

# Regulation of the Upstream Oil and Gas Industry in Texas



## Overview and Key Developments

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This executive summary covers the main sources of regulation of the onshore oil and natural gas exploration and production industry in Texas, recent developments on material topics, and anticipated areas of focus in 2022 and beyond. The final section highlights a few other important regulations.

The underlying statutes, rules, regulatory interpretations are nuanced and subject to change, and should always be consulted before making any business decision. This summary is meant as an overview and should not be relied on as providing definitive advice with respect to any particular activity or situation.

### 1. Introduction: Who regulates?

The Railroad Commission of Texas (RRC) regulates the vast majority of activities carried out by onshore oil and gas E&P companies in Texas. Other state and federal agencies, including the Texas Commission on Environmental Quality (TCEQ), U.S. Environmental Protection Agency (EPA), U.S. Department of Transportation (DOT), U.S. Army Corps of Engineers (USACE), Occupational Safety and Health Administration (OSHA), Federal Energy Regulatory Commission (FERC), and U.S. Fish and Wildlife (FWS), have jurisdiction over certain activities. The U.S. Bureau of Land Management (BLM) has jurisdiction over activity on federal lands.

Federal regulation of the oil and gas industry has received increased attention recently. With the exception of leases on federal lands, state agencies regulate most of the onshore oil and gas industry in the U.S. In some cases, federal environmental and other regulations have been substantially delegated to state agencies. Primary examples of such delegation in Texas include the underground injection control (UIC) program, in which federal Safe Drinking Water Act requirements are administered by TCEQ and RRC, and the Clean Air Act, which is administered by the TCEQ, and certain pipeline safety regulations. The Clean Water Act National Pollution Discharge Elimination System (NPDES) program governing stormwater discharge and other releases, until very recently, was administered jointly by EPA and the RRC. Alternatively, the federal government has jurisdiction in some areas, which are highlighted in more detail below. Federal agencies such as the EPA also collect data in order to monitor the oil and gas industry.

### 2. Recent areas of focus

This section highlights recent regulatory activity, and the anticipated focus of regulation in 2022 and beyond.

#### *a. Air Quality*

- i. **Flaring:** Statewide Rule 32 of the RRC allows release of natural gas only in certain circumstances. Exceptions require approval from the RRC. In late 2020, the RRC announced changes to its application for flaring exceptions (Form R-32). The RRC may reduce the amount of flaring time allowed, and operators must provide information justifying the request for an exception. Operators who successfully obtain a flaring exception must provide certain data to facilitate audits. The new form does not change underlying Statewide Rule 32. The RRC continues to resist calls for an outright ban on flaring, for reasons including the need to require flaring for safety reasons. Some operators have voluntarily reduced flaring, and flaring rates have consistently declined since June of 2019, with the newest record low at 0.21% reported in September 2021.

- ii. **TCEQ regulation:** Under Clean Air Act delegation from the federal government, the TCEQ regulates emissions of methane, other greenhouse gases (GHGs), and VOCs.
- iii. **Trump administration action:** In August 2020, EPA rolled back certain regulations under the Clean Air Act, including the removal of transmission and storage as sources, rescission of methane specific requirements for production and processing and rescission of certain methane requirements for all oil and gas sources. The BLM also rescinded methane requirements applicable to existing oil and gas operations on federal lands.
- iv. **Climate change:** The Biden administration has committed to addressing climate change, and with regard to the oil and gas industry, is expected to focus on regulations governing GHG emissions. Texas, along with 12 other states, challenged Biden's January 2021 moratorium on new oil and natural gas leases on public lands or in offshore waters. A Louisiana federal judge issued a nationwide injunction against the administration that following June, finding "there is a substantial likelihood that President Biden exceeded his powers" when issuing the executive order. Consistent with the decision, the Biden administration leased 1.7 million acres in federal waters of the Gulf of Mexico before the new year; then, in January 2022, a federal court invalidated the sale.
- v. **Outlook:** While the Biden administration's campaigns to ban new fracking and halt leasing on federal land have seemingly stalled, regulation of GHG emissions remains a viable avenue for more stringent regulation of the oil and gas industry. One of the EPA's main targets to date has been the reduction of methane emissions—a byproduct of fracking. Notably, the proposed regulations would apply to existing infrastructure. Public comment for the EPA's proposed regulations ended January 31, 2022. The U.S. Department of the Interior will also have the opportunity to apply stricter emissions limitations when crafting the next five-year offshore oil and gas leasing program, as the existing program is set to expire this year.

***b. Wastewater and Other Waste Disposal***

- i. **Oil and gas waste and wastewater:** The RRC regulates the control and disposition of oil and gas waste and the abatement and prevention of pollution of surface and subsurface water resulting from oil or gas exploration and development. Oil and gas waste (defined as waste that arises out of or incidental to the drilling for or producing of oil or gas, including salt water, brine, sludge, drilling mud, and other liquid, semi-liquid, or solid waste material) is exempt from the hazardous waste regulations under the Resource Conservation and Recovery Act, but may be subject to the Safe Drinking Water Act as described below. The Resource Conservation and Recovery Act governs handling and disposal of non-exempt hazardous waste, and those regulations are implemented by TCEQ.
- ii. **Stormwater discharge:** The Clean Water Act NPDES permit program governing stormwater discharge and other releases was formerly administered jointly by the EPA and RRC. In 2019, the Texas Legislature amended the Water Code to shift responsibility for the permitting of certain stormwater, produced water, hydrostatic test water, and gas plant effluent discharges to the TCEQ. The transition of authority was completed January 15, 2021. Companies should submit applications for permits to TCEQ before the expiration of issued EPA or RRC permits.
- iii. **Underground injection:** RRC regulates the underground injection of oil and gas waste under an EPA-approved UIC program, governed by the Safe Drinking Water Act. The TCEQ also administers elements of the Texas UIC program. The RRC has jurisdiction over certain wells that inject oil and gas wastes, including salt water and other produced fluids. Periodic mechanical integrity testing is an important part of the UIC program. The RRC also regulates wells used for enhanced recovery operations, brine mining, and underground hydrocarbon storage. The UIC program has been upgraded by the RRC in the past decade. For example, as of 2012, Texas operators must disclose the chemical components of fracking fluid on FracFocus, a national database.

- iv. **EPA jurisdiction:** EPA retains jurisdiction over certain hydraulic fracturing activities involving the use of diesel fuels. In addition, EPA regulations under the Clean Water Act prohibit wastewater discharges from hydraulic fracturing and certain other natural gas operations to publicly owned wastewater treatment plants. The EPA has performed studies on fracking, issuing a report in 2016 on the potential impacts to drinking water resources. However, since 2005, the EPA has no authority to require disclosure of fracking solution makeup.
  - v. **Federal and Indian lands:** A 2015 rule published by BLM required public disclosure of chemicals used in fracking, compliance with casing and cementing requirements, management of recovered fluids, and submission to BLM of certain detailed information as part of the permitting process. This rule was rescinded in 2017, and the rescission so far has survived appeal.
  - vi. **Outlook:**
    - The Executive Order of January 20, 2021 requires a comprehensive review of agency actions taken between 2017 and 2021 that affect public health and the environment. This review is ongoing.
    - The EPA likely will continue to gather data on the impact of fracking.
    - It is not clear whether the EPA will seek to impose more stringent regulations on the disposal of oil and gas waste. From time to time, the Congress and EPA have considered re-categorizing certain oil and gas waste as hazardous waste, which could significantly increase management, disposal, reporting and recordkeeping requirements. However, the EPA's most recent review in 2019 concluded that revisions to federal regulations for the management of oil and gas waste were not necessary. Additionally, Congress recently considered repealing the hydraulic fracturing exemption from the Safe Drinking Water Act, regulating hydraulic fracturing at the federal level, and requiring public disclosure of the chemicals used in fracking, but has not actually done so.
    - Meanwhile, RRC is touting the success of its upgraded UIC program in ensuring the protection of underground sources of drinking water and the control of seismic activity, citing EPA's annual evaluations of RRC's program.
- c. **Seismic activity:** Although the topic was vigorously debated in Texas in the past, the RRC recognizes that saltwater injection is associated with earthquake activity. Texas also has hired a State Seismologist. The RRC rules adopted in 2014 include the following provisions:
- Due diligence must be conducted using the USGS seismic database.
  - RRC staff can modify, suspend, or terminate a disposal well permit if scientific data indicate that the well is likely contributing to seismic activity.
  - Well operators must disclose injection volumes and pressures more frequently.
  - Applications for disposal well permits must include additional information on pressure and boundaries, ensuring fluid will remain confined.

New legislation in September 2021 established a technical advisory committee for the Tex Net seismic monitoring program comprised of nine members, including three from the energy industry. Operators received notice of a new Tex Net Injection Volume Reporting Tool in December 2021. Data can be submitted to the RRC using the new tool. Annual reports on disposal and injection well monitoring are still required.

In late 2021 and early 2022, several earthquakes in West Texas prompted the RRC to suspend saltwater disposal permits. In some areas, the RRC has indicated its intent to implement a response plan to mitigate the conditions contributing to seismic activity.

- d. Winter storm readiness:** In February 2021, Texas experienced an energy emergency caused by Winter Storm Uri. In response, and in compliance with new Texas legislation, the RRC adopted new rules defining the types of natural gas facilities that are critical suppliers (and critical electric power customers) during an energy emergency. The operators of such facilities must comply with certain filing requirements. Additionally, operators of natural gas facilities serving natural gas fired electric generation may file for a designation of critical load with the Electric Reliability Council of Texas (ERCOT). While RRC has not issued new rules for winterizing natural gas production facilities, it has from time to time issued notices to operators regarding best practices for winter weather. The RRC has reported that it is making ongoing site visits to natural gas production facilities and stated its opinion that operators have been taking necessary actions to ensure the continuous flow of natural gas.
- e. Oil and gas transportation:** The Texas and FERC pipeline permitting processes are receiving increased attention.
- i. As a result of a court case decided in 2019 (*Birckhead v. FERC*), FERC began giving increased scrutiny to GHG emissions in permitting new interstate natural gas pipeline projects. A March 2021 FERC order confirmed that the agency will consider the impact of GHG emissions in the same manner that it considers other environmental impacts.
  - ii. FERC Rule 871 (June 2020) prevents FERC from issuing notices to proceed to natural gas pipelines that have received a certificate until the request for rehearing process has been exhausted. FERC modified Rule 871 in February 2021. Under the new guidelines, construction may begin when the qualifying rehearing request is no longer pending before FERC or 90 days following the date that such request may be deemed denied by operation of law, whichever is earlier. Additionally, FERC announced the circumstances where it will stay its certificate orders under section 7(c) of the Natural Gas Act.
  - iii. A bill proposed for the 2021 Texas Legislature by Zwiener (Austin/Round Rock) would have required increased scrutiny of the route of oil or natural gas pipelines by the Public Utilities Commission of Texas (HB37). HB37 died in committee and was referred to the House State Affairs Committee.
- f. Endangered and threatened species:** Under the federal Endangered Species Act, the FWS may restrict certain activities that could affect endangered or threaten species or critical habitats.

Oil and gas operators may be eligible to participate in voluntary conservation agreements, which may result in less stringent restrictions than those for listed species. As an example, protection for the dunes sagebrush lizard, whose habitat includes part of the Permian Basin, has long been disputed among the FWS, environmental groups, industry, and state regulators. Finally, in November 2020, FWS issued a notice establishing a permitting process that would allow oil and gas companies in the Permian Basin to operate under a Candidate Conservation Agreement with Assurances (the CCAA). The FWS approved the CCAA in January 2021 after finding there would be no significant impact.

Under a 2011 settlement agreement, the FWS was required to review the listing status of more than 250 species by 2017, but missed the deadline. Renewed effort is expected in the Biden administration.

- g. Pipeline safety:** Currently the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the DOT implements and enforces pipeline safety requirements for natural gas and hazardous liquid pipelines. Through certification by PHMSA's Office of Pipeline Safety, the RRC administers and enforces pipeline safety requirements for intrastate gas and hazardous liquids pipelines in Texas.

A recently adopted federal rule designed to improve the safety of onshore gas gathering pipelines expanded PHMSA's oversight to more than 420,000 miles of previously unregulated lines. The final rule goes into effect on May 16, 2022 and will (1) apply minimum safety requirements to gas gathering pipelines with large diameters and high operating pressures and (2) extend federal reporting requirements to all gas gathering operators.

- h. Corps permitting:* USACE permitting is relevant for construction of pipelines, associated infrastructure, utility crossings, and access roads near wetlands or other jurisdictional waters. Nationwide permits are available for activities that will have a minimal impact on such waters. As an example, Nationwide Permit 12 for Oil or Natural Gas Pipeline Activities allows the construction, maintenance, repair and removal of pipelines and associated facilities in jurisdictional waters if certain requirements (including limits on the size of the affected area and pre-construction notices) are met.

Nationwide Permit 12 has received increased attention recently because of disputes over the Keystone XL pipeline. A recently proposed USACE rule includes a new requirement of pre-construction notice for any new pipeline greater than 250 feet in length, regardless of location. The comment period for this new proposed rule closed in late 2021, and USACE's website or the Federal Register can be monitored for publication of the final rule.

### 3. Other regulated activities

Most regulated activities of Texas oil and gas companies do not make the headlines. It is nevertheless critical for companies to understand and implement all applicable regulations to ensure that activities are carried out lawfully and safely, and compliance appropriately managed. Failure to comply can result in delay of operations, time-consuming and costly government investigations, fines/penalties, and reputational risk.

- a. **Permitting:** Well location, drilling, completion, pooling and unitization, waste disposal, and plugging and abandonment all require permits from the RRC. Numerous different types of reports are also required. Operators should consult the RRC website for the most up-to-date information.
- b. **Transportation**
- i. **Crude/liquids:** Common carriers must receive and transport without discrimination, both under Texas law and FERC regulations. Use of a FERC-regulated pipeline's capacity by its own marketing affiliate may violate the Interstate Commerce Act's prohibitions on discrimination and rebates. Establishment of marketing affiliates by liquids transporters is nevertheless becoming a common practice. If discrimination is a concern, public filings should be monitored.
  - ii. **Natural gas:** Producers that ship natural gas on FERC-regulated pipelines must comply with FERC rules, such as those governing capacity release. Shippers must have title to the gas they are shipping. FERC pipelines must provide service on a nondiscriminatory basis.
  - iii. **Crude gathering lines:** Jurisdiction is not well defined. Crude gathering may be subject to FERC jurisdiction under the Interstate Commerce Act if movement started or will continue in another state. FERC may review various factors in making its determination.
  - iv. **Gas gathering lines:** These lines are generally exempt from FERC jurisdiction, but are subject to state pipeline safety and other regulation, including the new PHMSA rule described above.
- c. **Sale of production:** Market manipulation is prohibited by FERC (natural gas) and the Commodity Futures Trading Commission and the Federal Trade Commission (crude and products). These agencies have significant authority to open investigations and to issue per-day penalties. Wholesale sellers of production must ensure that employees are appropriately trained.
- d. **Voluntary reporting of violations**
- i. In general, state and federal regulatory agencies are more lenient with assessment of penalties if companies self-report non-compliance. Internal company policies should

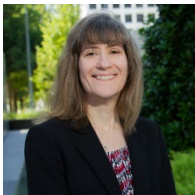
encourage early reporting of known or suspected problems to management, and must also prohibit retaliation for such communication.

- ii. For example, the Texas Environmental, Health, and Safety Audit Privilege Act provides immunity from administrative penalties, as well as limited evidentiary privilege, if certain requirements are met. The Act is designed to encourage companies to discover and resolve non-compliance. In general, the facility conducting the audit must give notice to the appropriate agency before the audit begins, disclose all violations for which immunity is sought and correct those violations within a reasonable period of time. Failure to comply with the statutory provisions, including the procedure and deadlines for corresponding with the agency, may result in the loss of protection. RRC and TCEQ have posted audit privilege guidance on their websites.

As a reminder, the underlying statutes, rules, regulatory interpretations are nuanced and subject to change, and should always be consulted before making any business decision.

### Acronyms

BLM – U.S. Bureau of Land Management  
CAA – Clean Air Act  
CERCLA – Comprehensive Environmental Response, Compensation and Liability Act  
CWA – Clean Water Act  
DOT - U.S. Department of Transportation  
EPA – U.S. Environmental Protection Agency  
ERCOT - Electric Reliability Council of Texas  
FERC – U.S. Federal Energy Regulatory Commission  
FWS – U.S. Fish and Wildlife Service  
GHG – greenhouse gases  
NPDES - National Pollution Discharge Elimination System  
NSPS – New Source Performance Standards  
PHMSA – Pipeline and Hazardous Materials Safety Administration  
RCRA – Resource Conservation and Recovery Act  
RRC – Railroad Commission of Texas  
TCEQ – Texas Commission on Environmental Quality  
UIC – Underground injection control  
USACE - U.S. Army Corps of Engineers  
VOC – volatile organic compound



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