

PA Septage Management Association

COMMENTS TO
DELAWARE RIVER BASIN COMMISSION
Proposed New 18 CFR Part 440 – Hydraulic Fracturing in Shale and Other Formations
Subchapter B – Special Regulations
March 29, 2018

From
PENNSYLVANIA SEPTAGE MANAGEMENT ASSOCIATION
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Dear Mr. Tambini and Ms. Bush:

Thank you for receiving these comments from the Pennsylvania Septage Management Association (PSMA) relative to the proposed regulation that would ban fracking in the Delaware River Basin and tightly regulate water transport if used for the development of natural gas in the Delaware River Basin or elsewhere.

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promise to continue a moratorium that he made in a May 8, 2014, interview with WITF and State Impact Pennsylvania.

Q: Do you support any changes to any of the current moratoriums?

A: There's a moratorium on the Delaware River Basin. I support continuation of that moratorium and I support a moratorium on drilling in any state lands... (Source:

<https://stateimpact.npr.org/pennsylvania/2014/05/08/meet-the-candidates-tom-wolf>)

New Jersey's Governor made it clear during his 2017 campaign exactly how he would vote on the proposed regulation. Then

Governor-elect Phil Murphy attacked Governor Christie's September 13 abstention on the 3-1 vote by the Delaware River Basin Commission to push forward with an anti-fracking regulation.

Murphy said "New Jersey may not have any fracking, but our connection to the Delaware River would force us to live with the environmental harm it causes. When I am governor, New Jersey will proudly vote for the final rule to implement this ban."

New York's Governor has also made it clear where he stands relative to fracking.

Our concern is that this regulatory review process being undertaken by the Delaware River Basin Commission is being done to follow a regulatory procedure but not to gain meaningful input from stakeholders since a majority of the Governors on the Delaware River Basin Commission are already committed to voting for this ban, thus rendering comments like ours something to be read and tossed. That is our concern. Frankly, PSMA hopes that this process is real, that the Delaware River Basin Commission listens to these constructive comments.

Specific Comments

Geographic Scope

While the proposed regulation is clear in that it holds the view that fracking is inherently bad for the Basin's water and is also clear on what it intends to do – ban fracking, there appears to be uncertainty in its application.

Article 2 of the 1961 Compact states:

2.7 Jurisdiction of the Commission.

The commission shall have, exercise and discharge its functions, powers and duties within the limits of the basin.

The phrase "Within the limits of the basin" may lead to confusion about to what geographic areas the regulation pertains.

The DRBC website says that of the PA counties in the basin, eight have Marcellus Shale formations. This covers well over 2/3 of the ground area in the Basin. (Source: DRBC <http://www.nj.gov/drbc/basin/map> Map Showing DRBC Special Protection Waters (SPW), SPW Drainage Area, and Marcellus Shale Formation)

A ban is self explanatory in counties such as Pike and Wayne since their entire geographic area is in the Delaware River Basin. However, there are portions of Lackawanna County, Luzerne County, Carbon County, and Schuylkill County which are in the Delaware River Basin and which have Marcellus Shale formations.

What that means is that fracking can occur in some parts of those counties but not the eastern portions. Has the Delaware River Basin Commission surveyed those areas to determine whether or

not active Marcellus Shale development is taking place now in those segments? Does the previous moratorium spell out specifically in which townships or fragments of townships fracking is prohibited? Do those communities know that? Do the energy companies know that?

In other words, independent of the regulation's merits or lack thereof, there may be workability issues and confusion.

Scope: What Marcellus Shale activities are governed by the proposed regulation?

The proposed regulation prohibits fracking and prohibits water taken from the Basin relative to natural gas development without a permit. However, there are other Marcellus Shale gas activities -- pipelines. Getting to domestic and international markets requires pipelines, some of which cross or will cross the Delaware River Basin.

Is the Delaware River Basin Commission taking the position that it has veto power over pipeline routing or even whether or not a pipeline can be constructed?

If so, it would be a major expansion of the Commission's authority into areas where other agencies already have primacy. In Pennsylvania, the Department of Environmental Protection regulates pipeline construction permits and safety evaluations. The Federal Government (FERC, Environmental Protection Agency, Army Corps of Engineers, and probably the Energy Department etc.) also exercises regulatory authority over pipelines. The Army Corps of Engineers already voted no to the proposed regulation September 13, 2017, possibly for this reason.

The regulation should clearly state that pipelines are not governed by this proposed regulation or state that it does but be prepared to justify the new authority the Commission seeks to give to itself.

Jurisdiction

Limits to Commission Authority

Anti-fracking advocates claim that the Commission has carte blanche to do what it wants in the name of protecting water and the wording of the Compact does provide wide discretion.

However, the original 1961 Compact as ratified by Pennsylvania Act 268 of 1961 (July 7, 1961) suggests that there are limits to this authority as shown by the following references:

Delaware River Basin Compact

Act 268 (PA) July 7, 1961

Article 1: 1.3 Purpose and Findings

(c) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.

<http://www.state.nj.us/drbc/library/documents/compact.pdf>

Many of the words used in the Compact are not heeded in what the Delaware River Basin Commission is seeking to do.

"To remove causes of present and future controversy?" "To provide for cooperative planning?" Clearly, something like fracking does not reduce controversy. Cooperative planning is not represented by the Commission's decision to impose this regulation by arbitrary fiat.

Another section of Act 286 addresses jurisdictional overlap.

Article 5: Pollution Control

5.5 Further 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.

The Commission action violates this section of the Compact. Pennsylvania's Act 13 sets forth a regulatory framework for extraction of natural gas in all of Pennsylvania. It does NOT exempt the Delaware River Basin Commission as taking precedence over Pennsylvania law.

Source: <http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/2012/act13.pdf>

APPENDIX TO TITLE 58 OIL AND GAS

Supplementary Provisions of Amendatory Statutes

2012,FEBRUARY 14,P.L.87,NO.13

§ 5. Application of law.

The addition of 58 Pa.C.S. Ch.23 shall apply to all oil and gas deposits and oil and gas development activities and operations subject to the jurisdiction of the Commonwealth. With respect to oil and gas deposits on national forest lands identified under section 17(o)of the Mineral Leasing Act (106 Stat. 3108,30 U.S.C.§ 226(o)),the application of regulations and statutes adopted by the Commonwealth shall be the exclusive method and means by which any requirements may be imposed on any feature, aspect or process of oil and gas operations pertaining to the development of the deposits. (Emphasis added)

The original enabling legislation which entered Pennsylvania into the Delaware River Basin Commission is Act 268 of 1961.

Section 7.4 Water Management reads:

Section 7.4. Cooperative Planning and operation

(a) The commission shall cooperate with the appropriate agencies of the signatory parties and with other public and private agencies in the planning and effectuation of a coordinated program of facilities and projects authorized by this article.

(b) The commission shall not operate any such project or facility unless it has first found and determined that no other suitable unit or agency is available to operate the same under reasonable conditions... (Emphasis added)

Trying to ignore Pennsylvania's Act 13 simply because the Delaware River Basin Commission is anti-fracking does not show "willingness to cooperate" with other public and private agencies such as the PA Department of Environmental Protection.

Another entity that should have been consulted is the PA General Assembly. The General Assembly passed legislation regulating fracking and development of natural gas within the Commonwealth. There is no evidence that the Delaware River Basin Commission has reached out to the PA General Assembly. In fact, the PA House of Representatives adopted House Resolution 515 on October 17, 2017, showing its displeasure of the Commission's unilateral approach with this proposed regulation.

In addition, (b) says that the Commission cannot "operate any such project" unless there is no "suitable" agency.

PA Department of Environmental Protection is quite suitable to regulate Marcellus Shale natural gas development and extraction. That is what it does now. How is DEP unsuitable is a question the Delaware River Basin Commission must answer before adopting this proposed regulation.

Another issue is whether a "project" is defined as including a prohibition on economic activity. The legal definition of "project" is currently being litigated but the Delaware River Basin Commission has argued in court that fracking and Marcellus Shale activities are "projects" that the Commission can regulate.

If the final court decision upholds this view, the Delaware River Basin Commission does not have this authority to regulate this "project" because a suitable unit or agency is already suitable and clearly available since Act 13 is already implemented.

The burden of proof falls on the Commission to show that Pennsylvania's regulators are not up to the task of protecting PA waters as relating to fracking. It has not done so.

Property Issues

Property owners in the Delaware River Basin and elsewhere believe that they have property rights relative to exploration and development of natural resources on their property insofar as those uses of property do not conflict with state or local law. Use of the term property here means using land for an economic purpose. Farming, for example, is an economic use of property. Having agritourism or a stable where people pay to ride is an economic activity. So is the leasing of property for Marcellus Shale natural gas extraction.

The proposed regulation is silent on property rights. In ignoring them, the Delaware River Basin Commission opens itself up to extensive judicial and legislative challenges.

Questions the Commission should address might be:

- Does prohibition of leasing/fracking constitute a violation of property rights?
- Does the proposed regulation amount to a "taking" of property since this available economic use is disallowed?
- Should there be just compensation to property owners because of their future economic loss due to the prohibition?
- Although the Commission maintains that it is permitted to regulate underground water as well as surface water, what if there are conflicts with mineral rights laws or court decisions? If natural gas is legally governed by mineral rights laws, exploiting these particular mineral resources would involve water, thus creating more conflict and more litigation.

Conclusion

To PSMA, the issue is not the assertion that fracking is an economic boon to a depressed region. Neither is the assertion that fracking means systematic degradation of water quality.

Our issue is the authority the Delaware River Basin Commission feels that it has to impose this regulation.

The Pennsylvania Septage Management Association believes that the extension of this authority per 18 CFR Part 440—Hydraulic Fracking in Shale and Other Formations is not supported by the 1961 Compact or by Act 286, the enabling statute that joined Pennsylvania to the Commission.

We further hold the position that this proposed regulation should be either withdrawn or halted until these substantive questions are fully answered.

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