

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

SUMMONS ISSUED

DAMASCUS CITIZENS FOR SUSTAINABILITY, INC.)

Plaintiff,)

vs.)

UNITED STATES ARMY CORPS OF ENGINEERS;)
BRIGADIER GENERAL PETER A. DELUCA, in his)
official capacity as an officer 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; LISA JACKSON, in her)
official capacity as Administrator of the United States)
Environmental Protection Agency; DELAWARE RIVER)
BASIN COMMISSION; and CAROL COLLIER, in her)
official capacity as Executive Director of the Delaware)
River Basin Commission,)

Defendants

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.

★ AUG 10 2011 ★

BROOKLYN OFFICE
COMPLAINT

IRIZARRY, J.

CV 11 - 3857

ORENSTEIN, M.J.

IRIZARRY, J.

ELECTRONICALLY FILED

COMPLAINT

Plaintiff, Damascus Citizens for Sustainability, Inc., as and for its complaint, alleges as follows:

NATURE OF THE ACTION

1. Damascus Citizens for Sustainability, Inc. (“DCS”) brings this action for declaratory and injunctive relief on behalf of its members and itself against defendant federal agencies United States Army Corps of Engineers (“USACE” or “Corps”), United States Fish and Wildlife Service (“USFWS”), National Park Service (“NPS”), Department of the Interior (“DOI”), United States Environmental Protection Agency (“USEPA”), Delaware River Basin Commission (“DRBC” or “Commission”), and the respective heads of each of these agencies in their official capacities (collectively “Defendants” or “Federal Agencies”). DCS seeks to compel these Federal Agencies to comply with the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* (“NEPA”) by preparing, making available for public comment and considering a draft environmental impact statement (“EIS”) including a health impacts assessment (“HIA”) prior to taking any further action on proposed DRBC regulations which would allow natural gas development (“Gas Development Regulations”) within the Delaware River Basin (the “Basin”).

2. The national importance of the Basin is reflected in the Delaware River Basin Compact (the “Compact”) an interstate compact among the federal government, the states of New York, New Jersey and Delaware, and the Commonwealth of Pennsylvania adopted in 1961 to manage and protect the water resources of the Basin for current and future generations. The Compact is implemented through the adoption by the Commission of a comprehensive plan for the Basin. Among the provisions of the Compact is a requirement (Section 3.8) that no project having a substantial impact on the water resources of the Basin may be undertaken unless it has first been approved by the Commission as not substantially impairing or conflicting with the comprehensive plan.

3. The DRBC voted 4-1 in December 2010 to publish for public comment the proposed Gas Development Regulations. Despite several prior pronouncements by DRBC's executive director, Carol Collier, and several staff and commissioners that an EIS would be prepared on the proposed Gas Development Regulations, no draft EIS was made available to the public at that time or at any point during the public comment period, which closed on April 15, 2011.

4. Promulgation of the DRBC Gas Development Regulations is expected by DRBC staff to result in the development of between 15,000 and 18,000 natural gas wells within the Upper Basin in Pennsylvania and New York, although others project as many as 60,000 gas wells in this area. The area that will be impacted includes approximately 90% of the New York City Watershed. The United States Environmental Protection Agency ("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 the New York City 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 (9) million New Yorkers, and cannot safely be permitted within the New York City watershed."²

5. NEPA is a procedural statute regulating the decision making process of federal agencies to assure that environmental impacts are fully evaluated in connection with proposals for legislation or other major federal actions significantly affecting the quality of the human

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

² Letter from Steven W. Lawitts to New York Department of Environmental Conservation, dated December 30, 2009, http://www.nyc.gov/html/drp/pdf/natural_gas_drilling/12_22_2009_impact_statement_letter.pdf.

environment. While NEPA requires each federal agency to take a hard look at environmental impacts of its actions, it does not mandate any particular result. Its purpose is to build environmental considerations into the federal decision making process in a transparent way with full public participation. NEPA's "core requirement" is that all federal agencies with decision making authority over a major federal action with potential environmental impacts, prepare an EIS and make it available to the public for review and comment as the agencies weigh what action, in any, to take. The statutory obligation to comply with NEPA before taking action on a proposal that triggers the Act's requirements is a mandatory, non-discretionary obligation. The EIS is to accompany the proposal through the consideration of the involved agencies. Often there are proposed actions that will involve decisions by several federal agencies. In these situations, while each agency must meet its own NEPA responsibilities, a lead agency is selected to undertake preparation of the EIS so that each agency can comply with the requirements of NEPA.

6. Defendant Federal Agencies have each determined that authorization of natural gas development in the Basin would potentially result in significant cumulative adverse health and environmental impacts and that a study of those impacts should be performed before actions are taken to commit environmental resources. But Defendants refuse to comply with NEPA and refuse to prepare an EIS to address the impacts.

7. Under NEPA, an EIS must include analysis of the health and environmental impacts of a proposed action or actions, identification of any irreversible and irretrievable commitments of resources if the actions are taken, consideration of alternatives to the proposed actions (including not taking such actions), and adoption of measures to mitigate the adverse health and environmental impacts. An EIS also must be available at the beginning of

consideration of the proposed action so the EIS may accompany the proposal through the decision making process. Especially when an action will cause such sweeping changes to an area, it is essential that an EIS include a health impact assessment (“HIA”) that looks at the public and private health consequences of the cumulative effects of all the actions that are allowed to occur.

JURISDICTION AND VENUE

8. This action arises under NEPA, the Administrative Procedures Act, 5 U.S.C. §§ 551-706 (“APA”) and the Delaware River Basin Compact, 75 Stat. 688, Pub. L. 87-328 (Sept. 27, 1961). Article 15.1(p) of the Compact provides that “The United States district courts shall have original jurisdiction of all cases or controversies arising under the Compact.”

9. The court has subject matter jurisdiction over this action under 28 U.S.C. §1331 because it raises a federal question under NEPA, the APA and the Compact. This court also has jurisdiction under 28 U.S.C. § 1361 because the statutory duty to comply with NEPA may be enforced by an action in the nature of mandamus. This court also has subject matter jurisdiction under Section 15.1 (p) of the legislation effectuating the Compact, Pub. L. 87-328, 75 Stat. 688 et seq., because this action arises under the Compact. DCS alleges that the refusal by DRBC and the other Defendant agencies to comply with NEPA concerning the proposal by DRBC to adopt gas development regulations that would significantly affect the Basin is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. Further, the failure by DRBC and the other Defendants to comply with NEPA substantially impairs and conflicts with the comprehensive plan adopted by the Commission under the Compact. DCS seeks declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202, 5 U.S.C. §701 et seq. and under the Compact.

10. This action is brought against federal agencies, including DRBC, 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 USACE 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. §1392(e)(2). A substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district because the decision by these Defendants not to prepare an environmental impact statement ("EIS") as required by NEPA likely occurred within their offices in Brooklyn and because much of the work to prepare the EIS would have occurred in these offices. Venue also is 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

11. Plaintiff, Damascus Citizens for Sustainability, Inc., is a non-profit conservation group composed of members who live, work, and recreate in the Pennsylvania and New York portions of the Delaware River Basin. DCS brings this action to protect the interests of the organization and its members in the environment and ecosystems of the Delaware River Basin from the impacts to the Basin from natural gas development that would be allowed under the DRBC Gas Development Regulations that have been proposed without compliance with the mandates of NEPA.

12. The members of DCS live in and/or own property in the Basin. Each of these individuals chose to live in this area for a variety of reasons focused around several characteristics of the Basin. These include the rural and pastoral environment of the area, the unique and majestic Delaware River and the diverse ecosystem it supports (including endangered

and threatened species, protected birds and rare animals), the clean air in the area, and the pristine streams, lakes and ponds that abound within the Basin. Many of the members of DCS derive their livelihood from activities that depend upon the special resources and setting of the Delaware River Basin. Among the members of DCS are families and individuals that own and operate businesses such as organic fruit and vegetable growing, dairy farming, vineyards and wineries, and other goods and services that depend on the clean water and air resources of the Basin. Other members of DCS are part time residents who work in the urban environments of the New York – New Jersey Metroplex and of the Philadelphia – Camden – Trenton area and escape on weekends and vacations to their refuge in the upper Delaware River Basin where they can commune with nature in the bucolic setting of the Basin. Some are avid bird watchers. Others are fishermen or hunters. Still others immerse themselves in the Basin's environment by hiking, biking or boating where they can enjoy the wildlife, the sounds and smells of the deep woods and pristine waters, and the expansive and scenic vistas from the ridges and trails throughout the Basin. For each member of DCS, the Basin's unspoiled resources are his or her own Walden Pond.

13. Defendant USACE is a federal agency within the Department of the Army with jurisdiction over the navigable waters of the Basin pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., and with permitting authority over dredging and filling in the navigable waters of the Basin pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The USACE employs the Division Engineer, North Atlantic Division of the USACE as the ex officio federal member of the DRBC pursuant to Section 5019(a) of the Water Resources Development Act of 2007, Pub. L. 110-114 ("WRDA"). Under WRDA the Secretary of the Army "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).

14. Defendant Brigadier General Peter A. DeLuca (“General DeLuca”) is the Division Engineer, North Atlantic Division of the USACE, who serves as the federal member of the DRBC. General DeLuca is employed by the USACE and is sued in his official capacity. He participates in, and exercises decision making authority over, action proposed to be taken by DRBC. In this capacity, General DeLuca reports to, and represents, federal agencies including USACE 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. The FWS and DOI have trust authority over endangered terrestrial fish, wildlife, and plant species within the Basin under the federal Endangered Species act of 1973, 116 U.S.C. § 1531 et seq., and migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d. Federally listed endangered species within the Basin protected by FWA and DOI include the dwarf wedge mussel, the Indiana bat, the 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 FWS and DOI 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 of 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 and represents them on DRBC matters.

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

17. Defendant National Park Service ("NPS") is a federal agency and bureau within the DOI involved in water resource management within the Basin. NPS and DOI exercise over and manage the Upper Delaware Scenic and Recreational River, the Middle Delaware National Scenic River, Lower Delaware Wild & Scenic River, and the Delaware Water Gap National Recreation Area. Each of these designations is under the Wild & Scenic Rivers Act of 1968, 16 U.S.C. § 1271 et seq. The Upper Delaware Scenic and Recreational River is approximately 73 miles long, flowing from Hancock, NY., to Sparrowbush, NY. The river and its tributaries offer some of the finest recreational opportunities in the northeastern United States, including hiking, sightseeing, bird watching, boating, camping, hunting, fishing – including world class cold water trout fishing. 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 serves 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 Interior 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 Safe Drinking Water Act, 42 U.S.C. § 300f, et seq., the Clean Water Act, 33 U.S.C. § 1251, et seq., the Clean Air Act, 42 U.S.C. § 7401, et seq., and the 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, para. 2. EPA is a federal agency to which General DeLuca reports and represents on the DRBC.

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

22. Defendant Delaware River Basin Commission is an agency and instrumentality created by the signatory parties to the Delaware River Basin Compact in 1961. The commissioners include the four governors, ex officio, of Delaware, New Jersey, New York, and Pennsylvania, and ex officio the Division Engineer, North Atlantic Division, USACE. The DRBC is charged with conserving and managing the water resources of the Basin and its watershed for current and future generations. The Commission has legal authority over both the

water quality and water quantity related issues throughout the Basin and is responsible for implementing and enforcing the provisions of the Compact. DRBC has jurisdiction by law under NEPA and is a federal agency for NEPA and other federal statutory purposes.

23. Defendant Carol Collier is executive director of DRBC and is sued in her official capacity.

STATUTORY AND REGULATORY FRAMEWORK

A. The Compact and the DRBC

24. The Compact is an agreement among the federal government and the four states of Delaware, New Jersey, New York and Pennsylvania to manage and protect the water resources within the Basin for current and future generations. 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.

25. Each party to the Compact appoints one commissioner having one vote on the Commission. The current federal commissioner, General DeLuca, reports to and represents DOI, FWS, NPS, EPA and other federal agencies on matters concerning the Basin and DRBC.

26. The federal legislation ratifying and effectuating the Compact, Pub. L. 87-328, 75 Stat. 688 (1961) refers to the DRBC as a “federal agency,” Compact, Article 15(o). The Commission’s regulations are published in the Code of Federal Regulations (18 C.F.R. Parts 400, 402, 410, 420, 430) and DRBC published notices of its meetings and rulemakings in the Federal Register. DRBC’s procedural rules, “Rules of Practice and Procedure,” are published at

18 C.F.R Part 401, and provide that, “This part is promulgated pursuant to section 14.2 of the Compact and shall be construed and applied subject to all of the terms and conditions of the Compact and of the provisions of section 15.1 of pub. L. 87-328, 75 Stat. 688. This provision means that DRBC’s regulations are to be construed according to federal law in the federal effectuating statute rather than the law or effectuating statutes of any of the member states of the Commission.

27. The federal effectuating statute makes the DRBC subject to any federal statutes adopted after the effectuating statute and exempts DRBC from only three federal laws existing at that time, the Federal Tort Claims Act, the Tucker Act and the Administrative Procedures Act. Compact, Article 15.1(m). Article 8 of DRBC’s Rules of Practice and Procedure, “Public Access to Records and Information, establishes that DRBC is subject to the Federal Freedom of Information Act, 5 U.S.C. § 552. The Freedom of information Act was enacted and is codified as part of the APA, 5 U.S.C. Subchapter II, 5 U.S.C. §§ 551-559.

28. USA.gov, the United States Government’s official web portal, lists DRBC in its “Index of U;S. Government Departments and Agencies.”

29. The President’s Council on Environmental Quality (“CEQ”), the federal agency that oversees compliance with NEPA, has long held that DRBC is subject to NEPA because it is a federal agency with “jurisdiction by law” over projects that may have a substantial effect on the waters of the Basin. See, 49 Fed. Reg. 49750, 39774 (Dec. 21,1984). CEQ continues to express that view on its website where it lists DRBC as a NEPA federal agency having such jurisdiction.

30. Following enactment of NEPA, DRBC acknowledged that it was subject to that statute and amended its Rules of Practice and Procedure in 1970 to “require environmental assessments and the preparation of environmental impact statements.’ DRBC Resolution 70-23.

Throughout the 1970s, Article 4 of the DRBC Rules of Practice and Procedure included detailed NEPA procedures to comply with CEQ guidelines and regulations.

31. In 1980, DRBC suspended its NEPA regulations because it lacked the 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 80-11 (July 23, 1980). However, rather than having the federal commissioner activate the provision of this resolution to designate an appropriate executive department agency to assume lead agency status for NEPA compliance purposes, DRBC has stated that it is not subject to NEPA, noting that four of the five DRBC commissioners are appointed by states. DRBC thus refuses to comply with NEPA.

32. 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.” The Commission may approve a project if it finds that the project will not substantially impact or conflict with the Comprehensive Plan adopted by the Commission. Section 3.8 specifies that “Any determination of the Commission hereunder shall be subject to judicial review in any court of competent jurisdiction and Section 15.1(p) of the Compact (part of the federal effectuating statute) provides that federal district courts shall have original jurisdiction of all cases and controversies arising under the Compact.

NATIONAL ENVIRONMENTAL POLICY ACT (“NEPA”)

33. In 1970 Congress and the President enacted the nation's charter for protection of the environment and public health in federal decision making, the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. NEPA made a dramatic and immediate change in the way federal decisions were made. To implement its stated purpose to promote "productive harmony" between humankind and nature, the Act every federal agency to build into its decision making procedures careful, thorough, and transparent consideration of the health and environmental impacts of its actions.

34. NEPA created the Council on Environmental Quality to encourage and oversee the process by which federal agencies incorporate health and environmental considerations into their decision making. CEQ adopted regulations which are binding on all federal agencies to implement NEPA's requirements. See, 40 C.F.R. 1500-1508, and Executive Order No. 11991 (May 24, 1977).

35.. NEPA's core requirement is on every recommendation or report on proposals for legislation or other major federal action significantly affecting the quality of the human environment, the action agency must prepare a detailed environmental impact statement ("EIS") that includes a complete review of all of the impacts of the proposed action on health and the environment, including: 1) impacts that are direct, indirect or cumulative impacts of the proposed action; 2) unavoidable adverse effects; 3) alternatives to the proposed action; and 4) irretrievable and irreversible resource commitments.

36. A "federal action" includes "projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies; new or revised rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18. A federal action is "major" if it is "significantly affecting" the quality of the human environment. *Id.* An agency has "jurisdiction

by law” over and action if it has “authority to approve, veto, or finance all or part of the proposal.” Id., § 1508.15.

37. When multiple federal agencies have jurisdiction by law over a major federal action significantly affecting the quality of 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 a proposed action. Id., §§ 1501.5(a) and 1501.6. The lead agency may request that other federal agencies that have jurisdiction by law shall be cooperating agencies. Id. § 1501.6. Further, “any other Federal agency which has special expertise with respect to any environmental issue that should be addressed in the statement may become a cooperating agency.” Ibid.

38. Compliance with NEPA must begin “at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” Id., § 1501.2 The EIS must be made available to the public for review and comment and must accompany the proposed action through the decision making process. “The statement must be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made. Id., § 1502.5.

39. While consideration of public health impacts of proposed actions has always been a core aspect of compliance with NEPA, over the years of implementation and litigation concerning NEPA’s impact statement requirements, the focus has most often been on environmental effects rather than health impacts. Especially in a situation where implementation of an action may have substantial are irreversible health impacts, the EIS should include a Health Impact Assessment (“HIA”) not only to inform the decision maker of the health implications of

the proposed action but also to assist affected communities and health care providers and institutions in dealing with the health care consequences if the action is approved and proceeds.

40. Public health impact assessment is central to the purposes of NEPA. As stated in Section 102 of the Act, it is a fundamental purpose of NEPA to “promote efforts which will prevent or eliminate damage to the environment and biosphere and **stimulate the health and welfare of man,**” 42 U.S.C. 4321 (emphasis added). NEPA’s purposes include consideration to “**assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings,**” 42 U.S.C. 4331, and to “attain the widest range of beneficial uses of the environment without degradation, **risk to health or safety, or other undesirable and unintended consequences.**” Ibid.

41. CEQ’s regulations also compel a thorough evaluation of health impacts from proposed major federal actions. The regulations define “effects” to include health impacts whether direct, indirect or cumulative, 40 C.F.R. § 1508.8, and require consideration of “the degree to which the proposed action affects public health or safety.” 40 C.F.R. §1508.27. When scoping an EIS, an agency should include an HIA when it can anticipate substantive health concerns, 40 C.F.R. § 1503.4.

42. Public health considerations under NEPA are further reinforced by Executive Orders 12898 and 13045. Executive Order 12898 instructs agencies to “make achieving environmental justice part of its mission by identifying and addressing as appropriate disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” Executive Order 13045 directs that all federal agencies must “make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect

children; and ... shall ensure that its policies, programs, activities, and standards address disproportionate risks to children that result from environmental health risks or safety risks.

43. CEQ has issued guidance on implementing Executive Order 12898 several aspects of which are relevant to public health assessment. These include: 1) lead agencies should involve public health agencies and clinics; 2) agencies should review relevant public health data; and 3) agencies should consider how interrelated cultural, social, occupational, historical, or economic factors may contribute to health effects of the proposed action and alternatives. "Environmental Justice Guidance under the National Environmental Policy Act" CEQ Guidance, (Washington DC 1997).

44. Health Impact Assessments have been increasingly incorporated into NEPA-based environmental impact analysis, including an HIA for the EIS for proposed oil development on Alaska's North Slope in 2007. See, Wernham, Aaron "Inupiat Health and Proposed Alaskan Oil Development: Results of the First Integrated Health Impact Assessment." *Ecohealth No. 4* pps. 500-513.

STATEMENT OF FACTS

45. The Marcellus Shale is a geologic formation containing substantial amounts of natural gas trapped in low permeability shale rock. This formation underlies a significant portion of Pennsylvania, much of New York and West Virginia, eastern Ohio, the two western counties of Maryland and small portions of Virginia, and Kentucky. Of the 13,539 square miles of the Delaware River Basin, shale gas resources are believed to underlie an area within the Basin (the

“Upper Basin”) of approximately 4,960 square miles, consisting of 2,349 square miles in New York and 2,612 square miles in Pennsylvania.

46. The Delaware River Basin is renowned for its pristine waters and serves as the primary source of clean unfiltered drinking water for nine (9) million New Yorkers every day. Waters of the Basin also supply drinking water daily to over six (6) million people in Pennsylvania, New Jersey and Delaware. The Delaware River is fed by direct runoff and by tributary streams ranging in size from the West Branch and the East Branch, that come together just south of Hancock, NY to form the Delaware River, to thousands of small streams, most of which are classified as high quality (HQ) or exceptional value (EV). The drainage area of the area above the Delaware Water Gap (the “Upper Basin”) is designated as “Special Protection Waters” by the DRBC and these waters are protected by an anti-degradation policy incorporated into DRBC’s water code regulations.

47. Producing natural gas from the Marcellus Shale involves application of horizontal drilling technology and hydraulic fracturing technology. Although both of these technologies have been used elsewhere in the United States for some time, the application of both technologies together in the Marcellus Shale is relatively new, having been used for the first time on a well in western Pennsylvania in 2005. The combination of horizontal drilling and slick water, high volume, high pressure hydraulic fracturing presents a range of environmental concerns that have not been posed by prior oil and gas projects in New York and Pennsylvania using more conventional vertical drilling and low pressure well stimulation.

48. The techniques used for production in the Marcellus Shale elsewhere in Pennsylvania outside the Delaware River Basin have involved drilling vertically down to penetrate the Marcellus formation and then drilling horizontally to intersect at a right angle the

natural joints and fractures in the shale rock. The vertical depth may be a mile or so while the horizontal length of a well may extend as much as two miles or more from the vertical portion of the well.

49. Once the full length of the well is drilled, small explosive charges are set off at the end of the well to blow holes in the production casing so that fracturing fluid can be introduced to the shale. A mixture of millions of gallons of water, tons of fine sand (or another propping agent) and tons of different chemicals, including many carcinogenic, toxic and hazardous substances, are injected into the perforated casing at pressures high enough to rupture the shale formation and create fractures from which the trapped natural gas can flow into the production casing and come back up the well to the surface. On information and belief, the pressures used to hydraulically fracture (sometimes referred to as "fracking") the shale range from about 5,000 pounds per square inch ("psi") to as much as 15,000 psi.

50. Once the shale is fractured, a portion of the fracturing fluid combined with other fluids occurring naturally in the production zone return to the surface and must be stored and managed in pits or tanks until they can be transported from the site for offsite treatment and disposal. In combination, the produced fluids typically contain extremely high levels of dissolved solids ("TDS") and chlorides, volatile and semi-volatile organic compounds, and dissolved heavy metals including barium, cadmium, chromium, lead, manganese, and radioactive radium, uranium and thorium. On information and belief, the typical return flow is about 20 to 30% of the volume of liquids that was injected into the well. As natural gas is produced from the well, it will carry with it varying amounts of the fracking and naturally occurring fluids.

51. It is not currently possible to learn the chemical composition of the fracking fluid because the gas companies consider this information to be business confidential. However,

toxicologists working with Dr. Theo Colborn of the Endocrine Disruption Exchange in Colorado have identified over 600 separate chemicals from material safety data sheets on products she has learned that the gas industry is using in well fracturing in various gas fields including the Marcellus Shale. Many of the chemicals on this list are carcinogenic, acutely toxic, chronically toxic and bioaccumulative, or harmful to essential organs such the brain, the kidneys, the liver and the heart. In its 2009 Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program, the New York State Department of Environmental Conservation identified over 500 specific chemicals being used by the gas industry for drilling and fracking.

52. Several of the adverse health effects that have been identified involve the types of symptoms, such as loss of sense of smell or taste, chronic headaches, nausea, heart palpitations, chest pains, rashes, neuropathies of arms, hands, legs and feet, loss of sleep, vomiting, asthma and other loss of breath, that are seen in chronic and acute exposures to various chemicals including those believed to be used for drilling and fracking gas wells. Barium poisoning has been found in some instances where gas wells are located near domestic water wells.

53. In areas of the Pennsylvania outside the Delaware River Basin which have been authorized to develop natural gas wells, over 2,000 wells have been drilled, resulting in over 1500 violations of state environmental regulations and pollution of numerous drinking water supplies. 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 As

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

the number of wells drilled increases, it also appears that the rate of violations has been accelerating.

54. In a study by researchers from Duke University released in the spring of 2011 it was found that in at least three areas of Pennsylvania where gas drilling has been ongoing for several years there is systematic evidence of methane contamination of drinking water from gas extraction activities. This peer reviewed study documented potentially explosive levels of methane in drinking water from private wells located in active gas extraction areas where the gas wells were within one kilometer of the private wells. The isotopic “signature” of the methane found in drinking water pointed to thermogenic methane sources more so than biogenic sources. Thermogenic materials are from deep geologic zones such as the Marcellus Shale, while biogenic methane is produced from sources much closer to the surface.

55. In May 2009, the Executive Director of DRBC, defendant Carol Collier issued a determination under Section 3.8 of the Compact and the Commission’s Rules of Practice and Procedure prohibiting natural gas extraction from shale layers within the drainage area of the Basin’s Special Protection Waters, which coincides in the Upper Basin with the Marcellus Shale area unless a project was approved by a vote of the full Commission. In this determination (the “EDD”) she found that “natural gas extraction projects in these shale formations may individually or cumulatively affect the water quality of Special Protection Waters by altering their physical, chemical, or hydrological characteristics.”

56. At its public meeting on May 5, 2010, the Commission unanimously approved a resolution directing DRBC staff to draft regulations for gas development and to postpone consideration of all shale gas well proposals (called “dockets”) under DRBC’s jurisdiction until adoption of gas development regulations. In effect, the Commission imposed a moratorium on

natural gas development projects in the Basin. The unanimous vote on this resolution included the federal commissioner, who at that meeting was Lt. Colonel Thomas J. Tickner, district engineer of the Philadelphia District of the USACE.

57. On June 14, 2010, Ms Collier issued a Supplement to her prior EDD to include a prohibition on most exploratory wells that had not been covered by the initial EDD. This supplement (the "SEDD") imposed the prohibition until adoption of final gas development regulations by the Commission.

58. On June 2, 2010, the national conservation group American Rivers designated the Upper Delaware River as the nation's most endangered because of the threat to the river posed by natural gas activities in the Marcellus Shale. In response, DRBC issued a statement acknowledging the significant adverse cumulative environmental impacts that would result from large scale gas development. The statement read in part:

"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 production and maintenance of water resources. One big concern is the effect of forest fragmentation on our waters."

59. In June 2010 the NPS and the FWS jointly stated in a letter to the DRBC executive director that "large-scale changes in land use and increased water withdrawals, like those associated with natural gas development (including the exploratory wells) will likely affect the Services' trust resources and should be reviewed for both individual and cumulative environmental effects,"

60. In responding to a letter from Congressman Maurice Hinchey of New York, on September 14, 2010, General DeLuca stated that the federal government's "position is to continue fully supporting the need for a cumulative impact study." However, in a subsequent letter to Congressman Hinchey, General DeLuca stated that he would "vote against a moratorium on regulation development pending completion of an impact study."

61. At the Commission's December 2010 meeting, over the objection of the governor of New York, the Commission voted 4-1 to publish the proposed gas development regulations for public review and comment.

62. DRBC staff estimates that, after the adoption of gas development regulations and the lifting of the moratoriums under the EDD and SEDD and the Commission's May 2010 resolution, between 15,000 and 18,000 gas wells and related facilities will be developed in the 4,960 square miles of the Basin that overlay the Marcellus Shale area. This equates to one well every 0.275 square miles, or one well every $\frac{1}{2}$ mile. Fracturing each of these wells will take over a thousand truck trips to transport the chemicals, sand and equipment as well as four to five million gallons of water needed to frack each well. Gathering pipelines to bring the gas from each well to centrally located compressor stations and related natural gas liquids separation plants will not only cause significant air pollution from truck exhaust emissions, it will also present major risk of serious vehicular accidents as these large trucks travel down rural country roads that were never designed to handle this volume of traffic. There already have been fatal accidents in other parts of Pennsylvania from gas development vehicles colliding with much smaller passenger vehicles.

63. In addition to truck emissions to the ambient air, EPA in November 2010 revised its estimated potential emissions from gas well completions from 0.02 tons of methane per well

to 177 tons of methane per well. Not only is methane one of the most potent greenhouse gas pollutants, methane is a volatile organic compound (“VOC”) and VOC emissions of 177 tons per year would make each well a major source of air pollution requiring an individual federal permit under the Clean Air Act. Additional pollutants associated with the equipment and processes used in gas development include oxides of nitrogen, carbon monoxide, particulate matter, and toxic air pollutants such as benzene, ethylbenzene, toluene, xylene, hydrogen sulfide, acrylonitrile, 2-butoxyethanol, and radionuclides, to name but a few of the chemicals found in fracking fluid or produced from fluids brought to the surface with the produced gas.

64. In addition to its clean water, the Upper Basin currently enjoys very high air quality and is in attainment for all national ambient air quality standards (“NAAQS”). The collective emissions from each well and the truck traffic to support each well could easily change the ambient air quality for ground level ozone precursors including VOCs to put the Upper Basin in non-attainment with the NAAQS for ground level ozone and the NAAQS for fine particulates. As a consequence, New York, Pennsylvania and perhaps the DRBC would be required to develop and implement a State Implementation Plan to bring the affected area back into compliance and maintenance of the NAAQS for ozone and the NAAQS for fine particulates.

65. The air pollution emissions described above will cause significant public health problems. Especially for people with respiratory, the elderly, children and adults who are active outdoors, poor air quality due to ozone and fine particulates can be very damaging to their health. Difficulties in breathing and exposure to ozone can lead to respiratory diseases such as asthma, bronchitis and more severe conditions. Exposure of expectant mothers to air pollution can cause significant health effects to the fetus including low birth weight and developmental disabilities in infants, including lower IQs. Exposure to fine particulates can add to the respiratory illness and

decreased lung function from ozone exposure. Air pollution impacts from gas development should be thoroughly examined in the Health Impact Assessment as part of an EIS.

66. The effect of gas development at the levels estimated by DRBC staff will be to permanently change the rural and scenic character of the Upper Basin to an industrialized zone. The air pollution and water pollution that will result will have profound public health effects. These effects must be carefully and fully examined as part of the EIS required in this case.

67. In its comments on the proposed regulations, plaintiff DCS asserted that DRBC was in violation of NEPA for failing to prepare, make available to the public, and consider an environmental impact statement under NEPA. DCS called on the Commission to withdraw the proposed gas development regulations until an adequate EIS is prepared, made publicly available and considered by the Commission as part of a new set of proposed gas development regulations.

68. Among others commenting on the proposed regulations and calling for preparation of an EIS was the New York City Department of Environmental Protection (“NYCDEP”), the agency responsible for providing pure drinking water to the 9 million New Yorkers who depend on it every day. NYCDEP stated that DRBC’s proposed regulations were premature because the Commission “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. 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.”

69. Although each of the agency and individual defendants have found that natural gas development in the Basin poses potentially significant adverse environmental and health impacts, but all have refused to prepare an EIS.

FIRST CLAIM FOR RELIEF

**(Violations of NEPA by
DRBC and Carol Collier)**

70. Plaintiff DCS realleges and incorporates by reference as if fully set forth herein the allegations in paragraphs 1 through 69.

71. Defendant DRBC is a federal agency subject to NEPA. Carol Collier is the Executive Director of DRBC.

72. DRBC has the authority to develop and implement regulations under its Compact and has jurisdiction by law over the development of natural gas in the Delaware River Basin. The DRBC is a federal agency that has drafted and will promulgate these regulations and will be responsible for implementing them.

73. The issuance of the proposed Gas Development Regulations by the DRBC is a “major federal action significantly affecting the quality of the human environment,” within the meaning of NEPA and its implementing regulations.

74. Natural gas development within the Basin will be permitted and regulated by the DRBC and will have significant effects on the quality of the human environment within the meaning of NEPA and its implementing regulations.

75. DRBC has recognized its own legal obligations as a federal agency to prepare environmental impact statement, including health impact assessments, on its major actions significantly affecting the quality of the human environment and has never provided a lawful basis through rulemaking for its refusal to comply with NEPA.

76. DRBC has jurisdiction by law over natural gas development within the meaning of the CEQ NEPA regulations because it has authority to approve the proposed Gas

Development Regulations and to take measures to implement them under the Compact, Water Code and RPP. DRBC also has special expertise on the effects of natural gas development on the water resources of the Basin within the meaning of the CEQ NEPA regulations.

77. DRBC has failed to undertake preparation of any environmental impact statement to accompany a report or recommendation on the proposed Gas Development Regulations as required by NEPA. DRBC's failure to undertake the NEPA process with respect to the proposed Gas Development Regulations violates NEPA's statutory and regulatory requirements.

78. By approving commencement of this federal action, commencing it, and implementing measures to carry it out without a NEPA analysis, Defendants DRBC and Carol Collier have violated, and continue to be 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 EI should normally accompany the proposed rule" (Id., §§ 1502.5, 1502.5a(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)).

79. Defendants DRBC and Collier have limited the choice of reasonable alternatives and risk causing adverse environmental and public health impacts, in violation of 40 C.F.R. §1506.1(a) by engaging in conduct to carry out the federal action without complying with NEPA.

80. Defendants DRBC and Collier have a mandatory, non-discretionary duty to comply with NEPA's statutory and regulatory requirements with respect to the proposed Gas

Development Regulations. Defendants have failed to fulfill their mandatory, non-discretionary duties under NEPA.

81. Plaintiff DCS' mission includes protecting the resources and health of people living, working and recreating in the Delaware River Basin through educating its members and the public about the consequences of government actions or inactions on these resources and the people in the Basin. Plaintiff DCS relies on the resources of the Basin for life and livelihood, including aesthetic, recreational, scientific and public health interests as well as for drinking water as well as other domestic and commercial purposes. Defendants DRBC and Collier's failure to undertake their mandatory, non-discretionary duty to perform a NEPA analysis on the proposed Gas Development Regulations has denied DCS of the right to understand both the environmental and public health impacts of natural gas development on these resources, to educate its members and the public on these impacts, to comment and testify on the likely impacts of the proposed Gas Development Regulations, and to suggest revisions to the proposed Gas Development Regulation after considering an EIS and HIA on this proposal in order to protect the resources of the Basin.

82. Defendants DRBC's and Collier's failure to comply with NEPA with respect to the proposed Gas Development Regulations has harmed and will continue to harm DCS's interests unless the Court grants the relief requested herein.

SECOND CLAIM FOR RELIEF

(Violations of NEPA,

NEPA implementing regulations,

the APA, and the Compact)

83. Plaintiff DCS realleges and incorporates by reference as if fully set out herein the allegations of paragraphs 1 through 69.

84. The development of the proposed Gas Development 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.

85. The Action is also a “federal action” because the Federal Agencies play a significant role in conducting, approving and implementing the Action.

86. Defendant Federal Agencies have “jurisdiction by law” over natural gas development within the basin because they have authority to approve the proposed Gas Development Regulations and to take measures to implement them under the Compact and other federal laws.

87. The Action is a “major federal action significantly affecting the quality of the human environment” within the meaning of NEPA and its implementing regulations.

88. Defendant Federal Agencies 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 preparation of the proposed Gas Development Regulations by DRBC staff, publication of those regulations in proposed form, making the proposed regulations available for public review and comment, and extending the period for submission of such comments.

89. Although the DRBC Gas Development Regulations would authorize natural gas development in the Basin and despite Defendant Federal Agencies’ determinations that the

Action would potentially cause significant environmental and public health impacts, Defendant Federal Agencies have refused, and continue to refuse, to prepare an EIS (including an HIA) for the Action or otherwise comply with NEPA.

90. By approving commencement of the Action and implementing measures to carry it out while refusing to prepare an EIS, Defendant Federal Agencies have violated, and continue to violate NEPA.

91. By approving commencement of the Action and implementing measures to carry it out while refusing to prepare and EIS, Defendant Federal Agencies have violated, and continue to violate 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 EI should normally accompany the proposed rule" (Id., §§ 1502.5, 1502.5a(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)).

92. Defendants Federal Agencies have limited the choice of reasonable alternatives and risk causing adverse environmental and public health impacts, in violation of 40 C.F.R. §1506.1(a) by engaging in conduct to carry out the Action without complying with NEPA.

93. Defendant Federal Agencies' unlawful refusal to prepare an EIS and HIA pursuant to NEPA while approving commencement of the Action and carrying out significant aspects of the Action is subject to judicial review under Sections 3.8 and 15.1(p) of the Compact in the case of DRBC and Collier and under Section 706(2) of the APA in the case of the other

Federal Defendants. Defendants DRBC and Collier' refusal to comply with NEPA and prepare an EIS and HIA is in violation of the Compact. The refusal of the other Defendant Federal Agencies to comply with NEPA and prepare an EIS and HIA is not in accordance with law and is arbitrary, capricious, and an abuse of discretion.

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

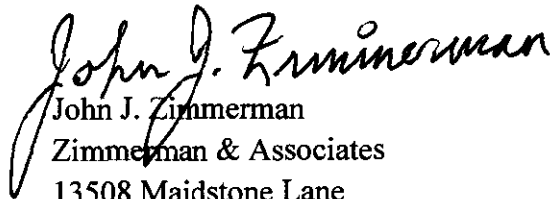
PRAYER FOR RELIEF

WHEREFORE, Plaintiff DCS respectfully requests that this Court issue a judgment and order:

- (1) Declaring that Defendants are in violation of NEPA by refusing to prepare an EIS and HIA for development of the proposed Gas Development Regulations authorizing natural gas development within the Basin under the Compact;
- (2) Declaring that Defendants are in violation of NEPA's implementing regulations by failing to prepare an EIS and HIA for development of the proposed Gas Development Regulations authorizing natural gas development within the Basin under the Compact;
- (3) Enjoining Defendants to comply with NEPA by promptly preparing an EIS and HIA for public review and comment;

- (4) Enjoining Defendants from promulgating or voting to promulgate final Gas Development Regulations or taking any other action to authorize or facilitate natural gas development within the Basin under the Compact until such time as Defendants have fulfilled NEPA's statutory and regulatory requirements;
- (5) Enjoining Defendants from permitting any activities subject to DRBC jurisdiction in furtherance of natural gas development until such time as Defendants have fully complied with NEPA's statutory and regulatory requirements;
- (6) Awarding Plaintiff DCS its reasonable fees and costs associated with this litigation, including attorneys' fees and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412 (d); and
- (7) Granting Plaintiff DCS such other and further relief as the Court may deem just and proper.

Dated: August 9, 2011
Potomac, MD



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