

~~BROOKLYN OFFICE~~
DELAWARE RIVERKEEPER NETWORK,)
the DELAWARE RIVERKEEPER,)
RIVERKEEPER, INC., the HUDSON)
RIVERKEEPER, and NATIONAL PARKS)
CONSERVATION ASSOCIATION,)

Plaintiffs,)

vs.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, BRIG. GEN. PETER A. DELUCA,)
Division Engineer, North Atlantic Division of the)
U.S. Army Corps of Engineers, (sued in his official)
capacity), DELAWARE RIVER BASIN)
COMMISSION, and CAROL COLLIER,)
Executive Director, Delaware River Basin)
Commission (sued in her official capacity),)

Defendants.)

CV 11 - 3780

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

IRIZARRY, J.

Civ. No:

J. ORENSTEIN, M.J.

1. Plaintiffs Delaware Riverkeeper Network, the Delaware Riverkeeper, Riverkeeper, Inc., the Hudson Riverkeeper, and the National Parks Conservation Association, by and through their undersigned attorneys, hereby allege as follows:

NATURE OF THE ACTION

2. Plaintiffs seek relief from this Court directing Defendants Delaware River Basin Commission (DRBC), Carol R. Collier, DRBC's Executive Director, the Army Corps of Engineers (Army Corps), and/or Brigadier General Peter A. DeLuca to perform Defendants' mandatory, non-discretionary duties to comply with the National Environmental Policy Act of

1969, 42 U.S.C. § 4321 et seq. (NEPA), with respect to the Army Corps' approval of the issuance and publication by DRBC of draft regulations to authorize development of natural gas within the Delaware River Basin (Basin) and with respect to the DRBC's issuance and publication of those draft regulations. When promulgated, the final regulations will add a new Article 7 to the DRBC's Water Quality Regulations (published at 18 C.F.R. Part 410).

3. The Delaware River is the longest undammed river east of the Mississippi, flowing freely for 330 miles as it travels from its headwaters in New York State through Pennsylvania, New Jersey, and Delaware to the Atlantic Ocean. Although its watershed is only about four-tenths of one percent of the land area of the continental United States, the Delaware River provides clean, safe drinking water to more than 15 million people – five percent of the nation's population.

4. The Delaware River Basin comprises 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania and Delaware. The Upper Delaware River is a federally designated "Scenic and Recreational River" administered by the National Park Service. The National Wild and Scenic Rivers System also includes parts of the Lower Delaware and the Delaware Water Gap. The Basin and River are home to a number of federal and state listed endangered or threatened species including the dwarf wedgemussel, Indiana bat, bog turtle, shortnose sturgeon, loggerhead and Kemp's ridley sea turtles, and Northeastern bulrush. Over 200 species of migratory birds have been identified within the drainage area of the Upper Delaware River within the Basin, including the largest wintering population of bald eagles within the Northeastern United States. Migratory birds breed in or migrate through the high quality riparian corridors of the Basin. The Delaware River and Delaware Bay are also home to dozens of species of commercially and recreationally important fish and shellfish species.

5. Promulgation of the Draft Regulations in final form is expected to result in the development of tens of thousands of natural gas wells in the 5000 square miles of the Marcellus Shale that lies within the Delaware River Basin in Pennsylvania and New York. The DRBC, the Environmental Protection Agency, and the National Park Service have variously estimated that between 16,000 and 64,000 natural gas wells will be installed in the Basin.

6. Natural gas well development is proceeding outside the Basin. In Pennsylvania, more than 2,000 natural gas wells have already been drilled and hundreds of violations of water pollution laws have ensued. Drinking water supplies relied on by hundreds of thousands of people have been polluted or placed at risk of contamination. Moreover, the cumulative effects of emissions from development of these wells are likely to contribute to violations of federal air pollution standards designed to protect public health.

7. Pursuant to NEPA, federal agencies considering a project must first consider the potential environmental impacts of that project. They must do so transparently and with full public participation. Projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies, as well as new or revised agency rules, regulations, plans, policies and procedures, are subject to NEPA. Defendants DRBC and the Army Corps were obligated as federal agencies to comply with NEPA before taking any action with respect to proposed natural gas regulations to govern natural gas development in the Basin. Plaintiffs seek declaratory and injunctive relief to remedy Defendants' failure to fulfill their NEPA obligations.

PARTIES

8. Plaintiff **Delaware Riverkeeper Network** (DRN) is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Basin watershed. DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 8,000 members with interests in the health and welfare of the Delaware River and its watershed. DRN brings this action on its own behalf and on behalf of its members, board, and staff.

9. Plaintiff **the Delaware Riverkeeper** is a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper, Maya van Rossum, advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats.

10. DRN petitioned the DRBC in 1990 to develop a program to protect the exceptional water quality and outstanding resources of the designated Wild and Scenic Delaware River pursuant to the Outstanding Natural Resource Waters (ONRW) provision of the federal Clean Water Act. In response, the DRBC amended its Water Code to include its unique version of ONRW, the Special Protection Waters program. In 1992, the DRBC granted the Upper and Middle Delaware Wild and Scenic River segments Outstanding Basin Waters status under their Special Protection Waters (SPW) program. In 2001, after the Lower Delaware River was designated by Congress as Wild and Scenic, DRN again petitioned DRBC to classify the Lower

Delaware River as SPW. As a result of DRN's efforts, the DRBC permanently designated the Lower Delaware River as Significant Resource Waters, a type of SPW, in July 2008. DRN also requested in its 2001 petition that DRBC fulfill the requirements for prioritization of the Upper and Middle Delaware Wild and Scenic River segments.

11. The Delaware Riverkeeper and DRN's members enjoy the water quality values of the Delaware River Basin, particularly within the drainage area of Special Protection Waters. DRN members live, work, and recreate in the lands and waters of the Delaware River Basin. DRN members boat, fish, canoe, birdwatch, hike, and participate in other professional, commercial, scientific, and recreational activities near or on the Delaware River and its tributaries and throughout the watershed. Many of DRN's members obtain their water for domestic, agricultural, and other purposes from groundwaters, streams and other surface waters within the Delaware River Basin.

12. DRN began its advocacy efforts to protect the Basin from the adverse impacts of natural gas development in March 2008. DRN has actively worked since that time to bring the environmental impacts of natural gas development to the public's attention through action alerts, press outreach, public appearances, and public statements and editorials. DRN has advocated to the DRBC, state lawmakers and agencies, and federal lawmakers and agencies regarding the impacts and risks of natural gas development in the Delaware River Basin. DRN has also advocated for scientific studies and a moratorium on natural gas development to the DRBC members, including associated state administrations, represented federal agencies and the federal representative to the DRBC.

13. DRN has commissioned numerous expert reports on the impacts of vertical gas well installation and horizontal hydraulic fracturing, also known as "hydrofracking" or

“fracking,” and has submitted those reports to the DRBC and other federal and state policymakers. DRN submitted extensive comments on the EPA’s draft plan to study the effects of hydrofracking on drinking water. DRN has brought litigation in federal district court against the DRBC challenging its approval of a water withdrawal permit for a hydrofracking operation as well as its decision to allow certain exploratory gas wells to be installed within the Delaware River Basin without DRBC review or permitting. DRN submitted extensive comments, including expert reports, to the DRBC on the Draft Regulations, and has advocated to the DRBC as part of this comment process that the DRBC must undertake a basin-wide cumulative impacts analysis before promulgating final regulations.

14. DRN has actively sought federal funding for the DRBC to undertake a cumulative impacts analysis. Due in part to DRN’s advocacy and coalition-building efforts, the public submitted over 8,000 letters to DRBC urging them to conduct a cumulative impacts study, including letters from Congressman Maurice Hinchey (D-NY), Congressman Rush Holt (D-NJ), New York Mayor Michael Bloomberg, and numerous environmental groups. Because of these efforts, the House Appropriations Committee Subcommittee on Interior, Environment, and Related Agencies approved a one million dollar appropriation for the DRBC to conduct a cumulative impacts study. However, this appropriation did not materialize due to the budget crisis in Washington.

15. The Delaware Riverkeeper and DRN’s members have an interest in determining how the individual and cumulative impacts of natural gas development will be felt throughout the Delaware River Basin and how the Draft Regulations, if finalized, will exacerbate, ameliorate, or otherwise regulate these effects. Defendants’ failure to undertake an environmental impact statement process under NEPA has harmed and will continue to harm

these interests by depriving the Delaware Riverkeeper and DRN's members of this information and by depriving the Delaware Riverkeeper and DRN's members of the right to submit comments on an environmental impact statement to contribute to a fully informed environmental decision-making process on the Draft Regulations.

16. Plaintiff **Riverkeeper, Inc.** is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, NY. Riverkeeper was formed in 1966 as the Hudson River Fishermen's Association, and changed its name to Riverkeeper in 1986. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the watershed that provides New York City its drinking water, a portion of which is in the Delaware River Basin. Riverkeeper has more than 4,000 members, many of whom reside in Brooklyn, and receive clean, unfiltered drinking water from the New York City Watershed. Riverkeeper brings this action on its own behalf and on behalf of its members, board, and staff.

17. Riverkeeper is a signatory of the 1997 Watershed Memorandum of Agreement, which provides a framework by which New York City can maintain the water quality of its unfiltered drinking water, fifty percent of which is provided by the Delaware River Basin. The water quality values of the Delaware River Basin are a critical resource for nine million New Yorkers. Riverkeeper dedicates a substantial amount of resources to litigation and advocacy to maintain the quality of the drinking water supplied by the New York City Watershed, including the Delaware River Basin portion of the Watershed.

18. Riverkeeper is actively involved in advocacy and public education surrounding the issue of natural gas development in the New York City Watershed and specifically the New York portion of the Delaware River Basin, in particular because of its potential impacts on the

watershed and a pristine New York recreational area. Riverkeeper has created an online community of 7,500 people, who help advocate against any horizontal drilling or hydrofracking in New York until detailed, stringent regulations specific to shale gas (the type of natural gas in the Basin) have been put in place. Riverkeeper has issued action alerts, engaged in press outreach, and made public appearances and statements on horizontal drilling and hydrofracking.

19. Riverkeeper has submitted extensive comments on the New York Department of Environmental Conservation's environmental impact statement on shale gas extraction, the draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (draft SGEIS), and on DRBC's Draft Natural Gas Regulations, as well as on EPA's draft plan to study the impacts of such development on drinking water. Riverkeeper has also, in collaboration with other environmental organizations, retained a number of consultants to prepare expert reports highlighting the inadequacy of New York's 2009 draft SGEIS on shale gas extraction.

20. Plaintiff the **Hudson Riverkeeper** is a full-time privately funded ombudsman who is responsible for the protection of the New York City Watershed, including Hudson River and its tributaries. The Hudson Riverkeeper, Paul Gallay, advocates for the protection of the New York City Watershed, including the portion in the Delaware River Basin. Mr. Gallay resides in Ossining, New York, and receives his drinking water from the New York City Watershed.

21. The Hudson Riverkeeper and Riverkeeper's members have an interest in determining how the individual and cumulative impacts of natural gas development will affect drinking water and recreation in New York and how the Draft Regulations, if finalized, will exacerbate, ameliorate, or otherwise regulate these effects. Defendants' failure to undertake an

environmental impact statement process under NEPA has harmed and will continue to harm these interests by depriving the Hudson Riverkeeper and Riverkeeper's members of this information and by depriving the Hudson Riverkeeper and Riverkeeper's members of the right to submit comments on an environmental impact statement to contribute to a fully informed environmental decision-making process on the Draft Regulations.

22. Plaintiff **National Parks Conservation Association** (NPCA) is a not-for-profit corporation domiciled in Washington D.C. NPCA has national headquarters in Washington, D.C., and twenty-three regional and field offices around the country including the Northeast Regional Office located in New York City.

23. Founded in 1919, NPCA is the leading voice of current and future generations of Americans in protecting and enhancing the National Park System. NPCA members care deeply for America's shared natural and cultural heritage that has been preserved by the National Park System and want future generations to inherit an even stronger and invigorated system of preserved lands. NPCA accomplishes its mission by promoting the protection of national park resources through lobbying campaigns and coordination with environmental groups, government agencies, and legislators, as well as, participation in the government agency decision-making process for actions potentially impacting natural resources.

24. NPCA works on projects that protect and enhance national parks, including national park properties in the Delaware River Basin, such as the Upper Delaware National Scenic and Recreational River, Middle Delaware National Scenic River, and the Delaware Water Gap National Recreational Area.

25. NPCA has over 330,000 members nationwide, more than 45,000 of whom live in New York, New Jersey, Pennsylvania or Delaware. Many of these members as well as others

residing in other states enjoy the open space, recreation, views and experiences available at the park properties in the Basin.

26. NPCA and its members participate in public processes relating to national park properties in the Basin and elsewhere. NPCA submitted comments to the DRBC on the proposed regulations at issue in this matter.

27. With 35 national parks within or near the Marcellus Shale formation, the threats posed by natural gas development to national treasures are significant. NPCA and its members will be adversely affected by any change in water quality and flow as well as any diminution in the Delaware River Basin watershed's ecological, aesthetic, recreational and other values resulting from the unlawful actions of Defendants challenged herein. NPCA brings this action on its own behalf and on behalf of its members, board, and staff.

28. Defendants' failure to comply with NEPA harms the interests of NPCA and its members as it interferes with their ability to accomplish their objectives and threatens the ecological health and accessibility of the watershed.

29. Defendant **Delaware River Basin Commission** is an agency and instrumentality created by the signatory parties to the Delaware River Basin Compact of 1961. The commission's members include the four governors, ex officio, of Delaware, New Jersey, New York, and Pennsylvania, ex officio, and the Division Engineer, North Atlantic Division, U.S. Army Corps of Engineers. The DRBC is charged with conserving and managing the water resources of the Delaware River and its watershed. The commission has legal authority over both water quality and water quantity-related issues throughout the basin. DRBC has jurisdiction by law under NEPA and is a federal agency for NEPA and other federal statutory purposes.

30. Defendant **Carol R. Collier** is the Executive Director of the Delaware River Basin Commission and is named in her official capacity.

31. Defendant **U.S. Army Corps of Engineers** is a federal agency within the Department of the Army with jurisdiction over the navigable waters within the Delaware River Basin pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401 et seq. and with permitting authority over dredging and filling navigable waters within the Delaware River Basin pursuant to the Clean Water Act, 33 U.S.C. § 1344. The Army Corps employs the Division Engineer, North Atlantic Division, as the ex officio federal member of DRBC pursuant to Section 5019(a) of the Water Resources Development Act of 2007, Public Law 110-114 (2007 WRDA). Under the 2007 WRDA, the Secretary of the Army “shall allocate funds to the Delaware River Basin Commission . . . to fulfill the equitable funding requirements” for the federal government under the Compact. Id., § 5019(b).

32. Defendant **Brigadier General Peter A. DeLuca** is the Division Engineer of the North Atlantic Division of the U.S. Army Corps of Engineers who currently serves on the DRBC as the federal member and is named in his official capacity. He participates in, and exercises decision-making authority over, actions proposed to be taken by DRBC. In this capacity, General DeLuca reports to, and represents, federal agencies, including the Army Corps, on DRBC matters.

JURISDICTION AND VENUE

33. This Court has subject matter jurisdiction over Plaintiffs’ claims against the DRBC and Carol Collier under 28 U.S.C. § 1331 (federal question jurisdiction), under 28 U.S.C. § 1361 (mandamus) and by virtue of the Delaware River Basin Compact, 75 Stat. 688, Pub. L. 87-328 (Sept. 27, 1961). Compact Article 15.1(p) reads in relevant part: “The United States

district courts shall have original jurisdiction of all cases or controversies arising under the Compact...”

34. This Court has subject matter jurisdiction over Plaintiffs’ claims against the U.S. Army Corps of Engineers and Brig. Gen. DeLuca under 28 U.S.C. § 1331 (federal question jurisdiction), under 28 U.S.C. § 1361 (mandamus), and under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

35. The Court may grant declaratory and injunctive relief as against the DRBC and the Army Corps pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 2202. The Court may also grant declaratory and injunctive relief against the Army Corps pursuant to 5 U.S.C. § 706.

36. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1) because it is the judicial district within which Defendant Brig. Gen. Peter DeLuca, Division Engineer, North Atlantic Division of the U.S. Army Corps of Engineers, is headquartered at Building 302, General Lee Avenue, Brooklyn, New York 11252.

37. Venue is also proper in this district pursuant to 28 U.S.C. § 1391(e)(2) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims against the U.S. Army Corps of Engineers, i.e., the decision not to comply with NEPA with respect to the Draft Regulations, likely took place in this office.

38. Venue is also proper in this district pursuant to 28 U.S.C. § 1391(e)(3) because one or more members of each Plaintiff organization resides in this district.

STATUTORY AND REGULATORY FRAMEWORK

The Delaware River Basin Compact and the Delaware River Basin Commission

39. Following the entry of a consent decree in New Jersey v. New York, 347 U.S. 995 (1954), the four states party to this water resources litigation and the federal government

negotiated the Delaware River Basin Compact (Compact). The Compact was entered into by President John F. Kennedy and the governors of New Jersey, New York, Delaware, and Pennsylvania in 1961 and created the Delaware River Basin Commission to conserve and manage the resources of the Delaware River under the Compact's terms.

40. The federal legislation ratifying and effectuating the Compact, Pub. L. 87-328, 75 Stat. 688 (1961) refers to the DRBC as a "federal agency," Compact, Article 15.1(o), Pub. L. 87-328, 75 Stat. 688, §15(o). The Compact exempts the DRBC from the application of only three enumerated federal laws, including the Federal Tort Claims Act, the Tucker Act, and the Administrative Procedure Act. Id. at Article 15.1(m).

41. The DRBC's procedural regulations are found in 18 C.F.R. Part 401, Rules of Practice and Procedure (RPP). 18 C.F.R. § 401.124, titled "Construction," provides: "This part is promulgated pursuant to section 14.2 of the Compact and shall be construed and applied subject to all of the terms and conditions of the Compact and of the provisions of section 15.1 of Pub. L. 87-328, 75 Stat. 688." Thus, the DRBC has stated that its regulations are to be construed and applied subject to the provisions of the federal effectuating statute rather than to the provisions of the respective effectuating statutes of the States parties.

42. The DRBC publishes notices of its meetings and rulemakings in the Federal Register. See, e.g., 76 Fed. Reg. 295 (Jan. 4, 2011) ("Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan To Provide for Regulation of Natural Gas Development Projects"). Upon information and belief, the DRBC does not publish notices of its meetings and rulemakings in any State bulletins nor are its regulations codified in any State regulations.

43. The DRBC's regulations are published in the Code of Federal Regulations at 18 C.F.R. Parts 401, 410, 415, 420, and 430 pursuant to the authority of 5 U.S.C. § 552(a) (part of the Administrative Procedure Act) and 1 CFR Part 51. See, e.g., 18 C.F.R. § 410.1(c). Copies are maintained at the federal National Archives, which maintains the Code of Federal Regulations and publishes the Federal Register in partnership with the Government Printing Office.

44. The DRBC's RPP Article 8, "Public Access to Records and Information," establishes that the DRBC is subject to the Freedom of Information Act, 5 U.S.C. § 552. The Freedom of Information Act was enacted and is codified as part of the APA, 5 U.S.C. Subchapter II, 5 U.S.C. §§ 551-559.

The DRBC's Regulatory Authority Over Natural Gas Development

45. In forming the Compact, the parties agreed that "the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin under a comprehensive multipurpose plan will bring the greatest benefits and produce the most efficient service in the public welfare." Compact, Whereas Clause.

46. The DRBC implements the Compact's directives and objectives and the Comprehensive Plan through the Water Code and the Administrative Manual: Rules of Practice and Procedure (RPP). To implement the Comprehensive Plan, the Commission annually adopts a Water Resources Program as required by Article 13, Section 13.2.

47. Article 14.2(a) empowers the DRBC to "make and enforce reasonable rules and regulations for the effectuation, application and enforcement of this compact . . . provided that any rule or regulation . . . shall be adopted only after a public hearing and shall not be effective unless and until filed in accordance with the law of the respective signatory parties applicable to administrative rules and regulations generally."

48. Article 13, Section 13.1 of the Compact provides for the development and adoption, and periodic review and revision, of a Comprehensive Plan “for the immediate and long range development and use of the water resources of the basin. The plan shall include all public and private projects and facilities which are required, in the judgment of the commission, for the optimum planning, development, conservation, utilization, management and control of the water resources of the basin to meet present and future needs . . .”

Article 3, Section 3.8 of the Delaware River Basin Compact requires that

No project 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, subject to the provisions of Sections 3.3 and 3.5. The Commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the Comprehensive Plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such Plan. The Commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the Commission hereunder shall be subject to judicial review in any court of competent jurisdiction.

See also 18 C.F.R. § 401.32.

49. The entire non-tidal Delaware River is protected by Special Protection Waters (SPW) anti-degradation regulations. This designation requires strict regulation to protect the water quality of all SPW waters, which are documented as “exceptional” through regular water quality testing by the DRBC. The agency must maintain this existing condition of high water quality so that there is “**no measurable change**” except towards natural conditions.

50. Water Code § 3.10.3 et seq. codifies the anti-degradation program of the DRBC’s Special Protection Waters program. See 18 C.F.R. Part 410; see also Water Code §2.200.1 (“[t]he quality of Basin waters shall be maintained in a safe and satisfactory condition for...wildlife, fish and other aquatic life”); Water Code §2.20.2 (“[t]he underground water-

bearing formations of the Basin, their waters, storage capacity, recharge areas, and ability to convey water shall be preserved and protected”); Water Code §2.20.5 (“[n]o underground waters, or surface waters which are or may be the sources of replenishment thereof, shall be polluted in violation of water quality standards duly promulgated by the Commission or any of the signatory parties”); Water Code §3.40.4.B (“[i]t is the policy of the Commission to prevent degradation of ground water quality....No quality change will be considered which, in the judgment of the Commission, may be injurious to any designated present or future ground or surface water use”).

National Environmental Policy Act

51. The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., was enacted as our nation’s basic national charter for the protection of the environment. Congress’ stated purpose was to promote “productive harmony” between humankind and nature. 42 U.S.C. § 4331(a)(1).

52. To that end, NEPA obligates every federal agency to consider all significant aspects of the environmental impacts of its major actions through a thorough review process that not only informs the agency’s decision-making process and the general public, but is also informed in turn by comments from other agencies, experts, concerned parties, and the public.

53. The Council on Environmental Quality (CEQ) is an agency within the Executive Office of the President created under NEPA to promote the statute’s purposes, including ensuring that the programs and activities of the federal government are informed by environmental considerations. 42 U.S.C. § 4344. The CEQ has promulgated regulations implementing NEPA that are binding on all federal agencies pursuant to Executive Order No. 11991 (May 24, 1977). 40 C.F.R. Parts 1500-1508.

54. To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a “detailed statement” regarding all “major Federal actions significantly affecting the quality of the human environment . . .” 42 U.S.C. § 4332(2)(C).

55. This detailed statement must be “include[d] in every recommendation or report on proposals for . . . major Federal actions.” Id. Copies of the statement together with the comments and views of the appropriate Federal, State, and local agencies with the authority to develop and enforce environmental standards must be made available to the President, the CEQ, and to the public and must “accompany the proposal through the existing agency review processes.” Id.

56. This statement, known as an Environmental Impact Statement (EIS), must describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) any “alternatives to the proposed action,” and (4) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(2)(C). By regulation, environmental impacts include direct, indirect, and cumulative effects of the action, including related past, present, and/or reasonably foreseeable future actions. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8.

57. The CEQ NEPA regulations mandate that an agency must comply with NEPA “at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. § 1501.2. They further require that

[a]n agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important

contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.

40 C.F.R. § 1502.5.

58. The CEQ regulations define “proposal” as

that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed . . . so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal.

40 C.F.R. § 1508.23.

59. “Major Federal actions” requiring preparation of an EIS include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies, as well as new agency rules, regulations, plans, policies, or procedures. 40 C.F.R. § 1508.18(a).

60. An agency may begin the NEPA process by preparing an environmental assessment (EA) to determine whether an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9(b). The EA must identify all reasonably foreseeable impacts, analyze their significance, and address alternatives. 40 C.F.R. §§ 1508.8, 1508.9, 1508.27.

61. If, after completing an EA, the agency determines that the proposed action is not likely to significantly affect the environment, the agency may issue a Finding of No Significant Impact (FONSI) instead of proceeding to complete an EIS. 40 C.F.R. § 1501.4(e).

62. An EIS must address the environmental impacts of a proposed action, identify “alternatives to the proposed action,” and “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented,” 42 U.S.C. § 4332(2)(C). In the alternatives analysis, the EIS must “present the environmental impacts of the

proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14.

63. NEPA implementing regulations also require that the EIS include mitigation measures to mitigate unavoidable environmental impacts. Id., §§ 1502.14(f), 1502.16(h).

64. Where multiple agencies have proposed or are involved in the same action, or are “involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity,” one of those agencies “shall supervise the preparation of an environmental impact statement” as “lead agency.” 40 C.F.R. § 1501.5(a).

65. The “lead” agency preparing the draft EIS must provide notice to, and make that document available for comment by, other involved federal agencies, state and local agencies, and the public. 40 C.F.R. §§ 1503.1, 1506.6. The lead agency is also responsible for evaluation and response to comments on a draft EIS. Id., § 1503.4. In response to comments, an agency may amend the proposed action or evaluate other alternatives not initially included in the EIS. Id. The final decision must be based on a public record of decision that summarizes the decision and determines that “all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” Id., § 1505.2(c). 40 C.F.R. §§ 1501.5(a), 1501.6.

66. If the lead agency so requests, “any other Federal agency which has jurisdiction by law shall be a cooperating agency.” In addition, upon request of the lead agency, “any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement” may become a “cooperating agency.” 40 C.F.R. § 1501.6. Non-lead federal agencies are entitled to reasonably rely on the EIS prepared by the lead agency.

The CEQ NEPA regulations define “jurisdiction by law” to mean “agency authority to approve, veto, or finance all or part of the proposal.” 40 C.F.R. § 1508.15. “Special expertise” “means statutory responsibility, agency mission, or related program experience.” 40 C.F.R. § 1508.26.

The DRBC and NEPA

67. On March 5, 1970, President Nixon signed Executive Order 11514 (35 Fed. Reg. 4247), directing the heads of Federal agencies to proceed with implementing NEPA’s environmental impact statement requirements and authorizing CEQ to oversee federal agency compliance with NEPA and to issue guidelines on implementing the statute’s procedural provisions. CEQ issued Interim Guidelines in April 1970. 35 Fed. Reg. 7391 (April 30, 1970). In April 1971, the CEQ published its revised Guidelines on Statements on Proposed Federal Actions Affecting the Environment. 36 Fed. Reg. 7724 (April 23, 1971).

68. In October 1970, the DRBC published its first set of proposed regulations to implement NEPA in the Federal Register, 35 Fed. Reg. 16,487 (Oct. 22, 1970). By resolution dated November 24, 1970, Resolution No. 70-23, the DRBC voted to amend the RPP to incorporate the proposed regulations, stating: “WHEREAS, the National Environmental Policy Act (P.L. 91-190) requires an environmental statement to accompany certain projects, and it is the purpose of the Commission to implement the Federal statutory requirement with appropriate regulations.”

69. After a hearing on July 28, 1971, see 36 Fed. Reg. 13,051 (July 13, 1971), the DRBC published the final version of its first set of NEPA regulations in October 1971. See 36 Fed. Reg. 20,381 (Oct. 21, 1971). The DRBC’s first set of NEPA regulations, codified as RPP 2-3.5.2, established categories of actions requiring environmental reports from project applicants

“in compliance with the provisions of the National Environmental Policy Act (Public Law 91-190).” 36 Fed. Reg. at 20,381-82.

70. The DRBC’s first set of NEPA regulations required the DRBC’s Executive Director to “prepare a draft environmental statement based upon the applicant’s environmental report and staff analysis of the proposed action.” Id. at 20,382. The Executive Director was required to distribute this draft environmental statement to the CEQ and other interested public and private agencies and organizations for comment. Id. The Executive Director was required to schedule the draft environmental statement for a public hearing by the Commission and make the statement available for public review and comment. After receiving comments, the Executive Director was required to prepare a final environmental statement and forward it to the CEQ and other agencies.

71. With respect to inter-agency NEPA coordination, the first set of DRBC NEPA regulations stated:

(k) When any project listed in section (a) hereof is subject to the requirement of an environmental impact statement to be prepared by another Federal agency, the Executive Director will consult with such agency and establish appropriate lead agency arrangements that will meet the requirements of the National Environmental Policy Act to avoid duplication.

Id. (citing RPP 2-3.5.2(k)) (emphasis added).

72. In 1973, the CEQ issued updated guidelines for federal agencies on preparing environmental impact statements. 38 Fed. Reg. 20,550 (Aug. 1, 1973). These guidelines identified the DRBC under Appendix II, Areas of Environmental Impact and Federal Agencies and Federal State Agencies With Jurisdiction by Law or Special Expertise to Comment Thereon. Id. at 20,557. They also identified the DRBC under Appendix III, Offices Within Federal Agencies and Federal-State Agencies for Information Regarding the Agencies’ NEPA Activities

And For Receiving Other Agencies' Impact Statements For Which Comments Are Requested. Id. at 20,559.

73. In October 1973, the DRBC published a notice of public hearing and announced its proposal to delete RPP Section 2-3.5.2 containing the requirements for EIS preparation and substitute an entire new section on EIS preparation. 38 Fed. Reg. 28,074 (Oct. 16, 1973).

74. On December 12, 1973, the DRBC passed Resolution No. 73-15 to amend the RPP to repeal RPP Section 2-3.5.2 and insert the new Article 4 on preparation of environmental impact statements, stating "WHEREAS, the Commission has deemed it necessary and desirable to revise and update its Rules of Practice and Procedure to conform with the revised guidelines promulgated by the Council on Environmental Quality on August 1, 1973"

75. The notice stated: "The proposed new regulation reflects Commission experience gained in preparing and reviewing environmental impact statements under the National Environmental Policy Act, and is in response to revised guidelines issued by the Council on Environmental Quality on August 1, 1973." Id.

76. The DRBC's second and more detailed set of NEPA regulations were published in the Federal Register in July 1974, and, pursuant to the DRBC's rulemaking authority under Article 14.2 of the Compact, effectuated the revisions to the RPP as embodied in 18 C.F.R. Part 401 Subpart D. 39 Fed. Reg. 25,473 at 25,473-74. (July 11, 1974).

77. These regulations stated in the Purpose section NEPA's requirements that all Federal agencies prepare environmental impact statements on all major Federal actions significantly affecting the quality of the human environment. Subpart D, § 401.51(a) (printed at 39 Fed. Reg. 25,749). These regulations further stated the agency's policy that:

[the DRBC] will, in consultation with other appropriate Federal, State and local agencies and the public, assess the environmental impacts of any proposed action

concurrent with initial technical and economic studies in order that adverse effects will be avoided, and environmental quality will be maintained, restored, or enhanced, to the fullest extent practicable. In particular, alternative actions that will minimize adverse impacts will be explored and both the long and short-range implications to man, his physical and social surroundings, and to nature, will be evaluated in order to avoid, to the fullest extent practicable, undesirable consequences as they relate to the quality of the human environment. This assessment shall take place as early as possible and in all cases prior to any decision that may significantly affect the environment and, where required, a draft environmental impact statement will be prepared and circulated in accordance with the regulations in this part.

Subpart D, § 401.51(b) (printed at 39 Fed. Reg. 25,749).

78. In 1980, via Resolution No. 80-11 (July 23, 1980), the DRBC suspended Article 4 of the RPP, 18 C.F.R. Part 401 Subpart D, governing environmental reviews and environmental impact statements. The DRBC implemented the suspension because the signatory parties, including the U.S. government, had not fulfilled their funding obligations to the DRBC. The DRBC concluded that it did “not have available to it sufficient financial resources to permit the continuation of this program at the present time and to carry out its responsibilities mandated by the Compact.” Therefore, it stated, “an appropriate agency of the executive branch of the federal government can assume the ‘lead agency’ and other environmental assessment functions for significant projects within the basin involving federal loans, grants or permits.” Accordingly, it stated: “The Commission shall not act as lead agency for environmental assessments and the preparation of environmental impact statements unless funding therefor is expressly provided by Commission action or otherwise approved by the Commission.”

79. Neither the Resolution nor any rulemaking carried out pursuant to this Resolution identify a legal basis or refer to statutory authority for the DRBC’s decision to rescind its NEPA regulations and refuse to comply with NEPA’s procedural and substantive obligations.

80. The current CEQ NEPA regulations require agencies to have an individual who is responsible for overall NEPA compliance and oversight and for coordination with the CEQ on behalf of the agency. 40 C.F.R. § 1507.2. CEQ NEPA regulations also require agencies to request the participation of other Federal agencies with jurisdiction by law or special expertise with respect to any environmental effects in the NEPA process and to provide copies of a draft EIS to other concerned agencies for review and comment. 40 C.F.R. §§ 1501.5(a), 1501.6(a), 1501.7(a), 1503.1.

81. To assist Federal agencies in identifying NEPA contacts at other agencies and other agencies with jurisdiction by law and/or special expertise in specific environmental issues, the CEQ published Appendices I through III to its NEPA regulations. See 49 Fed. Reg. 49,750 (Dec. 21, 1984). These Appendices, published in 1984 after the DRBC suspended its compliance with NEPA through Resolution No. 80-11 in 1980, include the DRBC on the list of Federal and Federal-State agencies with NEPA responsibilities.

82. The DRBC is identified in Appendix I, Federal and Federal-State Agency NEPA Contacts, as an agency with responsibility for NEPA compliance and coordination with CEQ. Id. at 49,573 (under Independent Agencies). The DRBC is identified in Appendix II, Federal and Federal-State Agencies With Jurisdiction by Law or Special Expertise on Environmental Quality Issues as having jurisdiction by law over “review and approval of water resource projects” and as having special expertise on “management of water resources in the Delaware River Basin.” Id. at 49,574. The DRBC’s contact information is given in Appendix III, Federal and Federal-State Agency Offices for Receiving and Commenting on Other Agencies’ Environmental Documents. Id. at 49,781.

83. The DRBC undertook no further rulemaking activity with respect to RPP Article 4, 18 C.F.R. Part 401 Subpart D, until 1997. At that time, pursuant to a general review and revision of the RPP, the DRBC proposed to delete Article 4 as obsolete: "Since the adoption of [Resolution No. 80-11] in 1980, the Commission has not conducted environmental assessments pursuant to DRBC's rules. . . . When Resolution No. 80-11 to suspend was adopted, the Resolution would have permitted reinstatement of environmental reviews if 'financial resources are developed.' The experiences of the last 17 years, and the financial constraints that have developed recently, make it clear that Federal or other funding is not likely to be available for the foreseeable future." 62 Fed. Reg. 45,766 (Aug. 29, 1997). The final regulations deleting RPP Article 4 from 18 C.F.R. Part 401 were published in December 1997 with no further discussion of the issue. 62 Fed. Reg. 64,154 (Dec. 4, 1997).

STATEMENT OF FACTS

84. Natural gas is bound in geologic formations thousands of feet underground in shale formations such as the Marcellus Shale, which underlies approximately thirty-six percent of the Delaware River Basin. It is primarily found one mile or more beneath the earth's surface.

85. Production from the Marcellus Shale began during 2005, from a well in Pennsylvania. By 2007, production from unconventional sources (including shale gas and coalbed methane) reached 8.7 tcf/yr, an increase of nearly sixty-five percent over 1998 rates.

86. The DRBC estimates that between 15,000 and 18,000 natural gas wells would be developed within the Basin and an average of 5 million gallons of water would be required per natural gas well constructed.

87. Exploitation of the Marcellus Shale has necessitated the use of alternate technologies, which in turn present an array of environmental concerns not posed by

conventional drilling. Shale gas development utilizes a combination of horizontal drilling and hydrofracking technology. To access and extract this gas from deep shale formations, vertical wells are bored to depths of thousands of feet below the earth's surface. "Horizontal drilling" refers to a technique where a well is first drilled vertically down to the appropriate depth and then horizontally through the shale deposit for several thousand feet from the terminus of the vertical well bore to maximize access to the shale layer.

88. Horizontal drilling, by increasing the degree of contact between the well and the shale formation, allows for greater gas recovery than would vertical drilling alone. Because shale formations are generally non-porous, hydrofracking is utilized to induce fractures in the shale deposit and increase gas flow. These fissures are created by pumping a fluid and a propping material (to prop the fractures open) down the well under high pressure. This involves the injection into the well bore of millions of gallons of water mixed with chemical agents and proppants such as sand or silica at high pressure to fracture the rock and release the natural gas.

89. Hydrofracking allows the extraction of natural gas from "low permeability" geologic formations, such as the Marcellus Shale, from which natural gas could not be economically extracted using conventional technologies. While horizontal drilling and hydrofracking are not new technologies when conducted separately, only recently have they been implemented together on a large scale to extract natural gas from low permeability formations.

90. The consumptive use of water required by these technologies, averaging between 4 and 5 million gallons per well, will permanently deplete the Delaware River Basin waters and its ecosystems, including the clean drinking water for more than fifteen million citizens of New York, New Jersey, Pennsylvania and Delaware who rely on access to these freshwater resources.

91. On the surface, the construction and use of each well pad, as well as the construction and use of associated pits, roadways, pipelines and other related structures and land use changes, result in soil disturbances and compaction, erosion and sediment pollution of waterbodies, nonpoint and point source pollution, stormwater runoff, and loss of forest habitat and species as well as natural vegetative communities. All of these impacts negatively affect the water quality, water quantity and flow regimes of the streams and rivers of the Basin as well as degrade the Basin's ecosystems.

92. The drilling of vertical wells to thousands of feet into the earth and horizontal wells thousands of feet in length, using either air or mud drilling technologies, results in contamination of ground and surface waters and air pollution through a number of mechanisms.

93. Toxic chemicals are used in drilling and completing wells as lubricants and biocides, and for many other purposes, and these chemicals can escape and contaminate the environment. The chemicals used in drilling and fracturing include known toxics and carcinogens including aromatic hydrocarbons benzene, toluene, ethylbenzene, and xylene (often referred to as BTEX), microbiocides, glycols, glycol ethers, petroleum products and other, undisclosed additives. In addition, naturally occurring radioactive materials, salty brines, biological agents, hydrocarbons, heavy metals, dangerous gases and other chemical hazards occur underground and are accessed by drilling activities. The wastewater recovered from hydrofracking operations during the drilling and production phases must be properly captured, stored and treated to avoid the contamination of air as well as ground and surface waters.

94. Natural gas wells produce flowback of liquids and/or gases from the penetrated geologic formations, many of which, whether added to fracking fluids or naturally occurring, are chemically hazardous. Defects in the cementing and casing in the upper portions of the well

closest to the surface may result in flowback fluids and/or gases such as methane intersecting with and contaminating freshwater aquifers that lie near the surface.

95. The drill cuttings themselves contain all the chemicals used in the drilling process as well as whatever chemical hazards are encountered by the drill bore in the penetrated geologic formations. These cuttings are brought to the surface and are permitted by state regulation to be buried on-site.

96. The siting of natural gas wells is often determinative of their environmental impacts over many years, especially if they are sited in environmentally sensitive areas. Forest fragmentation, degradation of high-quality streams, and other alterations of land surfaces all result in degradation of water quality, ecosystems, and habitats.

97. Drilling for natural gas also adversely affects air quality. The equipment and processes used for drilling, completion, and production of natural gas are sources of air pollutants such as volatile organic compounds (VOCs), nitrogen oxides (NO_x), carbon monoxide (CO), particulate matter (PM), and a variety of air toxics, including benzene (a known human carcinogen), toluene, and hydrogen sulfide.

98. Sources of emissions associated with natural gas development include: (1) combustion from engines, compressors, line heaters, and flares during exploration, drilling, and production; (2) venting and flaring of gas constituents; (3) emissions from heavy-duty support trucks; and (4) fugitive emissions from gas wells and associated gas pipelines and other distribution facilities.

Delaware River Basin Resources At Risk

99. The Delaware is fed by 216 tributaries, the largest being the Schuylkill and Lehigh Rivers in Pennsylvania. In all, the Basin contains 13,539 square miles. Over 15 million

people, representing approximately five percent of the nation's population, rely on the water in the Delaware River Basin for drinking, agricultural, and industrial use. This includes approximately seven million people in New York and northern New Jersey who live outside the Basin, but receive their drinking water from this region.

100. Three reaches of the Delaware River in New York are federally designated "Scenic and Recreational River" areas under the federal Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq. Among its unique features, the Upper Delaware River provides winter habitat for more bald eagles than any other river in northeastern United States. The Basin is home to a variety of endangered and threatened species protected under federal and/or state laws.

101. The Basin is a prized recreational and commercial resource. Many thousands of people enjoy fishing and recreational boating in the Delaware River and its tributaries. Many thousands more depend on the clean waters of the Delaware River for their commercial livelihoods based on fishing for fish and shellfish, the extraordinary birdwatching opportunities in the Delaware Bay along the Atlantic Flyway, tourism, and water-based recreation.

102. The Delaware Estuary, which consists of the Delaware Bay and Tidal Reach of the Delaware River, is included in the National Estuary Program, a project set up to protect estuarine systems of national significance.

New York Drinking Water Resources At Risk

103. The New York City Department of Environmental Protection (NYCDEP) provides clean, unfiltered drinking water to nine million New York residents each day, most of which is drawn from the Delaware sub-watershed of the New York City Watershed which is located within the Basin. Approximately 40 percent of the Delaware River Basin area in New York is part of the New York City Watershed.

104. When drinking water is obtained from surface waters (such as rivers), it is generally “filtered” to remove contaminants. Water obtained from the New York City Watershed, including the Delaware sub-watershed is not filtered. Rather, the water is disinfected and distributed by a system of aqueducts, tunnels and pipes to citizens in New York City and upstate communities. Since 1993, the United States Environmental Protection Agency has granted New York City a Filtration Avoidance Determination (FAD). In accordance with the FAD, rather than filtering its water, New York City has invested in pollution prevention efforts to protect the New York City Watershed and ensure safe drinking water.

105. Authorization of the Draft Regulations in the New York City Watershed portion of the Basin could pose a significant threat to New York’s clean unfiltered drinking water supply. Natural gas drilling presents the risk of increased stormwater runoff, surface water contamination, and water withdrawals. In addition, the mixture of water, sand and chemicals injected in the well provides large quantities of wastewater, mishandling of which can lead to potential spills and leaks at the drilling site and contamination from improper disposal.

106. The Basin is also one of New York State’s most valuable recreational resources and the water resources of the Basin in New York State are critical to agricultural, industrial, and other commercial interests. The Delaware River and its tributaries are among New York’s most prized cold water trout fisheries.

Known Risks of Gas Well Development

107. Gas well development in Pennsylvania is already proceeding on a large scale outside the Basin and will likely do so within the Basin upon finalization of the Draft Regulations and the DRBC’s issuance of natural gas development permits under those regulations. Development of gas wells in Pennsylvania within the Basin poses risks of unplanned

and unexpected spills, discharges of pollutants, and other accidents that would likely contaminate the surface waters of the Upper Delaware River, its tributaries, and/or the groundwaters of the Basin. This risks harm to the health, safety and welfare of Pennsylvania, New York, and New Jersey residents who use the River for contact recreation (swimming, boating, and fishing) and receive their drinking water from the Basin.

108. From January 1, 2008 through August 20, 2010, natural gas development in Pennsylvania outside of the Basin resulted in PADEP's issuance of 1,614 violations to drilling operators (not including traffic citations or written warnings), of which 1,056 were judged as having "the most potential for direct impact on the environment."¹

109. Among the several major pollution incidents in Pennsylvania, in 2008, commercial and publicly owned treatment works discharged inadequately treated wastewater from natural gas wells in the Monongahela River, impairing the drinking water supply for hundreds of thousands of people over a period of months.

110. On April 19, 2011, Chesapeake Energy Corporation, a national leader in natural gas development, experienced a blowout of a natural gas well in Bradford County, Pennsylvania, during the hydrofracking process. As a result of the blowout, thousands of gallons of water containing fracking chemicals were discharged into a nearby creek, a tributary to the Susquehanna River, which provides drinking water to over six million people. The blowout forced seven families to be evacuated from the area.

111. These incidents have continued to occur. On May 17, 2011, Pennsylvania's state environmental protection agency fined Chesapeake Energy \$1.1 million dollars for contaminating well water and causing a tank fire during well drilling operations outside the

¹ Pennsylvania Land Trust Association (October 1, 2010), <http://www.conserveland.org/violationsrpt>.

Basin.² Chesapeake's improper casing and cementing of wells allowed natural gas to seep into groundwater, contaminating the water supply of 16 families.

112. Natural gas development in Pennsylvania and in other states has already had multiple adverse environmental, public health and human safety impacts. In addition to threatening drinking water supplies and clean water for recreation, it has had significant air and climate impacts. The equipment and processes used in the natural gas drilling, completion, and production process result in soil, water, and air pollution. In addition, methane, a greenhouse gas significantly more potent than carbon dioxide, is released at several points in the natural gas drilling, production, and transmission process. A recent Cornell study determined that the greenhouse gas impacts from natural gas derived from sources like the Marcellus Shale are likely to be greater than those associated with oil and coal.³

113. Natural gas development has also resulted in adverse impacts on local communities. Each hydrofracking process entails 600-800 truck trips to deliver water and chemicals to the well pad, as well as several hundred trips to haul away contaminated "produced" water and fracking fluids. These heavy trucks damage local roads, causing increased erosion and sedimentation to nearby streams as well as impeding local traffic and forcing municipalities to expend their limited resources on costly road repairs. Fossil fuel development also permanently alters the landscape and has long-term environmental impacts that continue to occur long after the extraction is complete. New York alone has tens of thousands of

²<http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=17405&typeid=1>
<http://www.businessweek.com/ap/financialnews/D9N9C7981.htm>.

³ Robert W. Howarth, Renee Santoro, Anthony Ingraffea, *Methane and the greenhouse-gas footprint of natural gas from shale formations*, Climatic Change (2011).

decommissioned uncapped oil wells, while a large percentage of Pennsylvania's streams are still poisoned by mine drainage from mines abandoned a century ago.

Defendants' Actions on Draft Natural Gas Regulations

114. On May 19, 2009, Defendant Carol Collier, in her official capacity as Executive Director of the DRBC, issued her "Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations with the Drainage Area of Special Protection Waters" (EDD).

115. In the EDD, Ms. Collier found that shale formations targeted for horizontal drilling and hydrofracking are within the drainage area to "Special Protection Waters" to the Delaware River Basin and accordingly, "as a result of water withdrawals, wastewater disposal and other activities, natural gas extraction projects in these shale formations may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical, or hydrological characteristics."

116. Citing to Section 2.3.5B.18 of the DRBC's Rules of Practice and Procedure, Ms. Collier notified natural gas extraction project sponsors that "they may not commence any natural gas extraction project located in shale formations within the drainage area of Special Protection Waters without first applying for and obtaining Commission approval." The EDD defined "project" to include "the drilling pad upon which a well intended for eventual production is located, all appurtenant facilities and activities related thereto and all locations of water withdrawals used or to be used to supply water to the project."

117. DRBC has articulated three specific concerns regarding hydrofracking in the Marcellus Shale. First, that "gas drilling projects in the Marcellus Shale or other formations may have a substantial effect on the water resources of the basin by reducing the flow in streams

and/or aquifers used to supply the significant amounts of fresh water needed in the natural gas mining process.” Second, that “on-site drilling operations may potentially add, discharge or cause the release of pollutants into the ground water or surface water,” and third, that “the recovered “frac water” must be treated and disposed of properly.”⁴

118. At its public meeting on May 5, 2010, the members of the DRBC unanimously passed a resolution directing commission staff to draft regulations for natural gas development projects in shale formations in the Delaware River Basin. The resolution also called for DRBC staff to postpone action on all shale gas well “dockets” under the DRBC’s jurisdiction until the Draft Regulations are adopted, essentially enacting a moratorium on natural gas development in the Basin.

119. On May 5, 2010, Lt. Colonel Thomas J. Tickner of the Army Corps, predecessor to Defendant Brig. Gen. DeLuca as the federal member of the DRBC, approved commencement of the rulemaking for the Draft Regulations by voting to have the DRBC develop those regulations in draft form and make them available for public comment.

120. The DRBC’s Water Resources Program FY2010-2015 (WR Program) calls for the Commission to “Perform Cumulative Impact Analysis on water supply 2011-2012, funding permitting” under its Natural Gas Development regulation program.

121. Neither at the time the Draft Regulations were proposed to be developed nor at any time subsequent have any of the Defendants prepared an environmental assessment, an environmental impact statement or taken any other steps required by NEPA.

122. On June 14, 2010, Ms. Collier supplemented her May 19, 2009 EDD to include a prohibition on natural gas exploratory wells pending adoption of the Draft Regulations, with the

⁴ <http://www.state.nj.us/drbc/naturalgas.htm>

exception of certain exploratory wells, which DRBC “grandfathered” and thereby exempted from prospective regulatory oversight.

123. On June 2, 2010, the national environmental group American Rivers designated the Upper Delaware River as the nation’s most endangered river because “this clean water source is threatened by natural gas activities in the Marcellus Shale.”⁵

124. In response to that designation, the DRBC issued a statement acknowledging the significant adverse cumulative environmental impacts within the Basin:

The collective effects of the thousands of wells and supporting facilities that are projected in the basin pose potentially significant adverse effects on the surface water and groundwater of the basin . . . There are also impacts to the land which can affect water resources. The headwaters region where gas drilling activities would be located is the most sensitive and vulnerable area of any watershed. Over 80 percent of the DRB headwaters area is covered with forests that are critical to the production and maintenance of water resources. One big concern is the effect of forest fragmentation on our waters.⁶

125. The DRBC has adopted an anti-degradation policy which states that no change will be considered in the Basin which would be “injurious to any designated present or future use” of interstate waters. DRBC Water Quality Regulation 3.10.3(A)(1).

126. At its December 8, 2010 meeting, the DRBC approved the release of draft regulations for natural gas development in the Basin in a 4-1 vote. The New York representative to the DRBC opposed the release of the regulations. Despite the fact that neither Defendant Army Corps nor any other agency had adequately reviewed the action under NEPA, the Army Corps, through Defendant Brig. Gen. DeLuca, voted to approve the release of the regulations.

⁵ American Rivers, *America’s Most Endangered Rivers*, 2010 Edition, <http://www.americanrivers.org/assets/pdfs/mer-2010/americas-most-endangered-rivers-2010.pdf>

⁶ Statement by the Delaware River Basin Commission (DRBC) on the Upper Delaware River Being Named to “America’s Most Endangered Rivers” List, June 2, 2010, http://www.state.nj.us/drbc/DRBCstatement_EndangeredRivers_6-2-2010.pdf

127. On December 9, 2010, the DRBC published the Draft Regulations in draft form. On January 4, 2011, a notice of the issuance of the Draft Regulations was published in the Federal Register. 76 Fed. Reg. 295 (Jan. 4, 2011).

128. The proposed regulations are intended to implement sections 3.3, 3.6(b), 3.8, 4.1, 5.2, 7.1, 13.1 and 14.2(a) of the Delaware River Basin Compact and will have “a substantial effect on the water resources of the Basin.” Pub. L. 87-328, 75 Stat. 688, §3.8 (1961).

129. If and when the DRBC promulgates final regulations on natural gas development in the Basin, these regulations will be codified as a new Article in the Water Code and Administrative Manual Part III -- Water Quality Regulations, currently codified at 18 C.F.R. Part 410.

130. The DRBC accepted written comments on the Draft Regulations until April 15, 2011.

131. On April 15, 2011, DRN and NPCA submitted comments and expert reports on the Draft Regulations. DRN and NPCA urged the DRBC to withdraw the Regulations and complete a comprehensive environmental and cumulative impact analyses and assemble the scientific data necessary to support a comprehensive and effective rule-making.

132. On April 15, 2011, Riverkeeper submitted comments on the Draft Regulations. Like DRN, Riverkeeper urged DRBC to suspend its current rule-making to afford itself the time to proceed with its own comprehensive environmental impact analyses.

133. Although the DRBC found that natural gas development in the Basin poses potentially significant adverse impacts to Basin waters, it has refused to comply with NEPA by preparing an EIS on the Draft Regulations, in accordance with its 1997 decision to rescind its NEPA implementing regulations. Nor has it conducted any comprehensive environmental

analysis of the indirect, direct, or cumulative impacts of natural gas development on the water resources or ecosystems of the Basin.

134. On April 18, 2011, the Attorney General of the State of New York, Eric T. Schneiderman, wrote to Defendant Brig. Gen. DeLuca, with a copy to other federal agencies involved in water resource management within the Basin and DRBC, to request that DRBC and the Army Corps prepare a draft EIS before finalizing the Draft Regulations to comply with NEPA. On May 24, 2011, General DeLuca responded to Attorney General Schneiderman's letter stating that the involved federal agencies would not undertake environmental review of the Draft Regulations.

135. On May 31, 2011, the State of New York filed suit against the Army Corps and several other federal agencies involved in water, land, or resource management within the Basin in the United States District Court for the Eastern District of New York for violating NEPA by failing to prepare an EIS for the Draft Regulations.

136. The cumulative, Basin-wide impacts of natural gas development and hydraulic fracturing in the Delaware River Watershed are unknown and have not been studied or modeled by the DRBC, the Army Corps, or any other agency. Nor has the DRBC, the Army Corps, or any other agency proposed and discussed a comprehensive range of mitigation measures or alternatives to the Draft Regulations.

137. The individual and cumulative impacts to the environmental resources of the Basin from natural gas drilling are likely to adversely affect Plaintiffs' extensive interests in the aesthetic, commercial, professional, ecological and recreational opportunities in the Delaware River, its tributaries and the Basin as well as adversely affect their sources of clean, safe drinking water. Defendants' failure to conduct a thorough NEPA analysis of these impacts has harmed

and will continue to harm Plaintiffs' interests by depriving them of their procedural rights to be informed of and in turn to comment upon Defendants' major federal action in developing, proposing, and working to finalize regulations permitting natural gas development in the Delaware River Basin.

FIRST CLAIM FOR RELIEF

(Against Defendants DRBC and Carol Collier)

138. Plaintiffs hereby reallege and incorporate by reference as if fully set out herein the allegations in paragraphs 1 through 137.

139. Defendant DRBC is a federal agency subject to NEPA. Carol Collier is the Executive Director of the DRBC.

140. DRBC has the authority to develop and implement regulations under its Compact and has jurisdiction by law over the development of natural gas in the Delaware River Basin. The DRBC is a federal agency that has drafted and will promulgate these regulations and will be responsible for implementing them.

141. The issuance of the Draft Regulations by the DRBC authorizing natural gas development within the Basin under the Compact is a "major federal action" within the meaning of NEPA and its implementing regulations.

142. Natural gas development within the Basin that will be permitted and regulated by the DRBC will have significant effects on the quality of the human environment within the meaning of NEPA and its implementing regulations.

143. DRBC has recognized its own legal obligations as a federal agency to issue environmental impact statements on its major actions significantly affecting the quality of the

human environment and has never provided a lawful basis through a rulemaking for its refusal to comply with NEPA.

144. DRBC has jurisdiction by law over natural gas development within the meaning of the CEQ NEPA regulations because it has the authority to approve the Draft Regulations and to take measures to implement them under the Compact, Water Code, and RPP. DRBC also has special expertise on the effects of natural gas development on the water resources of the Delaware River Basin within the meaning of the CEQ NEPA regulations.

145. DRBC has failed to undertake any environmental impact statement to accompany a report or recommendation on the Draft Regulations as required by NEPA. DRBC's failure to undertake the NEPA process with respect to the Draft Regulations violates NEPA's statutory and regulatory requirements.

146. By approving commencement of this federal action, commencing it, and implementing measures to carry it out without a NEPA analysis, Defendants DRBC and Carol Collier have violated, and continue to be in violation of, NEPA's implementing regulations which requires the DRBC to: (i) perform environmental review at the "earliest possible time" in the decision-making process (40 C.F.R. § 1501.2); (ii) "commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal" and see to it that "the draft EIS should normally accompany the proposed rule" (*Id.*, §§ 1502.5; 1502.5(d)); and (iii) "integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." (*Id.*, § 1500.2(c)).

147. Defendants DRBC and Collier have limited the choice of reasonable alternatives, and risk causing adverse environmental impacts, in violation of 40 C.F.R. § 1506.1(a), by engaging in conduct to carry out the federal action without complying with NEPA.

148. Defendants DRBC and Collier have a mandatory, non-discretionary duty to comply with NEPA's statutory and regulatory requirements with respect to the Draft Regulations. Defendants have failed to fulfill their mandatory, non-discretionary duties under NEPA.

149. Plaintiff organizations' missions include protecting the resources of the Delaware River Basin through educating their members and the general public on the consequences of government action or inaction for these resources. Plaintiff organizations' members rely on the resources of the Delaware River Basin for aesthetic, professional, commercial, scientific, and recreational interests as well as for drinking water. Defendants DRBC and Colliers' failure to undertake their mandatory, non-discretionary duty to perform a NEPA analysis on the Draft Regulations has denied Plaintiffs of the right to understand the impacts of natural gas development on these resources, to educate their members on these impacts, to comment and testify on the likely impacts of the Draft Regulations, and to suggest what revisions to the Draft Regulations are needed to protect these resources.

150. Defendant DRBC's and Defendant Collier's failure to comply with NEPA with respect to the Draft Regulations has harmed and will continue to harm Plaintiffs' interests unless this Court grants the relief requested herein.

SECOND CLAIM FOR RELIEF

(Against Army Corps of Engineers and Brig. Gen. DeLuca)

151. Plaintiffs hereby reallege and incorporate by reference as if fully set out herein the allegations in paragraphs 1 through 137.

152. Defendant Army Corps is a federal agency subject to NEPA. Defendant Brig. Gen. DeLuca is the Army Corps representative to the DRBC.

153. The development of the Draft Regulations authorizing natural gas development within the Basin under the Compact and their release for public comment is a “federal action” within the meaning of NEPA and its implementing regulations because federal agencies play a significant role in conducting, approving, and implementing this action.

154. Defendant Army Corps has “jurisdiction by law” over natural gas development within the meaning of the CEQ NEPA regulations because it has authority to review and vote to approve the Draft Regulations and release them for public comment.

155. The federal action is “major” within the meaning of NEPA and its implementing regulations.

156. Defendant Army Corps is obligated to prepare an EIS, or reasonably rely on an EIS prepared by another agency, before it approves the action. 40 C.F.R. §§ 1501.5(a), 1501.6.

157. Defendants Army Corps and Brig. Gen. DeLuca have approved commencement of the federal action and participated in measures to carry out the action pursuant to their authority under the DRBC Compact by approving the publishing of the Draft Regulations in draft form in the absence of a NEPA analysis.

158. In addition, by approving commencement of this federal action and implementing measures to carry it out without a NEPA analysis, Defendants Army Corps and Brig. Gen. DeLuca have violated, and remain in violation of, NEPA, 42 U.S.C. § 4332(2)(C).

159. By approving commencement of this federal action and implementing measures to carry it out without a NEPA analysis, Defendants Army Corps and Brig. Gen. DeLuca have violated, and continue to be in violation of, NEPA's implementing regulations which requires the Army Corps to: (i) perform environmental review at the "earliest possible time" in the decision-making process (40 C.F.R. § 1501.2); (ii) "commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal" and see to it that "the draft EIS should normally accompany the proposed rule" (*Id.*, §§ 1502.5; 1502.5(d)); and (iii) "integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." (*Id.*, § 1500.2(c)).

160. Defendants Army Corps and Brig. Gen. DeLuca have limited the choice of reasonable alternatives, and risk causing adverse environmental impacts, in violation of 40 C.F.R. § 1506.1(a), by engaging in conduct to carry out the federal action without complying with NEPA.

161. Defendants Army Corps' and Brig. Gen. DeLuca's unlawful refusal to comply with NEPA while approving the commencement and carrying out of significant aspects of this federal action is arbitrary, capricious, and an abuse of discretion pursuant to the APA.

162. Defendants Army Corps and Brig. Gen. DeLuca have a mandatory, non-discretionary duty to comply with NEPA's statutory and regulatory requirements with respect to

the Draft Regulations. Defendants have failed to fulfill their mandatory, non-discretionary duties under NEPA.

163. Plaintiff organizations' missions include protecting the resources of the Delaware River Basin through educating their members and the general public on the consequences of government action or inaction for these resources. Plaintiff organizations' members rely on the resources of the Delaware River Basin for aesthetic, professional, commercial, scientific, and recreational interests as well as for drinking water. Defendants Army Corps' and Brig. Gen. DeLuca's failure to undertake their mandatory, non-discretionary duty to perform a NEPA analysis has denied Plaintiffs of the right to understand the impacts of natural gas development on these resources, to educate their members on these impacts, to comment and testify on the likely impacts of the Draft Regulations, and to suggest what revisions to the Draft Regulations are needed to protect these resources.

164. Defendants Army Corps' and Brig. Gen. DeLuca's failures to comply with NEPA with respect to the Draft Regulations have harmed and will continue to harm Plaintiffs' interests unless this Court grants the relief requested herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court issue a judgment and order:

- 1) Declaring that Defendants are in violation of NEPA's statutory and regulatory requirements by failing to prepare a draft EIS for development of the Draft Regulations authorizing natural gas development within the Basin under the Compact;
- 2) Enjoining Defendants to comply with NEPA by promptly preparing a draft EIS for public review and comment;

- 3) Enjoining Defendants from promulgating or voting to promulgate final regulations or taking any other action to authorize or facilitate natural gas development within the Basin under the Compact until such time as Defendants have fulfilled NEPA's statutory and regulatory requirements;
- 4) Enjoining Defendants from permitting any activities subject to DRBC jurisdiction in furtherance of natural gas development until such time as Defendants have fully complied with NEPA's statutory and regulatory requirements;
- 5) Awarding Plaintiffs their reasonable fees and costs associated with this litigation, including attorneys' fees and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and
- 6) Granting Plaintiffs such other and further relief as the Court may deem just and proper.

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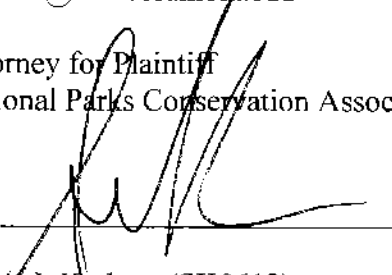
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Attorney for Plaintiff
National Parks Conservation Association

Dated: August 4, 2011

By: 
Susan J. Kraham (SK0612)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DELAWARE RIVERKEEPER NETWORK,)
the DELAWARE RIVERKEEPER,)
RIVERKEEPER, INC., the HUDSON)
RIVERKEEPER, and NATIONAL PARKS)
CONSERVATION ASSOCIATION,)

Plaintiffs,)

vs.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, BRIG. GEN. PETER A. DELUCA,)
Division Engineer, North Atlantic Division of the)
U.S. Army Corps of Engineers, (sued in his official)
capacity), DELAWARE RIVER BASIN)
COMMISSION, and CAROL COLLIER,)
Executive Director, Delaware River Basin)
Commission (sued in her official capacity),)

Defendants.)

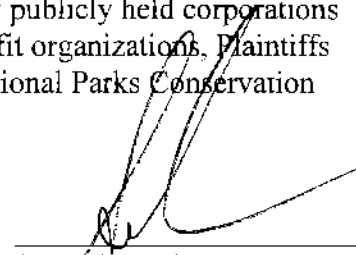
Civ. No:

**PLAINTIFFS' FED. R. CIV. P.
7.1 DISCLOSURE STATEMENT**

The undersigned counsel for Plaintiffs certifies as follows:

1. Plaintiffs Delaware Riverkeeper Network, Riverkeeper, Inc., and National Parks Conservation Association are non-profit organizations; and
2. Plaintiff the Delaware Riverkeeper and Hudson Riverkeeper are individuals. The Delaware Riverkeeper and Hudson Riverkeeper are the heads of the Delaware Riverkeeper Network and Riverkeeper, Inc. respectively;
3. Plaintiffs do not have parent corporations nor are there any publicly held corporations owning stock in any of Plaintiff organizations. As non-profit organizations, Plaintiffs Delaware Riverkeeper Network, Riverkeeper, Inc, and National Parks Conservation Association do not issue stock.

August 4, 2011


Susan J. Kraham
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Law Clinic