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March 29, 2018

Via Online Comment Collection System

Pamela M. Bush
Commission Secretary
Delaware River Basin Commission
P.O. Box 7360
West Trenton, NJ 08628

RE: Proposed Rule
Special Regulations - 18 CFR Parts 401 and 440
Administrative Manual and Special Regulations Regarding Natural Gas
Development Activities

Dear Ms. Bush,

The Pennsylvania Independent Oil & Gas Association (PIOGA) respectfully submits the following comments regarding the Delaware River Basin Commission's (DRBC) Notice of Proposed Rulemaking and Public Hearing, published (as revised) in the Federal Register on January 12, 2018 (Notice). The Notice solicits comments on proposed regulations and draft guidance related to hydraulic fracturing in shale and other formations in the Delaware River Basin (Proposed Rules). The DRBC specifically sought comments on the effect of the Proposed Rules on the control and abatement of water pollution, economic development, and any alternatives to the Proposed Rules, among other topics.

PIOGA is a nonprofit trade association with nearly 500 members, representing Pennsylvania independent oil and natural gas producers, both conventional and unconventional, marketers, service companies and related businesses, landowners, and royalty owners. PIOGA and its members have an interest in the proposed rules because of their effect within one relatively small discrete – but promising – area of the Commonwealth of Pennsylvania as well as the potentially adverse effect on activities related to oil and gas production in other areas where these activities have been conducted in an environmentally responsible manner, including the area within the jurisdiction of the Susquehanna River Basin Commission (SRBC).

PIOGA also supports and incorporates by reference the comments submitted by the Marcellus Shale Coalition in response to the Notice.

Proposed Prohibition on High Volume Hydraulic Fracturing

The Proposed Rules prohibit high volume hydraulic fracturing in hydrocarbon bearing rock formations within the Delaware River Basin, which affects about 10% of the surface area in the Basin. This proposed ban on hydraulic fracturing at proposed § 440.3 is unnecessary for protection of the water resources within the Basin or to protect public health and should be reconsidered and withdrawn by the DRBC.

The Supplementary Information provided by the DRBC as the basis for the proposed ban fails to consider significant relevant information, particularly the readily available alternative of developing appropriate regulations on water management and use and potential impacts associated with hydraulic fracturing. The DRBC has the authority to implement regulations to effectively protect the water resources of the Basin from the potential impacts identified in the Supplementary Information, and should consider the regulations promulgated by the SRBC for relevant examples. Appropriate regulation of water withdrawals and consumptive use by the DRBC, as well as reliance on host state regulations addressing oil and gas development and associated hydraulic fracturing operations, will provide the necessary level of protection for the Basin's water resources. The consideration of the impact of such regulations should be included in the DRBC's rulemaking analysis.

The DRBC identified several areas of concern related to hydraulic fracturing, including water acquisition, consumptive use, chemical use/additives, well drilling and construction, and wastewater handling and disposal. Many of the specific issues identified by the DRBC are either based on incomplete data, or fail to consider the role of appropriate regulation in mitigating potential impacts to water resources. For example, in the discussion of water acquisition, there is no reference to the fact that the amount of flowback waters reused in subsequent fracturing events (*i.e.*, recycled wastewater) within the Susquehanna River Basin increased on an annual basis from 2009 through 2013.¹ By providing only an average value for the percent of recycled water used in hydraulic fracturing over this time period (which is lower than the percent recycled in both 2012 and 2013), the DRBC failed to recognize a positive trend in water acquisition that has likely continued and so is relevant to any anticipated impact of hydraulic fracturing operations within the Basin in the future.

In the same section of the Supplementary Information, the DRBC notes that hydraulic fracturing operations may upset the balance between demand and availability of water resources, particularly during periods of low precipitation or drought. This issue, however, was addressed by the SRBC via the adoption of a Low Flow Protection Policy in December 2012.² There is no indication that the DRBC considered whether this type of policy (or some other regulatory approach) can effectively protect the resources of the Basin as a reasonable alternative to a

¹ SRBC NG Water Use 2016, p. 43.

² *Id.* at 44.

complete a ban on hydraulic fracturing. There is also no indication that the DRBC has considered the effect of non-oil and gas activities on the balance between demand and availability of water resources – including activities that use comparatively larger amounts of water.

The DRBC reviewed and summarized data related to water withdrawals, consumptive use of water, chemical use and wastewater disposal associated with hydraulic fracturing, but failed to provide any context for the data. The Supplementary Information did not compare water acquisition volumes for hydraulic fracturing to water acquisition volumes in other industries or activities currently present and active within the Basin. In the Susquehanna River Basin, for example, the average daily consumptive usage rate for the oil and gas industry is similar to the rate for manufacturing-related activities and recreational water users, and much lower than the rate for electric power generators.³ DRBC's review also failed to discuss the types of additives or wastewater disposal methods employed by other industries. Without the context provided by information about other industries, it is impossible to determine whether the impact of hydraulic fracturing on water resources within the Basin is likely to be significant by comparison to other industries and associated consumptive uses, or to justify a ban targeting one industry.

Critically, the implementation of a ban on hydraulic fracturing deprives property owners within the Basin of their right to earnings from oil and natural gas in hydrocarbon-bearing formations underlying their property. In Pennsylvania, the subsurface estate is the dominant estate, and deserves protection from ill-conceived and unnecessary regulations like this proposed prohibition on hydraulic fracturing.

By failing to consider all relevant information, the DRBC has developed Proposed Rules that will inappropriately and unreasonably limit economic growth within the Basin and deprive property owners of the opportunity to benefit from resources on their property, without providing justified environmental benefits beyond those that could be achieved by appropriate regulation of the oil and natural gas industry.

A. Proposed Rules for Water Exports and Imports

The Proposed Rules also set out new requirements for exporting water from the Basin for hydraulic fracturing and for produced water importation, treatment and discharge. With respect to the exportation of water, it is unclear whether the proposed rule intends to treat exportation for utilization in hydraulic fracturing differently than exportation for other purposes under Section 2.30.4 of the Water Code. To the extent that the DRBC intends for proposed § 440.4 to set a higher barrier to exportation than the existing rules, the proposed rule is both inappropriate and unnecessary. The DRBC should treat all exports from the Basin in a consistent manner, regardless of their purpose, to ensure that water quality and quantity within the Basin are

³ *Id.* at 23.

protected, without favor or disadvantage to any particular industry or business sector. Similarly, importation of wastewaters associated with oil and gas activities (*i.e.*, produced water and CWT wastewater as defined in this proposal) and the associated requirements in proposed § 440.5 should be consistent with how wastewater imports from other industries or business sectors are addressed by existing rules, and not subject to an oil and natural gas industry-specific higher barrier.

B. Pollutants of Concern and the Proposed DRBC Guidelines for Determining Background Concentrations in Surface Waters

The Proposed Rules include additional effluent requirements requiring that “pollutants of concern” do not exceed background concentrations in Special Protection Waters, or in other waters when no pollutant-specific numeric water quality criteria exist. The accompanying proposed guidance describes the approved methodology for determining background concentrations of pollutants of concern. The proposed definition of “pollutants of concern” references substances listed in specified tables in an EPA document titled “Technical Development Document for Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category (June 2016).”

The EPA technical development document, which is not itself a regulation, indicates that the tables referenced in the Proposed Rules were developed using data pulled from existing literature. The literature search included data from many unconventional formations other than the Marcellus, including formations that produce primarily oil.⁴ EPA selected the constituents because they were measured and/or reported in the existing literature – not because they were determined by EPA to be “constituents of concern” in unconventional oil and gas wastewater.⁵ EPA did not independently evaluate or cull this list of constituents.

The incorporation of irrelevant yet substantive information from a technical development document into a regulation is highly unusual, and in this case, inappropriate.⁶ As described in the document itself, these constituents were not identified as pollutants of concern in wastewater generated in the Marcellus Shale specifically, nor any other specific formation within the Delaware River Basin, and were not intended to be a list of potential pollutants. The definition of pollutants of concern should be revised to omit any reference to EPA’s 2016 technical development document.

⁴ See, e.g., EPA TDD 2016, p. 62.

⁵ EPA TDD 2016, p. 59.

⁶ The effluent limitation guidelines for which the technical development document was prepared have been challenged in court and are currently being reconsidered by the EPA. *See Pennsylvania Grade Crude Oil Coalition v. United States Environmental Protection Agency*, No. 16-4064 (3d Cir.).

C. Prejudgment and Lack of Due Process

Finally, PIOGA is concerned about the process by which the DRBC rules are being developed, where the ultimate decision makers have already voiced their decision to impose a ban, regardless of the nature or extent of public comment or additional information that should be evaluated. Under well-established principles of administrative law, notice and comment rulemaking is required so that government agencies and entities and officials do not make binding law without input from and accountability to the public. If this “proposed” rule is in reality a “final” rule with a predetermined outcome, the notice and comment process, including public hearings, is a sham undermining the validity of any rule finalized by the DRBC. Real rights and real property are at stake here – DRBC should take all necessary measures to assure protection of both.

On behalf of PIOGA and its members, thank you for considering these comments on the Proposed Rules.

Sincerely,

A handwritten signature in blue ink that reads "Kevin J. Moody". The signature is written in a cursive, flowing style.

Kevin J. Moody
General Counsel
PIOGA