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Assessing an NGO's Attempt to Use Federal Courts to Bypass Oklahoma's State Legislative and Regulatory Authority Over Produced Water Policy

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The unconventional oil and gas business is in many ways a water business, with commensurate regulatory challenges. The most appropriate avenue for creating policy to manage new issues such as induced seismicity is to first create legislation at the state level. State legislatures are the best-positioned entities to balance complex local interests and then empower state regulators to enforce laws passed with substantive voter input. Yet at least one nongovernmental organization now asks a federal court to effectively bypass the state-level legislative process and instead reinterpret an existing statute in a way that would disempower state institutions and transfer more regulatory power to federal entities. A lawsuit currently on the docket in the Western District of Oklahoma federal court exemplifies this strategy.[1]

The Sierra Club has sued four large oil and gas producers who operate disposal wells in northwest Oklahoma, asking the court to significantly and creatively reinterpret the Resource Conservation and Recovery Act (RCRA) in order to curtail these companies' injection activities. The RCRA was primarily designed—and has served—as a tool to protect citizens from contamination related to waste disposal.[2] Yet the Sierra Club now asks the court to halt the defendant companies' wastewater disposal operations in Oklahoma based not on contamination, but on seismic impacts driven by hydraulic forces exerted by the injected water. Expanding the RCRA's scope in this manner would undermine state regulators and legislators and risk creating at least three critical problems.

First, a dispositive ruling by the court would likely disrupt the Oklahoma Corporation Commission's (OCC) ongoing regulatory response to induced seismicity and risk displacing its regulatory authority over saltwater disposal wells, which the US Environmental Protection Agency delegated to the OCC more than 30 years ago.[3] It would also undermine the Oklahoma Legislature's active response to the seismicity challenge and constitute a distinct affront to Oklahoma voters who should be given the chance to conclusively speak on how they would like the seismicity issue to be addressed. Many are, after all, people on the front line whose houses sit near fault lines; they are breadwinners who may work in the oilfield and must decide the degree of risk their communities are willing to bear.

Initial signals suggest Oklahoma's state-level institutions are responding vigorously to induced seismicity problems. The first damaging quake of record struck Prague, Oklahoma, in November 2011 and within weeks, the OCC had shut-in the well suspected of triggering the quake. As the number of significant earthquakes (magnitude of 3.0 or higher) increased, the OCC ramped up its response

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commensurately, and by late summer 2015, began imposing material reductions to allowable injection volumes in areas assessed as having a higher risk of seismicity (Figure 1).[4]

Oklahoma legislators have already passed at least two measures to help address seismicity problems and will likely bring more to the table in coming weeks as they convene for the 2017 session. The most important legislation to date—House Bill 3158—was signed into law in April 2016 and grants the OCC authority to "take whatever action necessary without notice and hearing" to reduce or even stop wastewater injection in response to seismic events.[5] The new law clarifies the OCC's power to halt injections, which had been questioned by some disposal well operators.[6]

HB 3158 enhances the OCC's ongoing response to induced seismicity concerns, which has already seen companies significantly reduce injection volumes at the agency's request. The commission's requests that operators voluntarily reduce injection rates into the Arbuckle Formation drove a steady decline from roughly 2.8 million barrels per day in September and October 2014 to only half that amount by March 2016.[7] By granting clearer authority, the legislature armed the OCC with the leverage it needs to impose further reductions across all operators in seismically active zones.

In a secondary but still important act, the legislature also passed Senate Bill 1122, which entered force in August 2016 and requires the Corporation Commission to "work in conjunction with the Secretary of Energy and Environment, the Oklahoma Water Resources Board, and the Department of Environmental Quality to encourage the industrial use of water produced in oil and natural gas operations."[8] The recent legislation and other aspects of the legislative process should be allowed to play out without being preempted by a landmark judicial decision on produced water disposal—particularly one that asks for a radical expansion of RCRA's statutory scope without any voter input on the matter.

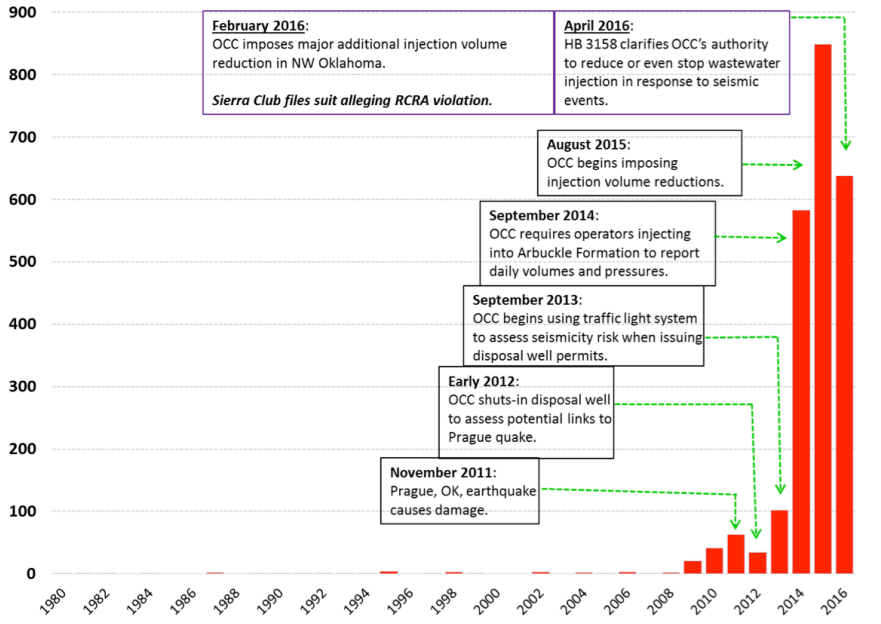
In a situation like the one presented in *Sierra Club v. Chesapeake*, where a party files a lawsuit while the responsible regulator is actively addressing the matter, a federal court may apply the *Burford* abstention doctrine. In a nutshell, the doctrine states that federal courts should not interfere with "the proceedings or orders of state administrative agencies" such as the OCC so long as:

A. "Timely and adequate state court review is available;" and

B. The exercise of federal review over the matter in question would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[9]

The US Supreme Court rarely favors abstention and requires parties seeking it to demonstrate strong state interests in maintaining "uniformity in the treatment of an 'essentially local problem'" and retaining local control over "difficult questions of state law bearing on policy problems of substantial public import."[10] Evidence to date suggests

FIGURE 1 — EARTHQUAKES OF 3.0 MAGNITUDE OR HIGHER IN OKLAHOMA VS. TIMING OF OCC ACTIONS AND SIERRA CLUB RCRA LAWSUIT



SOURCE Oklahoma Corporation Commission, PACER, US Geological Survey

the defendant companies in *Sierra Club v. Chesapeake* could credibly argue that their situation fulfills these requirements.

For the current case, the Western District Court will consider the fact that OCC orders are directly appealable to the Oklahoma Supreme Court, a channel frequently utilized by plaintiffs in other cases.[11] The court will also almost certainly note the OCC's ongoing efforts, described above, to safeguard public welfare by confronting seismicity problems. A dispositive federal court ruling while the OCC and other state agencies are actively attacking the seismicity problem would risk undermining these efforts and could also make the defendant companies subject to potentially conflicting orders from the court and the OCC.[12]

In its response brief, the Sierra Club argues that the court must not abstain under the *Burford* doctrine because the RCRA claim it brings is "exclusively federal" and thus cannot even be considered by a state court.[13] If the court accepts this argument, it risks creating the opportunity for plaintiffs to strong-arm state regulators by threatening to immediately take disposal well cases where there are not actual contamination issues into federal court, even though the state agencies are the frontline injection well regulators and policy implementers.

Congress deputizes state regulators (operating under US EPA approval) to implement nonhazardous waste programs such as oilfield produced water disposal under Subtitle D of RCRA, and it is doubtful that they intended the RCRA to become a tool for disempowering state regulators.[14] It will be interesting to see how—if at all—the court chooses to address this issue.

Second, plaintiffs who allege damages from seismic activity related to wastewater injection should seek remedies in tort law, not via judicial rewrite of a federal environmental statute. Virtually every key seismicity-related lawsuit filed to date in Oklahoma state court relies on tort law causes of action, both for personal injuries and for property damage.[15]

This is not surprising, for the events that have transpired to date—cracks in buildings, collapsed chimneys and roof spires, and the like—are not "environmental issues" per se. Rather, they involve nuisance and physical damage. While tort law aims to compensate victims and incentivize defendants to change their behavior by imposing costs, environmental law often has much broader ranging objectives that extend far beyond simply trying to make a victim whole. Consider, for instance, RCRA's goals as stated by the EPA:

1. "Ensure that wastes are managed in a manner that protects human health and the environment;"
2. "Reduce or eliminate, as expeditiously as possible, the amount of waste generated, including hazardous waste; and"
3. "Conserve energy and natural resources through waste recycling and recovery."[16]

The complete absence of contamination allegations in the state court cases highlights the reality that, while there may be viable tort law causes of action related to seismic activity induced by disposal well operations, it is not appropriate to use RCRA as a back door to invoke federal jurisdiction over what is fundamentally a state and local regulatory and legislative issue.

Third, using litigation instead of a combined regulatory and legislative response risks creating a legal quagmire in both Oklahoma and other states where induced seismicity has been—or could become—an issue. Litigating against only four parties out of hundreds injecting produced water in Oklahoma could result in a piecemeal solution that (a) forces the issue back into court multiple times as various water injectors are either impleaded into the current action or face separate lawsuits and (b) causes disposal well operators, environmental groups, and affected citizens to focus on prevailing in narrow legal disputes, rather than directing resources and energy toward crafting collaborative long-term policy solutions that better defend the public interest.

Congress crafted the Resource Conservation and Recovery Act to give citizens a legal pathway to redress potential harms from unremediated chemical contamination, yet seismic impacts in Oklahoma are driven by hydraulic forces—not the chemical contents of the injected water.

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WHY STATE LEGISLATION AND REGULATION IS THE MOST OPTIMAL SOLUTION

Litigation is a suboptimal tool for developing effective solutions to broad and complex policy issues. Full litigation—i.e., taking an issue through trial—is a zero-sum game in which one side wins and the other loses. It offers a viable method of resolving smaller scale disputes or forcing an entity to comply with the law as it exists at the time suit is brought.

Yet courts should interpret environmental statutes, not rewrite them by endorsing creative—and often, biased—statutory interpretations sought by narrowly focused special interests engaged in adversarial litigation. With regulators working to craft solutions and the window open for legislative action, a federal court ruling would essentially preempt and displace the technical experts and elected representatives who are empowered by the voting public to create rules and laws intended to protect the public interest.

It could take a long time for energies induced in the subsurface by produced water disposal to dissipate, and more quakes—perhaps even damaging ones—may happen. But Oklahoma's ongoing regulatory and legislative action is best judged by its responsiveness and thoroughness, rather than the impossible standard of immediately restoring local seismic activity to its earlier levels. Even if the court enjoined all produced water injection in Oklahoma tomorrow, risks and problems would likely endure—potentially for a protracted time.

At a fundamental level, induced seismicity highlights important issues of economic development versus environmental consequences that may impact other jurisdictions across the United States. As such, local regulators should be allowed to address the matter without external interference so long as they are operating in good faith. More importantly, citizens should be allowed to speak through their elected representatives. New York was allowed to conduct a seven-year public debate and ultimately impose a moratorium on frac'ing without federal interference.[17] It is only fair that Oklahomans—or residents of other states that might experience induced seismicity in the future—be accorded the same right to exercise state-level autonomy.

Critics will likely respond that the lobbying of moneyed interests will subvert the voice of voters. Yet the New York moratorium shows that the collective voice of the governed can, for better or worse, thwart the development ambitions of powerful industrial interests. Oklahoma's rapid rise in significant seismic events over the past several years is remarkable and merits close scrutiny regardless of one's ideological persuasions. Building façades in Cushing cracked by earthquakes and collapsed chimneys in Prague would speak forcefully in the face of intense counter-lobbying efforts. Oklahoma voters might very well decide that even the critically important oil and gas industry should face more rigorous regulation of its water disposal activities. But that should be determined by voters after a public debate, not by a federal court being prodded by pressure groups.

As economic interests and concerns for the public welfare collide, it is manifestly fairer to give state regulators, legislators, and voters first crack at the issue. If the induced seismicity problem endures due to insufficient state action or escalates to the point of credibly threatening the security of key national interests such as energy transport infrastructure, then a reexamination of federal intervention could be warranted.

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ENDNOTES

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