



EPA Settles Suit Concerning Fracking Waste Regulations Before Trump Takes Office

By: [Michael Cross](#)

In the final days of the Obama Administration, the Environmental Protection Agency (“EPA”) settled a [suit](#) filed by environmental groups concerning the sufficiency of EPA regulations on oil and gas wastes and state solid waste management plans. This case illustrates the need for a fresh look at the oil and gas industry’s ability to participate as intervenors in lawsuits between the federal government and environmental groups regarding regulations governing industry operations.

In *Environmental Integrity Project v. McCarthy*, No. 1:16-CV-00842-JDB, the Plaintiffs filed suit in the United States District Court for the District of Columbia in May 2016 alleging that the EPA failed to perform its nondiscretionary duties under the Resource Conservation and Recovery Act (“RCRA”) by not undertaking a “comprehensive” review of oil and gas waste and state solid waste management plan guidelines.

To justify their request for EPA to review and revise regulations covering wastes from oil and gas production (“E&P wastes”), Plaintiffs complained of the danger of injection wells to dispose of oil and gas wastewater, including use of injection wells in the hydraulic fracturing process. Plaintiffs also explained that increased transportation of E&P wastes and practices such as “road-spreading” increase the chance of environmental catastrophes.

In *McCarthy*, the State of North Dakota, the American Petroleum Institute, the Independent Petroleum Association of America, and the Texas Independent Producers and Royalty Owners Association all moved to intervene, asserting, amongst other things, that: (1) existing federal and state regulations adequately regulate E&P wastes; and (2) the EPA did in fact review existing regulations in the timeline required under RCRA by reviewing and approving the individual state regulations.

In November 2016, United States District Judge John Bates denied the motions to intervene, holding that the intervenors had not asserted a concrete injury sufficient to establish standing. Judge Bates opined that the outcome of the litigation did not guarantee the EPA would implement new, strict regulations, only a possibility of potentially adverse regulation. The State of North Dakota has appealed Judge Bates’s denial of their motion to intervene.

Shortly after Judge Bates denied the motions to intervene, Plaintiffs and the EPA entered into a consent decree. This settlement requires the EPA to publish a notice of proposed rulemaking or

sign a determination that the revision of the contested regulations is not necessary by March 15, 2019. If the EPA chooses to revise the regulations, the agency must publish a notice of final action by July 15, 2021.

EPA's decision to settle this suit highlights the importance of intervention by industry in regulatory lawsuits. One of the factors courts evaluate to determine whether to allow intervention is whether the proposed intervenor's interests are adequately protected by the existing parties. Although industry groups often seek to intervene on the "same side" as the federal government to affirm decisions, industry's interests are not identical to those of the government. Here, the EPA could have pursued many of the arguments raised by the proposed-intervenors, but determined that it was in the public's best interest to settle the suit and conduct a formal review of the existing E&P wastes regulations. Where regulatory lawsuits brought by environmental groups may cause harm to industry members' interests, intervention is the only way to ensure those interests may be protected.

For more information on the consequences of this litigation, please contact [Bret Sumner](#), [Jim Martin](#), or [Michael Cross](#).

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