

Third Circuit Finds Plaintiffs Lack Standing to Challenge the DRBC's Hydraulic Fracturing Ban

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On September 16, 2022, the U.S. Court of Appeals for the Third Circuit affirmed a district court ruling that Pennsylvania state legislators and municipalities lacked standing to challenge the Delaware River Basin Commission's (DRBC) regulation banning hydraulic fracturing for natural gas within the basin. *Yaw v. DRBC*, 49 F.4th 302 (3d Cir. 2022), *aff'g* No. 2:21-cv-00119, 2021 WL 2400765 (E.D. Pa. June 11, 2021); see Vol. XXXVIII, No. 3 (2021) of this *Newsletter*. The court held that the appellants failed to meet the standing requirements of Article III of the U.S. Constitution because: (1) in the case of the state senator appellants, individual members of the state legislature lack standing to assert the interests of the legislature as a whole; and (2) in the case of the municipality appellants, their alleged injuries were "conjectural" or "hypothetical," as opposed to "actual" or "imminent." The court also held that none of the appellants had standing as trustees of Pennsylvania's public natural resources under the Environmental Rights Amendment to the Pennsylvania Constitution because the DRBC's ban has not cognizably harmed the trust.

The five-member DRBC is governed by a compact between the federal government and four states that draw water from the Delaware River: Pennsylvania, New Jersey, Delaware, and New York, represented by a member of the U.S. Army Corps of Engineers and each state's governor, respectively. See Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688. The DRBC has authority to approve, construct, operate, and regulate projects and facilities that use the basin's water resources. It can also address issues outside the basin if they have a substantial effect on the basin's water quality and water supply and if the issues conflict with the DRBC's comprehensive plan. See Cong. Research Serv., "Federal Conservation of the Delaware River" (Mar. 18, 2015).

The Third Circuit's decision follows the DRBC's February 2021 vote to ban hydraulic fracturing in the basin, which had been under a de facto moratorium since 2010. In support of the ban, the DRBC found that hydraulic fracturing for extraction of oil and natural gas "poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation" of water resources within the basin. *Yaw*, 49 F.4th at 307. Following the ban, Pennsylvania legislators and municipalities filed suit, arguing that the DRBC overstepped its legal authority. Among other things, they alleged the ban "violated the Takings Clause of the United States Constitution, illegally exercised the power of eminent domain, and violated the Constitution's guarantee of a republican form of government." *Id.*

Acknowledging that challenges are likely to continue, the court noted that its ruling is narrow. It said that although the legislators and municipalities lack standing, they can attempt to seek redress of the issues by other means, such as requesting that the DRBC reverse the ban, seeking to amend the compact, or persuading a party with standing to assert the institutional injuries. *Id.*

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