁴²

Although these bills may not pass, stakeholders should pay attention to them and the impact, if any, they will have on the NDIC's gas capture goals and required operations.

III. Other state and federal legislation

This section is certainly not an exhaustive review of the potentially applicable law; instead, it is designed to provide a very basic introduction to some of the main pieces of legislation pertaining to the flaring of gas in each of the following jurisdictions.

A. Federal flaring laws and regulations

Methane emissions from oil and gas wells on federal lands and waters increased by 135 percent between 2008 and 2013.¹⁴³ About 5 mmcf of natural gas was flared without permits on federal land in 2013.¹⁴⁴ The greenhouse gas emissions from federal lands are the equivalent of to the annual greenhouse gas emissions emitted by 283,000,000 passenger vehicles.¹⁴⁵ The EPA

¹⁴⁰ *Id.*

¹⁴¹ S.B. 2287, 64th Leg. (N.D. 2015).

¹⁴² *Id.*

¹⁴³ Jennifer A. Dlouhy, *Methane pollution from federal lands rising, oil boom to blame*, FUELFIX, Oct. 6, 2014, available at <http://fuelfix.com/blog/2014/10/06/report-methane-emissions-from-federal-lands-climb-as-gas-goes-up-in-smoke/>.

¹⁴⁴ *Id.*

¹⁴⁵ Heidi Ries & Caroline Wagner, *Greenhouse Gas Emissions from Fossil Fuel Energy Extracted from Federal Lands and Waters: An Update*, Stratus Consulting, Sept. 17, 2014, available at http://cdn.americanprogress.org/wp-content/uploads/2014/10/WildernessSociety_GHGEmissions_September17Revisions.pdf.

recently updated its standards for emissions, and the Obama Administration is focusing on this issue as well.

1. Royalties

Pursuant to the Mineral Leasing Act of 1920, the Bureau of Land Management (BLM) is charged with protecting federal mineral interests from waste. The Secretary of the BLM possesses the exclusive authority to regulate oil and gas operations, including the flaring of gas, on tribal lands. The Secretary has, in turn, enacted regulations to manage oil and gas operations, including the payment of royalties.¹⁴⁶

Lessees or operators on federal leases are permitted to vent or flare gas without paying royalties in temporary emergency situations, during well purging and evaluation tests, and initial well production tests, not exceeding 30 days or the production of 50 mmcf, whichever occurs first.¹⁴⁷ However, no royalty obligation accrues for gas that is vented or flared from an oil well with prior BLM approval.¹⁴⁸ Pursuant to the BLM's Notice to Lessees 4A, which addresses royalty compensation for oil and gas loss, royalty obligations do not accrue as to gas that (1) is used on the same lease, communitized tract, or unitized participating area for "beneficial purposes"; (2) is vented or flared with the Areas Oil and Gas Supervisor's prior authorization or approval during drilling, completion, or production operations; (3) is vented or flared pursuant to the rules, regulations, or orders of the appropriate State regulatory agency when those rules, regulations, or orders have been ratified or accepted by the Supervisor; or (4) the Supervisor

¹⁴⁶ See 25 C.F.R. Part 212 (Leasing of Allotted Lands for Mineral Development); see also 30 U.S.C. § 1701 (Federal Oil and Gas Royalty Management Act); 43 C.F.R. Part 3160 (BLM regulations governing oil and gas operations on Indian lands); Notice to Lessees and Operators of Onshore Federal and Indian Oil & Gas Leases (NTL-4A), U.S. Dept. of the Interior Geological Survey, Conservation Division (hereinafter Notice to Lessees 4A) (setting forth procedures for flaring of natural gas in connection with oil and gas leases under the jurisdiction of the Geological Survey).

¹⁴⁷ Notice to Lessees 4A, *supra* note 146.

¹⁴⁸ *Id.*

determines to have been otherwise unavoidably lost.¹⁴⁹ However, when produced gas (1) is vented or flared during drilling, completion, or production operations without prior authorization, approval, ratification, or acceptance of the Supervisor, or (2) is otherwise avoidably lost, the royalty compensation due to the United States or the Indian lessor is computed on the basis of the full value of the wasted gas or the portion attributable to the lease.¹⁵⁰

The terms “avoidably lost” and “unavoidably lost” are used throughout Notice to Lessees 4A. Produced gas that is unavoidably lost is that which is vented or flared without the Supervisor’s prior authorization, approval, ratification, or acceptance and the loss of produced oil or gas when the Supervisor determines that the loss occurred as a result of: (1) the lessee’s or operator’s negligence; (2) the lessee or operator’s failure to take all reasonable measures to prevent or control the loss; (3) the lessee or operator’s failure to fully comply with the lease terms and regulations, the approved operating plan’s provisions, or the Supervisor’s prior written orders; or (4) any combination of the foregoing factors.¹⁵¹

On the other hand, production that is “unavoidably lost” includes (1) gas vapors that are released from storage tanks or other low-pressure production vessels unless the Supervisor determines that the recovery of those vapors would be warranted; (2) oil or gas that is lost because of line failures, equipment malfunctions, blowouts, fires, or otherwise except where the Supervisor determines that the loss resulted from the lessee or operator’s negligence or failure to take all reasonable measures to prevent or control the loss; and (3) under where the lessee or operator is authorized to vent or flare gas by the Notice.¹⁵²

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

Under the Notice, lessees or operators are authorized to vent or flare gas on a short-term basis without incurring a royalty obligation under four circumstances: (1) during temporary emergency situations limited to 24 hours per incident and 144 cumulative hours for the lease during any calendar month, except where the lessee or operator has the Supervisor’s prior authorization, approval, ratification, or acceptance; (2) during well purging and evaluations tests not exceeding a 24-hour period; (3) during initial well evaluation tests, not exceeding a period of 30 days or the production of 50 MMcf, whichever occurs first, unless the appropriate state regulatory agency has approved a longer test period and the Supervisor has accepted or ratified the agency’s decision; and (4) during routine or special well tests with the Supervisor’s approval.¹⁵³

The Notice to Lessees 4A also requires that operators of oil wells submit a report economically justifying continued flaring or venting or provide an action plan that would eliminate venting or flaring within one year.¹⁵⁴

2. Limits on flaring

Until recently, fracking was exempt from several significant federal environmental laws, including the Clean Air Act. In 2012, the EPA updated its New Source Performance Standards (NSPS) to reduce emissions from the oil and natural gas industry.¹⁵⁵ What is colloquially known as “NSPS Quad O” contains reporting requirements for methane but does not contain emissions controls. The EPA claims, however, that its new VOC control measures will result in “substantial methane reductions as a co-benefit.”

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 40 CFR Part 60, Subpart OOOO, “Emission Standards”—known as “NSPS Quad O.”

EPA recently approved new rules requiring operators to perform green completions, which, in part, immediately prohibit venting of natural gas and require development of technologies to capture fugitive emissions. The “green completions” standard will require capping of wellheads to capture gas during completion.¹⁵⁶ The EPA's recent amendment of these proposed rules allows a two-year transition period during which “producers will have the option until 2015 of either using green completion technology or flaring gas.”¹⁵⁷ But beginning January 1, 2015, flaring will no longer be an option.¹⁵⁸

The Obama Administration too has discussed the need to improve federal permitting for infrastructure to reduce operators resorting to venting and flaring of natural gas. In June 2013, the White House issued the President’s Climate Action Plan, which was designed to cut carbon pollution and reduce the impact of climate change.¹⁵⁹ Among other initiatives, the Plan seeks to reduce all greenhouse gases by 17 percent from 2005 levels and promotes switching from coal or oil to natural gas.¹⁶⁰ On the topic of flaring, the Plan “notes that investments to build and upgrade gas pipelines are critical to reducing venting and flaring.”¹⁶¹ The Plan also created the Bakken Federal Executive Group, an interagency group given the task of finding ways to address some obstacles facing infrastructure development in the Bakken.¹⁶²

Then, in March 2014, the White House released its Strategy for Reducing Methane Emissions, which builds on the Climate Action Plan and, among other things, addresses how

¹⁵⁶ *Final Updates and Clarifications for Requirements for Well Completions, Storage Tanks and Natural Gas Processing Plants*, EPA, available at <http://www.epa.gov/airquality/oilandgas/pdfs/20141219fs.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Executive Office of the President, *The President’s Climate Action Plan* (June 2013), available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

methane emissions can be reduced in four key sectors: landfills, coal mines, agriculture, and oil and gas.¹⁶³ On January 14, 2015, the Obama administration announced its goal to cut methane emissions from the oil and gas sector by 40 to 45 percent from 2012 levels by 2025.¹⁶⁴ Among the variety of actions the administration announced designed to reduce methane emissions was an update by the Department of the Interior of outdated venting and flaring standards applicable to public lands.¹⁶⁵ The administration also suggested a strong willingness to work with oil and gas companies, both individually and as part of broader initiatives, to reduce methane emissions.¹⁶⁶ The administration's plan notes that methane emissions in the U.S. have decreased by 8 percent since 1990, in part through partnerships with industry.¹⁶⁷ As a result, the Plan tasks the EPA and other agencies with developing an interagency methane strategy.¹⁶⁸

B. State flaring laws and regulations

1. Alaska

Alaska prohibits the waste of oil and gas,¹⁶⁹ which is defined by its “ordinary meaning” as well as “physical waste,” which includes “the release, burning, or escape into the open air of gas, from a well producing oil or gas,” unless authorized by the commission.¹⁷⁰ Gas “released, burned, or permitted to escape into the air constitutes waste” except when: (1) flaring or venting

¹⁶³ Executive Office of the President, *Climate Action Plan: Strategy to Reduce Methane Emissions* (March 2014), available at http://www.whitehouse.gov/sites/default/files/strategy_to_reduce_methane_emissions_2014-03-28_final.pdf.

¹⁶⁴ John Podesta, *New Actions to Reduce Methane Emissions Will Curb Climate Change, Cut Down on Wasted Energy*, The White House Blog, Jan. 14, 2015, available at <http://www.whitehouse.gov/blog/2015/01/14/new-actions-reduce-methane-emissions-will-curb-climate-change-cut-down-wasted-energy>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *The President's Climate Action Plan*, *supra* note 159.

¹⁶⁸ *Id.*

¹⁶⁹ Alaska Stat. § 31.05.095.

¹⁷⁰ *Id.* at § 31.05.170(15) (H).

of gas for a period not exceeding one hour as the result of an emergency or operational upset is authorized for safety; (2) flaring or venting for a period not exceeding one hour as the result of a planned lease operation is authorized for safety; (3) flaring pilot or purge gas to test or fuel the safety flare system is authorized for safety; (4) de minimis venting of gas incidental to normal field operations is authorized; (5) within 90 days of the receipt of the a flaring incident report, the commission can authorize the venting or flaring of gas for a period exceeding one hour under certain circumstances; or (6) authorized by the commission upon application for purposes of testing a well before regular production.¹⁷¹

Every month, operators are further required to report their gas disposition and acquisition on a “Facility Report of Produced Gas Disposition” form. Operators must report their gas acquisition or disposition by category, including gas flared or vented.¹⁷² Any release, burning, or escape of gas—other than de minimis venting—must be reported as gas vented or flared on the Facility Report of Produced Gas Disposition form.¹⁷³

Additionally, operators are required to report all flaring events in excess of one hour and submit a written supplement describing why the gas was flared or vented, the beginning and ending time of the flaring or venting, the volume of gas flared or vented, and the actions taken to comply with “good oil field engineering practices and conservation purposes to minimize the volume of gas . . . burned.”¹⁷⁴

¹⁷¹ Alaska Admin. Code tit. 20 § 25.235(d).

¹⁷² *Id.* at 20 § 25.235(a).

¹⁷³ *Id.* at 20 § 25.235(b).

¹⁷⁴ *Id.* at 20 § 25.235(c).

2. Arkansas

Arkansas permits operators to vent or flare gas within seven days of when gas is first encountered in a well.¹⁷⁵ After that time, gas may not be vented or flared unless the operator obtains an exception from the Arkansas Oil and Gas Commission.¹⁷⁶

3. Colorado

Pursuant to the rules of the Colorado Oil and Gas Conservation Commission (COGCC), the excessive venting or flaring of natural gas produced from a well is prohibited.¹⁷⁷ With the exception of certain specified circumstances—including emergency circumstances—gas from a well may be vented or flared only after notice has been given to and approval has been obtained from the Director of the COGCC.¹⁷⁸ Moreover, flaring may be required if necessary to protect public health, safety, and welfare.¹⁷⁹ Prior to flaring, operators must provide notice to local emergency dispatch or to another local governmental designee.¹⁸⁰

On February 3, 2014, Colorado’s Air Quality Control Commission (AQCC) adopted the nation’s first state-wide limit on emissions from fracking operations.¹⁸¹ These regulations were crafted by a coalition of energy companies and environmental groups. The regulations fully adopt the EPA’s New Source Performance Standards¹⁸² without imposing additional requirements beyond the minimum required by federal law, but they do make the federal rules

¹⁷⁵ Arkansas Oil and Gas Commission, General Rules and Regulations, Rule D-12.

¹⁷⁶ *Id.*

¹⁷⁷ COGCC Rule 912(a).

¹⁷⁸ *Id.* at 912(b).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 912(e).

¹⁸¹ AQCC Regulation No. 6 (5 CCR 1001-8, Standards of Performance for New Stationary Sources).

¹⁸² 40 CFR Part 60, Subpart OOOO, “Emission Standards.”

enforceable under Colorado law.¹⁸³ The regulations also adopt corresponding revisions to the emissions reporting and permitting framework.¹⁸⁴ A major focus of these regulations is on reducing emissions from venting, flaring, and leaks in the oil and gas sector, and they regulate methane and emissions along the entire natural gas chain—including the well site, storage tanks, gathering lines, compression stations, and processing plants.¹⁸⁵

4. Kansas

In Kansas, natural gas produced in connection with the production of oil may be flared or vented if authorized by order or rules and regulations of the Kansas Corporation Commission.¹⁸⁶ Although waste of natural gas is prohibited by Kansas statute,¹⁸⁷ the definition of “waste” does not include the flaring of natural gas if permitted by the state’s rules and regulations.¹⁸⁸ The venting or flaring of casinghead gas is permitted without a hearing before the Kansas Corporation Commission if: (1) the operator files an affidavit with the conservation division; (2) the well has 25 mcf/d or less of casinghead gas available for sale; (3) the casinghead gas volume is uneconomic to market because a pipeline connection is not feasible, or the price receive for such gas makes the investment required to market the gas unreasonable; and (4) the operator has made a diligent effort to obtain a market for the gas, and the volume of gas produced from the well does not economically justify a pipeline connection.¹⁸⁹

¹⁸³ AQCC Regulation No. 6.

¹⁸⁴ AQCC Regulation No. 3 (5 CCR 1001-5, Stationary Source Permitting and Air Pollutant Emission Notice Requirements) .

¹⁸⁵ AQCC Regulation Number 7 (55 CCR 1001-9).

¹⁸⁶ Kan. Stat. Ann. § 55-102(b).

¹⁸⁷ *Id.* at § 55-701.

¹⁸⁸ *Id.* at § 55-702.

¹⁸⁹ Kan. Admin. Regs. § 82-3-208(a).

If the volume of casinghead gas produced is in excess of 25 mcf/d, the commission may permit the venting or flaring of gas upon application and after notice and hearing.¹⁹⁰ In its determination, the commission will consider: (1) the availability of a market or pipeline facilities; (2) the probable recoverable gas reserves; (3) the necessity for maintenance of reservoir gas pressure to maximize the recovery of oil reserves from the formation; (4) the feasibility of reinjecting the gas; (5) a reasonable testing period; (6) any anticipated change in the gas-to-oil ratio; (7) the applicant's compliance with the departments applicable air quality regulations; and (8) any other fact or circumstance demonstrating the request's reasonableness.¹⁹¹

The commission also permits the venting or flaring of natural gas other than casinghead gas without a hearing if necessary for: (1) dewatering a well or well cleanup; (2) well testing; (3) well cleanup after stimulation or workover; (4) evaluation and testing before connecting to a pipeline; (5) emergencies; or (6) the purposes and conditions specified in section 55-102(a) of the Kansas Statutes.¹⁹² However, if the well is to be vented or flared for more than seven days, the operator must notify the appropriate district office of the commission and file an affidavit with the conservation division.¹⁹³ The affidavit must state that the extended venting or flaring period is necessary for at least one of the following reasons: (1) for the efficient operation of the well; (2) the evaluation or determination of whether the gas quality meets pipeline specifications; or (3) evaluation or determination of whether the well is capable of producing in economic quantities.¹⁹⁴ Gas may be flared or vented under other conditions not addressed by the

¹⁹⁰ *Id.* at § 82-3-208(b).

¹⁹¹ *Id.*

¹⁹² *Id.* at § 82-3-314(b) (1).

¹⁹³ *Id.* at § 82-3-314(b) (2).

¹⁹⁴ *Id.*

commission's regulations if the operator files an application, and the commission approves the application before the operator commences the venting or flaring activity.¹⁹⁵

5. Louisiana

Flaring of natural gas is prohibited unless the Louisiana Office of Conservation finds, upon written application, that such a prohibition would result in economic hardship on the operator. The regulations note that no such hardship can be found if the current market value—at the point of delivery for the gas proposed to be vented—exceeds the cost involved in making the gas available to market. Royalties must still be paid upon flared or vented gas even if the Department of Conservation has approved the flaring.¹⁹⁶

6. Montana

The Montana Board of Oil and Gas Conservation is tasked with (1) preventing waste of oil and gas resources, (2) conserving oil and gas by encouraging maximum efficient recovery of the resource, and (3) protecting the correlative rights of mineral owners.¹⁹⁷ The Board administers the rules and regulations found in Title 36, Chapter 22 of the Administrative Rules of Montana. Pursuant to these rules, and the Montana Code,¹⁹⁸ the waste of gas is prohibited. Specifically, section 36.22.1219 states: “After completion of a gas well, no gas shall be permitted to escape into the air, except that required for periodic testing or cleaning of the well bore.”¹⁹⁹

However, if the operator intends to flare associated gas once the well's average daily gas production exceeds 100 MCFG, the well may not produce more than an average of 100 MCFG

¹⁹⁵ *Id.* at § 82-3-314(e).

¹⁹⁶ Louisiana Department of Natural Resources, How-To Guide: Royalty Payments Frequently Asked Questions, available at <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=406>.

¹⁹⁷ Montana Board of Oil & Gas Conservation, <http://www.bogc.dnrc.mt.gov/BoardSummaries.asp>.

¹⁹⁸ Mont. Code Ann. § 82-11-121.

¹⁹⁹ Mont. Admin. R. 36.22.1219.

per day each month after the required 60-day test stabilized production test, which shows the average daily oil and gas production during the test period.²⁰⁰ If the operator would like to flare more than the average 100 MCFG per day, the operator must present with these production test results a statement justifying the need to flare more than that amount.²⁰¹ This statement should include such information as a gas analysis, estimated gas reserves, proximity of the well to a market, estimated gas price at the nearest market, estimated cost of marketing the gas, reinjection potential or other conservation-oriented disposition alternatives, amount of gas used in lease operations, and any other information pertinent to determining whether marketing or otherwise conserving the associated gas is economically feasible.²⁰²

After reviewing the operator's justification statement, the board may elect to: (1) docket a hearing where the operator may show cause why it should be allowed to flare; (2) restrict the operator's production until the gas is marketed or otherwise beneficially used; or (3) take any other action the board deems appropriate.²⁰³

On the other hand, flaring is required under the rules in some circumstances. Gas vented at a rate exceeding 20 mcf per day for a period exceeding 72 hours must be burned.²⁰⁴ Operators of wells venting any quantity of gas containing 20 parts per million or more of hydrogen sulfide must insure that workable igniter systems are installed on such wells and insure that such gas is burned rather than vented into the atmosphere.²⁰⁵

²⁰⁰ *Id.* at 36.22.1220(1).

²⁰¹ *Id.* at 36.22.1220(2).

²⁰² *Id.*

²⁰³ *Id.* at 36.22.1220(3).

²⁰⁴ *Id.* at 36.22.1221(1).

²⁰⁵ *Id.*

7. Oklahoma

In Oklahoma, an operator may vent or flare up to 50 mcf per day without a permit if: (i) it is not economically feasible to market the gas; (ii) a suitable stand, line, or stack is used to prevent a hazard to people; and (iii) there is less than 100 ppm of hydrogen sulfide in the gas.²⁰⁶ For venting or flaring at rate greater than 50 mcf per day, the operator must seek an administrative permit from the Conservation Division of the Oklahoma Corporation Commission.²⁰⁷ The Conservation Division may grant a permit to vent or flare volumes in excess of 50 mcf/d on a daily basis if it is not economically feasible to market the gas and a suitable stack, stand, or line will be used to prevent hazard from the flaring.²⁰⁸

An operator must file a copy of Form 1022 with the Technical Services Department of the Conservation Division of the Oklahoma Corporation Commission. If the Conservation Division denies the operator's Form 1022 application, the operator may apply for an order permitting venting or flaring of gas.²⁰⁹

Vented or flared gas during initial flowback of a newly completed well is exempt from the permit requirements of § 165:10-3-15(c) for 14 days—commencing from the first date gas flow is in excess of 50 mcf/d—if (1) combustible gas flow greater than 50 mcf/d is flared; (2) gas with a hydrogen sulfide content in excess of 100 ppm is flared; (3) the operator gives at least 48 hours' notice to the Conservation Division District Office or Field Inspector; (4) it is not economically feasible to market the gas; and (5) a suitable stack, stand, or line will be used to prevent hazard from the flaring.²¹⁰ However, after that initial 14-day flowback period, gas flared

²⁰⁶ Okla. Admin. Code 165:10-3-15(b).

²⁰⁷ *Id.* at 165:10-3-15(c).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 165:10-3-15(f).

²¹⁰ *Id.* at 165:10-3-15(d).

during flowback from a newly completed well will be exempt from the permit requirements for an additional period not exceeding 30 days if: (1) the volume of gas flared from the well is less than or equal to an average rate of 300 mcf/d over that 30 day period and no appropriate takeaway structure exists, the well is an exploration well, or the quality of gas flared is not pipeline acceptable; (2) gas with a hydrogen sulfide content in excess of 100 ppm must be flared; (3) a suitable stack, stand, or line is used to prevent hazard; (4) the well operator maintains a daily log of gas volumes flared during that 30-day period, which must be preserved for three years; and (5) if the operator flares volumes greater than 300 mcf/d during flowback from a newly completed well subsequent to the initial 14-day period, the operator must obtain a permit under § 165:10-3-15(c).²¹¹

8. Pennsylvania

In Pennsylvania, the Department of Environmental Protection oversees flaring. Pennsylvania's oil and gas conservation regulations do not address flaring other than to say that excess gas must be flared, captured, or diverted in a manner that does not create a hazard to the public health or safety.²¹² Venting is also prohibited where it produces a hazard to public health and safety.²¹³

Pennsylvania requires compliance with NSPS air emissions standards in 40 CFR Part 60, Subpart OOOO through its air quality permitting requirements.²¹⁴ Previously, Pennsylvania's Air Quality Permit Exemption List included an "automatic" blanket exemption for oil and gas

²¹¹ *Id.* at 165:10-3-15(e).

²¹² 25 Pa. Code § 78.73(e).

²¹³ *Id.* at § 78.74.

²¹⁴ Pennsylvania's Air Quality Permit Exemptions No. 38, Pennsylvania Department of Environmental Protection, available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-96215/275-2101-003.pdf> (hereinafter "Pennsylvania's Air Quality Permit Exemptions No. 38").

exploration and production facilities and operations.²¹⁵ However, beginning October 15, 2012, venting was no longer permitted.²¹⁶ Operators were required to capture and direct flowback emissions to a completion combustion device, except in conditions that could result in a fire hazard or explosion.²¹⁷ Then, beginning January 1, 2015, operators are required to direct all pipeline-quality gas during completion of development wells and re-completion or workover of any well into a pipeline for sales.²¹⁸ Open flaring is permitted only under the following circumstances: (1) at exploration wells to determine whether oil and/or gas exists in geological formations or to appraise the physical extent, reserves, and likely production rate of an oil or gas field; (2) for repair, maintenance, emergency, or safety purposes; and (3) for other operations at a wellhead or facility to comply with 40 CRF Part 60, Subpart OOOO requirements.²¹⁹ Following completion, operators must use an enclosed combustion device including an enclosed flare must be used for all permanent flaring operations at a wellhead or facility.²²⁰

9. Texas

Texas law prohibits the waste of oil and gas resources and delegates powers to the Railroad Commission to make rules, regulations, and orders to prevent such waste.²²¹ Texas producers may flare natural gas for ten days following initial completion or recompletion.²²² Authorized gas releases lasting longer than 24 hours must be flared, while gas releases lasting

²¹⁵ *Proposed Revisions to the Air Quality Permit Exemptions List Categories No. 33 & 38*, Pennsylvania Department of Environmental Protection, Bureau of Air Quality (Aug. 10, 2013), available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-96214/275-2101-003%20CR.pdf>.

²¹⁶ Pennsylvania's Air Quality Permit Exemptions No. 38, *supra* note 214.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Tex. Nat. Res. §§ 85.045, 86.011

²²² 16 Tex. Admin. Code § 3.32(f) (1) (A).

fewer than 24 may be vented if flaring is not required for safety or other regulatory reasons.²²³ Certain releases of gas are exempt from these venting and flaring requirements. The exemptions mentioned include gas released at a wellsite during drilling operations²²⁴ and gas released at a wellsite during initial completion, recompletion in another field, or workover operations in the same field.²²⁵ Releases of gas that are not routinely measured, such as small amounts that escape during initial well completion, are exempt from venting and flaring requirements and need to be measured for purposes of well allowables.²²⁶

Producers may obtain exceptions from the Texas Railroad Commission for the release of gas when the operator presents information to show the necessity of the release.²²⁷ However, such administrative exceptions will not be granted for periods exceeding 180 days, although the exceptions may be renewed.²²⁸ Operators must file a Rule 32 exception form with the Railroad Commission on the next business day following the initial 24 hours of venting or flaring.²²⁹

10. Wyoming

Like most states, Wyoming statute declares the waste of oil and gas sources is prohibited, but the state makes exceptions, which include flaring gas as a necessity to completing and putting into production oil and gas wells.²³⁰ Thus, Wyoming allows flaring without any additional regulatory authorization in certain situations: (1) during emergencies or upset

²²³ *Id.* at § 3.32(e) (1).

²²⁴ *Id.* at § 3.32(d) (1) (F).

²²⁵ *Id.* at § 3.32(d) (1) (G).

²²⁶ *Id.* at § 3.32(d) (1).

²²⁷ *Id.* at § 3.32(f) (2).

²²⁸ *Id.* at § 3.32(h).

²²⁹ Statewide Rule 32 Exception Data Sheet, Texas Railroad Commission, *available at* www.rrc.state.tx.us/media/8015/swr32datasht.pdf.

²³⁰ 30-3 Wyo. Code R. § 39.

conditions resulting in the unavoidable short-term flaring of gas; (2) for well purging and evaluation tests; (3) during initial completion or recompletion evaluation tests, which must not exceed 15 days unless otherwise authorized by the Supervisor; or (4) up to 60 mcf/d may be flared or vented from individual wells unless the Supervisor or the Commission determines that waste is occurring.²³¹

Unless flaring or venting is otherwise authorized, operators must apply for retroactive or prospective venting or flaring authorization.²³² The application must include, at a minimum: (1) a statement of the reason for the venting or flaring; (2) the estimated duration; (3) the estimated daily volume of gas; (4) the estimated daily volume and type of associated produced fluids, gas, or plant products; (5) a compositional analysis of the gas if hydrogen sulfide is present; (6) a legal description of the well and distance to the nearest potential sales point or pipeline; and (7) a discussion of applicable safety factors and plans.²³³

Wyoming's Office of State Lands and Investments (OSLI) amended its Natural Gas Flaring Policy with respect to WOGCC determinations to allow royalty-free disposition of the State's interest in vented or flared gas from stated oil and gas leased lands.²³⁴ Under the revised policy, effective March 1, 2014, the Office of State Lands will show some deference to WOGCC decisions to allow flaring, but it will reserve the right to set for hearing whether to assess royalty

²³¹ *Id.*

²³² *Id.* at § 39(c).

²³³ *Id.*

²³⁴ *Natural Gas Flaring Policy*, Wyoming Office of State Lands and Investments (Mar. 1, 2014), available at www.slf-web.state.wy.us/subsurface/policy/naturalgasflaringpolicy.pdf.

on the flared or vented gas.²³⁵ Thus, the OSLI could determine that flaring or venting constitutes waste under the Wyoming statute despite a decision by the WOGCC to allow flaring.²³⁶

IV. Conclusion

During the past two years, the flaring issue really heated up, particularly in the Bakken. In 2015, however, the issue seems to be cooling down as the majority of the North Dakota royalty class actions have concluded, and the regulators have adopted gas capture goals for the industry to meet. That said, there are a number of outstanding issues that could affect operations as they pertain to the flaring of associated gas in North Dakota, including the tribal litigation, falling oil prices and the impact on continued infrastructure investment, and pending or potential legislation (both state and federal) .

There are a number of potential lessons stakeholders can glean from the North Dakota experience. For example, the federal court royalty litigation further confirmed the broad authority of the NDIC in administering and enforcing the Oil and Gas Act and the doctrine under North Dakota law that statutes that govern a subject essentially preempt common law claims on that subject. The regulatory process also provides a good example of industry competitors working together before new regulations were passed to assist in the process, which resulted in what presently appear to be meaningful, yet obtainable goals. Of course, flaring of associated gas is not limited to North Dakota, and there are several overlapping requirements in the particular jurisdictions that should be consulted any time the issue arises.

²³⁵ *Id.*

²³⁶ *Id.*