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Damascus Citizens for Sustainability

September 10, 2010

By Electronic Mail

Pamela Bush, Esq.
Secretary and Assistant General Counsel
Delaware River Basin Commission
25 State Police Drive
P.O. Box 7360
West Trenton, NJ 06628-0360

Re: Request for Supersedeas Concerning Reservation Provisions of the
Supplemental Executive Director Determination

Dear Ms. Bush:

We are writing today to request immediate action by the Commission to protect the jurisdiction and integrity of the hearing process recently approved by the Commission on natural gas projects. We are asking the Commission to preserve the status quo that existed before the Executive Director exempted certain exploratory well projects from review procedures required for all other natural gas projects in the Special Protection Waters of the Basin.

As you know, at the July 2010 Commission meeting, the Commissioners voted to grant several hearing requests filed by various parties seeking review of the "Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters" (the "SEDD"). Among the hearing requests granted were requests by Damascus Citizens for Sustainability, the Delaware Riverkeeper, and the Delaware Riverkeeper Network challenging the inclusion of the "Reservation for Existing State-Approved Projects" (the "Reservation") in the SEDD.

The Reservation allows entities that "invested in exploratory well projects in reliance on [the Executive Director's] May 2009 Determination and information from staff to move ahead with these projects." The Reservation states that "a limited number" of gas

well drilling permits have been issued by the Pennsylvania Department of Environmental Protection since the May 2009 Determination and finds that “In contrast to the thousands of wells projected to be installed in the Basin over the next several years, the risk to Basin waters posed by only the wells approved by PADEP since May 2009 are comparatively small.” The Reservation goes on to note that these wells are subject to PADEP regulation of construction and operation and continue to require Commission approval before fracturing or modification for gas production. The Reservation concludes by stating:

“In light of these existing safeguards and the investment-backed expectations of the sponsors of these projects, the Supplemental Determination does not prohibit any exploratory natural gas well project from proceeding if the applicant has obtained a state natural gas well permit for the project on or before the date of issuance set forth above.”

The organizations listed above filed their hearing requests on the Reservation to challenge the legal basis for the Reservation and the application of that Reservation to each of the wells permitted by PADEP in the Basin between the May 2009 Determination and the June 2010 Supplemental Determination. These requests were granted by the Commission at its July 2010 meeting. Subsequently, the Executive Director amended the SEDD to add two additional well projects by Hess that had received sediment control plan approval but had not yet received a PADEP well permit prior to the issuance of the SEDD. Our organizations have also requested a hearing on the additional wells allowed to proceed under the Amended SEDD and suggested that the scope of the existing hearing be expanded to include these additional wells. The Commission has not yet taken action on our hearing request regarding the Hess wells.

Since the Commission’s action at the July meeting in granting the various hearing requests and consolidating them into a single hearing, several of the gas well projects allowed to continue under the Reservation provisions of the SEDD have been or are in the process of being constructed and drilled. To our knowledge, in Wayne County three well pads and access roads have been constructed and wells have been drilled on two of these sites by Newfield Appalachia PA, LLC. Drilling is about to or may already have begun on the third pad site. Preliminary pad construction work is beginning on a fourth Newfield site and there is a fifth site that presumably will be constructed next. In addition to these Newfield sites, at a site in Buckingham Township, Wayne County, in what appears (from a photograph from an aerial flyover) to be relatively recent activity, several acres of forested land have been cleared and a large, rectangular pond with what appears to be a plastic liner had been constructed.

At the first meeting with the hearing officer held September 2, 2010, the hearing date was set for the week of December 13, 2010, with preparation of expert reports and witnesses and other pre-hearing activities to take place between now and the December hearing date. At this first meeting, we raised the issuance of a supersedeas to halt the current drilling and well pad activities to prevent the issues related to the Reservation in the SEDD from potentially becoming moot by completion of all of the activity allowed under the Reservation. The hearing officer responded that we should present our supersedeas request directly to the Commission as there would not be time for him to consider and provide recommendations on this issue to the Commission before the September 15, 2010, Commission meeting.

We are requesting that the Commission direct that all activities under the Reservation provisions of the SEDD be halted until the hearing officer's post-hearing report has been presented to and acted upon by the Commission. If these activities are not halted, the likelihood is that most if not all of the gas projects within the scope of the Reservation provisions will have been completed before the hearing officer can hear our arguments and make a recommendation to the Commission on how to resolve the issues presented by our hearing request. In other words, issues raised by the undersigned and referred to the hearing process by the Commission would be rendered moot. The Commission has an obligation to protect the integrity of its hearing process by issuing a supersedeas to preserve the jurisdiction of the hearing process and the Commission's right to decide the issues we are presenting.

Granting this supersedeas is in the public interest because it is important for the public to be assured that the Commission is adhering to the requirements of the Compact and following administrative procedures that protect the interests of all parties affected by the management of the water resources of the Basin. Our organizations and members unquestionably will be adversely affected in the absence of the supersedeas because in all likelihood the issues on which we were granted a hearing will be rendered moot by completion of the wells at issue. Moreover, our organizations and members have already been and are continuing to be harmed by activities involved in well pad construction and well drilling. These activities have subjected our organizations' members to noise, dust, disturbance by heavy truck traffic, loss and/or interruption of sleep from high intensity lighting and drilling activity during night hours, and disruption of their lives and enjoyment of their property and community. The well pads, locations, land disturbance, access roads, drilling activity, wastes and wastewaters, and surface impoundments for these wastes from the wells that have been allowed to proceed under the Reservation provisions of the SEDD have created risks to our organizations and members and the environment that they are dedicated to preserving.

In contrast to the impact to our organizations and members if a supersedeas is not granted, the hiatus period in the operations by the gas drilling parties involved with the exempted sites will be limited to the period between now and the time early next year when the Commission will have received and may take action on the hearing officer's report. None of the projects at the exempted sites will be impaired and none of the work performed at those sites to date will be lost by the few months that the hearing process and Commission review will require.

Preservation of both the hearing process and the Commission's ultimate authority to decide the questions at issue in the hearing are compelling reasons to stay further well development activities under the Reservation provision of the SEDD. Alternatively, and independently of the SEDD, the Commission has the obligation under its Rules of Practice and Procedure to honor the requests for referral for Commission review of all exploratory wells by the National Park Service (letter of May 26, 2010) and by the Fish and Wildlife Service joined by the National Park Service (letter of June 25, 2010). To effectuate these referrals, the Commission must halt the gas development activities now taking place under the Reservation provisions of the SEDD. The Compact, Water Code, and Rules of Practice and Procedure all explicitly direct the Commission to act upon a referral. In this case, a stay of construction is the appropriate Commission action.

For the reasons stated above, Damascus Citizens for Sustainability, the Delaware Riverkeeper and the Delaware Riverkeeper Network respectfully request that the Commission issue a supersedeas to halt all natural gas activities covered by the Reservation provisions of the SEDD until the Commission has taken action on the report and recommendations of the hearing officer now conducting the hearing recently authorized by the Commission.

Respectfully submitted,

/s/ Jeff Zimmerman

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for

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