IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 17-1800

WAYNE LAND AND MINERAL GROUP, LLC,

Appellant,

vs.

DELAWARE RIVER BASIN COMMISSION, *et al*.

Appellees,

Appeal from the Final Order of the United States District Court for the Middle District of Pennsylvania dated March 23, 2017

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

REPLY ARUGMENT

I. THE PURPOSE OF A FACILITY IS RELEVANT.

The single, threshold issue presented by WLMG's claim is whether the facilities described in its complaint are a "project" subject to the Commission's "project" review jurisdiction under Section 3.8 of the Compact. Whether a facility is a "project" depends on whether its purpose is the "conservation, utilization, control, development or management of water resources." Compact, §1.2(g). If not "**undertaken** . . . **for**" one of the expressly identified purposes, a facility is not a "project" – even if it uses water. *Id*. (emphasis added).

The Commission, however, contends that purpose is irrelevant, observing that hydroelectric plants are "projects" even though built to produce electricity. But the definition of "project" makes purpose relevant and hydroelectric plants are not equivalent to natural gas wells. Despite suggesting that all "[w]ater users are within the Commission's purview," Commission's Brief at 41, even the Commission must acknowledge that not all facilities that utilize water are "projects." To be a "project," a facility must, at a basic, commonsense level, be a water resources development or management project. Although it produces electricity, a hydroelectric plant is built to channel and harness the flow and energy

of the Delaware River. Such plants are paradigmatic examples of water resource development projects.[1] The same cannot be said of natural gas wells.

II. THE COMMISSION'S HISTORICAL MATERIALS PROVE WLMG'S POINT.

A. Legislative History.

The Commission cites legislative history to support the uncontested proposition that Congress was concerned about water pollution. Article 5 of the Compact reflects that concern. *See* Compact, Article 5. This appeal, however, does not implicate Article 5 or the Commission's Water Quality Regulations ("WQRs") adopted thereunder. This appeal implicates Article 3 and jurisdiction to review "projects" pursuant to Section 3.8.

The WQRs cited by the Commission, moreover, evidence the difference between "projects" and other activities and facilities that may need to comply with the Commission's WQRs. The WQRs apply to "[w]ork, services, activities and facilities **affecting** the conservation, utilization, control, development or management of water resources." 18 C.F.R. §410.1(c) (emphasis added). In contrast, "projects" include "work, service or activity . . . or any separate facility **undertaken** . . . **for** the conservation, utilization, control, development or management of water resources." Compact, §1.2(g) (emphasis added).

[1] Development of "hydroelectric power potentialities" is expressly referenced in the third "Whereas" clause in the Compact's preamble and is the subject of a separate article, Article 9, of the Compact.

The cited legislative history, moreover, explains how Article 3 is intended to operate. For example, Secretary of the Interior Robert Udall explained that there are two ways for the Commission to control "development" of the "water resources of the Basin." ApADD42, 44. The Commission can construct and operate water resource development "projects" (Compact at §3.6(a)). *Id*. Alternatively, the Commission can review and approve "projects" constructed by private, local, State or federal authorities (Compact at §3.8). *Id*. The options are parallel and coterminous; the Commission's authority to construct and operate projects is functionally equivalent to its authority to review and approve projects. ***If the Commission does not have the authority to construct and operate a particular type of facility, then that type of facility is not a "project" subject to the Commission's project review jurisdiction***. *Compare* Compact §§3.6(a)-(b) *with* §3.8. The Commission lacks authority to construct and operate natural gas wells. *See* Compact at §3.6(b) (providing examples).

B. Annual Reports.

The Commission cites to annual reports as supporting the proposition that its current interpretation of "project" is consistent with its historical interpretation. The cited reports, however, demonstrate that, until its recent assertion of jurisdiction over gas wells, the Commission routinely exercised jurisdiction over prototypical water resource development and management projects. The Section

3.8 "projects" identified in the reports, in every case, are easily recognized as "undertaken . . . for the conservation, utilization, control, development or management of water resources."[2]

C. Individual "Project" Approvals.

Compelling evidence supporting WLMG's interpretation of the Compact is also found in "docket" approvals the Commission identifies. Most illuminating are the dockets for "projects" associated with power plants. The Commission implies that it exercised project review jurisdiction over the power plants themselves. But what the Commission *actually* did, and has historically done, was to review "separate facilities" associated with power plants which, in every case, were water resource development or management projects. *See* ApADD22 ("water withdrawal" facility); ApADD88 ("project to withdraw water and to discharge cooling and other wastewater used in the operation of a proposed nuclear-fueled steam-electric generating station"). *See also Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26, 31 (E.D. Pa. 1981) (identifying "projects").

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[2] The annual reports cited by the Commission are available on its website at:
www.state.nj.us/drbc/library/documents/1969AR.pdf(at 5)
www.state.nj.us/drbc/library/documents/1963AR.pdf(at 19)
www.state.nj.us/drbc/library/documents/1964AR.pdf(at 8)
www.state.nj.us/drbc/library/documents/1965AR.pdf(at 17)
www.state.nj.us/drbc/library/documents/1966AR.pdf(at 6)
www.state.nj.us/drbc/library/documents/1967AR.pdf(at 5)

Approvals for wastewater treatment plants associated with industrial facilities, likewise, support WLMG's position. The Commission's assertion of "project" jurisdiction over wastewater treatment plants is consistent with the reference, in the definition of "project," to activities that are "separately . . . identified by the commission." Compact at §1.2(g).[3] That language applies to wastewater treatment plants, water supply facilities, and other water development and management facilities that are associated with, but sufficiently "separate" from, the industrial facilities with which they are associated. Thus, rather than evidence the Commission's exercise of "project" jurisdiction over industrial facilities, wastewater treatment plant approvals evidence the Commission's exercised jurisdiction over "separate" facilities "undertaken . . . for" the development or management of water resources.[4]

The Commission also cites a regulation whereby it purports to assert "project" jurisdiction over landfills. *See* 18 C.F.R. §401.35(a)(14). This regulation accomplishes nothing because, on its face, it applies only to landfills not subject to State regulation. There are no such landfills. *See, e.g.*, 25 Pa. Code. Articles VIII,

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[3] Misusing this language, the Commission makes the extraordinary assertion that the term "'project' encompasses any activity 'separately identified by the commission.'" Commission's Brief at 10.

[4] WLMG, as alleged in its complaint, does not propose to construct or operate a water withdrawal, wastewater treatment plant or other any other type of water development or management facility that is in any way comparable to the water-related projects approved by the Commission over the past five decades.

IX. Indeed, the Commission does not cite a single example of that regulation, which originated from a 1969 Commission resolution, having *ever* been applied (which explains why the regulation has never been challenged). *See* 55 FR 52168 (Dec. 20, 1990); 62 FR 64154 (Dec. 4, 1997). Instead, the Commission points to a single example of a purported landfill "project" that was *voluntarily* applied for in 1968. ApADD83.

Finally, the Commission contends that, since 1961, in addition to approving thousands of easily identified water resource projects, it exercised "project" jurisdiction over a handful of petroleum pipelines (ApADD51-52), a section of an interstate highway crossing a reservoir (ApADD86), and the Delaware Memorial Bridge (ApADD71).

As an initial matter, in every case the Commission cites, the project sponsor received whatever approval the Commission asserted was required. The sponsor had no incentive to litigate whether the Commission had authority to stop construction of a pipeline, an interstate highway or a bridge crossing the Delaware River. Also, there was, unlike here, no nearly decade-long moratorium making it impossible to secure approval. And, in the case of the petroleum pipelines, the applicant was forced, over objection, to submit to Commission "project" review and contended, as WLMG does here, that it was not undertaking "projects" within the meaning of the Compact. *See* AppADD53, 59. The Commission, moreover,

did not review and approve the entire pipeline or the full length of the highway in the Basin because neither fit within the definition of "project." Rather, the Commission treated discrete stream and reservoir crossings as "projects." ApADD 51-52, 68, 86-87. The Commission, in sum, has never exercised project jurisdiction over activities that are comparable to natural gas well pads and associated wells.

D. Meeting Minutes.

The Commission's meeting minutes from the 1960s and 1970s similarly show that the Commission consistently has exercised "project" jurisdiction over only what everyone would agree are water resource development or management facilities or activities. *See* ApADD 48, 111, 114 (identifying "projects" approved in 1966, 1969 and 1976). The minutes are informative with respect to both what the Commission reviewed and, just as importantly, what it did not. The Commission reviewed water supply wells, industrial and public water supplies, wastewater treatment plants, navigation projects and surface water outtakes. The Commission, however, did ***not*** review any of the thousands of residential, commercial or industrial developments in the Basin other than those that everyone would agree were "separate facilit[ies] undertaken . . . for" the development or management of water resources.

III. THE SUSQUEHANNA RIVER BASIN COMMISSION ("SRBC").

Unlike the Commission, the SRBC does not claim that well pads or gas wells are "projects" that cannot proceed without its review. The SRBC does not purport to preempt state regulation of, and prevent, natural gas development. Rather, as the Commission concedes, the SRBC asserts authority over water withdrawals and consumptive use of water. *See* Commission's Brief at 54. The SRBC approves the former and charges fees for the later. Unlike the Commission, the SRBC recognizes that its authority is limited to addressing the development and management of water resources; the Pennsylvania Department of Environmental Protection ("PaDEP") reviews applications for wells pads and gas wells.

IV. WLMG'S CLAIM IS NOT PREMATURE.

A. Standard of Review.

The District Court held a plenary hearing with respect to the Commission's motion to dismiss under Fed. R. Civ. P. 12(b)(1) (ripeness and standing). It found, as a matter of fact, that the Commission has categorically and definitively determined that all natural gas extraction activities, including natural gas well pads and wells, are "projects" that may not commence without first obtaining Commission approval. JA13-22, 37(n.14). The Commission fails to demonstrate that this finding, and related findings, are clearly erroneous. *See CNA v. United*

States, 535 F.3d 132, 139 (3d Cir. 2008) (district court's findings of fact related to jurisdiction reviewed for clear error). With respect to the Commission's motion under Fed. R. Civ. P. 12(b)(6) (finality and exhaustion), this Court must accept the truth of the well-pleaded factual allegations in the complaint. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 193 n.5 (3d Cir. 2013).

B. WLMG's Claim Is Ripe.

The Commission has, as found by the District Court, finally and definitively determined that WLMG's proposed well pad and natural gas wells are "projects" that must be reviewed by the Commission under Section 3.8 of the Compact. JA13-22, 37(n.14). No "factual development" regarding WLMG's proposed development is needed and WLMG's claim is ripe. *Id*.

In determining ripeness, courts examine the fitness for judicial decision, as well as the hardship to the parties of withholding consideration. *See Abbott Labs v. Gardner*, 287 U.S. 136, 148 (1967); *Surrick v. Killion*, 449 F.3d 520, 527 (3d Cir. 2006); *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004). In *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643 (3d. Cir. 1990), this Court established a more refined test: (1) the parties must have adverse legal interests; (2) the facts must be sufficiently concrete to allow for conclusive legal judgment; and (3) the judgment must be useful to the parties. *Id*. at 647.

1. The parties have adverse legal interests.

The question is whether the claim involves uncertain and contingent events, or a real and substantial threat of harm. *See Surrick*, 449 F.3d at 527. The plaintiff need not suffer a completed harm in order to establish adversity of interest so long as there is a substantial threat of real harm. *Id*.

There is adversity of interest here. The Commission has finally and definitively determined that WLMG's proposed well pad and natural gas wells are "projects" that it must review under Section 3.8 of the Compact. JA13-22, 37(n.14). Consequently, WLMG must either submit to the Commission ***or*** proceed without approval and risk ruinous fines, penalties and other sanctions imposed by both the Commission and PaDEP (which will not issue permits until after the Commission acts or this Court rules in WLMG's favor). JA72(¶32). Indeed, the District Court found that WLMG, as evidenced by Section 14.17 of the Compact and the $90,000 civil penalty imposed on Stone Energy by the Commission, "is under a very real and substantial threat from the imposition of fines and penalties" if it proceeds with its proposed use without Commission "project" approval. JA34, 506-511. And, even if WLMG wanted to submit to the Commission's self-aggrandized "project" review jurisdiction, the Commission's "imposition of a moratorium" on consideration of applications would make such submission futile. JA37(n.14). The application would sit until the Commission adopts final

regulations that it, likewise, lacks jurisdiction to adopt. As found by the District Court, given these facts, the first prong of the *Step-Saver* inquiry is satisfied. JA34; *Surrick*, 449 F.3d at 528.

2. The facts allow for conclusive legal judgment.

"The second *Step-Saver* factor requires the Court to consider the fitness of the issue for adjudication to ensure that the declaratory judgment would in fact determine the parties' rights, as distinguished from an advisory opinion based on a hypothetical set of facts." *Surrick*, 449 F.3d at 528. Cases presenting predominately legal questions are particularly amenable to a conclusive determination in a pre-enforcement context, and generally require less factual development. *Id*.

As determined by the District Court, WLMG's claim concerns the Commission's unequivocal determination that WLMG's proposed well pad and gas wells are "projects" subject to the Commission's Section 3.8 jurisdiction – a purely *legal* determination that *requires* WLMG to either submit to the Commission's jurisdiction or face civil penalties it if it proceeds. JA36. WLMG's claim is, therefore, ripe for review. *See, e.g.*, *Ciba–Geigy Corp. v. U.S. Environmental Protection Agency*, 801 F.2d 430, 435-37 (D.C. Cir. 1986) (claim ripe where agency publicly articulates unequivocal position and expects regulated entities to conform to that position); *Atl. Richfield Co. v. Dep't of Energy*, 769

F.2d 771, 783 (D.C. Cir. 1984) (challenge by regulated entity concerning very power of agency to conduct certain kinds of proceedings ripe for review); *Athlone Indus. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489-90 n.30 (D.C. Cir. 1983) (same).

The jurisdictional issue presented here does not, as found by the District Court, depend on future factual determinations by the Commission. JA36. Indeed, factual development with respect to the nature of WLMG's proposed facilities is neither required nor useful as the question is purely legal. *See Surrick*, 449 F.3d at 529. This is not, moreover, a situation where the Commission's jurisdictional determination is "subject to further agency consideration or possible modification." *See Ciba-Geigy Corp*., 801 F.2d at 437 (D.C. Cir. 1986). There is no adjudicative process by which the Commission will reconsider or refine its final, threshold determination that well pads and natural gas wells are "projects" that must be reviewed by the Commission under Section 3.8. *Id*.

The cases on which the Commission's ripeness challenge relies, *e.g.*, *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003), are distinguishable and do not apply to WLMG's claim. In *Reliable*, in response to an inquiry from the agency, Reliable argued that its sprinkler heads were not subject to the Consumer Product Safety Commission's authority because they were not "consumer products" within the meaning of the

statute. But the court declined review because the determination as to whether the sprinkler heads were consumer products was a *factually-driven* question that required the exercise of agency expertise and because the administrative proceeding provided a formal opportunity for Reliable to litigate that *factual* issue. *See Reliable*, 324 F.3d at 733. Here, by contrast, and as concluded by the District Court, WLMG's claim does not involve a factual question; it is purely legal – are well pads and natural gas wells, as a matter of law, *i.e.*, under any set of facts, "projects" subject to the Commission's project review jurisdiction under Section 3.8 of the Compact? JA36.

In addition, the agency's preliminary assertion of jurisdiction in *Reliable* did not preclude the targeted company from entering into or operating its business. Here, by contrast, WLMG cannot even break ground without Commission approval unless, of course, it is willing to risk potentially ruinous penalties for proceeding without Commission approval and PaDEP permits (which cannot be secured absent Commission review). JA36.

The court in *Reliable*, moreover, bolstered its decision by distinguishing three cases that are on point with WLMG's claim. In *Ciba-Geigy Corp.*, *Atl. Richfield Co.*, and *Athlone Indus., Inc.*, *supra*, the agency actions challenged were "strictly legal issue[s] for which factual development and agency expertise were unnecessary." *Reliable*, 324 F.3d at 735. Reliable's challenge was "not a purely

legal" issue and involved "no unequivocal statement of the agency's position." *Id*. at 734. Rather, Reliable challenged the application of this statutory authority, which "would clearly involve the resolution of factual issues and the creation of a record," and which could be resolved or finally determined in the "hearing [that] would take place in due course should the Commission decide to pursue enforcement." *Id*. In sum, purely legal challenges, like WLMG's, to an agency's statutory authority are final and ripe, *see, e.g.*, *Ciba–Geigy Corp.*, 801 F.2d at 435-37, *Atl. Richfield Co.*, 769 F.2d at 782; *Athlone*, 707 F.2d at 1489, whereas challenges to the reasons for, or proper exercise of, that authority typically are not, *see Reliable*, 324 F.3d at 733-35.

3. A judgment will be useful to the parties.

The final *Step-Saver* prong is "whether a declaratory judgment will effect the parties' plan of action by alleviating legal uncertainty." *Surrick*, 449 F.3d at 529. As determined by the District Court, a declaration of rights would remove the obstacle to WLMG's activities created by the near decade-long moratorium and also permit WLMG to proceed without fear of Commission and PaDEP penalties. JA37. A grant or denial of relief would materially affect the parties and serve the purposes of the Declaratory Judgment Act by clarifying legal relationships so that WLMG can make responsible decisions about the future. *Surrick*, 449 F.3d at 529.

C. WLMG Has Standing.

The Commission asserts that because WLMG's claim is not ripe, it also lacks standing. Because the Commission's ripeness challenge fails, *see supra*, so too must its challenge to WLMG's standing.

WLMG, in any event, and as correctly determined by the District Court, has standing. JA31-32; *see also Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137-38 (3d Cir. 2009). WLMG intends to construct a well pad and drill an exploratory well on its property as soon as the uncertainty and threat of penalties resulting from the Commission's assertion of jurisdiction is resolved. JA31; JA68-74(¶¶17-38). WLMG, however, cannot proceed until the barrier of Commission's assertion of "project" review authority, and the related near decade-long moratorium on well pad construction in the Basin, is addressed. *Id*. Absent the relief requested by its complaint, WLMG cannot develop the natural gas on its property in a reasonable and timely manner. *Id*. WLMG is being deprived of its constitutionally protected right to use its property in a lawful and productive manner. JA76(¶44). In addition, WLMG has incurred, and will continue to incur, economic injury by being prevented from exploring for, extracting and selling natural gas associated with its property and also from benefiting from an increase in the market value of the property. JA31; JA68-74(¶¶17-38). These harms to

WLMG's property interests are classic forms of economic injury and satisfy the requirement of injury-in-fact. *See Toll Bros.,* 555 F.3d at 139-142.

WLMG's injury is also fairly traceable to the Commission's jurisdictional determination. JA31-32; JA75-76(¶42). The Commission's assertion of jurisdiction over otherwise lawful use of land in connection with natural gas extraction by WLMG, as well the Commission's assertion of jurisdiction over "related" activities, materially and adversely affects WLMG by interfering with WLMG's right to use its property in conducting a lawful business activity. *Id*. The material and adverse effect on WLMG's rights to use its property and to conduct a lawful business activity is caused by the Commission's unlawful assertion of jurisdiction, not simply by the existence of the Compact. *Id*. No action of a third party is a more immediate cause of these harms. *Id*. Thus, the District Court did not err in concluding that WLMG easily satisfies the traceability element. *Id*.; *Toll Brothers*, 555 F.3d at 142.

Finally, WLMG's injury will be redressed by a favorable decision. JA32. A decision in favor of WLMG in this case will remove the sole insurmountable barrier to WLMG's plan to develop its property in the manner described in its complaint and also will result in an increase in the market value of the property and nearby land owned by WLMG. *Id*.; *Toll Brothers*, 555 F.3d at 143.

D. The Commission Has Taken Final Action.

WLMG's claim is not one for judicial review under the Administrative Procedure Act, which requires "final agency action" and which is expressly made inapplicable by the Compact. *See* Commission's Brief at 27; Compact at § 15.1(m). "Finality" is, in any event, an *element* in the test for ripeness, addressed *supra*. *See Abbott Labs.*, 387 U.S. at 149. The Commission's "finality" argument, therefore, is properly addressed within the broader context of the assessment of ripeness.[5]

As a threshold matter, the District Court properly rejected the Commission's contention that Section 3.8's judicial review provision applies here. JA39-40; Commission's Brief at 27-28. WLMG is not seeking review of a determination made by the Commission under Section 3.8 of the Compact. Rather, WLMG seeks a declaration that its proposed use is not a "project" subject to Section 3.8 review at all. The Commission's invocation of Section 3.8's judicial review provision, moreover, evidences the Commission's jurisdictional determination. If a proposed use is not a "project," it is not subject review under Section 3.8 of the Compact. By invoking Section 3.8's judicial review provision, therefore, the Commission *confirms* its challenged jurisdictional determination.

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[5] WLMG notes that the Commission's "lack of final agency action" argument is presented pursuant to Fed. R. Civ. P. 12(b)(6), although, in this case, it is subsumed by the ripeness challenge.

With respect to the Commission's finality argument, two conditions generally must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, the action must mark the consummation of the agency's decision-making process. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Id*. at 177-178.[6]

Here, the Commission's assertion of jurisdiction over well pads and gas wells meets the first *Bennett* factor. The Commission, as alleged by WLMG's complaint and found by the District Court, has finally and definitively determined that WLMG's proposed well pad and natural gas wells are "projects" that must be reviewed by the Commission under Section 3.8 of the Compact. That determination clearly marks the consummation of the Commission's decision-making process on the *threshold* issue of its "project" review authority under Section 3.8.

The definitive nature of the Commission's determination also gives rise to "direct and appreciable legal consequences," thereby satisfying the second prong of *Bennett*. This conclusion is consistent with the "pragmatic" approach the Supreme Court has long taken to finality. *See United States Army Corps of*

[6] Any label the Commission may place on its jurisdictional determination is not conclusive – what matters is the *substance* of what the Commission has done. *Cf., e.g., Croplife Am. v. EPA*, 329 F.3d 876, 881-83 (D.C. Cir. 2003); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

Engineers v. Hawkes Co., Inc., 136 S.Ct. 1807, 1815 (2016) (citing *Abbott Labs.*, 387 U.S. at 149); *see also Soundboard Association v. U.S. Federal Trade Commission*, 2017 WL 1476116 at *5-*8 (D.D.C. April 24, 2017).

In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), for example, the Supreme Court considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not. Although the order "had no authority except to give notice of how the Commission interpreted" the relevant statute, and "would have effect only if and when a particular action was brought against a particular carrier," *Abbott*, 387 U.S. at 150, the Court held that the order was nonetheless immediately reviewable. *Frozen Food*, 351 U.S. at 44-45. The order, the Court explained, "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id*. at 44.

In *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), the Supreme Court held that FCC regulations barring the licensing of stations that enter into network contracts, though not self-executing, were subject to immediate review. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners

whose application for licenses the regulations will cause to be rejected." *Id*. at 422. Here, application of the Commission's determination alters and adversely affects WLMG's right to use its property in conducting an otherwise lawful business activity. The adverse effect is caused by application of the Commission's determination, not simply by the existence of the Compact.

Most recently, in *Hawkes*, the Supreme Court held that the definitive nature of an approved jurisdictional determination by the Corps that property constitutes "waters of the United States" within the meaning the Clean Water Act gave rise to "direct and appreciable legal consequences" because such determination constitutes the denial of a safe harbor from certain federal enforcement actions. *Hawkes*, 136 S.Ct. at 1814. The Court found neither of the Corps' alternative routes to judicial review sufficient. The Court rejected the notion that a property owner can reasonably be expected to risk sanctions and "wait[] for EPA to 'drop the hammer' in order to have their day in court." *Hawkes*, 136 S.Ct. at 1815. Second, the Court rejected the notion that property owners should have to go through the "arduous, expensive, and long" permitting process before securing judicial review of whether that permitting process was even required in the first place. *Id*. at 1815-16.

The Commission would have WLMG follow alternative routes to judicial review similar to those advanced by the Corps in *Hawkes* and rejected by the

Supreme Court. WLMG is subject to Section 14.17 penalties should it proceed with its proposed use without Commission "project" approval. WLMG should not have to risk the "hammer" of Commission sanctions. WLMG, moreover, should not be forced to go through the costly and time-consuming "project" review process before this Court can determine whether WLMG's proposed use is, as a matter of law, a "project" that must go through that process.

The Commission attempts to distinguish *Hawkes* on the basis that it has conducted made no binding decisions as to whether WLMG's proposed activities are a "project". Commission's Brief at 29-31. But, as pleaded in WLMG's complaint, and found by the District Court based on overwhelming evidence, the Commission has finally and definitively determined that WLMG's proposed well pad and natural gas wells are "projects" that must be reviewed by the Commission under Section 3.8 of the Compact. Indeed, the Commission's invitation that WLMG submit an application all but confirms that the Commission has finally and definitively determined that its well pad and natural gas wells are "projects" subject to Section 3.8 review. Commission's Brief at 29.

E. WLMG'S Claim Does Not Require Further Exhaustion.

Courts generally require parties challenging agency action to first "exhaust" their administrative remedies before seeking judicial review. *See Athlone*, 707 F.2d at 1488-89 (citing *McKart v. United States*, 395 U.S. 185, 193-95 (1969)).

However, "the doctrine of exhaustion is not inflexible," and when "the reasons supporting the doctrine are found inapplicable, the doctrine should not be blindly applied." *Athlone*, 707 F.2d at 1488 (internal quotations omitted). *See also McKart*, 395 U.S. at 200-01; *Atl. Richfield Co.*, 769 F.2d at 782; *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 869 (3d Cir. 1990) (no exhaustion required where remaining issues are matters of law).

WLMG's claim presents a purely legal issue that does not require, and will not benefit from, any further Commission review, which, in any event, would be futile. In such circumstances, administrative remedies need not be exhausted. *See McKart*, 395 U.S. at 197-98; *Athlone*, 707 F.2d at 1487-89.

The Commission claims that WLMG has failed to avail itself of an opportunity to convince the Commission not to exercise its authority under Section 3.8 of the Compact. *See* Commission's Brief at 31, 32. The Commission contends that WLMG must seek a preliminary "jurisdictional determination." It appears from the record that the Commission fabricated this concept shortly before the plenary hearing in this case. There is no mention of, let alone procedures applicable to, such a determination in the Commission's regulations or policies. And, there no evidence that the Commission has ever provided, or required anyone else to seek, such a determination.

More fundamentally, the exhaustion argument both confuses the claim actually advanced by WLMG and demonstrates that further administrative proceedings would be futile. WLMG does not challenge whether the Commission *should* exercise its Section 3.8 "project" review authority over WLMG's proposed use. Rather, WLMG claims that the Commission *does not have* that authority at all. When the Commission writes that WLMG might convince it not to exercise its authority under Section 3.8, the Commission *assumes that it has that authority*. Nothing in the Commission's brief suggests that the Commission is open to the argument that it does not possess this authority.

The Commission, moreover, continues to contend that it cannot determine whether an activity is a "project" without also determining whether the activity will have a "substantial effect" on water resources. But the clear language of Section 3.8 of the Compact provides that "no **[1]** **project** **[2]** having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved" by the Commission. Compact at § 3.8 (emphasis added, bracketed material added). There is, based on the plain and unambiguous language of the Compact, simply no way to get to the secondary "substantial effect" inquiry without **first** going through the threshold "project" door. Whether an activity may have a "substantial effect" is completely and utterly irrelevant to

the threshold question of whether that activity is a "project" as defined in Section 1.2(g) of the Compact.

Thus, the threshold issue, and the only one presented by WLMG's claim, is whether the activities described in WLMG's complaint, individually or collectively, are a "project" subject to review and approval pursuant Section 3.8 of the Compact. If the proposed activities are not a "project," they are not subject to the Commission's "project" review jurisdiction under Section 3.8 of the Compact.

The Commission, notwithstanding the plain and unambiguous language of the Compact, continues to claim that a further factual record must be developed in order for the Commission to determine whether the activities described in WLMG's complaint, individually or collectively, are a "project." *See* Commission's Brief at 22-23, 32. It claims to need, *inter alia*, information regarding the quantity of water WLMG intends to use to fracture each well and the quantity of wastewater it will generate. *Id*. Such information, however, if provided to the Commission, could only inform the secondary "substantial effect" issue and cannot possibly inform the threshold "project" issue. And, again, the Court will find no explanation in the Commission's brief as to *how* the Commission will, or even can, use the foregoing information to render the threshold "project" determination.

V. OTHER MATTERS.

A. Shale Gas Development Does Not Threaten Water Resources.

Shale gas development has not destroyed water resources, as the Commission and its supporters suggest. State regulations are comprehensive and demonstrably effective.[7] Contrary to "the sky is falling" rhetoric, the SRBC recently concluded that there have been ***no*** discernible impacts on water resources due to shale gas development.[8]

B. WLMG Did Not Waive Its Right To Be Heard.

The suggestion that counsel for WLMG conceded that additional factual development was unnecessary mischaracterizes what occurred. The point made during the plenary hearing was that WLMG's complaint provided the District Court with sufficient information *about WLMG's proposed activities* to determine whether those activities constituted a "project." JA200-201. That is not the same as conceding that WLMG need not be afforded a full and fair opportunity to present its legal arguments (and related factual support) regarding the merits of its claim.

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7 *See, e.g.*, 25 Pa. Code Chapters 78, 79, 91, 93.

8 Available at http://www.srbc.net/pubinfo/techdocs/NaturalGasReport/.

C. WLMG Seeks Equal Treatment.

WLMG does not seek preferential treatment. WLMG seeks to be treated in the same manner as thousands of landowners in the Basin who, over the past 50 years, were able to build residential, commercial and industrial developments, many of which used, and still use, vast quantities of water ***without*** having to obtain Commission "project" approval.

D. *Chevron* Does Not Apply To Interpretation Of The Compact.

The Commission contends that the *Tarrant Regional Water District v. Herman*, 133 S.Ct. 2120 (2013) does not apply here and that this Court must, instead, defer to its interpretation of the Compact under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Commission's Brief at 33, 42-43. The Commission's position is contrary to the framework used by the Supreme Court in *Tarrant* and cases cited therein. *Chevron* deference to the Commission's interpretation of the Compact is, any event, not warranted here for several reasons.

First, the Commission's rejection of the *Tarrant* framework is premised upon the untenable proposition that the Compact can have different meanings depending on the identities of the parties. It is also premised upon the false proposition that administrative-law standards generally apply when a court reviews

an implementing agency's interpretation of an interstate compact. *See Alabama v. North Carolina*, 560 U.S. 330, 334 (2010).

Second, *Chevron* addressed when a federal court will defer to a *federal agency's* interpretation of the *statute* the agency administers. The Commission, formed by a compact among four states and the United States Government as co-equal members, is not a *federal agency* created by Congress like that involved in *Chevron* (*i.e.*, U.S. EPA). Additionally, while the interpretation of Compact is a matter of federal law because of Congressional consent, *see New Jersey v. New York*, 523 U.S. 767, 811 (1998), the Compact is not a federal statute like that involved in *Chevron* (*i.e.*, the Clean Air Act) but instead is a "contract," "a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

Third, before considering whether any deference is due, the question is whether the Compact provision at issue is ambiguous. If there is no ambiguity, that is the end of it: the agency's views never come into play. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *see also Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 & n.9 (3d Cir. 2012). Here, for reasons explained above and in WLMG's opening brief, there is no ambiguity. The threshold issue under the plain and *unambiguous* language of Section 3.8 of the Compact is whether the proposed development activity is a "project" *as defined by* Section

1.2(g). If a proposed development activity is not a "project" as defined, it is not subject to the Commission's "project" review jurisdiction under Section 3.8 of the Compact – *regardless* of whether it may have a "substantial effect" on water resources.

Fourth, even if the Court were to find ambiguity, *Chevron* deference would still not be warranted here (again, setting aside whether *Chevron* applies to an interstate compact, which WLMG contends it does not). *Chevron* deference is appropriate only where Congress has delegated authority to the agency generally to make rules carrying the force of law, *and* the agency interpretation claiming deference was promulgated in the exercise of that authority. *See United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). *See also Arlington*, 133 S. Ct. at 1874 (recognizing preconditions to *Chevron* deference); *Hagans*, 694 F.3d at 298-300 (same).

Here, section 14.2 of the Compact authorizes the Commission to "[m]ake and enforce reasonable rules and regulations for the effectuation, application and enforcement of this compact." The Commission, however, ***did not*** exercise that rulemaking authority when it finally and definitively determined that WLMG's proposed well pad and natural gas wells targeting shale formations in the Basin are "projects" that must be reviewed by the Commission under Section 3.8 of the Compact. Instead, as demonstrated by the evidentiary record, and found by the

District Court, the Commission made that determination in a series of Commission pronouncements starting in 2008, including the civil penalty imposed on Stone Energy by the Commission and yet-to-be rescinded and subsequently-ratified determinations by the Executive Director made pursuant to regulatory authority expressly delegated by the Commission in 18 C.F.R. § 401.35(b)(18). JA13-22, 37(n.14).

The Commission, through the foregoing pronouncements, has asserted categorical jurisdiction over all natural gas extraction activities within the area of Special Protection Waters. JA13-22, 37(n.14).[9] That determination and assertion of jurisdiction necessarily includes the activities proposed by WLMG as described in its complaint. Those Commission pronouncements, while demonstrating that the Commission has categorically determined that well pads and natural gas wells are "projects" that must be reviewed by the Commission under Section 3.8 of the Compact, lack the force of law. ***At best***, therefore, the challenged Commission interpretation, and jurisdictional assertion, might be "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only to the extent that it has "the power to persuade." The Commission's interpretation is not entitled to respect, given the plain and unambiguous language of the Compact, its negotiation and

[9] The Commission's assertion that WLMG failed to challenge those pronouncements when issued is a red-herring, as WMLG did not exist when they were made. *See* https://www.corporations.pa.gov/Search/corpsearch (entity number 6300224).

history, and the Commission's own prior conduct. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (agency cannot bootstrap itself into an area in which it has no jurisdiction.); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (agency interpretation conflicting with earlier interpretation is entitled to considerably less deference than a consistently held agency view).

VI. CONCLUSION

For the reasons herein, and in WLMG's opening brief, the District Court erred when it dismissed WLMG's complaint with prejudice.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I certify that this brief includes 6,426 words as calculated with the word counting feature of Microsoft Word and including the parts of the brief specified in Federal Rule of Appellate Procedure 32.

s/David R. Overstreet
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ELECTRONIC FILING CERTIFICATIONS

I hereby certify that the attached brief as provided to the Court in electronic form includes the same text as the paper copies of the brief filed by U.S. mail with the Court. I also certify that this electronic file has been scanned with Windows Defender antivirus software.

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CERTIFICATE OF SERVICE

I certify that, on August 30, 2017, I also caused a copy of this REPLY BRIEF FOR APPELLANT to be served electronically on the following counsel for Appellee and Intervenor/Appellee:

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