

Marcellus Shale Update: The DRBC and the Limits of Administrative Agency Power

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There are two lessons from the petition by Pennsylvania State Senators Lisa Baker and Gene Yaw and Senate President Pro Tempore Joseph Scarnatti to intervene on behalf of a Wayne County landowner in his challenge to new rules by the Delaware River Basin Commission that would ban hydraulic fracturing in the entire Basin. The first is that there is a limit to how far administrative agencies can go and how far their power extends. The second is that it is imperative for the industry to engage with the citizens of the State to enforce its rights and not just speak to some residents or concentrate on only one issue.

The move by the State Senators is the latest in a series of maneuvers related to proposed rules by the DRBC that stretch back years. In their current manifestation, the DRBC announced on September 13, 2017 it would publish new rules that would ban fracking throughout the Basin. The Commission claimed that fracking anywhere in the Basin constitutes a “water project” that is within the DRBC’s power to regulate. Earlier, in 2016, a landowner in Wayne County had sued the DRBC claiming that it did not have jurisdiction to prevent the drilling of a natural gas well on his property. The lawsuit was dismissed in US District Court but overturned by the Third Circuit, which in July 2018 sent it back to the District Court.

The current landowner argues that the DRBC interprets the term “Project” so broadly that it can regulate anything that happens within the Basin. I made that same argument at a public meeting in Philadelphia in January 2018. One person from the American Petroleum Institute came, but nobody from any of the natural gas producers showed up. Because there was no one there to advance the industry position, all we heard was a series of truths, half-truths and plain falsehoods. It was a propaganda session for those who oppose any natural gas development. Given a chance to engage with Southeastern Pennsylvanians who know little about the subject, the energy industry punted. It was yet another missed opportunity.

The industry could have made the point that the DRBC’s position is so overbroad it puts them in virtual control of, or at least gives them a veto over, any development, whether fracking related or not, that happens anywhere within the Basin – which extends the length of the 330 mile Delaware River. Supporters of the ban were thrilled, but cooler heads in the Third Circuit asked whether the 1961 interstate compact granting power to the DRBC was meant to be so broad. Using the DRBC standard, it could prevent the erection of a gas station 30 miles away from the river.

All three Pennsylvania State Senators seeking to intervene are Republican, but we need to ask ourselves whether this truly is a partisan issue. Are our citizens truly comfortable with an administrative agency comprised of five unelected but appointed individuals claiming so much power to regulate our lives, even for activities outside the natural gas industry? There are those who think fracking should not be permitted in the area within the jurisdiction of the DRBC – or anywhere else for that matter. Regardless, they should not be so sanguine about the enormous power grab being attempted by the DRBC. Over subscribed power

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has a way of appearing fickle when the next project comes along that we do not oppose but actually support.

One other area where those opposed to natural gas development should not be so sanguine is in their ultimate reliance on Russian gas exports for their winter power. Heading into the 2018-9 winter, New York and New England may be even more reliant on gas imports than they were last winter. As you recall, that meant Boston had to turn to Moscow for gas drilled in the environmentally sensitive Arctic. The Russian supply may not be as available this winter. While all eyes have been focused on the Supreme Court confirmation, the United States and Russia are edging closer to confrontation in the Middle East.

Last week, Israel attacked a Syrian rocket facility in Latakia, on the Mediterranean coast north of Lebanon. The area is well outside of the normal Israeli area of operation, and indicates the importance the Israelis placed on the target. Syrian anti-aircraft guns erupted, missing all of the Israeli planes but shooting down a Russian military transport plane, killing 15 Russians. The Russian military blamed Israel, claiming it did not follow the normal rules for informing Russia when Israel conducts military operations in Syria. Although Russian President Putin played down the issue, the Russian military continued to accuse Israel. Last week Russia announced that new, more sophisticated anti-aircraft weapons were being transferred to Syria. National Security Advisor John Bolton warned Russia that such a transfer would be a "significant escalation".

Oil prices rose over \$70/barrel. While not moving in step with natural gas prices, the coming of further Iran sanctions adds to the price pressure on fuel. If Russia and the United States grow further estranged in the Middle East, it could affect the ability of Massachusetts to call on Russian gas now that it has effectively banned Pennsylvania gas. Both short term and long term, I doubt that is a good move economically, ecologically or national security-wise for New Englanders.

ATTORNEYS MENTIONED

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