

JANE P. DAVENPORT
Delaware Riverkeeper Network
300 Pond St., 2nd Floor
Bristol, PA 19007
(215) 369-1188 x106 (tel)
(215) 369-1181 (fax)
jane@delawareriverkeeper.org

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DELAWARE RIVERKEEPER NETWORK,)
the DELAWARE RIVERKEEPER, and)
DAMASCUS CITIZENS FOR)
SUSTAINABILITY, Inc.))
Plaintiffs,)
vs.)
CAROL COLLIER, Executive Director,)
Delaware River Basin Commission (sued in)
her official capacity) and)
DELAWARE RIVER BASIN COMMISSION,)
Defendants.)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Civ. No:

INTRODUCTION

1. Plaintiffs bring this action to challenge decisions by the Delaware River Basin Commission and its Executive Director, Carol Collier, unlawfully to exempt from regulation certain wells intended for exploration of natural gas within shale formations thousands of feet below the lands of the Delaware River Basin. These wells, extending thousands of feet into the earth, have numerous environmental impacts and pose numerous risks of contamination and pollution before any natural gas is ever extracted from them. By giving these wells a free pass to be constructed and drilled without Commission oversight, Defendants failed to meet their legal obligations towards the Special Protection Waters of the Delaware River, whose extraordinarily clean waters provide drinking water for millions of Americans, as well as waters necessary to the recreational, agricultural, industrial, commercial, aesthetic, and other requirements of citizens from New Jersey, New York, Pennsylvania, Delaware, and beyond.

PARTIES

2. Plaintiff **Delaware Riverkeeper Network** (DRN) is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. To achieve these goals, DRN organizes and implements streambank restorations, a volunteer monitoring program, educational programs, environmental advocacy initiatives, recreational activities, and environmental law enforcement efforts throughout the entire Delaware River Basin watershed – an area which includes portions of New York, New Jersey, Pennsylvania and Delaware. The DRN is a membership organization with 6,500 members throughout the Delaware River watershed. DRN brings this lawsuit on behalf of its members.

3. Plaintiff **the Delaware Riverkeeper** is a full-time privately funded ombudsman

who is responsible for the protection of the waterways in the Delaware River Watershed. The Delaware Riverkeeper, Maya van Rossum, advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries and habitats.

4. DRN petitioned the Delaware River Basin Commission (DRBC) in 1990 to develop a program to protect the exceptional water quality and outstanding resources of the designated Wild and Scenic Delaware River pursuant to the Outstanding Natural Resource Waters (ONRW) provision of the federal Clean Water Act. In response, the DRBC amended its Water Code to include its unique version of ONRW, the Special Protection Waters program. In 1992 the DRBC granted the Upper and Middle Delaware Wild and Scenic River segments Outstanding Basin Waters status under their Special Protection Waters (SPW) program. In 2001, after the Lower Delaware River was designated by Congress as Wild and Scenic, DRN again petitioned DRBC to classify the Lower Delaware River as SPW. As a result of DRN's efforts, the DRBC permanently designated the Lower Delaware River as Significant Resource Waters, a type of SPW, in July 2008. DRN also requested in its 2001 petition that DRBC fulfill the requirements for prioritization of the Upper and Middle Delaware Wild and Scenic River segments.

5. The Delaware Riverkeeper and DRN's members all enjoy the water quality values of the Delaware River, particularly within the drainage area of Special Protection Waters. DRN members live, work, and recreate in the lands of the Delaware River Basin. DRN members boat, fish, canoe, birdwatch, hike, and participate in other commercial and recreational activities near or on the Delaware River and its tributaries and throughout the watershed. Many of DRN's members obtain their water for domestic, agricultural, and other purposes from groundwaters,

streams and other surface waters within the Delaware River Basin.

6. DRN began publicly advocating on the issue of natural gas development in March 2008. DRN worked throughout 2008 and 2009 to bring this issue to the public's attention and to advocate to the DRBC through letters filed regarding various aspects of natural gas development, specific applications from natural gas development companies to the DRBC, and broad public policy issues. DRN also advocated for scientific studies and a moratorium on natural gas development to the DRBC members and state administrations and the federal representative on the DRBC through meetings and discussion and submittal of educational material from 2008 through to the present. DRN letters regarding issues were submitted to the DRBC throughout this period and DRN helped educate the public and encourage public participation through action alerts, press outreach, and public statements and editorials on various natural gas applications before the DRBC and points of decision by the DRBC.

7. The Delaware Riverkeeper and DRN's members will be adversely affected by any change in water quality and flow as well as any diminution in the Delaware River Basin watershed's ecological, aesthetic, and other values resulting from the unlawful actions of Defendants challenged herein. DRN brings this action on behalf of its members.

8. Plaintiff **Damascus Citizens for Sustainability, Inc.** (DCS) is a non-profit organization established in 2008 to protect the Delaware River Basin and watershed from the risks associated with natural gas exploration, production, processing and transportation (collectively "natural gas development") and to promote the health and prosperity of communities in the Delaware River Basin. DCS's 5,000 members live, work, recreate and have family, property and businesses in the Delaware River Basin. Many of DCS's members obtain their water for domestic, agricultural, and other purposes from groundwaters, streams and other

surface waters within the Basin. Natural gas development will have an adverse impact on these water resources, the environment and the ecosystems in the Basin that are important to DCS and its members. DCS and its members are committed to protecting the existing high quality waters, environment, and ecosystems in the Basin for current and future generations from the risks associated with natural gas development. Natural gas development in other watersheds near the Basin has caused contamination of the environment and water supplies with pollutants released during and after natural gas development activities. These releases have damaged aquatic life in streams and rivers in many areas in watersheds near the Delaware River Basin.

9. DCS and its members interact with, use and enjoy the water resources and flora and fauna in the drainage area of the Special Protection Waters of the Basin and the areas within the Basin designated as a Scenic and Recreational River under the Wild and Scenic Rivers Act. DCS has advocated to the DRBC that it is required by the Delaware River Basin Compact to regulate any and all natural gas development that may have a substantial impact on the water resources and ecosystems of the Basin. In 2008, through the efforts of DCS and others, the DRBC issued an order to halt the drilling of a natural gas well in the Basin on the Matoushek property in the Wayne County, PA. In 2009, DCS and its members conducted aerial flyover inspections and documented that gas drilling activities on the Robson property in Wayne County had caused the death of numerous trees in areas down gradient from a drill pad. DCS reported these conditions to DRBC and the Pennsylvania Department of Environmental Protection (PADEP), which resulted in a PADEP enforcement action against the gas company at the site.

10. In 2010, DCS was instrumental in assisting the National Park Service and the U.S. Fish & Wildlife Service in the preparation and submission of referral letters to the DRBC to compel full Commission review of exploratory natural gas wells that had been excluded from a

prior referral by the Executive Director of DRBC to the full Commission of shale gas wells intended for production. Also in 2010, DCS submitted the hearing requests that led to the Commission granting the hearing at issue in this case.

11. DCS and its members will be adversely affected by any change in water quality and flow as well as any diminution in the Delaware River Basin watershed's ecological, aesthetic, and other values resulting from the unlawful actions of Defendants challenged herein. DCS brings this lawsuit on behalf of its members.

12. Defendant **Carol R. Collier** is the Executive Director of the Delaware River Basin Commission and is named in her official capacity..

13. Defendant **Delaware River Basin Commission** is an agency and instrumentality created by the signatory parties to the Delaware River Basin Compact of 1961. It consists of the four governors of Delaware, New Jersey, New York, and Pennsylvania, ex officio, and the Division Engineer, North Atlantic Division, U.S. Army Corps of Engineers, who serves as the federal representative. The DRBC is charged with conserving and managing the water resources of the Delaware River and its watershed

JURISDICTION AND VENUE

14. This Court has jurisdiction of this action under 28 U.S.C. § 1331 (federal question jurisdiction), by virtue of the Delaware River Basin Compact, 75 Stat. 688, Pub. L. 87-328 (Sept. 27, 1961). Compact Article 15.1(p) reads in relevant part: "The United States district courts shall have original jurisdiction of all cases or controversies arising under the Compact..."

15. The Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. § 2202 (declaratory and injunctive relief).

16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because it is the

judicial district within which Defendants DRBC and Carol Collier, Executive Director of DRBC, are located, and Defendants' actions giving rise to this complaint occurred within this judicial district.

17. DRBC Rule of Practice and Procedure Article 6, Section 2.6.10, 18 C.F.R. § 401.90, provides:

Any party participating in a hearing conducted pursuant to the provisions of this article may appeal any final commission action. To be timely, such an appeal must be filed with an appropriate federal court, as provided in Article 15.1(p) of the Commission's Compact, within forty-five (45) days of the final Commission action.

18. Plaintiffs have timely filed this action within 45 days of Defendants' rescission on December 8, 2010, of Plaintiffs' request for a hearing originally granted by Defendants on July 14, 2010. Plaintiffs have exhausted their administrative remedies and have no adequate remedy at law. Unless the Court grants the requested relief, Defendants' actions will allow irreparable harm to the environment, to Plaintiffs, and to the public. No monetary damages or other legal remedy can adequately compensate Plaintiffs or the public for these harms.

STATUTORY FRAMEWORK

19. Following the entry of a consent decree in New Jersey v. New York, 347 U.S. 995 (1954), the four states party to this water resources litigation and the federal government negotiated the Delaware River Basin Compact. The Compact was entered into by President John F. Kennedy and the governors of New Jersey, New York, Delaware, and Pennsylvania in 1961 and created the Delaware River Basin Commission to conserve and manage the resources of the Delaware River under the Compact's terms.

20. Article 13, Section 13.1 of the Compact provides for the development and adoption, and periodic review and revision, of a Comprehensive Plan "for the immediate and

long range development and use of the water resources of the basin. The plan shall include all public and private projects and facilities which are required, in the judgment of the commission, for the optimum planning, development, conservation, utilization, management and control of the water resources of the basin to meet present and future needs . . .”

21. The DRBC implements the Compact’s directives and objectives and the Comprehensive Plan through the Water Code and the Administrative Manual: Rules of Practice and Procedure (RPP) (codified at 18 CFR §§ 401.81–90). To implement the Comprehensive Plan, the Commission annually adopts a Water Resources Program as required by Article 13, Section 13.2.

22. Article 3, Section 3.8 of the Delaware River Basin Compact requires that

No project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation, or governmental authority unless it shall have been first submitted to and approved by the commission, subject to the provisions of Sections 3.3 and 3.5. The Commission shall approve a project whenever it finds and determines that such project would not substantially impair or conflict with the Comprehensive Plan and may modify and approve as modified, or may disapprove any such project whenever it finds and determines that the project would substantially impair or conflict with such Plan. The Commission shall provide by regulation for the procedure of submission, review and consideration of projects, and for its determinations pursuant to this section. Any determination of the Commission hereunder shall be subject to judicial review in any court of competent jurisdiction.

See also 18 C.F.R. § 401.32.

23. The entire non-tidal Delaware River is protected by Special Protection Waters anti-degradation regulations. This designation requires strict regulation to protect the water quality of all SPW waters, which is documented as “exceptional” through regular water quality testing by the DRBC. The agency must maintain the high existing water quality so that there is “no measurable change” except towards natural conditions. Water Code Article 3.10.3.A.2 et seq. codifies the anti-degradation program of the Commission’s Special Protection Waters

program. See also 18 C.F.R. Part 410.

24. Section 2.3.5 of the Rules of Practice and Procedure (RPP) classifies projects for Commission review under Article 3, Section 3.8 of the Compact based upon whether or not the project will have a substantial effect on the water resources of the Basin.

25. RPP Section 2.3.5A enumerates nineteen classes of projects that are deemed not to have a substantial effect on the water resources of the Basin and therefore are not required to be submitted for Commission Review, “except as the Executive Director may specially direct by notice to the project owner or sponsor, or as a state or federal agency may refer under paragraph C. of this section.”

26. RPP Section 2.3.5B specifies that “All other projects which have or may have a substantial effect on the water resources of the Basin shall be submitted to the Commission in accordance with these regulations for determination as to whether the project impairs or conflicts with the Comprehensive Plan.” That section lists eighteen classes of projects that require Commission review unless otherwise exempted by RPP Section 2.3.5A.

27. In defining the last of these enumerated classes, RPP Section 2.3.5B.18 states: “Any other project that the Executive Director may specifically direct by notice to the project sponsor or land owner as having a potential substantial water quality impact on waters classified as Special Protection Waters.”

28. RPP Section 2.3.5C enables federal and state agencies to refer otherwise-excluded projects to the Commission for action as follows:

Whenever a state or federal agency determines that a project falling within an excluded classification (as defined in paragraph A. of this section) may have a substantial effect on the water resources of the Basin, such project may be referred by the state or federal agency to the Commission for action under these Rules.

29. RPP Article 6, “Administrative and Other Hearings,” establishes administrative remedies for parties aggrieved by Commission action. Parties have a right to seek a hearing to review an action or decision of the Commission or Executive Director by submitting a hearing request in writing to the DRBC within 30 days of the action or decision at issue. Id. at Section 2.6.1C.

30. The Commission “shall grant a request for a hearing pursuant to this article if it determines that an adequate record with regard to the action or decision is not available, the contested case involves a determination by the Executive Director or staff which requires further action by the Commission or that the Commission has found that an administrative hearing is necessary or desirable.” Id. at Section 2.6.2A.

31. Once a hearing request has been granted, the person requesting the hearing as well as any other person whose legal rights may be affected is deemed an interested party. Id. at Section 2.6.4A. Interested parties have the “right to be represented by counsel, to present evidence and to examine and cross-examine witnesses.” Id. Additionally, non-parties may submit written statements to the Commission concerning the subject matter of the hearing for inclusion in the record. Id.

32. Upon granting a hearing request, the Commission may choose to appoint a Hearing Officer. Id. at 2.6.4B. The Hearing Officer is provided with the powers to run the hearing process as provided in Section 2.6.4B. DRBC staff and other expert witnesses may submit reports and testify at the hearing as called by the DRBC and interested parties. Sections 2.6.5A, B. A hearing is conducted on the record with the proceedings and evidence presented recorded by a designated stenographer. Section 2.6.6.

33. Once the hearing is concluded, the Hearing Officer prepares a report of his

findings and recommendations, which is served on each party to the hearing. Parties may file objections to the report together with briefs. The Hearing Officer's report, together with any objections and briefs submitted, is then submitted to the Commission, which may choose to hold oral argument. Section 2.6.8A. The Executive Director may also submit comments on or a response to the Hearing Officer's findings and report. Section 2.6.8B.

34. The Commission "will act upon the findings and recommendations of the Hearing Officer pursuant to law." Section 2.6.9A. This determination must be in writing and is to be filed "together with any transcript of the hearing, report of the Hearing Officer, objections thereto, and all plans, maps, exhibits and other papers, records or documents relating to the hearing." Section 2.6.9C.

35. The RPP provides for the assessment of costs for a hearing as follows:

Whenever a hearing is conducted under this article, the costs thereof, as herein defined, shall be assessed by the Hearing Officer to the party requesting the hearing unless apportioned between the interested parties where cost sharing is deemed fair and equitable by the Hearing Officer. For the purposes of this section costs include all incremental costs incurred by the Commission, including, but not limited to, hearing examiner and expert consultants reasonably necessary in the matter, stenographic record, rental of a hearing room and other related expenses.

RPP Section 2.6.7A.

36. The RPP provides for the appeal of a final Commission action on a hearing as follows:

Any party participating in a hearing conducted pursuant to the provisions of this article may appeal any final Commission action. To be timely, such an appeal must be filed with an appropriate federal court, as provided in Article 15.1(p) of the Commission's Compact, within forty-five (45) days of final Commission action.

RPP Section 2.6.10.

37. Under Pennsylvania state law and regulation, oil and gas drilling activities are

governed by the Oil and Gas Act, 58 P.S. §601.101, et seq. and 25 Pa. Code Part 1, Subpart C, Article 1, Chap. 78. This statutory and regulatory regime is administered by the PADEP, which issues permits that authorizes and governs the construction and operation of natural gas wells in Pennsylvania.

FACTS

38. Natural gas is bound in geologic formations thousands of feet underground in shale formations such as the Marcellus Shale. To access and extract this gas, vertical wells are bored to depths of thousands of feet below the earth's surface. Then stimulation practices are used, including hydraulic fracturing, also known as "hydrofracking" or "fracking."

Hydrofracking involves the injection into the well bore of millions of gallons of water mixed with chemical agents and other materials such as sand or silica at high pressure to fracture the rock and release the natural gas. In deep shale formations, horizontal drilling practices are also employed in which drilling proceeds horizontally from the terminus of a vertical well bore to maximize access the shale layer.

39. The consumptive use of this water, on average between 4 and 5 million gallons per hydrofracked well, will permanently deprive the Delaware River Basin waters and its ecosystems, including the clean drinking water for more than fifteen million citizens of New York, New Jersey, Pennsylvania and Delaware who rely on access to these freshwater resources. On the surface, each well pad results in earth disturbance through its construction and use and the construction and use of associated pits, roadways, pipelines and other related structures and land use changes, resulting in soil disturbances and compaction, erosion and sedimentation issues, nonpoint source pollution, point source pollution, stormwater runoff, and/or loss of forest habitat and species, and natural vegetative communities. All of these processes negatively affect

the water quality, water quantity and flow regimes of the streams and rivers of the Basin as well as degrade the Basin's ecosystems.

40. Natural gas well drilling, whether vertical or horizontal, and horizontal hydraulic fracturing also result in toxic pollution. Groundwater and surface water may be and often is contaminated by the chemicals used in drilling and fracturing as well as naturally occurring radioactive materials, salty brines, biological agents, hydrocarbons, heavy metals, dangerous gases and other chemical hazards occurring underground and accessed by drilling activities. The wastewater recovered from hydraulic fracturing operations must be properly captured, stored and treated to avoid the contamination of air and ground and surface waters. In Pennsylvania, waste waters are not required by state law and regulation to be tracked or monitored.

41. Although much public and media attention has been focused on the health and environmental risks of the hydraulic fracturing process, there are many environmental concerns associated with the installation of vertical wells intended for exploration, whether or not those wells are converted to production wells through horizontal drilling and hydrofracking technologies.

42. First, many exploratory wells will, in fact, be converted to production wells, and therefore the siting of these wells is often determinative of their environmental impacts over many years, especially if they are sited in environmentally sensitive areas. Forest fragmentation, degradation of high-quality streams, and other alterations of land surfaces all result in degradation of water quality, ecosystems, and habitats. Second, inherent in the concept of an exploratory well is that it is drilled into an area where the resource is unknown and unmapped, and may present unexpected hazards and potentially a higher risk profile than a production well drilled into a mapped area. Third, a smaller exploratory well site may avoid regulatory

requirements for erosion, sedimentation, stormwater, and other environmental controls for non-point source pollution because its well pad area does not reach threshold size triggers. Thus, these sites may in effect escape environmental regulation to minimize and mitigate impacts. Even where the well pad sites are large enough to trigger requirements for erosion, sedimentation, stormwater, and other controls, the inadequacy of a regulatory regime, such that of Pennsylvania, may result in adverse environmental impacts from well pad site construction and use. Fourth, drilling exploratory wells into a seismically active area such as occurs in northeastern Pennsylvania may pose hazards. Drilling can trigger seismic activity that may destabilize existing geologic formations and man-made structures, increasing the likelihood of pollution migrating into, say, drinking water wells or ground water.

43. Finally, in drilling vertical wells to thousands of feet into the earth, either through air or mud drilling technologies, contamination of ground and surface waters and air pollution can occur through a number of mechanisms. Toxic chemicals are used in drilling and completing wells as lubricants and biocides, and for many other purposes, and these chemicals can escape and contaminate the environment. Exploratory wells will produce flowback of liquids and/or gases from the penetrated geologic formations, many of which are chemical hazards such as naturally occurring radioactive materials, heavy metals, hydrocarbons, brines, and methane. The drill cuttings themselves contain all the chemicals used in the drilling process as well as whatever chemical hazards are encountered by the drill bore in the penetrated geologic formations. These cuttings are brought to the surface and are permitted by state regulation to be buried on-site.

44. In short, as this non-exhaustive list demonstrates, there are many ways by which exploratory wells, even if never converted to production, can result in environmental harm and

risk to human and ecosystem health.

45. On May 19, 2009, Defendant Carol Collier, in her official capacity as Executive Director of the DRBC, issued her “Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations with the Drainage Area of Special Protection Waters” (EDD).

46. In the EDD, Ms. Collier found that shale formations targeted for horizontal drilling and hydraulic fracturing are within the drainage area to Special Protection Waters to the Delaware River Basin and accordingly, “as a result of water withdrawals, wastewater disposal and other activities, natural gas extraction projects in these shale formations may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical, or hydrological characteristics.”

47. Therefore, citing to RPP Section 2.3.5B.18, Ms. Collier notified natural gas extraction project sponsors that “they may not commence any natural gas extraction project located in shale formations within the drainage area of Special Protection Waters without first applying for and obtaining Commission approval.” The EDD defined “project” to include “the drilling pad upon which a well intended for eventual production is located, all appurtenant facilities and activities related thereto and all locations of water withdrawals used or to be used to supply water to the project.”

48. The EDD stated that “[t]he Commission recognizes that each natural gas extraction project will also be subject to the review of the environmental agency of the state or Commonwealth in which the project is located and in some cases, to federal agency review.” Thus, the project approval to be required by the Commission is in addition to any applicable state and/or federal permitting requirements.

49. The EDD, however, specifically excluded wells to be drilled for exploration and not production: “Wells intended solely for exploratory purposes are not covered by this Determination.”

50. At its public meeting on May 5, 2010, the DRBC directed commission staff to draft regulations for natural gas well pad projects in shale formations in the Delaware River Basin.

51. The National Park Service, a federal agency within the U.S. Department of the Interior, manages the Upper Delaware Scenic and Recreational River, the Delaware Water Gap National Recreation Area, and the Middle Delaware National Scenic and Recreational River.

52. On May 26, 2010, Sean J. McGuiness, Superintendent of the Upper Delaware Scenic and Recreational River, sent a letter to Executive Director Collier regarding “Exercise of Project Review Jurisdiction Over All Natural Gas Wells, Including Exploratory Wells, in the Area Draining to Special Protection Waters in the Delaware River Basin” (NPS Referral Letter).

53. Explicitly invoking the authorities of Section 3.8 of the Compact and RPP Sections 2.3.5A and C, Superintendent McGuiness referred to the Commission “all projects that involve drilling of natural gas wells that are not already subject to project review under the Commission’s regulations” and the EDD.

54. The NPS Referral Letter explicitly stated: “This referral includes both ‘exploratory’ or ‘test’ wells, and wells completed in a geological strata other than shale, and it extends to all aspects of natural gas development that involves land disturbance or water use from the proposed construction of exploratory wells to gas distribution pipelines.”

55. Superintendent McGuiness explained the significant concerns with the impacts of so-called exploratory or test wells to the Special Protection Waters of the Delaware River Basin

as follows:

The decision to exclude exploratory wells may have been based largely on the fact that these ‘test’ wells will, for the most part, not require hydrofracturing, and will each require less than the 100,000 gallon threshold for consumptive use that requires project review under the compact in accordance with the DRBC Rules of Practice and Procedure. Yet, experience with natural gas development in the region has shown that a very large percentage of ‘exploratory’ wells are eventually converted to production wells. Thus, the DRBC will have little or no influence over the location of these projects if they’re proposed at pre-existing ‘test’ well sites. This could result in projects having greater environmental impacts, or in the denial of permits which might otherwise have been approved if the projects had been located in less environmentally sensitive areas.

56. On June 14, 2010, Ms. Collier issued a “Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations within the Drainage Area of Special Protection Waters” (SEDD). The SEDD withdrew the exclusion for exploratory wells of the May 2009 EDD and extended the provisions of the EDD to include exploratory wells.

57. The SEDD stated:

I am specially directing all natural gas well project sponsors, *including the sponsors of natural gas well projects intended solely for exploratory purposes*, that they may not commence any natural gas well project for the production from or exploration of shale formations within the drainage area of Special Protection Waters without first applying for and obtaining Commission approval. (emphasis in original)

58. In support of this decision to bring all exploratory gas wells under the DRBC’s jurisdiction via the project approval process, the SEDD:

recognize[d] the risks to water resources, including ground and surface water that the land disturbance and drilling activities inherent in any shale gas well pose. . . . [T]his Supplemental Determination removes any regulatory incentive for project review sponsors to classify their wells as exploratory wells and install them without Commission review before the Commission’s natural gas regulations are in place. It thus supports the Commission’s goal that exploratory wells do not serve as a source of degradation of the Commission’s Special Protection Waters.

59. The SEDD carved out an exemption for a particular group of wells in Pennsylvania:

Reservation for Existing State-Approved Projects. Where entities have invested in exploratory well projects in reliance on my May 2009 Determination and information from staff, there are countervailing considerations that favor allowing these projects to move ahead. I am informed that since May of 2009 the Pennsylvania Department of Environmental Protection (PADEP) has issued a limited number of natural gas well permits targeting shales in the Basin, while the New York State Department of Environmental Conservation has not issued any natural gas well permits targeting shales in the Basin since that date.

60. As justification for allowing these wells to be exempted from the DRBC regulatory process designed to ensure that Special Protection Waters would not be degraded, the SEDD rationalized:

In contrast to the thousands of wells projected to be installed in the Basin over the next several years, the risk to Basin waters posed by only the wells approved by PADEP since May 2009 are comparatively small. Not only are these wells subject to state regulation as to their construction and operation, but they continue to require Commission approval before they can be fractured or otherwise modified for natural gas production. In light of these existing safeguards and the investment-backed expectations of the sponsors of these projects, this Supplemental Determination does not prohibit any exploratory natural gas well project from proceeding if the applicant has obtained a state natural gas well permit for the project on or before [June 14, 2010].

61. The SEDD did not cite or make reference to the May 26, 2010 NPS Referral Letter by which the National Park Service had invoked the authority of RPP 2.3.5A and C to refer all gas-development-related activities other than those encompassed by the May 2009 EDD to the DRBC for project review.

62. On June 25, 2010, Marvin Moriarty, Acting Northeast Regional Director of the U.S. Fish and Wildlife Service (FWS), and Dennis Reidenbach, Northeast Regional Director of the National Park Service, sent a joint letter to Ms. Collier regarding the SEDD.

63. Although Regional Directors Moriarty and Reidenbach strongly supported the

decision to subject exploratory wells in the drainage area of Special Protection Waters to DRBC jurisdiction and regulation, they objected to Ms. Collier's decision to grandfather wells already approved by PADEP without further DRBC review. This letter constituted a referral of the grandfathered wells to the DRBC pursuant to RPP 2.3.5A and C.

64. The Referral Letter from the NPS and FWS Regional Directors pointed out that the environmental effects of exploratory and production wells are almost the same:

With the exception of activities related to hydraulic fracturing (for increasing production), the environmental effects of natural gas well construction, either as a 'production' well as an 'exploratory' well, or into shale or non-shale formations, is virtually identical. Each drilling project involves construction of a well pad and associated roadways, the drilling of a well bore, the withdrawal and transport of surface or groundwater, and the recovery and handling of flow-back water and drilling fluids. As stated in your May 19, 2009, Executive Director's Determination, 'Each of these activities, if not performed properly, may cause adverse environmental effects, including effects on water resources.' (emphasis added)

65. The FWS and NPS Regional Directors further emphasized the industry practice of converting exploratory wells to production wells, underscoring the critical need for environmental review prior to any well pad construction and development:

Additionally, it appears to be industry standard to convert exploratory or test wells to full production wells if suitable gas deposits are encountered. Based on our discussions with PADEP staff working on Marcellus permitting in southwestern Pennsylvania, we concluded that exploratory wells fall into two general categories. A small number of wells (e.g., one to two per county) are drilled during the initial phase of expansion into a new area and are truly exploratory wells intended to optimize drilling practices for the new area. The second and larger category of 'exploratory' wells includes wells drilled during subsequent expansion into an area. Only a very small percentage of these wells are abandoned without being converted to a production well. In fact, Pennsylvania regulations do not distinguish between exploratory and production wells for State-issued permits. The high rate of exploratory-to-production well conversion, the environmental effects common to both, and the cumulative effects are of concern to the Services. (emphasis added)

66. Plaintiffs timely submitted hearing requests to challenge not only the SEDD's exclusion of the sponsors of specifically named wells from DRBC regulation and project review but also the SEDD's general "Reservation for Existing State-Approved Projects" allowing exploratory natural gas well pad projects that received state drilling permits as of June 14, 2010 to proceed without DRBC oversight of the impacts of these wells on Special Protection Waters.

67. Thereafter, various interested parties, including Plaintiffs, gas drilling companies, Nockamixon Township, individual drillers, and a group of lessors, timely submitted hearing requests to the DRBC challenging various aspects of the SEDD. For example, the lessors' group, Northern Wayne Property Owners' Alliance (NWPOA), in its hearing request challenged the legal basis for the DRBC to exercise jurisdiction over exploratory wells at all.

68. By resolution dated July 14, 2010, the DRBC granted the various hearing requests and ordered that they be consolidated and assigned to a single Hearing Officer.

69. On July 23, 2010, Ms. Collier issued the "Amendment to Supplemental Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations within the Drainage Area of Special Protection Waters" (ASEDD). In the ASEDD, Ms. Collier extended the grandfathering/exemption of the SEDD to two additional wells sponsored by the Hess Corporation that had received or would shortly receive PADEP permits.

70. As with the SEDD, the ASEDD did not reference the letter from the NPS referring all exploratory wells to the DRBC for project review or address the June 25, 2010 letter from NPS and FWS objecting to the SEDD's grandfathering provision.

71. Plaintiffs once again submitted a timely hearing request regarding the ASEDD's grandfathering of the two additional Hess wells, which hearing request was granted at the September 15, 2010 meeting of the DRBC.

72. By letter dated August 6, 2010, the DRBC confirmed the appointment of the Hon. Edward N. Cahn, former chief judge of the U.S. District Court for the Eastern District of Pennsylvania, and presently Of Counsel at Blank Rome, LLP, as Hearing Officer.

73. Despite the fact that Defendants' decisions in the SEDD and ASEDD explicitly relied on the "existing safeguards" of PADEP's permitting process as a basis for the decision to exempt certain PADEP-permitted wells from DRBC's jurisdiction and regulatory oversight, the DRBC's appointment letter to Judge Cahn attempted to foreclose review of the adequacy of PADEP's regulations: "Please note that . . . the various decisions of state regulatory agencies regarding state permits for natural gas wells are not matters to be reviewed at the hearings."

74. Judge Cahn convened a meeting of the interested parties on September 2, 2010, at which time all hearing requests were consolidated and a scheduling order was entered governing the production of expert reports by Plaintiffs, the DRBC, and the other interested parties as well as a date of December 13, 2010, for the Hearing to commence. The scheduling order established a procedure for this Hearing regarding the production of exhibits and affidavits as well as cross-examination of expert witnesses.

75. The parties who posted security and/or put down deposits for assessed costs as per RPP 2.6.7 and were therefore deemed interested parties able to participate in the Hearing were Plaintiffs DRN and DCS, NWPOA, and two gas drilling companies, Hess and Newfield. (Although another drilling company, Arbor, and the Township of Nockamixon appeared at the September 2, 2010 meeting, for all intents and purposes that portion of the Hearing process was concluded on September 24, 2010, when Arbor withdrew its appearance in the Hearing as a result of its decision not to construct an exploratory well in Nockamixon Township).

76. At the September 2, 2010 meeting of the parties, Plaintiffs raised the issue of an

order by the DRBC to halt construction of the grandfathered exploratory wells to maintain the status quo and avoid issues of mootness being raised before the completing of the Hearing. Judge Cahn instructed Plaintiffs to raise this issue with the Commission directly.

77. On September 10, 2010, Plaintiffs submitted a letter to the DRBC requesting immediate action by the Commission to maintain the status quo and issue an order halting further construction and development of the grandfathered exploratory gas wells:

We are requesting that the Commission direct that all activities under the Reservation provisions of the SEDD be halted until the hearing officer's post-hearing report has been presented to and acted upon by the Commission. If these activities are not halted, the likelihood is that most if not all of the gas projects within the scope of the Reservation provisions will have been completed before the hearing officer can hear our arguments and make a recommendation to the Commission on how to resolve the issues presented by our hearing request. In other words, issues raised by the undersigned and referred to the hearing process by the Commission would be rendered moot. The Commission has an obligation to protect the integrity of its hearing process by issuing a supersedeas to preserve the jurisdiction of the hearing process and the Commission's right to decide the issues we are presenting.

Granting this supersedeas is in the public interest because it is important for the public to be assured that the Commission is adhering to the requirements of the Compact and following administrative procedures that protect the interests of all parties affected by the management of the water resources of the Basin. Our organizations and members unquestionably will be adversely affected in the absence of the supersedeas because in all likelihood the issues on which we were granted a hearing will be rendered moot by completion of the wells at issue. Moreover, our organizations and members have already been and are continuing to be harmed by activities involved in well pad construction and well drilling. These activities have subjected our organizations' members to noise, dust, disturbance by heavy truck traffic, loss and/or interruption of sleep from high intensity lighting and drilling activity during night hours, and disruption of their lives and enjoyment of their property and community. The well pads, locations, land disturbance, access roads, drilling activity, wastes and wastewaters, and surface impoundments for these wastes from the wells that have been allowed to proceed under the Reservation provisions of the SEDD have created risks to our organizations and members and the environment that they are dedicated to preserving.

In contrast to the impact to our organizations and members if a supersedeas is not granted, the hiatus period in the operations by the gas drilling parties involved

with the exempted sites will be limited to the period between now and the time early next year when the Commission will have received and may take action on the hearing officer's report. None of the projects at the exempted sites will be impaired and none of the work performed at those sites to date will be lost by the few months that the hearing process and Commission review will require.

Preservation of both the hearing process and the Commission's ultimate authority to decide the questions at issue in the hearing are compelling reasons to stay further well development activities under the Reservation provision of the SEDD. Alternatively, and independently of the SEDD, the Commission has the obligation under its Rules of Practice and Procedure to honor the requests for referral for Commission review of all exploratory wells by the National Park Service (letter of May 26, 2010) and by the Fish and Wildlife Service joined by the National Park Service (letter of June 25, 2010). To effectuate these referrals, the Commission must halt the gas development activities now taking place under the Reservation provisions of the SEDD. The Compact, Water Code, and Rules of Practice and Procedure all explicitly direct the Commission to act upon a referral. In this case, a stay of construction is the appropriate Commission action.

78. At the September 15, 2010, Commission meeting, the DRBC denied Plaintiffs' request to maintain the status quo, therefore allowing all construction on the grandfathered wells to proceed without DRBC environmental review and without regard to the question of the effects on the Hearing requests made by Plaintiffs and granted by the DRBC as well as the Hearing process established under the RPP.

79. On October 20, 2010, pursuant to the scheduling order, as amended by subsequent agreement of the parties, Plaintiffs and the DRBC submitted letters identifying their expert witnesses and providing their credentials.

80. On November 2, 2010, Judge Cahn issued a revised scheduling order moving the Hearing to January 19 – 26, 2011, and extending the dates for submission of expert reports, rebuttal expert reports, and objections to expert reports accordingly.

81. On November 19, 2010, Plaintiffs submitted eight expert reports and supporting exhibits demonstrating various environmental impacts and risks specific to vertical exploratory

well construction and operation. Plaintiffs retained these expert witnesses at a total cost of \$22,084.70. In addition, Plaintiffs' counsel and staff spent hundreds of hours on the process of identifying, hiring, and providing information to these expert witnesses and readying their reports for submission.

82. On November 23, 2010, the DRBC submitted its five expert reports.

83. On or around November 17, 2010, counsel for NWPOA and the drilling interests renewed their arguments to the Commission's attorneys and to Judge Cahn that the Hearing scheduled for January 2011 would be rendered moot by the completion of the grandfathered wells and/or by withdrawal (without prejudice) of NWPOA's hearing request on the question of the DRBC's jurisdiction over exploratory wells. Accordingly, NWPOA, Hess, and Newfield did not submit expert reports as contemplated in the revised scheduling order.

84. Despite an Interim Order from Judge Cahn entered November 17, 2010, establishing an expedited briefing schedule on the issue of whether the completion of the grandfathered exploratory wells would render the Hearing Process moot, by letters dated November 22, 2010, NWPOA and the drilling interests advised Judge Cahn that they would not file motions on mootness as scheduled because the mootness argument was not yet ripe.

85. By letter dated December 3, 2010, the DRBC again advised Judge Cahn that the adequacy of Pennsylvania's statutory and regulatory regime governing natural gas development was not appropriately a subject to be addressed through the Hearing, despite the explicit reliance in the SEDD and ASEDD on the adequacy of this regime as a major basis for Defendants' decision to exempt certain wells from DRBC review.

86. Through letters to Judge Cahn as well as oral argument via conference call, Plaintiffs vigorously contested NWPOA's and the drilling interests' contentions and advocated

that Judge Cahn recommend to the DRBC that the Hearing continue as planned, given the DRBC's continued jurisdiction over the exploratory well sites to ensure that such exploratory wells would be plugged and capped and any and all necessary site remediation carried out to avoid degradation to Special Protection Waters. Plaintiffs also requested that Judge Cahn recommend to the DRBC that it issue a cease and desist order to the drilling companies to prevent further work on the exploratory wells pending resolution of the Hearing.

87. Judge Cahn sent a letter dated December 6, 2010, to the DRBC, setting forth his recommendations as to the parties' arguments on mootness on NWPOA's jurisdictional claim as well as the alleged completion of the exploratory wells themselves as well as his recommendation that the DRBC deny Plaintiffs' request for a cease and desist order.

88. On December 8, 2010, at a public meeting of the DRBC, the Commissioners adopted a resolution dismissing Plaintiffs' hearing requests as moot and/or futile, withdrawing the hearing referral to the Hearing Officer, and terminating the Exploratory Well Hearing.

89. The Resolution of December 8, 2010, was premised in part on a requirement that:

Newfield and Hess shall file applications with the Commission for approval of the five natural gas wells spudded to date. Such applications shall be filed on the earlier of thirty (30) days following the Commission's adoption of natural gas regulations or as directed by the Executive Director or Commission. Nothing in this Resolution shall limit the authority of the Executive Director or Commission to take appropriate action to address past or future actions, if any, that may pose a risk to water resources of the Basin whether through any approvals issued in response to the applications or otherwise.

90. On December 9, 2010, Defendants notified the public of the availability of draft regulations to govern natural gas development in the Delaware River Basin. The comment period on these draft regulations is scheduled to close on March 16, 2011. The final regulations have not yet been published.

91. On information and belief, neither the Executive Director nor the Commission has

to date directed Newfield or Hess to file applications with the DRBC for approval of the five spudded exploratory gas wells.

93. Plaintiffs have timely filed this Complaint within 45 days of the final action by Defendants on December 8, 2010, terminating the Hearing Process.

CLAIMS

COUNT ONE

94. Plaintiffs hereby incorporate by reference the allegations made in paragraphs 1 through 93 supra as if fully restated herein.

95. The Referral Letters by NPS dated May 26, 2010 and by NPS and FWS dated June 25, 2010, respectively operated as referrals under RPP 2.3.5A and 2.3.5C. Accordingly, the Executive Director and the DRBC were without legal authority to fail to require project review for any and all natural gas development projects within the Delaware River Basin, including exploratory or test wells.

96. After receiving the Referral Letters, the Executive Director was without legal authority or discretion to issue the SEDD and ASEDD with provisions exempting exploratory gas wells within the drainage area of Special Protection Waters of the Delaware River Basin from further regulation and project review by the DRBC. The DRBC acted unlawfully in endorsing, ratifying, or otherwise allowing the SEDD and ASEDD's exemption provisions to operate to release the grandfathered wells from any obligations to submit to project review by the DRBC.

97. In issuing and/or endorsing the SEDD and ASEDD with the exemption provisions after receiving the Referral Letters invoking the DRBC's project review jurisdiction under RPP 2.3.5.A and 2.3.5C, Defendants failed to comply with their governing legal authorities including the Compact, the Water Code, and the Rules of Practice and Procedure.

98. Defendants' actions as stated in this Claim were arbitrary, capricious, abuses of discretion, contrary to law, and in excess of statutory and regulatory jurisdiction.

99. Plaintiffs have no other adequate remedy at law and are entitled to relief.

WHEREFORE, Plaintiffs pray for relief as specified below.

COUNT TWO

100. Plaintiffs hereby incorporate by reference the allegations made in paragraphs 1 through 93 supra as if fully restated herein.

101. No provision in the Compact, Water Code, and/or Rules of Practice and Procedure gives the Executive Director and/or the DRBC authority to allow a project that may not meet the anti-degradation standards for Special Protection Waters to evade Commission project review simply because its impacts may be less than other, future projects.

102. Defendants' decisions to grandfather certain exploratory wells in the SEDD and ASEDD based on the statement that these wells would pose comparatively small risks to Basin waters in contrast to the thousands of wells projected to be installed in the Basin over the next several years were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law.

103. The statutory and regulatory regime administered by PADEP to issue permits for natural gas development activities does not require permittees to meet or comply with the anti-degradation standards required for Special Protection Waters under the DRBC's legal authorities.

104. Defendants' decisions to grandfather certain exploratory wells in the SEDD and ASEDD based on the "existing safeguards" of the PADEP permitting process were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law.

105. Defendants' actions as stated in this Claim were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law.

106. Plaintiffs have no other adequate remedy at law and are entitled to relief.

WHEREFORE, Plaintiffs pray for relief as specified below.

COUNT THREE

107. Plaintiffs hereby incorporate by reference the allegations made in paragraphs 1 through 93 supra as if fully restated herein.

108. Nothing in the RPP establishes a procedure whereby Defendants may revoke or rescind an administrative hearing request or cancel an administrative hearing once the DRBC has

granted a timely hearing request.

109. By granting Plaintiffs' hearing requests at the July 14 and September 15, 2010, Commission meetings, and subsequently dismissing Plaintiffs' hearing requests, withdrawing the hearing referral, and terminating the Exploratory Well Hearing via resolution on December 8, 2010, Defendants' actions were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law.

110. By denying Plaintiffs' requests for orders to halt the further construction of the exploratory gas drilling wells, Defendants' actions were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law.

111. Defendants' actions as stated in this Claim violated Plaintiffs' rights to due process of law.

112. Plaintiffs have no other adequate remedy at law and are entitled to relief as specified below.

WHEREFORE, Plaintiffs pray for relief as specified below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For a declaratory judgment that Defendants' actions as specified in Claims One, Two, and Three were arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, in excess of statutory and regulatory jurisdiction, and contrary to law;
2. For injunctive relief enjoining Defendants to issue an order requiring the exploratory wells grandfathered under the SEDD and ASED to be plugged, capped and properly abandoned in accordance with applicable state and DRBC regulations and all

appurtenant facilities and construction to be remediated and the well sites restored to pre-existing conditions;

3. For injunctive relief enjoining Defendants to comply fully with all statutory and regulatory requirements under the Delaware River Basin Compact, Water Code, and Delaware River Basin Administrative Manual: Rules of Practice and Procedure in any further actions taken with respect to the exploratory wells grandfathered under the SEDD and ASED;

4. For the Court to retain continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein;

5. For an award of Plaintiffs' costs of litigation, including reasonable attorneys' fees; and

6. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

Respectfully submitted this 21st day of January, 2011.

s/ Jane P. Davenport

JANE P. DAVENPORT
Delaware Riverkeeper Network
300 Pond St., 2nd Floor
Bristol, PA 19007
(215) 369-1188 x106 (tel)
(215) 369-1181 (fax)
jane@delawariverkeeper.org

JORDAN B. YEAGER
Curtin & Heefner, LLP
Heritage Gateway Center
1980 South Easton Rd, Suite 220
Doylestown PA 18901
(267) 898-0570 (tel)
(215) 340-3929 (fax)
jby@curtinheefner.com

JEFF ZIMMERMAN
Zimmerman & Associates
13508 Maidstone Lane
Potomac MD 20854
(240) 912-6685 (tel)
(301) 963-9664 (fax)
jjzimmerman@comcast.net

Attorneys for Plaintiffs