IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Date of Service:
November 1, 2011

DELAWARE RIVERKEEPER NETWORK, the DELAWARE RIVERKEEPER, RIVERKEEPER, INC., the HUDSON RIVERKEEPER, and NATIONAL PARKS CONSERVATION ASSOCIATION, Plaintiffs, v. THE UNITED STATES ARMY CORPS OF ENGINEERS *et al.*, Defendants, -and- AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and US OIL & GAS ASSOCIATION, Putative Defendant-Intervenors.	No. 11-CV-3780 (NGG)(CLP) ECF Case Oral Argument Requested
DAMASCUS CITIZENS FOR SUSTAINABILITY, INC., Plaintiff, v. THE UNITED STATES ARMY CORPS OF ENGINEERS *et al.*, Defendants, -and- AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and US OIL & GAS ASSOCIATION, Putative Defendant-Intervenors.	No. 11-CV-3857 (NGG)(CLP) ECF Case

STATE OF NEW YORK, Plaintiff, v. THE UNITED STATES ARMY CORPS OF ENGINEERS *et al.*, Defendants, -and- AMERICAN PETROLEUM INSTITUTE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and US OIL & GAS ASSOCIATION, Putative Defendant-Intervenors.	:	No. 11-CV-2599 (NGG)(CLP) ECF Case

THE DELAWARE RIVER BASIN COMMISSION AND CAROL COLLIER'S (IN HER OFFICIAL CAPACITY) MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINTS

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Defendants Delaware River Basin Commission ("Commission" or "DRBC") and Carol Collier (in her official capacity) (collectively "DRBC Defendants") submit this Memorandum of Law in Support of their Motion to Dismiss the Complaints in Civil Action Nos. 11-cv-3780 and 11-cv-3857. Plaintiffs have no private right of action to challenge the Commission's proposed natural gas regulations at this time. Therefore, their complaints should be dismissed without reaching the merits of their claims. In the event that, contrary to the arguments herein, the Court considers the merits, Plaintiffs' claims must fail. The Commission is a federal-interstate compact agency, not a "federal agency" to which the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4347, applies. The claims against the Executive Director should also be dismissed on the ground that only the Commissioners, and not the Executive Director, may compel the Commission to undertake the NEPA process if ordered by the Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Delaware River Basin Compact and Commission

The Delaware River Basin Compact (the "Compact"),[1] enacted in 1961 by concurrent legislation in the United States and the Delaware River Basin ("Basin") states of New York, New Jersey, Pennsylvania and Delaware, established the DRBC and conferred upon it broad powers to manage the water resources of the Basin. The Compact defines water resources to include surface water, groundwater and related areas of land. Compact § 1.2(i). A goal of the Compact is to coordinate the "planning, conservation, utilization, development, management and control of the water resources" of the Basin through a comprehensive plan administered by a basin-wide agency. *See* Compact Third Precatory Clause and § 1.3(e); *see also DRBC v. Bucks County*

[1] The Compact, DRBC Water Quality Regulations and DRBC Rules of Practice and Procedure cited in this Memorandum are available on the Regulations page of the DRBC website, http://www.state.nj.us/drbc/regula.htm.

Water & Sewer Auth., 641 F.2d 1087 (3d Cir. 1981). The Compact authorizes the DRBC, among other things, to establish standards of planning, design and operation of all projects and facilities in the Basin which affect its water resources. Compact § 3.6(b).

The "signatory parties" to the Compact are the four Basin states and the federal government. Compact § 1.2. The signatory parties act through their respective commissioners (or their alternates), referred to in the Compact as the "members" of the Commission. Compact §§ 2.2 and 2.3. The DRBC's five commissioners or members are, *ex officio*, the governors of the four Basin states and a representative of the President. By statute, the President's representative is the commander of the North Atlantic Division, U.S. Army Corps of Engineers. Compact § 2.2, as amended by Pub. L. 110-114 § 5019.

The Commissioners serve as the governing body of the DRBC. Compact § 14.1(b)(1). Each Commissioner is entitled to one vote. Compact § 2.5. Decisions of the Commission are made by vote of a majority of the membership, *i.e.*, by three or more votes. *Id.* The decisions of the Commissioners are implemented on a day-to-day basis by an Executive Director. The Executive Director serves at the pleasure of the Commissioners who may remove her by the vote of a majority of the Commission members. Compact § 14.5. Because the Compact does not directly confer decision-making authority on the Executive Director, she has only that authority delegated to her by the Commissioners. The Commission remains a small organization; it currently has a total staff of approximately forty-five employees.

The Compact grants the Commission broad authority to manage the water resources of the Basin through planning, adjudication and regulation. A key innovation of the Compact was to empower the Commission to adopt a comprehensive plan for the immediate and long range development and uses of the water resources of the Basin to which federal, state and local

agencies and private parties are bound. Compact §§ 3.2 and 13.1. A comprehensive plan addresses and coordinates the multiple uses of the Basin's water resources to reconcile competing demands. Comprehensive management recognizes the importance of coordinated administration of a watershed based on good science without regard to political boundaries.

To implement the comprehensive plan, the Compact prohibits federal, state and local agencies from making any expenditure or commitment to a project or facility affecting the water resources of the Basin unless the Commission has first included the project or facility in the Commission's comprehensive plan. Compact §§ 11.1 and 11.2. In 1961, when the Compact was enacted, requiring federal agencies to adhere to a comprehensive plan adopted by a federal-interstate agency controlled by the states was unprecedented. To preserve the authority of federal government where the national interest may override the regional importance of coordinated water resource management, the Compact provides that the President may suspend, modify or delete any provision of the comprehensive plan as it affects the exercise of federal powers, rights, functions or jurisdiction. Compact § 15.1(s). Congress also has the power to alter the Compact's terms by virtue of, among other things, its authority to approve interstate compacts under the Compact Clause of the Constitution, Article I, § 10, clause 3, and its right to alter or withdraw from the Compact as provided in § 1.4 of the Compact.

The adjudicatory powers that the Compact confers on the Commission assist in ensuring that the comprehensive plan is followed. In addition to requiring Commission approvals for federal and state projects that may affect the water resources of the Basin, *see* Compact Art. 11, the Compact also prohibits any person, corporation or governmental authority from undertaking any project having a substantial effect on the water resources of the Basin unless and until the Commission approves the project. Compact § 3.8. In exercising this adjudicatory function,

which is akin to permitting or licensing, the Commission evaluates whether "the project would substantially impair or conflict with" the Commission's comprehensive plan. Compact § 3.8. Commission approvals, ordinarily issued in the form of "dockets," frequently "modify" the project by imposing conditions necessary to conform the project to the comprehensive plan. Thus, the Commission's adjudicatory powers work in combination with the Commission's planning authority to promote compliance with the comprehensive plan and coordinate what the Compact describes as "the duplicating, overlapping and uncoordinated administration of some forty-three State agencies, fourteen interstate agencies and nineteen Federal agencies which exercise a multiplicity of powers and duties resulting in a splintering of authority and responsibilities." Compact Fifth Precatory Clause.

The third aspect of the Commission's authority is regulatory. The Commission may "make and enforce reasonable rules and regulations for the effectuation, application and enforcement of the Compact." Compact § 14.2; *see also* § 3.6(h) (the Commission may "have and exercise all powers necessary or convenient to carry out its express powers") and § 5.2 (the Commission may "adopt and from time to time amend and repeal rules, regulations and standards to control such future pollution and abate existing pollution"). Congress and the states granted the Commission authority to control or abate water pollution through rulemaking when they formed the Commission in 1961, years before Congress established the U.S. Environmental Protection Agency ("EPA") or enacted our modern federal environmental statutes such as NEPA or the Clean Water Act, 33 U.S.C. §§ 1251-1387.

B. The DRBC's Regulation of Natural Gas Development in the Delaware River Basin

Over its fifty-year history, DRBC has used its regulatory authority to address water resource issues requiring interstate and federal cooperation. For example, DRBC regulates and

coordinates the operation of Basin reservoirs during drought conditions, *see* DRBC Water Code, and establishes water quality objectives for the main stem Delaware River. *See* DRBC Water Quality Regulations. After years of data gathering and analyses, the DRBC has also classified the waters of the main stem Delaware River upstream of the head of tide in Trenton, New Jersey, and limited portions of tributary streams, as Special Protection Waters and imposed antidegradation requirements to protect their high water quality, *see* DRBC Water Quality Regulations § 3.10.3A.2.[2] DRBC has likewise reduced pollution in the Delaware Estuary through regulations allocating the assimilative capacity of the receiving stream. *Id.* § 4.30.7. Resulting reductions in the discharge of pollutants that deprive the Estuary of oxygen necessary to support aquatic life have facilitated the return of the American shad to the Estuary.

DRBC promulgated Rules of Practice and Procedure ("RPP") to clarify which projects have a substantial effect on the water resources of the Basin and, therefore, must obtain Commission approval. The RPP, among other things, establish thresholds for triggering Section 3.8 project review based on the average amount of water withdrawn or wastewater discharged over a 30-day period. *See* RPP § 2.3.5A.

Due to advances in horizontal drilling, hydraulic fracturing ("hydrofracking") and other natural gas extraction technologies, the Commission anticipates that many natural gas development projects will be proposed for the Delaware River Basin. These projects pose risks to the water resources of the Basin. Each well may utilize 3-5 million gallons of water as part of the process of fracturing the shale formation to release the natural gas. This industrial activity presents the potential for the large quantities of water needed to support hydrofracking to be

[2] The DRBC permanently designated the final segment of the non-tidal Delaware River as Special Protection Waters by Resolution No. 2008-9 on July 16, 2008, based on a process initiated by Petition of the Delaware Riverkeeper Network. No NEPA analysis was requested or performed for that rulemaking.

withdrawn on an intermittent basis from small headwater streams, and for wastewater that may differ in composition or quantity from normal municipal and industrial waste streams to be recovered from the wells and stored, treated, reused or discharged.

Developed for more traditional activities, the RPP thresholds based on average monthly withdrawal or discharge quantities in this situation may not be protective of water resources. The proposed regulations eliminate these thresholds for natural gas development projects. Also, the changes to high-value landscapes such as forests and wetlands associated with installation of natural gas well pads, roads and ancillary facilities, and the risks posed by operation of the facilities, threaten the quality of designated Special Protection Waters and the ecology of other sensitive areas. The proposed regulations seek to minimize these potential adverse effects.

Commencing over a year before the draft regulations were published, the Executive Director responded to these challenges by exercising the authority expressly conferred on her by Section 2.3.5B.18 of the RPP to require sponsors of natural gas projects in shale formations in the drainage area of Special Protection Waters to obtain Commission approval for their projects notwithstanding the RPP thresholds that are otherwise applicable. The Executive Director Determinations issued pursuant to the RPP are described in and attached to the Commission's Memorandum of Law in Response to American Petroleum Institute's Motion to Intervene (No. 11-3780, Doc. No. 50) ("Response Memorandum"), which is incorporated herein.

At its public meeting on May 5, 2010, the Commission unanimously adopted a motion that stated as follows:

> (1) we direct staff to develop regulations on well pads in the shales for notice and comment rulemaking; (2) we will postpone the Commission's consideration of well pad dockets until regulations are adopted; and (3) we will move forward with water withdrawal dockets in due course.

A true and correct copy of the relevant portions of the May 5, 2010 Commission minutes is attached to the Response Memorandum as Exhibit "D."

Consistent with the May 5, 2010 motion, on December 9, 2010, the DRBC published draft natural gas regulations for public review and comment. The proposed regulations are designed to manage and protect water resources in three principal areas. Water withdrawals are regulated to protect stream flows critical for aquatic health, the assimilative capacity of the stream to handle wastewater discharges, and competing water uses. Wastewater treatment, including tracking of wastewater, is regulated to prevent pollutant discharges. Well pads and their associated activities would also be regulated to prevent adverse impacts to Basin waters. These proposed regulations, if and when adopted, will supplement and *increase* the protection of water resources that existing DRBC, state and federal regulations provide. As the foregoing discussion reveals, these regulations were developed with a heavy focus on protection of water resources and consideration of the quality of the human environment.

DRBC conducted a full public process regarding the proposed regulations. DRBC held eighteen hours of public hearings on the proposed regulations during six sessions in Honesdale, Pennsylvania; Liberty, New York; and Trenton, New Jersey. See Gore Decl. ¶ 20. In addition to receiving comments at the hearings, DRBC received approximately 69,000 written comments. *Id.* DRBC is revising the regulations as a result of the public comments and will issue a comment and response document in conjunction with the final regulations, if and when they are adopted. *Id.* DRBC has scheduled a vote on the revised regulations for November 21, 2011 (postponed from October 21, 2011).

C. The Current Litigation

Three lawsuits were commenced in this Court challenging the regulations before they have been promulgated. New York State, a signatory party to the Compact, commenced the first

lawsuit, No. 11-CV-2599, against the federal representative on the Commission and various federal agencies, contending that the federal representative and the federal agencies had failed to fulfill their obligations under NEPA in conjunction with the proposed natural gas regulations. According to its Complaint, New York State did not bring claims against the DRBC Defendants because Congress exempted the DRBC from the requirements of the Administrative Procedure Act ("APA"), the statutory mechanism for bringing NEPA claims. (NYS Compl. ¶ 3.)

The Delaware Riverkeeper Network, among others, and Damascus Citizens for Sustainability commenced the remaining two lawsuits, No. 11-CV-3780 and No. 11-CV-3857, respectively, against the defendants named by New York State and also against the DRBC Defendants. The central allegations in these Complaints are that DRBC is a federal agency subject to NEPA, that NEPA requires all federal agencies to comply with its procedural requirements when undertaking major federal actions significantly affecting the quality of the human environment, and that DRBC should have performed the environmental review required by NEPA in conjunction with DRBC's draft natural gas regulations. Plaintiffs allege potential harm to the environment from the natural gas development activities to be undertaken by the companies that DRBC proposes to regulate if and when the regulations become final. They do not contend that the Commission plans to undertake any development project. (*See* Riverkeeper Compl. ¶¶ 127-128.)[3]

[3] The DRBC Defendants incorporate by reference and adopt the standard of review as set forth in the brief of the United States in support of its motion to dismiss. The DRBC Defendants also incorporate by reference and adopt the standing arguments made by the United States, as well as all other arguments made by the United States to the extent that they are equally applicable to the DRBC Defendants. In support of their Motion, the DRBC Defendants rely in part on the portions of the Declaration of Richard C. Gore and its supporting documents cited herein. Mr. Gore's Declaration is based upon and attaches public records which the court may consider in deciding a motion to dismiss. *See Blue Tree Hotels Inv. Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004).

II. ARGUMENT

A. Plaintiffs' Claims Against The DRBC Defendants Should Be Dismissed Because Plaintiffs Have No Cause of Action.

1. Plaintiffs Must Demonstrate That They Have A Private Right Of Action To Enforce NEPA.

Plaintiffs' claim that the Commission is obligated to follow NEPA is not cognizable in this Court unless Plaintiffs have a private right of action. The question of whether a person has a right to enforce a federal statute is analytically distinct from the question of whether jurisdiction exists under 28 U.S.C. § 1331 (federal question) or otherwise. Claims that a federal statute has been violated plainly arise under federal law, but as this Court has stated, "not all federal laws give rise to a private right of action that permits private parties to enforce federal laws by filing suit in federal court." *Shahid v. Brooklyn Legal Servs. Corp.*, No. 03-cv-3029 (E.D. N.Y. November 10, 2003) (Garaufis, J.), *aff'd*, No. 03-9323 (2d Cir. 2004). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *George v. NYC Dep't of City Planning*, 436 F.3d 102, 103 (2d Cir. 2006) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).

In *Shahid*, Brooklyn landlords contended that a legal services attorney had improperly represented tenants in matters adverse to the landlords. The Court noted that the Legal Services Act did not create a private cause of action. *Id.* (citing *Regional Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 462 (4th Cir. 1999)). The Court further noted that under the four-part test of *Cort v. Ash*, 422 U.S. 66, 78 (1975), no private right of action could be implied. Consequently, the Court dismissed Plaintiffs' claim. The Second Circuit affirmed based on the reasoning of the district court and of the Fourth Circuit in *Regional Management*.

In *Regional Management*, a lender challenged a determination by the Legal Services Corporation ("LSC") that certain recipients of LSC's funds had not violated statutory restrictions on the use of those funds. The Fourth Circuit noted the limited basis for judicial review:

> There are generally only two possible bases for judicial review of federal agency action. First, and most often applicable, is the APA which "provides the generally applicable means for obtaining judicial review of actions taken by federal agencies." Second, a substantive statute may provide a private right of action for judicial review of an agency action…. The Supreme Court has suggested that there may be some exceptional cases where judicial review of agency action would always be available…. The two chief areas of this sort appear to be constitutional claims and claims by a party facing a governmental action against it for violating regulations or laws….

Id. at 461 (citations omitted).

The Fourth Circuit examined and rejected two potential sources of a private right of action to challenge LSC's determination: the APA and the LSC Act itself. The court concluded that LSC Act exempts LSC from the APA. The LSC Act also does not create a private right of action expressly or by implication. The court reasoned that Congress would not choose to exclude LSC from the APA and then through silence grant a private right of action to challenge LSC decisions that are exempt from APA review. *Id.* at 463.

Like the Fourth Circuit, the Second Circuit has refused to imply a private right of action to sue for alleged violations of federal law absent clear congressional intent. *See Cohen v. Viray*, 622 F.3d 188, 193 (2d Cir. 2010) ("Congressional intent is the keystone as to whether a federal private right of action exists for a federal statute."); *Belikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116-17 (2d Cir. 2007) (citing *Sandoval*, 532 U.S. at 288 (a court "cannot ordinarily conclude that Congress intended to create a right of action when none was explicitly provided")); *Rojas-Reyes v. INS*, 235 F.3d 115 (2d Cir. 2000) (no private right to compel Attorney General to issue regulations allegedly mandated by statute); *Thye v. United States*, 109 F.3d 127, 129 (2d Cir.

1997) (per curiam) ("[S]tatutory provisions that are phrased as general prohibitions or commands to federal agencies are unlikely to give rise to private rights of action."); *Shahid*, *supra*; *see also Cenzon-DeCarlo v. Mt. Sinai Hosp.*, No. 09cv3120, 2010 U.S. Dist. Lexis 3208 (E.D.N.Y. Jan. 15, 2010), *aff'd per curiam*, 626 F.3d 695 (2d Cir. 2010).

As the Supreme Court explained:

> "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one…."

Sandoval, 532 U.S. at 286.[4] As will be shown, in the present case no private right of action is conferred by the APA, NEPA, or the Compact (directly or implicitly). The Court should not create such a right by writ of mandamus. Consequently, Plaintiffs' claims should be dismissed.

2. <u>Neither the APA Nor NEPA Provides Plaintiffs With A Private Right Of Action.</u>

Actions of the DRBC are not subject to judicial review pursuant to the APA, the mechanism through which compliance with NEPA is ordinarily enforced. Section 15.1(m) of the Compact specifically exempts the DRBC from the purview of the APA. That section provides in relevant part: "For purposes of . . . the Act of June 11, 1946, 60 Stat. 237, as amended (Title 5, U.S. Code, Sections 1001 and 1011 . . .), the commission shall not be considered a Federal agency." The APA was enacted by the Act of June 11, 1946, 60 Stat. 237-44, and 5 U.S.C. §§ 1001 and 1011 are the precursors of the current APA, which is codified at 5 U.S.C. §§ 551 *et*

[4] As Judge (now Justice) Breyer recognized, in the ordinary case challenging administrative agency action, the APA expresses Congress's intent to provide the necessary right of action. Nevertheless, "a court might have to decide whether Congress implicitly means a statute to provide a party with a 'private right of action' against one of the few federal bodies exempted from the APA's coverage." *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987). As discussed *infra*, the Commission is not a federal body, and Congress did not intend to create an action against it to review whether its draft regulations comply with NEPA.

seq. By its express terms, then, the APA does not apply to action taken pursuant to the Compact. *See also Del. Water Emergency Group v. Hansler*, 536 F. Supp. 26, 36 (E.D. Pa. 1981) (citing § 15(m) of the Compact and concluding that "[t]he Administrative Procedure Act . . . , 5 U.S.C. § 551-559, does not apply."), *aff'd*, 681 F.2d 805 (3d Cir. 1982) (table). Therefore, the APA does not provide an avenue for Plaintiffs' claim in this case.[5]

NEPA itself does not provide a private right of action for failure to comply with the study it mandates that "agencies of the Federal Government" undertake prior to "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C). *See, e.g.*, *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("[B]ecause NEPA creates no private right of action, challenges to agency compliance with the statute must be brought pursuant to the Administrative Procedure Act . . . .") (citing *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) ("The upshot of the NEPA cases is that parties are required to proceed under the APA in order to challenge claims violations of NEPA.")); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173 (11th Cir. 2006) ("'Because NEPA does not provide for a private right of action, plaintiffs challenging an agency action based on NEPA must do so under the Administrative Procedure Act.'") (quoting *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir.2005)); *Noe v. Metro. Atlanta Rapid Transit Auth.*, 644 F.2d 434, 439 (5th Cir. 1981) (finding no implied cause of action under NEPA); *cf. Thye, supra* (commands to federal agencies are unlikely to give rise to private rights of action); *San Carlos Apache Tribe, supra* (relying on the rule that NEPA cases must be filed under the APA as a basis for holding that claims for violation of the National Historic

[5] As noted above, the third consolidated case in this litigation, No. 11-CV-2599, appropriately did not name the DRBC as a defendant because, according to New York State's Complaint, Congress expressly exempted the DRBC from the requirements of the Administrative Procedure Act, the statutory mechanism for bringing NEPA claims. (NYS Compl. ¶ 3.)

Preservation Act, 16 U.S.C. §§ 470 *et seq.*, must be brought under the APA); *Weiss v. Inc. Village of Sag Harbor*, 762 F. Supp. 2d 560, 579 n.11 (E.D.N.Y. 2011) (explaining that "although this issue has not yet been addressed by the Second Circuit, other circuit courts have held that there is no private right of action under . . . NEPA").[6]

In light of the Compact's clear statement that the Commission is not a federal agency for purposes of the APA, and the numerous cases holding that NEPA does not create a private cause of action, neither the APA nor NEPA provides a means for enforcing NEPA's requirements.

3. The Compact Does Not Provide A Private Right Of Action Expressly Or Implicitly For Challenges To The Regulatory Process.

At base, Plaintiffs' claim rests on "DRBC's failure to undertake the NEPA process with respect to the Draft Regulations"; as a result of this inaction, Plaintiffs' contend, the DRBC violated NEPA. (Riverkeeper Compl. ¶ 145.) Plaintiffs do not allege that the DRBC failed to comply with the Compact, failed to comply with constitutional mandates, or failed to comply with any other law providing a private right of action. *See supra* Part III.A.2 (describing the absence of a private right of action under NEPA).

With respect to DRBC action, the Compact expressly provides for judicial review – that is, a private right of action – with respect to some, but not all, DRBC action. Section 3.3(c) provides for judicial review of "action of the commission with respect to an out-of-basin

[6] The factors in *Cort v. Ash*, 422 U.S. 66, 78 (1975), are now reviewed with a focus on "whether Congressional intent to create a private cause of action can be found in the relevant statute." *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 619 n.7 (2d Cir. 2002). The *Cort* factors support the conclusion that NEPA does not create a private cause of action. NEPA sets forth procedural requirements to protect the environment, not a particular class of persons. NEPA's statutory language does not expressly create a private right of action, and nothing in the statute or legislative history suggests that private enforcement was intended. The legislative scheme contemplated oversight by the newly created Council on Environmental Quality ("CEQ"), not private parties. States traditionally follow their own procedures and the federal government follows its own procedures. In sum, the statute simply provides internal directions for the federal government; it does not create a private right of action.

diversion or compensating releases in connection therewith." According to Section 3.8, Commission "determinations" (that is, decisions on requests for approvals) are subject to judicial review. Also subject to judicial review are the Commission's "assessments" pursuant to Section 4.3, orders "to cease the discharge of" pollutants pursuant to Section 5.4, "determinations and delineations" of protected areas pursuant to Section 10.2, and, pursuant to Section 10.6, the "granting, modification or denial of permits" pursuant to Sections 10.3, 10.4, and 10.5 (relating to regulation of withdrawals and diversions from surface and ground waters in delineated protected areas). These express provisions granting a right of review do not cover the alleged violation of NEPA in the course of preparing draft regulations. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979); *see also generally Sandoval*, *supra*; *Brooklyn Legal Servs. Corp.*, *supra*.

The Compact's express exemption of DRBC actions from review under the APA, when combined with its grant of review directly under the Compact for certain DRBC actions but not others, is controlling. Only those actions for which Congress provided a right of review are reviewable. Otherwise, the detailed statutory structure established by Congress would be upset, and the various provisions of the Compact dealing with judicial review would be superfluous.

As the Fourth Circuit recognized in *Regional Management*, *supra*, the case relied upon by the district court and Second Circuit in *Brooklyn Legal Services Corp.*, there may be exceptional cases where judicial review of agency action would always be available, or for which a strong presumption of reviewability would exist. Those areas mentioned by the *Regional Management* court included constitutional claims and claims by a party facing a governmental action. Neither is present here. Even the concurring opinion in *Regional*

Management recognized that congressional intent could overcome any presumption of reviewability that may otherwise exist. Commands to federal agencies involving their internal processes, such as NEPA requirements, do not benefit a particular class of persons, and carry no such presumption.

In light of the absence of a private right of action under NEPA, the express Compact language exempting DRBC action from review under the APA, and the clear intent of Congress and the signatory states to allow only specified DRBC action to be reviewed outside of the APA, judicial review would be inappropriate here.

4. Mandamus Cannot Substitute For a Cause Of Action.

The Riverkeeper Complaint seeks relief pursuant to 28 U.S.C. § 1361, which provides that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mandamus is "an extraordinary remedy to be invoked only in exceptional circumstances." *Agunbiade v. United States*, 893 F. Supp. 160, 163 (E.D.N.Y. 1995) (citing *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976)); *see also Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 34 (1980). As will be shown, the grant of mandamus jurisdiction is not a license for a court to create a private cause of action to enforce a federal statute when Congress chose not to provide a private remedy.

As an initial matter, mandamus is available only to "compel an officer or employee of the United States or any agency thereof"; it may not be used to compel action by non-federal actors. 28 U.S.C. § 1361; *Cave v. Beam*, 433 F. Supp. 172, 175 (E.D.N.Y. 1977). For the reasons set forth in Part II.C, below, the DRBC is not a federal agency, and pursuant to the clear terms of Section 1361, the DRBC may not be compelled by the federal court to take the action requested by Plaintiffs.

Separately, grant of mandamus in this context would create an end run around the Compact's express exemption of the DRBC's action from the type of review sought by Plaintiffs. Federal courts have recognized, in the context of judicial review of agency action by plaintiffs seeking injunctive relief, that the power to compel agency action under the APA, *see* 5 U.S.C. § 706(1), is "coextensive" with their mandamus powers. *Conservation Law Found. of New England v. Clark*, 590 F. Supp. 1467, 1472 (D. Mass. 1984), *aff'd*, 864 F.2d 954 (1st Cir. 1989); *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981). As described above in Part II.A.2, the Compact expressly declares that the DRBC's actions are not subject to review by the courts pursuant to the APA. Allowing review of the DRBC's actions through an action titled "mandamus" would contravene the Compact and should not be permitted.

Moreover, grant of mandamus would conflict with Congress's determination *not* to create a private right of action under NEPA. As discussed above, actions alleging failure by a federal agency to comply with NEPA must be brought within the framework of the APA, because NEPA does not create a private right of action. Grant of mandamus in this case would risk turning the "exceptional" writ of mandamus "into a freestanding cause of action for plaintiffs seeking to enforce virtually any statute, even those that provide no such private remedy." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 395 (2004) (Thomas, J., concurring in part). The Second Circuit and other courts of appeals have concluded that mandamus relief is unavailable when the underlying statute to be enforced does not itself provide a private right of action. *See Aguirre v. Meese*, 930 F.2d 1292, 1293 (7th Cir. 1991) (per curiam) (denying petition for mandamus because underlying statute, 8 U.S.C. § 1252, does not provide a private right of action); *Gonzalez v. INS*, 867 F.2d 1108, 1110 (8th Cir. 1989) (same, relying on *Cort v. Ash*); *CETA Workers' Org.*

Comm. v. City of N.Y., 617 F.2d 926, 934, 936, (2d Cir. 1980) (finding no implied right of action under the Comprehensive Employment and Training Act and concluding, as a result, that mandamus jurisdiction does not exist); *Dist. Lodge No. 166 v. TWA Servs., Inc.*, 731 F.2d 711, 717 (11th Cir. 1984) (finding no private right of action under the Service Contract Act and denying mandamus relief, "refus[ing] to blind ourselves to the inequity of granting plaintiff relief which is not an end in itself but is merely a means to an end which plaintiff could not obtain except by this end run"); *see also United States v. Egwu*, No. 92cv1291 (SJ), 1992 WL 266934, at *1 (E.D.N.Y. Sept. 15, 1992) ("Because no private right of action may be discerned from [the statute under consideration in *Egwu*], mandamus is not available.").[7] Those results are even more compelling in light of the Supreme Court's recent pronouncements on the limitations of implied private rights of action, discussed in greater detail in Part II.A.1. *See, e.g.*, *Sandoval*, 532 U.S. at 275 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").[8]

"That the statute permits the issuance of mandamus does not require its issuance. Mandamus is issued at the discretion of the court." *Nat'l Wildlife Fed'n v. United States*, 626

[7] *Borough of Morrisville v. DRBC*, 382 F. Supp. 543, 546 (E.D. Pa. 1974), and other cases permitting mandamus jurisdiction to enforce NEPA, *see, e.g.*, *Joseph v. Adams*, 467 F. Supp. 141 (E.D. Mich. 1978); *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975), were decided before the cases cited above that require NEPA challenges to be brought under the APA, and thus do not address efforts to circumvent the Compact's APA exemption. Likewise, they do not discuss the effect of the composition and voting provisions of the Compact or, as discussed in Section 3 above, the limited review provisions in the Compact itself.

[8] This result is also actuated by separation-of-powers concerns. The initial issue for the Court is whether Congress intended to create rights under a statute enforceable by individuals. *See, e.g., Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (describing, in an action brought under 42 U.S.C. § 1983, the "concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes").

F.2d 917, 923 (D.C. Cir. 1980). For the reasons set forth above, the Court should not issue mandamus relief in this case. Plaintiffs' claims should be dismissed.[9]

B. The DRBC's Executive Director Is Not A Proper Party To This Lawsuit.

In addition to naming the DRBC as a defendant in this action, Plaintiffs named Carol Collier, the DRBC's Executive Director, in her official capacity, as a defendant. She is not a proper party to this action because she does not have authority to grant the relief requested – that is, she does not have the authority to direct the DRBC to prepare an environmental impact statement ("EIS") with respect to the proposed regulations prior to their adoption.

The *Commissioners*, subject to the provisions of the Compact, serve as the governing body of the Commission, and exercise and discharge its powers and duties. Compact § 14.1(b). The DRBC's five Commissioners are, *ex officio*, the governors of the four member states and the commander of the North Atlantic Division, U.S. Army Corps of Engineers on behalf of the federal government. Compact § 2.2, as amended by Pub. L. 110-114 § 5019. The *Commissioners* appoint the principal officers of the commission and delegate to and allocate among them administrative functions, powers and duties. *Id.* And while "[t]he officers of the commission shall consist of an executive director. . . . [t]he executive director shall be appointed and may be removed by the affirmative vote of a majority of the full membership of the commission . . . ." Compact § 14.5(a). Moreover, the *Commissioners* "shall be entitled to one vote on all matters which may come before the Commission" and "[n]o action of the commission shall be taken at any meeting unless a majority of the membership shall vote in favor thereof."

[9] Additionally, Plaintiffs purport to bring their claims under 28 U.S.C. §§ 2201 and 2202. "However, a request for relief in the form of a declaratory judgment does not by itself establish a case or controversy involving an adjudication of rights." *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993). "The Declaratory Judgment Act does not . . . . provide an independent cause of action. Its operation is procedural only – to provide a form of relief previously unavailable." *Id.*

Compact § 2.5. Whether to draft an EIS prior to the promulgation of regulations is a decision that belongs to the Commissioners.

In two recent cases brought against the DRBC by Plaintiff the Delaware Riverkeeper Network, one of which was also joined in by Plaintiff Damascus Citizens for Sustainability, the U.S. District Court for the District of New Jersey dismissed the Executive Director as a defendant. *Del. Riverkeeper Network v. Collier*, No. 11-0423, 2011 U.S. Dist. LEXIS 99983 (D.N.J. Aug. 29, 2011); *Del. Riverkeeper Network v. DRBC*, No. 10-5639, 2011 U.S. Dist. LEXIS 99979 (D.N.J. Aug. 29, 2011). In these cases, like the present case, plaintiffs named the Executive Director in her official capacity even though only the Commission and not the Executive Director had the authority to take the challenged actions. In dismissing the Executive Director from both cases, the court noted the limitations on the Executive Director's authority, and stated that suing the Executive Director when DRBC is also a named defendant would at best be redundant. The same result should apply here and all claims against the Executive Director should be dismissed.

C. The Complaints Should Be Dismissed Because The Context, Terms, And Legislative History Of The Compact Demonstrate That The DRBC Is A Federal-Interstate Compact Agency, Not A Federal Agency.

1. The Context In Which The Signatory Parties Adopted The Compact Evidences An Intent To Create A New Form of Agency, Not A "Federal Agency."

Assuming *arguendo* that Plaintiffs have a private right of action to seek review of DRBC regulations, which they do not, and that this alleged right extends to draft regulations, which it does not, we reach the substance of the appeal. A central issue presented by the Complaints is whether the DRBC is an "agency of the Federal Government" as defined in NEPA and is therefore subject to NEPA's strictures. To determine whether DRBC falls within NEPA's coverage, we must first discern the nature of the entity created by Congress and the Basin states

in 1961 and then examine whether when Congress enacted NEPA in 1969 it intended to impose NEPA's procedural requirements on this entity. A review of the relevant factors demonstrates that as a federal-interstate compact agency, DRBC is not an agency of the federal government for NEPA purposes and is, therefore, not subject to its requirements.

To understand Congress's intent in enacting the Compact, it is useful to place the Compact in context. In their seminal article, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925), Felix Frankfurter and James M. Landis traced the history of interstate compacts in the United States and made recommendations for their future use. They described the historic use of compacts to resolve boundary disputes between the colonies and later the states, and the newer use of the compact mechanism to resolve water disputes such as those among the states claiming rights to Colorado River flows. But Frankfurter and Landis suggested that conceiving federalism only in terms of the "exclusive duality" of the "States and Nation" foreclosed opportunities for innovative solutions to modern problems. They noted that "the combined legislative powers of Congress and of the several states permit a wide range of permutations and combinations for governmental action." *Id.* at 688.

To illustrate the potential use of a compact for reconciling state and national interests, Frankfurter and Landis noted the problem that competing demands on a limited water supply posed for conservation. Because both the water supply available to satisfy multiple needs and the needs themselves vary over time, an institutional mechanism allowing adjustment for changing conditions is required. "Agreement among the affected states and the United States, with an administrative agency for continuous study and continuing action, is the legal institution alone adequate and adapted to the task." *Id.* at 701. The authors thus proposed creation of an agency formed by agreement among the states and federal government and charged with

continuing administrative responsibilities. Joint administration would afford the states a decision making role while protecting the national interest.

Proceedings before the U.S. Supreme Court demonstrated that the problems foreseen by Frankfurter and Landis were present in the Delaware River Basin. As the population of New York City grew, the City looked to the headwaters of the Delaware River in New York State as a new location for the City's water-supply reservoirs. Not surprisingly, the down-basin states of New Jersey, Pennsylvania, and Delaware opposed an out-of-basin transfer of water to the City that might limit the water available to support future growth in these states. *See Badgley v. City of N.Y.*, 606 F.2d 358, 362 (2d Cir. 1979). Interim outcomes of the prolonged fight for the Delaware River's waters were the Supreme Court decrees in 1931 and 1954 allocating the waters of the Basin based on the doctrine of equitable apportionment. The Supreme Court retained jurisdiction over the case, leaving open the potential for further litigation as growth within the Basin or in the City continued. *See New Jersey v. New York*, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954); *see also* Compact Fourth Precatory Clause and Riverkeeper Compl. ¶ 39.

The need for coordinated management in the Basin was not limited to protection of water supply. Other challenges such as flood control, recreation, pollution control, hydroelectric power development and groundwater protection affected multiple Basin states and required a joint solution. *See* Compact Third Precatory Clause. One effort in interstate collaboration, the Interstate Commission on the Delaware River Basin ("INCODEL"), which operated by voluntary cooperation, proved unable to assist the multiple state and federal agencies in developing a single, binding comprehensive plan. INCODEL recommended the use of an interstate compact with federal participation. *See* Compact Sixth Precatory Clause.

As often occurs in water management matters, severe weather conditions including hurricanes in 1955 and drought in 1957 spurred the states and federal government to further study and action. A study undertaken by the Syracuse University Research Institute concluded that "an administrative agency throughout the River Basin promises the most logical solution to the regional aspects of the water resources problem." R.C. Martin, *River Basin Administration and the Delaware* (1960) ("Syracuse Report") at 341. To expedite implementation of this solution, the Syracuse report recommended a two-phase effort. The first phase would consist of prompt enactment of a federal statute forming a federal agency with members appointed by the President. Although the Presidential appointees would include state representatives, the President would have the power to discharge them. *Id.* at 346.

Consistent with the approach advocated by Frankfurter and Landis and by INCODEL, the Syracuse Report recommended that as a second phase, the Basin states and federal government establish a commission by federal interstate compact. The Report envisioned that the commission would "shift the basic legal authority for compact integrated and comprehensive development of water resources" to the states while recognizing the vital role of the federal government. *Id.* at 359. The Report further describes this transfer as "the shift of responsibility from a federal to a federal-interstate agency." In other words, a federal-interstate compact agency is a fundamentally different institutional construct than a federal agency. As we now know, the states and federal government bypassed the first phase recommended in the Syracuse Report and opted to form the federal-interstate compact agency directly.

The DRBC breaks the traditional mold of state-only or federal-only institutional management. Plaintiffs' characterization of the DRBC as a federal agency falls into the "duality" trap that Frankfurter and Landis cautioned against. It does injustice to the innovative

nature of the Compact through which Congress and the state legislatures intended to and did create a new form of entity. In his extensive review of the DRBC's successful efforts to reduce pollution in the Delaware River, Professor Bruce Ackerman has described the Commission as "one of the most sophisticated forms of 'cooperative federalism' yet attempted – the epitome of the American effort to obtain the advantages of decentralized decision making while simultaneously avoiding the perils of provincialism." B. Ackerman, *The Uncertain Search for Environmental Quality* at 4 (1974).

2. **The Language of the Compact Creates A Federal-Interstate Compact Agency, Not A "Federal Agency."**

The language of the Compact is the starting point for determining the nature of the entity that Congress and the state legislatures created. The Compact states the signatory parties' intent to effectuate the purposes of the "draft of an interstate-Federal compact for the creation of a basin agency" prepared by an advisory committee constituted by the Governors of the Basin states and the mayors of the cities of New York and Philadelphia. Compact Final Precatory Clause; *see also* Compact Third Precatory Clause (form a "basin-wide agency"). This basin agency created by federal-interstate compact is a "federal interstate compact agency."

In contrast to how it normally treats entities that it considers to be federal agencies, in the Compact Congress specified what attributes of a federal agency it chose to confer and not to confer on the Commission. This congressional sorting of laws applicable to federal agencies into those that apply to the Commission and those that do not apply compels the conclusion that Congress was creating a new form of entity, not simply another federal agency, and that laws applicable to federal agencies do not automatically apply to the Commission. For the most part, Congress chose not to endow the Commission with the characteristics inherent in agencies of the federal government. The following are some key examples:

a) The Commission is controlled by the States.

A hallmark of a federal agency is that its decisions are controlled by the federal government and not the states. The Commission does not satisfy this test. Decisions of the Commission are made by majority vote of the Commissioners, each of whom represents a signatory party. Unlike the Commission, federal agencies do not engage in representative decision-making. With only one of five votes, the federal representative cannot control the Commission. Because the remaining Commissioners are the governors of the four Basin states, in no sense are they responsible to or do they serve as representatives of the federal government. Indeed, this lack of control led Congress to add Section 15.1(s) to the Compact, reserving the right of the President to suspend, modify, or delete any provision of the comprehensive plan when the national interest so requires.

b) The Commission is funded by the States, not the federal government.

The federal government does not control the Commission through financial appropriations. Unlike federal agencies dependent solely on Congress for financial support, the Commission may receive monies made available to it by any signatory party or by any other public or private corporation or individual. Compact § 14.1(a)(2). The federal government is intended to be only one contributor to the Commission, and only the federal contribution is subject to Congress's approval and authority. *See* Compact § 13.3 and 15.1(e). The United States has no obligation to pay the principal or interest on any Commission bonds. Compact § 15.1(g). Significantly, since 1996 the federal government has appropriated monies to the Commission in only one year. See Gore Decl. at ¶¶ 4-11 and Decl. Exhibits "A" and "B". Consequently, the Commission has become a state funded agency.

An important hallmark of federal agencies is federal funding through appropriations by Congress and close federal oversight of financing. *See* U.S. Const. art. I, § 9, cl. 7. Federal agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341. Revenues received by federal agencies outside of the appropriations process must be forwarded to the United States Treasury. 31 U.S.C. § 3302(b).[10] Congressional oversight of federal agencies' budgets through these requirements and myriad others – the "power of the purse" – "reflects the fundamental proposition that a federal agency is dependent on Congress for its funding." U.S. Gen. Accounting Office, Office of the Gen. Counsel, 1 *Principles of Federal Appropriations Law* 1-5 (3d ed. 2004); *see also id.* at 1-12 (listing applicable statutes). Moreover, federal agencies' financing plans must be approved by the United States Treasury. 12 U.S.C. § 2286.[11] The DRBC is subject to none of these requirements, and congressional appropriations have played almost no role in its operation over the past 15 years. Labeling an agency lacking this critical mechanism of federal control a "federal agency" would be highly anomalous.

c) The Commission's employees are not federal employees.

Section 15.1(n) of the Compact provides that the officers and employees of the Commission (other than the federal representative and his staff) "shall not be deemed to be, for any purpose, officers or employees of the United States or to become entitled at any time by

[10] Section 3302(b) provides: "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

[11] Section 2286(a) provides, in relevant part: "To insure the orderly and coordinated marketing of Treasury and Federal agency obligations and appropriate financing planning with respect thereto, and to facilitate the effective financing of programs authorized by law subject to the applicable provisions of such law, the prior approval of the Secretary of the Treasury shall be required with respect to . . . obligations issued or sold by any Federal agency."

reason of employment by the Commission to any compensation or benefit payable or made available by the United States solely and directly to its officers or employees." Indeed, the Commission staff participates in the State of New Jersey's health and pension benefit plans. See Gore Decl. at ¶¶ 18-19 and Decl. Exhibit "E". Unlike the Commission's employees, appointees who exercise significant authority under the laws of the United States must be appointed in the manner prescribed in the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. *Buckley v. Valeo*, 424 U.S. 1, (1976) (per curiam). An agency with no federal officers or employees is not what is ordinarily considered to be a "federal agency."

d) The Commission is expressly not a federal agency for purposes of various federal statutes.

Section 15.1(m) exempts the Commission from the Federal Tort Claims Act, the Tucker Act and the Administrative Procedure Act. These acts, pertaining to suits against the United States and appeals of administrative agency action, prescribe fundamental requirements for actions against the United States and its agencies. Indeed, "the provisions of the APA 'provide[] the statutory structure upon which federal administrative law is built.'" *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 531 (2d Cir. 2010) ("*ASMFC*") (quoting *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1012 (9th Cir. 2000)). Congress's decision to exclude DRBC from federal administrative law weighs against characterizing DRBC as a federal agency.

e) When Congress wanted laws applicable to federal agencies to apply to the Commission, Congress so specified.

In one area Congress chose to require the Commission to follow requirements applicable to federal agencies. In Section 15.1(j) of the Compact, Congress instructed the Commission to comply with the provisions of the Walsh-Healy Public Contracts Act, 41 U.S.C. 35 *et seq.* Similarly, Congress applied the provisions of the Davis-Bacon Act, 40 U.S.C. 276a-276a-5, to the Commission. Compact 15.1(i). These very limited ways in which Congress expressly

applied federal agency law to the Commission (indeed, the Davis-Bacon Act is not solely addressed to federal agencies) illustrate the sorting function that Congress performed, and the decision not to treat the Commission as a federal agency for most purposes. If the Commission were a federal agency, sections 15.1 (i) and (j) would be superfluous.

f) The Compact created a regional agency to administer regionally, not a national agency.

The Commission is a regional agency, Compact §§ 11.1 and 11.2, an attribute at odds with characterizing it as a "federal agency." In *Kenaitze Indian Tribe v. Alaska*, the court of appeals for the Ninth Circuit described characteristics of federal agencies, including a "nationwide perspective" and being subject to "continuous congressional supervision by virtue of Congress's powers of advice and consent, appropriation, and oversight." 860 F.2d 312, 316 (9th Cir. 1988). The DRBC has a regional perspective and is not subject to congressional supervision. Only one of its five members is a federal appointee, and because of the majority vote needed for action by the DRBC, the federal appointee cannot supervise the Commission.

Congress would not have created a federal agency without almost any federal agency attributes. Stated more colloquially, if it does not walk like a duck, quack like a duck or look like a duck, it is probably not a duck.

Plaintiffs' Complaints focus on the language of Section 2.1 of the Compact, which creates the Commission "as an agency and instrumentality of the governments of the respective signatory parties." Plaintiffs construe this section to mean that the Commission is an agency of each of the signatory parties and, because the federal government is one of the signatories, the Commission is a federal agency subject to NEPA. Given that the other four signatory parties are states, Plaintiffs do not explain why their logic would not compel the conclusion that the Commission is a state agency and therefore not subject to NEPA. In reality, neither

interpretation is exact. A better reading of this section is that by using the plural term "governments," the signatories viewed the Commission as a joint agency of all of the signatories and not an agency of any single signatory. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (agencies created by interstate compact "occupy a significantly different position in our federal system" than do the individual state members); *accord Brooklyn Bridge Park Coal. v. Port Auth.*, 951 F. Supp. 383, 393-94 (E.D.N.Y. 1997). In other words, the Commission is a new construct, a federal-interstate compact agency, neither a "federal agency" nor a "state agency." [12]

As Plaintiffs allege, in the Reservations section of the Compact adopted by Congress, the phrase "any Federal agency other than the Commission" is used. Compact § 15.1(o); *see* Riverkeeper Compl. ¶ 40. This phrase once again shows that Congress was sorting those features of a federal agency that it wanted the Commission to have and those that it did not. The basis for use of this language in the Federal Reservations added to the Compact by Congress[13] may be found in a Memorandum from Assistant Attorney General (and later Attorney General) Nicholas Katzenbach to Frederick G. Dutton, Special Assistant to President Kennedy. A true and correct copy of the Memorandum is attached to the Gore Decl. as Exhibit "F". Katzenbach described the Compact as creating "a novel federal state relationship involving the acceptance by the federal government of a position formally equal to that of each of the State of New York, New Jersey, Pennsylvania and Delaware." *Id.* at 1.

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[12] The Compact further specifies that the Commission is responsible for the negligent acts or omissions of its employees only to the extent of and subject to the procedures prescribed by law with respect to employees of the government of the United States. If the Commission were the government of the United States, and if its employees were federal employees, this provision would be superfluous.

[13] When Congress enacted the Compact, it added Section 15.1 also known as the "Reservations" section to reserve or clarify certain federal rights.

Katzenbach recognized the ambiguity of whether the Commission would be a "federal agency" (quotation marks in original) given the federal government's "minority voice." *Id.* at 13. He noted that the federal government's minority position is lawful because the execution of a federal law may be imposed on a state officer. *Id.* at 14. Nevertheless, he underscored the confusion that could result from characterizing the Commission as an agency and instrumentality of the signatory parties with regard to the applicability of statutes governing the activities of federal agencies. As examples, he noted the Davis-Bacon and Walsh-Healy Acts, the Tucker Act, the Federal Tort Claims Act, Executive Orders, the Federal Criminal Code and the Administrative Procedure Act which would apply if the Commission were regarded to be a federal agency by virtue of its inclusion as a signatory party. *Id.* at 16-17. He recommended: "The Compact should dispose of as many of these problems as can reasonably be foreseen."[14]

The Reservations clause of the Compact, § 15.1, sets forth Congress's effort to address the applicability of federal statutes as recommended by the Assistant Attorney General.[15] In this context, the references to "any other federal agency" recognize only that in limited circumstances (*e.g.*, the Walsh Healy Act) Congress chose to treat the Commission in the same manner as federal agencies. Understanding that it had created a new form of governmental agency, Congress attempted to clarify how existing laws applied to a federal-interstate compact agency. Section 15.1 would not have been necessary if Congress intended to treat the Commission as a federal agency.

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[14] Of course, since NEPA was not enacted until 1969, it was not on Katzenbach's 1961 list.

[15] Section 15.1(m) in particular lists three statutes, the Federal Tort Claims Act, the Tucker Act, and the APA, for which the Commission should not be considered a "federal agency." Section 15.1(n) clarified that Commission officers and employees were not federal employees. Section 15.1(p), granting jurisdiction to federal district court of cases or controversies arising under the Compact, preserves the sovereign immunity of the United States.

Because NEPA was enacted eight years after the Compact, the Compact does not specifically state whether its terms should apply to the Commission. But NEPA bears no resemblance to those very few statutes applicable to federal agencies that Congress applied to the Commission. Indeed, Plaintiffs' incorrect averment that the Compact created DRBC as a federal agency would subject DRBC to a host of federal requirements applicable to federal agencies, without any of the funding needed to comply. *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. § 668; National Historic Preservation Act, 16 U.S.C. § 470h-2; Endangered Species Act, 16 U.S.C. § 1536; National Fishery Management Program, 16 U.S.C. § 1855(b)(2); Noise Control Act, 42 U.S.C. § 4903; Records Management Requirements, 44 U.S. C. §§ 3101 and 3102; Aid to Small Business, 15 U.S.C. § 631(j), § 644 (g) (h) and (k); Federal Advisory Committee Act, 5 U.S.C. App. 2; *see also* Federal Acquisition Regulation, 48 C.F.R. §§ 1.101 and 2.101.

It is highly unlikely that Congress would routinely impose unfunded mandates on the Commission without any mention of doing so. Requiring the Commission to follow the provisions of those statutes applicable to federal agencies would reverse fifty years of Commission practice and require the Commission to expend funds that it does not have.

We turn next to the legislative history for guidance and conclude that it likewise shows that Congress intended the Commission to be a new federal interstate compact agency, not a traditional federal agency.

3. **The Legislative History Of The Compact Shows That Congress Intended To Create A New Entity, Not A "Federal Agency."**

The legislative history of the Compact reveals Congress's struggle to characterize the new federal-interstate compact commission. Congressman Walter, a chief proponent of the Compact, noted President Kennedy's charge to Congress to develop comprehensive river basin

plans as state-federal partnerships. 107 Cong. Rec. S10,813, 10976 (June 29, 1961). In the Delaware River Basin, nineteen federal and forty-three state agencies administered programs affecting the water resources of the Basin. Walter emphasized that comprehensive development requires states and the federal government to act together through a single coordinated agency. *Id.* at 10976-77. Federal participation in the Commission would enable the Commission to coordinate federal as well as state agencies. *Id.*

Descriptions of this new agency varied. As an agency and instrumentality of the signatory parties, the Commission was described by Congressman Walter as of "dual character" and similar to a mixed-ownership government corporation. *Id.* at 10978. Congressman Poff of Virginia, another Compact proponent, stated that the Compact is "not a purely interstate Compact but, rather, it is a compact among four states and the Federal Government, a five-sided creature." Congressman Cramer from Florida, responded as follows:

> The gentleman from Virginia said this is a five-sided creature. Yes, as a matter of fact, this is more unusual than the duck-billed platypus. This is more unusual than the duck-billed platypus with four parts State and one part Federal. It is a new, unique creature without any precedent, and I believe it is bad as a precedent.

By adopting the Compact, the Congress and the States had finally breached the wall between state and federal administration, forming a true partnership for the comprehensive planning, use, and administration of water resources in the Basin. They had not formed a traditional federal or state agency, but rather a unique federal-interstate compact agency. With deference to Congressman Cramer, the DRBC's attributes are more attractive and useful than those of the duck-billed platypus. The new agency resulted from a federal-interstate partnership to share responsibility for development and ongoing administration of a comprehensive plan. It reflected the Frankfurter and Landis admonition to stop envisioning state and national interests

as dualities and to think creatively about a new partnership capable of ongoing administration. Congress recognized that it was creating a new "creature" not automatically subject to every statute applicable to "federal agencies."

D. Courts Have Not Treated DRBC As A Federal Agency.

Although in the fifty years since the Compact was enacted there have been few judicial decisions related to the status of a federal-interstate compact agency, in general courts have not treated the Commission as a federal agency. In *M&M Stone Co. v. Pennsylvania*, No. 07cv04784, 2008 U.S. Dist. LEXIS 76050 (E.D. Pa. Sept. 29, 2008), a quarry operator sued the Commission, among others, based on an alleged (and fictitious) conspiracy to deprive it of its state operating permit. In rejecting the Commission's assertion of sovereign immunity, the court noted in part that "Defendant Commission is not an arm of the federal government." *Id.* at *51-52 n.16. The court further concluded that the Commission was not entitled to immunity under the Eleventh Amendment as an interstate entity because, in the court's view, the Commission is self-supporting. Although the Commission respectfully notes its disagreement with the latter point (the Commission cannot generate revenues to support most of its operations), the court's approach is instructive. When determining whether immunities or obligations of federal (or state) agencies apply to the Commission, courts will not automatically consider the Commission to be a federal agency.[16]

In *Borough of Morrisville v. DRBC*, 399 F. Supp. 469 (E.D. Pa. 1975), plaintiffs challenged the DRBC's imposition of charges for water supplied from two reservoirs partly

[16] If the Commission were a federal agency, it would have been dismissed based on the federal government's sovereign immunity expressly preserved in Section 15.1(p) of the Compact and the Eleventh Amendment would have been facially inapplicable.

funded by the Commission. Plaintiffs alleged that DRBC had violated NEPA by imposing charges without first performing an EIS. Because DRBC's regulations at the time required DRBC to perform an environmental impact analysis, DRBC did not contest that it was a federal agency for NEPA purposes. *Id.* at n.7. The court found that DRBC had properly concluded that its regulations would not significantly impact the environment and therefore had satisfied NEPA's requirements. In its discussion, the court accurately described the Commission as "neither wholly a federal agency nor a state one. It is a body on which both the federal government and each of the four states through whose territory the Delaware River runs are equally represented." Based on this description, it is unlikely that the court would have characterized the Commission as a federal agency had the point been contested.

In *Delaware Water Emergency Group v. Hansler*, 536 F. Supp. 26 (E.D. Pa. 1981), *aff'd*, 681 F.2d 805 (3d Cir. 1982), the court faced a NEPA challenge to DRBC's approval of the projects of the Philadelphia Electric Company and Neshaminy Water Resources Authority to construct facilities to withdraw and divert water from the Delaware River for use as cooling water at the Limerick nuclear generating facility and for public water supply. Pursuant to its then-existing regulations, DRBC prepared an environmental assessment and found no significant adverse impacts on the environment. In evaluating Plaintiff's contention that NEPA applied to the DRBC and had been violated, the court stated:

> *That DRBC is a federal agency for purposes of NEPA is very doubtful.* 42 U.S.C. § 4332(2)(C) requires that an environmental impact statement be prepared as to all "major Federal actions significantly affecting the quality of the human environment." The Commission, formed by a compact among four states and the United States Government as co-equal members, would not appear to be a federal agency, nor would actions of DRBC appear to be "Federal."

Id. at 35-36 (emphasis added). Because the DRBC regulations in effect when the project was approved satisfied NEPA requirements, the court did not finally determine whether NEPA applies to the DRBC, *id.* at 36, but rather concluded that DRBC had complied with NEPA. Nevertheless, the court's discussion reflects the view that a federal-interstate compact agency should not be viewed as a federal agency for NEPA purposes.

Finally, in *Badgley*, 606 F.2d at 363, the Second Circuit noted that the Commission was formed by a compact among the four Basin states that was approved by Congress. The court discussed the Compact provisions limiting the Commission's authority to modify the terms of the Supreme Court decree in *New Jersey v. New York*, *supra*, unless the parties to the decree unanimously consent (or an emergency was declared, *see* Compact § 3.3(a)). Nowhere does the Second Circuit reference the Commission as a federal agency or even find the federal government's participation as a signatory party significant enough to warrant mention.

E. The DRBC Is Not A "Federal Agency" Within The Meaning Of NEPA.

Classifying the new institutional arrangement created to implement the regional partnership between the states and federal government, the federal-interstate compact agency, as an "agency of the Federal Government" within the meaning of NEPA would contravene the structure and function of the Commission and is not necessary to satisfy the policies of NEPA. Accordingly, NEPA has no application to Commission rulemaking.

The only court to directly discuss the applicability of NEPA to the DRBC found coverage "very doubtful." *See Del. Water Emergency Group*, *supra.* The Court of Appeals for the Second Circuit has not explored the meaning of "federal agency" for purposes of NEPA, but has examined a similar term, "authority of the [g]overnment of the United States," as used in the APA. *ASMFC*, *supra*. The Second Circuit's analysis sets forth the principles to guide a court in determining whether an agency is a "federal agency" for purposes of a statute.

In *ASMFC*, New York State contended that various federal defendants adopted a management rule for the 2008 recreational summer flounder fishery in violation of federal law, including the APA. Intervenor trade associations and anglers joined the Atlantic States Marine Fisheries Commission ("ASMFC") as a defendant. ASMFC moved to dismiss the complaint on the ground that the APA does not apply to an action by an interstate compact agency.

The Second Circuit first examined the word "agency," which is defined in the APA to mean an "authority of the [g]overnment of the United States." The court found that definition to be ambiguous, and cautioned that definitions using the term "means" rather than "includes" should be read narrowly. The court then looked to the structure of ASMFC, a corporate body with powers and duties set forth in its compact. The court found that ASMFC exists outside of the administrative law framework, and that even when ASMFC acts in parallel with the federal government, it would "upset the 'federal-state balance'. . . to subject its actions to accountability measures designed to restrain the actions of federal authorities." *Id.* at 532 (citations omitted). The court concluded that the APA did not authorize federal courts to review the actions of an agency that is comprised of states and regulates in areas traditionally left to the states.[17]

Similar to the APA's procedural mandates to federal agencies, the operative provision of NEPA applies to "agencies of the Federal Government." 42 U.S.C. § 4332(2). NEPA's definition thus suffers from the same ambiguity as the APA definition. The CEQ has promulgated regulations that use the term "Federal agency," defined to mean "all agencies of the

[17] The Second Circuit also rejected the intervenors' contention that the "quasi-federal" agency doctrine brings ASMFC within the meaning of the term "agency" under the APA. The court expressed skepticism of the validity of the doctrine. *Id.* at 534. The court noted that "Congress and the states may work in partnership in the interest of a common regulatory goal without subjecting an interstate body to review provisions designed to apply to federal agencies." *Id.* at 535. Even if this doctrine existed, Congress's approval of the compact and grant of funds did not transform ASMFC into a quasi-federal agency. The court also noted that ASMFC is a politically accountable body composed of appointees of the governors of the member states.

Federal Government."[18] Consequently, the CEQ regulations, like the APA, use the narrow term "means," not the expansive term "includes," but do little to resolve the definitional ambiguity.

Like the commission in *ASMFC*, the DRBC draws its authority from a compact approved by Congress and exists outside the administrative law framework. Indeed, Congress expressly exempted the Commission from the APA. When regulating natural gas development, the Commission acts in an area traditionally left to the states. In the Energy Act of 2005, Congress expressly expanded the exemption of oil and gas activities from the requirements of the Clean Water Act, *see* 33 U.S.C. §§ 1362(24) and 1342(l)(2), and excluded hydrofracking from the term "underground injection" under the Safe Drinking Water Act, *see* 42 U.S.C. § 300h(d)(1)(B)(ii). Thus, it is mainly the states, not the federal government, that regulate the natural gas industry.

In addition, regulation of water withdrawals has always been an exclusive state function. In the Clean Water Act, Congress empowered EPA to regulate the discharge of pollutants to navigable waters, *i.e.*, water quality, but did not authorize EPA to regulate the withdrawals or diversions of water, *i.e.*, water quantity. In the case of the Basin, the states have chosen to regulate water withdrawals through the Commission, which is a politically accountable body by virtue of the authority of the four state governors (and representative of the President) who serve as commissioners and the reliance of the Commission on state funding. Treating DRBC as a federal agency for purposes of NEPA would upset the federal-state balance by imposing

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[18] 40 U.S.C. § 1508.12. The full definition reads:

> "Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

procedures designed for federal authorities on an agency that is comprised principally of states, funded by states, and that regulates in areas traditionally left to state administration.

Just as the *ASMFC* court examined the purpose of the APA in determining how broadly the term "federal agency" should be construed, federal courts have examined NEPA's goals when determining whether to classify an agency as a "federal agency" under NEPA. The principal goal of NEPA is to protect the environment. *EDF v. EPA*, 489 F.2d 1247, 1255 (D.C. Cir. 1973). NEPA forces an agency to consider carefully detailed information about significant environmental impacts and insures that relevant information is made available to the public. *Alabama v. EPA*, 911 F.2d 499, 503 (11th Cir. 1990). The purpose of an EIS is to "provide full and fair discussion of significant environmental impacts and to inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts." *NRDC v. United States*, 613 F.3d 76, 84 (2d Cir. 2010) (citations omitted). The EIS helps to "coordinate disparate environmental policies of different federal agencies." *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

Courts have invoked these policies to hold that EPA, a federal executive agency, is not a "federal agency" as defined in NEPA. *Portland Cement* involved a challenge to regulations promulgated by EPA under Section 111 of the Clean Air Act. Although EPA had not followed NEPA procedures, the court recognized that EPA performs the functional equivalent of an environmental impact statement. *Id.* at 384. After reviewing NEPA's legislative history, the court rejected as "myopic" the contention that NEPA was intended to apply to an agency exercising an environmental mission. *Id*. at 385. As subsequently articulated by the U.S. District Court for the District of Maryland:

> Where federal regulatory action is circumscribed by extensive procedures, including public participation, for evaluating

> environmental issues and is taken by an agency with recognized environmental expertise, formal adherence to the NEPA requirements is not required unless Congress has specifically so directed.

Maryland v. Train, 415 F. Supp. 116, 122 (D. Md. 1976.)

The functional equivalence doctrine has been widely followed in federal courts and applied to EPA actions under numerous statutes including, among others, the Resource Conservation and Recovery Act, the Clean Air Act, and the Federal Insecticide and Fungicide and Rodenticide Act ("FIFRA"). *See Alabama v. EPA*, *supra*; *Amoco Oil Co. v. EPA*, 501 F.2d 722, 163 (D.C. Cir. 1974); *EDF v. EPA*, 489 F.2d at 1256 (D.C. Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). The doctrine applies even when environmental protection is not EPA's narrow statutory concern. For example, a formal NEPA review is not required when EPA determines whether an action is "essential" to the public interest or the public welfare, or whether in light of economic interests the action generally causes unreasonable adverse effects on the environment. *See, e.g.*, *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); *EDF*, *supra*; *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975).

If NEPA's goals are satisfied when an actual federal agency with a mission of protecting the environment adopts regulations or issues permits, then surely they are satisfied when a federal-interstate compact agency acts with a similar mission. In developing natural gas regulations, DRBC was not itself undertaking a project but rather addressing the potential water-resource impacts caused by the actions of natural gas development companies. DRBC's exercise of its regulatory responsibilities to protect water resources, when implemented with full public participation, satisfies NEPA's environmental objectives.[19] In addition, the role of the

[19] Like the staff of the EPA, the Commission staff has the qualifications and expertise to perform its statutory mission. *See* Gore Decl. at ¶ 17 and Decl. Exhibit "D" attached to the Gore Declaration.

President's representative on the Commission in coordinating actions of the federal agencies satisfies NEPA's coordination goal identified in *Portland Cement*, *supra*.

If the Commission were an actual federal agency, which it is not, the functional equivalence doctrine would preclude treating the Commission as a "federal agency" under NEPA. For present purposes, however, it is sufficient to draw the narrower conclusion that the DRBC's mission and procedure vindicate NEPA's policy objectives. The structure and function of DRBC, the Commission's water resources and environmental protection mission, and the extensive public involvement in the Commission's rulemaking process in combination compel the conclusion that the Commission is not a "federal agency" for NEPA purposes.

Plaintiffs' Complaints attempt to counter this conclusion by alleging that the DRBC promulgated NEPA regulations and that the agency with responsibility for administering NEPA, the CEQ, listed the DRBC on its published appendices of "Federal and Federal-State" agencies. (Riverkeeper Compl. ¶¶ 70-82.) These allegations are meritless. The DRBC's choice in the 1970s to follow the NEPA process does not suggest that it was compelled to do so. A voluntary decision does not equate with a statutory obligation. As Plaintiffs' Complaints acknowledge, the DRBC changed course in 1980 for financial reasons and suspended these regulations, and later, when federal funding ceased, repealed them. (Riverkeeper Compl. ¶¶ 78-83.) The fact that the DRBC previously implemented NEPA provides no basis for concluding that it must, or without federal funding could, continue to do so. *See, e.g.*, *FCC v. Fox Tel. Stations*, 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009) (rejecting argument that rescissions of prior actions trigger more rigorous review than does initial agency action).

CEQ's listing decisions also contradict Plaintiffs' contentions. CEQ made no determination that the Commission is a federal agency. Rather, CEQ merely listed the

Commission among the independent agencies with identified NEPA contacts. The Commission does not appear on CEQ's current published lists. *See* http://ceq.hss.doe.gov/nepa/contacts.cfm (Federal NEPA contacts); http://ceq.hss.doe.gov/nepa/regs/agency/agencies.cfm (Agency NEPA Procedures) and http://ceq.hss.doe.gov/nepa/agencies.cfm (Agency NEPA Websites). CEQ's action removing the Commission from its lists reinforces the conclusion derived from the text of NEPA, the structure and function of the Commission as a federal-interstate compact agency and NEPA's policies that the Commission is not a federal agency for NEPA purposes.

III. CONCLUSION

As set out above, Plaintiffs have no private right of action to challenge DRBC's proposed regulations. In addition, the DRBC is not a federal agency within the meaning of NEPA, and therefore is not required to comply with NEPA's EIS requirement prior to the promulgation of its regulations. As each of Plaintiffs' claims against the DRBC defendants arises out of the DRBC's decision not to prepare an EIS prior to issuing draft regulations, all claims should be dismissed in their entirety. The claims against the DRBC's Executive Director should also be dismissed on the separate ground that the Commissioners, not the Executive Director, have the authority to undertake the environmental review requested. A proposed order is attached.

Respectfully submitted,

Dated: November 1, 2011

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CERTIFICATE OF SERVICE

I, Kenneth J. Warren, Esquire, hereby certify that on November 1, 2011, I caused a true and correct copy of the foregoing The Delaware River Basin Commission and Carol Collier's (in Her Official Capacity) Memorandum of Law in Support of Their Motion to Dismiss The Complaints to be served via first-class mail and electronic transmission on all counsel of record.

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