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The Legal 500 Country Comparative Guides

United States

ENERGY - OIL & GAS

Contributing firm

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This country-specific Q&A provides an overview of energy - oil & gas laws and regulations applicable in United States.

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UNITED STATES ENERGY - OIL & GAS



1. Does your jurisdiction have an established upstream oil and gas industry? What are the current production levels and what are the oil and gas reserve levels?

The U.S. has an established and rapidly growing commercial upstream oil and gas industry dating back to the mid-19 -century, with a recent oil and gas boom beginning in 2010. As of September 2020, the U.S. reported producing, on average, 12.248 million barrels per day (12.248 mmbd/d) of crude oil for calendar year 2019. In terms of natural gas production, the U.S saw record production of dry natural gas of 97.06 Bcf/d in December 2019 and marketed production of 100.04 Bcf/d. The U.S. had estimated proven reserves of natural gas at the end of 2018 of 438.5 Tcf and 2,390.3 Tcf of unproven reserves of dry natural gas.

2. How are rights to explore and exploit oil and gas resources granted? Please provide a brief overview of the structure of the regulatory regime for upstream oil and gas. Is the regime the same for both onshore and offshore?

U.S. onshore extraction of oil and gas is generally regulated by the individual states which promulgate their own statutes, rules and regulations and by common law. Federal and constitutional law may also apply in certain cases for the offshore production of oil and gas. Under U.S. law, a variety of interests may hold subsurface rights and subsurface oil and gas rights on the property they own, including private individuals, corporate entities, Native American tribes, and local, state and federal governments. Although there are legal and regulatory variations among the states, the owner of a particular parcel of land will typically also own the oil, gas and minerals underneath the surface. There are two legal doctrines covering the private ownership of onshore oil and gas in the U.S.: (1) the law of capture and (2) the doctrine of correlative rights. On one hand, the law of capture provides that a person who has a well

on its own land or leased land may produce and keep for itself all of the oil and gas produced from that well. On the other hand, under the doctrine of correlative rights, states will typically restrict the number of wells in a given area to the minimum number capable of efficiently producing the common source of supply, that is the reservoir. Each owner of oil or gas rights can then share proportionately from the production of the permitted wells drilled from the common supply. The legal doctrine that applies to a particular parcel of land will vary depending on state law.

3. What are the key features of the licence/production sharing contract/concession/other pursuant to which oil and gas companies undertake oil and gas exploration and exploitation?

Oil and gas development rights in the U.S. are primarily granted through lease agreements between the owner of the minerals and the person/entity that will be permitted to explore and develop the oil and gas. In leases that confer privately held oil and gas rights, negotiations are typically confidential between the parties, while in public land and offshore leases, there is a public bidding process for those exploration rights. Oil and gas leases in the U.S. can last for a specified term of "drill to hold" years, during which the lessee may explore the land without having to pay any royalties. If oil and gas is discovered in commercial quantities on the property, then the lease will continue as long as there are producing quantities.

4. Are there any unconventional hydrocarbon resources (such as shale gas) being exploited and is there a separate regulatory regime for unconventional?

Yes. The U.S. has very large unconventional hydrocarbon resources (such as shale gas) that are being exploited, but there is no separate regulatory regime for such resources relative to the regime for the development of

conventional resources.

5. Who are the key regulators for the upstream oil and gas industry?

Onshore oil and gas development in the U.S. is regulated by the individual state in which the oil and gas resources are located. Each state has its own regulatory agency or agencies that protect the rights of landowners. These agencies also regulate the impact of drilling, production, plugging and abandonment, as well as control health and safety issues. Additional regulations by the Federal Government, relating to hydrocarbon resources subject to federal jurisdiction, are present under federal law, constitutional law and are executed by Federal regulatory bodies. Some examples of U.S. Federal regulatory bodies include: (1) the Federal Energy Regulatory Commission (FERC), which regulates interstate natural gas and petroleum product pipelines; (2) the U.S. Department of Energy (DOE), which is responsible for instituting and implementing energy policies and authorizing entities to import/export natural gas to/from the U.S.; (3) the U.S. Environmental Protection Agency (EPA), which is responsible for developing and enforcing regulations; and (4) the U.S. Department of Transportation (DOT), which is responsible for establishing national policy and setting and enforcing standards for the transportation of energy. Offshore oil and gas development in the Outer Continental Shelf (OCS) is independently regulated by U.S. federal law and regulatory bodies. Some examples of these regulatory bodies include: (1) the Department of the Interior (DOI), which regulates the extraction of oil and gas from federal lands; (2) the Bureau of Ocean Energy Management (BOEM), which manages federal OCS leasing programs, conducts resource assessments, and licenses seismic surveys; (3) The Bureau of Safety and Environmental Enforcement (BSEE), which regulates all OCS oil and gas drilling, production and plugging and abandonment; and (4) the Office of Natural Resources Revenue, which collects and disburses rents and royalties owed to the government for offshore production.

6. Is the government directly involved in the upstream oil and gas industry? Is there a government-owned oil and gas company?

No. The U.S. Government does not directly participate in oil and gas exploration and production through a national oil company or otherwise. All activity is carried out by independent private oil and gas companies in a free market, subject to the federal and state regulations mentioned above.

7. Are there any special requirements for or restrictions on participation in the upstream oil and gas industry by foreign oil and gas companies?

Yes. The Committee on Foreign Investment in the United States (CFIUS) is primarily responsible for reviewing proposed foreign investment transactions and ensuring compliance with special federal requirements. The Foreign Investment and National Security Act of 2007 (FINSA) covers a broad range of energy and infrastructure transactions in the U.S. and intensifies the screening for foreign transactions.

Finally, the Mineral Leasing Act (MLA) prohibits foreign entities from owning leases, except through the ownership of stock in a domestic corporation. Foreign stockholders are required to come from countries that grant similar privileges to U.S. citizens. Foreign investment in OCS leases also must be passed through U.S. corporations.

8. What are the key features of the environmental and health and safety regime that applies to upstream oil and gas activities?

In the U.S., the key features of the environmental regime involve federal legislation and the implementation of that legislation, and associated rules and regulations by federal regulatory agencies. The Environmental Protection Agency (EPA), a key regulatory body, is primarily responsible for enforcing many of the environmental statutes and regulations in the U.S. In addition to the EPA, the U.S. federal government enacted the National Environmental Policy Act of 1969 (NEPA), which established the common use of environmental assessments (EAs). An EA is an environmental review and analysis of a proposed oil and gas project. The scope of each EA varies and will depend on the location of the activities (i.e. private property, local, state or federally owned property, Native American tribal lands, or offshore production in the Outer Continental Shelf (OCS)). State regulatory bodies can also help establish specific health and safety protocols for issues unique to their regulatory jurisdiction, including the Federal Regulatory Energy Commission (FERC) safety measures for the construction and use of pipelines or the Bureau of Safety and Environmental Enforcement (BSEE) regulations relating to the operation of an offshore drilling or production platform.

As for the health and safety regime, the U.S. has developed a federal agency called the Occupational

Safety and Health Administration (OSHA), with comparable state agencies that also help regulate workplace health and safety in various industries, including oil and gas. OSHA requires that there be comprehensive recordkeeping and reporting requirements to promote regulatory safety measures and to record and assess workplace hazards.

9. How does the government derive value from oil and gas resources (royalties/production sharing/taxes)? Are there any special tax deductions or incentives offered?

The U.S. does not have a national tax regime governing the production of oil and/or gas. Rather, individual states may place a tax on the property and/or on extraction of oil and/or gas that is produced in the state. In some instances, where a local, state or federal government entity is the owner and leases its rights for development in the oil and/or gas, the lease conveying the rights to an operator will include a production royalty. Such royalty is then payable to the respective person or entity that owns the property. Therefore, government entities only derive direct economic benefits from the ownership and development of oil and gas estates through royalties obtained from production on government-owned lands and property taxes.

10. Are there any restrictions on export, local content obligations or domestic supply obligations?

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11. Does the regulatory regime include any specific decommissioning obligations?

Under U.S. Federal law, oil wells must follow the requirements for well-plugging and abandonment issued

by the Bureau of Land Management (BLM) for onshore properties and by the Bureau of Safety and Environmental Enforcement (BSEE) for offshore properties. Oil wells located wholly within a state must follow the regulations of their respective jurisdiction. Typically, in decommissioning, an operator is required to notify the state that it intends to abandon a well and conduct surface reclamation on the property. The process of reclamation involves returning the development of the site (i.e. pads, pits and roads) to a safe condition and revegetating the property. The scope of reclamation and obligations will vary depending on the type and size of the well and the state that it is being abandoned. Private individuals may also establish certain plugging and decommissioning obligations in their leases.

12. What is the regulatory regime that applies to the construction and operation of offshore and onshore oil and gas pipelines?

Under U.S. Federal law, oil wells must follow the requirements for well-plugging and abandonment issued by the Bureau of Land Management (BLM) for onshore properties and by the Bureau of Safety and Environmental Enforcement (BSEE) for offshore properties. Oil wells located wholly within a state must follow the regulations of their respective jurisdiction. Typically, in decommissioning, an operator is required to notify the state that it intends to abandon a well and conduct surface reclamation on the property. The process of reclamation involves returning the development of the site (i.e. pads, pits and roads) to a safe condition and revegetating the property. The scope of reclamation and obligations will vary depending on the type and size of the well and the state that it is being abandoned. Private individuals may also establish certain plugging and decommissioning obligations in their leases.

13. What is the regulatory regime that applies to LNG liquefaction and LNG receiving terminals? Are there any such terminals in your jurisdiction?

The Federal Energy Regulatory Commission (FERC) is responsible for authorizing the siting, construction and operation of onshore and near-shore LNG import or export facilities in the U.S. under Section 3 of the Natural Gas Act. In authorizing the construction and operation of LNG facilities, FERC is required by law to find that the proposed projects are not inconsistent with the public interest. To satisfy the requirements of the National

Environmental Policy Act of 1969 (NEPA), the FERC also prepares an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) and will authorize the project if it finds that any adverse environmental impacts may reasonably be mitigated. The terms and conditions of LNG liquefaction or regasification services are not regulated.

Currently, there are more than 110 LNG facilities operating in the U.S. Some facilities export natural gas from the U.S., some import and regasify LNG to provide natural gas supply to the interstate pipeline system or local distribution companies, while others are used to store natural gas for periods of peak demand. There are also facilities which produce LNG for vehicle fuel or for industrial use. As of November 2019, the U.S. has six operating LNG liquefaction facilities for the export of U.S. LNG by ship: Sabine Pass, Cove Point, Corpus Christi, Cameron, Elba Island and Freeport LNG.

14. What is the regulatory regime that applies to gas storage (not LNG)? Are there any gas storage facilities in your jurisdiction?

The siting, construction, operation and abandonment of a natural gas transportation and storage facility in interstate commerce is also regulated by the FERC under the Natural Gas Act (NGA) and the Natural Gas Policy Act (NGPA). Similar to an LNG project, the FERC's environmental-impact review of a proposed natural gas storage project results in FERC's issuance of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS).

Contrary to services provided by LNG facilities, in the case of jurisdictional gas storage facilities the FERC also regulates the terms and conditions of services, although, under certain circumstances, the FERC does not require the approval of specific terms and conditions and permits the charging of market-based rates by the project owner. The U.S. has about 380 active underground gas storage facilities with a demonstrated peak storage capacity of approximately 4.3 trillion cubic feet of gas.

15. Is there a gas transmission and distribution system in your jurisdiction? How is gas distribution and transmission infrastructure owned and regulated? Is there a third party access regime?

The U.S. downstream gas market is privately owned and operates in a competitive environment with no

government-owned suppliers. There are commercial arrangements available for customers in the major types of downstream operations, including supply contracts, franchise and distributorship agreements, and storage agreements.

Natural gas distribution is regulated by the states. Privately-owned, municipally-owned or cooperatively-owned companies provide service to end-use customers and those services are regulated by state regulatory bodies.

16. Is there a competitive and privatised downstream gas market or is gas supplied to end-customers by one or more incumbent/government-owned suppliers? Can customers choose their supplier?

The U.S. downstream petroleum market is privately owned and operates in a competitive environment with no government-owned suppliers. There are commercial arrangements available for customers in the major types of downstream operations, including supply contracts, franchise and distributorship agreements, and storage agreements.

The downstream natural gas market is regulated by state regulatory bodies. Several states have retail choice regimes that allow end-users to choose their retail suppliers of natural gas.

17. How is the downstream gas market regulated?

Largely, depending on the ownership of the land surface, oil and gas resources in the U.S. are owned and controlled by the federal and state governments and by private persons. There is non-uniform federal, state and local regulation of the industry in the areas of environment, safety, health and tax, as there is no single regulatory body with jurisdiction over all the oil and gas resources and their development in the U.S. Given this multijurisdictional regulatory body, it is difficult to pinpoint any one significant government policy in the U.S. affecting the entire industry, other than the support for a free market.

The downstream natural gas market is regulated by state regulatory bodies. Several states have retail choice regimes that allow end-users to choose their retail suppliers of natural gas.

18. Have there been any significant recent changes in government policy and regulation in relation to the oil and gas industry?

The U.S. does not have a national energy policy. Largely depending on the ownership of the land surface, oil and gas resources in the U.S. are owned and controlled by the federal and state governments and by private persons. There is non-uniform federal, state and local regulation of the industry in the areas of environment, safety, health and tax, as there is no single regulatory body with jurisdiction over all the oil and gas resources and their development in the U.S. Given this multijurisdictional regulatory body, it is difficult to pinpoint any one significant government policy in the U.S. affecting the entire industry, other than the support for a free market.

19. What key challenges have been identified by the government and/or industry in relation to your jurisdiction's oil and gas industry? In this context, has the Covid-19 pandemic had an impact on the

oil and gas industry and if so, how has the government and/or industry responded to it?

Due to COVID-19, energy demand in the US has decreased in the industrial and commercial sectors; however, energy demand has increased in the residential areas. Overall, almost every region hit by the event has experienced a reduction of overall electricity demand by around 10-30%.

It is expected that the pandemic will accelerate the move towards low-carbon sources of energy, which could affect future demand due to the steep decline in commercial and industrial usage because of business closures.

20. Are there any policies or regulatory requirements relating to the oil and gas industry which reflect/implement the global trend towards the low-carbon energy transition?

It is expected that the Biden Administration will resume the focus on reducing carbon emissions. As transition is underway, the policies are evolving.

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