



Commission Secretary, DRBC
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Re: Public Comment – Draft Natural Gas Development Regulations

To the Delaware River Basin Commission:

These are the public comments of Damascus Watch, submitted by and through its attorney the Widener Environmental and Natural Resources Law Clinic, with regard to the Natural Gas Development Regulations, Article 7 of Part III – Basin regulations released by the Delaware River Basin Commission (“DRBC”) staff. Damascus Watch is a group of concerned citizens located in the Delaware River Basin (DRB) dedicated to the protection of the air, water and soil of the DRB.

I. Summary

Damascus Watch believes that the proposed draft Natural Gas Development Regulations are deficient for two reasons:

First, implementing these regulations in the present form would violate the Delaware River Basin Compact and abdicate DRBC’s legal responsibility under the Compact by bestowing effective regulatory authority to the signatory states. Damascus Watch believes that such an abdication of responsibility is inconsistent with core purpose of the DRBC to protect the DRB and is contrary to law.

Second, additionally, the DRBC has failed to complete an environmental assessment (EA) or in the alternative an environmental impact statement (EIS) as required from by all federal agencies under NEPA.¹

II. The Draft Regulations In Their Present Form Would Violate The Compact Because They Would Release Effective Control And Authority To The Signatory States

Throughout the first half of the Twentieth Century, compacts, cases and controversies abounded over control regarding diversion, access and pollution of the Delaware River by New York, New Jersey, Pennsylvania, and Delaware. In 1931, in *State of New Jersey v. State of New York*, the states continued to disagree about diversions of tributary waters of the Delaware to New York City reservoirs and the continued dumping of raw sewage from Port Jarvis which contributed negatively to the overall health of the Delaware River Basin. In reference to the Delaware River, but also more generally to all rivers, Justice Holmes stated “A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.”²

However, the 1931 case was not the end of controversies. New York and New Jersey returned to court several times because each time the states entered into a compact, they failed to have it ratified by Congress and eventually fell back to their individual interest without regard to the other states. It was only in 1954, after the Supreme Court decision in *State of New Jersey v. State of New York*, 347 U.S. 995, allowing further diversions of water to New York City, that the signatory parties decided that something different needed to be done. Tired of the uncertainty and continuous litigation over the years, the signatory parties agreed to a formal compact that also included the Federal Government as a party. The parties realized that as a vital

¹ 42 U.S.C. 4332.

² *State of New Jersey v. State of New York*, 51 S.Ct. 478, 479 (1931).

natural resource that so many Americans rely on in the region, something needed to be done to protect the DRB.

The creators of the Delaware River Basin Compact envisioned and authorized a single administrative agency—the Delaware River Basin Commission-- to direct, supervise and coordinate efforts of all activities in the Delaware River Basin. .

As stated in the Preamble of the Compact, the water resources of the basin at that time were subject to the duplicative, overlapping and uncoordinated administration by some 43 state agencies, 14 interstate agencies and 19 federal agencies which exercised a multiplicity of powers and duties resulting in a splintering of authority and responsibilities. The Compact sought to remedy these deficiencies by creating the DRBC with the purpose to:

- i. promote interstate comity;
- ii. remove causes of present and future controversy;
- iii. make secure and protect present developments within the states;
- iv. encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin;
- v. provide for cooperative planning and action by the signatory parties with respect to such water resources; and
- vi. apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.³

As stated in the DRB compact Article 1, Section 1.3(c) (Purpose and Findings):

³ DRB compact Article 1, Section 1.3(e).

“The water resources of the basin are functionally inter-related, and the uses of these resources are interdependent. *A single administrative agency is therefore essential* for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and private enterprise.” (*Emphasis added*)

Unfortunately, the Article 7 draft regulations now proposed reject the essential purpose of the DRBC. Instead of regulating the impacts of gas drilling activities on the Basin through the DRBC, the proposed regulations abdicate the DRBC’s responsibility to effectively direct, supervise and coordinate efforts of federal, state and local governments and private enterprise by allowing each state to regulate drilling activity under their own rules. Instead of the single entity providing a single, consistent regulatory construct throughout the watershed, the proposed regulations envision 4 different regulators with 4 different sets of rules. It is difficult to understand how the DRBC could effectively meet their charged purposes when it intends to relinquish almost total control in the planning, construction, and operation of natural gas development activities within the Basin to the various state agencies. Further, by splitting the basin along political lines and agencies, these regulations backslide to the very situation that existed in the first half of the twentieth century that led to the creation of the DRBC and its authority. Comparing the Article 7 regulations to the requirements of the compact, it is impossible to see how the DRBC can meet its purpose of equal and uniform treatment to all water users of the basin--especially when gas development activities will have to meet different standards for development and operation depending on the State or Commonwealth in which they are operating.

The fact that the regulations envision DRBC playing some role does not alter this result. The Article 7 regulations effectively handcuff the DRBC from performing its required duties under the Compact by establishing a 30 day review of proposed projects. That is far too short a review time for anything more than a rubber stamping process and does away with the intended purpose that the DRBC is required by law to uphold.

Overall, by leaving authority of the design and control of gas development projects to each state, the regulations risk creating a “race to the bottom” regarding regulation (or, more likely, lack of regulation) of this expanding industry. Each state has a strong interest in allowing as much expansion of this industry as possible. Without an independent voice and decision maker that will consider all effects of gas development within the DRB, regardless of political boundary, the DRB will be irreparably harmed.

In Draft regulation Article 7, Section 7.1(i), the DRBC stress that New York and Pennsylvania have enacted statutes and promulgated regulations governing the gas industry and indicate that these should be sufficient to protect the DRB. The draft regulations continue by stating that under the DRB compact Article 1, Section 1.5 that it is the purpose of the signatory parties to the Compact to “preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent not inconsistent with the compact.”

Section 1.5 authorizes and directs the Commission “to utilize and employ such offices and agencies for the purpose of this compact to the fullest extent it finds feasible and advantageous.” Draft regulations propose to suggest that it would be in accordance with section 1.5 of the Compact, for the Commission to utilize and employ existing offices and rely upon agencies of the State of New York and the Commonwealth of Pennsylvania in their respective

states in lieu of separately administering natural gas and exploratory well inspections, construction and operation standards.

Looking to the four corners of the compact, it is clear that the DRBC has misconstrued the meaning of Section 1.5 to the detriment of all parties involved. Although Section 1.5 of the compact directs the commission to utilize existing resources of the parties, the signatory parties could not have meant Section 1.5 to direct the DRBC to shift their assigned duties to the very parties that contributed to the environmental and resources degradation issues that required the DRBC to be created in the first place. Viewing Sec. 1.5 in this way would in effect render the compact moot.

The only possible remedy to fix the draft regulations is for the DRBC to take more control of the inspection, construction and operation of natural gas development sites in the way of independent regulation that would apply to all activities in the DRB regardless of political boundaries. By setting the minimum standards for gas development in the DRB, the DRBC would ensure that basic safety, construction and disposal measures are taken to ensure that the high quality resources of the DRB are maintained for generations to come as required by law.

III. DRBC Has Failed To Complete An Environmental Assessment (EA) Or In The Alternative, An Environmental Impact Statement (EIS) As Required By All Federal Agencies Under NEPA

The DRBC was created by an interstate compact between New York, New Jersey, Delaware, Pennsylvania and the United States. An interstate compact is an agreement between two or more states. The authorization to enter such a compact is found in Article I, Section 10, Clause 3 (compact clause) of the United States Constitution. The Compact Clause provides that "no state shall enter into an agreement or compact with another state" without the consent of

Congress. The DRBC long ago conceded that it is a federal agency for purposes of NEPA.⁴ As a federal agency, the DRBC must perform an EIS when major federal action is considered.

Under NEPA, a federal agency triggers the EIS requirement if the agency proposes a major federal action significantly affecting the quality of the human environment.⁵ According to the Council on Environmental Quality (CEQ), a federal action is major if it *might* be major. In other words, uncertainty about the action's effects cuts in favor of requiring an EIS. Otherwise, major reinforces but does not have a meaning independent of significantly. Significantly, in turn refers to both the context and the intensity of the agency action, meaning the type of environment actually affected and to the severity of that impact.⁶ Actions include new and continuing activities, new or revised agency rules, regulations, plans, policies, procedures or legislative proposals such as the draft Gas Development regulations offered here by the DRBC.

The CEQ's Regulations provide that in addition to major fed action, a proposed action must significantly affect the quality of the human environment before it is subject to NEPA's EIS requirements. The CEQ regulations define "significantly" as requiring considerations of both *context* and *intensity* of the proposed action.

The regulations further define "context" to mean that an agency must consider the significance of an action by analyzing it in several contexts such as society as a whole, the affected region, the affected interest, and the locality. Significance varies with the setting of the proposed action. Additionally, short and long term effects are relevant.

The regulations also define intensity which refers to the severity of the impact. CEQ lists several factors that agencies should consider in evaluating intensity:

- a) Impact beneficial or adverse

⁴ *Borough of Morrisville v. DRBC*, 399 F.Supp. 469, 477 n. 7 (U.S.Dist., E.D. Pa. 1975).

⁵ NEPA Sec 102(C); 42 USC 4332(C).

⁶ 40 CFR 1508.27.

b) Public health or safety effects

c) Unique characteristics of the geographical area.

According to CEQ regulations, affecting means a proposed action will or may have an effect on the human environment. As a result, actions that MAY significantly affect the quality of the human environment are still subject to NEPA requirements. The CEQ defines human environment broadly and the term shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. As held by the Supreme Court in Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), the time at which the agency must prepare the final statement is the time at which it makes a recommendation or report on a proposal for federal action.⁷ The Article 7 draft regulations if implemented would apply to a vast area that includes land and water resources of four states. Because of the dependence on the Delaware River Basin water resources by the population in the region, it is without question that the Article 7 draft regulations would constitute major federal action that may greatly affect human environment. In the present context, this means that DRBC was required to prepare and submit the final EIS statement when it published the article 7 draft regulations for public comment.

Without the EA / EIS statement, it become impossible to determine how the DRBC can explain how it is complying with the mandatory NEPA requirements. Additionally, without the EIS statement, there is no explanation or justification in the change of the approval process, which normally took six to nine months for gas development related projects, that is now achievable in less than 30 days. This fast track approach ensures that DRBC will be overwhelmed with permit request and the amount of in-depth scrutiny will be greatly reduced.

⁷ 422 U.S. 289, 320 (1975).

This would require too much reliance by the DRBC on the judgment of state agencies and corresponding regulations that do not consider the special needs of the DRB or the human environment.

Overall, the proposed draft regulations are offered by a federal agency and they include major changes that may have a significant effect on the human environment within the DRB, which is a geographical area with unique characteristics. The regulations should be delayed until such time as an EIS can be completed according to NEPA and corresponding federal regulations. The Commission must reconsider the draft regulations or risk violation of NEPA, several regulations of the DRBC, as well as the DRB Compact.

CONCLUSION

For all these reasons, we urge you to reconsider the draft regulations until such time an EIS is performed and if it determined that the regulations should be proposed, they first be reworked so that DRBC has more control over inspection, operation and implementation of gas development in the DRBC.

Respectfully submitted,



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