

**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 SUGGESTION OF MOOTNESS AND MOTION TO DISMISS

Defendant Delaware River Basin Commission (“DRBC” or “Commission”),
by and through its undersigned counsel, hereby submits this Suggestion of
Mootness and moves to dismiss the above-captioned action as moot pursuant to
Federal Rule of Civil Procedure 12(h)(3). In support of its Motion, the
Commission asserts the following:

1. Wayne Land and Mineral Group, LLC (“WLMG”) seeks a declaration that its planned natural gas development activities and facilities at its property located in Wayne County, Pennsylvania are not a “project” as defined in the

Delaware River Basin Compact (“Compact”) and hence not subject to the Commission’s project review authority under Section 3.8 of the Compact. Complaint (Doc. 1) ¶¶ 1, 6, 7, 35, 48, 49. *See also*, Memorandum Opinion (Doc. 205) at 4.

2. The Complaint avers that the Commission has determined, and publicly announced, that “Well Pads” (defined in paragraph 17 of the Complaint to include the well pad, appurtenant facilities and related activities) are projects requiring Commission review. Complaint ¶ 18. WLMG has identified the Executive Director Determinations issued on May 19, 2009, June 14, 2010 and July 23, 2010, available at <https://www.nj.gov/drbc/programs/natural/archives.html#4>, as evidence that the Commission has classified “Well Pad” facilities and activities as projects. Plaintiff’s Brief in Opposition to Defendant’s Motion to Dismiss (Doc. 22) at 11-12.

3. WLMG alleges that the Commission’s determination that Well Pads constitute projects subject to Commission review and approval is “an absolute barrier” to WLMG’s ability to move forward with its plans, Complaint ¶ 35, and that there are no other known impediments. Complaint ¶¶ 36, 43.

4. As clarified through discovery, the sole relief sought in this case is to remove this “barrier” by a declaration that the Commission may not review

WLMG's planned activities and facilities under Section 3.8 of the Compact as a "project." Letter from Christopher R. Nestor, Overstreet & Nestor LLC, to Mark L. Greenfogel, Warren Environmental Counsel LLC (July 12, 2019) at 2, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "A."

5. On May 5, 2010, the Governors of the four Delaware River Basin ("Basin") states and a representative of the President, in their capacities as DRBC Commissioners, acting through their duly appointed alternate Commissioners, unanimously adopted a resolution directing DRBC staff to develop draft regulations on well pads in shale formations for notice and comment rulemaking. The May 5, 2010 resolution also postponed consideration of well pad dockets until final regulations are adopted. Complaint ¶ 19;
https://www.nj.gov/drbc/library/documents/5-05-10_minutes.pdf at 5.

6. In accordance with the Commission's May 5, 2010 resolution, the Commission has since the date of the resolution engaged in an active public rulemaking process that has included the following:

a. On December 9, 2010, DRBC published draft regulations concerning natural gas development on which it received nearly 69,000 public comments. <https://www.nj.gov/drbc/library/documents/naturalgas-draftregs.pdf>.

b. On November 8, 2011, DRBC published revised draft natural gas development regulations.

<https://www.nj.gov/drbc/library/documents/naturalgas-REVISEDdraftregs110811.pdf>.

c. During the period the proposed regulations remained under consideration, the New York State Department of Environmental Conservation (“NYSDEC”) and the U.S. Environmental Protection Agency (“EPA”) each issued its own report which, among other things, discussed the adverse impacts of high-volume hydraulic fracturing activities on water resources, including drinking water resources. <https://www.dec.ny.gov/energy/75370.html>;

<https://www.epa.gov/hfstudy>.

d. By Resolution dated September 13, 2017, the DRBC Commissioners directed the Executive Director to publish no later than November of that year revised draft regulations which, among other things, proposed to prohibit high-volume hydraulic fracturing in the Basin.

https://www.nj.gov/drbc/library/documents/ResforMinutes091317_natgas-initiate-rulemkg.pdf. The proposed regulations were issued on November 30, 2017.

https://www.nj.gov/drbc/library/documents/ResforMinutes091317_natgas-initiate-rulemkg.pdf.

e. Before the close of the public comment period on March 30, 2018, the Commission conducted six public hearings on the 2017 proposed regulations at which 223 individuals presented oral comments, and received 8679 written submissions, many of which included multiple comments.

https://www.nj.gov/drbc/meetings/proposed/notice_hydraulic-fracturing.html#4.

f. Based on its review of the NYDEC and EPA reports identified above, the public comments submitted as part of the rulemaking process, and other technical and scientific analysis discussed in an extensive Comment and Response Document issued in conjunction with the final regulations,

https://www.nj.gov/drbc/library/documents/CRD_HVHFrulemaking.pdf, on

February 25, 2021, the Commission adopted Resolution No. 2021-01. This Resolution sets forth the Commission's conclusion that controlling future pollution by prohibiting high-volume hydraulic fracturing in the Basin is required to effectuate the Commission's Comprehensive Plan, avoid injury to the waters of the Basin, and preserve the waters of the Basin for uses in accordance with the Comprehensive Plan. A true and correct copy of Resolution No. 2021-01 is attached hereto and incorporated herein as Exhibit "B," and is available at

https://www.nj.gov/drbc/library/documents/Res2021-01_HVHF.pdf.

7. Section 440.3(b) of the new regulations, a copy of which is attached to Resolution No. 2021-01 (Exhibit “B” hereto), prohibits high-volume hydraulic fracturing in the Basin. *Id.*

8. Section 440.1(b) of the new regulations identifies the several rulemaking sections of the Compact providing the Commission with authority to issue the prohibition, including, among others, Section 5.2 (pollution control). *Id.* The Commission’s project review authority in Section 3.8 of the Compact, which is the subject of the Complaint, is an adjudicatory provision which is not among the stated bases for the regulations.

9. Resolution No. 2021-01 at paragraph C provides, “The Comprehensive Plan amendments and final rules adopted today replace the Executive Director determinations of May 19, 2009, June 14, 2010 and July 23, 2010. The Resolution for the Minutes of May 5, 2010, which postponed the Commission’s consideration of well pad projects until the adoption of final rules, expires by its own terms.” *Id.* As such, the Commission actions serving as the bases for the Complaint have been replaced by the new regulations or have expired and no longer serve as a “barrier” to WLMG’s planned activities. *See* Complaint ¶¶ 35 and 43.

10. Section 440.2 of the regulations defines “High volume hydraulic fracturing (HVHF)” as “hydraulic fracturing using a combined total of 300,000 or more gallons of water during all stages in a well completion....”

11. WLMG plans to use more than 300,000 gallons of water during well completion and therefore plans to undertake high-volume hydraulic fracturing activities in the Basin as defined in the regulations. *See, e.g.*, Plaintiff’s Response to Concise Statement of Material Facts in Support of DRBC’s Motion for Partial Summary Judgment (Doc. 183) at ¶ 8; Plaintiff’s supplemental Answers to Defendant’s First Set of interrogatories at 2-6 attached as Exhibit E to DRBC’s Motion for Summary Judgment (Doc. 169); Letter from John Holko, Lenape Resources, Inc. to A.J. Sandone, WLMG (June 18, 2019) attached as Exhibit D to DRBC’s Motion for Summary Judgment (Doc. 169). As such, the final regulations prohibiting high-volume hydraulic fracturing in the Basin prohibit WLMG’s planned activity.

12. In light of the prohibition imposed by the new regulations, the declaration WLMG seeks regarding DRBC’s project review authority under Section 3.8 of the Compact will not redress its alleged injuries.

13. Because the final regulations establishing the prohibition were adopted jointly by multiple sovereigns following an extensive public rulemaking process commenced years before the filing of the Complaint in this action, and the

regulations replaced the assertion of Section 3.8 project review authority averred in the Complaint with a prohibition adopted pursuant to other Compact provisions, no reason exists for anticipating that the Commission will reassert project review authority over Well Pad facilities and hydraulic fracturing activities.

14. Persons claiming to be aggrieved by the final regulations have filed a lawsuit challenging those regulations. *See Yaw v. Del. River Basin Comm'n*, No. 2:21-cv-00119-PD (E.D. Pa.).

15. WLMG has the right to file its own lawsuit challenging the new regulations.

16. The new regulations render the current dispute over DRBC's project review authority moot.

WHEREFORE, defendant Delaware River Basin Commission respectfully requests that the case be dismissed as moot.

Dated: April 13, 2021

s/ Kenneth J. Warren
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