Re: Regulatory Takings: Northern Wayne Property Owners Alliance Letters to DRBC

QUESTION PRESENTED

Whether a gas rights leaseholder has a claim for uncompensated regulatory takings due to the Delaware River Basin Commission temporary moratorium on shale gas development? Would a leaseholder have a claim if the moratorium were permanent?

BRIEF ANSWER

Leaseholders likely do not have a taking claim because the DRBC's moratorium on drilling within the Delaware River Basin pending the promulgation of final regulations constitutes neither a total taking under the *Lucas* Test, nor a partial taking under the factors articulated in *Penn Central*. Furthermore, it is likely that this case is not ripe for consideration as no "unreasonable delay" in promulgating final regulations on DRBC's part can be established.[1]

The DRBC should, of course, perform its own legal research and analysis on the issues.

REGULATORY TAKINGS OVERVIEW

The Takings Clause of the Fifth Amendment to the Constitution states that private property shall not be "taken for public use, without just compensation." U.S. Const. Art. 5 Ultimately, the "purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

[1] This analysis does not include a review of two recent Supreme Court cases decided in June of 2013: *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard.* While these decisions may expand a property-owner's ability to challenge local land use regulation, it is not clear whether this expansion will result in more successful legal challenges.

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the public as a whole.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18, (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A disproportional burden borne by the property owner does not automatically indicate a taking. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (stating that there is no "set formula" to determine *when* the imposition of a disproportional burden requires compensation). Instead, "[t]he Takings Clause [] preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'" *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (quoting *Penn Central Transp. Co*, 438 U.S. at 124) (emphasis added).

Takings jurisprudence "aims to identify regulatory actions that are *functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (emphasis added). Additionally, the Supreme Court has denied takings challenges "in a wide variety of situations when the challenged governmental action prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." *Penn Central Transp. Co*, 438 U.S. at 125. A taking stemming from a moratorium is known as a "regulatory taking" and was first acknowledged in *Pennsylvania Coal Co. v. Mahon*. 260 U.S. 393 (1922). Given a protected property interest, the types of regulations that constitute total or partial takings fall into three categories: a regulation requiring a physical intrusion onto the owner's property, a regulation that totally eliminates any productive use for the property, and a regulation that does not wholly eliminate the property's productive use but is found to be severe in light of a balance of relevant factors. *Lingle*, 544 U.S. at 538-39.

In non-appropriation/non-physical invasion cases, such as a regulatory taking case, there are two different tests to determine whether a taking has occurred: the first test addresses the

"relatively rare" situation in which a land use regulation deprives the owner of all use of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The second "test" is the more traditional takings analysis, which becomes applicable if the regulation does not rise to the level of a *Lucas* taking, known as the *Penn Central* test. *Penn Central*, 438 U.S. at 124.

Lucas stands for the proposition that regulations that deprive an owner of "all economically beneficial or productive use of land" are takings unless the use constitutes a public nuisance or are caused by the nature of the use and the owner could have expected that the government might prohibit it. *Lucas*, 505 U.S. at 1027-1029, 112 S.Ct. 2886. Therefore, to conduct a *Lucas* analysis, courts determine whether the subject regulation "deprives a landowner of all economically beneficial" use of his or her property. If so, the regulation will constitute a taking unless state property law independently prohibits the use. *Id.* at 1027. More recently, in *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court again noted that one of the situations "that generally will be deemed *per se* takings for Fifth Amendment purposes" occurs when a regulation or regulatory action "completely deprive[s] an owner of 'all economically benefit us[e]' of her property." 544 U.S. 528, 538 (2005). Courts have denied *Lucas*-type takings claims when the regulation at issue left the claimant with beneficial uses. *Palazzolo*, 533 U.S. at 630-31, 121 S. Ct. at 2464 (claimant could build a "substantial residence"); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 501, 107 S. Ct. 1232, 1250 (1987) (claimants retained right to mine mineral estates, and only some of the support estates were restricted under the challenged statute); *Briarcliff Associates, Inc. v. Town of Cortlandt*, 272 A.D.2d 488, 491 (2d Dep't 2000) (claimant retained right to operate emery mine as legal nonconforming use; residential development remained a possibility).

In the absence of a physical, *per se* takings claim, the claimant may fall back on the default rule laid out in *Penn Central*. *Lingle*, 544 U.S. at 538, 125 S. Ct. at 2081; *Friedenburg v. DEC*, 3 A.D.3d 86, 95, 767 N.Y.S.2d 451, 458 (2d Dep't 2003). The analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Tahoe-Sierra Preservation Council*, 535 U.S. at ___, 122 S. Ct. at ___ (quoting *Yee v. Escondido*, 503 U.S. 519, 523, 112 S. Ct. 1522, 1526 (1992)).In *Penn Central*, the Court decided there was no taking when a Landmarks Preservation Law prohibited the owner of Grand Central Terminal from building a multistory office structure on top of the terminal. Since the regulation did not deprive the owner of all economically beneficial use, the Court used a three-pronged analysis that included the economic impact of the regulation, the interference with reasonable investment-backed expectations, and the character of the government action in coming to this decision. *Palazzolo*, 533 U.S. at 617, 121 S. Ct. at 2457 (citing *Penn Central Transp. Co*, 438 U.S. at 124, 98 S. Ct. at 2659). The third factor is explained as whether the action resembles a physical intrusion into the property interest or whether it more resembles a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co*, 438 U.S. at 124, 98 S. Ct. at 2659; *see also Lingle*, 544 U.S. at 539, 125 S. Ct. at 282.

THE DENOMINATOR PROBLEM

Pursuant to either analysis, there is a threshold question, frequently referred to as the "denominator problem," which must be answered: what is the parcel against which the takings tests are applied? *See Keystone*, 480 U.S. 470 at 479, 107 S.Ct. 1232, 94 L.Ed.2d 472. If the area is defined broadly, almost no government action-no matter how intrusive-will be found to be a taking. *See* John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI.

L.REV. 1535, 1536 (1996). Similarly, if we define the land too narrowly, virtually all government action that affects private property will be a taking that requires compensation and government will be inhibited from enacting necessary legislation. *Id.*

Because property is conceptualized as a "bundle" of "property rights." *see Loretto v. Teleprompter Manhattan CATV, Corp.,* 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), courts have had to struggle with what has been referred to as "severance" issues in defining the relevant parcel. See Marc R. Lisker, *Regulatory Takings and the Denominator Problem,* 27 RUTGERS L.J. 663, (Spring 1966) ("the Lisker Article"). In other words, the courts have been called upon to consider whether some of the property rights in the bundle may be severed from the others and viewed separately as the relevant parcel. Severance issues have involved the following: (1) the horizontal, physical division of property - is the relevant parcel all the land in a given geographic area that one owns or some smaller portion of that acreage? *See, e.g., Florida Rock Industries v. United States,* 791 F.2d 893 (Fed.Cir.1986); (2) the vertical division of property - can the parcel be divided among air rights, surface rights, and mineral rights? *See Penn Central,* 438 U.S. at 130, 98 S.Ct. 2646 and *Keystone,* 480 U.S. at 470, 107 S.Ct. 1232; or (3) the temporal division of property - can the property be viewed in discrete temporal units? *See Tahoe-Sierra Pres. Council Inc. v. Tahoe Reg. Planning Agency,* 535 U.S. ----, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

When a regulatory takings claim involves the ownership of a fee simple estate in land, it is well established that the owner cannot break that fee estate into segments in order to establish a taking of the regulated segment. *E.g., Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 130-31 (1978) ("'Takings' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely

abrogated"); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (rejecting plaintiff's attempt to vertically define the relevant parcel as only its "support estate" even though that segment was recognized as a legally distinct property interest under state law). From 1978 until recently, the lower federal courts and state courts have generally utilized the whole-parcel analysis, usually to defeat a taking claim. *Appolo Fuels, Inc. v. U.S.*, 54 Fed. Cl. 717, 56 Env't. Rep. Cas. (BNA) 1393 (2002); *Naegele Outdoor Adver. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Dufau v. United States*, 22 Cl. Ct. 156 (1990), *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *Moore v. City of Costa Mesa*, 678 F. Supp. 1448 (C.D. Cal. 1987); *Jentgen v. United States*, 657 F.2d 1210 (1981); *Deltona Corp. v. United States*, 657 F.2d 1184 (1981); *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000).

The U.S. Supreme Court recently reaffirmed the validity of the property as "a whole rule." *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency,* 535 U.S. ----, 122 S.Ct. 1465, 1480-81, 152 L.E.2d 517 (2002). In *Tahoe-Sierra,* Petitioners sought to divide their interests in land into temporal parts to claim that the statute, which imposed a temporary moratorium on development of private property surrounding Lake Tahoe, caused the restricted temporal portion of their property to become valueless. *Id.* at 1482-83. The Court declined to allow Petitioners to so divide their property. *Id.* It held that the moratorium did not constitute a *Lucas* taking because a fee simple interest in property may not be temporally divided for the purpose of takings analysis. *Id.* at 1482-84. The Court held that, when viewed as a whole the

properties at issue retained value and that the temporary development prohibition did not rise to the level of a *Lucas* taking. The Court explained:

> Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question.... Thus, the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period....

Pin cite.

In some courts, a trend contrary to *Tahoe-Sierra* has appeared, arising principally from decisions of the Court of Federal Claims under the statute known as the Tucker Act, which governs tort claims against the federal government. In *Loveladies Harbor, Inc. v. United States*, the court held that the denial of a United States Army Corps of Engineers permit for the development of the last 12 acres of what had been a 250-acre subdivision was a taking; the court permitted analysis of the 12-acre parcel instead of the entire parcel as it had been developed during more than 20 years. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Rather than adopting a firm rule, however, the court held that each case would have to be reviewed on its own facts in order to determine what the proper numerator and denominator of the takings analysis should be. *Id*.

Less than eight months after the United States Supreme Court decision in *Tahoe-Sierra*, supporting the "parcel as a whole" rule, the Ohio Supreme Court rejected the rule in *State ex rel. R.T.G., Inc. ("R.T.G.")*. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1 (2002). The court concluded that mineral rights were separate property interests from land surface rights. In segmenting the property interests, the court concluded that the restriction of coal mining on a portion of the property constituted a taking of that particular piece of property. In rendering its decision, the Ohio Supreme Court acknowledged that the U.S. Supreme Court had twice rejected

this kind of segmentation, but it ignored these precedents by claiming certain Supreme Court justices had questioned the application of the parcel-as-a-whole rule. However, in the same year that *R.T.G.* was decided, the Pennsylvania Supreme Court in *Machipongo Land and Coal Co., Inc. v. Com.* reached the opposite conclusion on similar facts as *R.T.G.* The Pennsylvania Supreme Court has consistently relied upon the decisions of the U.S. Supreme Court when considering takings issues, and as such, flatly rejected the argument that surface rights could be segmented from mineral rights, thereby supporting the parcel-as-a-whole rule. *See Machipongo Land and Coal Co., Inc. v. Com.*, 569 Pa. 3, 799 A.2d 751, (2002) (court examined the whole parcel in light of the individual portions of the property subject to logging restrictions and found no taking).

Ultimately, while there has been some dissension, the Supreme Court has refused to allow: vertical severance of the mineral estate in *Keystone;* vertical segmentation of air and surface rights in *Penn Central;* or temporal division of property in *Tahoe-Sierra.* Thus, the relevant parcel cannot be segmented, and must be defined to include both the surface and mineral rights.

ANALYSIS: LANDOWNERS DO NOT HAVE A TAKING CLAIM

To properly bring a successful takings claim, first the claimant must identify the property interest allegedly taken. *Northwest La. Fish & Game Pres. Comm'n v. United States,* 79 Fed. Cl. 400, 408 (2007). A Leaseholder has a recognized property right, lease rights, subject to 5th Amendment takings clause. *Love Terminal Partners v. United States,* 97 Fed. Cl. 355, 371 (2011). "As a general proposition, a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof." *Sun Oil Co. v. United States,* 215 Ct. Cl.

716, 769 (1978) (Sun Oil held lease for oil and gas rights from Department of Interior). The property interest allegedly taken through the DRBC moratorium is a natural gas leasehold.

As indicated in the February 2012 letter provided by NWPOA landowners to the DRBC, "all of NWPOA's members owned unsevered natural gas rights." Therefore, the "denominator" is unquestionably the entire parcel – both surface and subsurface rights. As such, NWPOA landowners likely do not have a taking claim because the moratorium on drilling constitutes neither a total taking under the *Lucas* Test, nor a partial taking under the factors articulated in *Penn Central*. Under *Lucas*, landowners retain other reasonable uses of their land, and therefore have not been deprived of "all economically beneficial or productive use of land." Lucas, 505 U.S. at 1027-1029. In fact, in NWPOA's June 2013 letter it is made abundantly clear that landowners may "timber their lands or subdivide them and open the subdivisions to development so they and their families can keep going financially." Under the *Penn Central* analysis, the economic impact is mitigated by the potential use of the properties for other reasonable purposes. Additionally, the investment backed expectations of the landowners are in a heavily regulated arena and are not derived from traditional long-protected land uses. Lastly, the rare circumstance of extraordinary delay and bad faith are not supported by the DRBC's crafting of a series of complex, permanent regulations that have the potential to impact the drinking water of over 15 million people.

LUCAS TEST:

Under the test in *Lucas*, the prohibition of particular uses does not constitute a taking if other uses are allowed. *Andrus v. Allard*, 444 U.S. 51, (1979); *Thompson v. City of Red Wing*, 455 N.W.2d 512 (Minn. App. 1990) (prohibition on gravel mining not taking where other economic uses remain); *see also Adolph v. Federal Emergency Management Agency*, 854 F.2d

732 (5th Cir. 1988) (FEMA floodplain regulations not taking because they only require elevation and floodproofing, and thus do not prevent all reasonable uses of land) *Miller & Son Paving, Inc. v. Plumstead Township,* 552 Pa. 652, 717 A.2d 483 (1998) (A taking does not result merely because a regulation ... deprive[s] the owner of the most profitable use of his property). For landowners who own drilling rights as part of their estate, the banning of mining activities does not extinguish all economic use of their property. *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (zoning ordinance valid even though reduced property value by more than 90%); *see also Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); *Pace Resources Inc. v. Shrewsbury Tp.*, 808 F.2d 1023 (3d Cir. 1987) (In measuring diminution of value, as noted by the court in Pace Resources, the owner's loss of highest and best use is not the controlling factor).

Landowners here retain other reasonable uses of their land, such as for the construction of residences, farming, timber sales, conventional natural gas extraction, and mining. The Supreme Court has repeatedly criticized defining the property interest taken in terms of the regulation challenged as "circular." *Tahoe-Sierra Preservation Council*, 535 U.S. at 331, 122 S. Ct. at1483. The Court looks instead to the parcel as a whole. *Id.* Therefore, NWPOA's claim that "the value of natural gas development would dwarf the value of the surface estate," is irrelevant. Under *Lucas*, landowners here simply do not have a total taking claim.

PENN CENTRAL TEST:

Turning now to the Penn Central test, the landowners regulatory takings claim here fail as well. Regulatory takings jurisprudence under Penn Central is characterized by "essentially ad hoc, factual inquiries," designed to allow "careful examination and weighing of all the relevant circumstances," *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'CONNOR, J.,

concurring). The Supreme Court has "identified several factors ... that have particular significance: 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."' *Eastern Enters. v. Apfel* at 521 (citing *Penn Central Transp. Co*. at 124).

a) Economic Impact

Similar to the focus in the *Lucas* test, in evaluating the economic impact of a regulation on a plaintiff, a court focuses on the nature and extent of the interference with a plaintiff's rights in the parcel as a whole. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Planning Agency* at 327; *Andrus v. Allardat* 51, 66. The Supreme Court found a 94 percent diminution in value to leave more than "a token interest" that did not leave the property "economically idle." *Palazzolo v. Rhode Island* at 631. Similarly, a 91 percent reduction in value was found not to be a categorical taking. *Rith Energy Inc. v. United States*, 270 F.3d at 1349. Recently, the Federal Circuit found losses of 92 percent and 78 percent to be "manifestly insufficient" to establish a taking. *Appolo Fuels Inc. v. United States* at 1347; *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75 percent diminution in value); *Hadacbeck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5 percent diminution); *Lucas v. South Carolina Coast Council* at 1019-1020 n.8 (suggesting that a 95 percent diminution in value would not constitute a categorical taking); *Maritrans Inc. v. United States* at 1358 (13 percent reduction in value does not constitute a taking); *Brace v. United States* at 337, 357 (14 percent diminution in value does not have the effect of a taking). However much a gas drilling moratorium diminishes the value of mineral rights, a court cannot find a taking unless the other *Penn Central* factors weigh heavily in favor of a taking, which they do not.

b) Investment Backed Expectations

In determining whether there has been a regulatory taking, it is well settled that courts must evaluate the extent to which the challenged governmental action has interfered with the reasonable investment-backed expectations of the property owner. *Keystone Bituminous Coal Ass'n v. DeBenedictis* at 495. NWPOA landowners have little reason for investment-backed expectations. No permit has ever been granted in Pennsylvania for the practice of horizontal high-volume hydraulic fracturing in the Delaware River Basin. Courts consider three factors for property that was acquired prior to regulation: (1) is it a highly regulated industry or activity; (2) was the plaintiff aware of the problem that spawned regulation when the property was acquired; and (3) could the regulation have been reasonably anticipated?

Gas development is a heavily regulated field everywhere in the United States and subject to a rigorous permitting process. In the area of mineral interests, such expectations are necessarily shaped by the fact that the development and extraction of natural resources through mining or drilling has a long history of heavy regulation due to the adverse environmental impacts that can result. *See District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 884 (D.C. Cir. 1999) ("[b]usinesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends."). Because hydrocarbon extraction and development is such a heavily regulated field, any landowner who acquired property in the Delaware River Basin for the purpose of resource extraction, as well as any gas driller, should be well aware that the economic prospects may be limited by regulations. However, since high-volume horizontal hydrofracking is a relatively new process for extracting gas, many landowners in the Marcellus Shale may have just recently discovered the profitability of their property for gas development. The third prong of the analysis addresses this situation by considering whether regulation could have reasonably been

anticipated when the industry introduced a new practice. Because hydrofracking is more invasive and resource intensive than previous methods used to extract gas, imminent regulation should have been anticipated. This is especially true in the Delaware River Basin where dangers to surface waters have been targeted for rigorous regulation by the DRBC since the 1950s. A landowner can change the economic expectations of his or her property once a new practice is introduced that can suddenly change the land's profitability, but those expectations will only be considered in the context of the overall regulatory regime in place.

This case does not deal with traditional, long-protected land uses. Natural gas from mile deep shale formations is considered an "unconventional" fuel source. In turn, natural gas extraction by high volume slick water fracturing is an unconventional land use. Under these circumstances, fairness requires giving agencies with proper jurisdiction, such as the DRBC, the chance to determine the legal limits of the property interest associated with the new technology, before courts step in to require compensation for denying the exploitation of that interest.

c) Character of Government Action

An evaluation of the character of the government's action involves an inquiry into "the public purposes served by the [g]overnment's regulatory actions. ..." *Bass Enterprises Prod. Co. v. United States*, 381 F.3d at 1369-1370. The assessment includes an analysis of "[t]he purposes served, as well as the effects produced, by a particular regulation," *Palazzolo v. Rhode Island* at 633, and the "purpose and economic effect" of the government's actions. *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Planning Agency* at 323. A government's traditional regulatory actions, such as those involving zoning, permits, moratoriums, and other land use provisions, as well as those affecting safety, often do not constitute takings if the duration of the regulatory restriction is within reasonable time limits. *Id*. at 329.

The Federal Circuit first observed that neither a permitting process alone nor the mere assertion of regulatory jurisdiction, without more, can constitute a taking; nor can mere fluctuations in value during the decision-making process, absent extraordinary delay. *Id.* at 1098-99 (citing *Agins*). *see also Cooley,* 324 F.3d at 1307 ("The length of the delay is not the only or necessarily the critical factor for finding a taking by extraordinary governmental delay."); *see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (eight years is insufficient delay to effect a taking); *Bass Enters.,* 381 F.3d at 1367 (45 months' delay is not extraordinary); *Wyatt,* 271 F.3d at 1098 (nearly ten-year permitting process including seven years' delay is not extraordinary); *1902 Atlantic Ltd. v. United States,* 26 Cl.Ct. 575 (1992) (five years' delay not extraordinary); *Dufau v. United States,* 22 Cl.Ct. 156, 162-63 (1990) (16 months' delay is not extraordinary). The Federal Circuit explained that it is not the *length* of the delay alone that makes it "extraordinary," but rather, the *reasons* for delay and the nature of the permitting process will determine whether a delay is extraordinary. *Id.* at 1099. The nature of the regulatory scheme is especially critical when the permitting process requires detailed technical information necessary to determine environmental impacts. *Id.* at 1098. If no extraordinary delay is found, this issue would be dispositive on grounds of ripeness. Courts have latched onto extraordinary delay as the trigger that, absent a "final" decision, ripens a takings claim. *McGuire v. United States,* 2011 WL 576060 at *7 (Fed. Cl. Feb. 18, 2011).

What is more, the Federal Circuit cautioned that only in rare circumstances can a delay be extraordinary without a finding of bad faith on the part of the government. *Id.; see also Bay-Houston Towing Co. v. United States,* 58 Fed. Cl. 462, 477-78 (2003) (holding that eleven-year dispute over whether the plaintiff was entitled to a CWA § 404 dredge and fill permit for mining

peat did not amount to bad faith or unreasonable delay, so no temporary taking occurred). In order for bad faith to be established the delay would need to be "so objectively unreasonable as to give rise to the inference" that the government was acting "solely for purposes of delay or some other illegitimate reason." *Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1200 (Cal. 1998). The Court in *Tahoe-Sierra* offered very little on what may constitute bad faith. In *dicta,* the court included a sentence implying that had the agency not "acted diligently and in good faith" but had instead been "stalling," such facts "arguably could support" a "bad faith" takings claim. However, this is a difficult burden to carry as the government is entitled to the presumption that its actions were lawful and authorized. That is because, in a takings case, "we assume that the underlying governmental action was lawful." *Appolo Fuels Inc. v. United States* at 1351 n.7, citing *M & J Coal v. United States* at 1154. Furthermore, the DRBC could rightly claim it is justified using a moratorium to craft complex, wise, permanent regulations that have the potential to have a significant impact on a significant number of people.

CONCLUSION

Over fifteen million people benefit from the unfiltered drinking water supplied by the Delaware River Watershed. Clean drinking water is a quintessential public good that benefits everyone in the population. The burdens to the landowners, by contrast, are small and consist of no more than what any landowner must submit to in order to secure "the advantage of living and doing business in a civilized community." *Andrus v. Allard*, 444 U.S. at 67, 100 S. Ct. at 328 (quoting *Pennsylvania Coal Co*, 260 U.S. at 422, 43 S. Ct. at 163 (Brandeis, J., dissenting)). The regulation of gas drilling has long been concerned with environmental protection, including the protection of drinking water supplies. The aim is not to conserve wild land in its natural state—this is a law specifically focused on drilling for natural gas. A narrowly drawn regulation

focused precisely on the injury to be prevented is one for which the burden should "in all fairness and justice" be borne by the property owner *alone* because he holds his property subject to reasonable regulation and the implied obligation not to use property in a way injurious to the community. *See Mugler v. Kansas*, 123 U.S. 623, 665, 8 S. Ct. 273, 299 (1887). For the aforementioned reasons, leaseholders in the Delaware River Basin likely do not have an actionable taking claim.