

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT E.D.N.Y.

★ MAY 31 2011 ★

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STATE OF NEW YORK,

BROOKLYN OFFICE

Plaintiff,

v.

CV 11 - 2599

UNITED STATES ARMY CORPS OF ENGINEERS;
BRIGADIER GENERAL PETER A. DELUCA, in his official
capacity as Division Engineer, North Atlantic Division of the
United States Army Corps of Engineers;
UNITED STATES FISH AND WILDLIFE SERVICE;
ROWAN W. GOULD, in his official capacity as Acting Director
of the United States Fish and Wildlife Service; UNITED STATES
NATIONAL PARK SERVICE; JONATHAN B. JARVIS,
in his official capacity as Director of the United States National Park
Service; UNITED STATES DEPARTMENT OF THE INTERIOR;
KENNETH SALAZAR, in his official capacity as Secretary of the
United States Department of the Interior; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY; and
LISA JACKSON, in her official capacity as Administrator of the
United States Environmental Protection Agency,

COMPLAINT

ROSS, J.

Defendants,
-----X

Plaintiff State of New York ("New York"), by Eric T. Schneiderman, Attorney General
of the State of New York, as and for its complaint, alleges as follows:

NATURE OF THE ACTION

1. New York brings this action for declaratory and injunctive relief, in its proprietary
capacity and as parens patriae on behalf of its citizens, against defendant federal agencies United
States Army Corps of Engineers ("ACE"), United States Fish and Wildlife Service ("FWS"),
United States National Park Service ("NPS"), United States Department of the Interior ("DOI"),
and United States Environmental Protection Agency ("EPA"), and chief executives of these
agencies (collectively, "Defendants" or "Federal Agencies"). New York seeks to compel these
Federal Agencies to comply with the National Environmental Policy Act of 1969, 42 U.S.C. §

4321 *et seq.* (“NEPA”), by preparing and making available for public comment a draft environmental impact statement (“EIS”) before proceeding to adopt proposed Delaware River Basin Commission (“DRBC”) regulations that would authorize natural gas development (“DRBC Regulations”) within the Delaware River Basin (the “Basin”).

2. The Basin is an area of 13,539 square miles, draining parts of Pennsylvania, New Jersey, New York, and Delaware. The Upper Delaware River within the Basin is renowned for its pristine waters that serve as the primary source of clean unfiltered drinking water for 9 million New Yorkers each day, and is a federally designated “Scenic and Recreational River” administered by the NPS. The Basin provides an important source of public water supply beyond New York, and serves as home to endangered species and migratory birds under FWS jurisdiction. Below the Upper Delaware, the Delaware Water Gap and a reach of the lower Delaware also are included in the National Wild and Scenic Rivers System, combining to cover three-quarters of the non-tidal segment of the Delaware River. The Delaware River Port Complex (including docking facilities in Pennsylvania, New Jersey and Delaware) is the largest freshwater port in the world.

3. The national importance of the Basin is reflected in the Delaware River Basin Compact (the “Compact”), a fifty-year old agreement among the federal government and the States of New York, New Jersey and Delaware, and the Commonwealth of Pennsylvania to manage and protect water resources within the Basin. The federal statute approving and effectuating the Compact establishes that the DRBC is a federal agency, and provides that the functions and jurisdiction of the United States under future legislation such as NEPA shall not be impaired or affected by the Compact. Pursuant to federal law, the federal member of the DRBC is an Army officer within the ACE who functions as the representative of the Federal Agencies

with respect to the actions and policies of the DRBC. Following the subsequent enactment of NEPA, the DRBC and the federal Council on Environmental Quality (“CEQ”), the federal agency charged with oversight of the federal government’s implementation of NEPA, determined that the DRBC is subject to NEPA. Thereafter, for financial reasons, the DRBC suspended its NEPA implementation, stating that it would rely instead on NEPA compliance by the Federal Agencies participating in the Commission through the federal member. The DRBC is not named as a defendant in this action because the federal approval statute exempts the Commission from the Administrative Procedure Act.

4. Promulgation of the DRBC Regulations is expected to result in the development of between 15,000 and 18,000 natural gas wells within the Basin in Pennsylvania and New York, which includes a large portion of the New York City Watershed. EPA has expressed “serious reservations about whether gas drilling in the New York City watershed is consistent with the vision of long-term maintenance of a high quality unfiltered water supply.”¹ The New York City Department of Environmental Protection (“NYCDEP”), which supplies drinking water from that watershed, has concluded based on third-party scientific studies that natural gas development would “pose an unacceptable threat to the unfiltered, fresh water supply of nine million New Yorkers, and cannot safely be permitted within the New York City watershed.”²

5. In areas of Pennsylvania outside of the Basin, natural gas well development has been authorized, and is proceeding. Over 2,000 natural gas wells have been drilled, resulting in hundreds of violations of water pollution laws and the pollution of drinking water supplies relied

¹ Letter from John Filippelli, Chief of EPA’s Strategic Planning and Multi-Media Programs Branch, to New York State Department of Environmental Conservation, dated December 30, 2009.

² Letter from Steven W. Lawitts to New York State Department of Environmental Conservation, dated December 22, 2009, http://www.nyc.gov/html/dep/pdf/natural_gas_drilling/12_22_2009_impact_statement_letter.pdf

on by hundreds of thousands of people. In addition, the Pennsylvania Department of Environmental Protection (“PADEP”) has found that the cumulative effects of air pollution emissions from development of these wells may contribute to violations of federal air pollution standards developed to protect public health.³

6. NEPA is a procedural statute regulating the decision making process of federal agencies without mandating any particular substantive result. Its purpose is to ensure that federal agencies act transparently -- with full public participation -- in considering the potential significant environmental impacts of proposed actions before making final decisions. NEPA’s “core requirement” is that all federal agencies with decision making authority over an action prepare an EIS, subject to public review and comment, if the action could potentially cause such environmental impacts. “Federal” actions subject to NEPA include projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies, and new or revised agency rules, regulations, plans, policies and procedures.

7. The Federal Agencies have determined that authorization of natural gas well development in the Basin would potentially result in significant cumulative adverse environmental impacts and that a study of those impacts should be performed. But Defendants refuse to comply with NEPA and refuse to prepare an EIS assessing the cumulative environmental impacts. Under NEPA, an EIS must include analysis of the environmental impacts of a proposed action, and consideration of alternatives to the action and measures to mitigate adverse environmental impacts.

³ Pennsylvania Department of Environmental Protection Northeastern PA Marcellus Shale Short-Term Ambient Air Sampling Report, at p. 21 (Jan. 12, 2011).

8. New York brings this action to protect its waters, air quality, climate, public health, and landholdings within the Basin which have been placed at risk by Defendants' NEPA violations and to vindicate the State's procedural rights under that statute.

JURISDICTION AND VENUE

9. This action arises under NEPA, the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), and the Compact. Plaintiff New York alleges that Defendant Federal Agencies' refusal to comply with NEPA concerning the authorization of natural gas development in the Basin pursuant to the DRBC Regulations is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under 5 U.S.C. § 706(2)(A).

10. The Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because it raises a federal question, and under the statute effectuating the Compact, Pub. L. 87-328, 75 Stat. 688, §15.1(p) (1961), because this action arises under the Compact. New York seeks declaratory and injunctive relief under 28 U.S.C. §§ 2201, and 2202; and 5 U.S.C. § 701 et seq., which provides for judicial review under the APA.

11. This action is brought against federal agencies and employees acting in their official capacities. Venue is proper within this district pursuant to 28 U.S.C. § 1391(e)(1) because defendants General DeLuca and the ACE reside within the district, with their offices located at Building 302, General Lee Avenue, Brooklyn, New York 11252. Venue is also proper within this district pursuant to 28 U.S.C. § 1391(e)(2). A substantial part of the events or omissions giving rise to plaintiff's claim occurred in this district because these defendants' decision not to prepare an EIS as required by NEPA likely occurred within their offices in Brooklyn, and because much of the work in preparing that EIS would have occurred in those offices. Venue is also proper within this district pursuant to 28 U.S.C. § 1391(e)(3), which

establishes venue in any judicial district in which a plaintiff resides, if no real property is involved in the action.

THE PARTIES

12. Plaintiff New York is a sovereign state of the United States of America and brings this action in its proprietary capacity and as *parens patriae* on behalf of its citizens and residents to protect public health, safety, welfare, and the environment.

13. Defendant ACE is a federal agency involved in water resource management within the Basin. The ACE employs the Division Engineer, North Atlantic Division of the ACE, as the *ex officio* federal member of DRBC pursuant to Section 5019(a) of the Water Resources Development Act of 2007, Public Law 110-114 (“WRDA”). Under WRDA, the Secretary of ACE “shall allocate funds to the Delaware River Basin Commission . . . to fulfill the equitable funding requirements” for the federal government under the Compact. WRDA, § 5019(b). The ACE exercises authority over navigable waters within the Basin under the federal Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*, and the filling and dredging of navigable waters within the Basin under section 404 of the federal Clean Water Act, 33 U.S.C. § 1344. The ACE is a federal agency with decision-making authority under the Compact to which General DeLuca reports on DRBC matters.

14. Defendant Brigadier General Peter A. DeLuca (“General DeLuca”) is the Division Engineer, North Atlantic Division of the ACE, who serves as the federal member of the DRBC. General DeLuca is employed by the ACE, and is sued in his official capacity. He participates in, and exercises decision making authority over, actions proposed to be taken by DRBC. In this capacity, General DeLuca reports to, and represents, federal agencies, including the ACE, on DRBC matters.

15. Defendant United States Fish and Wildlife Service (“FWS”) is a federal agency and bureau within the Department of the Interior (“DOI”) involved in water resource management within the Basin. FWS and DOI have trust authority over endangered terrestrial fish and wildlife species within the Basin under the federal Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, and birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, and Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d. Federally listed endangered species within the Basin protected by DOI and FWS include the dwarf wedge mussel, Indiana bat, bog turtle, and Northeastern bulrush. These agencies have responsibility for over 200 species of migratory birds identified within the drainage area of the Upper Delaware River within the Basin, including the largest wintering population of bald eagles within the Northeastern United States. Many species of migratory birds for which DOI and FWS have responsibility breed in or migrate through the high quality riparian corridors of the Basin. FWS has also recently approved creation of the Cherry Valley National Wildlife Refuge, encompassing over 20,000 acres in an area in eastern Pennsylvania which drains into the Delaware River. DOI and FWS are federal agencies with decision-making authority under the Compact according to General DeLuca, who states that he reports to them and represents them on DRBC matters.

16. Defendant Rowan W. Gould is Acting Director of FWS, and is sued in his official capacity.

17. Defendant United States National Park Service (“NPS”) is a federal agency and bureau within Defendant DOI involved in water resource management within the Basin. NPS and DOI exercise authority over, and manage, the Upper Delaware Scenic and Recreational River, the Delaware Water Gap National Recreation Area along the Middle Delaware National

Scenic River, and the Lower Delaware Wild & Scenic River. The Upper Delaware River within the Basin is a federally designated “Scenic and Recreational River” under the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq. The Upper Delaware is approximately 73 miles long, flowing from Hancock, New York, to Sparrowbush, New York. The river and its tributaries offer some of the finest recreational opportunities in the northeastern United States, including sightseeing, boating, camping, hunting, fishing -- including world-class cold water trout streams, hiking, and bird watching. The Delaware Water Gap National Recreation Area is over 69,000 acres in size, located along 40 miles of the Middle Delaware National Scenic River portion of the Delaware River. The Recreation Area, which receives over 5 million visitors each year, boasts spectacular waterfalls, hiking trails, campgrounds, swimming beaches, and picnic sites. The Lower Delaware Wild & Scenic River is noted for its natural beauty and historic riverside towns and mills. NPS and FWS are federal agencies with decision-making authority under the Compact according to General DeLuca, who states that he reports to them and represents them on DRBC matters.

18. Defendant Jonathan B. Jarvis is Director of the NPS, and is sued in his official capacity.

19. Defendant Kenneth Salazar is Secretary of the DOI, and is sued in his official capacity.

20. Defendant EPA is a federal agency involved in water resource management within the Basin. EPA exercises authority within the Basin pursuant to various federal environmental statutes, including the federal Safe Drinking Water Act, 42 U.S.C. § 300f et seq., Clean Water Act, 33 U.S.C. § 1251 et seq., Clean Air Act, 42 U.S.C. § 7401 et seq., and Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., and as a party to the 1997

New York City Watershed Memorandum of Agreement ("MOA"). The MOA is an agreement among EPA, New York agencies, New York City, New York City Watershed municipalities, and environmental groups to protect the City's watershed through a complex cooperative effort to prevent water pollution. Under the MOA, EPA expressed its intention "to assure the continued adequate supply of exceptional quality drinking water for the eight million residents of the City of New York and the one million New York State residents outside the City who depend upon the New York City drinking water supply system." MOA, paragraph 2. Upon information and belief, EPA is a federal agency to which General DeLuca reports and represents on DRBC matters.

21. Defendant Lisa Jackson is Administrator of the EPA, and is sued in her official capacity.

STATUTORY AND REGULATORY FRAMEWORK

A. The Delaware River Basin Compact and the DRBC

22. The Compact is an agreement among the federal government, the states of Delaware, New Jersey, and New York, and the Commonwealth of Pennsylvania, to manage and regulate water resources within the Basin. In forming the Compact, the parties agreed that "the conservation, utilization, development, management, and control of the water and related resources of the Delaware River Basin under a comprehensive multipurpose plan will bring the greatest benefits and produce the most efficient service in the public welfare." Compact, Whereas Clause.

23. Congress and the respective state legislatures voted to approve the Compact, and President Kennedy signed the Compact in 1961. See 75 Stat. 688 (September 27, 1961).

24. The Compact created the DRBC to manage and regulate water resources within the Basin. Each party to the Compact appoints one DRBC Commissioner having one vote on the Commission. Compact, §§ 2.2, 2.5.

25. The current federal Commissioner, General DeLuca, reports to and represents FWS, NPS, and EPA, on matters concerning the Basin and the DRBC.

26. The congressional statute approving and effectuating the Compact on behalf of the federal government designates the DRBC as a “federal agency.” Pub. L. 87-328, 75 Stat. 688, §15(o) (1961). The Commission’s regulations are published in the Code of Federal Regulations. See 18 C.F.R. Parts 400, 401, 410, 420, 430. USA.gov, the United States Government’s official web portal, lists the DRBC in its “Index of U.S. Government Departments and Agencies.” While the federal effectuation statute provides that the DRBC is a federal agency, it also states that the Commission is not a federal agency for certain specified purposes, for example, for purposes of the Administrative Procedure Act and the Tucker Acts. Pub. L. 87-328, 75 Stat. 688, §15(o) (1961).

27. CEQ has long held that DRBC is subject to NEPA because it is a federal agency with “jurisdiction by law” over water resource projects within the Basin. 49 Fed. Reg. 49750, 49774 (Dec. 21, 1984). CEQ continues to express that view on its website where it lists DRBC as a NEPA federal agency having such jurisdiction.⁴ Following enactment of NEPA, DRBC acknowledged that it was subject to that statute, amending its Rules of Practice and Procedure in 1970 to “require environmental assessments and the preparation of environmental impact statements.” DRBC Resolution 70-23.

⁴ See <http://ceq.hss.doe.gov/nepa/contacts.cfm>; <http://ceq.hss.doe.gov/nepa/regs/agency/agencies.cfm>; <http://ceq.hss.doe.gov/nepa/regs/ceq/iii-7app2.pdf>.

28. In 1980, DRBC suspended its environmental review regulations because it lacked sufficient funds to prepare EISs and stated that “an appropriate agency of the executive branch of the federal government can assume the ‘lead agency’ and other environmental assessment functions for significant projects within the basin” under NEPA. DRBC Resolution No. 80-11 (July 23, 1980). Recently, DRBC stated that it is not subject to NEPA, noting that four of the five DRBC commissioners are appointed by states.⁵ In accordance with that statement, DRBC refuses to comply with NEPA.

29. Section 3.8 of the Compact gives the Commission broad approval authority over projects within the Basin. It states: “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. . . .” Compact, § 3.8.

B. NEPA

30. NEPA was enacted in 1970, effecting a “dramatic change in the federal agencies’ decision-making procedures [reflecting] Congress’ determination that the federal government should lead the nation in preventing the continued environmental degradation caused by technological advances.” M. Gerrard, 1 Environmental Law Practice Guide § 1.01 at 1-6 (Matthew Bender 2003).

31. NEPA imposes on federal agencies an obligation to consider every significant aspect of the environmental impact of a proposed action, and to inform the public that it has indeed considered environmental concerns in its decision-making process. Under NEPA, every federal agency is required to prepare an EIS for any major federal action “significantly affecting”

⁵ DRBC Rulemaking to Implement a Flexible Flow Management Program for the New York City Delaware Basin Reservoirs: Response to General Comment Subjects, January 21, 2009.

the quality of the human environment. See 42 U.S.C. § 4332(2)(C). Preparation of an EIS is NEPA's "core requirement" for all actions which could cause such impacts, providing a springboard for public comment.

32. NEPA created the federal CEQ to, among other things, implement policies to further the statute's purpose of incorporating environmental considerations within the decision-making process of federal agencies. 42 U.S.C. §§ 4342-4344. CEQ has issued regulations for carrying out NEPA's requirements which are binding on all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1.

33. Under NEPA regulations, when multiple federal agencies have "jurisdiction by law" over a major federal action significantly affecting the human environment, each federal agency is obligated to prepare an EIS, or reasonably rely on an EIS prepared by another federal agency, before it approves the action. 40 C.F.R. §§ 1501.5(a), 1501.6. An agency has jurisdiction by law over an action if it has "authority to approve, veto, or finance all or part of the proposal." Id., § 1508.15.

34. A "federal action" includes "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures." Id., § 1508.18. A federal action is deemed "major" if it is "significantly affecting" the quality of the human environment. Id., § 1508.18 ("Major reinforces but does not have a meaning independent of significantly."). Under NEPA caselaw, if any 'significant' environmental impacts might result from the proposed agency action, then an EIS must be prepared before the action is taken.

35. An EIS must include a detailed statement of the environmental impacts of a proposed action, adverse environmental effects that cannot be avoided, and alternatives to the

proposed action. 42 U.S.C. § 4332(2)(C). Environmental impacts include direct, indirect, and cumulative effects of the action (which include related past, present, or reasonably foreseeable future actions). 40 C.F.R. §§ 1502.16, 1508.7, 1508.8.

36. Consideration of alternatives “is the heart of the EIS [and] should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14. The EIS must also include appropriate measures to mitigate environmental impacts. Id., §§ 1502.14(f), 1502.16(h).

37. To reduce delay and inefficiency, federal agencies must perform environmental review at the “earliest possible time” in the decision-making process. 40 C.F.R. § 1501.2; see § 1500.5 (“Agencies shall reduce delay by integrating the NEPA process into early planning.”) Federal agencies “shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal.” Id., § 1502.5. They must “integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.” Id., § 1500.2(c). In the context of a proposed rule, such as the DRBC Regulations, “the draft EIS should normally accompany the proposed rule.” Id., § 1502.5(d). Conducting environmental review early in the agency’s decision-making process is necessary so that such review “will not be used to rationalize or justify decisions already made.” Id., § 1502.5.

38. The “lead” federal agency preparing the draft EIS must provide notice to, and make that document available for comment by, other involved federal agencies, state and local agencies, and the public. 40 C.F.R. §§ 1503.1, 1506.6. The lead federal agency must assess and

consider such comments and respond to them in a final EIS. Id., § 1503.4. The lead agency's response to comments can include modifying the proposed action or developing and evaluating alternatives to the proposed action not previously considered. Id. The agency's final decision on the proposed action must be set forth in a public record of decision that summarizes the decision and states "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." Id., § 1505.2(c).

STATEMENT OF FACTS

A. Failure of Defendant Federal Agencies and the DRBC to Prepare an EIS

39. On May 19, 2009, the Executive Director of the DRBC issued a determination under Section 3.8 of the Compact (the "Determination") prohibiting natural gas extraction projects (unless authorized by the Commission) within the Basin's "Special Protection Waters," a large portion of the Basin which includes, among other areas, the full extent of the Basin in New York and nearby areas in Pennsylvania which lie within the natural gas bearing formation, called the "Marcellus Shale."

40. The Marcellus Shale is a geologic formation containing substantial amounts of natural gas that are being extracted in Pennsylvania and other states using a technique consisting of first drilling vertically down, then angling toward the shale formation, then drilling horizontally hundreds of feet within the formation, and then hydraulically fracturing the shale (collectively referred to here as "hydrofracking"). Hydrofracking entails pumping millions of gallons of water, sand, and chemicals (some of which are hazardous) deep underground to cause fractures along a horizontal well bore within the shale to release the natural gas trapped within.

41. Hydrofracking allows the extraction of natural gas from "low permeability" geologic formations, such as the Marcellus Shale, from which natural gas could not be

economically extracted using conventional technologies. While horizontal drilling and hydraulic fracturing are not new technologies when conducted separately, only recently have they been implemented together on a large scale to extract natural gas from low permeability formations.

42. Hydrofracking in the Basin will involve pumping millions of gallons of water containing “fracking” additives into the ground under high pressure, at each well. The fracking additives include many chemicals which may pose risks to health and the environment, including the aromatic hydrocarbons benzene, toluene, ethylbenzene, and xylene (often referred to as BTEX); microbiocides; glycols; glycol ethers; and petroleum products.⁶ Flowback water, brought to the surface in the hydrofracking process, and some production water transported to the surface during the production phase, will contain these fracking additives and other potential contaminants, and thus must be properly handled. The potential risk that these additives pose to the Delaware Basin must be thoroughly evaluated before natural gas development is authorized.

43. In issuing the Determination, the DRBC Executive Director found that “as a result of water withdrawals, wastewater disposal and other activities, natural gas extraction projects in these [gas bearing] formations may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics.”⁷ Pending finalization of these regulations, the DRBC has not issued drilling permits for production of natural gas within the Special Protection Areas and, on June 14, 2010, it extended that prohibition to wells intended solely for exploratory purposes with the exception of certain exploratory wells which it has “grandfathered.” The DRBC estimates that between 15,000 and 18,000 natural gas wells would be developed within the Basin.

⁶ DSGEIS, pp. 5-46 through 5-66.

⁷ Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters, DRBC, dated May 19, 2009.

44. In 2010, the national environmental group American Rivers designated the Upper Delaware River as the nation's most endangered river because "this clean water source is threatened by natural gas activities in the Marcellus Shale."⁸

45. In response to that designation, the DRBC issued a statement elaborating on its view that natural gas development could pose significant adverse cumulative environmental impacts within the Basin:

The collective effects of the thousands of wells and supporting facilities that are projected in the basin pose potentially significant adverse effects on the surface water and groundwater of the basin . . . There are also impacts to the land which can affect water resources. The headwaters region where gas drilling activities would be located is the most sensitive and vulnerable area of any watershed. Over 80 percent of the DRB headwaters area is covered with forests that are critical to the protection and maintenance of water resources. One big concern is the effect of forest fragmentation on our waters.⁹

46. Although the DRBC found that natural gas development in the Basin poses potentially significant adverse environmental impacts, it has refused to comply with NEPA and refused to prepare a draft EIS for the DRBC Regulations which would authorize that development.

47. The Federal Agencies have also determined that natural gas development in the Basin poses potentially significant adverse environmental impacts while also refusing to prepare a draft EIS. FWS and NPS have stated that "[l]arge-scale changes in land use and increased water withdrawals, like those associated with natural gas development (including the construction of exploratory wells) will likely affect the Services' trust resources and should be

⁸ <http://www.americanrivers.org/assets/pdfs/mer-2010/americas-most-endangered-rivers-2010.pdf>.

⁹ http://www.state.nj.us/drbc/DRBCstatement_EndangeredRivers_6-2-2010.pdf

reviewed for both individual and cumulative environmental effects.”¹⁰ As alleged in paragraph 4, above, EPA has determined that natural gas development within the New York City Watershed (which includes a portion of the Basin) threatens the City’s “high quality unfiltered water supply.” General DeLuca has stated that the federal government’s “position is to continue fully supporting the need for a cumulative impact study.”¹¹

48. Nevertheless, the Federal Agencies have refused to perform that study. Instead, they have approved moving forward with the rulemaking by “agree[ing] to vote [within the DRBC] against a moratorium on regulation development pending completion of an impact study.”¹² On May 5, 2010, Lt. Colonel Thomas J. Tickner of the ACE, predecessor to General DeLuca as the federal member of the DRBC, approved commencement of the rulemaking for the DRBC Regulations on behalf of the other Defendants by voting to have the DRBC develop those regulations in draft form and make them available for public comment.

49. On May 12, 2010, XTO Energy, Inc. (“XTO Energy”) applied to the DRBC for approval of a project to withdraw water for its natural gas exploration and production activities in Broome and Delaware counties in New York from a site on Oquaga Creek, a stream known for its excellent trout fishing, within Broome County, New York, within the drainage area of the Upper Delaware River. The DRBC has solicited public comments and scheduled hearings concerning the application for June 2011. In the event that the DRBC approves the application, XTO Energy will have the right to develop the withdrawal site, potentially risking harm to the Oquaga Creek.

¹⁰ Letter from Marvin E. Moriarty and Dennis Reidenbach to Carol Collier, dated June 25, 2010.

¹¹ Letter from Duke DeLuca to Congressman Maurice Hinchey, dated September 14, 2010.

¹² Letter from Peter A. DeLuca to Congressman Maurice Hinchey, dated November 24, 2010.

50. On December 9, 2010, over the objection of New York's Governor David Paterson, the DRBC published the regulations in draft form on the website of Defendant NPS without preparing a draft EIS as required by NEPA. Prior to publication of the regulations, New York's Governor Paterson wrote to the DRBC Executive Director criticizing the Commission's decision to move forward with regulations without "the advantage of the full investigations and public deliberations taking place in New York."¹³ Governor Paterson was referring to the environmental review process in New York concerning its proposed new permit conditions for natural gas development, involving the preparation and revision of a supplemental EIS under New York's State Environmental Quality Review Act, the State's analogue to NEPA.

51. NYCDEP provides water to 9 million New Yorkers each day, most of which is drawn from the Delaware sub-basin of the New York City Watershed which is located within the Basin. On April 7, 2011, NYCDEP submitted comments concerning the DRBC Regulations to the DRBC, echoing Governor Paterson's objection. NYCDEP stated that the DRBC's regulations are premature because the agency "should conduct a rigorous analysis of the potential cumulative impacts natural gas development could have on water quantity and water quality in the Delaware River Basin."¹⁴ NYCDEP also noted that "its own study determined that, based on the best available science and the current state of technology, hydrofracking cannot safely be conducted in the New York City Watershed."¹⁵

52. On April 15, 2011, New York Attorney General Eric T. Schneiderman filed comments with the DRBC requesting that it comply with NEPA by preparing a draft EIS for the

¹³ Letter from David A. Paterson to Carol Collier, dated December 6, 2010.

¹⁴ Letter from Paul V. Rush to Paul Schmitt, dated April 7, 2011.

¹⁵ *Id.*

DRBC Regulations. The comments requested that the EIS consider as an alternative to the DRBC Regulations a prohibition of natural gas development within the New York City Watershed in the Basin. The comments also discussed the risk of environmental harm posed by natural gas development in the Basin, including the potential for water and air pollution.

53. On April 18, 2011, Attorney General Schneiderman wrote to General DeLuca of the ACE, with copies to other Defendant Federal Agencies and the DRBC, to request that the federal agencies agree within 30 days to comply with NEPA and prepare a draft EIS. In the letter, the Attorney General stated that, in the absence of such agreement, his office intended to sue the appropriate federal agencies to compel preparation of that study. A copy of the Attorney General's letter is attached to this Complaint as Exhibit A.

54. The next day, on April 19, 2011, Chesapeake Energy Corporation, a national leader in natural gas development, experienced a blowout of a natural gas well in Bradford County, Pennsylvania, located outside of the Basin, during the hydraulic fracturing process. As a result of the blowout, thousands of gallons of water containing fracking chemicals were discharged into a nearby creek, and seven families were evacuated from the area.

55. On May 24, 2011, General DeLuca responded to Attorney General Schneiderman's letter, stating that involved federal agencies would not undertake environmental review of the proposed the DRBC Regulations under NEPA because "the DRBC itself is not a federal agency subject to NEPA, and the mere participation of a federal officer in the DRBC regulatory process does not constitute a federal action." A copy of General DeLuca's letter is attached to this Complaint as Exhibit B.

B. New York Resources Placed at Risk by the DRBC Regulations

1. The New York City Watershed and Other Water Resources

56. The Basin in New York consists of areas with underlying Marcellus Shale in Broome, Delaware, Greene, Sullivan, Ulster and Orange Counties. Approximately 40 percent of the Basin in New York is comprised of the Delaware sub-watershed of the New York City Watershed. That sub-watershed is a critical water resource for New York because it provides most of the clean unfiltered drinking water consumed by 9 million people in New York City, its suburbs, and upstate communities each day.

57. When drinking water is obtained from surface waters (such as reservoirs and rivers), it is generally “filtered” to remove contaminants prior to distribution to consumers. However, water obtained from the Delaware sub-watershed and other areas in the New York City Watershed (collectively referred to as the “West of Hudson Watershed”) is not filtered. Indeed, West of Hudson water is the largest unfiltered surface drinking water supply in the nation.

58. West of Hudson water, including the Delaware sub-watershed within the Basin, is collected by streams and reservoirs from precipitation, runoff from rain and melting of snow, groundwater infiltration, and other sources. The water is disinfected and distributed by a system of aqueducts, tunnels and pipes to consumers in New York City, its northern suburbs, and in upstate communities. In accordance with successive Filtration Avoidance Determinations (“FADs”), rather than filtering the water, the City has spent almost \$1.5 billion on pollution prevention efforts to protect the West of Hudson Watershed and ensure safe drinking water. This “pollution prevention” approach, adopted instead of filtration, represents the longstanding

consensus of New York, Defendant EPA, New York City, Watershed communities, and environmental groups, as agreed in the MOA.¹⁶

59. The pollution prevention approach includes purchasing Watershed lands to serve as buffers for pollutant discharges, strict regulation of human activities that generate pollution, upgrading sewage treatment plants, and various other pollution prevention programs. Pollution prevention and filtration avoidance have been effective in ensuring the safety of West of Hudson water and have been endorsed by the National Research Council (which functions under the auspices of the National Academy of Sciences).¹⁷ In addition, the program has been much less expensive than filtration, which would require capital expenditures of over \$10 billion and annual operation and maintenance costs exceeding \$100 million.

60. Authorization of natural gas development in the New York City Watershed within the Basin could pose significant cumulative adverse environmental impacts to that clean unfiltered drinking water supply, as EPA has already found. Widespread drilling could present risk of spills, discharges of pollutants, and other incidents of concern, risking contamination of the water supply with radioactive materials, brine, methane, aromatic hydrocarbons, heavy metals, pathogens, turbidity, phosphorus, and other potentially harmful substances. Natural gas development would result in the disturbance of undeveloped and typically forested land within the Basin which, according to the DRBC, is “critical to the protection and maintenance of water resources.” Natural gas development could introduce industrial activity on a large scale to an area long characterized by more benign and less intensive land uses which, unlike natural gas

¹⁶ See “New York City Watershed Memorandum of Agreement” (January 21, 1997) at www.nysefc.org?home/index.asp?page=294.

¹⁷ National Research Council, *Watershed Management for Potable Water Supply: Assessing the New York City Strategy* (2000) (“NRC Study”).

development, have proven compatible with clean, unfiltered drinking water. Unless comprehensively studied in an EIS and consideration given to a prohibition on natural gas development in the New York City Watershed, such development has the potential to adversely affect the City's water quality, public confidence in its water, and the City's "filtration avoidance" status. Water quality has already been compromised in the East of Hudson portion of the New York City Watershed (the Croton sub-watershed), causing the City to minimize its reliance on that water source and, pursuant to a federal court order, forcing it to spend approximately \$3 billion to construct a filtration plant to improve Croton water quality.

61. Well development and natural gas production has the potential to exacerbate existing water quality problems in the West of Hudson Watershed. An effort to adopt regulations should consider the potential impact of increased discharges of stormwater polluted by turbidity, pathogens, phosphorus, and the wide variety of potential pollutants associated with natural gas development. Turbidity not only facilitates the transportation of pollutants, but it can shelter pathogens from exposure to attack by chlorine, a disinfectant routinely used in the West of Hudson Watershed to protect public health. In addition, the organic particles that contribute to turbidity can also combine with chlorine to create disinfection by-products which may increase the risk of cancer or early term miscarriage for people drinking the water.¹⁸ For these reasons, EPA prohibits raw water turbidity measurements in unfiltered drinking water at the intake to the distribution system in excess of 5 nephelometric turbidity units. See 40 CFR § 141.71(a)(2).

62. Violations of this turbidity standard could provide grounds for the City to be forced to filter the water from its West of Hudson Watershed. In its 2007 FAD, EPA found that

¹⁸ See NRC Study at 2, 5-6, 102-05, 109.

“significant improvement to the City's ability to prevent, manage, and control turbidity in the City's Catskill portion of the West of Hudson Watershed is required in order to maintain filtration avoidance for the long-term.”¹⁹ The widespread development of natural gas within the Delaware portion of the Watershed could add to the turbidity problem already experienced in the Catskill portion.

63. Preventing pathogens from contaminating the water is of particular concern for the West of Hudson Watershed because of the risks pathogens pose to public health. Pathogens include viruses and bacteria, such as *Giardia lamblia*, *Cryptosporidium*, and *E. coli* O157:H7, which can cause serious illness or death, especially among the very young, the elderly, and people with compromised immune systems.²⁰ Because of the health risks of pathogens, EPA requires that each unfiltered water system meet strict requirements “ensuring that the system is not a source of a waterborne disease outbreak.” 40 C.F.R. § 141.71. If the West of Hudson Watershed fails to comply with these requirements, the City could be forced to filter that water supply. The potential for gas development in this area to increase pathogens in this critical water supply must be evaluated.

64. Stormwater discharges of the nutrient “phosphorus” are also of great concern in the West of Hudson Watershed because it contributes to the eutrophication of reservoirs, pathogenic and other contamination, and creation of harmful disinfection by-products. A eutrophic reservoir suffers from abundant algae growth (called algae blooms) in the growing seasons if phosphorus discharges into it are excessive. Algae blooms can impair the taste and

¹⁹ 2007 FAD, pp. 13-14.

²⁰ In 1993, the water supply for the City of Milwaukee became contaminated with *Cryptosporidium* causing over 400,000 people to suffer stomach cramps, fever, diarrhea and dehydration, and killing over 100 people. In August 1999, the largest outbreak of waterborne *E. coli* O157:H7 illness in United States history occurred at the Washington County Fair in New York, when a drinking water supply well became contaminated with that pathogen, infecting 781 people, and resulting in the hospitalization of 71 people and two deaths.

odor of reservoir water and deplete levels of dissolved oxygen in the reservoir's bottom waters, impairing aquatic life and releasing into the water metals and phosphorus previously bound in the sediment.²¹ Phosphorus-induced algae blooms increase organic and other matter suspended in the water and facilitate pathogenic contamination and can potentially result in the adverse effects associated with chlorination discussed above.²²

65. Phosphorus pollution (and resulting algae growth) has been a longstanding problem for the City's Cannonsville Reservoir, which has the largest drainage area of the four City reservoirs within the Basin. Stormwater discharges of phosphorus from natural gas development has the potential to contribute to that problem and thus such impacts must be evaluated.

66. In addition to stormwater discharges, groundwater contamination of the various pollutants described in this section could also pollute watercourses and other surface waters in the West of Hudson Watershed which supply drinking water. The potential for spills and leaks from above-ground tanks, pits and containers, and leaks from defects in well design or construction must be evaluated to determine the potential risk to groundwater. Groundwater generally flows toward and recharges surface waters. Local geologic features below the land surface, such as faults, fractured bedrock, coarse gravel, or other permeable materials can facilitate the migration of contaminated groundwater to surface waters. Such potential risks to surface and groundwater must be evaluated prior to the issuance of regulations.

²¹ NRC Study at 106-07.

²² NRC Study at 2.

2. **The Upper Delaware River**

67. The remainder of the Basin in New York, and much of the Basin with underlying Marcellus Shale in Pennsylvania, drains to the Upper Delaware River, which forms a portion of the Pennsylvania-New York border. The Upper Delaware River is a federally designated “Scenic and Recreational River” under the federal Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq. Among its unique features, the Upper Delaware provides winter habitat for more bald eagles than any other river in the northeastern United States. The river and its tributaries are also among New York’s most prized cold water trout fisheries with strong support among angler organizations.

68. Thousands of New Yorkers enjoy fishing and recreational boating on the Upper Delaware River, and use the adjacent 11,967 acre Mongaup Valley Bird Conservation Area and various boat launches, and other facilities owned and/or operated by New York along the River. In addition, the Basin is home to a variety of federally listed endangered species, including the dwarf wedgemussel which is found over a 22-mile section of the Upper Delaware.

69. Gas well development in Pennsylvania currently is proceeding on a large scale outside the Basin and will likely do so within the Basin upon finalization of the DRBC Regulations and the DRBC’s issuance of natural gas development permits under those regulations. Portions of several Pennsylvania counties within the Basin, including nearly all of Wayne County and a small portion of Lackawanna County, drain into the Upper Delaware River. Ten natural gas wells located in these counties have been drilled there, and natural gas development companies already hold 51 additional drilling permits issued by the Pennsylvania Department of Environmental Protection (“PADEP”) to drill within that portion of the Basin.

70. Development of gas wells in Pennsylvania within the Basin would present risks of unplanned and unexpected spills, discharges of pollutants, and other incidents (such as the April 19, 2011 blowout in Bradford Township) which would contaminate the Upper Delaware River. This would risk harm to the health, safety, and welfare of New Yorkers who use the River for contact recreation (swimming, boating, and fishing), and risk harm to New York's proprietary interests in: the River, the State's boat launches and related facilities, the Mongaup Valley Bird Conservation Area, and other New York interests in land near the Upper Delaware.

71. From January 1, 2008 through August 20, 2010, natural gas development in Pennsylvania outside of the Basin resulted in PADEP's issuance of 1,614 violations to drilling operators (not including traffic citations or written warnings), of which 1,056 were judged as having "the most potential for direct impact on the environment."²³

72. One pollution incident occurred in Pennsylvania's Monongahela River in 2008, impairing the drinking water supply for hundreds of thousands of people over a period of months, when commercial and publicly owned treatment works discharged inadequately treated wastewater from natural gas wells. As a result of these discharges, concentrations of total dissolved solids and sulfate in the river reached historic highs, exceeding drinking water quality standards at all 17 potable water supply intakes south to the West Virginia state line, and bromides concentrations became elevated, potentially subjecting people ingesting the water to increased health risks.²⁴

²³ Pennsylvania Land Trust Association (October 1, 2010) available at <http://conserveland.org/violationsrpt>.

²⁴ Paul Handke, Water Program Specialist, Pennsylvania Department of Environmental Protection, "Trihalomethane Speciation and the Relationship to Elevated Total Dissolved Solid Concentrations Affecting Drinking Water Quality at Systems Utilizing the Monongahela River as a Primary Source During the Third and Fourth Quarters of 2008." Available at: http://files.dep.state.pa.us/Water/Wastewater%20Management/WastewaterPortalFiles/MarcellusShaleWastewaterPartnership/dbp_mon_report__dbp_correlation.pdf

3. Air Pollution and Climate Change

73. The equipment and processes used for drilling, completion, and production of natural gas are sources of air pollutants such as volatile organic compounds (“VOCs”), nitrogen oxides (“NOx”), carbon monoxide (“CO”), particulate matter (“PM”), and a variety of air toxics, including benzene (a known human carcinogen), toluene, and hydrogen sulfide.

74. Sources of emissions associated with natural gas development include: (1) combustion from engines, compressors, line heaters, and flares during exploration, drilling, and production; (2) venting and flaring of gas constituents; (3) emissions from heavy-duty support trucks; and (4) fugitive emissions from gas wells and associated gas pipelines and other distribution facilities. Added up, these sources have the potential to significantly impact air quality not only on a local basis, but also on a regional basis.

75. In addition to being unhealthy to breathe in their own right, VOCs and NOx react with other compounds in the atmosphere to produce ground level ozone and PM_{2.5} (airborne particulate matter with aerodynamic diameter of less than 2.5 microns). Many low income and communities of color are especially at risk from ozone and PM_{2.5} pollution.

76. In New York, ozone pollution is primarily a concern during the summer months when the weather conditions needed to form ground level ozone - sunshine and hot temperatures - normally occur. Ozone is unhealthy to breathe, especially for people with respiratory diseases, children, the elderly, and adults who are active outdoors. Symptoms include reduced lung function and chest pain, and can lead to respiratory diseases such as bronchitis or asthma. In the New York City Metropolitan Area alone in the summer of 2010, residents were subjected to 17 days when measured ozone levels were above the EPA’s current health based 8-hour ozone national ambient air quality standard (“NAAQS”) of 0.075 parts per million.

77. Short-term and long-term exposure to $PM_{2.5}$ can cause a variety of harmful health effects, including premature death, chronic respiratory illness, decreased lung function, cardiovascular disease, and asthma. Certain subgroups in the population, including infants, children, senior citizens, and people with existing lung and heart diseases (including diabetes) are more susceptible to harm from this pollutant than the rest of the population. A New York State Department of Health study found a statistically significant association between $PM_{2.5}$ and emergency room visits in the Bronx, which includes many environmental justice communities.²⁵

78. New York generally pays 50 percent of Medicaid health care costs incurred within the State. Increased ozone and $PM_{2.5}$ pollution as a result of natural gas well development in the Basin will likely increase the healthcare services used by Medicaid patients within the State, thereby increasing New York's Medicaid expenditures.

79. Many areas within New York are downwind of the Basin, and currently exceed the NAAQS for ground-level ozone of 0.075 parts per million. NYSDEC has recommended to EPA that Orange, Ulster and Greene Counties, which are each partially within the Basin, and many additional counties downwind of the Basin, including the New York City Metropolitan Area, be designated as in nonattainment of the 0.075 parts per million ozone NAAQS under the federal Clean Air Act, 42 U.S.C. § 7409.

80. EPA has designated the New York City Metropolitan Area as in nonattainment for both the annual and 24 hour $PM_{2.5}$ NAAQS under that statute. As a result, New York has taken measures to reduce $PM_{2.5}$ pollution in that Area pursuant to air quality plans that do not contemplate emissions from upwind natural gas development. Such development will likely undermine New York's efforts to reduce $PM_{2.5}$ pollution.

²⁵ New York State Department of Health, Center for Environmental Health, "A Study of Ambient Air Contaminants and Asthma in New York City: Final Report," July 2006, NYSERDA Report 06-02.

81. PADEP has already concluded that the cumulative effects of air pollution emissions from the development of some 2,000 natural gas wells within Pennsylvania may contribute to violations within Pennsylvania of federal air pollution standards developed to protect public health.²⁶

82. Because New York is often downwind of many areas within the Pennsylvania portion of the Basin, emissions of ozone and PM_{2.5} precursors as a result of natural gas development in Pennsylvania would likely contribute to nonattainment of NAAQS in New York, and impair New York's ability to meet air quality goals under applicable State Implementation Plans ("SIPs"), as required by the Clean Air Act. The air pollution resulting from such development would likely harm the health, safety, and welfare of New Yorkers who live downwind of the Basin, and impair New York's proprietary interests in its air quality, Medicaid program, and compliance with the SIP (rendering such compliance more difficult). The DRBC Regulations do not propose any mitigation measures for these air pollution impacts.

83. Climate change will result in harm to New York's environment, public health, safety and welfare, and proprietary interests. Climate change is primarily caused by the emission of greenhouse gases, such as carbon dioxide ("CO₂") and methane, the principle component of natural gas.

84. Although, from a climate change perspective, the combustion of natural gas is generally regarded as producing less CO₂ emissions than the combustion of coal or oil on a per unit energy produced basis, natural gas development can result in significant emissions of methane directly to the atmosphere, thereby further contributing to climate change. Methane is a greenhouse gas 25 times more potent over a 100 year timeframe than CO₂. Thus, the release of natural gas to the atmosphere during production, distribution, storage or use of natural gas can

²⁶ See *infra*. at fn 3.

reduce or eliminate climate change benefits associated with natural gas when compared to other fossil fuels.

85. The DRBC Regulations would authorize natural gas well development without analyzing potential adverse climate change impacts resulting from the venting and leakage of methane during production, distribution, storage or use of natural gas within or from the Basin, or measures to mitigate those potential impacts. The failure to take mitigation measures would cause harm to the health, safety, and welfare of New Yorkers, and harm to New York's proprietary interests as well.

CLAIM FOR RELIEF

**Violations of NEPA, 42 U.S.C. § 4332(2)(C);
NEPA Implementing Regulations,
40 C.F.R. § 1500 et seq.;
and APA, 5 U.S.C. §§ 701-706**

86. Plaintiff New York realleges the allegations set forth in all preceding paragraphs and incorporates them herein by reference.

87. The development of the DRBC Regulations authorizing natural gas development within the Basin under the Compact (the "Action") is a "federal action" within the meaning of NEPA and its implementing regulations because the DRBC is a federal agency, is promulgating those regulations, and is responsible for implementing them.

88. The Action is a "federal action" because federal agencies play a significant role in conducting, approving, and implementing the Action.

89. Defendant Federal Agencies have "jurisdiction by law" over natural gas development within the Basin because they have authority to approve the DRBC Regulations and take measures to implement them under the Compact and other federal laws.

90. The Action is a “major” federal action within the meaning of NEPA and its implementing regulations.

91. Defendants have approved commencement of the Action and have participated in measures to carry out the Action pursuant to their authority under the Compact by approving drafting of the DRBC Regulations by the Commission’s staff, publication of those regulations in draft form, making the regulations available for public comment using the website of the NPS, and extending the period for such comments through April 15, 2011.

92. Defendant Federal Agencies have taken in measures to carry out the Action by, among other things, participating in the scheduling of hearings and soliciting of comments concerning the application of XTO Energy to withdraw water within the Basin to support its planned natural gas extraction activities there. Defendants have engaged in that conduct despite having determined that water withdrawals for natural gas development purposes pose potentially significant adverse environmental impacts (distinct from water withdrawals for other purposes) and that a cumulative environmental impact study addressing water withdrawals among other matters is necessary.

93. Although the DRBC Regulations would authorize natural gas development in the Basin and despite Defendants’ determinations that the Action would potentially cause significant environmental impacts, Defendant Federal Agencies have refused, and continue to refuse, to prepare an EIS for the Action or otherwise comply with NEPA.

94. By approving commencement of the Action and implementing measures to carry it out while refusing to prepare a draft EIS, Defendant Federal Agencies have violated, and remain in violation of, NEPA, 42 U.S.C. § 4332(2)(C).

95. By approving commencement of the Action and implementing measures to carry it out while refusing to prepare a draft EIS, Defendant Federal Agencies have violated, and remain in violation of, NEPA's implementing regulations which require them to: (i) perform environmental review at the "earliest possible time" in the decision-making process (40 C.F.R. § 1501.2); (ii) "commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal" and see to it that "the draft EIS should normally accompany the proposed rule" (Id., §§ 1502.5; 1502.5(d)); and (iii) "integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively" (Id., § 1500.2(c)).

96. By engaging in conduct to carry out the Action prior to preparing an EIS and issuing a NEPA record of decision, Defendants have limited the choice of reasonable alternatives, and risk causing adverse environmental impacts, in violation of 40 C.F.R. § 1506.1(a).

97. Defendant Federal Agencies' unlawful refusal to prepare a draft EIS pursuant to NEPA while approving commencement of the Action and carrying out significant aspects of the Action is subject to judicial review under Section 706(2) of the APA. Defendant Federal Agencies' refusal to comply with NEPA and prepare a draft EIS is not in accordance with law and is arbitrary, capricious, and an abuse of discretion.

98. The APA, 5 U.S.C. § 703, and the Declaratory Judgment Act, 28 U.S.C. § 2201(a), entitle Plaintiff New York to a declaration that Defendant Federal Agencies have violated NEPA, NEPA's implementing regulations; and the APA, 5 U.S.C. §§ 702 & 703, authorizes the award of injunctive relief for such violations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff New York respectfully requests that the Court issue a judgment and order:

- a) declaring that Defendants are in violation of NEPA by refusing to prepare a draft EIS for development of the DRBC Regulations authorizing natural gas development within the Basin under the Compact;
- b) declaring that Defendants are in violation of NEPA's implementing regulations by failing to prepare a draft EIS for development of the DRBC Regulations authorizing natural gas development within the Basin under the Compact, as required by 40 C.F.R. §§ 1500.2(c), 1501.2, 1502.5, 1502.5(d);
- c) declaring that Defendants are in violation of 40 C.F.R. § 1506.1(a) by carrying out significant aspects of the Action before issuance of a record of decision under NEPA;
- d) enjoining Defendants to comply with NEPA by promptly preparing a draft EIS subject to public comment, which shall include consideration as an alternative to the DRBC Regulations a prohibition on natural gas development within the New York City Watershed within the Basin, and which shall also include an analysis of reasonable measures to mitigate all potentially significant adverse environmental impacts; and by taking all further measures required by NEPA;
- e) enjoining Defendants immediately to cease approving or carrying out any aspect of the Action until they have fully complied with their obligations under NEPA;


f) awarding Plaintiff New York its reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

g) awarding Plaintiff such additional and further relief as the Court may deem just, proper, and necessary.

Dated: May 31, 2011
Albany, New York

ERIC T. SCHNEIDERMAN

Attorney General of the State of New York
Attorney for Plaintiff State of New York

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EXHIBIT A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

April 18, 2011

By Overnight Delivery

Peter A. DeLuca
Brigadier General, U.S. Army
Division Engineer/DRBC Federal Commissioner
U.S. Army Corps of Engineers, North Atlantic Division
Bldg 302, General Lee Avenue
Brooklyn, New York 11252

**Re: Proposed Regulations Concerning Natural Gas Development
in the Delaware River Basin**

Dear General DeLuca:

I write to request that federal agencies involved in the promulgation of Natural Gas Development regulations for the Delaware River Basin ("the Basin") comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), by preparing a draft environmental impact statement ("draft EIS") as quickly as possible, and before finalization of regulations authorizing gas well development within the Basin.

The regulations, proposed by the Delaware River Basin Commission ("DRBC" or "the Commission"), would authorize drilling for natural gas within the Delaware sub-basin of New York City's West of Hudson Watershed ("WOH Watershed"), and in the drainage basin of the Upper Delaware River, a federally designated "Scenic and Recreational River" shared by New York and Pennsylvania. The WOH Watershed is a critical water resource in New York, providing over 90 percent of the *unfiltered* water consumed by 9 million New York residents and visitors each day.

As discussed in comments concerning the proposed regulations filed by my office with the DRBC on April 15, 2011 (see copy enclosed), natural gas development poses risk of harm to water, air, and public health within the Basin, and heightened risk within New York City's WOH Watershed. In fact, the New York City Department of Environmental Protection ("NYCDEP"), the entity responsible for providing an adequate supply of safe clean drinking water drawn from New York City's watershed, has concluded that natural gas development would "pose an

unacceptable threat to the unfiltered, fresh water supply of nine million New Yorkers, and cannot safely be permitted within the New York City watershed.”¹

Involved federal agencies, including the DRBC, the United States Army Corps of Engineers (“Army Corps”), the Fish and Wildlife Service (“FWS”), and the National Park Service (“NPS”), have all acknowledged that proposed natural gas development would risk significant environmental harm within the Basin and that a cumulative environmental impact analysis should be performed. Prior to proposing the regulations, the DRBC determined that natural gas development “may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, biological, chemical or hydrological characteristics.”² As federal commissioner on the DRBC who “reports to” and acts as “representative of” involved federal agencies, you stated that the “administration’s position is to continue fully supporting the need for a cumulative impact study.”³ Similarly, FWS and NPS have stated that “[l]arge-scale changes in land use and increased water withdrawals, like those associated with natural gas development (including the construction of exploratory wells) will likely affect the Services’ trust resources and should be reviewed for both individual and cumulative environmental effects.”⁴ Nevertheless, these federal agencies have approved moving forward with the rulemaking by “agree[ing] to vote against a moratorium on regulation development pending completion of an impact study.”⁵

The involved federal agencies’ failure to prepare a draft EIS violates NEPA. NEPA’s purpose is to ensure that federal agencies act transparently -- with full public participation -- in considering the potential significant environmental impacts of their decisions. NEPA imposes on federal agencies the “obligation to consider every significant aspect of the environmental impact of a proposed action [and to] inform the public that it has indeed considered environmental concerns in its decision-making process.” Baltimore Gas and Electric v. NRDC, 462 U.S. 87, 97 (1983). Preparation of an EIS, subject to public comment, is the “core requirement” of NEPA for every action which “might” cause significant environmental impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); American Bird Conservancy, Inc. v. FCC, 516 F.3d 1027, 1034 (D.C. Cir. 2008); 42 U.S.C. § 4332(C).

Because proposed natural gas development in the Basin may have significant environmental impacts, involved federal agencies have violated NEPA by failing to prepare an EIS concerning the proposed regulations. The proposed regulations are a direct action of the

¹ Letter from Steven W. Lawitts to New York State Department of Environmental Conservation, dated December 22, 2009, http://www.nyc.gov/html/dep/pdf/natural_gas_drilling/12_22_2009_impact_statement_letter.pdf.

² Determination of the Executive Director Concerning Natural Gas Extraction Activities in Shale Formations Within the Drainage Area of Special Protection Waters, DRBC, dated May 19, 2009.

³ Letter from Duke DeLuca to Congressman Maurice Hinchey, dated September 14, 2010; Letter from Peter A. DeLuca to Congressman Maurice Hinchey, dated November 24, 2010 (copies enclosed).

⁴ Letter from Marvin E. Moriarty and Dennis Reidenbach to Carol Collier, dated June 25, 2010 (copy enclosed).

⁵ DeLuca letter, dated November 24, 2010.

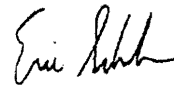
DRBC, a federal agency which must comply with NEPA. See Delaware River Basin Compact, § 15.1(o) (DRBC is a federal agency); 49 Fed. Reg. 49750, 49774 (December 21, 1984) (Council on Environmental Quality (“CEQ”) holds that DRBC is subject to NEPA because it is a federal agency with approval authority over water resource matters within the Basin); see also Andrus v. Sierra Club, 442 U.S. 347, 357-58 (1979) (CEQ interpretations of NEPA are given substantial deference). The Army Corps and other involved federal agencies are also required to comply with NEPA because of their participation in, and approval of, the decision to perform the rulemaking. 40 C.F.R. § 1508.15. Moreover, NEPA required the involved federal agencies to prepare the draft EIS at the time the proposed regulations were published. See 40 C.F.R. §§ 1502.5(d) (“the draft EIS should normally accompany the proposed rule”); 1500.2(c) (agencies must integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.”).

The proposed regulations do not distinguish between gas well development within the unfiltered WOH Watershed and the area of the Basin outside that watershed. In light of the heightened risk of gas well development within the WOH Watershed, the draft EIS should develop and analyze, as an alternative, a prohibition on gas well development within the WOH Watershed.

The cumulative impacts of regulations authorizing natural gas development in the Basin may have significant environmental impacts, and an EIS assessing those impacts is necessary. Accordingly, please contact me within 30 days to let me know whether the involved federal agencies will comply with NEPA by promptly preparing the required draft EIS. If they will not do so, I intend to take legal action against the appropriate involved federal agencies to compel such compliance.

My staff and I are available to discuss this matter. Please contact Lemuel M. Srolovic, Bureau Chief, Environmental Protection Bureau at (212) 416-8448 or at Lemuel.Srolovic@ag.ny.gov.

Very truly yours,



Eric T. Schneiderman
Attorney General

Enclosures

cc (by first class mail):

Executive Director, DRBC
Administrator, EPA

Regional Administrator, EPA Region II
Regional Administrator, EPA Region III
Director, U.S. Fish and Wildlife Service
Director, U.S. National Park Service
Governor, State of New York
Commissioner, New York State Department of Environmental Conservation
Commissioner, New York State Department of Health
Commissioner, New York City Department of Environmental Protection
Governor, State of Delaware
Governor, State of New Jersey
Governor, Commonwealth of Pennsylvania

EXHIBIT B



U.S. ARMY CORPS OF ENGINEERS
NORTH ATLANTIC DIVISION
FORT HAMILTON MILITARY COMMUNITY
302 GENERAL LEE AVENUE
BROOKLYN, NEW YORK 11252-6700

May 24, 2011

Eric Schneiderman, Esq.
New York State Attorney General
26th Floor
120 Broadway
New York, NY 10271-0332

Dear Mr. Schneiderman:

I have received your April 18, 2011 letter on the "Proposed Regulations Concerning Natural Gas Development in the Delaware River Basin." The Delaware River Basin Commission (DRBC) has conducted an open public process in the development of regulations for natural gas development. Through this process, the Commissioners, including one from New York State, have held many meetings on this issue, and have published draft regulations for public comment. That comment period has now closed and the DRBC is in the process of evaluating the comments received.

Your letter requests that as part of the DRBC's process to develop regulations for natural gas development the DRBC undertakes an environmental review under the National Environmental Policy Act (NEPA). While we share and understand your concerns about the environmental issues surrounding proposed development in the Delaware River Basin, the DRBC itself is not a federal agency subject to NEPA, and the mere participation of a federal officer in the DRBC regulatory process does not constitute a federal action. We therefore believe that the federal commissioner is neither required to produce, nor has the statutory authority to perform, a study under NEPA as part of this process.

As you know, New York State is represented on the DRBC by Mr. Mark Klotz, Director, Division of Water of the New York State Department of Environmental Conservation. I, in my capacity as federal commissioner, have been working with him, the DRBC's New Jersey, Pennsylvania, and Delaware representatives, and the DRBC staff to reach a resolution on these important issues. I would urge you to coordinate with New York State's representative on the commission.

In addition, I would note that there are a number of other federal activities underway to help evaluate and manage environmental risks associated with natural gas development. The U.S. Environmental Protection Agency (EPA) is conducting a comprehensive research study to investigate the potential adverse impact that hydraulic fracturing may have on water quality and public health, specifically drinking water and groundwater. The scope of the proposed research includes the full lifespan of water in hydraulic fracturing, from acquisition of the water, through the mixing of chemicals and actual fracturing, to the post-fracturing stage, including the

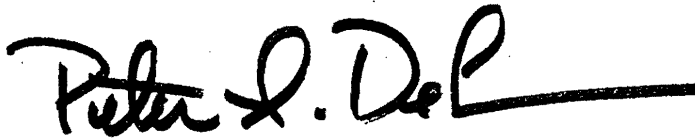
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management of flow back and produced water and its ultimate treatment and disposal. Initial research results are expected by the end of 2012 with a goal for a report in 2014.

The U.S. Geological Survey (USGS) is undertaking a range of science activities to study and monitor the impacts of natural gas production. The U.S. Department of Energy continues to evaluate the impacts of natural gas drilling, including funding multiple projects to develop environmental tools and technologies to address concerns about produced water. In addition, the Secretary's Energy Advisory Board has undertaken a review of hydraulic fracturing and will make recommendations on ways to improve the safety and environmental performance of this practice. Its final recommendations will be provided in November 2011.

We do not believe that litigation is necessary or an appropriate means to address our shared concerns about the impacts of natural gas production. I understand that our staffs have had a positive initial meeting on these issues and I am still willing to meet with you personally to discuss our shared concerns.

Sincerely,

A handwritten signature in black ink that reads "Peter A. DeLuca". The signature is stylized and includes a long horizontal line extending to the right.

Peter A. DeLuca
Brigadier General, U.S. Army
Division Engineer