# CRACKING DOWN ON FRACKING? THE LEGAL CASE AGAINST AN EXECUTIVE BAN

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Hydraulic fracturing, or "fracking," emerged as a contentious issue during the 2020 presidential race. Then-President Trump repeatedly challenged candidate Biden during the campaign by claiming that Biden wanted to completely ban fracking. Biden walked a tightrope with his position on fracking, trying to appease both the environmentalist wing of his party, which may not be satisfied with anything less than a total ban, and important constituencies in Pennsylvania and New Mexico, where fracking is a major source of jobs and tax revenue. Broadly speaking, Biden's position was that there should be "no more drilling on federal lands" and that we should "transition from the oil industry."

Biden has taken significant steps towards these goals during his first month in office. On January 21, Biden's second day in office, Acting Interior Secretary Scott de la Vega signed an order pausing federal permitting for 60 days or until Biden's political appointees in the Department of the Interior are confirmed. And on January 27, 2021, President Biden issued an executive order titled "Tackling the Climate Crisis at Home and Abroad." Section 208 of that order, pertaining to "Oil and Natural Gas Development on Public Lands and in Offshore Waters," directs the Secretary to "pause" federal leasing pending a likely comprehensive overhaul of federal permitting and leasing.

It remains to be seen exactly how the Biden administration intends to handle the fracking issue, but whatever steps he takes may be unwelcome news for the industry. In addition to President Biden's comments, New Mexico Representative Deb Haaland (now Secretary of the Interior), publicly stated that she intends to stop all oil and gas leasing on federal lands. Industry stakeholders therefore should be prepared to assert a variety of legal claims, depending on what regulatory mechanisms the Biden administration ultimately employs.

***The Biden administration probably lacks authority to completely "ban" fracking.***

An outright rule banning fracking on federal lands would be subject to challenge as violating the Administrative Procedure Act. 5 U.S.C. § 706. Simply put, the Interior Department cannot eliminate fracking on federal lands unless it has the statutory authority to do so. After all, executive agencies "literally [have] no power to act . . . unless and until Congress confers power upon [them]." *La. Pub. Ser. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

And there is serious doubt about the Bureau of Land Management's ("BLM") authority to regulate fracking. In *State of Wyoming v. United States Dep't of the Interior*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *2 (D. Wyo. June 21, 2016), *judgment vacated, appeal dismissed sub nom. Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017), the court rejected BLM's attempt to rely on its general land management authority to regulate fracking, i.e., wellbore construction, chemical disclosures, and water management, on federal land. The court held that "Congress has not delegated to the Department of the Interior the authority to regulate hydraulic

fracturing [fracking]. [Its] effort to do so through the Fracking Rule is in excess of its statutory authority and contrary to law."

If the government does not have the authority to *regulate* fracking, it is difficult to see how it would have the authority to *ban it outright.* Thus, any potential effort by the Biden administration to ban fracking on federal lands would be subject to a threshold legal claim about Interior's statutory authority to regulate in this area absent express delegation of authority granted to it by Congress.

The Biden administration may attempt to rely on Section 39 of the Mineral Leasing Act, which authorizes suspension of production "in the interest of conservation." 30 U.S.C. § 209. But that statute also requires that such a suspension be "for the purpose of encouraging the greatest ultimate recovery," *id*., a statutory condition that a total ban is unlikely to satisfy.

***Substantive legal challenges are also available if the Biden administration adopts something less than a total "ban."***

The Biden administration might also try to sharply reduce the number of leases and permits granted for operations on federal land. But the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947 require the BLM to promote exploration and development of federal minerals. Further, the BLM is required by statute to offer quarterly oil and gas leases sales. *See* 30 U.S.C. § 226. An end to federal leasing would certainly violate these statutory requirements, but even a sharp reduction might too.

If the administration were to limit permitting, current leaseholders who have not yet obtained permits could assert breach of contract actions against the federal government, and, having paid for a lease that they cannot develop, they might also have a claim for an unconstitutional taking of property. *See Union Oil Co. of California v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975) ("[R]efusal to permit installation of that platform now or at any time in the future deprives Union of all benefit from the lease in that particular area.").

It is also possible that the administration will eschew a broad, sweeping ban in favor of piecemeal measures that will reduce fracking by raising production costs. However, the types of measures commonly discussed—e.g., requirements that operators disclose information regarding the chemicals injected into wells, and technical regulations meant to ensure that wells are properly constructed to protect water supplies—are similar to the Obama-era rules that were held unlawful in *State of Wyoming v. United States Dep't of the Interior*, and would be subject to similar legal challenges about the lack of executive authority.

***Any new rules would also be subject to procedural challenges.***

In addition to the substantive challenges identified above, newly promulgated rules would be subject to procedural challenges under the APA. For example: Did Interior engage in meaningful notice and comment? Did Interior adequately justify its decision-making, including explaining what, if any, benefits would be derived from this ban and how they weigh against the enormous costs that would be imposed on energy manufacturers and many other stakeholders? Did Interior explain what the ban on federal lands would purport to accomplish given that continued fracking activities on non-federal lands, which comprise the vast majority of fracking

operations, would be outside the scope of Interior's ban? Although it is difficult to evaluate the strength of these arguments in the abstract without seeing the rule, this type of argument can be particularly strong where, as here, it is combined with a serious claim that the agency has exceeded its statutory authority.

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At bottom, the case against an executive ban on fracking is relatively simple—it's an important policy choice that should be decided by Congress, rather than the executive branch. Congress has not done so, nor has it delegated to the executive branch the ability to make that decision. As the court explained in *State of Wyoming v. United States Dep't of the Interior*, "Congress' inability or unwillingness to pass a law desired by [Obama's] executive branch does not default authority to [that] branch to act independently, regardless of whether hydraulic fracking is good or bad for the environment or the citizens of the United States." 2016 WL 3509415 at *12.

Although it remains unclear how the Biden administration will ultimately address this issue, there is serious doubt about its legal authority to act in the manner it is expected to, and the industry should be ready to say so.