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1. The DRBC's justification is based on Article 5 of the Delaware River Compact relating to "Pollution Control." However, the Compact was executed long before the Clean Water Act was enacted, and the courts have subsequently determined this act has fully occupied the field of interstate water pollution. This is, in fact, apparently why the DRBC has been doing nothing about ongoing pollution since 2003 from the Barnes Landfill in Sullivan, New York; because it is a matter of New York State regulation under the Clean Water Act and not subject to DRBC jurisdiction. Therefore, Article 5 has, for all practical purposes, been superseded and replaced with regulations enacted by each state that cannot be imposed on other states through the simple vote of the DRBC. Pennsylvania is giving up its sovereignty with respect to the Delaware River watershed portion of the Commonwealth, an action that will affect but a single county from a practical standpoint. Pennsylvania, by not insisting its regulations are primary and already adequately protect the waters of the Commonwealth, is preventing some of its citizens from being able to undertake activities otherwise permitted under Pennsylvania law and surrendering its own authority to other states.

2. One of the major excuses for the ban is the idea "landscape changes" associated with high-volume hydraulic fracturing "will reduce forested areas and potentially vegetated buffers, increase non-point source pollution, diminish groundwater infiltration, and risk adversely affecting water quality and quantity in surface and groundwater." Yet, Pennsylvania arguably already has the toughest erosion, sedimentation and stormwater management regulations anywhere. They completely address this issue and often lead to reduction of existing pre-development stormwater flows. Moreover, Wayne County has added nearly 45,000 acres of forest since 1959, many times more than would ever be removed by natural gas development. There is zero foundation for additional regulation on this front and this is all that is required for the DRBC to ban a legitimate land use, what is to stop the agency from banning agriculture ventures, forestry, commercial uses and residential development of any kind, based on similar speculation about future "landscape changes" and the like?

3. The DRBC's justification for the proposed ban acknowledges its mission includes addressing water needs for "power generation" and "industrial activity." Yet, these proposed regulations, far from recognizing these needs and balancing them with others through reasonable standards, would simply prohibit development of one of the key natural resources associated with power generation and industrial activity; for the sake of pandering to special interests. Providing water for natural gas fueled generation of electrical power also undeniably serves to reduce carbon and other emissions through substitution of gas for coal and oil fuels, which has saved hundreds of New York City lives that would have otherwise been lost to air pollution. There should be a more balanced approach and a benefit/cost analysis on the proposed regulations before enacting them; a process that would ensure the impacts on communities, businesses and landowners are at least considered.

4. Pennsylvania is a member of both the DRBC and SRBC. Yet, the DRBC justification for its fracking ban, which premises its stand on the potential threats to water quality and references SRBC data for certain purposes, takes no notice of the most important fact of all; that the SRBC has, via a continuing comprehensive water quality study in a watershed that also provides drinking water for millions and includes the equivalent of special protection waters, found "no discernible impacts on the quality of water resources as a consequence of natural gas development." By ignoring this fact, the DRBC is refusing to recognize Pennsylvania experience showing the Delaware River Basin's special protection waters are not threatened and the proposed fracking ban is, therefore, not

justified. Why should natural gas development not be permitted in 95% of the Commonwealth having gas given the experience in the SRBC region? A DRBC ban will immediately lead to a similar demand for a fracking ban in the SRBC if this evidence doesn't matter, given that the same majority of members govern both.

5. The DRBC authority to enact a ban relies heavily on Special Protection Waters designations as an excuse, but this is a red herring. First, the designation is nothing more than a regurgitation of Clean Water Act standards for what, in Pennsylvania, are known as Exceptional Value and High Quality streams. Such streams also exist throughout the drilled areas of the Susquehanna River Basin with "no discernible impacts on the quality of water resources" as a result. Gas drilling already occurs in Exceptional Value watersheds, in fact, and is able to meet non-degradation standards. Secondly, the responsibility for meeting the non-degradation standards is already incorporated in Clean Water Act regulations the Commonwealth implements as well as existing regulations of the DRBC itself. Pennsylvania is, in effect, consenting to this abuse of regulatory authority to extend the reach of DRBC regulations over the landowners of a single county in the Commonwealth when its own regulations and experience contradict every rationale for the regulations. It is also important to note the DRBC Compact only provides for standards of treatment of wastes and provides no authority to ban land uses or industrial processes. See attached materials.

6. Because the DRBC and/or its members states already regulate water withdrawals, wastewater disposal, erosion and sedimentation and stormwater management, the sole remaining aspect of natural gas development it can claim as an excuse for a fracking ban is the risk of accidents and spills. Indeed, it states "the combination of activities and factors more likely than others to result in more frequent or more severe impacts to water resources are spills." It goes on, in fact, to cite such factors as equipment failure, human error, weather and vandalism. The DRBC, in other words, proposes to totally ban a legitimate land use based on the potential for accidents and does so without even quantifying the actual risk compared to other activities. Yet, there is a long history of train derailments that have spilled all kinds of things into the river, including hazardous chemicals. The premise of the DRBC position, therefore, would allow the banning of trains, for example. This is a taking of Wayne County mineral rights on the basis of what appears to be no more than pure speculation, a precedent that could deny the opportunity for any economic development whatsoever in those portions of the Delaware River Basin where special anti-growth interests want nothing to happen.

7. The DRBC quotes the EPA study as to "uncertainties [that] precluded a full characterization of the severity of impacts" and indicates such uncertainties are justification for a ban. This ignores the fundamental point; that the EPA spent several years, several millions of dollars and employed hundreds of professionals in an effort that failed to find evidence to conclude hydraulic fracturing conducted on millions of wells over decades had a quantifiably severe impact on water resources. The EPA made no recommendations to ban the practice, only suggesting improvements that might be made. Pennsylvania has a superb record in regulating natural gas development that it frequently extols. The DRBC is misrepresenting what the EPA study shows for the sake of absconding with the mineral rights of one county.

8. The DRBC also cites the infamously politicized New York State findings that, at the governor's direction, suddenly went directly contrary to its own DEC's earlier conclusions, relying instead upon junk science conducted by natural gas opponents and, astoundingly, peer-reviewed by other such opponents.

9. The DRBC justification for its proposed fracking ban is riddled with errors, suggesting the following:

- ◆ hydraulic fracturing itself has polluted water supplies (it hasn't),
- ◆ gas wells are hydraulically fractured multiple times (they aren't),
- ◆ the amount of water used is massive (it doesn't come close),
- ◆ the water is lost forever (not true),
- ◆ water use is growing (not so),
- ◆ hydraulic fracturing causes gas migration (doesn't happen),
- ◆ risk increases over time due to declining well integrity (not true as pressures decrease over time),
- ◆ wastewater disposal is not regulated (it is thoroughly regulated),
- ◆ the drinking water of 15 million people is threatened (once again, not even close), and
- ◆ fracturing using other than water (e.g., CO<sub>2</sub>, natural gas, propane) might still be subject to DRBC regulation.

10. The DRBC has had a long unholy alliance with the Delaware Riverkeeper Network and its benefactor, the William Penn Foundation, which even funded the Riverkeeper group while it was suing the DRBC over gas drilling issues. Simultaneously, the DRBC accepted money from this same biased foundation to study gas drilling issues. This conflict of interest has ensured DRBC can never equitably address this issue. The foundation for a fracking ban is hopelessly compromised.

11. This proposed fracking ban is patently unconstitutional and illegal on several bases. See attached.

# Special Protection Waters Is No Excuse for a DRBC Fracking Ban

## Legal Issues:

1. The DRBC Compact gives authority to classify **waters, not activities or land uses**.  
  
“The commission, after such public hearing may classify **the waters of the basin** and **establish standards of treatment** of sewage, industrial or other waste ... and to **require such treatment** of sewage, industrial or other waste.”
2. The DRBC “Special Protection Waters” program is an anti-degradation policy, not a set of rules regarding industrial processes or land uses, which are sovereign interests of the states that have not been surrendered.
3. Authority to classify waters, establish standards and require treatment of wastes doesn’t give the DRBC police power over Pennsylvanians.
4. The DRBC can’t extend its own authority , which was granted by the U.S. Congress.
5. Disparate treatment of citizens is not legally sustainable and the proposed ban would target one group of citizens. Pennsylvania can’t discriminate against one county to prohibit some otherwise legitimate land uses and the DRBC can’t create authority to do what Pennsylvania itself cannot.
6. The DRBC justification is based largely on unproven speculation of future harm from accidents, spills and releases that could be extended to anything whatsoever if allowed to stand.

## Practical Issues:

1. DEP is already permitting natural gas development in EV and HQ watersheds in the SRBC region.
2. DEP already has good standards (endorsed by STRONGER) that protect the Delaware River Basin as well as the Susquehanna River Basin (where there are also EV/HQ waters).
3. SRBC data in DEP possession indicates “no discernible impact to the quality of water resources from natural gas development.”
4. If the DRBC is permitted to get away with this, than the SRBC will be next on the fractivist hit list. A DRBC fracking ban will put Pennsylvania in an impossible political situation and guarantee battles, both legal and political, for many years to come and threaten the Commonwealth’s entire oil and gads industry.

Special protection waters policies of the DRBC cannot be used to deny certain Pennsylvanians equal justice under the law. There is no legal basis for such abuse of authority and no practical evidence to support the proposed dRBC fracking ban.

# Article V Comparison

Section	DRBC	SRBC
<b>General Powers</b>	The commission may undertake investigations and surveys, and acquire, construct, operate and maintain projects and facilities to control potential pollution and abate or dilute existing pollution of the water resources of the basin. It may invoke as complainant the power and jurisdiction of water pollution abatement agencies of the signatory parties.	<p>(a) The commission may undertake or contract for investigations, studies, and surveys pertaining to existing water quality, effects of varied actual or projected operations on water quality, new compounds and materials and probable future water quality in the basin. The commission may receive, expend, and administer funds, Federal, state, local or private as may be available to carry out these functions relating to water quality investigations.</p> <p>(b) The commission may acquire, construct, operate, and maintain projects, and facilities for the management and control of water quality in the basin whenever the commission deems necessary to activate or effectuate any of the provisions of this compact.</p>
<b>Policy and Standards</b>	The commission may assume jurisdiction to control future pollution and abate existing pollution in the waters of the basin, whenever it determines after investigation and public hearing upon due notice that the effectuation of the comprehensive plan so requires. <b>The standard of such control shall be that pollution by sewage or industrial or other waste originating within a signatory state shall not injuriously affect waters of the basin as contemplated by the comprehensive plan.</b> The commission, after such public hearing may <b>classify the waters of the basin and establish standards of treatment</b> of sewage, industrial or other waste, according to such classes including allowance for the variable factors of surface and ground waters, such as size of the stream, flow, movement, location, character, self-purification, and usage of the waters affected. After such investigation, notice and hearing the commission may adopt and from time to time amend and repeal rules, regulations and standards to control such future pollution and abate existing pollution, and to <b>require such treatment</b> of sewage, industrial or other waste within a time reasonable for the construction of the necessary works, as may be required to protect the public health or to preserve the waters of the basin for uses in accordance with the comprehensive plan.	<p>(a) In order to conserve, protect, and utilize the water quality of the basin in accordance with the best interests of the people of the basin and the states, it shall be the policy of the commission to encourage and coordinate the efforts of the signatory parties to prevent, reduce, control, and eliminate water pollution and to maintain water quality as required by the comprehensive plan.</p> <p>(b) The legislative intent in enacting this article is to give specific emphasis to the primary role of the states in water quality management and control.</p> <p>(c) The commission shall recommend to the signatory parties the establishment, modification, or amendment of standards of quality for any waters of the basin in relation to their reasonable and necessary use as the commission shall deem to be in the public interest.</p> <p>(d) The commission shall encourage cooperation and uniform enforcement programs and policies by the water quality control agencies of the signatory parties in meeting, the water quality standards established in the comprehensive plan.</p> <p><b>(e) The commission may assume jurisdiction whenever it determines after investigation and public hearing upon due notice given that the effectuation of the comprehensive plan so requires. After such investigation, notice, and hearing, the commission may adopt such rules, regulations, and water quality standards as may be required to preserve, protect, improve, and develop the quality of the waters of the basin in accordance with the comprehensive plan.</b></p>
<b>Cooperative Legislation and Administration</b>	Each of the signatory parties covenants and agrees to prohibit and control pollution of the waters of the basin according to the requirements of this compact and to cooperate faithfully in the control of future pollution in and abatement of existing pollution from the rivers, streams, and waters in the basin which flow through, under, into or border upon any of such signatory states, and in order to effect such object, agrees to enact any necessary legislation to enable each such party to place and maintain the waters of said basin in a satisfactory condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits and adaptable to such other uses as may be provided by the comprehensive plan.	Each of the signatory parties agrees to prohibit and control pollution of the waters of the basin according to the requirements of this compact and to cooperate faithfully in the control of future pollution in and abatement of existing pollution from the waters of the basin.
<b>Enforcement</b>	The commission may, after investigation and hearing, issue an order or orders upon any person or public or private corporation, or other entity, to cease the discharge of sewage, industrial or other waste into waters of the basin which it determines to be in violation of such rules and regulations as it shall have adopted for the prevention and abatement of pollution. Any such order or orders may prescribe the date, including a reasonable time for the construction of any necessary works, on or before which such discharge shall be wholly or partially discontinued, modified or treated, or otherwise conformed to the requirements of such rules and regulations. Such order shall be reviewable in any court of competent jurisdiction. The courts of the signatory parties shall have jurisdiction to enforce against any person, public or private corporation, or other entity, any and all provisions of this article or of any such order. The commission may bring an action in its own name in any such court of competent jurisdiction to compel compliance with any provision of this article, or any rule or regulation issued pursuant thereto or of any such order, according to the practice and procedure of the court.	The commission shall have the authority to investigate and determine if the requirements of the compact or the rules, regulations, and water quality standards of the commission are complied with and if satisfactory progress has not been made, may institute an action or actions in its own name in the proper court or courts of competent jurisdiction to compel compliance with any and all of the provisions of this compact or any of the rules, regulations, and water quality standards of the commission adopted pursuant thereto.
<b>Further Jurisdiction</b>	Nothing in this compact shall be construed to repeal, modify or qualify the authority of any signatory party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of waters within its jurisdiction.	Nothing in this compact shall be construed to repeal, modify, or qualify the authority of any signatory party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of waters within its jurisdiction.

## Legal Problems with the Proposed DRBC Ban

The proposed DRBC Ban would prohibit high volume hydraulic fracturing within the Delaware River Basin. Because Pennsylvania is the only Basin state with significant gas reserves that does not already prohibit HVHF activities, the ban would impact it only.

The foundation for the HVHF ban relies, as a practical matter, upon perceived or speculated risks of inadvertent spills and releases that do not qualify as legal justification. Water acquisition, consumptive use, siting and landscapes are already addressed by other Compact provisions, leaving only Section 5.2 and reliance upon potential spills and releases as ban excuses.

Yet, DRBC staff, relying upon Pennsylvania DEP, previously told a Federal Court, in another matter, how Pennsylvania's robust and comprehensive regulatory program eliminates, reduces, and minimizes the very same perceived risks that it now asserts to justify banning HVHF.

The DRBC also cites its own regulations as authority for the ban, but, as a creature of the Compact, the agency has only those powers conferred upon it through that agreement and accompanying legislation. The DRBC cannot expand its own authority, as it does in this case.

Moreover, in the absence of a clear statement to the contrary in the Compact, "each State [is] left to regulate the activities of her own citizens." A surrender of state sovereignty "should be treated with great care, and the Supreme Court has stated that courts should not find a surrender unless it has been 'expressed in terms too plain to be mistaken.'"

Similarly, the Supreme Court rejected the U.S. Army Corps of Engineers' assertion of jurisdiction over certain wetlands, noting the "government's expansive interpretation would result in a significant impingement of the State's traditional primary power over land and water use."

This case law is why, since its creation in 1961, the DRBC has not attempted to ban refineries, nuclear power plants, chemical plants, commercial farms, or, until recently, well pads and natural gas wells; it doesn't possess the authority. More importantly, it cannot expand its authority through the back door.

The Compact does allow DRBC to classify waters of the basin and then "establish standards of treatment of sewage, industrial or other waste, according to such classes," and can "require such treatment of sewage, industrial or other waste within a time reasonable for the construction of the necessary works."

Jurisdiction to classify waters and establish standards for, and require, treatment of wastes that are discharged into those waters, does not entitle the DRBC to ban an activity or preclude an otherwise lawful use of private property. If the DRBC had such broad authority, it could simply use it to ban any human activity that might cause pollution.

The DRBC is not, and was never intended to be, a regional super-regulator or zoning authority, with veto power over the use of private property. If DRBC attempts to so expand its authority go unchallenged, the DRBC would, in effect, have a form of police power exceeding States. Under the guise of controlling "future pollution," the DRBC would be able to dictate when, where, and under what conditions **any** human activity can occur in the Basin.

## Legal Problems with the Proposed DRBC Ban

The DRBC's core mission was, and properly remains, coordinating development of water projects to meet water needs of Basin residents and New York City. The DRBC has historically understood its authority was limited to classifying waters of the Basin and establishing standards for, and requiring, treatment of wastes discharged into those waters.

In 1973, in response to the 1972 Federal Water Pollution Control Act amendments, the DRBC relinquished its program on pollution abatement schedules in favor of the federal NPDES and state programs. It said it was now spending more time coordinating and reformulating water quality standards, reworking assimilative capacity allocations, developing better monitoring programs" and occasionally arbitrating some interstate issues.

Summarizing, the DRBC's interpretation and application of its Compact over many decades provides compelling evidence it has always understood Article 5 authority to be limited to classifying waters and establishing standards for, and requiring, treatment of wastes discharged into those waters. It has never interpreted Article 5 to authorize a wholesale ban on anything.

There are other legal problems as well. The ban would result in categorical and other regulatory "takings" of property, for example. Because vertical wells would not be feasible as a means to recover gas in the Basin, the ban would fully and permanently prevent owners of but gas rights from making **any** economical viable use of their property - a categorical regulatory taking. There is also a good argument for regulatory takings in the case of owners with surface **and** gas rights on the basis that there is no environmental justification for the huge declines in property values.

Even assuming, for argument's sake, the ban would not effectuate regulatory "takings" of property in the Basin, it would, nevertheless, violate substantive due process principles. There is a wealth of evidence to show, contrary to DRBC claims, shale gas production activities are safe for water and other environmental resources. There is, therefore, no rational basis for a ban.

The proposed permanent ban would likewise run afoul of equal protection principles. When a governmental action creates a discriminatory classification system, the validity of the action, from an equal protection perspective, is determined by certain tests, including whether the discrimination bears "a rational relation" to a legitimate governmental purpose. The proposed permanent ban would not pass the test as it would effectively prevent members of the oil and gas industry from producing gas in the Basin but, at the same time, would not prevent those in other industries from undertaking their business operations in the Basin.

This discriminatory classification system, in other words, would not "bear a rational relation" to a legitimate government purpose. It would be arbitrary and irrational because it would be premised on a perceived risk of spills and releases from one activity (HVHF) in one industry (oil and gas), even though there is an equal or greater risk of spills and releases from various activities that occur in various other industries, including the refining, energy-generation, chemical, landfill, paper, technology, farming, sewage, wastewater treatment, and housing.

Finally, as a general matter, an agency action will be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. DRBC action must be supported by "substantial evidence that " that simply doesn't exist in this case.