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THE FIGHT FOR FRACKING: THE BATTLE RAGES ON

BY JESSIE SMITH

A storm is brewing in the United States District Court for the District of Columbia. In May of 2016, a suit was filed against the Environmental Protection Agency (“EPA”) by a multitude of plaintiffs, including prominent environmental protection groups such as the Natural Resources Defense Counsel, Earthworks, and the Environmental Integrity Project.^[i]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn1) The suit alleges that the EPA has “failed to meet continuing nondiscretionary duties” under the Resource Conservation and Recovery Act (“RCRA”).^[ii]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn2) As a result, certain methods of waste disposal employed by the fracking industry have gone unchecked, resulting in, among other things, increased seismic activity in affected regions.^[iii]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn3) The relief sought by plaintiffs, if granted, would essentially require the EPA to update waste disposal rules governing the oil and gas industry, rules that have not been updated since before fracking and horizontal drilling techniques became mainstream.^[iv]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn4)

The suit raises a number of questions revolving around issues of public policy. Perhaps the most important issue is whether this increased seismic activity is serious enough to warrant an updated laundry list of federal regulations – regulations that will inevitably hamper an industry that has reduced gas bills for American consumers by \$13 billion per year from 2007 to 2013, and an industry that is quickly becoming a powerful player in the economy.^[v]

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To understand the seriousness of the seismic activity at issue, consider the following: according to the United States Geological Survey (hereinafter “USGS”), there were an average of twenty-one magnitude three or larger earthquakes per year between the years 1973 and 2008 in the central and eastern United States.^[vi]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn6) Between 2009 and 2013, this number had risen to an average of ninety-nine magnitude three or larger earthquakes per year.^[vii]

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The numbers produced by the USGS illustrate a serious increase in the number of earthquakes seen in affected regions of the United States, and these increases have been directly attributed to waste disposal methods associated with fracking and horizontal drilling techniques.[ix]
(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn9) However, the earthquakes themselves have been, in the words of the USGS, "large enough to have been felt by many people, yet small enough to rarely cause damage." [x]
(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn10) The USGS assessment that these earthquakes "rarely cause damage" [xi]
(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_edn11) begs the question of how stringent updated regulations need to be in order to ensure the public welfare.

Naturally, public safety should be valued above all else; however, the regulations that are eventually promulgated should be proportional to the threat imposed to public welfare. Ultimately, overzealous regulations could have the unfortunate effect of hampering an industry that is becoming a driving force in the American economy, and may do no more to ensure public safety than would less restrictive, more reasonable regulations. The EPA, in fulfilling their obligations under the RCRA, must be careful to strike the appropriate balance in this delicate situation; public safety must be guaranteed, but appropriate measures must also be taken to safeguard against overly burdensome regulations that may do more harm than good for the average American.

[i]
(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref1) Complaint for Declaratory and Injunctive Relief at 1-2, *Envtl. Integrity Project v. McCarthy*, No. 1:16-cv-00842 (D.D.C. filed May 4, 2016), *available at* <http://environmentalintegrity.org/wp-content/uploads/2016-05-04-RCRA-OG-Wastes-Deadline-Suit-Complaint-FILED.pdf>.

[ii]
(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref2) *Id.* at 3, 22.

[iii]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref3) See Brennan Linsley, *EPA sued over fracking waste-disposal rules amid worry over earthquakes*, Lexington Herald Leader (May 4, 2016, 6:20 PM), <http://www.kentucky.com/news/nation-world/national/article75657002.html>.

[iv]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref4) *Id.*

[v]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref5) See Fred Dews, *The economic benefits of fracking*, Brookings Institution (Mar. 23, 2015, 11:05 AM), <http://www.brookings.edu/blogs/brookings-now/posts/2015/03/economic-benefits-of-fracking>.

[vi]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref6) *Induced Earthquakes*, USGS, <http://earthquake.usgs.gov/research/induced/> (last visited June 1, 2016).

[vii]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref7) *Id.*

[viii]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref8) *Id.*

[ix]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref9) See William L. Ellsworth et al., *Increasing seismicity in the U.S. midcontinent: Implications for earthquake hazard*, 34 *The Leading Edge* (Society of Exploration Geophysicists) 618, 618 (June 2015), https://profile.usgs.gov/myscience/upload_folder/ci2015Jun041350265600EllsworthTLE.pdf.

[x]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref10) *Induced Earthquakes*, *supra* note vi.

[xi]

(file:///C:/Users/Evan/Documents/KJournal/Online%20Editor%20Stuff/Blog%20Posts/J.SmithBlog.docx#_ednref11) *Id.*

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