



## Separating Fiction from Invention in ProPublica's Latest Anti-HF Attack Piece

Appropriately filed on its "[opinion/perspectives](#)" page than as part of its straight-news reporting.

Prior to its release, [Energy In Depth](#) spoke at length with Mr. Lustgarten about the direction of the (presumably already written) piece and the myriad mistakes he was making in issuing a blanket indictment of [recent](#) government and [third-party reports](#) finding that EPA regulation of hydraulic fracturing would cost Americans [jobs, revenues and future security](#).

Regrettably, none of those explanations made it into his final piece. What follows is our attempt to identify and correct the areas in which Mr. Lustgarten's errors were most egregious:

**PP:** "Now, Congress is considering legislation to **restore** the EPA's oversight of [hydraulic fracturing]."

**Fact:** Opponents of hydraulic fracturing understand well that the success of their anti-fracing campaign depends in large part on their ability to [convince people](#) that fracturing was previously regulated by the EPA, and that all they are therefore seeking to achieve is the full and fair restoration of the Safe Drinking Water Act (SDWA) of 1974 to its previous self.

Set aside the fact that ***hydraulic fracturing has never been regulated by SDWA at any point in the 35-year history of the Act.*** Not only does Mr. Lustgarten continue to parrot this falsehood, but members of Congress and staff have begun to pick up on the theme as well:

Jeff Lieberman, a spokesman for [Rep. Maurice] Hinchey, said the IHS study should be discounted because it was not conducted independently. "It's just ridiculous," he said. "Their forecasting showing production going down dramatically doesn't make sense, because **all we're trying to do is to go back to the way things were in 2004, before the loophole was inserted in the 2005 energy bill.**" (June 1, 2009, [Platts Gas Daily](#))

Of course, what Mr. Lieberman likely does not know - but Mr. Lustgarten likely does - is that "the way things were in 2004" is identical to the way things are in 2009; that is, states continue to [aggressively regulate](#) the process of hydraulic fracturing, continue to have access to the [all the information they need](#) to exercise full oversight over the process, and continue to update and improve their regulations to reflect changes in landscape, science and new technology.

**PP:** "Furthermore, none of the tests listed in the table is mentioned in the text of the Safe Drinking Water Act ...[a]nd they aren't mentioned in the bill being floated in Congress, either."

**Translation:** Studies that show EPA regulation over hydraulic fracturing [could cost billions](#) in lost revenues, lost wages, and lost energy production must necessarily be wrong - since there's nothing in the DeGette/Casey [anti-FRAC Act](#), or in the text of SDWA, that identifies specific compliance measures that would need to be followed pursuant to the bill.

**Fact:** Very rarely does the text of any legislation, proposed or passed, include an explicit enumeration of the regulatory mechanics under which its stated mandate must be carried out (that's what the regulatory agency and, if needed, the courts are for). In fact, EPA has promulgated rules that create five classes of [Underground Injection Control](#) wells and is now considering creating a sixth classification to address carbon sequestration. None of these are explicitly "mentioned in the text of the Safe Drinking Water Act"; all of them are solely the creation of EPA under its SDWA authority.

In the case of DeGette/Casey, [section 2\(a\) of the bill](#) clearly amends SDWA to include the regulation of hydraulic fracturing under its portfolio. With SDWA regulation comes the potential for EPA permit-authority over the process, a prospect that then-EPA administrator [Carol Browner](#) admitted was unnecessary in 1995. Current administrator Lisa Jackson is neither bound by, nor has she endorsed, that position.

Bottom line: Just because a detailed set of instructions for how, why, and when EPA should regulate fracturing wasn't included in DeGette/Casey doesn't mean that EPA, once allotted this new authority, won't pursue it to the fullest possible extent - including the possibility of regulating fracturing activities under hyper-stringent Class I rules previously set aside for the permanent disposal and storage of the world's most hazardous wastes (a proposal included in the Natural Resource Defense Council recommendations to Congress).

[Nine out of 10 wells in America](#) undergo fracturing to remain viable producers of energy - a process that happens hundreds of times a week, thousands of times a year, and more than 1.3 million times in all. Any effort to impose a new regulatory structure on a process as common and critical as that will necessarily produce serious consequences. And as studies from the [Department of Energy](#), [Ground Water Protection Council](#), and [IHS Global Insight](#) make plain, the disruption of this technology could lead to a significant loss in jobs, revenue and energy produced.

**PP:** "A close examination of the appendixes attached to the research also showed that 21 of the 31 [states](#) listed do not have any specific regulation addressing hydraulic fracturing."

**Translation:** If the words "hydraulic" and "fracturing" aren't included in consecutive sequence in a state's regulatory handbook, it must be the case that the state does not regulate any aspect of the process whatsoever.

**Fact:** It is in fact possible (and indeed, common) for a government entity to claim regulatory authority over something that's not explicitly enumerated in the text of the relevant statutory document (see: the "general welfare" clause of the U.S. Constitution). No one doubts, we hope, that the states of Pennsylvania, New York and Texas regulate hydraulic fracturing. But you won't find the term "hydraulic fracturing" anywhere in their individual oil and gas regulations. [Here's what you will find](#) (pg. 26):

*Pennsylvania:* "[T]he department shall have the authority to issue such orders as are necessary to aid in the enforcement of the provisions of [the oil and gas] act." (58 P.S. section 601.503)

*New York:* "The drilling, casing and completion program adopted for any well shall be such as to prevent pollution. Pollution of the land and/or of surface or ground fresh water resulting from exploration or drilling is prohibited." (6 NYCRR Part 554)

*Texas:* "No person conducting activities subject to regulation by the commission may cause or allow pollution of surface or subsurface water in the state." (TAC 16.1.3.8)

"The states," the Ground Water Protection Council [found](#) in its April 2009 report, "have broad powers to regulate, permit, and enforce all activities-the drilling and fracture of the well, production operations, management and disposal of wastes, and abandonment and plugging of the well." Moreover: "[S]tate laws generally give the state oil and gas director or agency the discretion to require whatever is necessary to protect human health and the environment."

In reality, the primary method for protecting ground and drinking water from contamination by natural gas wells - during both hydraulic fracturing and production activities - is the use of additional steel piping (casing) and cementing of the well bore above and below the ground water. ProPublica tries to discount the effectiveness of this proven management method by applying a superficial reading of various state regulations. The real tests are the 950,000 operating natural gas and oil wells throughout the United States that function daily with rare failures.

**PP:** "In May the [Ground Water Protection Council](#), a group made up mostly of industry representatives and state oil and gas regulators...."

**Translation:** If industry is involved in an organization, it cannot be trusted.

**Fact:** The Ground Water Protection Council is "a national association of state ground water and underground injection control agencies whose mission is to promote the protection and conservation of ground water resources for all beneficial uses, recognizing ground water as a critical component of the ecosystem."(from the GWPC [web site](#)). Industry members are not allowed on its board. Its committee members are primarily state officials, but can include both environmentalists and industry participants.

Unable to credibly undermine GWPC's findings, ProPublica instead focuses on undermining the integrity of the institution itself, implying that its study should be discounted solely on the basis of its perception of industry influence. In fact, and as noted, the studies ProPublica references were conducted under funds provided by the [Department of Energy](#).

**Want to participate in the discussion?** Click [here](#) to access the ProPublica piece on the *Politico* website; [here](#) to post a public comment on the piece; [here](#) to email a blog post to [Energy In Depth](#); or here to send an [email](#) to Mr. Lustgarten.

--

Additional resources available at [Energy In Depth](#):

- **Press Release:** [Duplicative hydraulic fracturing rules could imperil U.S. economy](#)
- **GWPC Study:** [State Oil and Natural Gas Regulations Designed to Protect Water Resources](#)
- **Graphic:** [How Far Down Do We Frac?](#)
- **Graphic:** [What's In Frac Fluids?](#)
- **Fact Sheet:** [New Federal Regulations Will Cost Americans Jobs, Revenue, and Security](#)
- **EPA Study:** [Study to Evaluate the Impacts to USDWs by Hydraulic Fracturing of Coalbed Methane Reservoirs](#)
- **Browner Memo:** [Letter of Support for Hydraulic Fracturing from Carol Browner, Fmr. EPA Administrator](#)
- **Interactive Graphic:** [How Could Efforts to Attack Hydraulic Fracturing Impact Your State?](#)