



*Via Overnight Service & Electronic Delivery*

April 12, 2011

Pamela Bush, Esquire  
Commission Secretary and Assistant General Counsel  
Delaware River Basin Commission  
P.O. Box 7360  
25 State Police Drive  
West Trenton, NJ 08628-0360

**Re: Comments on Draft Natural Gas Development Regulations**

Dear Ms. Bush:

I write on behalf of the Marcellus Shale Coalition (“MSC”) with respect to the *Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Provide for Regulation of Natural Gas Development Projects*, published for public notice and comment on December 9, 2010 (“Draft Regulations”). This letter provides comments by the MSC regarding the legal authority of the Delaware River Basin Commission (“DRBC”) to regulate natural gas development activities in the Delaware River Basin (“Basin”) and highlights certain key issues of concern to the MSC with respect to the Draft Regulations. Additional specific comments and recommendations on the Draft Regulations endorsed by the MSC are set forth in the *Analysis of Delaware River Basin Commission Proposed Natural Gas Development Regulations*” by ALL Consulting, LLC (“ALL Report”), which is being submitted separately to you.

The MSC is a multi-state organization, founded in 2008 to advance the responsible development of natural gas from the Marcellus Shale geological formation that underlies a number of states, including Pennsylvania, New York, Ohio, West Virginia, and Maryland. The MSC seeks to engage and educate state and federal regulators, elected officials and the general public about natural gas – a clean, job-creating resource with tremendous economic and environmental benefits. The members of the MSC, who are identified on the MSC webpage, [www.marcelluscoalition.org](http://www.marcelluscoalition.org), are dedicated to developing this resource safely, efficiently and in a sustainable manner. The MSC is pleased to submit these comments on behalf of its members.

**Introduction**

Responsible development of natural gas from the Marcellus Shale presents an unprecedented opportunity to provide sustainable and broad-based economic benefits to our region. In 2010, the MSC again commissioned economists from the Penn State College of Earth and Mineral Sciences Department of Energy and Mineral Engineering to examine the economic impact of the Marcellus Shale, resulting in the release of *The Economic Impacts of the Pennsylvania Marcellus Natural Gas Play: An Update*, in the spring of 2010. According to the study, during 2010 in Pennsylvania, the Marcellus Shale industry was projected to generate \$8 billion in value added, and \$800 million in state and local tax revenues. In addition, total jobs grew to 90,000. By 2020,

the industry could generate nearly 212,000 jobs, more than \$19 billion in value added, and nearly \$1.9 billion in state and local tax revenues. The economic benefits of development will be spread throughout the regional economy, benefiting local governments, farmers, construction workers, professionals, and thousands of other workers that have been negatively impacted by the recession.

The Marcellus Shale also represents a significant opportunity to provide energy security and environmental benefits to our nation. Development of the Marcellus Shale will allow Pennsylvania to become a net exporter of natural gas and provide lower cost energy to the surrounding states. Domestically sourced natural gas also can be a part of a more sustainable energy future and it has the potential to reduce significantly greenhouse gas and other emissions.

These tremendous opportunities come with a collective responsibility to protect the environment in a manner firmly grounded in the law and sound science. It is for this reason that the MSC's members have already spent hundreds of millions of dollars on industry-specific environmental and best management programs to ensure that their operations meet or exceed the regulatory requirements applicable to their industry, and why they are fully committed to the development of natural gas in a manner that will protect the environment in the areas in which they operate.

As the federal-interstate agency charged with managing the water resources of the Basin, DRBC has an important role to play along with the other regulatory agencies with jurisdiction over certain activities associated with the exploration and development of natural gas reserves. The role of the DRBC is defined by the Delaware River Basin Compact ("Compact"), and is limited to the unique, water-related interests that the DRBC was established to protect a half century ago. DRBC asserted as much in its January 4, 2011 Notice of Proposed Rulemaking published in the Federal Register, stating that the purpose of the Draft Regulations is "to protect the water resources of the Basin during construction and operation of natural gas development projects," and to do so in an integrated manner that defers to existing regulatory programs "where separate administration by the Commission would result in unnecessary duplication."

The MSC supports DRBC in its stated mission of ensuring that proper environmental controls are provided to safeguard the water resources of the Delaware River Basin, and of establishing a regulatory scheme within the scope of DRBC authority that is complementary and not duplicative of the requirements or procedures of state and federal agencies already regulating the industry, and not duplicative of existing DRBC programs.

### **Summary of the ALL Report**

The ALL Report, which is being submitted separately to you, reflects the independent analysis of the Draft Regulations by ALL Consulting, LLC ("ALL"). ALL is a professional consulting firm specializing in energy, water management, earth science, planning, engineering, and technology services and is highly respected for its work in connection with the exploration and development of shale gas.

ALL analyzed the following issues with respect to the Draft Regulations:

- The potential impact of the Draft Regulations on natural gas operators, in terms of the cost and time of compliance;

- The potential use of land and water by natural gas operations in the Basin as compared to other industries and projects;
- The scope of the Draft Regulations as compared to the regulatory programs administered by the Susquehanna River Basin Commission, and by the Commonwealth of Pennsylvania and the State of New York; and
- The potential effect of the Draft Regulations on the amount of land available for exploration and development of natural gas in the Basin.

The ALL Report, which is incorporated herein by reference, includes the results of these analyses. In summary, ALL concludes as follows:

- The consumptive water use requirements for natural gas development at full build-out, as compared to other water uses within the Basin, are relatively minor – nuclear power uses more than 10 times the amount of water that would be used for natural gas development; golf course maintenance uses more than 20 times the amount; and thermoelectric power generation and agriculture use more than 45 times the amount.
- The land footprint for natural gas development, as compared to other land uses, is relatively minor – the footprint for natural gas development would be less than the footprint for golf courses in the Basin, and 50 times less than the footprint for homes in the Basin.
- Absent a variance, the siting restrictions and setbacks contained in the Draft Regulations (which are more stringent than those established in experienced state programs) would preclude natural gas development in more than half of the land area overlying Marcellus Shale in the Basin.
- Many of the submittals, reporting requirements and notices required by the Draft Regulations are duplicative of host state requirements.
- The process of applying for and obtaining approval to develop natural gas wells pursuant to the Draft Regulations is likely to take as long as 24 months.

The ALL Report also includes a comprehensive bibliography of technical resources that address many of the issues raised in comments to DRBC regarding shale gas development in the Basin. The MSC commends those resources to you in aid of your work responding to and addressing comments regarding the Draft Regulations.

Finally, the ALL Report includes detailed, line-by-line comments on the Draft Regulations. The detailed comments by ALL supplement the comments of this letter.

### **Comments on Draft Regulations**

The MSC thanks DRBC for the opportunity to present these comments and welcomes the opportunity to work with DRBC to revise the Draft Regulations based on DRBC's consideration



of these comments. The MSC has significant concern regarding the scope of the Draft Regulations, which we believe exceed DRBC's legal authority and duplicate member state jurisdiction and existing DRBC programs in several critical respects. The MSC is hopeful that DRBC will consider this analysis and revise the Draft Regulations to establish a program that comports with the terms of the Compact and does not unnecessarily duplicate existing programs.

### **I. Section 7.5 – Requirements for the Siting, Design and Operation of Well Pads**

In addition to comprehensive regulatory provisions relating to water usage (Section 7.4) and wastewater treatment and disposal (Section 7.6) – activities that DRBC has traditionally regulated (see comments below) – the Draft Regulations contain very detailed and far-reaching land use requirements pertaining to the siting, design, construction and operation of well pads for natural gas activities (Section 7.5). These requirements include the need to obtain DRBC review and approval of all natural gas well pad projects in the Basin, with the term “well pad” defined broadly to include any “site constructed, prepared, leveled or cleared in order to perform the activities and stage the equipment necessary to drill a natural gas exploratory or production well.” They also contain a host of new construction and operational standards that are either not required by or inconsistent with state regulatory requirements, including:

- A requirement to submit a Natural Gas Development Plan (“NGDP”) for review and approval, which would compel operators to prepare detailed, forward-looking information about the development of all of their leasehold areas in the Basin;
- Stricter siting and setback requirements that serve to limit where well pads may be located in the Basin;
- Additional restrictions related to the management and disposal of wastewater and drill cuttings generated as a result of drilling activities that prohibit waste management techniques otherwise allowed under Pennsylvania law and regulations; and
- Significantly enhanced monitoring and reporting requirements that require more data to be collected, more frequent reporting, and the installation of additional monitoring systems.

The imposition of these siting and planning requirements on well pad projects and the expansion of DRBC's docket approval process for this purpose would significantly enlarge the scope of DRBC's authority and mark a substantial departure from prior practice. Such action is unauthorized, unnecessary and unprecedented. Accordingly, the MSC urges DRBC to remove Section 7.5 from its rulemaking entirely and defer to host state regulation in this area.

#### **A. Section 7.5 exceeds the scope of DRBC authority.**

The Delaware River Basin Compact does not grant DRBC the authority to adopt regulations pertaining to the siting, design, construction and operation of well pads for natural gas activities. The applicable provision of the Compact, Article 7 (“Watershed Management”), is limited in scope and, unlike other articles in the Compact, does not contain a grant of rulemaking power. Nor does the Compact otherwise authorize DRBC to review, permit, approve or disapprove such

activities, as natural gas wells are not “projects” subject to DRBC’s jurisdiction under Section 3.8 of the Compact.

DRBC’s regulatory authority is derived from, and thus limited by, the Compact, which established DRBC in 1961 as a regional agency to manage and control the water resources of the Basin. In its statement of purpose and policy, the Compact charges DRBC as follows:

The commission shall develop and effectuate plans, policies and projects relating to the water resources of the basin. It shall adopt and promote uniform and coordinated policies for water conservation, control, use and management in the basin. It shall encourage the planning, development and financing of water resources projects according to such plans and policies.

Compact, Section 3.1. The Compact further provides that it is the purpose of the Compact, and thus of DRBC, “to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent not inconsistent with the compact.” Compact, Section 1.5.

Consistent with these dual purposes, the Compact provides DRBC with certain specified responsibilities in seven areas:

- (1) water supply (flow management);
- (2) pollution control;
- (3) flood control;
- (4) watershed management;
- (5) recreation;
- (6) hydroelectric power; and
- (7) water withdrawals and diversions.

Each of these subject matter areas is dedicated its own article in the Compact, which carefully defines DRBC’s roles, power and duties with respect to the particular function.

Significantly, DRBC does not have rulemaking authority in each of these seven areas. When the signatory parties to the Compact wanted to grant DRBC such authority, they said so expressly. Article 7 of the Compact, which addresses watershed management, does not grant DRBC rulemaking authority, but instead instructs DRBC only to “promote sound practices of watershed management in the basin,” and limits DRBC’s powers to the acquisition, sponsorship or operation of facilities and projects in furtherance of this goal. Specifically, Article 7 provides that DRBC may:

- “acquire, sponsor or operate facilities and projects to encourage soil conservation, prevent and control erosion, and to promote land reclamation and sound forestry practice;” and

- “acquire, sponsor or operate facilities and projects for the maintenance and improvement of fish and wildlife habitats related to the water resources of the Basin.”

In contrast, with respect to water quality, Article 5 of the Compact specifically authorizes DRBC to:

- “assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin,”
- “establish standards of treatment of sewage, industrial or other waste,” and
- “*adopt and from time to time amend and repeal rules, regulations and standards to control such future pollution and abate existing pollution, and to require such treatment of sewage, industrial or other waste....*” (emphasis added)

Similarly, with regard to water consumption and withdrawal, Article 10 expressly authorizes DRBC to “regulate and control” withdrawals and diversions of surface water and groundwater, and to require permits under specified circumstances.

DRBC expressly relies upon Article 7 as authority for the Draft Regulations. But under this legislative framework, regulatory authority over land use and watershed management remains within the sole purview of the Basin states, not with DRBC.<sup>1</sup> Article 7 does not grant DRBC authority to adopt the siting, design and operational requirements in Section 7.5. DRBC can “promote” such practices, but it cannot adopt them as enforceable regulatory requirements.<sup>2</sup>

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<sup>1</sup> Section 14.2 of the Compact, which DRBC cites in the authority section of the Draft Regulations, sets forth DRBC’s general regulatory and enforcement authority, including its authority to “make and enforce reasonable rules and regulations for the effectuation, application and enforcement” of the Compact. But it is a tenet of statutory construction that the specific governs the general. Thus, this general statement in Section 14.2 cannot be read to grant DRBC broad regulatory authority over any and all environmental issues, including land use planning, where the Compact otherwise specifically limits DRBC’s powers and responsibilities.

In fact, in an April 2007 report issued by the United States Government Accountability Office (“GAO”) addressing the organizational structures and powers and authorities of 45 congressionally approved environment and natural resource commissions, including DRBC, the GAO reported to Congress that DRBC does not have regulatory authority over land use. *See Interstate Compacts: An Overview of the Structure and Governance of Environment and Natural Resource Compacts*, GAO-07-519, at p. 26 (April 2007). The GAO explained, however, that since DRBC does “regulate water consumption and withdrawal,” DRBC can have an indirect effect on land use because water withdrawal requirements can influence how land can be used. *Id.* Notably, the GAO interviewed DRBC staff, as well as other compact stakeholders, in its preparation of the report. GAO-07-519, App. I, p. 29-30.

<sup>2</sup> The language of the Compact allows DRBC to “acquire, sponsor or operate facilities” that encourage certain watershed management objectives, but DRBC has elected not to do so here. Instead, DRBC has chosen improperly to regulate the siting and operation of well pad sites that are not within its jurisdiction.

Moreover, even if DRBC could adopt regulations pertaining to the siting, design and operation of gas wells, it lacks the authority to enforce such regulations through a pre-construction approval process as set forth in the proposed rules. Section 3.8 of the Compact grants DRBC project review authority for any “project having a substantial effect on the water resources of the Basin.” The term “project” is defined by the Compact as any work, service or activity “for the conservation, utilization, control, development or management of water resources.” Compact, Section 1.2. Read in context, this definition only reasonably applies to work, service or activity *with the aim or purpose of* “the conservation, utilization, control, development or management of water resources.” See New World Dictionary (2d College Ed. 1972) at 544 (defining “for” as “with the aim or purpose of.”); see also New Webster's Dictionary and Roget's Thesaurus (HarperCollins 1992) at 156 (defining “for” as “with the purpose of”).

Section 1.2 defines “water resources” as “water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control.” Compact, Section 1.2.

Synthesizing these definitions reveals that Section 3.8 authorizes DRBC to require review and approval of activities that will have a substantial effect on water and related natural resources subject to beneficial use, ownership or control, and that are conducted with the aim or purpose of conserving, utilizing, controlling, developing, or managing those water resources. If the aim or purpose of an activity is not the use or management of water resources, then the activity and any related use of land is not a project.

With limited exception, activities related to natural gas development are not activities “for the conservation, utilization, control, development or management of water resources.” That is, the purpose or aim of those activities is not conserving, utilizing, controlling, developing or managing a water resource. The purpose or aim of developing a well pad site and drilling a natural gas well, for instance, is to explore for or extract natural gas reserves beneath privately owned land. This land is not a natural resource related to water, nor is it a resource that is subject to beneficial use, ownership or control. See Black's Law Dictionary, 9<sup>th</sup> ed., at p. 1681 (defining beneficial use as “[t]he right to use property and all that makes that property desirable or habitable, such as light, air, and access, even if someone else owns the legal title to the property”).

## **B. Section 7.5 is unprecedented.**

Adoption of Section 7.5 not only would be beyond DRBC's regulatory authority, but also it would signal a significant and unnecessary departure from the agency's traditional role in managing the Basin waters. Construction projects involving land disturbance take place every day in the Basin, and there are already comprehensive state and local regulatory programs in place to ensure that those projects do not cause environmental harm. The MSC is unaware of any other instance where DRBC nonetheless has decided to address these issues in a duplicative manner through its project review function under the Compact, adding an additional and wholly unnecessary layer of review. In every other sector, even in the upper Basin's special protection waters, DRBC has relied on state and local regulatory programs through conditions that provide for appropriate non-point source control programs adopted by state and local authorities. In this case, such programs are in place, as most particularly reflected in Pennsylvania's Chapter 102

regulations, which are implemented via state permits administered by the Department of Environmental Protection and incorporate and reflect best management practices for special protection watersheds.

The extent of this foray into land use regulation is best illustrated by the requirement in the Draft Regulations for a NGDP. Preparation of a NGDP would require an operator to provide extraordinary detail about infrastructure plans years ahead of any development activity. For example, the NGDP Docket application requires a project sponsor to submit a “Lease Area Map” identifying all of its leaseholds in the Basin, as well as a “Landscape Analysis” consisting of a series of detailed maps that identify, among other things:

- Existing roadways, rights-of-way, water supply wells, wellhead protection areas and buildings;
- A list of property and mineral rights owners of the leaseholds located within 0.5 miles of any proposed well pad site;
- Slopes greater than 15% and 20%; and
- Critical habitat areas, natural heritage sites, and forested landscapes.

The NGDP Docket application also must include: (i) a “Constraints Analysis Map” identifying areas of the leaseholds that do not meet the siting and setback restrictions for well pads as prescribed by the Draft Regulations; (ii) a “Circulation Plan” describing existing and proposed infrastructure (*i.e.*, vehicular, pipeline and utility access) to and among well field development areas, natural gas well pads, compressor stations and other ancillary equipment, with a preference towards co-locating such infrastructure and these future sites; and (iii) a “Monitoring Plan” including a map of all surface water and groundwater monitoring locations that would be used as part of a mandatory pre-drilling survey if the leasehold was developed. These plans and maps must be prepared on the basis of a 5-year development projection, at minimum.

DRBC has not attempted to regulate any other industry in this fashion or to this extent. Yet many activities – unregulated by DRBC – involve the clearing of forest or alteration of land to the same or greater extent than natural gas development. In short, natural gas development has been singled out, unjustifiably, to adhere to standards that are not imposed on other types of activities that have similar or greater impacts, and to present extraordinary long-term development projections – tantamount to land development planning requirements – that are not required of any other industry.

The MSC also is concerned that DRBC’s stated reasoning behind these requirements may ultimately require or lead DRBC to regulate a host of other activities that occur in the Basin – activities that DRBC, as a regional agency created to manage the water resources of the Basin, was never intended to regulate. Indeed, if adopted, Section 7.5 could set the stage for DRBC to review and regulate virtually any aspect of any construction project that takes place in the Basin.

The Compact does not authorize DRBC to act as a land development agency, and the proposal by the Draft Regulations to do so only threatens to stifle the responsible exploration and development of natural gas resources in the Basin by slowing down and significantly



complicating the regulatory process. DRBC, instead, should defer to the regulatory authority of its member states in this area, and focus on the water-related issues associated with natural gas development that DRBC is uniquely equipped to address.

**C. Section 7.5 is duplicative of host state requirements.**

As detailed by the ALL Report, many requirements of the Draft Regulations, and particularly Section 7.5, are duplicative of member state requirements. Both New York and Pennsylvania have comprehensive oil and gas regulatory programs. DRBC should defer to the member state programs in all areas where they regulate, and thereby avoid unnecessary, duplicative requirements and administrative costs.

By way of example only, detailed siting restrictions and setbacks are imposed by Pennsylvania's amended well construction and operation regulations (25 Pa. Code Chapter 78) and its erosion and sediment control regulations (25 Pa. Code Chapter 102). New York has similarly extensive requirements pursuant to Articles 17 and 23 of the Environmental Conservation Law. The requirements of these programs should govern the development of natural gas well pads. Regulation by DRBC of these activities would be duplicative and entirely unnecessary.

**D. Section 7.5 is unworkable as framed.**

Under the Draft Regulations, any operator with significant lease holdings would be obligated to obtain NGDP Docket approval by DRBC. As noted above, the NGDP would be required to include a Lease Area Map, Landscape Analysis, a Constraints Analysis Map, a Circulation Plan and a Monitoring Plan. The Lease Area Map would be required to identify development units within the lease holdings on a 5-year incremental basis.

The extended planning horizon required by the NGDP evinces a fundamental misunderstanding of the manner in which natural gas development occurs. In areas such as this Basin with privately held mineral rights, operators do not explore and produce natural gas according to pre-formulated master plans of development. The processes for acquiring mineral rights and exploring an unknown resource are far too dynamic to allow for a pre-formulated master plan. An operator's plan of development is constantly changing based on a wide-variety of factors, including results of the most-recently drilled well, commitments to or requests by land and mineral owners, available equipment, and return on investment and available capital. No one could reasonably project forward to a 5-year horizon, especially given the past variation in economic conditions, including in energy markets.

Requiring operators to attempt to plan forward on such a vast scale, as suggested by the Draft Regulations, literally would bring development to a halt for an extended period. And, even if an operator could develop a NGDP meeting the requirements of the Draft Regulations, the operator would need to seek amendment of it with such frequency as to render the original plan meaningless and of very little value.

The level of detail required by the NGDP requirement compounds these problems. The proposed regulations require that the NGDP include site-level detail, such as existing and proposed roads and rights-of-way that will be used for vehicular, pipeline or utility access, and well pad, compressor station and pipeline locations. This level of detail – over the entirety of an

operator's lease holdings to be developed in 5 years – would be impossible to assemble in advance with any meaning or accuracy.

#### **E. DRBC does not have the resources required to administer Section 7.5.**

DRBC manages a valuable natural resource and is charged with an extensive scope of responsibilities involving stream flow, flood control, source water, water diversions and wastewater discharges. In addition, DRBC is responsible for developing surface water quality standards, total maximum daily loads, water quality monitoring programs, groundwater protection strategies and coordinating many water-related activities with the Basin states. The Commissioners only meet five times per year to handle all of the business of the agency, including Dockets, Resolutions, committee reports, budget matters, staff recommendations, and other business. Diligently attending to these important tasks requires considerable expertise, a proper level of staffing and adequate funding. Frequently, DRBC has found such resources lacking.<sup>3</sup>

By the Draft Regulations, DRBC proposes to add to this full-time burden an extensive regulatory program applicable to an industry with which DRBC generally is unfamiliar and that has operational features never before regulated by DRBC. Even if DRBC adds additional staff, as is contemplated, defers to the State oil and gas programs issues relating to natural gas development, and updates the Administrative Agreements with the State of New York and the Commonwealth of Pennsylvania in an effort to better allocate scarce resources, properly and effectively implementing the proposed natural gas development program will be overwhelming. If the Commissioners determine to regulate the natural gas industry in a manner distinctly different from other industries operating within the Basin, the MSC urges DRBC to adopt a more focused, realistic program keyed to the specific authority provided under the Compact. Such an approach will enable DRBC to discharge its responsibilities more effectively and thereby maintain its unique role as the environmental steward of the water resources of the Basin.

If DRBC attempts to regulate all of the issues identified in Section 7.5, it will inevitably be brought into, and tied up with, administrative hearings and appeals over a myriad of subjects that are well beyond its water resources mission. For example, if an NGDP includes a Circulation Plan, that might be read to imply that DRBC is obligated to review and approve issues relating to vehicular flow. In such case, a person or municipality with a concern about traffic might seek to appeal the NGDP approval and compel DRBC to address its concern regarding truck routes, road capabilities, and associated impacts.

#### **II. Section 7.4 – Water Sources for Uses Related to Natural Gas Development.**

Section 7.4 of the Draft Regulations addresses water sources for uses related to natural gas development. Much of this section is unnecessary, since DRBC already has a well-established program for review and approval of water withdrawals. DRBC should utilize its existing program for Project Review under Section 3.8 of the Compact and should not adopt a special

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<sup>3</sup> DRBC's budget needs are not being met by the states or the federal government. For example, since FY1996, funding from the federal government has largely been eliminated (with the exception of FY2009). The latest example of DRBC's resource limitations is its recent decision to cancel its boat run sampling event due to lack of funding.

water source program for water used in natural gas operations. No other industry is singled out by DRBC with an industry-specific water source regulation.

To the extent that requirements for water sources contained in the Draft Regulations differ from the standards that now exist in the DRBC regulations, the MSC believes that amendments, if appropriate, should be made to the existing regulations and applied to all users. DRBC should not single out the natural gas industry by a separate regulatory program and requirements for new water sources that do not apply to other industries. A gallon of water withdrawn from the river to water a golf course or cool a power plant has the same effect on the river as a gallon of water withdrawn to drill a natural gas well.

DRBC has an existing and comprehensive program that addresses water withdrawal project approval. That program should be utilized for any covered activity associated with natural gas development. (In fact, it has already done so by issuing a Docket for water withdrawal to a natural gas producer.) In this regard, particularly, Section 7.4(e) of the Draft Regulations should be deleted and replaced with a cross-reference to the existing requirements for Project Review under Section 3.8 of the Compact.

### **III. Section 7.6 – Wastewater Generated by Natural Gas Development.**

Section 7.6 of the Draft Regulations addresses wastewater generated by natural gas development. As with water sources, DRBC has existing, robust programs to review and approve wastewater discharges and to protect water quality. These existing programs should be utilized rather than creating a separate set of requirements for wastewater generated by natural gas development.<sup>4</sup>

### **IV. Section 7.3 – Administration.**

Section 7.3 of the Draft Regulations contains various provisions relating to the “administration” of the regulatory program. Consistent with the comments above, many parts of Section 7.3 are unnecessary, because the substantive provisions to which they refer are unnecessary or duplicative of other programs and should be deleted. *E.g.*, elimination of Section 7.5, including the NGDP requirement, would render Section 7.3(a)(2) & (a)(3) moot.

There are aspects of Section 7.3 that present additional concerns as well, as follows.

#### **Financial Assurance**

Section 7.3(k) of the Draft Regulations would require an operator to provide financial assurance for the plugging, abandonment and restoration of each natural gas well and well pad site, and for the mitigation and remediation of any pollution. These requirements are duplicative of host state bonding requirements and ignore the fact that the member states administer regulatory requirements pertaining to each of the activities for which financial assurance would be required. Moreover, DRBC has absolutely no experience or capability of administering such a bonding program. Unlike well-established state oil and gas programs, DRBC has not a single petroleum

<sup>4</sup> Additionally, given the adoption of Pennsylvania’s new standards for total dissolved solids (“TDS”) (25 Pa. Code §95.10), the likelihood of new or increased discharges of oil or gas wastewaters in the Basin is nil. Indeed, industries across the Basin contribute quantities of TDS and chlorides that far exceed anything that would be allowed by the natural gas industry under the new Pennsylvania standards.

engineer on staff (nor is one requested in the proposed FY2012 budget), and has no capability of undertaking projects to plug wells or reclaim sites. DRBC should eliminate these duplicative requirements and rely on its member states to assure performance by operators in the Basin.

The amount of the proposed financial assurance also is staggering. The Draft Regulations would require an operator to provide financial assurance in the amount of \$125,000 *per natural gas well*. For an operator with a significant leasehold position, the total bonding amount would be astronomical. At a hundred wells, the total bond amount would equal \$12.5 million. At 500 wells, it would equal \$62.5 million. These amounts are unjustified and bear no relation to any risk to be mitigated. Even assuming that additional bonding beyond state requirements is warranted (a point with which we disagree), there should be a reasonable cap on an operator's total bonding obligation.

### **Reporting Violations & Enforcement**

Section 7.3(n)(1) of the Draft Regulations authorizes the Executive Director to order a project sponsor to cease, correct, mitigate or remediate any practice, operation or activity whenever the Executive Director determines either that there has been a violation of applicable regulations or approvals, or a "threat" to the water resources of the Basin. Section 7.3(n)(2) further authorizes the Executive Director to suspend, modify or terminate an approval or any DRBC approval or condition thereof "in the event of serious, continuing or repeated violations of Commission regulations or of the conditions of approval, or when in the judgment of the Executive Director or Commission, such action is necessary to protect the water resources of the basin or to effectuate the Comprehensive Plan." These broad enforcement authorities are expressly supplementary to, and do not limit the authority of, existing enforcement authorities and remedies afforded the Executive Director and DRBC.

There are a number of serious issues associated with this framework. First, both the Compact and DRBC's Rules of Practice and Procedure already include detailed enforcement mechanisms and procedures that, in the absence of Section 7.3(n), would provide DRBC with ample enforcement authority should it need to exercise it. DRBC does not need to, and should not, include additional enforcement mechanisms in this rulemaking package.

Second, there are no criteria for the Executive Director's determinations that can prompt enforcement under Section 7.3(n). For example, language permitting the Executive Director to issue an order whenever the Executive Director unilaterally concludes that there is any "threat" to Basin waters, or to suspend or terminate an existing approval whenever the Executive Director concludes that a violation is "serious" or that such action is otherwise "necessary," is unconstitutionally vague and overbroad, granting the Executive Director virtually unfettered enforcement authority. To compound this problem, the Draft Regulations do not provide procedures for the prompt review of the Executive Director's enforcement determinations, thereby further abridging the due process rights of those subject to the Draft Regulations.

Finally, Section 7.3(n) is not limited to natural gas development activities. Thus, as it is currently written, the Executive Director could rely upon the authority granted under Section 7.3(n) to order a project sponsor to cease or modify *any* practice, operation or activity it may be undertaking, whether related to natural gas development or not, upon a determination that there is a violation of *any* applicable regulations or approvals, or that there is *any* threat to Basin

waters. The Executive Director should not be able to utilize enforcement remedies in DRBC's regulations governing natural gas development to take enforcement action under other programs, which rely upon DRBC's general enforcement authority under its Rules of Practice and Procedure.

### **Conclusion**

The MSC wishes again to express its commitment to work with DRBC on establishing an effective regulatory framework that allows for the responsible development of natural gas within the Basin. We are cognizant of the unique features of the Basin, the Special Protection Waters program and the need for diligence and care in the exploration and development of natural gas in the region. If the natural gas industry is to be subject to a regulatory program tailored to its activities, such a program cannot be so far-reaching that it risks collapse under its own weight. Appropriate requirements protective of water resources that relate to water withdrawals, water management and tracking, and wastewater discharges are within DRBC's regulatory authority and should be the sole focus of any new regulatory program for the natural gas industry. DRBC's foray into land use regulation and industry operational standards already covered by the states goes beyond DRBC's authority under the Compact and should be removed from the regulatory package.

We appreciate the opportunity to submit these comments and thank you in advance for your careful consideration of our comments and concerns.

Sincerely,



Kathryn Z. Klaber  
President and Executive Director

cc: Brigadier General Peter A. DeLuca, USACE  
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