

## Expert Analysis

### Hydraulic Fracturing Regulation In President Obama's Second Term

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Before we even finished counting the votes in the 2012 presidential election, political pundits, environmental and energy practitioners and, in some ways, even Wall Street traders, offered their insights on how President Obama would regulate the energy industry in the next four years. Such an exercise is perilously speculative, particularly when applied emerging segments of the industry, such as hydraulic fracturing and horizontal drilling. Nonetheless, the general consensus is that the administration will take a heavy hand, that long-shelved initiatives will take on new life and that the hydrocarbon extraction industry should brace for punitive measures.

While we absolutely agree that the pace of regulatory activity on hydraulic fracturing will hasten in Obama's second term, we do not share the sentiment that this administration is out to destroy America's domestic unconventional oil and gas industry. We hold the view that this administration will try to use existing statutory authority to further regulate hydraulic fracturing on a federal level, but will not *purposefully* punish the industry with regulations aimed at killing the hydraulic fracturing industry. That being said, this administration and the energy industry has, at times, had trouble working together, and there may be some residual bad blood over a contentious election where energy issues were front and center. If this administration attempted to proceed with federal regulation of hydraulic fracturing without meaningful input from the energy industry, there is a very real chance of a regulatory overreach that could deal a detrimental blow to a critical domestic industry.

Here is the context that informs Fracking Insider's view of federal hydraulic fracturing regulation in Obama's second term:

#### IT IS ENTIRELY UP TO THE WHITE HOUSE

Democrats held the Senate, and Republicans continue to control the House of Representatives. There will be some musical chairs among key committees with jurisdiction over hydraulic fracturing, but there is no indication that partisan gridlock will thaw in the coming years, particularly on a hot button issue like energy. While there will be hydraulic fracturing legislation introduced in both chambers, the White House is not banking on a meaningful hydraulic fracturing bill reaching the president's desk.

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Absent new statutory authority, this administration is going to inventory the regulatory authority it has within existing environmental statutes and figure how to promulgate rules under those statutes. The Obama Environmental Protection Agency did the same thing with climate change in the first term. Once the administration satisfied itself that the divided legislature would not pass a climate change bill, it promulgated greenhouse gas, or GHG, regulations under the Clean Air Act. Even the administration acknowledged that the CAA was a poor tool to regulate GHGs and that the CAA would need to be modified administratively to accommodate these ubiquitous gases, but they shoehorned GHGs into the CAA anyhow and, so far, courts have allowed it. We suspect that experience is fresh in this administration's mind and that the regulatory shoehorn is primed for action.

The petitions for rulemaking and ongoing studies say more about this administration's plans for hydraulic fracturing regulation than the "delayed rules."

Much has been made about a backlog of environmental regulations that the administration shelved in the months leading up to the election and that now will be unleashed upon industry. While true that this administration postponed a number of environmental regulations that could be seen as hurting jobs, energy prices and the fledgling economic recovery, none of those are precisely directed at hydraulic fracturing. Certainly, industry should and will engage in issues such as ozone and particulate matter standards, the Boiler MACT, sulfur standards for gasoline, and New Source Performance Standards for power plants and refineries, but it should not forget about the environmental groups' petitions for hydraulic fracturing rulemaking that have similarly (but less conspicuously) been delayed.

Those petitions include:

- Petition to regulate hydraulic fracturing fluids under the Toxic Substances Control Act (partially granted already).
- Petition to apply the Resource Conservation and Recovery Act to drilling fluids and produced waters.
- Petition to require Toxic Release Inventory reporting for hydraulic fracturing operations under the Emergency Planning and Community Right to Know Act.
- Request for regulatory determination over whether biocides in hydraulic fracturing fluid should be regulated under the Federal Insecticide, Fungicide and Rodenticide Act.

For an administration that has resigned itself to congressional inaction, these petitions provide avenues (albeit flawed) for shoehorning new regulatory authority into old statutes.

If petition-driven regulation is promulgated, it may also accompany Clean Water Act regulation. The EPA has been studying the impact of hydraulic fracturing on water since 2010. Draft findings are due in early 2013 with a final report due in 2014. Regardless of the draft or final findings, many administration officials predisposed to increased regulation of hydraulic fracturing under the CWA will point to this study as a justification for further regulation. On top of the administration's 2012 initiatives to increase regulation under the CAA, the Safe Drinking Water Act, and on federal land, it is easy to see how this "all-points/all-media" approach to hydraulic fracturing regulation has convinced many that the Obama administration is out to dismantle the industry.

## PRESIDENT OBAMA NEEDS HYDRAULIC FRACTURING

Despite this administration's regulatory propensities and the apparent attempt to federally regulate hydraulic fracturing through a multimedia, multi-statute approach, we believe that this administration needs a thriving domestic natural industry and the hydraulic fracturing that makes such an industry possible.

From an economic perspective, America is still in trouble, and the energy industry provides a rare bright spot on an otherwise gloomy economy. Obama's second term was made possible by millions of union workers who rely on a thriving domestic energy industry for paychecks, and by voters in Ohio and Pennsylvania where hydraulic fracturing breathed life into state treasuries and local economies. While term limits permit the president to decouple himself from these constituencies, history will judge this president on how he managed our nation's economic recovery — and recovery is impossible without a thriving domestic energy industry.

Obama is undoubtedly looking at his legacy from an environmental perspective as well. His election night reference to the "destructive power of a warming planet" reveals that he sees his response to climate change as a key component of his environmental legacy. This administration has aggressively pursued GHG regulation and fuel efficiency standards, but such efforts would be meaningless unless he can show a reduction in GHG emissions. Such reductions are not possible without meaningfully embracing natural gas. The Obama administration may not love hydraulic fracturing, but it likes natural gas a whole lot more than coal because natural gas combustion produces half the carbon dioxide emissions of coal. This administration's heavy-handed regulation of the coal and coal-fired power industries reflects that fact.

We believe that Obama understands that the fate of his economic and environmental legacy is intertwined with the energy industry and hydraulic fracturing. Whether that understanding will be sufficient to reign in anti-hydrocarbon elements of his administration and take a more restrained approach to regulation remains unclear. What is clear, however, is that this administration stands no chance of finding an appropriate level of regulation without working closely with industry. Unless Obama reaches out to the energy industry in a meaningful way, he will run the risk of allowing his regulators to run right past the breaking point of a healthy domestic energy and hydraulic fracturing industry.



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