

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

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

**DEFENDANT DELAWARE RIVER BASIN COMMISSION’S
MOTION TO DISMISS THE COMPLAINT**

Defendant Delaware River Basin Commission (“DRBC” or “Commission”), by and through its undersigned counsel, hereby moves to dismiss Plaintiff Wayne Land and Mineral Group, LLC’s (“WLMG”) Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of this Motion, the Commission asserts the following:

1. WLMG’s Complaint seeks a declaration from this Court that the Commission has no jurisdiction over the natural gas development

activities, including construction of an exploratory well and one or more production wells, that WLMG intends to undertake on approximately seventy-five (75) acres of land that WLMG allegedly owns in Wayne County within the Delaware River Basin (the “Basin”). *See* Complaint, ¶¶ 7, 12. The portion of Wayne County located within the Basin drains to interstate waters that the Commission has designated as Special Protection Waters (“SPW”). *See* Declaration of Richard C. Gore (“Gore Declaration”) at ¶ 13.

2. The Commission is a federal-interstate agency formed by the Delaware River Basin Compact (“Compact”) to manage the water resources of the Basin. 7 Statutes at Large 688 (1961), available at <http://www.nj.gov/drbc/library/documents/compact.pdf>. Pursuant to Section 3.8 of the Compact, no project having a substantial effect on the water resources of the Basin shall be undertaken unless it shall have been first submitted to and approved by the Commission. The Commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the Commission’s comprehensive plan. *Id.*
3. On May 19, 2009, the Commission’s Executive Director issued a determination (“2009 EDD”) which required sponsors of natural gas

extraction projects in shale formations within the drainage area of SPW to apply for and obtain Commission approval. Wells intended solely for exploratory purposes were excluded from the 2009 EDD. The 2009 EDD was not appealed to the DRBC Commissioners as allowed by Commission regulations. *See* DRBC Rules of Practice and Procedure, 18 CFR subparts E and F. A true and correct copy of the 2009 EDD is attached to the Gore Declaration as Exhibit “A”.

4. On May 5, 2010, the Commission through a unanimous vote of the Commissioners postponed any consideration of applications for well pad approvals until regulations could be drafted to govern any such review. A true and correct copy of the minutes of the Commission’s May 5, 2010 business meeting is attached to the Gore Declaration as Exhibit “B” (*see* pp. 4-5).
5. The Commission on December 9, 2010 published draft regulations governing natural gas development projects for public comment and in November 2011 published revised draft regulations on its website. To date, the Commission has not issued final regulations. *See* Gore Declaration, at ¶¶ 6, 9.
6. On June 14, 2010, the Executive Director issued a supplemental determination (“2010 SEDD”) expanding coverage of the 2009 EDD to

natural gas exploratory well projects in shale formations in the drainage area of SPW, except those projects for which the Pennsylvania Department of Environmental Protection (“PADEP”) had already granted natural gas well permits. A true and correct copy of the 2010 SEDD is attached to the Gore Declaration as Exhibit “C”.

7. On June 23, 2010, the Executive Director amended her 2010 SEDD to provide that Hess Corporation did not require Commission approval to install two exploratory wells for which Hess had obtained PADEP soil and erosion control permits before June 14, 2010 and for which PADEP natural gas well permits were by that date under active review (“2010 Amended SEDD”). A true and correct copy of the 2010 Amended SEDD is attached to the Gore Declaration as Exhibit “D”.
8. The 2010 SEDD and 2010 Amended SEDD were appealed to the Commissioners by several parties, including the Northern Wayne Property Owners Alliance (“NWPOA”). Based on the recommendation of the Hearing Officer, the Honorable Edward N. Cahn, by Resolution and Order dated December 8, 2010 (“2010 Order”) entered in the administrative proceeding, the Commission, among other things, approved NWPOA’s withdrawal of its administrative appeal without prejudice.

9. The 2010 Order identifies the issue raised by NWPOA in its administrative appeal as “whether exploratory natural gas development projects are properly subject to the Commission’s review and approval jurisdiction.” 2010 Order, p. 5 ¶ 1.a. The 2010 Order deferred resolution of this question and also expressly preserved the right of NWPOA or other parties to “assert the same issues of whether exploratory natural gas development projects are properly subject to the Commission’s review and jurisdiction” by filing an application. *Id.* A true and correct copy of the 2010 Order is attached to the Gore Declaration as Exhibit “E”.
10. WLMG has not requested the Commission to review, make factual findings concerning or reach a conclusion regarding whether WLMG’s intended activities are subject to DRBC review and approval under Section 3.8 of the Compact. *See* Gore Declaration, at ¶ 13. As a result, the Commission has not made any decision regarding WLMG’s project.
11. WLMG’s Complaint must be dismissed for lack of subject-matter jurisdiction pursuant to F.R.C.P. 12(b)(1) on ripeness and standing grounds.
 - a. Because the Commission disputes the allegations of the Complaint, the instant Motion makes a factual attack and evidence may be

introduced to resolve the dispute. Accordingly, this Court may consider documents outside the pleadings and may take judicial notice of decisions of an administrative agency such as the DRBC.

- b. As alleged more fully in paragraph 10, above, the Commission has not been asked to review whether it has project review jurisdiction with respect to some or all of WLMG's proposed activities.
- c. With respect to the portion of WLMG's claim alleging that the Commission has no jurisdiction over WLMG's plan to install a natural gas exploratory well, the 2010 Order resolving the administrative appeal of the 2010 SEDD makes clear that the Commission's decision is deferred until such time as an application is submitted to the Commission regarding a particular project or the Commission issues final natural gas regulations. To date, WLMG has not submitted an application and final regulations have not been issued.
- d. With respect to the portion of WLMG's claim alleging that the Commission has no jurisdiction over WLMG's plan to install natural gas production wells and conduct various activities including hydraulic fracturing, WLMG has not requested the Commission to review the 2009 EDD, which was not appealed by any person.

Likewise, WLMG never submitted an application asking the Commission whether WLMG's proposed production well activities would trigger the Commission's project review jurisdiction.

- e. For the reasons stated above, the claim raised in WLMG's Complaint is not ripe for judicial review.
- f. For the reasons stated above, WLMG's alleged injuries are hypothetical and speculative or not legally cognizable, and are not traceable to the actions of the Commission and, therefore, WLMG lacks standing.

12. WLMG's Complaint must also be dismissed pursuant to F.R.C.P. 12(b)(6) for lack of final agency action and for failure to exhaust administrative remedies.

- a. In deciding 12(b)(6) motions, a court may consider "matters of public record" without converting the motion into a motion for summary judgment.
- b. WLMG remains able to file an application requesting that the Commission decide its jurisdiction to review WLMG's proposed activities to determine whether they would substantially impair or conflict with DRBC's Comprehensive Plan. *See Compact*, at § 3.8. *See also*, Gore Declaration, at ¶ 13. If WLMG files such an

application, the Commission will conduct administrative proceedings to establish the relevant facts of WLMG's proposal, evaluate the statutory, regulatory and policy considerations at issue and make a final determination regarding whether WLMG's planned activities trigger the Commission's project review jurisdiction. *Id.* If requested, the Commission will also grant WLMG a full administrative appeal, including an evidentiary hearing under the Commission's Rules of Practice and Procedure. Final Commission adjudications on a project application are appealable to any court of competent jurisdiction. *See Compact*, at § 3.8.

13. The Complaint does not expressly mention the 2009 EDD or state that WLMG is challenging it. If such a challenge were inferred from the allegations of the Complaint, this challenge, which has never been presented to the Commissioners, would be barred by the statute of limitations and/or failure to file a timely administrative appeal and therefore should be dismissed pursuant to F.R.C.P. 12(b)(1) or 12(b)(6).
14. Defendant hereby incorporates by reference the Declaration of Richard C. Gore filed with this Motion, and its brief in support which will be timely filed in accordance with Local Rule 7.5, as if fully stated herein.

WHEREFORE, Defendant Delaware River Basin Commission respectfully requests that the Complaint be dismissed.

July 8, 2016

s/Kenneth J. Warren
Kenneth J. Warren / PA 30895
WARREN ENVIRONMENTAL COUNSEL LLP
975 Mill Road
Millridge Manor House Suite A
Bryn Mawr, PA 19010
Telephone: (484) 383-4830
Fax: (484) 302-4370
kwarren@warrenenvcounsel.com

*Attorney for Defendant
Delaware River Basin Commission*