

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DAMASCUS CITIZENS FOR SUSTAINABILITY	:	
	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO.
v.	:	2:23-CV-00061-RBS
	:	
THE DELAWARE RIVER BASIN COMMISSION	:	
	:	
	:	
Defendant.	:	

**DEFENDANT DELAWARE RIVER BASIN COMMISSION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS THE COMPLAINT**

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I. Introduction.

On December 7, 2022, the Delaware River Basin Commission (“DRBC” or “Commission”) adopted regulations prohibiting the discharge of wastewater from high-volume hydraulic fracturing (“HVHF”) and HVHF-related activities to waters or land within the Delaware River Basin (“Basin”). 18 C.F.R. § 440.4.¹ Additional provisions of these regulations established standards for the importation or exportation of water and wastewater into or from the Basin. §(incorporated by reference into the Code of Federal Regulations at 18 C.F.R. § 410.1. While the discharge prohibition addresses only wastewater from HVHF and HVHF-related activities, the importation/exportation provisions apply to all inter-Basin transfers of water and wastewater, not exclusively to HVHF wastewater. Adopted after an extensive public process, the regulations were accompanied by a preamble, a DRBC Resolution, a comment and response document (“CRD”), and frequently asked questions and responses (“Final Rule FAQs”). *See* Complaint Exhibits E (CRD), K (Notice of Final Rules), L (Final Rule FAQs) and DRBC Resolution 2022-04.

The regulations complemented the Commission’s regulation adopted on February 25, 2021 prohibiting any person from conducting HVHF in hydrocarbon bearing rock formations within the Basin. 18 C.F.R. § 440.3(b).² Consequently, at present, HVHF may not be used in oil and gas extraction in the Basin; HVHF and HVHF-related wastewater may not be discharged to waters or land within the Basin; and the importation into the Basin of wastewater of any type is subject to stringent regulations. Nevertheless, plaintiff Damascus Citizens for Sustainability

¹ The text of the DRBC regulations and resolutions cited in this Memorandum regarding the December 7, 2022 rulemaking may be accessed through the DRBC website, https://nj.gov/drbc/about/regulations/final-rule_import-export-hvfh-discharge.html.

² https://www.nj.gov/drbc/library/documents/regs/Part440_HVHF.pdf.

(“DCS”), a 501(c)(3) organization concerned with risks posed by oil and gas development, Complaint ¶ 5, contends that these regulations as they will be administered by DRBC do not go far enough.

On January 6, 2023, DCS filed a Complaint requesting declaratory and injunctive relief in two respects. First, the Complaint seeks a declaration that DRBC’s purported “extra-regulatory exemptions” to the prohibition on the discharge of HVHF wastewater to waters or land within the Basin are unlawful or vague and an injunction requiring DRBC to implement its discharge prohibition in Section 440.4 to encompass all HVHF and HVHF-related wastewater. Second, the Complaint asks the Court to ban, or to direct DRBC to commence a rulemaking to ban, the importation of all oil and gas waste and wastewater into the Basin. *See* Complaint prayers for relief.

The Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of federal jurisdiction. Article III, § 2 of the U.S. Constitution limits courts to deciding cases or controversies. Federal courts utilize doctrines such as standing and ripeness to evaluate whether jurisdiction exists. Notwithstanding DCS’s opposition to oil and gas activities, DCS lacks standing to bring its claims because it has not shown that it or its members have suffered or will suffer a concrete, particularized, and imminent injury. For similar reasons, DCS’s claims are not ripe.

DCS’s alleged injuries from so-called “extra-regulatory exemptions” to the discharge prohibition are based on its mistaken assertion that DRBC will allow the road spreading of HVHF wastewater from certain types of oil and gas wells. *See, e.g.*, Complaint ¶¶ 74-75. To the contrary, DRBC and DCS agree that the discharge prohibition in the new DRBC regulation extends to all HVHF and HVHF-related wastewater regardless of the type of well or target

formation generating the wastewater. DRBC intends to implement the prohibition accordingly. To avoid any doubt, DRBC issued revised Frequently Asked Questions (“Revised FAQs”)³ to that effect. Because only non-HVHF wastewater falls outside the scope of the discharge prohibition, no extra-regulatory exemptions exist, no injury from the alleged exemptions can result, and there is no case or controversy over the so-called extra-regulatory exemptions.

Even if the extra-regulatory exemptions DCS posits were real, which they are not, DCS still fails to demonstrate any concrete, particularized and imminent injury to DCS or its members from the so-called exemptions to the discharge prohibition. In addition, DCS fails to demonstrate any concrete, particularized and imminent injury from the importation rule. Absent averments showing that the discharge of HVHF oil and gas wastewater or importation of oil and gas wastewater into the Basin is imminent or even planned, DCS’s allegations of harm are merely speculative. DCS also has not identified any specific locations where the future wastewater discharge will likely occur, any persons seeking to import oil and gas wastewater, or any persons likely to be adversely affected by either a discharge or importation of wastewater at specific locations.

Several allegations of the Complaint underscore the absence of any imminent harm to DCS or its members. DCS avers that Pennsylvania “allegedly” has halted road spreading of wastewater from conventional oil and gas wells, Complaint ¶ 41, and that road spreading of wastewater from unconventional wells is banned in Pennsylvania by regulation. Complaint ¶ 40; 25 Pa. Code §§ 78a.70 and 78a.70a. State restrictions are unaffected by DRBC’s regulation.

³ Frequently Asked Questions dated March 28, 2023, https://www.nj.gov/drbc/library/documents/FAQ_FinalRule_import-export-hvfh-discharge_revised.pdf.

They complement DRBC's prohibition on the discharge of HVHF and HVHF-related wastewater, and limitations on importation of wastewater. The Complaint further acknowledges that importation of oil and gas brine into the Basin has not occurred to date. Complaint ¶ 25. DCS's speculative allegations of injury are clearly insufficient to demonstrate standing to bring its claims.⁴

Each of the Complaint's five counts also fails to state a claim. Counts I, II, III, and portions of Counts IV and V are based upon so-called "extra-regulatory exemptions" to the discharge prohibition. As noted above, DRBC and DCS agree that the regulation DRBC adopted on December 7, 2022 clearly prohibits the discharge of HVHF and HVHF-related wastewater from all sources, including conventional and unconventional oil and gas wells. If DCS could properly invoke federal jurisdiction, which it cannot, DCS's claim that DRBC will unlawfully narrow the discharge prohibition is refuted by the exhibits to the Complaint and matters of public record that may be considered on a motion to dismiss.⁵

Count IV alleges a violation of one of the stated purposes of DRBC's organic statute, the Delaware River Basin Compact ("Compact"),⁶ "to apply the principle of equal and uniform treatment to all water users who are similarly situated." Compact, § 1.3(e). No private cause of action exists for violation of the "purpose" of the Compact. Moreover, this Count is in part

⁴ As discussed more fully *infra*, in addition to failing to satisfy criteria for standing, DCS's Complaint likewise fails under separate jurisdictional doctrines implementing the case and controversy requirement, including the ripeness doctrine.

⁵ "Matters of public record" may be considered in a motion to dismiss. *See, e.g., Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010); *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

⁶ Public Law 87-328, 75 Stat. at Large 688 (September 27, 1961), is available at <https://www.nj.gov/drbc/library/documents/compact.pdf>. *See also*, Complaint Exhibit A.

based on DRBC's alleged intent to violate its newly adopted regulations by exempting from the discharge ban HVHF wastewater produced by all "conventional" wells. As noted above, no such exemption exists or will be implemented. DCS also speculates that residents will be disproportionately affected by spills, leaks and other discharges of oil and gas brines depending on the residents' proximity to oil and gas facilities. If "equal and uniform treatment" were a standard DRBC must meet, it would not violate that standard to promulgate a rule that applies equally to all residents of the Basin regardless of where they live.

Finally, Count V is based on DRBC's purported lack of authority to set regulatory standards less stringent than those established by any of the Compact's signatory parties. No Compact provision or other legal support exists for this proposition. Based on this incorrect legal premise, DCS alleges that DRBC has improperly set a weaker standard than Pennsylvania law, under which, in DCS's view, the discharge of brines from conventional wells constitutes a nuisance and also a violation of the environmental rights amendment in Article I, Section 27 of the Pennsylvania Constitution. Complaint ¶¶ 139-142. Assuming *arguendo* that DCS has correctly stated Pennsylvania law, that law applies solely in Pennsylvania. Nothing in the Compact allows a single Basin state to dictate standards for its sister Basin states by establishing the most stringent state standard or otherwise. Rather, as discussed more fully below, the Compact authorizes its signatory parties to take collective actions required to effectuate the Commission's Comprehensive Plan, including establishing standards throughout the Basin, by vote of a majority of the Governors of the Basin states and a federal representative who serve as DRBC Commissioners. *See* Compact § 5.2. The Compact expressly preserves each state's authority to set more stringent pollution prevention standards within its own jurisdiction if it so chooses. Compact § 5.5.

II. Background.

A. The Delaware River Basin Compact.

The Third Circuit has explained the origins, functions and authority of the Commission in several opinions. *See, e.g., Yaw v. Del. River Basin Comm'n*, 49 F.4th 302 (3d Cir. 2022); *Wayne Land and Min. Grp., LLC v. Del. River Basin Comm'n*, 959 F.3d 569 (3d Cir. 2020) (*Wayne II*); *Wayne Land and Min. Grp., LLC v. Del. River Basin Comm'n*, 894 F.3d 509 (3d Cir. 2018) (*Wayne I*); *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981). Only a brief overview is provided here as relevant to the present Motion.

Pennsylvania, New York, New Jersey, Delaware, and the United States enacted the Compact in 1961 to provide for their joint administration of the water resources of the Basin pursuant to a multipurpose comprehensive plan without regard to state boundaries. The Compact formed the Commission and designated the four Governors of the Basin states and a representative of the President as the five Commissioners who serve as the organization's governing body. *See* Compact §§ 1.3(b), 2.2, 14.1(b)(1). An affirmative vote of at least three Commissioners at a public meeting is required to take any Commission action. Compact §§ 2.5, 14.4(a). As set forth in separate articles of the Compact, DRBC's broad authority over water management in the Basin extends to water supply, pollution control, flood protection, watershed management, recreation, hydroelectric power, and water withdrawals and diversions. *See Bucks Cnty.*, 641 F.2d at 1089 n.3.

To ensure an adequate supply of clean water for drinking, recreation, commercial activities, and industrial operations upon which over 14 million people depend, the Commission adopts a comprehensive plan, promulgates regulations, and reviews projects proposed by public or private entities that may have a substantial effect on the water resources of the Basin. *See, e.g.,*

Compact, § 13.1 (Comprehensive Plan), Article 5 (Pollution Control) and § 3.8 (Referral and Review). DRBC's Section 3.8 authority to review projects provides an adjudicatory mechanism to prevent entities from commencing projects that may impair DRBC's Comprehensive Plan, and is distinct from the rulemaking provisions of the Compact at issue here.

B. The Commission Regulates the Water Resource Impacts of Oil and Gas Activities in the Basin.

The regulations prohibiting HVHF in the Basin promulgated by the Commission on February 25, 2021, and the regulations at issue here, promulgated on December 7, 2022, resulted from over a decade of technical and scientific work by Commission staff in consultation with staff of the signatory parties. By 2009, new technologies combining HVHF and horizontal drilling created the potential for natural gas development and resulting water pollution and diminished stream flows in certain areas that might not have been subject to development or as much development but for fracking. Such areas include a large swath of the Basin overlying the Marcellus Shale formation. However, DRBC's Special Protection Waters⁷ and ecologically sensitive headwater areas are located in this same region. To address threats to water resources posed by HVHF activities, the Commission's former Executive Director issued three determinations ("EDDs")⁸ in 2009 and 2010, requiring companies planning to develop natural

⁷ The Commission classifies certain interstate waters as Special Protection Waters due to their high water resource values. The Commission seeks to ensure that there is no measurable change to the quality of these waters except toward natural conditions. *See* DRBC Water Code (incorporated by reference at 18 C.F.R. Part 410), § 3.10.3A.2 available at <https://www.nj.gov/drbc/library/documents/WQregs.pdf>.

⁸ Determination of the Executive Director of May 19, 2009, available at <https://www.nj.gov/drbc/library/documents/EDD5-19-09.pdf>; Supplemental Determination of the Executive Director of June 14, 2010, available at <https://www.nj.gov/drbc/library/documents/SupplementalEDD6-14-10.pdf>; Amendment to Supplemental Determination of the Executive Director of July 23, 2010, available at <https://www.nj.gov/drbc/library/documents/AmendedSuppEDD072310.pdf>.

gas in shale formations in the Basin to submit their plans to the Commission for review and approval under Section 3.8 of the Compact before commencing on-site work.

While asserting its project review authority over this activity new to the Basin, the Commission also sought to develop regulations pursuant to its rulemaking authorities, including, among others, Section 5.2 of the Compact, which grants the Commission power to control future pollution. By Resolution for the Minutes dated May 5, 2010, the Commissioners unanimously instructed the Executive Director to develop proposed regulations and announced they would defer consideration of projects involving natural gas development activities in shale formations (termed “well pad docket”) until such time as the Commission adopted rules to protect the Basin’s water resources and the Comprehensive Plan from the potential adverse impacts of these activities.⁹ The Complaint refers to the deferral of project review as a “*de facto* moratorium.” Complaint ¶¶ 30-31.¹⁰

The Commission conducted an extensive notice and comment rulemaking process. On November 30, 2017, the Commission proposed rules prohibiting HVHF activities in the Basin, and addressing exportation of water and wastewater for use in hydraulic fracturing and importation of oil and gas wastewater from oil and gas wells or centralized waste treatment

⁹ May 5, 2010 Resolution for the Minutes (“May 2010 Resolution”), available at https://www.nj.gov/drbc/library/documents/5-05-10_minutes.pdf at 4-5.

¹⁰ The deferral of review was directed solely to well pad docket and not to importation of wastewater.

facilities.¹¹ After considering the voluminous public comments on the draft rules, the actions of state and federal agencies, and peer-reviewed scientific literature, and after performing its own technical and scientific analysis, the Commission on February 25, 2021 adopted final regulations prohibiting HVHF in hydrocarbon bearing rock formations within the Basin.¹² As stated in Resolution 2021-01, these regulations replaced the EDDs, and the Commission's deferral of its review of natural gas well pad projects expired by its own terms.¹³

Although as noted above, the regulations DRBC proposed in 2017 contained provisions addressing interbasin transfers of water and wastewater, the Commission by Resolution 2021-01 on February 25, 2021 withdrew these provisions. A Resolution for the Minutes also adopted on February 25, 2021 (Complaint Exhibit J) directed the Executive Director to prepare and publish for public comment new proposed rule amendments governing, among other things, conditions under which an importation of wastewater into the Basin may be prohibited.

¹¹https://www.nj.gov/drbc/library/documents/HydraulicFracturing/18CFR440_HydraulicFracturing_draft-for-comment_113017.pdf. Then-existing Commission regulations provided that “it is the policy of the Commission to discourage the importation of wastewater into the Delaware River Basin that would significantly reduce the assimilative capacity of the receiving stream....” DRBC Water Code § 2.30.2. DRBC regulations have discouraged, but never prohibited, importation of all types of wastewater, including oil and gas wastewater. The regulations adopted on December 7, 2022 add more specific criteria to DRBC's review of requests to import any wastewater regardless of whether it is oil and gas derived and without weakening existing regulations and refine the policy discouraging importation of wastewater. *See* Final Rule FAQ 15.

¹² *See* Final Rule with Respect to HVHF and Final Amendments to the Rules of Practice and Procedure Concerning Project Review Classifications and Fees, 18 C.F.R. § 440.3, available at https://www.nj.gov/drbc/about/regulations/final-rule_hvhf.html.

¹³ *See* Resolution 2021-01 adopting the HVHF prohibition, https://www.state.nj.us/drbc/library/documents/Res2021-01_HVHF.pdf at ¶ C.

On October 28, 2021, the Commission issued a notice of proposed rulemaking, frequently asked questions (“Proposed Rule FAQs”), and proposed amended rule text to, among other things, amend the DRBC Water Code by clarifying the circumstances under which importations of water, including wastewater, into the Basin are considered by the Commission and the factors to be used in evaluating whether such proposed imports may be approved, and to amend the Commission’s regulations in 18 C.F.R. Part 440 to prohibit the discharge of wastewater from HVHF and HVHF-related activities to waters or land within the Basin.¹⁴

The rulemaking process on the draft rules published in October 2021 again included extensive public participation. As recited in Resolution 2022-04, DRBC received oral comment from 73 individuals at five virtual public hearings and 2,388 written submissions, many with multiple comments. On December 7, 2022, the Commission adopted the final regulations at issue in this case, establishing criteria for its review of applications for imports and exports of water and wastewater, DRBC Water Code § 2.30, and prohibiting the discharge of wastewater from HVHF and HVHF-related activities to waters or land within the Basin, 18 C.F.R. § 440.4(b). The Commission also approved and issued a comment and response document addressing the comments received during the public comment period. *See* Complaint Exhibit E.¹⁵

¹⁴ *See* recitation in DRBC Resolution 2022-04, http://nj.gov/drbc/library/documents/Res2022-04_finalrule_import-export-hvhf-discharge.pdf.

¹⁵ DRBC Comment and Response Document, Importations of Water into and Exportations of Water from the Delaware River Basin and Discharges of Wastewater from High Volume Hydraulic Fracturing and Related Activities, available at http://www.nj.gov/drbc/library/documents/CRD_Import-Export-HVHF-Discharge120722.pdf.

C. Public Comments on the HVHF Discharge Rulemaking.

Certain comments submitted to the Commission by the public during the comment period on the proposed discharge prohibition employed terms not defined or utilized in DRBC's rule. For example, instead of distinguishing wastewater produced by HVHF and HVHF-related activities from wastewater generated by other oil and gas activities, some commenters used the terms "conventional" and "unconventional" when referring to oil and gas wells or the formations they tap.¹⁶ Pennsylvania's oil and gas regulations at 25 Pa. Code § 78.1 and 25 Pa. Code § 78a.1 define as "unconventional" certain deep shale formations and the wells that target them, and apply the term "conventional" to all other oil and gas wells and formations. To extract natural gas economically, energy companies use HVHF to stimulate unconventional wells. Conventional wells ordinarily target shallower formations, and, according to the Complaint, may be developed using HVHF or non-HVHF techniques. Complaint ¶ 34. Consequently, while wastewater from unconventional oil and gas wells results from HVHF, Complaint ¶ 38, and is covered by DRBC's discharge prohibition, wastewater from conventional oil and gas wells may or may not result from HVHF, *see* Complaint ¶ 34, and thus may fall within or outside the discharge prohibition. Simply put, the discharge of oil and gas wastewater to waters or land within the Basin is prohibited if and only if the well generating the wastewater was stimulated using HVHF techniques or with fracturing fluid composed in part of HVHF wastewater.¹⁷

¹⁶ *See, e.g.*, Complaint Exhibit E, Statement of Concern 38, at 63.

¹⁷ Although not at issue in this case, the composition of the fracturing fluid used at a well site for a specific fracturing event may include, as a substitute for fresh water, treated or untreated HVHF wastewater generated at the same or a different well site. Because in this scenario the wastewater generated from the new well development contains HVHF wastewater injected as fracturing fluid, DRBC classifies the resulting wastestream as HVHF wastewater. This wastewater is subject to the DRBC's discharge prohibition regardless of whether or not a

The Complaint reflects confusion on the part of some members of the public arising from the DRBC's efforts to address the public comments on the proposed regulation using terms employed by commenters. DCS avers that the prohibition on discharge of HVHF wastewater in the Basin "clearly encompassed wastewater/water from all well sites involving high-volume hydraulic fracturing." Complaint ¶ 75. DRBC agrees that the discharge prohibition encompasses all HVHF and HVHF-related wastewater, regardless of whether the state regulations or commenters classify the source well or target formation as conventional or unconventional. The discharge of wastewater from a conventional well falls outside the prohibition imposed by DRBC's regulation only when the well has not been stimulated using HVHF or HVHF wastewater.

DRBC's guidance documents issued in conjunction with the HVHF discharge prohibition, copies of which serve as exhibits to the Complaint, explained this distinction. Subsequently, recognizing that certain members of the public misread DRBC's explanation to exclude from the discharge prohibition wastewater from conventional wells using HVHF techniques, DRBC issued the Revised FAQs emphasizing that it intends to implement its regulations as written. The Revised FAQs, a copy of which is appended to this Memorandum as Exhibit "A" and available on the DRBC's website,¹⁸ provides that the prohibition on the discharge of wastewater from HVHF and HVHF-related activities to waters or land within the Basin applies regardless of whether the oil and gas well or the targeted formation is labeled conventional or unconventional. DRBC's position is straightforward: if wastewater from a

combined total of 300,000 or more gallons of water is used during all stages of completion of the new well (the threshold quantity to meet the definition of HVHF in 18 C.F.R. § 440.2).

¹⁸ *Supra* note 3.

conventional or unconventional well is generated using HVHF methods or HVHF wastewater, the discharge of that wastewater to the waters or land within the Basin is prohibited by DRBC's regulation.

III. The Complaint Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1) for Lack of Subject Matter Jurisdiction.

The judicial power of the federal courts is limited to the adjudication of "Cases" or "Controversies." U.S. Const. art. III, § 2; *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitations of federal court jurisdiction to actual cases or controversies." *Raines v. Bird*, 521 U.S. 811, 818 (1997). This limitation supports our system of separated powers and, in cases involving state governments, protects the principle of dual sovereignty. *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137 (3d Cir. 2009) (citations omitted).

"The existence of a case and controversy is a prerequisite to all federal actions, including those for declaratory and injunctive relief." *Peachlum v. City of York*, 333 F.3d 429, 433 (3d Cir. 2003) (citations omitted). "In order to present a justiciable controversy in an action seeking a declaratory judgment to protect against a feared future event, the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Salvation Army v. Dep't. of Cmty. Affs. of State of N.J.*, 919 F.2d 183, 192 (3d Cir. 1990) (citations omitted). *See also, Yaw*, 49 F.4th at 318, *citing Clapper*, 568 U.S. at 49 ("The future injury must also be 'imminent,' meaning that it is 'certainly impending' rather than just merely 'possible.'").

“Courts enforce the case-or-controversy requirement through the several justiciability doctrines that ‘cluster about Article III.’” *Toll Bros.*, 555 F.3d at 137, quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (further citation omitted). “They include standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions.” *Id.* “[P]erhaps the most important of these doctrines’ is standing.” *Toll Bros.*, 555 F.3d at 137, quoting *Allen*, 468 U.S. at 750.¹⁹

A. DCS Lacks Standing to Bring All of its Claims.

Article III standing is a “threshold” jurisdictional issue, *Wayne II*, 959 F.3d at 573-74 (citations omitted), which “limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citations omitted). Plaintiff bears the burden of demonstrating standing for each claim in its Complaint and for each form of relief it seeks. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (citation omitted); *Wayne II*, 959 F.3d at 574, citing *Town of Chester v. Laroe Ests.*, 581 U.S. 433, 439 (2017), quoting *Davis*, 554 U.S. at 734. To establish standing, a plaintiff must clearly allege that it has suffered an injury in fact, its injury is fairly traceable to the challenged conduct, and the injury is likely to be redressed by a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992).

The element of injury in fact requires a plaintiff to show that its alleged injury was “an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Spokeo*, 578 U.S. at 339 (citations and quotations omitted).

¹⁹ The zone of interests test discussed in *Allen* as a feature of the prudential standing doctrine, 468 U.S. at 751, is now utilized as a factor determining whether a statute creates a private cause of action. *Lexmark Intern. Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-132 (2014).

“For an injury to be particularized, it must affect the plaintiff in a personal and individual way.” *Id.* (citations and quotations omitted). And for an injury to be “concrete,” it must actually exist and “it must be real and not abstract.”²⁰ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021), *quoting Spokeo*, 578 U.S. at 340 (additional citations omitted).

In *Bognet v. Commonwealth of Pennsylvania*, 980 F.3d 336, 348 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021), the Third Circuit explained these requirements:

Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court.

The Third Circuit further noted:

[W]hen a plaintiff alleges future injury, such injury must be “certainly impending.” *Clapper [v. Amnesty Int’l USA]*, 568 U.S. at 409, 133 S.Ct. 1138 (*quoting Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of “possible” future injury simply aren’t enough. *Id.* (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 158... (1990)).

Id. Bald assertions that rest on mere supposition are not credited. *Id.* at 362, *citing Finkelman v. Nat’l Football League*, 810 F.3d 187, 201-02 (3d Cir. 2016). *Accord, Ellison v. Am. Bd. Of Orthopaedic Surgery*, 11 F.4th 200, 205 (3d Cir. 2021) (allegations of mere possible future injury are insufficient); *Pontes v. Rowan Univ.*, No. 20-2645, 2021 WL 4145119 (3d Cir. Sept.

²⁰ Even when traditional Article III standing exists, “Prudential considerations further limit a plaintiff’s ability to establish that she has standing. These considerations require that . . . a litigant ‘assert his [or her] own legal interests rather than those of third parties,’ . . .” *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994) (citations omitted). *See also, Lexmark*, 572 U.S. at 125-128.

13, 2021), *citing Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (cleaned up) (“[a] threatened injury must be ‘certainly impending []’ and ‘proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.’”).

In *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), the Supreme Court held that an organization lacked standing to challenge a regulation because it could not show that harm to any of its members was concrete and imminent. The plaintiff in *Summers*, an environmental group, challenged a U.S. Forest Service regulation exempting first-rehabilitation activities and sales of salvage timber from the requirement to file an environmental impact statement if the activities were conducted on less than the acreage specified in the regulations. After settlement of one project-specific dispute, plaintiff pressed its claim that the regulation would harm future project areas that members of plaintiff’s organization planned to visit.

Because the regulation was directed at the conduct of Forest Service officials, and not at plaintiff, standing of plaintiff was “substantially more difficult to establish.” *Id.* at 493-94, *quoting Lujan*, 504 U.S. at 562. Plaintiff did not show it had been injured in the past, did not identify any particular site of a future project, and did not show that a member of plaintiff’s organization would be injured imminently at a particular location. The Court rejected the argument that standing could be based on a “statistical probability” that some of the plaintiff’s members are threatened with concrete injury. *Id.* at 497. The *Summers* Court thus held that plaintiff failed to demonstrate the imminent, concrete harm necessary to confer standing. *See also, TransUnion LLC*, 141 S. Ct. at 2211 (“[t]he plaintiffs did not factually establish a sufficient risk of future harm to support Article III standing.”); *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 732 (7th Cir. 2020) (Barrett, J.), *quoting Friends of the Earth, Inc. v. Laidlaw*

Env't Services (TOC), Inc., 528 U.S. 167, 181 (2000) (“[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff.”).

As in *Summers*, DCS in this case has not alleged that in the past its members have been injured by HVHF wastewater discharged in the Basin through road spreading or other means, that HVHF wastewater has ever been imported into the Basin, that concrete plans exist to import HVHF wastewater into the Basin in the future, that there are specific locations at which HVHF wastewater will be imminently spread on roads or otherwise discharged, or that any specific DCS members will be exposed to HVHF wastewater discharged at those particular locations. The same deficiencies exist with respect to allegations of injury from exposure to non-HVHF oil and gas wastewater.

The Complaint contains allegations laying bare the absence of imminent injury to DCS or its members. The Complaint avers that to date no importation of HVHF wastewater into the Basin has occurred. *See* Complaint ¶¶ 53, 125. The Complaint also avers that Pennsylvania “allegedly” halted road spreading of wastewater from conventional wells. Complaint ¶ 41. The Complaint acknowledges that Pennsylvania regulations ban the road spreading of wastewater from unconventional oil and gas wells. Complaint ¶ 40.²¹ *See also*, 25 Pa. Code §§ 78a.70 and 78a.70a. New York State prohibits road spreading of brines from the Marcellus Shale (an “unconventional formation” in Pennsylvania parlance), and allows road spreading of production brines from all other wells only if the discharge is made pursuant to a plan approved by the New York Department of Environmental Conservation (“NYDEC”) to prevent runoff to waterbodies and otherwise satisfies the conditions of a NYDEC beneficial use determination, as set forth in

²¹ Elsewhere the Complaint alleges that road spreading of oil and gas wastewater is unlawful in Pennsylvania under Pennsylvania’s Environmental Rights Amendment, Pa. Const. art. I, § 27, and the doctrine of nuisance. Complaint ¶¶ 138, 142.

state regulations designed to prevent any injury to human health and the environment.

6 NYCRR 360.12(f). *See also*, N.J.A.C. § 7:14A-2.1(d) (prohibiting the discharge of any pollutant in New Jersey except in conformity with a valid NPDES permit). These state requirements are not limited by DRBC's regulations.

In an effort to show that its members will be injured by DRBC's discharge prohibition, DCS incorrectly avers that DRBC intends to implement exemptions to its prohibition of the discharge of wastewater from HVHF and HVHF-related activities to permit the discharge in the Basin of HVHF wastewater from conventional wells. *See, e.g.*, Complaint ¶¶ 70-74. As discussed herein, these allegations are refuted by the public record. In addition, DCS has not demonstrated the existence of plans by any person to discharge any oil and gas wastewater in the Basin, let alone plans that would lead to DCS members becoming exposed to the wastewater at specific locations.

DCS also alleges that DRBC has lowered the standard of protection for allowing wastewater into the Basin, thereby purportedly encouraging importation of non-HVHF oil and gas brines. Complaint ¶ 125. To the contrary, an examination of the new regulations shows that they merely give greater specificity to the stringent criteria DRBC will apply in its review of a proposed importation. Before adoption of the recent amendments, DRBC's Water Code stated that importation of wastewater is "discouraged." DRBC Water Code § 2.30.2. The recent amendments left this provision unchanged. When DRBC reviews applications, the new provisions require consideration of, among other things, the effect of the importation on water uses established by the DRBC's Comprehensive Plan, including the Water Code, and on aquatic ecosystems. DRBC Water Code § 2.30.3B. Unless the applicant seeking approval for an importation can show that the importation meets DRBC's strict criteria, DRBC will not approve

the importation. Clearly nothing in these amendments is likely to change the status quo under which DRBC has to date granted no approvals for importation of wastewater from oil and gas operations, Complaint ¶ 125. DCS has not demonstrated that as a result of the amendments, any person plans to import oil and gas wastewater to any location in the Basin, that DRBC plans to approve importation of this wastewater, or that DCS or any of its members will suffer an imminent injury.

B. DCS’s Claims Should Be Dismissed Because They are not Ripe.

“Ripeness is among the requirements for a case or controversy to exist.” *Birdman v. Off. of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012) (citation omitted). In declaratory judgment cases, the Third Circuit’s ripeness analysis focuses primarily on “(1) the adversity of the parties’ interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment.” *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir. 1996) (citations omitted); *accord, Khodara Env’t, Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 646-47 (3d Cir. 1990). A court may consider additional relevant factors. *Armstrong-World Indus., Inc. by Wolfson v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992).

Here, DCS’s challenge to the regulations is not ripe. With respect to adversity, DRBC and DCS agree that the discharge prohibition prohibits the discharge of HVHF and HVHF-related wastewater to the waters and land within the Basin. Clearly the parties are not adverse as to this issue forming the basis of Counts I, II, III, and portions of Counts IV and V. With respect to the separate importation provisions of the regulations applicable to all types of wastewater that are the subject of other portions of Counts IV and V, DCS has not identified any specific request to import oil and gas wastewater that has been or will imminently be made, let alone any that DRBC may grant. DCS has likewise not identified where the wastewater will be transported in

the Basin or where specific members of DCS may be exposed to it. Unless and until DCS can show that there is a real and substantial threat DRBC will approve the importation of oil and gas wastewater for a specific project, *see Salvation Army, supra*, the parties' interests are not adverse.

Regarding the remaining factors, the judgment may be conclusive, depending on what if any relief the Court grants. The judgment would not, however, have utility. A declaration as to the agreed-upon scope of the discharge prohibition would have no practical effect. As to the importation rule, DRBC will not approve a request to import oil and gas wastewater into the Basin unless it meets DRBC's regulatory criteria. If and when an application to import oil and gas wastewater is submitted to DRBC and approved, an event without any precedent, Complaint ¶ 25, the Compact permits an aggrieved party to appeal the approval to federal court. Compact § 3.8. It would be premature to interfere with this statutory process, and no harm to DCS will result from awaiting an unlikely, concrete factual scenario. Because the parties may become adverse, and a prospective judgment conclusive, only under potential factual circumstances not likely to occur, DCS's claims are not ripe and should be dismissed for lack of jurisdiction.

C. The Parties' Identical Positions With Respect to the Scope of the Discharge Prohibition Precludes Federal Jurisdiction Over Counts I, II, III, and Portions of Counts IV and V of the Complaint.

Standing is one of the doctrines commonly employed to limit federal court jurisdiction to "cases" and "controversies" as required by U.S. Const. art. III, § 2. At times, however, courts recognize the absence of a case or controversy without the need to cite standing or other doctrines. As the Supreme Court has stated, a case or controversy does not exist when "both litigants desire precisely the same result." *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47, 48 (1971) (*per curiam*). In *Moore*, both parties agreed that the anti-busing law at issue was

constitutional and that the order of the district court enjoining the law's enforcement should be set aside. The Supreme Court concluded that because the litigants desired the same result, no case or controversy within the meaning of Art. III of the Constitution existed. The Supreme Court thus dismissed the case for lack of jurisdiction. *Accord, United States v. Windsor*, 570 U.S. 744, 758 (2013) (where parties agreed that Defense of Marriage Act is unconstitutional, standing existed only because United States refused to refund money to taxpayer); *Del. Dep't of Health and Soc. Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1135-36 (3d Cir. 1985) (questioning federal jurisdiction where parties agreed on arbitration award); *Langbord v. United States Dep't of the Treasury*, 749 F.Supp. 2d 268, 279-80 (E.D. Pa. 2010), *aff'd in part*, 832 F.3d 170 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1578 (2017) (no jurisdiction where parties do not seek different outcomes); *Haile v. Super. Ct. of Del.*, 387 F.Supp. 865 (D. Del. 1975) (three-judge panel) (case dismissed for lack of "case" or "controversy" where plaintiffs and Superior Court did not have adverse interests).

Here, DCS and DRBC do not have adverse interests with respect to the scope of the discharge prohibition. The parties agree that the discharge regulation prohibits the discharge of HVHF and HVHF-related wastewater to the water or land within the Basin. Although as discussed above, DCS has not demonstrated standing as to any of its claims, its challenge specifically to the discharge prohibition suffers from the same jurisdictional defect found in *Moore* and its progeny. Where, as here, the parties agree on the scope of the discharge prohibition, no case or controversy exists.

In sum, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12 (b)(1) because (1) DCS has not shown that the importation rule or the discharge prohibition will inflict a concrete, particularized and imminent injury on DCS or any of its members, (2) DCS has not

shown that any of its claims are ripe, and (3) the parties' identical positions regarding application of the discharge prohibition to all HVHF and HVHF-related wastewater refutes the existence of a case or controversy on that issue.

IV. DCS's Complaint Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim.

Because standing is a threshold issue going to the power of the Court to adjudicate a claim, DRBC's Rule 12(b)(1) motion to dismiss for lack of standing should be resolved before reaching the Rule 12(b)(6) grounds addressed in this section. If contrary to DRBC's arguments above, the Court concludes that DCS has standing to bring one or more counts of its Complaint, these counts should be dismissed for failure to state a claim.

A. The Complaint's Claims Directed to the So-Called Extra-Regulatory Exemptions Should Be Dismissed.

Counts I, II, and III of the Complaint in their entirety, and Counts IV and V in part, are based on DCS's erroneous contention that DRBC created "extra-regulatory exemptions" that narrow the scope of its discharge prohibition. As support, DCS relies entirely on its interpretation of certain explanatory documents DRBC issued in conjunction with issuance of the rule. DCS mistakenly construes these documents to mean that HVHF wastewater from a conventional well is exempt from the discharge prohibition. To the contrary, as discussed above, DRBC agrees that its regulation prohibits the discharge to waters or land within the Basin of all HVHF and HVHF-related wastewater, 18 C.F.R. § 440.4, regardless of the type of well at which the wastewater is generated. This is the interpretation advocated for by DCS. DRBC is implementing and will continue to implement the regulation in this manner. Hence there is no basis for declaratory or injunctive relief.

A review of the evidence cited in the Complaint reveals that DCS has misinterpreted portions of DRBC's guidance documents despite the plain language of the rule itself and other rulemaking documents that explained the purpose of the rule. The Revised FAQs dispel any confusion on the part of DCS or others.

Exhibit B to the Complaint includes DRBC's notice of proposed rulemaking for the HVHF discharge regulation and for the importation/exportation rule as published in the Pennsylvania Bulletin on December 4, 2021. Similar notices were published in the registers of the other Basin states and in the Federal Register.²² The notices include the basis and background for the proposed rule and reference the extensive CRD from the rulemaking finalized on February 25, 2021 prohibiting HVHF in the Basin. The CRD for that rulemaking discusses the technical and scientific basis for concluding that substantial risks and impacts to water resources would occur if HVHF wastewater were discharged to the land and waters of the Basin.²³ As in the February 2021 rulemaking prohibiting HVHF in the Basin, the key distinction in the December 2022 rulemaking prohibiting discharges of wastewater from HVHF and HVHF-related activities to waters or land within the Basin is between wastewater generated by HVHF and HVHF-related activities on the one hand and wastewater generated by non-HVHF activities on the other. Nothing in the rule text nor the notices for the rulemaking on the discharge

²² Because like other provisions of the DRBC Water Code and DRBC Water Quality Regulations, the discharge and interbasin transfer provisions as adopted would be incorporated by reference into the Code of Federal Regulations, the Office of the Federal Register required some non-substantive modifications of the proposed and final rulemaking notice to conform with Federal Register requirements.

²³ The CRD from the rulemaking finalized on February 25, 2021 prohibiting HVHF in the Basin may be accessed at http://nj.gov/drbc/library/documents/CRD_HVHFrulemaking.pdf.

prohibition mentions any exemption whatsoever, let alone based on well type or discharge activity.

Exhibit M to the Complaint contains the Proposed Rule FAQs. Proposed Rule FAQ 13 asks, “Would the spreading of HVHF wastewater or by-products on roads be permitted if the proposed rule amendments are adopted?” The response is consistent with the plain language of the rule which addresses all HVHF wastewater: “Land application of HVHF wastewater by road spreading would constitute a prohibited discharge under 18 C.F.R. 440.4(b) of the proposed amendments which provides that ‘no person may discharge wastewater from high-volume hydraulic fracturing or HVHF-related activities to waters or land within the Basin.’”

When adopting its final rule establishing the HVHF discharge prohibition, DRBC issued the CRD, Complaint Exhibit E, addressing comments submitted during the public comment period. Response 38 notes that various comments had been directed at road spreading of brines from conventional natural gas wells, “an activity that is not addressed by the draft DRBC rule but which has been suspended in the Commonwealth by the Pennsylvania Department of Environmental Protection.”²⁴ DRBC used the term “conventional wells,” employed by commenters and Pennsylvania regulations,²⁵ to signify that DRBC’s discharge prohibition is not based on the type of well generating the wastewater, and thus there is no blanket prohibition on the discharge of wastewater from all conventional wells. DCS misinterpreted this to mean that

²⁴ CRD Response 38 further noted: “By regulation, Pennsylvania banned the practice of road spreading of HVHF (“unconventional” in Pennsylvania terms) wastewater in 2016.” CRD Response 38, citing 25 Pa. Code §§ 78a.70 and 78a.70a.

²⁵ See 25 Pa. Code §§ 78.1 (definition of “conventional well” and “unconventional well”) and 78a.1 (definition of “unconventional well”).

DRBC would not prohibit the discharge of HVHF wastewater from conventional wells that employ HVHF techniques.

DRBC's response to Final Rule FAQ 13, also issued in conjunction with the final rule, shows the distinction between the conventional/unconventional typology used by Pennsylvania and the HVHF/non-HVHF classification employed in DRBC's rules. Final Rule FAQ 13 asks, "Does the final rule prohibit road spreading of wastewater from conventional drilling activities?"

The stated response is:

"No. The rule prohibits road spreading of HVHF wastewater. The Commission will continue to coordinate with the Basin states to review the scientific evidence regarding harm to water resources caused by road spreading of conventional oil and gas production wastewater and may in the future consider whether additional regulation of the practice is needed in the basin. Refer to the Commission's CRD (Response R-38) for a more detailed explanation.

To be sure that its guidance is correctly understood, the Commission adopted the Revised FAQs, a copy of which is attached hereto as Exhibit "A" and available on DRBC's website.²⁶

The Revised FAQs state that the discharge prohibition applies to wastewater meeting the definitions of HVHF and HVHF-related activities regardless of whether the well or the formation targeted by the well is labeled "conventional" or "unconventional." They further state that the prohibition does not apply to the discharge of wastewater outside the scope of the applicable definitions. Accordingly, whether the discharge of wastewater to waters or land within the Basin is prohibited by the final regulations depends on whether it is generated by HVHF or HVHF-related activities; it does not hinge on the type of well generating the wastewater or the target formation.

²⁶ *Supra* note 3.

Although DRBC believes that the guidance as issued on December 7, 2022 distinguished between HVHF and non-HVHF wastewater, the Revised FAQs eliminate any perceived ambiguity. Because the record shows that the “extra-regulatory exemptions” serving as the basis for Counts I, II, and III, and in part for Counts IV and V, do not exist, claims based upon these purported exemptions should be dismissed.²⁷

B. Counts IV and V Alleging a Violation of the Compact’s Purpose Should Be Dismissed.

1. The Compact’s “Purpose” Section Does Not Create a Private Cause of Action.

Counts IV and V fail for a common reason, the absence of a private cause of action, as well as for reasons particular to each Count. These Counts are based on DRBC’s alleged violation of the Compact’s purpose clause, in particular the purpose of applying the principle of equal and uniform treatment to all water users. Compact § 1.3(e). Nothing in the Compact creates an express cause of action for alleged violation of this principle.

DCS appears to be asking the Court to imply a cause of action. Yet “[i]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.” *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (citations omitted). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court identified four factors to be considered when determining whether a private cause of action is implicit in a statute: (1) whether the plaintiff is in a class for whose special benefit the statute was enacted,

²⁷ Count II alleges that the so-called extra-regulatory exemptions violate DRBC’s February 25, 2021 Resolution for the Minutes directing the Executive Director to publish for public comment with the proposed rule any “other provisions.” In DCS’s view, the so-called extra-regulatory exemptions are “other provisions” that the Commission directed be published for public comment. Even if the exemptions exist, which they do not, the Commissioners’ adoption of the regulations on December 7, 2022 supersedes any direction they gave to the DRBC Executive Director in the February 25, 2021 Resolution.

(2) whether there is any indication of legislative intent to create a remedy, (3) whether implying a remedy is consistent with the underlying purpose of the statutory scheme, and (4) whether the cause of action is traditionally relegated to state law in an area of concern to the states. *Id.* at 78.

Here, as an interstate Compact approved by Congress, the Compact is an agreement among the signatory parties. Because the shared water resources of the Basin are of joint interest to the signatory parties, they formed the Commission to jointly exercise their sovereign powers. *See* Compact 1.3(a), (b) and (c). *See generally*, *Wayne I*, 894 F.3d at 515, *Yaw*, 49 F.4th at 308. In agreements among sovereigns, each sovereign represents all of its citizens. *See Badgley v. City of New York*, 606 F.2d 358, 364 (2d Cir. 1979 (holding that Pennsylvania represented its citizens in proceedings before the Supreme Court to equitably allocate waters of the Delaware River). The Compact was not enacted for the particular benefit of persons like DCS and its members opposing natural gas development.

In addition, the Compact does not evidence an intent to create a remedy for alleged violation of the “purpose” provision upon which DCS relies. Rather, the Compact places the authority to administer water resources upon the Governors and federal representative, an organizing principle wholly inconsistent with the notion of an implied remedy for individual Basin residents. Finally, the causes of action at issue involve water resource matters traditionally within the province of the states. In sum, no private cause of action exists for violation of a “purpose” of the Compact. *Contrast* Compact § 3.8 (authorizing judicial review of determinations of the Commission under that section, not at issue here).

2. The Complaint Fails to State a Claim for Unequal and Non-Uniform Treatment.

Assuming *arguendo* that a cause of action exists for violation of the Compact’s purpose of equal and uniform treatment of Basin water users, which as discussed above, it does not, Count IV nonetheless fails to state a claim. Count IV is captioned “Violation of Compact – Article I Arbitrary, Unequal, and Non-uniform Treatment of Basin Water Users.” Citing Article I of the Compact, which includes the Compact’s definitions and purposes, this Count asserts that the regulations violate the principle of equal and uniform treatment in two potential ways:

(1) by means of alleged extra-regulatory exemptions from the prohibition on discharge of HVHF and HVHF-related wastewater that allegedly result in unequal and non-uniform treatment of Basin water users in violation of Section 1.3 of the Compact, a “Purpose and Finding” provision. Complaint ¶ 120.

(2) by virtue of including importation provisions (which apply to all water and wastewater, not exclusively to wastewater from HVHF and HVHF-related activities) that are alleged to disproportionately “harm those residents, particularly in Pennsylvania, closest to oil and gas activities where new waste and wastewater processing facilities may open and expose nearby residents to the well-documented harms and risks of spills, leaks, and other releases (even if not a ‘discharge’) that presently they do not have to be concerned with. *See, e.g.*, Exhibits G through I, N through Q.” Complaint ¶ 126 (footnote citation omitted).

a. Count IV’s Challenges to the Discharge Prohibition Fail to State a Claim.

The first of these contentions is based on DCS’s misunderstanding. As discussed above, all claims based on the so-called extra-regulatory exemptions should be dismissed because DRBC will apply the discharge prohibition to all wastewater from HVHF and HVHF-related activities. DRBC is not basing its regulation on Pennsylvania’s well classifications. DCS’s

speculation that as a result of the alleged exemption from the prohibition on discharging HVHF wastewater, users located near waste and wastewater facilities will be at higher risk than residents located further from these facilities, Complaint ¶ 120, is thus based on the false premise that exemptions exist.

Significantly, if there were an exemption for HVHF wastewater generated by conventional wells, which there is not, the exemption would not constitute unequal and non-uniform treatment of water users. Regardless of how it is construed, DRBC's discharge prohibition applies uniformly throughout the Basin. The alleged increased risk would result from where the residents live and work and not from differential treatment by DRBC.

Because the discharge prohibition is facially neutral, DCS appears to be making a disparate impact claim, *i.e.*, a claim that the prohibition disproportionately impacts a class of residents. Yet DCS has not shown that this speculative impact is imminent or would occur at all, particularly in light of Pennsylvania laws and regulations that prohibit or allegedly prohibit road spreading of oil and gas wastewater. Complaint ¶¶ 40, 41.

Even if DCS could demonstrate that DRBC's discharge prohibition would create a disparate impact, which it cannot, its claim would still be legally deficient. Although DRBC is unaware of any caselaw interpreting the phrase "uniform and equal treatment," its language resembles the Equal Protection Clause contained in the Fourteenth Amendment to the U.S. Constitution. Under Equal Protection Clause jurisprudence, a generally applicable, neutral law is not constitutionally infirm because it has a disparate impact. A violation occurs only if discriminatory intent is shown. This is true even when a protected class is disproportionately impacted. *See, e.g., Washington v. Davis*, 426 U.S. 229, 248 (1976). Less reason exists to find a violation based upon disparate impact to a class of persons not triggering heightened protection.

Crawford v. Marion Cnty Election Bd., 553 U.S. 181, 207-08 (2008) (Scalia, J. concurring), citing *Harris v. McRae*, 448 U.S. 297, 323, and n.26 (1980) (poverty); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (disability); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (age); *Employment Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878-879 (1990) (First Amendment religious objectors). The Complaint contains no allegation that DCS and its members comprise a protected class for equal protection purposes or that DRBC intends to discriminate against them. DRBC's neutral rules are thus not "unequal;" they apply uniformly throughout the Basin and do not classify residents based on any criteria, including where they reside.

The Complaint disputes the basis for *Pennsylvania's* distinction between discharge of wastewater from conventional and unconventional wells,²⁸ Complaint ¶ 35. The Complaint's prayers for relief do not challenge *DRBC's* distinction between the discharge of wastewater from HVHF and HVHF-related activities on the one hand and wastewater from non-HVHF activities on the other. DRBC agrees that its distinction does not violate the objective of uniform and equal treatment of water users. DRBC first addressed oil and gas wastewater in 2009, when the potential existed for energy companies to install wells targeting deep shale formations.²⁹

²⁸ Pennsylvania has recognized that not all wells pose the same risk—it has long regulated unconventional and conventional wells through separate regulatory schemes. Pennsylvania regulations applicable to unconventional wells are found in 25 Pa. Code Chapter 78a. Pennsylvania regulations applicable to conventional wells are codified at 25 Pa. Code Chapter 78. Although DRBC's distinction between HVHF and non-HVHF wastewater differs from Pennsylvania's scheme, both recognize that separate classes of wells or activities may present distinct risks.

²⁹ See, Daniel J. Soeder and William M. Kappel, USGS Fact Sheet 2009-3032, *Water Resources and Natural Gas Production from the Marcellus Shale* (2009), available at <https://pubs.usgs.gov/fs/2009/3032/pdf/FS2009-3032.pdf>.

Stimulating these wells requires injection of millions of gallons of water and chemicals.³⁰ Other methods of well stimulation commonly use much less water.³¹ DRBC’s definition of HVHF establishes a conservative and protective threshold of 300,000 gallons to trigger the prohibition, an amount identical to that employed by New York State.³² Although DRBC continues to investigate whether regulation by DRBC of smaller quantities (regulated by state law) is necessary, the more substantial risk posed by high volumes of wastewater provides a rational basis for distinguishing HVHF from non-HVHF activities.

b. Count IV’s Challenges to the Importation Regulation Fail to State a Claim.

The second alleged basis for DCS’s allegation of unequal treatment focuses on the importation/exportation regulation, which addresses the transfer of all water and wastewater into and out of the Basin.³³ DCS avers that DRBC has a legal obligation to single out oil and gas wastewater and prohibit its importation. See Complaint ¶¶ 125-126. DCS’s theory appears to be that because DRBC has banned use of HVHF to stimulate oil and gas wells targeting hydrocarbon formations in the Basin, Complaint ¶ 127, and has prohibited the discharge of HVHF wastewater within the Basin, it must prohibit importation of all oil and gas wastewater.

³⁰ US EPA, EPA-600-R-16-236Fa, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, p. ES-12 (Dec. 2016), available at <https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990>.

³¹ NYS Dep’t of Env’t Conservation, Final Supplemental Generic Environmental Impact Statement, Findings Statement, p. 4 (June 2015) (“[H]igh-volume hydraulic fracturing requires significantly more water [compared to ‘other methods of well completion’], and chemical additives, which may pose public health hazards through potential exposure.”) available at: https://www.dec.ny.gov/docs/materials_minerals_pdf/findingstatevhf62015.pdf.

³² NYS Final Supplemental Generic Environmental Impact Statement, Glossary at G-12 (definition of High-Volume Hydraulic Fracturing), https://www.dec.ny.gov/docs/materials_minerals_pdf/fsgeis2015gb.pdf. See also, *supra* note 29.

³³ DCS challenges only the importation provisions of the rule. See Complaint ¶ 61.

This theory does not present a legally cognizable equal treatment claim. First, as discussed above, a “purpose” section of a statute does not create a private cause of action. Second, for importation of any water or wastewater to obtain DRBC approval, it must satisfy the stringent requirements of the importation rule. DRBC’s importation regulation is thus facially neutral. To date, DRBC’s technical and scientific analysis has not demonstrated that despite the prohibitions on HVHF in the Basin and on the discharge of HVHF and HVHF-related wastewater to the waters or land within the Basin, the risks from the potential importation of oil and gas wastewater warrant regulating importation of this wastestream differently from importation of other industrial wastestreams. But even if there were such heightened risks, for reasons discussed above, all applications to approve importation of wastewater are subject to the same DRBC requirements, and no class of wastewater, let alone user of water or wastewater, is singled out. The Compact’s purpose of equal and uniform treatment of water users does not invalidate a regulation applying uniformly to all water users in the Basin.

C. Count V’s Allegations that DRBC Regulations Must Meet the Most Stringent Standard of DRBC’s Signatory Parties Fail to State a Claim.

Count V asserts that “DRBC Lacks Authority under the Compact to set a Regulatory Floor Lower than the Laws of Any of Its Signatory Parties.” Complaint Count V, Heading and ¶¶ 130, 143. Because no section of the Compact imposes this limitation on DRBC, DCS once again cites one of the stated “purposes” of the Compact, equal and uniform treatment of Basin water issues. Complaint ¶ 131. In DCS’s unsupported view, equal and uniform treatment by DRBC means DRBC must impose on all water users throughout the Basin the most stringent requirement adopted by any Basin state under state law. DCS then asserts that road spreading of brines from conventional wells is prohibited by the Environmental Rights Amendment to Pennsylvania’s Constitution, Art. I, § 27 (“ERA”), and by Pennsylvania *per se* nuisance law,

Complaint ¶¶ 138, 142, an averment directly in conflict with DCS’s assertion that it will be injured unless DRBC adopts more stringent regulations. Complaint ¶¶ 13, 64, 120, 126, 137, 142. For purposes of this Motion, we assume *arguendo* that DCS has correctly stated Pennsylvania law.³⁴

The Third Circuit has stated that the Compact must be construed using principles of contract interpretation. *Wayne I*, 894 F.3d at 527. *See also, Tarrant Reg’l. Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). The terms of the Compact may be dispositive. If not, other factors such as the Commission’s course of performance under the Compact are among the factors relevant to interpreting the Compact. *Id.*

We begin with the language of the Compact. The phrase “apply the principle of equal and uniform treatment to all water users,” Compact § 1.3(e), does not state that DRBC must adopt the most stringent standard utilized by any one of its member states. Other provisions of the Compact conflict with DCS’s misreading of this provision.

By creating the Commission, the Compact provided the institutional mechanisms for the five sovereigns comprising the Commission to jointly administer regional water resources for which they have “joint responsibility.” *See* Compact first recital. Section 1.3(e), cited by DCS, recites as a purpose of the Compact, “to provide for cooperative planning and action by the signatory parties.” The Compact grants each member of the Commission one vote, and provides that an action of the Commission requires the affirmative vote of a majority of the Commissioners. Compact § 2.5.

³⁴ DRBC is unaware of any judicial decision resolving the applicability of Pennsylvania’s ERA or Pennsylvania’s doctrine of nuisance *per se* to the road spreading of oil and gas brines.

Section 13.1 of the Compact instructs the Commission to develop and adopt a Comprehensive Plan for the immediate and long-range development and use of the water resources of the Basin. To create the Comprehensive Plan, DRBC must consult with water users and interested public bodies and public utilities, consider the “findings and recommendations” of the various agencies of the Signatory Parties and their political subdivisions, and conduct public hearings. Compact § 13.1. Any public and private projects and facilities included in the Comprehensive Plan must be required “in the judgment of the Commission.” *Id.* If the Compact’s purpose of applying the principle of equal and uniform treatment to all water users were to transform a single state agency’s “findings and recommendations” into requirements binding on the Commission and the other states, the process specified by Section 13.1 could not be followed and the delicate balancing of the sovereign interests of the four Basin states and the federal government through a comprehensive planning process would be upended.

When the Commission adopts regulations to control future pollution and to abate existing pollution, it must satisfy the following standard: “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.” Compact § 5.2. The applicable standard for controlling pollution expressly references the Comprehensive Plan developed cooperatively by the Signatory Parties, *see* Compact § 13.1, and not the most stringent existing state standard.³⁵

³⁵ The other provisions of the Compact granting the Commission authority to adopt regulations are similarly unrestricted by an obligation to follow the law of any single state. *See, e.g.*, Compact §§ 3.6(b), 6.2, 10.1, 10.3, and 14.2.

Significantly, Section 5.5 of the Compact, contained in Article 5 which addresses the Commission's Pollution Control authority, makes clear that a state may promulgate and enforce pollution control standards more stringent than the Commission's standards. Section 5.5 provides:

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 Compact thus clearly contemplates states imposing requirements within their jurisdictions that are more restrictive than Commission requirements. In this manner, the Compact balances the need for the Commission to establish Basin-wide standards with the continuing interest of each Basin state in ensuring adequate protections to meet conditions within its borders.

The Commission's course of performance, including the substance of the regulations adopted by the Commission, is consistent with Section 5.5 of the Compact. Section 2.20 of the Commission's Water Quality Regulations, 18 C.F.R. Part 410, provides:

Section 2.20 Additional Requirements. Any of the signatory parties may impose standards, including water quality criteria and effluent quality requirements, with respect to waste discharges within its jurisdiction more stringent than those provided by the Comprehensive Plan and these Regulations.³⁶

The Basin states have adopted regulations providing that they will apply the more stringent of their own standards or DRBC's standards within their respective jurisdictions. *See, e.g.*, 25 Pa. Code § 93.2(b) (applying the more stringent of DRBC's water quality standards and those of Pennsylvania); N.J.A.C. § 7:9B-1.14(h)(2) (applying the more stringent of DRBC's surface water quality criteria and those of New Jersey).

³⁶ <http://nj.gov/drbc/library/documents/WQregs.pdf>.

These provisions should be of no surprise to DCS. The states' retention of authority to promulgate their own more stringent criteria is a common feature of environmental law. Implementation of the Clean Water Act, which is subject to the Equal Protection Clause of the U.S. Constitution, provides a useful analogy.

Under the Clean Water Act, the U.S. Environmental Protection Agency reviews water quality standards established by states and may disapprove them if they are inconsistent with the applicable requirements of the Act. 33 U.S.C. § 1313(a), (b) and (c). States may also administer the program for permitting pollutant discharges if the state program satisfies federal standards. 33 U.S.C. § 1342(b). This form of cooperative federalism facilitates achieving the Act's goals of restoring the physical and biological integrity of the nation's waters, 33 U.S.C. § 2251(a), while preserving the responsibilities and rights of the states to prevent pollution. 33 U.S.C. § 2251(b). *See also*, 40 C.F.R. § 233.1(c) (approval of state programs under Section 404 of the Clean Water Act), 33 U.S.C. § 1342(b) (delegation of Clean Water Act permitting program to states); 33 U.S.C. § 1370 (preserving state authority to adopt or enforce any standard or limitation respecting discharges of pollutants or any requirement respecting control or abatement of pollution except for limitations or standards less stringent than those provided in the Clean Water Act). The Equal Protection Clause has never been interpreted to require that the standards or program components applicable to each state or water user be identical or to mandate that EPA impose the most stringent state standard on all other states. The Compact likewise allows Basin states to have standards within their jurisdictions that are more stringent than DRBC's standards.

The terms of the Compact and the Commission's course of performance reveal that consistent with principles of cooperative federalism, each sovereign may adopt more stringent standards within its own jurisdiction. Equal and uniform treatment of water users does not mandate that DRBC impose throughout the Basin the standards DCS attributes to Pennsylvania.

V. Conclusion.

For the foregoing reasons, DRBC respectfully requests that the Complaint be dismissed.

Respectfully submitted,

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s/ Kenneth J. Warren
Kenneth J. Warren / PA 30895
WARREN ENVIRONMENTAL COUNSEL LLC
975 Mill Road, Millridge Manor House Suite A
Bryn Mawr, PA 19010
Telephone: (484) 383-4830 / Fax: (484) 302-4370
Email: kwarren@warrenenvcounsel.com