Bloomberg BNA

Daily Environment Report™

HYDRAULIC FRACTURING

Opponents of hydraulic fracturing in the Marcellus Shale suffered a setback when a federal court in New York dismissed suits filed by the State of New York and environmental groups arguing that the Delaware River Basin Commission was obligated to conduct an assessment of its draft rules. The court held that the rules were draft and not a final action. The authors write that, even if the plaintiffs come back to court after the final rules are issued, they probably will fail because the court is not likely to agree that the Commission is a federal agency bound by the National Environmental Policy Act.

Overcoming NEPA Challenges to Fracking Rules in the Delaware River Basin

BY GEORGE C. HOPKINS, JEREMY MARWELL, AND BRANDON TUCK[1]

Opponents of hydraulic fracturing in the Marcellus Shale recently suffered a sharp setback when a federal court in New York dismissed three suits filed by the State of New York and a number of private environmental groups.

The lawsuits had challenged draft fracking regulations published by the Delaware River Basin Commission (DRBC or Commission)—a regional body charged with managing the Delaware River water resources. Those regulations, if finalized, would lift an ongoing de facto moratorium on natural gas extraction through fracking in the Delaware River Basin. But the plaintiffs had claimed that the DRBC and certain federal defendants were required to prepare an environmental impact statement under the National Environmental Policy Act before publishing even *draft* regulations.

Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York dismissed the suits, holding that the plaintiffs lacked standing and that their claims (which challenged proposed, not final, rules) were not ripe for judicial review.[2]

The court explicitly declined to reach the merits of the plaintiffs' claims. If the regulations are finalized and the plaintiffs ultimately return to court, they will again face several threshold barriers to success even if they can cure the standing and ripeness barriers fatal to their recent lawsuits. One key merits issue is whether the

[1] The authors are grateful to Theresa Romanosky for her substantial contributions to researching and drafting this article.

[2] New York v. U.S. Army Corps of Engineers, —- F. Supp. 2d —-, No. 11-cv-2599, 2012 BL 248467 (E.D.N.Y. Sept. 24, 2012); *see* also 186 DEN A-7, 9/26/12.

 ISSN 1060-2976

DRBC is subject to NEPA at all—i.e., whether it is a federal agency under that statute, or whether a federal agency's involvement in the Commission otherwise triggers NEPA. In this article, we explain why plaintiffs are unlikely to prevail in seeking to use the federal NEPA statute to delay or halt regional fracking regulations.

Background

Delaware River Basin Compact

The Delaware River Basin Compact, signed into federal law in 1961, is an agreement among Delaware, New Jersey, New York, Pennsylvania, and the federal government to manage and regulate water resources within the Delaware River basin.[3] The Compact created the DRBC, the entity charged with overseeing the Compact, for the purpose of ''develop[ing] and effectuat[ing] plans, policies and projects relating to the water resources of the basin.''[4] Congress vested the DRBC with authority to ''adopt and promote uniform and coordinated policies for water conservation, control, use and management in the basin.''[5] Further, the Compact provides that the Commission ''shall encourage the planning, development and financing of water resources projects according to such plans and policies.''[6]

Under the Compact, the Commission comprises five members: the governors of each of the four member states together with one federal representative appointed by the president (the commander of the North Atlantic Division of the U.S. Army Corps of Engineers). Each member has a single vote.[7] If the DRBC adopts a ''comprehensive plan, or any part or revision thereof'' with the ''concurrence'' of the federal member, ''the exercise of any powers conferred by law on any officer, agency or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan.''[8]

The DRBC was established in response to disputes between the states about the Delaware River's waters.[9] These disputes had twice ended up before the U.S. Supreme Court.[10] The DRBC is ''unique among the interstate agencies approved by Congress in that Congress affirmatively acted to make the federal government a partner rather than merely consenting to the Compact's formation under Article 1, § 10 of the Constitution.''[11] Notwithstanding this federal participation, the Compact explicitly provides that the DRBC ''shall not be considered a Federal agency'' for purposes of the Administrative Procedure Act (''APA''). Courts have concluded that the DRBC is neither a federal nor state agency, but rather a novel hybrid ''body on which both the federal government and each of the four states through whose territory the Delaware River runs are equally represented.''[12]

National Environmental Policy Act

Congress enacted NEPA in late 1969 as a means to influence the decision-making process of federal agencies.[13] Prior to NEPA, federal agency decisions had sometimes resulted in environmental harms that the agency could and would have avoided had there been prior review of the action's potential implications and alternatives.[14] NEPA's principal requirement is that ''all agencies of the Federal Government'' prepare an EIS for all ''major Federal actions significantly affecting the quality of the human environment.''[15] An EIS must include a description of, and reason for, the proposed action, an analysis of its potential environmental effects, and possible alternatives.[16] As part of this process, an agency must publish its EIS and provide opportunity for public comment.[17]

Title II of NEPA created the Council on Environmental Quality (CEQ). Pursuant to executive order, CEQ is responsible for administering NEPA through the adoption of interpretive regulations.[18] Congress did not vest CEQ with authority to issue ordinary legislative regulations with the force of law. However, CEQ regulations are binding on executive branch agencies, and other agencies generally adopt their own NEPA regulations that conform with CEQ regulations.[19]

Plaintiffs seeking to challenge an agency's compliance with NEPA's EIS requirement typically must do so pursuant to the APA's general judicial review provisions because NEPA itself lacks any specific provision authorizing a private right of action.[20] Considerable risk accompanies an agency's decision not to prepare an EIS. If that decision is challenged in court, the litigation may result in wasted time and resources if the court decides an EIS is necessary after all. Under the APA, agency action may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[21]

NEPA provides that an EIS must be prepared by agencies on ''proposals for . . . major Federal actions significantly affecting the quality of the human environment.''[22] Ordinarily, the threshold question in NEPA cases is whether a federal agency must prepare an EIS—i.e., whether the matter is a ''major'' federal action, and whether the action would significantly affect

---

[3] Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961).

[4] *Id.* § 3.1, 75 Stat. at 692.

[5] *Id.*

[6] *Id.*

[7] *Id.* §§ 2.2, 2.5, 75 Stat. at 691.

[8] *Id.* § 15.1(s), 75 Stat. at 716.

[9] Borough of Morrisville v. Del. River Basin Comm'n, 399 F. Supp. 469, 470 (E.D. Pa. 1975).

[10] *See* New Jersey v. New York, 283 U.S. 336 (1931); New Jersey v. New York, 347 U.S. 995 (1954).

[11] *Borough of Morrisville*, 399 F. Supp. at 470.

[12] *Id.*

[13] 42 U.S.C. §§ 4321 *et seq*. (2006).

[14] Kenneth J. Warren, Judicial Review under NEPA: A Look at Two Recent Decisions, The Legal Intelligencer, July 15, 2010, available at http://www.hangley.com/ufiles/judicial-review-under-nepa-eprint.pdf.

[15] 42 U.S.C. § 4332.

[16] Warren, *supra* note 14.

[17] *Id.*

[18] Linda Luther, CRS Report for Congress, The National Environmental Policy Act: Background and Implementation (CRS-34-35 (2005)), *available at* http://assets.opencrs.com/rpts/RL33152_20051116.pdf.

[19] *Id.*

[20] Baltimore Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 97-98 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971).

[21] 5 U.S.C. § 706.

[22] 42 U.S.C. § 4332(C).

  DEN ISSN 1060-2976

the human environment.[23] A challenge to any DRBC rulemaking, however, raises a different set of questions: whether the DRBC itself is an ''agency of the federal government,'' and whether its actions are ''Federal actions'' under NEPA. The NEPA statute does not define either term.

Plaintiffs' Initial Challenges to the Draft Fracking Regulations

Because fracking techniques involve the use of water resources of the Delaware River Basin, natural gas development activity would require DRBC approval. In May 2010, the DRBC directed its staff to develop draft regulations addressing water resource issues relating to fracking, and to defer consideration of any permit applications until such regulations were finalized—thus creating a de facto moratorium on fracking projects. The DRBC published draft regulations in December 2010, and later released a revised draft in November 2011. The State of New York has considered its own political and scientific issues associated with the use of fracking techniques within the state, and New York's representative on the DRBC voted against releasing the draft regulations.

In May 2011, New York Attorney General Eric Schneiderman filed a lawsuit in the Eastern District of New York, seeking to enjoin the DRBC and several federal defendants from approving or implementing regulations authorizing natural gas development within the Basin until they had complied with NEPA. The practical effect of the lawsuit would be to delay (perhaps indefinitely) fracking activity anywhere in the basin, including outside New York itself. New York sued the DRBC, its executive director, several federal agencies (the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Department of the Interior, and the Environmental Protection Agency), and their respective federal officials. The case was consolidated with two similar suits brought by environmental groups.[24] Collectively, the plaintiffs sought an order requiring the defendants to prepare an EIS before the DRBC could finalize any regulations allowing the withdrawal of water within the DRBC's jurisdiction for natural gas extraction through fracking.

As noted above, NEPA requires a federal agency to prepare an EIS before undertaking ''major Federal actions significantly affecting the quality of the human environment.'' One question presented in the DRBC litigation was whether actions taken by the Commission are ''Federal actions'' under NEPA. The plaintiffs argued that the Compact creating the Commission demonstrates Congress's intent that NEPA apply to the DRBC itself, and that in any case, federal agencies have sufficiently substantial involvement with the DRBC's activity to warrant application of NEPA. The defendants moved to dismiss, arguing that the plaintiffs lacked standing and that their claims were unripe because the suit challenged only draft regulations, and that the federal defendants had not waived their sovereign immunity to suit. The defendants further sought dismissal on the grounds that there is no final agency action for purposes of review under the Administrative Procedure Act, that the DRBC is not subject to NEPA because it is not itself a federal agency, and that federal involvement in the DRBC process is insufficient to trigger NEPA obligations for the federal defendants.

The district court on Sept. 24 dismissed the suits on standing and ripeness grounds.[25] As to standing, Judge Garaufis found that although New York and the individual members of the plaintiff environmental groups had alleged sufficiently concrete interests, they were unable to show the constitutionally-required ''injury-in-fact,'' i.e., an actual or threatened invasion of their interests. The court acknowledged the Supreme Court's suggestion in *Lujan v. Defenders of Wildlife* that ''procedural rights are special: the person who has been accorded a procedural right . . . can assert that right without meeting all the normal standards for redressibility and immediacy.''[26] And Judge Garaufis acknowledged cases applying that rule to allow challenges to agency action without a showing that preparation of an EIS would change the agency's ultimate decision. But the court found *no* precedent for recognizing injury-in-fact based solely on the publication of a draft regulation. And the court declined to extend the concept of injury-in-fact to cover the plaintiffs' situation. As the court explained, there is ''no way of judging reliably how probable it is that the regulation will be enacted, and thus no way of judging whether risks that natural gas development may create are more than conjecture.''[27] Allowing the plaintiffs' suits to proceed, the court explained, would be tantamount to ''eliminat[ing]'' the requirement that an injury be ''immediate'' and not overly speculative—a step the court was unwilling to take. In short, ''the mere existence of proposed regulations is not sufficient to allow this court to say Plaintiffs' interests are at risk.''[28]

Judge Garaufis also held, in the alternative, that the plaintiffs' claims were constitutionally unripe. The court observed that constitutional ripeness and standing ''overlap,'' and the lack of ''present injury-in-fact'' showed that the plaintiffs had not alleged a ripe claim. Moreover, the court concluded that the challenges were also *prudentially* unripe, rejecting the plaintiffs' contention that the prudential ripeness doctrine is inapplicable to NEPA cases. Under that doctrine, the claims were unfit for judicial review. If the DRBC declined to adopt its draft regulations, the court explained, the existing moratorium would remain in place. And the DRBC might issue final regulations banning fracking in certain areas (and thus affect the standing of some of the current plaintiffs). Delay, in the court's view, would not impose any hardship on the parties because the draft regulations do not create any ''legal rights'' or ''obliga-

[23] NEPA Law and Litig. § 8:1 (2010).

[24] The environmental plaintiffs were Delaware Riverkeeper Network; Delaware Riverkeeper; Riverkeeper, Inc.; Hudson Riverkeeper; National Parks Conservation Association; and Damascus Citizens for Sustainability, Inc.

[25] The court rejected the federal defendants' claim of sovereign immunity, concluding that the APA's general waiver of immunity, 5 U.S.C. § 702, was sufficient because the plaintiffs sought only equitable, nonmonetary relief against an agency of the United States.

[26] 504 U.S. 555, 572 n.7 (1992).

[27] *New York*, 2012 BL 248467 *13.

[28] *Id.* The District Court also rejected the private plaintiffs' allegation that publication of the draft regulations without an EIS caused them injury in the form of increased difficulty disseminating information about environmental impacts or commenting on the draft regulations.

tions,'' and the DRBC had implemented a moratorium until the regulations were finalized. Deferring review would also further judicial efficiency, as final regulations might later be challenged on other grounds in addition to NEPA. In short, the plaintiffs' claims ''can and should wait until, at least, if or when the DRBC ends the moratorium currently in place.''

Unresolved Questions

In dismissing the plaintiffs' complaints in their entirety, the court took care to emphasize that it had not reached the merits of their claims, and that a future lawsuit might require a court to address many of the difficult merits issues that the parties had briefed. One key threshold question that is likely to arise in any future challenge is whether NEPA applies at all in the context of DRBC regulations, either because the DRBC is subject to NEPA in its own right, or because the involvement of a federal agency in the DRBC proceedings triggers NEPA obligations for the federal defendants.[29]

As a practical matter, this issue is important because requiring the DRBC to comply with NEPA would delay substantially the timeframe for adopting fracking regulations. Not only is the EIS process time-consuming in its own right (extending 18 months or longer), but any action based on an EIS could then be subject to judicial review, further extending the interval until any DRBC regulations would be final.

Federal Action Under NEPA

Whether the DRBC's promulgation of regulations is subject to NEPA depends in part on whether a DRBC rulemaking constitutes a ''Federal actio[n]'' as that term is used in the statute.[30] Under the statute and relevant case law, that question will require a court to consider whether there is a sufficient degree of federal involvement to classify DRBC actions as ''federal.''

''Federal actions'' under NEPA have been found to include ''federal activities, such as establishing government policies and regulations; undertaking or authorizing federal projects, issuing federal permits, activities which are potentially subject to Federal control and responsibility, for example through the dispensation of federal funds; and an agency's failure to act when such omission is reviewable by courts.''[31] More specifically, the CEQ regulations identify several categories of typical federal actions, including:

- The adoption of ''official policy,'' such as federal ''rules, regulations, and interpretations adopted pursuant to the [APA],'' and other ''formal documents establishing an agency's policies'';
- The adoption of ''formal plans . . . which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based'';
- The adoption of ''programs, such as a group of concerted actions to implement a specific policy or plan'' or ''allocating agency resources to implement''; and
- The approval of specific projects such as ''actions approved by permit or other regulatory decision as well as federal and federally assisted activities.''[32]

Notwithstanding the relatively broad language in the CEQ regulations, courts have made clear that actions undertaken by nonfederal agencies do not constitute ''Federal actions'' under NEPA.[33] Thus, actions by the Trust Territory of the Pacific Islands (i.e., Micronesia) and the California Tahoe Regional Planning Agency have been held not subject to NEPA.[34]

In considering whether actions by hybrid or other nonfederal entities trigger NEPA, several additional issues arise. One is the ''small handle'' problem, when a federal agency plays only a small part in an otherwise-nonfederal project.[35] The CEQ regulations provide that major federal actions include not only actions by the federal government, but nonfederal actions ''with effects that may be major and which are potentially subject to Federal control and responsibility.''[36] Applying this standard where a federal agency has authorized a nonfederal entity to undertake an activity or a project requires analysis of the particular legal structure and facts.[37] Courts have acknowledged generally that where ''the United States' member of [a commission] votes in favor of an application or otherwise acquiesces . . . such approval might be deemed 'Federal action' which, if of sufficient importance, could constitute 'major Federal action.' ''[38] However, where federal control over a particular entity or project is not substantial, the project will not be considered a federal action.[39]

A second issue is whether federal funding or partnership triggers NEPA obligations.[40] Courts have held that NEPA applies to the approval of federal funding even if a project will be carried out by a state or private entity.[41] But the manner and extent of financial assistance is relevant. If there is no federal funding commitment to execute the project itself (for example, where planning

[29] Future plaintiffs may face other threshold issues. In the initial DRBC lawsuit, New York argued that even if the APA did not provide a cause of action, Section 3.3(c) of the Compact provided a right of judicial review. The court did not reach this issue, but the argument is unlikely to prevail. Section 3.3(c) of the Compact provides that an aggrieved party may invoke the original jurisdiction of the Supreme Court of the United States regarding ''an out-of-basin diversion or compensating release.'' Section 3.3(c) further provides that ''[a]ny other action of the commission pursuant to this section [on water allocations, diversions, and releases] shall be subject to judicial review in any court of competent jurisdiction.'' Delaware River Basin Compact at § 3.3(c), 75 Stat. at 693. Read in context, Section 3.3(c)'s right of action appears to apply to water *quantity* issues, not (as here) water *quality* issues. Indeed, the Compact addresses water *quality* issues in Article 5 (Pollution Control), which does not provide a private right of action.

[30] 42 U.S.C. § 4332(C).

[31] Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 Envt'l Affairs 601, 604 (2006) (internal quotations omitted); *see also* 40 C.F.R. § 1508.18; 42 U.S.C. § 4332(C).

[32] 40 C.F.R. § 1508.18(b) (definition section).

[33] *See, e.g.*, People of Saipan v. United States Dep't of Interior, 502 F.2d 90 (9th Cir. 1974); California Tahoe Reg'l Planning Agency v. Sahara Tahoe Corp., 504 F. Supp. 753 (D. Nev. 1990) (regional agency established by interstate compact).

[34] *Id.*

[35] NEPA Law and Litig. § 8:19 (2010).

[36] 40 C.F.R. § 1508.18.

[37] NEPA Law and Litig. § 8:19 (2010).

[38] Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 36 (E.D. Pa. 1981).

[39] NEPA Law and Litig. § 8:19 (2010).

[40] *Id.*

[41] *Id.*

  DEN ISSN 1060-2976

and preliminary studies are being funded with federal dollars but not the actual project), NEPA may not apply.[42] And if federal control over the project is marginal or insubstantial, the project may not be considered a federal action even if federal funds are received.[43] The case law and analysis are context- and fact-specific.

Federal 'Agency' under NEPA

NEPA itself does not define the term ''agency of the federal government.'' One commonly cited definition of ''agency'' is found in the APA, which establishes the basic procedural requirements for federal administrative action and provides for judicial review of agency action.[44] The APA defines ''agency'' (with exceptions not relevant here) to mean ''each authority of the Government of the United States, whether or not it is within or subject to review by another agency.''[45] As noted above, however, the Compact explicitly provides that the DRBC is not an ''agency'' for purposes of the APA.[46] Thus, although the DRBC does follow some procedures that are similar to those prescribed in the APA (such as publishing its proposed regulations in the *Federal Register*), this is not a result of a legal obligation.[47]

Are DRBC Regulations ''Federal Actions'' Subject to NEPA?

A court considering a NEPA challenge to a DRBC rulemaking proceeding will likely need to consider whether the actions of the DRBC are subject to NEPA. NEPA might apply either to the DRBC in its own right or to the federal agency member of the DRBC. In our view, neither theory is likely to prevail.

1. The DRBC is not a federal agency in its own right.

For several reasons, a court is unlikely to determine that DRBC is a federal agency in its own right.

First, the Compact explicitly establishes the Commission as a ''*regional* agency'' created by ''intergovernmental compact for the planning, conservation, utilization, development, management, and control of the water and related natural resources of the Delaware River Basin.''[48] The Compact describes the DRBC as ''a body politic and corporate,''[49] as ''an agency and instrumentality of [all] the governments of the respective signatory parties,''[50] and as ''a regional agency of the signatory parties.''[51] These are the most definitive statements of the nature of the DRBC, appearing in the Compact's sections on ''Organization and Area'' and ''Intergovernmental Relations.'' As such, the Compact's plain text demonstrates that the DRBC is neither a purely federal nor a purely state agency, and instead is a novel form created to address the unique problems of regional water management. In the recently dismissed lawsuit, the plaintiffs had attempted to discount the ''regional agency'' designation as merely describing the geographic scope of water resources within the Commission's jurisdiction, and suggested that a ''regional agency'' is a subset of the more general category of ''federal agencies,'' akin to the Tennessee Valley Authority and the Bonneville Power Authority. This view, however, does not align with numerous provisions in the Compact that show the DRBC is a novel hybrid entity that is neither purely state nor purely federal. Importantly, the Compact specifies that the DRBC is not a federal ''agency'' for purposes of the APA, the most important background law governing federal administrative procedure and judicial review.

The plaintiffs invoked other provisions from the Compact, mostly drawn from the section on Reservations, in attempting to show the DRBC is a federal agency. But the plaintiffs took the provisions in isolation and out of context; the more natural reading of the document as a whole demonstrates that the DRBC is not a federal agency. The Compact specifically provides, for instance, that the ''officers and employees of the Commission . . . shall ***not*** be deemed to be, for any purpose, officers or employees of the United States.''[52] And as noted, the Compact specifically exempts the DRBC from the APA, and characterizes the DRBC as a ''regional'' entity. The Compact also takes care to specify which federal laws apply to the DRBC, which would be unnecessary if the DRBC itself was a federal agency.

The plaintiffs in the New York litigation relied heavily on a provision in the Compact's ''Reservations'' section that states, in full, that ''[n]either the Compact nor this Act shall be deemed to enlarge the authority of any Federal agency other than the Commission to participate in or to provide funds for projects or activities in the Delaware River Basin.''[53] This passing reference in a provision that emphasizes what the Compact does *not* achieve should not override the express *affirmative* provisions elsewhere in the Compact, including in the two immediately preceding subsections. Those provisions state that the DRBC is not a federal agency for purposes of the APA and Tucker Acts, and that its officers and employees are not to be ''deemed'' officers or employees of the United States.[54] The precautionary reference guarding against ''deem[ing]'' DRBC employees federal officers or employees is telling; if the Commission were a federal agency, its employees would presumably not need to be ''deemed'' federal officers or employees, as they would be so by definition. Conversely, the Compact specifies that the DRBC must comply with the Walsh-Healy Public Contracts Act and the Davis-Bacon

---

[42] *Id.*

[43] For cases finding no ''major federal action'' where federal funding constituted only a minority share, see *Sancho v. U.S. Dep't of Energy*, 578 F. Supp. 2d 1258, 1266-67 (D. Hi. 2008) (less than 10%); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1482 (10th Cir. 1990) (''minimal'' proportion).

[44] 5 U.S.C. §§ 500 *et seq*.

[45] *Id.* § 551(1).

[46] Delaware River Basin Compact, § 15.1(m), 75 Stat. at 715.

[47] Although the Federal Register Act, 44 U.S.C. § 1501, defines ''Federal agency'' to include a ''commission'', the definitions of ''agency'' in the APA, 5 U.S.C. § 551(1), and the Paperwork Reduction Act, 44 U.S.C. § 3502(1), do not incorporate that term.

[48] Delaware River Basin Compact Joint Resolution, 75 Stat. at 688.

[49] *Id.* § 2.1, 75 Stat. at 691.

[50] *Id.*

[51] *Id.* § 11.1, 11.2, 75 Stat. at 700-01.

[52] *Id.* § 15(n), 75 Stat. at 715 (emphasis added).

[53] *Id.* § 15(o), 75 Stat. at 715; Am. Compl. ¶ 29.

[54] Delaware River Basin Compact § 15(m), (n), 75 Stat. at 715; *see also* William S. Morrow, Jr., The Case for an Interstate Compact APA, 29.2 Admin Reg. L. News 12, 13 (2004) (listing examples of compact entities which Congress has expressly stated are not federal agencies, including the Delaware River Basin Commission).

Act.[55] Because these Acts apply to all federal agencies, there would have been no need to extend their reach to the DRBC unless the Compact parties and Congress understood the DRBC to be something other than a ''federal agency.'' As the DRBC argued, it is a distinct kind of entity—a ''federal interstate compact agency''—that is not automatically subject to laws that apply generally to ordinary federal agencies.[56]

Even if the Compact were ambiguous on this point, its treatment of the APA is significant. The Compact takes care to specify that the DRBC ''shall not be considered a Federal agency'' for purposes of the APA. Thus, even if the DRBC might be considered a federal agency in some respects, its actions are not subject to the APA. Because the APA provides the *exclusive* cause of action for judicial review of NEPA claims, this exclusion weighs heavily against the viability of a lawsuit seeking judicial review of the DRBC's rules under NEPA.

The New York plaintiffs also relied on the fact that the DRBC amended its internal Rules of Practice and Procedure in 1970, after NEPA had been enacted, to ''require environmental assessments and the preparation of environmental impact statements.''[57] The plaintiffs argued that this amendment shows the DRBC ''acknowledg[ing] that it was subject to [NEPA].''[58] But the DRBC's environmental assessment rules did not refer to any NEPA requirement, and instead created a unique system of assessment and review. Thus, adoption of the regulations does not suggest that the DRBC understood itself as compelled by NEPA to adopt environmental assessment and impact statement rules. To the contrary, that the DRBC created its own procedures that differ in some ways from NEPA suggests the DRBC did not consider itself bound by NEPA. The plaintiffs also relied on a footnote from a 1975 district court opinion for the proposition that the DRBC has in the past conceded it is a federal agency for NEPA purposes. But that authority cannot outweigh three decades of practice and determinations by other courts that DRBC is not subject to NEPA.

In any event, the DRBC suspended its environmental review regulations more than three decades ago, in 1980, and eventually repealed them entirely in 1997.[59] The plaintiffs quoted selectively from the 1980 resolution, noting the DRBC's statement that ''an appropriate agency of the executive branch of the federal government can assume the 'lead agency' and other environmental assessment function for significant projects within the basin.''[60] The plaintiffs omitted, however, the end of the clause, which specifies that the statement refers to projects involving ''federal loans, grants or permits.''[61] Although the plaintiffs in the New York cases asserted the Army Corps of Engineers violated NEPA by not completing an EIS for the draft DRBC regulations, they did not identify any federal loan, grant, or permit. The DRBC's statement is best understood to mean that where another federal agency's involvement in DRBC activity—e.g., by virtue of that federal agency's loans, grants, permits, or other activity—triggered that agency's NEPA obligations, the DRBC would not seek to be a ''lead agency.''[62] This history does not support plaintiffs' claim that the DRBC itself is subject to NEPA.

The plaintiffs also asserted that the CEQ has identified the DRBC as a federal agency with jurisdiction over the ''[r]eview and approval of water resource projects,'' citing to a 1984 Federal Register notice.[63] However, Congress did not vest CEQ with authority to promulgate legislative regulations with the force of law,[64] CEQ interpretations of NEPA are not formally binding on federal courts, and existing case law supports the conclusion that the DRBC's actions are not subject to NEPA.[65]

Several other federal cases in New York demonstrate that courts are reluctant to treat multi-state compact entities as federal agencies for purposes of NEPA or the APA. For example, the court in *New York v. Gutierrez* concluded that a commission created in a similar fashion to the DRBC, the Atlantic States Marine Fisheries Commission (ASMFC), was not a federal agency, even if it could be a quasi-federal agency for purposes of APA review.[66] The court explicitly embraced the position that the commission in question was a ''creature of interstate compact, not a federal agency.''[67] The court reached that conclusion even though the statute creating the ASMFC did not exclude that entity from APA review. And in a footnote, the *Gutierrez* court pointedly observed that the DRBC is a compact entity which Congress has expressly stated is not a federal agency.[68]

Similarly, in *Brooklyn Bridge Park Coalition v. Port Authority of New York and New Jersey*, the court stated that ''Compact Clause entities are hybrids, occupying a special position in the federal system.''[69] The court further observed that federal involvement ''does not mean that Congress intends to subsume the Compact Clause agency within the federal government or to subject its

[55] Delaware River Basin Compact § 15.1(i), (j), 75 Stat. at 714.

[56] *See* Def. DRBC and Carol Collier's Mem. of Law in Support of Their Mot. to Dismiss the Compl. at 23.

[57] DRBC Resolution 70-23 (Nov. 24, 1970).

[58] Am. Compl. at ¶ 31.

[59] *See* DRBC Resolution 80-11 (July 23, 1980); 62 Fed. Reg. 45,766, 45,767 (Aug. 29, 1997); 62 Fed. Reg. 64,154, 64,154 (Dec. 4, 1997).

[60] Am. Compl. at ¶ 32.

[61] DRBC Resolution 80-11 (July 23, 1980).

[62] Under CEQ regulations, the role of lead agency is not exclusively federal; rather, both state and local agencies may act as joint lead agencies alongside a federal agency. *See* 40 C.F.R. § 1501.5(b).

[63] Am. Compl. at ¶ 30 (citing 49 Fed. Reg. 49750, 49774 (Dec. 21, 1984)); Mem. of the State of New York in Support of its Motion for Sum. Judgment on Liability and in Opposition to Defendants' Dispositive Motions at 37 (citing definition of ''federal agency'' in CEQ regulations and statements in 1973 and 1984 *Federal Register* notices treating the DRBC as having ''jurisdiction by law'' over water resources in the Basin).

[64] The Supreme Court has stated in the past that the ''CEQ's interpretation of NEPA is entitled to substantial deference.'' Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). But under more recent administrative-law precedents such as United States v. Mead Corp., 533 U.S. 218, 227-29 (2001), federal courts may not afford CEQ regulations the deference accorded to agency rules adopted with the power of law.

[65] *See, e.g.*, Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 35 (E.D. Pa. 1981) (''That DRBC is a federal agency for purposes of NEPA is very doubtful.'')

[66] No. 08-CV-2503 (CPS)(RLM), 2008 BL 260564 (E.D.N.Y Nov. 20, 2008).

[67] *Id.* at *11.

[68] *Id.* at *11 n.5.

[69] Brooklyn Bridge Park Coalition v. Port Authority of New York and New Jersey, 951 F. Supp. 383, 393 (E.D.N.Y. 1997).

  DEN ISSN 1060-2976

operations to general federal regulatory schemes.''[70] In reaching these conclusions, the court held that the Port Authority, an agency created through a multistate compact, was not a federal agency subject to NEPA.[71]

2. The involvement of a federal agency in the DRBC does not trigger NEPA.

The precedents and analytical framework discussed above also weigh against the suggestion that the federal government's limited involvement in, and influence over, the DRBC triggers NEPA obligations for the federal defendants.

Each of the Commission's five members has a single, equal vote. As such, the federal government member of the DRBC has no veto power over the other four voting members and lacks formal control or responsibility for the decision-making processes of the DRBC. As one district court has concluded, ''[t]he [DRBC], formed by a compact among four states and the United States Government as co-equal members, would not appear to be a federal agency, nor would actions of DRBC appear to be 'Federal.' ''[72] Similarly, the Ninth Circuit has stated that ''the approval of [a] Compact by Congress and the limited appointment power of the President do not thereby establish [a] [Compact entity] as an agency of the United States.''[73] The DRBC's federal agency member's single vote is not analogous to a situation where the federal government must issue a permit or license before a project can proceed.

The plaintiffs in the New York cases argued that the federal government is not, in fact, co-equal with each of the four states, but rather has substantially greater power over the DRBC because the Compact gives the federal government authority to unilaterally alter, amend, or repeal the Compact. However, the cited provisions are only conditions for the federal government's participation in (and right to withdraw from) the Compact; they do not alter the federal government's position as one vote of five, or give the federal Government control over particular DRBC positions or actions. Indeed, as the DRBC argued, the fact that Congress found it necessary to reserve certain powers before consenting to participate ''underscores that Congress neither viewed the new federal-interstate compact agency as a federal agency nor one that was subject to its control.''[74]

The extremely limited federal funding provided to the DRBC supports the same conclusion. Although DRBC budget planning documents identify the target federal ''fair share'' as 20%, or $715,000, with other member states typically contributing between 12.5% and 25%, as a practical matter, the United States has contributed funds to the DRBC only *once* since 1996, when Congress appropriated $715,000 in 2009.[75] As the federal defendants in the New York cases explained, between 2009 and 2011, when the DRBC was developing its natural gas regulations, its total General Fund revenue equaled $10.6 million—of which the 2009 federal funding constituted only 6.7%. This nearly uninterrupted record of no federal financial involvement, and the tiny fractional share of federal funding in the one year when funds were appropriated, foreclose any suggestion that the federal government controls the DRBC through power of the purse. Indeed, as a general matter, ''[t]he federal government provides funds to many state and local governments and agencies. That alone does not make all their actions federal actions. Merely providing funds is not enough.''[76]

Conclusion

Arguments that DRBC rulemaking triggers NEPA are difficult to square with the text of the Compact and existing case law. Reading the Compact in context and as a whole indicates that the DRBC was not intended to be a federal agency for purposes of NEPA, but rather is a novel hybrid entity dominated by its four state members. That Congress explicitly exempted the DRBC from the APA weighs heavily against the suggestion that a federal court should subject DRBC actions to judicial review. Neither the actions of the DRBC in its own right in promulgating fracking regulations, nor those of the DRBC's federal member, trigger NEPA obligations. Courts have historically refrained from treating other, similar interstate compact entities as federal agencies under NEPA—in part because the same arguments would support application of a host of other federal laws that there is no evidence Congress intended to apply to compact entities. Nor does the federal government exercise any significant influence over the DRBC through the appropriation of federal funds. Thus, if and when plaintiffs challenge a final DRBC regulation on fracking, it appears unlikely that a federal court would issue an order directing preparation of an EIS under NEPA.

About the authors:

George C. Hopkins, environmental partner with Vinson & Elkins, advises clients on environmental law, counsels companies in obtaining environmental approvals for energy infrastructure, and represents, buyers, sellers, lenders, borrowers and issuers with respect to environmental issues in the context of various corporate transactions. He can be contacted at ghopkins@velaw.com.

Appellate associate Jeremy Marwell practices in federal and state appellate and trial courts, and provides regulatory and legal counseling, with an emphasis on constitutional, environmental, and administrative law matters. He can be contacted at jmarwell@velaw.com.

Environmental associate Brandon Tuck's practice involves defense in civil and criminal environmental matters, environmental litigation, and regulatory com-

[70] *Id.*
[71] *Id.* at 395.
[72] *Hansler*, 536 F. Supp. at 35-36.
[73] Jacobson v. Tahoe Regional Planning Agency, 566 F2d 1353, 1362 (9th Cir. 1977), aff'd and rev'd on other grounds sub nom. Lake County Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979).
[74] Def. DRBC and Carol Collier's Mem. of Law in Opposition to Pl.' Mot. Summ. J. and Reply Mem. of Law in Support of their Mot. Dismiss at 30 (April 5, 2012).
[75] *See* Delaware River Basin Commission, Signatory Funding by DRBC Fiscal Year (7/1 to 6/30) – General Fund *available at* http://www.state.nj.us/drbc/library/documents/ContributionHistoryJuly2012.pdf (providing actual fiscal year funding for years 1963 through 2011). The DRBC reports a cumulative federal funding shortfall of almost $10 million as of the end of the 2012 fiscal year. *See* DRBC Budget at http://www.state.nj.us/drbc/about/budget.html.
[76] Tahoe Reg'l Planning Agency, 504 F. Supp. at 763.

pliance. He can be contacted at btuck@velaw.com.

This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.

  DEN ISSN 1060-2976