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Commission Secretary
Delaware River Basin Commission
P.O. Box 7360
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March 29, 2018

RE: Proposed Amendments to the Administrative Manual and Special Regulations Regarding Hydraulic Fracturing Activities; Additional Clarifying Amendments

The Pennsylvania Chamber of Business and Industry (PA Chamber) is the largest, broad-based business advocacy organization in the Commonwealth. Our nearly 10,000 member companies are involved in all industrial categories and are of all sizes. On behalf of these businesses, we welcome the opportunity to respond to the Commission's invitation to provide comments on the proposed rulemaking regarding hydraulic fracturing in the basin.

The PA Chamber and its members recognize that development, use and stewardship of the state's water resources are vital to the health and success of the communities, industries and enterprises throughout the state. That stewardship of our water resources requires a thoughtful balancing of environmental and economic considerations. It is with that perspective that we approach these comments on the DRBC's rulemaking.

The PA Chamber is extremely disappointed that the Commissioners voted last year to begin review of regulatory language that would, in effect, prohibit the exercise of private property land use by barring energy development and exploration within the Basin. Clearly, the Commission is without the requisite legal authority to do so. Specifically, the Commission has not developed a sufficient scientific record to support such a rulemaking, and should the rulemaking be finalized with language barring energy development from occurring it will be an illegal taking of private property without compensation. This sets a chilling precedent for other industries operating in the Basin and will, contrary to the Compact's explicit language to provide for the public welfare, discourage economic investment (and thus impairing quality of life) in the Basin.

The Commission Lacks the Legal Authority to Expressly Prohibit Entire Categories of Industrial Activity

The 1961 Compact¹ establishing the powers and duties of the Commission does not empower the Commission to, *carte blanche*, bar the activities of any one particular industry from doing business within the Basin. Part 1, Paragraph 3 of the Compact specifies that the Commission was designed to develop and implement a comprehensive plan that, among many responsibilities, conserves, utilizes, develops, manages and controls the water and related resources of the Basin "for municipal, industrial and agricultural uses." This language explicitly confirms that the Commission is charged with, in part, affording the use of water for industrial purposes – as a result, language lacks express authority to prohibit particular industrial uses.

¹ Delaware River Basin Commission Compact, 1961. <http://www.nj.gov/drbc/library/documents/compact.pdf>

Further, Article 3 Section 6 Subsection b (General Powers) affords that the Commission may “establish standards of planning, design and operations of all projects and facilities in the basin which affects its water resources.” Again, there is no express language authorizing the prohibition of particular industrial activity – only the permission for the Commission to establish planning, design and operational standards for projects within the basin.

Article 5 Section 3 affords that the Commission may establish pollution control standards, which historically have generally read to be in the context of point source or non-point source discharge standards that are incorporated into state permits, or in the context of establishing or building upon in-stream water quality standards. The language in Article 5 Section 3 does not lend support to the notion that the Commission may prohibit any particular industrial activity, only that the Commission may establish certain pollution control standards for industrial or other uses. Article 5 Section 4 further makes this point clear, as the enforcement language provides the Commission with the ability to issue orders to particular persons or corporations to cease particular operations of particular projects that have been discharging sewage, industrial or other waste into the basin. “To cease” implies that the discharge must first have been occurring; even if the Commissioners are assuming that natural gas development will necessarily result in discharges occurring (which is not the case in practice), the enforcement language in Article 5 does not empower the Commission to ban drilling from the outset – only to respond with orders in the event of discharges.

The Commission Has Not Developed a Sufficient Scientific Record to Support a Prohibition on Natural Gas Development

The Commission has not adequately developed a scientific record supporting the prohibition of natural gas development within the basin. The experience of the neighboring Susquehanna River Basin Commission and its River Water Quality Monitoring Network, as well as the findings listed in the Pennsylvania Department of Environmental Protection’s biannual Section 303(d) Integrated Water Quality Monitoring and Assessment Report, are both relevant and worthy of discussion. As it has still not finished its draft rulemaking begun nearly a decade ago, the Delaware River Basin Commission has not allowed natural gas drilling to occur in the Basin for the vast majority of active energy development via horizontal hydraulic fracturing occurring in Pennsylvania; the first of such wells drilled using the technique occurred in 2004. Thus, the Commission ought to look to the experience of state regulators and the neighboring Susquehanna River Basin Commission for an examination of what, if any, impacts to water quality occur should natural gas development take place in the Basin.

In 2010, in response to concerns about impact to water quality, the Susquehanna River Basin Commission instituted a River Water Quality Monitoring Network. The RWQMN consists of 50 monitoring points deployed across the watershed, taking regular readings or measurements of key water quality data for criteria such as pH, dissolved oxygen, conductivity, and temperature. Each year, SRBC publishes an annual report outlining the RWQMN’s findings, and each year has made similar points to what was included in last year’s report:

The Susquehanna River Basin Commission has released a report on potential impacts to water quality from unconventional natural gas drilling and other activities in the Basin. A water quality monitoring network with more than 50 stations was put into place in 2010, as the natural gas industry was rapidly growing in the Basin. Most of the activity was located near headwater

streams where water quality observations and data were scarce. To date, the Commission's network of monitors has not detected discernible impacts on the Basin's water resources, but continued vigilance is warranted.²

SRBC has also recently finalized policy requiring project sponsors seeking approval to withdraw water to conduct a detailed alternatives analysis, which outlines how the project sponsor considered other means to acquire water for the project aside from withdrawal. SRBC previously instituted pass-by requirements to projects, including natural gas companies, in times of low flow conditions (such as low rainfall periods or drought conditions). SRBC is also contemplating a consumptive use mitigation policy, which will require withdrawals to possibly sponsor or develop mitigation projects during low-flow periods.

Further, every two years the Department of Environmental Protection submits to the federal Environmental Protection a detailed water quality report per the agency's obligations under Section 303(d) of the federal Clean Water Act.³ The Pennsylvania Integrated Water Quality Monitoring and Assessment Report identifies streams and other bodies of water that are not meeting statutorily defined uses (such as aquatic life or recreational use) and makes impairment designations. An impairment designation then results in the development of a Total Maximum Daily Load, or TMDL, to reduce the contribution of the particular pollutant(s) causing the impairment.

DEP notes in plain language that "it is DEP's responsibility to issue permits that assure stormwater from earthmoving and construction activities is managed properly so as not to cause damage to streams or adversely affect their hydrology. County conservation districts work with DEP on stormwater protection."⁴

Part B of the narrative portion of the Integrated Report further describes the regulatory obligations for erosion and sediment control and post-construction stormwater control for oil and gas companies. The Integrated Report also notes the results of a first of its kind, long-term study of Technologically Enhance Naturally Occurring Radioactive Material (TENORM) which analyzed the naturally occurring levels of radioactivity associated with flowback water and waste materials from oil and gas development activities. The report concluded that "there is little potential for harm to workers or the public from radiation exposure due to oil and gas development"

Most importantly, the Integrated Report lists on page 53 the causes, if known, contributing to impairment of various streams. Among these causes are sources such as agriculture, runoff or combined sewer overflows; not listed is oil and gas. To put a finer point on it, the Pennsylvania Department of Environmental Protection has not identified oil and gas development as the cause of or a contributor to the impairment of a single stream mile in the state.

² Susquehanna River Basin Commission Releases Water Quality Report. SRBC, Oct. 12, 2017.
<https://www.srb.net/newsroom/NewsRelease.aspx?NewsReleaseID=184>

³ Integrated Water Quality Monitoring and Assessment Methodology. Dept. of Environmental Protection, Dec. 2015. <http://www.dep.pa.gov/Business/Water/CleanWater/WaterQuality/Pages/Assessment-Methodology.aspx>

⁴ 2016 Final Pennsylvania Integrated Water Quality Monitoring and Assessment Report: Clean Water Act Section 305(b) Report and 303(d) List.
<http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=6725&DocName=01%202016%20PENNSYLVANIA%20INTEGRATED%20WATER%20QUALITY%20MONITORING%20AND%20ASSESSMENT%20REPORT.PDF%20>

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A Blanket Prohibition on Hydraulic Fracturing Without Compensation to Mineral Rights Owners and Surface Landowners Is an Unconstitutional Taking

Finally, the Commission's prohibition on natural gas development within the Basin will constitute a taking without payment to mineral rights owners and to surface landowners. The U.S. Constitution's Fifth Amendment protects private property rights and due process; the final promulgation of a rule that prohibits the exercise of private property rights, and that has the effect of a takings without just compensation, will conflict with these constitutional rights, resulting in a constitutionally infirm regulation.

The PA Chamber also supports and incorporates by reference the comments of the Marcellus Shale Coalition regarding this rulemaking.

Thank you for your consideration of our comments on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Gene Barr".

Gene Barr
President and CEO