President Obama has described his energy policy as “all of the above.” His opponents have called it “picking winners and losers.” In practice, it has been driven by two major changes in the nation’s energy landscape: a boom in private domestic oil and natural gas production, and concerted federal promotion of renewable energy development. This article focuses on the oil and gas industry. Specifically, it looks at expected policy changes that will redefine how oil and gas drilling practices are regulated under federal environmental laws, as well as the impact of increased oil and gas production in driving new infrastructure and facilities proposals needed to deliver these energy resources to market. Finally, the article discusses the tension between two stated policies of the Obama administration: fighting climate change by reducing greenhouse gas emissions and increasing oil and gas production to promote economic growth and energy independence.

EXPECT MORE FEDERAL REGULATION OF OIL AND GAS PRODUCTION

Domestic oil and gas production is currently booming in the United States. Technical advances in deep horizontal drilling...
combined with existing hydraulic fracturing technologies have opened up unconventional oil and gas deposits from Pennsylvania to North Dakota to California. With production moving into new territories, some largely unaccustomed to their practices, calls have arisen to increase federal regulatory control over the oil and gas industry—activities historically regulated primarily by the states. Today’s debate over “fracking” is, in many respects, a debate regarding the proper balance between state and federal regulation over the oil and gas industry.

President Obama has enjoyed political benefits from the increased energy independence, low energy prices, and domestic industrial expansion that the boom is bringing. But his administration has also had to address the rising insurgency from environmental interests within the party ranks. In large part, the Obama administration has handled the rising tensions by conducting studies and proposing, but (generally) not finalizing, new regulations. Now that the election is over, it appears likely that the regulatory machinery will continue forward. The question is exactly how?

One initiative that appears likely to be finalized is the US Bureau of Land Management’s (BLM’s) proposal to regulate hydraulic fracturing on federal lands. Responding to public pressure to force disclosure of chemicals used in the hydraulic fracturing process and address potential fluid spills in its federal drilling program, the BLM drafted regulations modeled after, and often duplicating, state-level efforts to address the same issues. The draft regulations were released in May 2012, and the public comment period was extended until just before the election, meaning that final action necessarily was put off until afterward.

Now, with the election over, it appears likely that drilling on federal lands will soon be subject to additional disclosure, well integrity, and flowback management standards. The proposed rules have been criticized for increasing costs and adding an additional regulatory layer for industry to manage, but the Obama administration has not responded to requests to suspend the rulemaking. Rather, most recently, the Department of the Interior announced its intention to push off finalization until early 2013 in order to better evaluate the 170,000 comments it received.

The last four years have left little question that the EPA is very interested in extending its regulatory oversight to oil and gas drilling; the question for the agency has been how, exactly, to do so? Through trial and error, the agency has been exploring multiple avenues toward additional control.

• Like the BLM, the EPA has considered its authority to require drillers to disclose the chemicals used in hydraulic fracturing in some fashion. To that end, in November 2011, the EPA granted a petition requesting disclosure of hydraulic fracturing fluid chemicals under the Toxic Substances Control Act §§ 8(a) and 8(d). If finalized, the regulations would require recordkeeping and data submission by chemical manufacturers and processors. As of this writing, the EPA has announced its intention to issue an Advance Notice of Proposed Rulemaking in December 2012, after which the EPA will seek input from stakeholders.

• The EPA has also been active, with mixed success, under the Clean Air Act. In a friendly settlement with environmental groups, it agreed to review and revise Clean Air Act regulations applicable to the oil and gas industries. This resulted in final regulations requiring flaring and, in several years, emissions controls during flowback (green completions). This, however, was shortly followed by a significant loss of agency control, as the Sixth Circuit Court of Appeals struck down the EPA’s practice of aggregating non-adjacent production wells to push them over the emissions threshold for Clean Air Act permits. It remains to be seen whether the EPA intends to seek some other way to expand its permitting jurisdiction over production wells.

• On the water front, the EPA began developing new Clean Water Act effluent limitations for coalbed methane extraction and shale gas production in October 2011. Under its current schedule, the EPA intends to address natural gas guidelines in 2013 and move on to coalbed methane in 2014.

• The EPA has also taken steps toward tightening regulations under the Safe Drinking Water
movement on no less than six federal initiatives to evaluate and extend existing environmental regulation of oil and gas drilling practices. This represents a significant potential shift away from the traditionally local and state regulation that has existed for decades.

President Obama’s reelection means that the next several years may see movement on no less than six federal initiatives.

THE CONSEQUENCES OF SUPPLY: INFRASTRUCTURE AND EXPORTS

With much more oil and gas to move, process, use, and sell than in the past, the oil and gas boom will also spur numerous efforts to expand the nation’s existing pipeline network and refinery capacity. These activities are already beginning, and can be expected to increase. As that happens, proponents and opponents will meet before state and federal agencies to fight over permitting requirements and the adequacy of environmental reviews and mitigation, inevitably leading to lawsuits. In the arid west, the potential listing of the sage grouse under the Endangered Species Act in 2015 will continue to loom large over infrastructure proposals.

Due in large part to abundant domestic natural gas supplies, energy prices are expected to remain relatively low for years to come. This has led to a revival of energy-intensive industrial projects. For example, low natural gas prices have allowed Alcoa to secure a 10-year power contract for a smelter in the Pacific Northwest that until recently faced uncertainty about its long-term power supply. And chemical and manufacturing operations that were recently leaving the United States to cut costs are now planning to invest billions of dollars in domestic facilities.

The glut of low-priced domestic natural gas is also spurring interest in liquefied natural gas (LNG) exports. Indeed, the United States is forecasted to become a net energy exporter for the first time in decades. During his second term, President Obama will begin to clarify the nation’s changing role in the world energy markets—including defining the extent to which domestic natural gas is exported.

But controversy surrounds the export of domestically produced energy. On one
exports increased. The report’s conclusions, however, have been criticized by industries that would be impacted by the inevitable increase in domestic natural gas prices.

Heightened congressional scrutiny of LNG export policies will also continue during President Obama’s second term. At least two bills were introduced in 2012 that would significantly restrict LNG exports. One bill would have required natural gas extracted from federal lands to be sold only to customers in the United States. A second bill would have prohibited FERC from licensing LNG export terminals. Senator Ron Wyden (D-OR), the likely incoming chair of the Senate Energy and Natural Resources Committee, has asked Energy Secretary Steven Chu to describe the factors the DOE-FE will consider as it deals with the backlog of LNG export applications.

As more LNG export proposals move forward, litigation is also likely to increase. The NEPA review process, as well as local land-use decisions, will provide fertile ground for project opponents to challenge energy export projects. Other lesser-known regulatory hurdles will also trigger litigation—for example, environmental nongovernmental organizations (NGOs) recently challenged a US Coast Guard determination concerning the safety and security of bulk LNG shipping on the Columbia River.

There will undoubtedly be profound impacts on the nation’s energy landscape from increased domestic oil and natural gas production. The second Obama administration stands to shape the trajectory of that change for years to come.

The main factor affecting the level of DOE-FE scrutiny afforded to LNG export projects is whether the project will export LNG to countries with which the United States has a fair trade agreement (FTA). To date, the DOE-FE has approved exports to non-FTA countries from only one facility—ExxonMobil’s Sabine Pass LNG terminal in Texas. In its approval order, the DOE-FE reserved the right to revisit the permit if cumulative levels of approved exports prove contrary to the public interest. To that end, the DOE-FE stayed its consideration of other pending LNG export licenses while it analyzes the economic impact of LNG exports, including the extent to which such exports would increase domestic natural gas prices, create domestic jobs, or offset trade imbalances. The DOE-FE recently issued that report, which concluded that LNG exports would result in net economic benefits, and that net economic benefits would increase as the level of LNG exports increased. The report’s conclusions, however, have been criticized by industries that would be impacted by the inevitable increase in domestic natural gas prices.

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THE ELEPHANT IN THE ROOM: CLIMATE CHANGE

Finally, the Obama administration will need to clarify how increased fossil fuel production can be aligned with the administration’s professed interest in taking action on climate change. While the issue was largely set aside during President Obama’s first term, it arose late in the election cycle in the wake of the devastation wrought by Hurricane Sandy. The question naturally arises: what does the oil and gas boom mean for the nation’s climate policy, and vice versa?

The debate over the Keystone XL Pipeline exemplifies this tension between climate-change policy and energy production. As
originally proposed, the pipeline would carry 830,000 barrels per day of crude oil produced in the Canadian oil sands to refineries along the US Gulf Coast. Proponents of the project argue that it will create thousands of construction jobs, stimulate the economy, and provide a reliable source of oil from a nearby, stable, and friendly country. Opponents’ concerns include the climate-change impacts from expanded US imports of fuel derived from Canadian oil sands.

A presidential permit is needed for the northern segment of the project, which stretches from the oil sands in Alberta, Canada, to Cushing, Oklahoma, and the Department of State is completing a Supplemental Final Environmental Impact Statement (EIS) for the project, which should include some consideration of climate impacts. A final determination on whether the pipeline project is in the “national interest” is expected in the first quarter of 2013. While the outcome remains far from certain, President Obama’s support for the southern phase of the project and his recent statements that he would not “ignore jobs and growth simply to address climate change,” have given confidence to industry that the project’s approval is only a matter of time. As Canada’s Natural Resources Minister Joe Oliver stated after President Obama’s reelection, “We believe that the Keystone XL will be approved by the Americans because it is clearly in the US national interest in terms of national security, jobs (and) economic growth.”

Proposed coal export facilities will also pose another test of the administration’s position on climate, as federal agencies will soon be asked to issue permits for aspects of these facilities. The Obama administration is not widely known as a friend of coal, and US coal demand is dropping. This has led coal producers to look to export US-produced coal to foreign markets. In 2012, US exports of both steam and metallurgical coal are expected to exceed 113 million short tons—a level last seen in 1981.

The majority of these exports (to both Asia and Europe) are shipped from ports on the East and Gulf Coasts due to the proximity of metallurgical coal deposits concentrated in the eastern United States. In recent years, however, a number of proposals have been advanced to develop coal export facilities in the Pacific Northwest, as those facilities would provide ready access to Asian markets for coal extracted from the Powder River Basin and other western deposits.

Each of these proposals faces local and national opposition, largely from parties that oppose the export of greenhouse gas emissions.

CONCLUSION
During President Obama’s first term, there were many proposals but fewer final actions on new federal regulation of oil and gas production. That pattern appears likely to change in the president’s second administration. The boom in oil and gas production is creating a counter-boom in litigation aimed at stopping or limiting development, and both industry and environmentalists are pressing their case as to the role the federal government should play in an era of greater energy abundance.

NOTES
7. See http://water.epa.gov/lawsregs/lawsguidance/cwa/304m/index.cfm.
10. The EPA’s other major effort under the SDWA has been shelved. In US v. Range Production Co., No. 11:-cv-00116 (N.D. Texas filed Jan. 18, 2011; dismissed by stipulation Mar. 30, 2012), the EPA contended that it could force drillers to investigate allegations of nearby offsite contamination without first establishing that the contamination came from those drillers’ activities. The case was quietly withdrawn after the US Supreme Court struck down similar practices under the Clean Water Act. Sackett v. EPA, 132 S. Ct. 1367 (2012).


15. The US Energy Information Administration (EIA) recently forecast that between 2010 and 2035, the United States will transition from being a net importer to a net exporter of LNG. EIA, Natural Gas from Executive Summary (June 25, 2012), available at http://www.eia.gov/forecasts/aeo/ source_natural_gas_all.cfm#natgas. While the glut of natural gas resulting from unconventional drilling techniques has fueled the discussion of exports, similar discussions are not being had with respect to unconventional oil, for the simple fact that crude oil exports are prohibited under federal law, except under very narrow circumstances. 42 U.S.C. § 6212. Similar restrictions, however, are not in place with respect to refined products. In 2011, the United States exported 439,000 barrels per day of gasoline and other refined products, and became a net exporter for the first time since 1949. US exports are expected to increase by as much as 2.6 million barrels per day of oil products.

16. E.g., 15 U.S.C. § 717b(e)(a) (FERC “shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”).

17. Dep’t of Energy, 2012—LNG Import/Export Authorization Applications, available at http://www.eia.gov/forecasts/aeol/ source_natural_gas_all.cfm#nagtgas. While the glut of natural gas resulting from unconventional drilling techniques has fueled the discussion of exports, similar discussions are not being had with respect to unconventional oil, for the simple fact that crude oil exports are prohibited under federal law, except under very narrow circumstances. 42 U.S.C. § 6212. Similar restrictions, however, are not in place with respect to refined products. In 2011, the United States exported 439,000 barrels per day of gasoline and other refined products, and became a net exporter for the first time since 1949. US exports are expected to increase by as much as 2.6 million barrels per day of oil products.


19. Section 3 of the Natural Gas Act (NGA) established a rebuttable presumption favoring natural gas exports. Under that provision, the DOE-FE must authorize natural gas exports unless it finds that such “proposed exportation . . . will not be consistent with the public interest.” 15 U.S.C. § 717b(a). Section 3(c) further provides that proposed natural gas exports to countries with an FTA requiring national treatment for trade in natural gas are “deemed to be consistent with the public interest, and applications for such . . . exportation shall be granted without modification of delay.” 15 U.S.C. § 717b(c). Facilities that propose to export natural gas to countries without FTAs must submit an application to the DOE-FE, which conducts a “public interest” review. Countries without FTAs, including Japan, are some of the largest importers of natural gas.


25. Columbia Riverkeepers v. US Coast Guard (9th Cir. No. 12-73358).


28. According to a Congressional Research Service survey of various scientific studies, “Canadian oil sands crude are, on average, somewhat more GHG emission intensive than the crude they would displace in the US refineries.” See note 27, at 24.

29. US Dep’t of State, New Keystone XL pipeline application, available at http://www.keystonepipeline-xl.state.gov/. The Final EIS prepared for the original Keystone XL pipeline project stated that “[t]he proposed Project is not likely to impact the amount of crude oil produced from the oil sands,” but provided an estimate “for illustrative purposes . . . estimat[ing] that incremental lifecycle US greenhouse gas emissions from displacing reference crude oils with Canadian oil sands crude oils imported through the proposed Project would be between 3 and 21 million metric tons of carbon dioxide emissions annually.” ES-15.


35. Millennium Bulk Terminals (Longview, Washington); Gateway Pacific Terminal (Cherry Point, Washington); Morrow Pacific Project (Port Morrow, Oregon); Coos Bay Terminal (Coos Bay, Oregon); and Port of St. Helens (St. Helens, Oregon).