



# Judge Dismisses Attorney General's "Fracking" Suit Over the Delaware River Basin

October 15, 2012

U.S. District Judge Nicholas G. Garaufis recently dismissed a lawsuit brought by New York Attorney General Eric T. Schneiderman against the Delaware River Basin Commission ("DRBC"), EPA, and other federal agencies seeking to compel the production of a full environmental study on the impact hydraulic fracking could have on the Delaware River Basin. Judge Garaufis found that the dispute was not currently fit for judicial review as regulations concerning gas drilling had not been finalized.

Specifically, Judge Garaufis stated that "[t]he harms that Plaintiffs ultimately are concerned about are speculative, and rely on a chain of inferences that may never come to pass."<sup>[1]</sup> Since the development plans have not been finalized and remain in the early stages "[t]he court has no way of judging reliably how probable it is that the regulation will be enacted and thus no way of judging whether risk that natural gas development may create are more than conjecture."<sup>[2]</sup>

Part of the Delaware River Basin is located above the Marcellus Shale that contains an estimated 400 trillion cubic feet of natural gas.<sup>[3]</sup> Plaintiffs claimed that the DRBC had failed to comply with the National Environmental Policy Act (NEPA) in assessing the environmental impact of the proposed regulation. In response the DRBC claimed that it was not subject to NEPA as they are not a federal agency and that there has not been a "final action" as defined under the Administrative Procedures Act.<sup>[4]</sup>

Three suits were consolidated for pre-trial purposes. Plaintiffs included New York State, Damascus Citizens for Sustainability, Inc., Delaware Riverkeeper Network, the Delaware Riverkeeper, Riverkeeper, Inc., the Hudson Riverkeeper, and the National Parks Conservation Association. Defendants included the United States Army Corps of Engineers, the United States Fish and Wildlife Service, the United States National Park Service, the United States Department of the Interior, the United States Environmental Protection Agency, and Delaware River Basin Commission.<sup>[5]</sup>

Schneiderman noted that the decision handed down by Judge Garaufis does not rule out another potential lawsuit in the future as the case was dismissed based upon procedural grounds. The Attorney General's office released a statement stating that they were "pleased that the ruling left the door open for legal action on the merits of our case at a later date. We are also pleased the court agreed with our office that New York has concrete interests in protecting its citizens and environment from harmful pollution if drilling is allowed... This office will continue to review all options moving forward to ensure that the federal government meets its clear legal obligation to fully study the potential risks to New Yorkers' health, environment and public safety before

allowing “fracking” in the Delaware River Basin.”<sup>[6]</sup>

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1. <sup>[1]</sup> New York State v. United States Army Corps of Eng’rs, 2012 U.S. Dist. LEXIS 136712, 46 (E.D.N.Y. Sept. 24, 2012).
2. <sup>[2]</sup> *Id.* at 38.
3. <sup>[3]</sup> Christie Smythe and Tiffany Kary, *Judge Dismisses N.Y. Lawsuit Over Delaware Basin Fracking*, Businessweek, Sept. 24, 2012.
4. <sup>[4]</sup> New York State, 2012 U.S. Dist. LEXIS at 19.
5. <sup>[5]</sup> *Id.* at 8.
6. <sup>[6]</sup> Sabbatino, Daniel, *AG ‘fracking’ suit dismissed on procedural grounds*, [www.legislativegazette.com](http://www.legislativegazette.com), October 1, 2012.