
Vote By Interstate Commission On Banning Fracking Raises A Multitude Of Legal Issues

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On Thursday, February 25, the Delaware River Basin Commission (DRBC) will vote on whether to ban fracking in the Delaware River Basin, or not. Given the current composition of the DRBC, it is likely that the ban will pass. If it does, however, the result may provide the perfect test case for those trying to limit the power of quasi-governmental administrative agencies.

As I have written before, the DRBC is an interstate agency established in 1961 by a compact among the United States and the individual states through which the Delaware River flows (Delaware, New Jersey, New York, and Pennsylvania). Each state, and the federal government, has one vote. By grant of its founding compact, the DRBC has jurisdiction over “Projects” within the area of drainage of the Delaware River that would impact the river.

In recent years, the DRBC has attempted to expand its jurisdiction by interpreting the term “Project” very broadly. In September 2017, the DRBC announced that it would promulgate regulations that would ban hydraulic fracturing within the river basin itself. That move sparked a lawsuit by a northeastern Pennsylvania resident challenging the proposed regulation as allowing the DRBC to regulate anything within the basin under the guise of it being a “Project”, regardless of whether it actually relates to the river or not. In effect, the DRBC now claims jurisdiction over any activity within the Basin, justifying that untrammelled jurisdictional claim on the grounds that any such activity might impact drainage into the Delaware River.”

Interestingly, there is a similar agency with jurisdiction over the nearby Susquehanna River called the Susquehanna River Basin Commission (SRBC). Despite being comprised of many of the same members, the SRBC has not placed the same restrictions on fracking, nor has it taken an adversarial position toward it. Thus, the data from the Susquehanna River is very relevant to the decision about to be made by the DRBC.

In 2016, American Rivers, an environmental advocacy group, classified the Susquehanna River as the third most endangered river in the United States. However, the reasons had nothing to do with fracking. The Chesapeake Bay Foundation, another environmental group, has listed dams, farm field pollution from animal manure, poorly treated sewage, and other items as the main causes of the pollution in the Susquehanna River. “Fracking-related” pollution is not listed. In fact, one of the biggest controversies in

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recent years has dealt with a “renewable” source, hydropower. Downstream dams alter water flow, block fish, and affect water quality, showing clearly that there are tradeoffs to any type of energy generation.

Interestingly, there is a danger to the Delaware River that is well known, yet the DRBC is making no effort to stop it. The danger comes from deicing salt that is poured on the roads during snowstorms, such as we have been experiencing in recent weeks. In fact, at least one study shows that the average concentrations of chloride in urban rivers in the northern United States almost doubled from 1990 to 2011.

All of this will be fodder for those who challenge any decision by the DRBC to ban fracking. Despite the consistent drumbeat in the media about the dangers of fracking, the scientific evidence is lacking. The fact that there are other activities that clearly damage the River, yet the DRBC chooses to do nothing about them, raises additional questions about the sincerity of the DRBC’s move, and certainly its consistency.

Exactly what are the limits of a regulatory agency’s power to control everything within its jurisdiction, especially when other more limited measures (such as setbacks from the river for fracking operations) might be available that could get to a similar result? Does an agency have the right to ban certain activities wholesale, yet selectively permit others despite the fact that the activities which are permitted are arguably more destructive to the fundamental purpose of the agency?

The United States Supreme Court recently accepted the Penn East Pipeline case that in reality deals with the ability of states to supersede federal priorities. Don’t be surprised if any decision by the DRBC to ban fracking ends up in the Court as well, and with it the ultimate question of what limits exist on the discretion and aggregation of power of the quasi-governmental agencies that so impact our lives.