

DELAWARE RIVER BASIN COMMISSION FINALIZES REGULATIONS PROHIBITING HIGH-VOLUME HYDRAULIC FRACTURING OPERATIONS WITHIN RIVER BASIN

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On February 25, 2021, the Delaware River Basin Commission (DRBC) adopted final regulations banning high-volume hydraulic fracturing operations within the Delaware River Basin (Basin) through an amendment of the DRBC's Comprehensive Plan.¹ This action culminates a process that was initiated more than a decade ago when the Commission began to consider regulations that would address the impacts of natural gas development on waters within the Basin. In this article, we will discuss the content of the final regulations as well as the rulemaking process that led to the promulgation of the final regulations and selected litigation that resulted from the rulemaking process.

Background

Shortly after development of the Marcellus Shale formation began in Pennsylvania, many governmental entities began to consider and initiate regulatory efforts to address a variety of environmental issues, including concerns over water quantity and water quality. These governmental entities included state agencies and local municipalities as well as the lesser-known DRBC.

DRBC is a federal interstate agency composed of the states of Delaware, New Jersey, New York, and Pennsylvania and the U.S. Army Corps of Engineers working together, with shared responsibility to allocate and regulate water use and to preserve water quality in the Basin.² The Basin drains an area of 13,500 square miles, covering parts of the four member states. The Basin underlies portions of the Marcellus and Utica Shale formations in Pennsylvania and New York.

DRBC Regulatory Process

The regulatory process began in May 2010 when DRBC Commissioners passed a resolution directing DRBC staff to develop new natural gas development regulations prior to considering any application for natural gas extraction projects.³ DRBC staff subsequently published draft regulations for public review in December 2010.⁴ After receiving comments and following further discussions, DRBC staff then published revised draft regulations on

¹ Del. River Basin Comm'n, Res. 2021-01 (2021).

² Del. River Basin Comm'n, Delaware River Basin Compact (1961).

³ Meeting of May 5, 2010, Minutes, Del. River Basin Comm'n.

⁴ Meeting of Dec. 8, 2010, Minutes, Del. River Basin Comm'n; Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Provide for Regulation of Natural Gas Development Projects, 76 Fed. Reg. 295 (proposed Jan. 4, 2011) (to be codified at 18 C.F.R. 410).

November 8, 2011.⁵ These draft regulations were to apply to all natural gas development projects, “including the construction or use of production, exploratory or other natural gas wells in the Basin regardless of the target geologic formation, and to water withdrawals, well pads and related activities, and wastewater management activities comprising part of, associated with or serving such projects.” These draft regulations proposed to allow natural gas development within the Basin in a manner consistent with the regulatory provisions.

A special meeting was scheduled on November 21, 2011, for the five DRBC members, including the governors of the states of Delaware, New Jersey, New York, and Pennsylvania, and the federal representative of the U.S. Army Corps of Engineers, to vote on the draft regulations. This meeting, however, was cancelled for the stated reason to provide DRBC members with additional time to conduct a review of the regulations. The meeting to vote on the draft regulations was not rescheduled, and the regulatory process remained stalled for nearly six years.

On September 13, 2017, DRBC approved a procedural resolution for the staff to prepare and publish revised draft regulations addressing natural gas development in the Basin by November 30, 2017.⁶ Pursuant to the resolution, the revised draft regulations would no longer allow unconventional shale gas development as did the 2011 draft regulations. They were to prohibit the use of hydraulic fracturing and horizontal drilling technologies within the Basin. The resolution also required that the draft rules address the “storage, treatment, disposal, or discharge” of wastewater produced by shale gas operations in addition to inter-basin water transfers related to shale development. The resolution was approved by a vote of 3 to 1 with Pennsylvania, New York, and Delaware voting in favor, the federal government voting in opposition, and New Jersey abstaining.

As expected, on November 30, 2017, DRBC promulgated draft regulations prohibiting the use of hydraulic fracturing within the Basin.⁷ As explained in the draft regulations, DRBC determined that the use of hydraulic fracturing represented a significant threat to the “development, conservation, utilization, management, and preservation” of the Basin’s waters and Special Protection waters. In addition to instituting the hydraulic fracturing ban, the draft regulations also discouraged the exportation of the Basin’s waters for use in hydraulic fracturing as well as the importation of wastewater into the Basin.

With the adoption of the final regulations on February 25, 2021, DRBC now expressly prohibits the use of high-volume hydraulic fracturing in hydrocarbon-bearing rock formations within the Basin.⁸ After declaring that it carefully considered reports and studies on the impacts of hydraulic fracturing on the environment, DRBC found that using high-volume

⁵ Natural Gas Development Regulations, Del. River Basin Comm’n, Nov. 8, 2011.

⁶ Press Release, DRBC Approves Resolution to Publish Revised Draft Rules Addressing Natural Gas Development Activities within the Delaware River Basin (Sept. 13, 2017), available at https://www.nj.gov/drbc/home/newsroom/news/approved/20170913_newsrel_natgas-res.html.

⁷ Administrative Manual and Special Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments, 83 Fed. Reg. 1586 (proposed Jan. 12, 2018) (to be codified at 18 C.F.R. 401; 18 C.F.R. 440).

⁸ 18 C.F.R. 440.

hydraulic fracturing would severely damage water security and create environmental hazards. More precisely, DRBC reported as part of its findings that the use of high-volume hydraulic fracturing in the region of the Basin could lead to dangerous spills of hazardous substances that would contaminate surface water and groundwater, and thus impair available drinking water resources as well as sensitive water resource features.⁹

In implementing its hydraulic fracturing ban, however, DRBC decided not to include provisions addressing the importation of hydraulic fracturing wastewater into the Basin and the exportation of water used for hydraulic fracturing outside of the Basin as initially proposed in the draft regulations. The Commission explained that it intended to deal with this issue separately and that it would work on developing and publishing appropriate draft rules by September 30, 2021.

Related Litigation

During its rulemaking process, DRBC has faced several lawsuits directly challenging the actions that it has taken as well as its authority to act and regulate natural gas development projects within the Basin. These lawsuits have been filed by interested parties who support as well as those who oppose natural gas development within the Basin.

In May 2011, New York Attorney General Eric Schneiderman filed a lawsuit in the U.S. District Court for the Eastern District of New York against the U.S. Army Corps of Engineers along with other federal agencies for failing to conduct a full environmental review of the original draft regulations published in December 2010. Attorney General Schneiderman alleged that this failure was contrary to the requirements of the National Environmental Policy Act (NEPA).¹⁰ A group of environmental nonprofit organizations, including the Delaware Riverkeeper Network, filed a similar lawsuit in the same court in August 2011, alleging that “absent [an environmental] review, there is no assurance that the regulations the DRBC is poised to finalize will be adequate to control a risky industrial activity that has already caused documented environmental and human health impacts in other states, including Pennsylvania.”¹¹ The federal district court dismissed both lawsuits in September 2012 contending that “this dispute [was] not currently fit for judicial review.”¹²

In May 2016, Wayne Land and Mineral Group, LLC (WLMG) filed suit against DRBC in the U.S. District Court for the Middle District of Pennsylvania challenging DRBC’s authority to review and approve natural gas projects within the River Basin.¹³ WLMG owned

⁹ Del. River Basin Comm’n, *Frequently Asked Questions (FAQs) Final Rules Addressing Hydraulic Fracturing within the Delaware River Basin* (2021), available at https://www.state.nj.us/drbc/library/documents/FAQ_HVHFrulemaking.pdf.

¹⁰ Complaint, *New York v. United States Army Corps of Eng’rs*, No. 11 Civ. 2599 (E.D.N.Y. May 31, 2011).

¹¹ Complaint, *Del. Riverkeeper Network v. United States Army Corps of Eng’rs*, No. 11 Civ. 3780 (E.D.N.Y. Aug. 4, 2011).

¹² *New York v. United States Army Corps of Eng’rs*, 896 F. Supp. 2d 180 (E.D. N.Y. 2012).

¹³ Complaint, *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, No. 16 Civ. 897 (M.D. Pa. May 7, 2016).

land overlying shale gas formations in the Basin and intended to extract shale gas resources from the targeted shale formations using the technique of hydraulic fracturing. WLMG argued that DRBC did not have authority to review and approve natural gas development projects and therefore it had no authority to impose a de facto moratorium on natural gas extraction within the Basin.

DRBC filed a motion to dismiss the case, asserting that it had planning and project review authority for any activity or facility undertaken for the purpose of managing, developing, and using water resources of the Basin, and that all projects in the Basin must be reviewed and approved by DRBC pursuant to section 3.8 of the Delaware River Basin Compact.¹⁴ The district court agreed, upholding the authority of DRBC to decide on the application for review of a natural gas development project.¹⁵ On appeal, however, the U.S. Court of Appeals for the Third Circuit vacated the lower court decision and remanded the case for reconsideration in July 2018.¹⁶

Shortly thereafter, in September 2018, three Pennsylvania state senators filed a motion to intervene in the *Wayne* case to defend their “substantial protective interest” in the process of interpreting the Compact as well as their fiduciary duties as trustees of the natural resources of Pennsylvania.¹⁷ The district court denied their motion in May 2019, stating that it was not convinced that “the Senators’ participation will add anything to this litigation.”¹⁸

The *Wayne* case is still awaiting trial; however, on February 25, 2021, DRBC General Counsel, Kenneth J. Warren, informed the court in writing that, due to the recent adoption of the final regulations prohibiting high-volume hydraulic fracturing within the Basin, DRBC is reviewing the impacts of the new regulations on this litigation.¹⁹

In separate litigation, in January 2021, state of Pennsylvania Senators Gene Yaw and Lisa Baker, the Pennsylvania Senate Republican Caucus, and Damascus Township filed suit in the U.S. District Court for the Eastern District of Pennsylvania seeking a determination that DRBC improperly exercised its authority by imposing a de facto moratorium on natural gas development projects within the Basin or, alternatively, that such moratorium amounted to an uncompensated taking under the Fifth Amendment of the United States Constitution.²⁰ According to the plaintiffs, the moratorium prevented both private and public lands from

¹⁴ Mot. to Dismiss for Failure to State a Claim by Delaware River Basin Commission, *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, No. 16 Civ. 897 (M.D. Pa. Jul. 8, 2016).

¹⁵ *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, 247 F. Supp. 3d 477 (2017).

¹⁶ Precedential Opinion, *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, No. 17-1800 (3d Cir. Jul. 3, 2018).

¹⁷ Mot. to Intervene as Parties Plaintiffs, *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, No. 16 Civ. 897 (M.D. Pa. Sep. 17, 2018).

¹⁸ *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, 331 F.R.D. 583 (2019).

¹⁹ Letter from Kenneth J. Warren, *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, No. 16 Civ. 897 (M.D. Pa. Feb. 25, 2021).

²⁰ Complaint, *Sen. Gene Yaw, et al. v. Del. River Basin Comm’n*, No. 21 Civ. 119 (E.D. Pa. Jan. 11, 2021).

being utilized to produce natural gas from the Marcellus Shale formation, denying both private landowners and the state their opportunities to generate revenue from natural gas resources. The district court has not yet ruled on this case.

Conclusion

With the adoption of its final regulations on February 25, 2021, it appears that the long DRBC regulatory journey is nearing its conclusion. The process originated with a proposal to allow regulated shale development, but likely due to changes in the political composition of DRBC as well as advocacy efforts from interested parties, the process ultimately resulted in a ban on shale development within the Basin. During the pendency of this long regulatory journey, New York state acted to prohibit high-volume hydraulic fracturing within the state,²¹ so the practical impact of the DRBC action is limited to portions of two counties in Northeastern Pennsylvania – Wayne and Pike Counties – located with the Basin where Marcellus Shale reservoirs lie underneath. But the impact in these two counties is large as shale extraction likely would be occurring there but for the DRBC action.

²¹ Howard A. Zucker, N.Y. Acting Health Comm’r, N.Y. Dep’t of Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* (2014), available at https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf.