

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

WAYNE LAND AND MINERAL GROUP, LLC,	:	
	:	: CIVIL ACTION NO. 3:16-CV-897
Plaintiff,	:	: (JUDGE MARIANI)
	:	
v.	:	
	:	
DELAWARE RIVER BASIN COMMISSION,	:	
	:	
Defendant, and	:	
	:	
DELAWARE RIVERKEEPER NETWORK, et al.,	:	
	:	
Intervenors-Defendants.	:	

ORDER

The background of this Order is as follows:

Pending before the Court is Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper's Motion for Summary Judgment (DRN's Mot. Summ. J. at 1-2, Doc. 171 at 1-2).¹ With the motion, Delaware Riverkeeper Network and Maya Van Rossum (collectively "DRN") request that the Court grant summary judgment in favor of DRN and Defendant Delaware River Basin Commission ("DRBC") and declare that "[t]he proposed activities of WLMG are a 'project' within the meaning of the Delaware River Basin

¹ Because DRN filed all documents in support of its Motion in a single ECF filing, ECF Document 171, and the document is 408 pages in length, the Court will reference both the page numbers in the cited document as well as the page numbers in ECF Document 171 where needed for clarification.

Compact, and therefore subject to the jurisdiction of Defendant Delaware River Basin Commission.” (*Id.* at 2.)

The Court set out detailed procedural and factual backgrounds of this case in the Memorandum Opinion addressing Defendant Delaware River Basin Commission’s Motion for Partial Summary Judgment (Doc. 169). (Doc. 205.) Having done so, the Court will not repeat that recitation here.

As an initial matter, the Court notes that, as with the statement of facts and response thereto proffered in DRBC’s motion where limited facts were agreed upon (see Doc. 205 at 7-11), here WLMG admits nine of the fifty-two proffered facts (paragraphs 3, 4, 8-10, 14, 21, 29, 44) and six are procedural matters not subject to dispute (paragraphs 3, 4, 8-10, 14). (See DRN’s Concise Statement of Undisputed Facts (“SOF”) at 1-10, Doc. 171 at 26-35; PI’s Resp. to SOF (“RSOF”) at 1-17, Doc. 185.)

DRN and WLMG agree on the following substantive facts:

- WLMG’s first activities at the Property will be the construction of an access road and the well pad. (SOF ¶ 21; RSOF ¶ 21.)
- The completion site pad would be designed to handle the produced water coming out of the well. (SOF ¶ 29; RSOF ¶ 29.)
- WLMG’s representative did not know how many acres would need to be in production to make a pipeline feasible. (SOF ¶ 44; RSOF ¶ 44.)

Rather than parse the contents and nature of the disputes asserted as to factual averments contained in the filings at this juncture, the Court will turn to DRN's arguments proffered in support of its Motion to determine if the admitted facts support the relief sought.

DRN asserts that

[t]he development of facts on remand related to WLMG's proposed activities establishes that WLMG's proposed well pad activities include water resource management and wastewater management, about which there can be no disagreement, within the meaning of the word "project" in the Compact. The course of performance, negotiations and legislative history show the parties to the Compact purposefully granted DRBC broad authority to protect water quality and regulate activities that threaten water quality.

(DRN's Br. at 8-9, Doc. 171 at 13-14.) DRN provides the following summary of its argument:

DRN is entitled to summary judgment that WLMG's planned activities fall squarely within the definition of project, as revealed by the intent drafters, and the course of conduct. WLMG plans deliberative and repetitive use of water at its Property. Further, hydraulic fracturing water use and attendant infrastructure activities support the conclusion that the WLMG's plan is a project subject to DRBC jurisdiction.

(DRN's Br. at 2, Doc. 171 at 7.)

Underlying this claimed entitlement to summary judgment is DRN's contention that WLMG's "deliberate and repetitive use of water is a project." (DRN's Br. at 10, Doc. 171 at 15." According to DRN,

[t]he Third Circuit indicated the if WLMG's proposed activities involved "[d]eliberative, repetitive use of water," DRBC jurisdiction could be satisfied. Wayne II at 530. (identifying that the Court would need to pay "careful attention" to determine if hydraulic fracturing could also fall under DRBC jurisdiction due to the "[d]eliberative, repetitive use of water,").

(DRN's Br. at 10, Doc. 171 at 15.)

WLMG poses the question presented by DRN's Motion to be "Are WLMG's proposed natural gas development activities a 'project' subject to Commission review under Section 3.8 of the Delaware River Basin Compact ("Compact") because 'WLMG's activities will be deliberate and repetitive use of water'?" (WLMG's Br. at 1, Doc. 186 at 5 (quoting Doc. 171 at 8; citing Doc. 171 at 10).) WLMG answers its question in the negative. (*Id.*) WLMG maintains that the question can be answered without looking beyond the four corners of the Compact, and, if the Court should decide to look at extrinsic evidence, the evidence supports WLMG. (*Id.*) WLMG also seeks summary judgment in its favor pursuant to Federal Rule of Civil Procedure 56(f)(1). (*Id.*)

The Court agrees with WLMG that the Third Circuit's opinion does not entitle DRN to summary judgment. The Circuit Court recognized that "[d]eliberate, repetitive use of water is an essential part of fracking, and the Commission contends that is enough to conclude that the purpose of fracking is to utilize water resources." *Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 530 (3d Cir. 2018). The Circuit Court characterized this as an argument that "deserve[s] careful attention," and added that the argument "do[es] not foreclose the possibility that Wayne's interpretation of the term 'project' is correct." *Id.* The Circuit Court did not otherwise discuss the deliberate, repetitive use of water in its opinion. Thus, the Third Circuit *did not* find that DRBC jurisdiction could be satisfied if it were shown that WLMG's activities involved deliberate and repetitive use of water, and DRN's claimed basis for relief is lacking the support asserted.

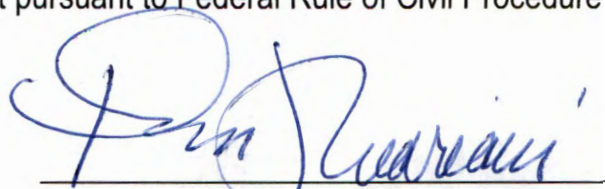
Turning to alternative supporting argument, although DRN states that “[t]he course of performance, negotiations and legislative history show the parties to the Compact purposefully granted DRBC broad authority to protect water quality and regulate activities that threaten water quality” (DRN’s Br. at 8-9, Doc. 171 at 13-14), DRN does not explore these interpretive tools identified by the Circuit Court, see 894 F.3d at 534, nor does it explain how the grant of broad authority resolves the ambiguity in the term “project” and DRBC’s project review authority in § 3.8 of the Compact recognized by the Circuit Court.

Thus, DRN has not shown that it is entitled to summary judgment on the bases alleged and the pending Motion is properly denied. Further, because ambiguity is not resolved in the current filings of the parties as fully discussed in the Court’s Memorandum Opinion denying DRBC’s motion for partial summary judgment (Doc. 205), the Court will deny WLMG’s request for summary judgment pursuant to Federal Rule of Civil Procedure 56(f)(1).

ACCORDINGLY, THIS 6th DAY OF JANUARY 2021, IT IS HEREBY

ORDERED THAT:

1. Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper’s Motion for Summary Judgment (Doc. 171 at 1-2) is **DENIED**;
2. WLMG’s request for summary judgment pursuant to Federal Rule of Civil Procedure 56(f)(1) is **DENIED**.



Robert D. Mariani
United States District Judge