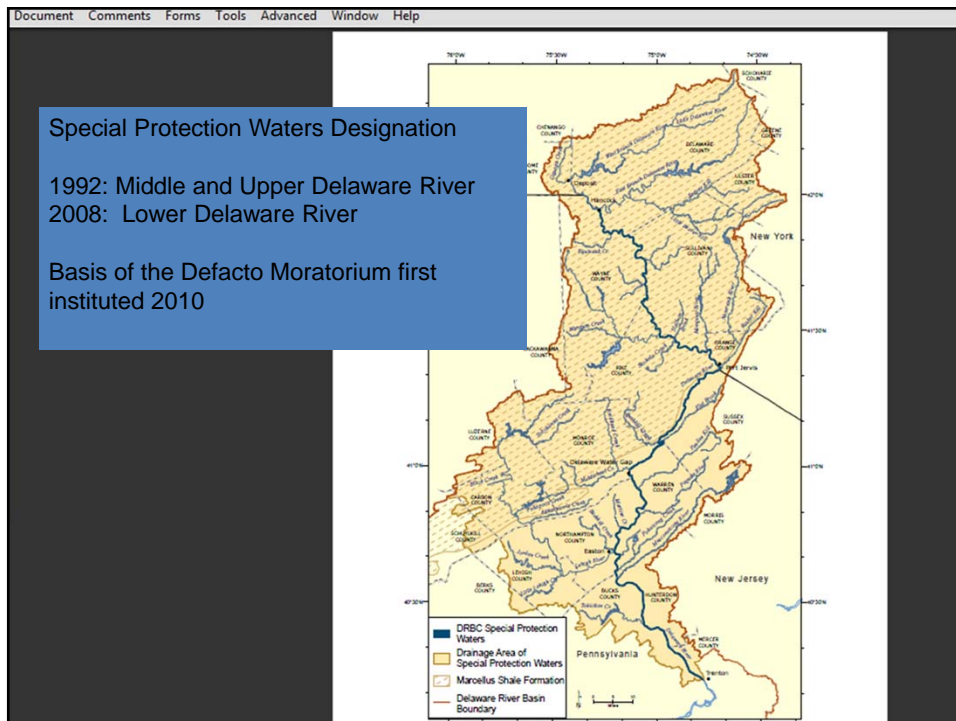


## DELAWARE RIVER BASIN UPDATE

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2010 *de facto* moratorium includes: drilling, wastewater & water withdrawals

... In Place Until DRBC Issues Regulations on Fracking in the Basin



November 30, 2018 DRBC posted draft regulations for public comment.

**Proposed:**

- A ban on “high volume hydraulic fracturing” throughout the Delaware River Basin
- Draft regulations that allow the export of water from the Watershed for fracking,
- Draft regulations that allow the storage, processing, and discharge of frack wastewater within the Basin.

## **WLMG v. DRBC**

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Wayne Land & Mineral Group challenged the Delaware River Basin Commission's temporary moratorium on shale gas extraction within the boundaries of the Delaware River Watershed seeks a declaration that Wayne Land and Mineral Group is entitled to pursue drilling without DRBC review, approval or docket.

## **WLMG v. DRBC cont'd**

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July 3, 2018 decision from U.S. Court of Appeals for Third Circuit, reversing U.S. District Court dismissal of the case:

“Because we conclude that the meaning of the word “project” as used in the [DRBC] compact is ambiguous, we will vacate the order of dismissal and remand the case for fact-finding on the intent of the compact’s drafters.”

## Delaware River Basin Compact

Purpose: “to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin” §1.3(e)

DRBC tasked with the “conservation... management, and control of the *water and related resources* of the Delaware River Basin... and to bring about “the greatest benefits and produce the most efficient service in the public welfare.” Recitals

## Delaware River Basin Compact cont'd

- Requires DRBC to:
- promote “sound practices of watershed management in the basin”
- develop a Comp Plan
- create policies related to the water resources of the Basin including related land use per the definition found in § 1.2(i).

§§3.1, 4.1, and 13.1

## **Delaware River Basin Compact**

- grants DRBC “jurisdiction to control future pollution and
- abate existing pollution in the waters of the basin...” §5.2
- grants DRBC authority adopt rules, regulations, and standards,
  - “to protect the public health or to preserve the waters of the basin
  - in accordance with the comprehensive plan.” §5.2

## **Delaware River Basin Compact**

- allows DRBC to enforce these rules and regulations via the issuance of orders
- against any entity, including private corporations,
- when DRBC determines the entity has violated rules and regulations regarding the prevention and abatement of pollution. §5.4.

## Delaware River Basin Compact

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- allows the Commission to:
- exercise such other and different powers as may be delegated to it by the compact or otherwise pursuant to law, and...
- *exercise all powers necessary or convenient to carry out its express powers or which may be reasonably implied therefrom. §3.6(h)*

## Delaware River Basin Compact

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Article 3 gives the Commission the authority to review “projects” undertaken in the Basin if they will have “a substantial effect on the water resources of the Basin.”

The Commission has the power to promulgate rules “for the procedure of submission, review and consideration of projects.”

## **Delaware River Basin Compact**

“No project having a substantial effect on the water resources of the Basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the Commission, subject to the provisions of Sections 3.3 and 3.5. The Commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such plan.” § 3.8.

## **Delaware River Basin Compact**

“project” = “any work, service or activity which is separately planned, financed, or identified by the Commission, or any separate facility undertaken or to be undertaken within a specified area, for the conservation, utilization, control, development or management of water resources which can be established and utilized independently or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation. § 1.2(g)

## **Delaware River Basin Compact**

“water resources” = “water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control.”

“facility” = “any real or personal property, within or without the Basin, and improvements thereof or thereon, and any and all rights of way, water, water rights, plants, structures, machinery and equipment, acquired, constructed, operated or maintained for the beneficial use of water resources or related land uses... § 1.2(e).

## **Atlantic Sunrise Pipeline Cert Petition**

Filed by Delaware Riverkeeper Network, the Delaware Riverkeeper, Maya van Rossum, and Lancaster Against Pipelines for review of the judgment of the United States Court of Appeals for the Third Circuit.

Potential to determine the preemption or preservation of state administrative review processes for all appeals taken pursuant to Section 717r(d)(1) of the Natural Gas Act in every state.



## **Atlantic Sunrise Pipeline Cert Petition**

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*Delaware Riverkeeper Network, et al. v. Secretary Pennsylvania Department of Environmental Protection, et al.*, 903 F.3d 65 (3d Cir. 2018) supplanted Pennsylvania's definition of finality with regard to a state issued certification and instead substituted a federal standard, invoking the Natural Gas Act's appeal mechanism.

## **Atlantic Sunrise Pipeline Cert Petition**

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Administrative review process in Pennsylvania is preempted, while in neighboring New Jersey a comparable administrative process is unchanged.

Arguments over whether the Third Circuit's decision irreconcilably conflicts with the First Circuit and whether it commandeers Pennsylvania's legislative and administrative processes in violation of the 10th Amendment.

## **Atlantic Sunrise Pipeline Cert Petition**

Petitioners challenged the issuance of a conditional water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a) (“water quality certification”).

DEP issued the Section 401 water quality certification to Transco on April 5, 2016.

Notice in the PA Bulletin on April 23, 2016 directed any person aggrieved by the action to an appeal with the PA EHB.

## **Atlantic Sunrise Pipeline Cert Petition**

States have traditionally played central role in regulating environmental impacts of various types of construction projects. “Cooperative federalism.”

Clean Water Act: “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources.” 33 U.S.C. §1251(b).

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