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

WAYNE LAND AND MINERAL GROUP, LLC, Plaintiff, v. DELAWARE RIVER BASIN COMMISSION, Defendant, and DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER Intervenors-Defendants.	:	Civil Action No. 3:16-cv-00897 (Judge Mariani) (Electronically Filed)

DEFENDANT DELAWARE RIVER BASIN COMMISSION'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE CASE AS MOOT

I. Introduction

In accordance with Fed. R. Civ. P. 12(h)(3), the Delaware River Basin Commission ("DRBC" or "Commission") suggests that the case is moot and requests the Court to dismiss this action for lack of jurisdiction.

Wayne Land and Mineral Group, LLC ("WLMG") seeks a declaration that it may proceed with its planned natural gas development activities and facilities, including hydraulic fracturing, at its property located in Wayne County, Pennsylvania without submitting its plans to the DRBC for review and approval

under Section 3.8 of the Delaware River Basin Compact. Specifically, WLMG contends that its planned activities and facilities are not a "project" under Section 3.8. Years before WLMG filed its lawsuit, DRBC commenced a public rulemaking process to regulate hydraulic fracturing and related activities in the Delaware River Basin ("Basin"). On February 25, 2021, the DRBC Commissioners completed that process by adopting regulations prohibiting high-volume hydraulic fracturing, based on neither Section 3.8 nor an interpretation of the term "project."[1] The Commission's regulatory prohibition renders moot WLMG's challenge to DRBC's project review jurisdiction. Other persons have now challenged the regulation establishing the prohibition,[2] and WLMG is free to bring its own action in that regard.

II. Background

WLMG commenced this action seeking a declaration that its planned natural gas development facilities and activities at its property located in Wayne County, Pennsylvania are not subject to the Commission's project review authority under

[1] https://www.nj.gov/drbc/library/documents/Res2021-01_HVHF.pdf. The DRBC Commissioners are the Governors of the Basin states and a federal representative. Compact § 2.2. The Governors acting through their alternates who are the highest environmental officials in each of the Basin states voted in favor of the Resolution adopting the regulations. The federal DRBC Commissioner noted his need to abstain due to the change in Administrations.

[2] *Yaw v. Del. River Basin Comm'n,* No. 2:21-cv-00119-PD (E.D. Pa.).

Section 3.8 of the Delaware River Basin Compact ("Compact") because they do not constitute a "project." The Complaint avers that the Commission "has declared that all-natural gas well pads and related facilities targeting shale formations in the Delaware River Basin ("Basin") are 'projects' that it will review under Section 3.8 of the Compact." Complaint ¶ 4. *See also*, Complaint ¶ 18. In support of this averment, the Complaint alleges that the Commission determined that "Well Pads" (defined in paragraph 17 of the Complaint to include "well pads, all appurtenant facilities, and related activities carried out in connection with gas wells targeting shale formations in the Basin") are "projects," and announced that it would not approve dockets for these "Well Pads" until regulations are adopted. Complaint ¶¶ 18 and 19.[3] WLMG alleges that its planned Well Pad is not a "project," and that DRBC lacks authority under Section 3.8 to require its review and approval. Complaint ¶¶ 48-49.

The Complaint avers that these Commission actions harm WLMG. As set forth in the Complaint: "The Commission's final determination that well pads constitute "projects" subject to Commission review and approval under Section 3.8 of the Compact has an immediate and practical impact on WLMG. The

[3] The determinations at issue were issued by the Commission's former Executive Director on May 19, 2009, June 14, 2010 and July 23, 2010. https://www.state.nj.us/drbc/programs/natural/archives.html. *See* Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss (Doc. 22) at 11-12.

Commission's unlawful assertion of jurisdiction is an absolute barrier to WLMG's ability to move forward with its plan to develop a Well Pad on the Property." Complaint, ¶ 35.[4] According to the Complaint, "A decision in favor of WLMG in this case will remove the sole insurmountable barrier to WLMG's plan to develop the Property… and also will result in an increase in the market value of the Property…." Complaint, ¶ 43. *See also*, Memorandum Opinion (Doc 92) at 8.

In its opinion resolving DRBC's Motion to Dismiss, this Court concluded that the facts at issue are sufficiently concrete: "If the Court were to grant Plaintiff the relief it requests, then Plaintiff could proceed with its proposed development without being subject to the DRBC's Project Review Authority under Section 3.8 of the Compact because its proposed activities would not constitute a 'project' subject to review." *Id.* at 32. The Court termed this a "real, substantiated, and practical consequence for the parties." *id.*, which would affect the parties' plans of action. *Id.* at 33.

The law governing hydraulic fracturing in the Basin has changed dramatically since the Complaint was filed. On February 25, 2021, the Commission adopted final natural gas development regulations. These regulations prohibit high-volume hydraulic fracturing within the Basin due to, among other

[4] Section 3.8 of the Compact grants DRBC authority to review "projects having a substantial effect on the water resources" of the Delaware River Basin ("Basin").

things, the potential adverse impacts of this activity on drinking water sources and other water resources protected by the Commission's Comprehensive Plan.[5] The regulations were issued pursuant to the Commission's regulatory authority under Section 5.2 of the Compact to control future pollution, and other provisions of the Compact that authorize the Commission to promulgate regulations, and not pursuant to the adjudicatory authorities in the Compact, including Section 3.8.

These rulemaking provisions do not utilize the term "project." And as discussed in Section III below, the Commission's prior and interim conclusion that Well Pads are projects has been replaced by the regulations and is no longer operative. Even if WLMG obtains the declaration it seeks in this case declaring that its well pad, appurtenant facilities and related activities are not a project,[6] the

[5] During discovery in this case, the Commission produced an expert report by Paula Mouser, Ph.D., P.E., unrebutted by WLMG, explaining that high-volume hydraulic fracturing involves the utilization of water resources in a manner posing a high risk of polluting surface and ground water resources. *See* Exhibit C to DRBC's Motion for Summary Judgment (Doc. 169). Consistent with Dr. Mouser's report, the Commission's comment and response document in the administrative record for the regulations contains an extensive discussion of the scientific and technical studies showing the risks and harmful impacts from high volume hydraulic fracturing. https://www.state.nj.us/drbc/library/documents/CRD_HVHFrulemaking.pdf.

[6] Although the averments of the Complaint are directed solely to whether WLMG's planned activities constitute a "project" for purposes of Section 3.8, the Complaint's prayer for relief is broader. Following the Court's resolution of discovery disputes, WLMG clarified that the requested relief is limited to a declaration that WLMG's planned activities do not constitute a "project" as defined in the Compact, and therefore are not subject to review in accordance with

new regulations prohibit it from undertaking its planned activities. The adoption of the regulations has rendered this case moot because a declaration would no longer redress the injuries alleged in the Complaint.

III. STATEMENT OF QUESTIONS INVOLVED

Question: Whether the case should be dismissed as moot.

Suggested Answer: Yes

IV. ARGUMENT

A. A Federal Court Has No Jurisdiction Over a Moot Controversy

The jurisdiction of federal courts is limited to "Cases" and "Controversies." U.S. Const., Art. III. "[T]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), *quoting*, *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). "The 'case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.'" *Chafin*, 468 U.S. at 172, *quoting*, *Lewis*, 494 U.S. at 477 (citations omitted). If the relief available to the plaintiff would not redress its alleged injuries, then the court lacks jurisdiction. *See*, *e.g.*,

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Section 3.8 of the Compact. Letter from Christopher R. Nestor, Overstreet & Nestor LLC, to Mark L. Greenfogel, Warren Environmental Counsel LLC (July 12, 2019) at 2 (Motion Exhibit A). The WLMG Complaint and the relief it seeks has now been completely overtaken by the new regulations prohibiting the proposed WLMG activity.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000). "And if in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).[7] *Accord*, *Donovan v. Punxsutawney, Area Sch. Bd., 336 F.3d 211, 216 (3d Cir. 2003); Int'l Bhd. Of Boilermakers v. Kelly*, 815 F.2d 912, 915-16 (3d Cir. 1987).

The Supreme Court has described mootness as the "doctrine of standing" set in a time frame. *Arizonians for Official English v. Arizona*, 520 U.S. 43, 68 n. 22. Both doctrines are based on the requirement in Art. III, section 2 of the U.S. Constitution that limits the jurisdiction of federal courts to cases and controversies. *Id.* at 180. "Mootness ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit." *Alpha Painting & Construction Co., Inc. v. Delaware River Port Auth.*, 812 Fed. Appx. 61, 66 (3d Cir. 2020), *quoting Freedom from Relig. Found. Inc. v. New Kensington Harold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (internal quotations omitted). "A case is moot when there is no effective relief for the district court to grant." *Id.* (citation omitted). *Accord*,

[7] Just as a new statute moots a case, *see, e.g.*, *Bowen v. Kizer*, 485 U.S. 386 (1988) (*per curiam*); *United States Dep't of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986); *Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016), so too does a change to a regulation. 13C Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 3533.6, 259 (3d ed. 2008); *Ransom v. Marrazzo*, 848 F.2d 298 (3d Cir. 1988).

Marcavage v. Nat'l Park Serv., 666 F.3d 856, 862 n. 1 (3d Cir. 2012). *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698-99 (3d Cir. 1996).[8]

"The case or controversy requirement must be met regardless of the relief sought, including declaratory relief." *Rosetti v. Shalala*, 12, F.3d 1216 at n. 22 (citations omitted). A claim for declaratory relief seeks to affect future conduct. *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29, 31 (2010). Hence a claim for declaratory relief becomes moot if "there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct." *Hartnett*, 963 F.3d at 306 (citations omitted). Moreover, even if a claim satisfies Constitutional requirements, it may nonetheless be dismissed due to prudential considerations. *Blanciak*, 77 F.3d at 700 ("The discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not constitutionally moot, is well established.") (citations omitted). *Del. Riverkeeper Network v. Sec'y Pa. Dep't. of Env'tal Protection*, 833 F.3d 360, 371 (3d Cir. 2016) ("Prudentially a court may decline to exercise discretion to grant declaratory and injunctive relief if

[8] Notwithstanding the similarity in the doctrines of standing and mootness, the burden of persuasion differs. At the start of the litigation, plaintiff must show its standing to sue. During the litigation, however, defendant bears the burden of persuading the court that the case is moot. *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020), *citing*, *Laidlaw*, 528 U.S. 189.

a controversy is 'so attenuated' that considerations of prudence and comity counsel withholding relief.") (footnote omitted).

Unlike the doctrine of standing which mandates dismissal at the outset of a case whenever a present case or controversy is absent, the mootness doctrine contains two exceptions, neither of which apply here. First, mootness caused by a defendant's voluntarily cessation of its activity does not require dismissal of a case if the allegedly wrongful behavior could reasonably be expected to reoccur. *Laidlaw*, 528 U.S. at 189. Defendant bears the burden of overcoming the "evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist." *Id.* at 213 (Scalia, Jr. dissenting). The exception's purpose is to deter "a manipulative litigant [from] immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstate it immediately after." *Town of Portsmouth*, 813 F.3d at 59 (citations omitted).

The exception is frequently invoked where the defendant changes its position due to litigation and may reinstate the prior position once the litigation is dismissed. In contrast, where the voluntary cessation was initiated before litigation began, the doctrine may not apply at all. *Drenth v. Bookvar*, 2020 WL 4805621 (M.D. Pa. 2020) at *6, *citing*, *Hartnett*, 963 F.3d at 306. *See also*, *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chi.*, 326 F.3d 924, 929-30 (7th Cir. 2003)

(because government will not be presumed to act in bad faith, repeal of a challenged law renders a case moot absent expectation that it will be reenacted). As discussed in Section IV.B below, the rulemaking process predates the Complaint, and the February 2021 regulation, following notice and comment, is the action of sovereign entities working within the congressionally approved Compact structure to make a binding decision impacting each state in the Basin.

Second, a case may also be deemed "live" in "exceptional situations," *Lewis*, 494 U.S. at 481, if it is capable of repetition yet evading review. This "extremely narrow exception" *Donovan*, 336 F.3d at 217, applies only if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (citations omitted), *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citations omitted). That exception does not apply here because the procedures in place before the February 2021 regulatory prohibition no longer exist, as they have been completely supplanted by the new regulations.

Because a moratorium is often intended to be a temporary event continuing only until further government action, courts examining challenges to moratoria that expire or are revoked during the pendency of litigation frequently dismiss the cases on mootness grounds. *See, e.g.*, *Providence Pediatric Medical Daycare Inc. v.*

Alaigh, 672 Fed. Appx. 172 (3d Cir. 2016) (case moot when moratorium lifted); *Cellco Partnership v. Russell* (4th Cir. 1999) (per curiam) (case moot because new ordinance ended moratorium); *Cox v. Phillips*, 145 F.3d 1323 (4th Cir. 1998) (per curiam) (expiration of moratorium moots declaratory claims); *Nevada v. United States*, 699 F.2d 486 (9th Cir. 1983) (lifting of moratorium mooted declaratory claim); *Texas Oil and Gas Corp. v. Watt*, 683 F.2d 427 (DC Cir. 1982) (lifting of moratorium on oil and gas leasing mooted claim); *Philadelphia Vietnam Veterans Memorial Society v. Kenney*, 2020 WL 7640930 (E.D. Pa. 2020) (appeal pending) (executive orders rescinding Philadelphia's event moratorium rendered claim challenging moratorium moot); *Covenant Media of S. Car., LLC v. City of No. Charleston*, 2005 WL 8162991 (D. S. Car. 2005) (amended ordinance mooted challenge to prior regulations and moratorium); *Ensca Offshore Co. v. Salazar*, 2010 WL 11538688 (E.D. La. 2010) (lifting of moratorium on deepwater drilling mooted case). For the reasons discussed in these cases, this action should also be dismissed as moot.

B. **WLMG's Claims Are Moot Because Declaratory Relief Would Not Redress its Alleged Injury.**

WLMG seeks a declaration that its planned activities are not a "project" reviewable under Section 3.8 of the Compact. DRBC's final natural gas regulations make several changes that render the claim moot. First, the final regulations prohibit high-volume hydraulic fracturing in the Basin regardless of whether the

planned activities constitute a "project." A declaration that the Compact's definition of "project" does not encompass WLMG's planned activities would not alter the prohibition or redress the alleged harm.

Second, as stated in the DRBC Resolution adopting the new regulations, https://www.nj.gov/drbc/library/documents/Res2021-01_HVHF.pdf at p. 5, ¶ C, DRBC's May 5, 2010 Resolution deferring consideration of well pad dockets in shale formations expired by its own terms. And the Executive Director Determinations requiring sponsors of well pad projects to submit their projects for Commission review were replaced by the regulations. *Id.* Hence WLMG's obligation to submit plans to conduct hydraulic fracturing activities to the Commission for its review and approval no longer exists.[9]

Here, the voluntary cessation doctrine is inapplicable. DRBC's natural gas regulations did not result from this litigation. DRBC published its initial proposed natural gas rules for public comment in 2010, almost six years before this litigation commenced. After considering the voluminous public comments on the 2010 draft rules, along with the growing body of peer-reviewed scientific literature and the

[9] The project review provisions of Section 3.8 of the Compact apply to projects having a substantial effect on the water resources of the Basin. WLMG contests only that its plans constitute a "project" and does not contest their substantial effect.

actions of state and federal agencies,[10] DRBC published its revised rules for public comment in 2017. DRBC again received thousands of public comments, many of which cited scientific and technical studies which DRBC also reviewed. The adoption of final rules in 2021 was the culmination of this extensive rulemaking process, not the result of litigation.

The key question in applying the voluntary cessation doctrine is whether the defendants could reasonably be expected to engage in the challenged behavior again. *Hartnett*, 963 F.3d at 306. In light of the adoption of a prohibition by regulation approved by four Commissioners after an extensive public rulemaking process,[11] the project review process challenged in the Complaint no longer applies to the activities and facilities planned by WLMG, and there is no reasonable scenario in which that review process would return, as it has been completely superseded by the new regulation.

The stated purpose of DRBC's May 5, 2010 Resolution deferring review of applications for natural gas projects was to afford DRBC time to adopt regulations,

[10] During the period that DRBC was developing its 2017 proposed regulations, the U.S. Environmental Protection Agency issued its final report on the effects of hydraulic fracturing on drinking water, and New York State issued its final Supplemental Generic Environmental Impact Statement and Findings Statement. *See*, Resolution No. 2021-01 (February 25, 2021) (attached to the Motion as Exhibit B) at p.1.

[11] The federal Commissioner abstained due to a change in Administrations.

which has now occurred. A formal regulation, adopted by the Commissioners after public notice, extensive public comment, and thorough review by DRBC staff, has replaced the actions on which the Complaint is based.[12] A declaration regarding the lawfulness of DRBC's assertion of project review jurisdiction over WLMG's planned activities and facilities will not allow WLMG to extract natural gas. "Article III does not permit federal courts to decide moot cases." *Rosetti*, 12 F.3d at 1223 (citations omitted). Adjudicating WLMG's claim for declaratory relief would result in an advisory opinion in violation of "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted).

[12] Because DRBC's Rules of Practice and Procedure implementing project review under Section 3.8 of the Compact do not require review of hydraulic fracturing activities, the Executive Director Determinations of 2009 and 2010 were key to requiring such review. The final regulations adopted in 2021 replaced these Determinations.

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the case be dismissed as moot.

Respectfully submitted,

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