Shaking it up: Sierra Club brings a novel RCRA claim in an attempt to tighten regulation of fracking-related activities

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The steady increase in the use of hydraulic fracturing (or “fracking”) has brought with it a debate about the impact of fracking and fracking-related activities on human health and the environment. While industry cites a lengthy track record of successful fracking operations over decades, citizen groups have raised concerns over risks of water contamination, climate change, and induced earthquakes. The earthquake risk in particular has been the subject of a great deal of recent scientific literature and public concern, and the State of Oklahoma has acknowledged on its website a likely connection between wastewater injection wells and an increase in seismic activity. Earthquakes in Oklahoma, Oklahoma Geological Survey, http://earthquakes.ok.gov/what-we-are-doing/oklahoma-geological-survey/ (last visited May 11, 2016). Although there have been numerous government actions relating to fracking, including new and revised state and federal regulations, citizen groups have voiced frustration over the pace and substance of government actions, which have, in their view, not gone far enough to curtail or ban fracking activities. These groups have increasingly attempted to take matters into their own hands, with decidedly mixed results. In their recently filed Resource Conservation and Recovery Act (RCRA) lawsuit, Sierra Club has taken a new approach: arguing for the judicial creation of a quasi-regulatory regime intended to address the “imminent and substantial endangerment” allegedly presented by induced earthquakes. Sierra Club v. Chesapeake Operating, LLC, Complaint for Declaratory and Injunctive Relief Under 42 U.S.C. § 6972(a)(1)(B) (W.D. Okla. Feb. 16, 2016).

Prior citizens group efforts

Since 2010, numerous local and county governments have responded to citizens’ public health concerns by passing ordinances limiting or banning fracking. But the ultimate efficacy of these ordinances has been mixed. Bans in Pennsylvania and New York have been upheld. But courts in other states, including most recently in Colorado, have overturned such ordinances as preempted by state regulation of oil and gas activities. Oklahoma and Texas have passed state laws prohibiting all such ordinances, with limited exceptions for certain laws such as setbacks and emergency response services.

Citizen and environmental groups have also sued federal and state agencies under environmental laws like the Safe Drinking Water Act (SDWA), Clean Water Act, and National
Environmental Policy Act (NEPA), and state versions thereof. Most of these have argued that the government has failed to satisfy its legal duties to oversee, or fully address the environmental impacts of, fracking activities. For example, the Legal Environmental Assistance Foundation successfully argued in LEAF v. U.S. E.P.A., 276 F.3d 1253 (2001), that the SDWA required the U.S. Environmental Protection Agency (EPA), when it approved delegation of SDWA permitting responsibilities to Alabama, to require Alabama to regulate fracking operations. (That success was short-lived, however: Congress amended the SDWA to expressly exempt nondiesel fuel fracking in 2005.) NEPA lawsuits have argued, with limited success, that permits granted to fracking operations have failed to address the full litany of environmental risks, but those suits have done little to impact the overall regulatory landscape. More recently, several environmental groups sued EPA under RCRA, arguing that EPA must regulate fracking waste fluid under the act. See Complaint, Environmental Integrity Project v. EPA, No. 1:16-cv-842 (D.D.C. May 4, 2016) (Environmental Integrity Project).

The Sierra Club’s new angle

On February 16, 2016, the Sierra Club filed a citizen suit against several oil and gas companies alleging violations of section 7002(a)(1)(B) of RCRA. This provision allows citizens to sue companies whose “storage, treatment, transportation, or disposal” of solid wastes “may present an imminent and substantial endangerment to health or the environment.” Id.

The Sierra Club suit alleges an imminent and substantial threat from induced earthquakes caused by the defendants’ use of injection wells in Oklahoma. Complaint, Environmental Integrity Project, at 1–2 (Feb. 16, 2016). The complaint seeks declaratory and injunctive relief, including an order to reduce the amount of fluids injected into wells “to levels that seismologists believe will not cause or contribute to increased earthquake frequency and severity.” In addition, “[b]ecause no government body is currently taking a holistic or proactive view of waste injection and its potential to induce earthquakes,” the Complaint seeks “an Order requiring the establishment of an independent earthquake monitoring and prediction center to determine the amount of Production Wastes which may be injected into a specific well or formation before induced seismicity occurs.” Id. at *3.

This complaint presents a novel interpretation of the RCRA provision. Historically, citizens have sued under this provision to address possible harms from unremediated contamination. Here, the Sierra Club seeks to prevent the act of disposing of wastes based on impacts unrelated to contamination. The defendants have called plaintiffs’ novel interpretation into question. In their motions to dismiss, they have argued both that RCRA’s focus on contamination and pollution brings induced earthquakes out of the act’s zone of interest, and that the provision applies only to waste that “in and of itself, endangers public health or the environment.” Motion to Dismiss, Environmental Integrity Project, at *34–37 (Apr. 25, 2016).

In addition, this suit brings to a head the question of whether citizens can force regulatory
change through judicial action, even in light of an existing state-level framework. As the defendants point out, the Oklahoma Corporation Commission already regulates injection wells and has established a permitting system that takes into account the risk of increased seismicity. *Id.* at *3. Indeed, just days after the Sierra Club filed its complaint, the commission announced a new program to address the risks of induced earthquakes. Yet Sierra Club lawyers *contend* that state agencies are unable to effectively regulate in the face of significant pressure from industry. The establishment of an independent monitoring center would, according to plaintiffs, take politics out of the process. The defendants argue, however, that this case falls squarely within the *Burford* abstention doctrine, which provides that federal courts should avoid interfering with a state's comprehensive regulatory plan. *Id.* at *19. They also contend that the questions presented, which require a high level of scientific expertise to resolve, are better left to the primary jurisdiction of the state agency. *Id.* at *24.

The outcome of this suit will turn on the court's interpretation of RCRA and concepts of preemption in the context of existing state regulatory action. The decision will have implications beyond Oklahoma as the success or failure of this suit, and the opinions of the trial and appellate courts, will set important precedent in this uncharted territory. Whether the court will agree that it should step in to fill a perceived regulatory void remains to be seen, but practitioners on both sides of these issues should pay careful attention as this case progresses.