

## Legal Problems with the Proposed DRBC Ban

The proposed DRBC Ban would prohibit high volume hydraulic fracturing within the Delaware River Basin. Because Pennsylvania is the only Basin state with significant gas reserves that does not already prohibit HVHF activities, the ban would impact it only.

The foundation for the HVHF ban relies, as a practical matter, upon perceived or speculated risks of inadvertent spills and releases that do not qualify as legal justification. Water acquisition, consumptive use, siting and landscapes are already addressed by other Compact provisions, leaving only Section 5.2 and reliance upon potential spills and releases as ban excuses.

Yet, DRBC staff, relying upon Pennsylvania DEP, previously told a Federal Court, in another matter, how Pennsylvania's robust and comprehensive regulatory program eliminates, reduces, and minimizes the very same perceived risks that it now asserts to justify banning HVHF.

The DRBC also cites its own regulations as authority for the ban, but, as a creature of the Compact, the agency has only those powers conferred upon it through that agreement and accompanying legislation. The DRBC cannot expand its own authority, as it does in this case.

Moreover, in the absence of a clear statement to the contrary in the Compact, "each State [is] left to regulate the activities of her own citizens." A surrender of state sovereignty "should be treated with great care, and the Supreme Court has stated that courts should not find a surrender unless it has been 'expressed in terms too plain to be mistaken.'"

Similarly, the Supreme Court rejected the U.S. Army Corps of Engineers' assertion of jurisdiction over certain wetlands, noting the "government's expansive interpretation would result in a significant impingement of the State's traditional primary power over land and water use."

This case law is why, since its creation in 1961, the DRBC has not attempted to ban refineries, nuclear power plants, chemical plants, commercial farms, or, until recently, well pads and natural gas wells; it doesn't possess the authority. More importantly, it cannot expand its authority through the back door.

The Compact does allow DRBC to classify waters of the basin and then "establish standards of treatment of sewage, industrial or other waste, according to such classes," and can "require such treatment of sewage, industrial or other waste within a time reasonable for the construction of the necessary works."

Jurisdiction to classify waters and establish standards for, and require, treatment of wastes that are discharged into those waters, does not entitle the DRBC to ban an activity or preclude an otherwise lawful use of private property. If the DRBC had such broad authority, it could simply use it to ban any human activity that might cause pollution.

The DRBC is not, and was never intended to be, a regional super-regulator or zoning authority, with veto power over the use of private property. If DRBC attempts to so expand its authority go unchallenged, the DRBC would, in effect, have a form of police power exceeding States. Under the guise of controlling "future pollution," the DRBC would be able to dictate when, where, and under what conditions **any** human activity can occur in the Basin.

## Legal Problems with the Proposed DRBC Ban

The DRBC's core mission was, and properly remains, coordinating development of water projects to meet water needs of Basin residents and New York City. The DRBC has historically understood its authority was limited to classifying waters of the Basin and establishing standards for, and requiring, treatment of wastes discharged into those waters.

In 1973, in response to the 1972 Federal Water Pollution Control Act amendments, the DRBC relinquished its program on pollution abatement schedules in favor of the federal NPDES and state programs. It said it was now spending more time coordinating and reformulating water quality standards, reworking assimilative capacity allocations, developing better monitoring programs" and occasionally arbitrating some interstate issues.

Summarizing, the DRBC's interpretation and application of its Compact over many decades provides compelling evidence it has always understood Article 5 authority to be limited to classifying waters and establishing standards for, and requiring, treatment of wastes discharged into those waters. It has never interpreted Article 5 to authorize a wholesale ban on anything.

There are other legal problems as well. The ban would result in categorical and other regulatory "takings" of property, for example. Because vertical wells would not be feasible as a means to recover gas in the Basin, the ban would fully and permanently prevent owners of but gas rights from making **any** economical viable use of their property - a categorical regulatory taking. There is also a good argument for regulatory takings in the case of owners with surface **and** gas rights on the basis that there is no environmental justification for the huge declines in property values.

Even assuming, for argument's sake, the ban would not effectuate regulatory "takings" of property in the Basin, it would, nevertheless, violate substantive due process principles. There is a wealth of evidence to show, contrary to DRBC claims, shale gas production activities are safe for water and other environmental resources. There is, therefore, no rational basis for a ban.

The proposed permanent ban would likewise run afoul of equal protection principles. When a governmental action creates a discriminatory classification system, the validity of the action, from an equal protection perspective, is determined by certain tests, including whether the discrimination bears "a rational relation" to a legitimate governmental purpose. The proposed permanent ban would not pass the test as it would effectively prevent members of the oil and gas industry from producing gas in the Basin but, at the same time, would not prevent those in other industries from undertaking their business operations in the Basin.

This discriminatory classification system, in other words, would not "bear a rational relation" to a legitimate government purpose. It would be arbitrary and irrational because it would be premised on a perceived risk of spills and releases from one activity (HVHF) in one industry (oil and gas), even though there is an equal or greater risk of spills and releases from various activities that occur in various other industries, including the refining, energy-generation, chemical, landfill, paper, technology, farming, sewage, wastewater treatment, and housing.

Finally, as a general matter, an agency action will be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. DRBC action must be supported by "substantial evidence that " that simply doesn't exist in this case.