



For Immediate Release
July 8, 2013

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Moratorium Does Not Constitute a Regulatory Taking
Delaware Riverkeeper Network submits legal memo to DRBC

West Trenton, NJ – A Legal Memorandum has been submitted by Delaware Riverkeeper Network to the Delaware River Basin Commission (DRBC) explaining why leaseholders do not have a regulatory takings claim against them for their enactment of a moratorium on shale gas drilling. The Memo was submitted, says the organization, to provide fundamental information amidst a mounting furor that lacks reasoned analysis and appeared to be driven by temperament.

Letters submitted to DRBC by the Northern Wayne Property Owners Alliance of Damascus, PA in February 2012 and on June 27, 2013 claimed that the property owners were being deprived of their “mineral estates” and threatened litigation if at its July 9-10 meeting DRBC does not schedule a vote on its draft natural gas regulations to lift its current drilling moratorium or doesn’t “step aside” to let the States take control. In what looked to be an orchestrated campaign to pressure DRBC to capitulate, Governor Tom Corbett also sent a letter on June 27 opining that “DRBC’s inaction may very well constitute a ‘taking’ under the U.S. Constitution”. No legal analysis was provided.

“What is sorely missing in these wild claims of the taking of private property rights is a levelheaded analysis of the legal basis for such claims. Delaware Riverkeeper Network is offering this Memo as a reasoned contribution to this debate. The simple fact is there is no legal basis for a takings claim by these leaseholders. Certainly lawsuits are filed every day but they must have legal merit to be successful and these claims do not pass the basic tests. The Commission’s drilling moratorium is in place to protect and manage the water resources of the basin and they should continue their careful deliberations without yielding to this undue pressure,” said Maya van Rossum, the Delaware Riverkeeper. “The threat of legally dubious litigation should not compel

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the Commission to take unwarranted action. Especially knowing that if they were to act, that the last time they did so the Delaware Riverkeeper Network and the New York Attorney General both filed very strong, legally valid, and likely successful legal challenges.”

The Memo is available at:

<http://www.delawareriverkeeper.org/resources/Comments/Regulatory%20Taking%20Legal%20Memo%20Final.pdf>

DRBC instituted a moratorium on natural gas drilling in the Delaware River Basin in May 2010 when they began developing gas-specific regulations since gas and oil extraction had not been an activity there previously. They issued draft natural gas development regulations on December 9, 2010 with a public comment period that closed April 15, 2011 (<http://www.state.nj.us/drbc/naturalgas-draftregs.pdf>). A Public Meeting was noticed for November 21, 2011 to approve the revised draft regulations amidst a storm of public protest. The meeting was cancelled after two voting members of the DRBC, the Governors of Delaware and New York, made it clear they were not in favor of the proposed regulations, keeping the drilling moratorium in place.

“The water supply for 17 million people, billions of dollars in ongoing economic activity and the future of the Wild and Scenic Delaware River are at stake as the DRBC evaluates the potential impact of gas drilling on the watershed. The public - 69,000 people - weighed in on the proposed gas regulations the DRBC issued and the majority asked the agency to not move ahead. The voting members of the DRBC – the four state governors and the federal representative - have not decided if gas drilling can be done safely in the watershed employing the regulations that were proposed. The large public policy implications of this issue are what matters here and it is essential that our eyes be kept on that ball,” said Tracy Carluccio, Deputy Director, Delaware Riverkeeper Network.

The DRBC was formed in 1961 following a Compact that resulted from a Supreme Court Decree settling water wars amongst the states over the allocation of the Delaware River’s resources. The agency has broad powers and is ultimately responsible for the management and protection of the ~13,000 square mile Watershed, the Wild and Scenic Delaware River (designated as Special Protection Waters, an anti-degradation regulatory program) and National Estuary, which supplies water to over 17 million people.

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