IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WAYNE LAND AND MINERAL GROUP, LLC, Plaintiff, v. DELAWARE RIVER BASIN COMMISSION, Defendant, and DELAWARE RIVERKEEPER NETWORK and MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER Intervenors-Defendants.	:	Civil Action No. 3:16-cv-00897 (Judge Mariani) (Electronically Filed)

Defendant Delaware River Basin Commission's
Motion for Partial Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and LR 7.1 through 7.8 and 56.1 of the Local Rules of the United States District Court for the Middle District of Pennsylvania, Defendant Delaware River Basin Commission ("DRBC" or "Commission") by and through its attorneys, Warren Environmental Counsel LLC, hereby respectfully moves this Court for partial summary judgment based on the facts stated herein and in the Statement of Material Facts submitted

herewith, and for the reasons set forth in the Brief in Support to be submitted in accordance with LR 7.5.

I. INTRODUCTION

1. Through the present action, Plaintiff Wayne Land and Mineral Group, LLC ("WLMG") seeks a declaration that its planned natural gas well pad and appurtenant facilities and its planned high volume hydraulic fracturing activities are not a "project" as defined in the Delaware River Basin Compact, PL 87-328, 75 Stat. 688 ("Compact") and that DRBC lacks the authority to review its activities.

2. On July 3, 2018, the United States Court of Appeals for the Third Circuit vacated an earlier decision of this Court dismissing this action with prejudice and remanded the case for further fact-finding. Since that time, the parties have conducted extensive discovery, including completing numerous interrogatories and document productions, conducting five fact depositions and two expert depositions, and exchanging ten expert reports. Accordingly, the factual record is now robust and many factual issues have been resolved.

3. There is no genuine dispute that WLMG's plans include conducting activities, employing equipment and constructing structures at its well pad site for the purpose of managing wastewater and related uses of land. This motion for partial summary judgment is limited to requesting a judgment from the Court that, at a minimum, these wastewater management activities and the associated

structures and other facilities constitute a "project" within the meaning of the Compact and that DRBC is entitled to judgment as a matter of law on these aspects of WLMG's planned undertaking. For purposes of this motion for partial summary judgment only, DRBC does not seek a judgment concerning other aspects of WLMG's proposed undertaking that DRBC contends are also projects, including WLMG's acquisition and storage of water, construction of non-wastewater management equipment and structures associated with its well pad, and use of water including extraction of natural gas by injecting millions of gallons of water mixed with chemicals and other substances into the ground.

II. BACKGROUND

4. The Delaware River Basin ("Basin") states of New York, New Jersey, Pennsylvania and Delaware and the United States (collectively the "Signatory Parties") agreed to and enacted the Compact in 1961 to provide for their joint administration of the water resources of the Basin pursuant to a multipurpose comprehensive plan. *See* Compact § 3.2. The Compact formed the Delaware River Basin Commission ("Commission" or "DRBC") through which the Signatory Parties jointly exercise their respective sovereign authorities. *See* Compact § 1.3(b). As set forth in separate Articles of the Compact, DRBC's broad authority extends to water supply, pollution control, flood protection, watershed

management, recreation, hydroelectric power and water withdrawals and diversions.

5. The governors of the Basin states and a representative of the President of the United States are the Commissioners who serve as the organization's governing body. Compact §§ 2.2, 14.1(b)(1).

6. For the more than thirteen million people who depend on an adequate supply of clean Basin water for drinking, recreation and business operations, DRBC plays a critical role. DRBC manages and protects both the quantity and quality of water through several interrelated authorities: adoption of a comprehensive plan, promulgation of regulations, and review of projects proposed by public or private entities that may have a substantial effect on the water resources of the Basin. *See, e.g.,* Compact, § 13.1 (Comprehensive Plan), Article 5 (Pollution Control) and § 3.8 (Referral and Review). DRBC's project review authority is its principal mechanism for preventing entities from commencing projects that may impair DRBC's Comprehensive Plan. *See* DRBC 1963 Annual Report at 7, attached as Exhibit 1 to Declaration of Pamela M. Bush, J.D., M.R.P. attached to this Motion as Exhibit A ("Bush Declaration").

7. WLMG owns approximately 180 acres of land in Wayne County, Pennsylvania. Approximately 75 acres of WLMG's property are located in the Basin (the "Property"). Doc. 1 at ¶ 12 (WLMG Complaint).

8. Even though approximately 105 acres of its property are located in the Susquehanna River Basin where WLMG could proceed now with its project subject to review and approval by the Susquehanna River Basin Commission ("SRBC") and the Pennsylvania Department of Environmental Protection ("PADEP"), WLMG seeks a declaration permitting it to construct a well pad on the portion of its Property within the Delaware River Basin without review by the DRBC. *See* Doc. 1 at ¶¶ 21 and 51.

9. The most relevant portions of the Compact are as follows:

(a) Section 3.8 of the Compact provides that "[n]o 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[.]" *See* Compact, Section 3.8.

(b) Section 1.2(g) of the Compact defines "project" as:

> any work, service or activity which is separately planned, financed, or identified by the commission, or any separate facility undertaken or to be undertaken within a specified area, for the conservation, utilization, control, development or management of water resources which can be established and utilized independently or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation.

(c) Section 1.2(e) of the Compact defines "facility" as:

> any real or personal property, within or without the basin, and improvements thereof or thereon, and any and all rights of way, water, water rights, plants, structures, machinery and equipment, acquired, constructed, operated, or maintained for the beneficial use of water resources or related land uses including, without limiting the generality of the foregoing, any and all things

> and appurtenances necessary, useful or convenient for the control, collection, storage, withdrawal, diversion, release, treatment, transmission, sale or exchange of water; or for navigation thereon, or the development and use of hydroelectric energy and power, and public recreational facilities; or the propagation of fish and wildlife; or to conserve and protect the water resources of the basin or any existing or future water supply source, or to facilitate any other uses of any of them[.]

(d) Section 1.2(i) of the Compact defines "water resources" as:

> water and related natural resources in, on, under, or above the ground, including related uses of land, which are subject to beneficial use, ownership or control.

III. PROCEDURAL POSTURE OF THE CASE

10. WLMG commenced this action on May 17, 2016, alleging that DRBC has no jurisdiction over, or the authority to review and approve, WLMG's planned natural gas development consisting of a well pad, appurtenant facilities and related activities including hydraulic fracturing. *See* WLMG Complaint, ¶¶ 21, 24, 50, Wherefore Clause. The relief WLMG seeks was clarified through discovery to be limited to a judgment that WLMG's planned activities do not constitute a "project" as defined in the Compact, and are therefore not subject to review in accordance with Section 3.8 of the Compact**.** Letter from Christopher R. Nestor, Overstreet & Nestor LLC, to Mark L. Greenfogel, Warren Environmental Counsel LLC, 2 (July 12, 2019) ("Nestor Letter"), attached to this Motion as Exhibit G.

11. On March 23, 2017, the Court dismissed WLMG's complaint with prejudice. *Wayne Land and Mineral Grp., LLC v. Del. Riv. Basin Comm'n*, 247 F. Supp. 3d 477 (M.D. Pa. 2017) ("*Wayne I*").

12. On July 3, 2018, the United States Court of Appeals for the Third Circuit ruled that the definition of "project" in the Compact is ambiguous, vacated the final judgment, and remanded this case for further fact-finding as to, among other things, the intent of the Compact drafters. *Wayne Land and Mineral Grp., LLC v. Del. Riv. Basin Comm'n*, 894 F.3d 509 (3d Cir. 2018) ("*Wayne II*").

13. Upon remand, the parties conducted extensive discovery, which has now concluded, including thirty interrogatories, the exchange of several thousand pages of information, requests for admission, ten expert reports (including one subsequently withdrawn), and five fact witness and two expert witness depositions. This motion is submitted in accordance with the Court's Order establishing a due date of April 6, 2020 for submission of all potentially dispositive motions. Doc. 143 (Scheduling Order).

IV. UNCONTESTED FACTS FOLLOWING FACT AND EXPERT DISCOVERY

14. As discovery has shown and as detailed below, WLMG plans to construct and operate numerous facilities to manage, conserve and protect water resources, including ground and surface water resources and related uses of land. Based on this now extensive record, including interrogatory responses and

document productions, expert reports, and depositions, many facts demonstrating that WLMG's activities and facilities separately and in combination constitute one or more waste management projects are now uncontested. The opinions of DRBC's expert environmental scientist, Paula J. Mouser, P.E., Ph.D., setting forth the facilities WLMG must employ and the activities it must perform to manage wastewater, a water resource, are among the uncontested facts and are supported by testimony of WLMG's own witnesses.

15. WLMG plans to construct a well pad approximately five to seven acres in size and to install at least six natural gas wells to facilitate high volume hydraulic fracturing ("HVHF"). Coccodrilli 30(b)(6) Dep. 79:14-20, 120:23-121:12, 257:5-258:15, Aug. 27, 2019 attached to this Motion as Exhibit B.

16. WLMG plans to conduct HVHF in four key phases: (i) preparation and maintenance of the access road and well pad; (ii) vertical and horizontal drilling; (iii) well completion activities including hydraulic fracturing (accomplished by staging the horizontal borehole with perforated casings, and hydraulic fracturing of the shale in isolated stages by positively surging a fluid or fluid/gas mixture containing chemical modifiers under high pressure into the formation); and (iv) flowback and produced water handling and disposal. *See* Exhibit 1 to Declaration of Paula J. Mouser, P.E., Ph.D., attached to this Motion as Exhibit C (*Report on the Deliberate Utilization, Management, and Conservation of*

Water Resources During Natural Gas Development and Production Activities, 2 (Oct. 9, 2019) ("Mouser")); Letter from John Holko, Lenape Resources, Inc. to A.J. Sandone, WLMG (June 18, 2019), WLMG2229-2233 ("Holko Letter"), attached to this Motion as Exhibit D.

17. As detailed below, integral to each phase of WLMG's HVHF plans are equipment and activities for the control, utilization, management, and conservation of water resources including wastewater management. Mouser at 2.

18. WLMG intends to drill a borehole and install three to five protective casings. The drinking water available at the Property at which WLMG plans to conduct natural gas activities is supplied from groundwater under the Property. Coccodrilli 30(b)(6) Dep. 70:19-71:15, Aug. 27, 2019. Because there is no public water supply in the area, WLMG's neighbors' drinking water is also supplied from groundwater. Coccodrilli 30(b)(6) Dep. 71:21-73:4. As a result, the surface casings must extend through fresh groundwater aquifers used as a source of drinking water. Mouser at 4; Coccodrilli 30(b)(6) Dep. 164:16-165:2; Holko Letter at 2231. Because following WLMG's injection of water-based fracture fluids down the borehole it plans to and must recover and manage wastewater returning up the borehole, the casings are critical for "protecting surface and subsurface water resources from the migration of stray gases, formation brines, and stimulation fluids containing contaminants." Mouser at 4.

19. Of all the project stages, WLMG plans to use the largest quantity of water in the well completion and hydraulic fracturing stage. The amount of water required for well completion and hydraulic fracturing is proportionate to the depth and lateral length of a well. Holko Letter 2230. After drilling to sufficient depth, WLMG expects to extend a five-thousand-foot lateral borehole from each of its six wells and to use three to five million gallons of water mixed with chemicals and other substances ("fracture fluid") to hydraulically fracture each of its six wells. Coccodrilli 30(b)(6) Dep. 80:12-17; Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories, 3 (June 18, 2019) ("WLMG Interrogatory Answers") attached to this Motion as Exhibit E. WLMG is considering constructing longer laterals depending on its success in securing consent of neighboring property owners. Coccodrilli 30(b)(6) Dep. 80:18-82:9. In Pennsylvania, completion and hydraulic fracturing of each HVHF well uses on average twenty million gallons of water, with the projected thirty-year lifetime water use associated with each well expected to approach twenty-seven million gallons. Mouser at 6.

20. WLMG plans to mix millions of gallons of water with sand or resin proppant and chemical modifiers to form the fracture fluid to be injected into the well bore. Holko Letter at WLMG2230. WLMG has not yet selected the specific chemicals or other material it intends to add to the millions of gallons of water it

plans to use to form its fracture fluid. Coccodrilli 30(b)(6) Dep. 93:14-94:3; Holko Dep. 102:8-103:10, Aug. 28, 2019 attached to this Motion as Exhibit F; WLMG Interrogatory Answers at 5. The relief WLMG seeks would allow it to use any of these chemicals as part of a water-based fracture fluid and inject this mixture through shallow aquifers and into the target shale formation without Commission review.

21. More than one thousand different chemical modifiers have been used in HVHF projects, some of which are known to be toxic to humans and aquatic life, and many others of which lack published information on their biodegradability or toxicity. Mouser at 7; Exhibit 2 to Declaration of Paula J. Mouser, P.E., Ph.D., attached to this Motion as Exhibit C (Paula J. Mouser, P.E., Ph.D., *Supplemental Report Containing Response to Report by J. Daniel Arthur on November 6, 2019*, 2 (Jan. 23, 2020) ("Mouser Supplemental")). Various types of chemical modifiers commonly used in fracture fluids include acids, biocides, breakers, clay stabilizers, corrosion inhibitors, friction reducers, iron control agents, oxygen scavengers, scale inhibitors, solvents, and surfactants, many of which can pose a risk to drinking water and aquatic life if released to the environment. Mouser at 7.

22. Following the injection of fracture fluids during the fracture stimulation, a mixture of fracture fluids and formation brine returns to the surface as "flowback." Formation brine is "wastewater that derives from the black shale

and consists of numerous geogenic constituents, including salts (e.g., sodium, potassium, chloride, bromide), naturally occurring radioactive materials (NORM), petroleum compounds (e.g. benzene, toluene, ethylbenzene, and xylenes, or "BTEX"), and kerogen, among others (e.g., barium, strontium, sulfate)." Mouser at 2.

23. In the Marcellus Shale, typically ten to twenty percent of the fracture fluid returns to the surface as flowback water mixed with formation brine originating in the shale formation. This mixture of flowback water and formation brine must be collected in temporary storage containers and managed: it may be recycled, treated on-site and transported to a centralized waste treatment facility for further treatment, or permanently disposed in underground injection wells. Mouser at 8. *See* Holko Letter at WLMG2233. Because the flowback water contains the chemical additives in the fracture fluid and the contaminants in the formation brines, improper management, treatment, and disposal of such wastewater has the potential to impair water resources and their uses in the Basin. Mouser at 15-17.

24. Hydraulic fracturing uses water consumptively. That is, the fracture fluid comprised mainly of water that is injected down the borehole, including both the portion remaining in the formation and the portion returning up the borehole as

wastewater, is thereafter unavailable for industrial or domestic use other than fracturing or refracturing natural gas wells. Mouser at 8.

25. During the natural gas production phase, the duration of which WLMG estimates to be twenty to fifty years, residual stimulation fluids, and formation brine return to the surface as "produced water" which must also be collected, separated, and managed. Mouser at 8; Nestor Letter at 1-2 (Exhibit G).

26. In addition to the structures, machinery, and equipment used for other purposes and not at issue in this Motion, to manage flowback water (together with formation brine) and produced water, and to contain any leaks, spills or releases of wastewater and other substances, WLMG plans to deploy the following structures, machinery, and equipment:

(a) Up to twenty 21,000-gallon polypropylene or steel walled tanks for the purpose of collecting and temporarily storing residual fluids such as flowback and production water. Mouser at 5 n.x, 12, 19; Nestor Letter at 1-2.

(b) One 12,600-gallon storage tank for every well drilled on the pad for the purpose of collecting and storing produced water for the remaining life of the well, which could be anywhere between 20 and 50 years. Mouser at 5 n.x, 8-10, 12-13, 19; Nestor Letter at 1-2.

(c) Protective casings within the borehole of each well—which may include conductor, surface, intermediate, and production casings—for the purpose

of protecting and conserving water resources by preventing the migration of gas, wastewater and other fluids into groundwater aquifers. Mouser at 3-4, 17, 19; WLMG Interrogatory Answers at 3; Holko Letter at WLMG2231.

(d) Secondary containment such as berms—constructed around tanks storing produced fluids, brine, condensate, or oils and around the separator system and below the well pad itself—to capture or contain spills or leaks, and geosynthetic/subbase materials acting as liners beneath the well pad, for the purpose of protecting and conserving the water resources of the Basin by preventing the migration of spilled or leaked contaminants to ground and surface waters. Mouser at 4, 12-14, 16, 19; Coccodrilli 30(b)(6) Dep. 169:24-170:4; WLMG Interrogatory Answers at 3; Holko Letter at WLMG2229-2230.

27. Additionally, due to the large quantity of flowback and produced water that returns to the surface, WLMG plans to develop a wastewater management plan for the purpose of planning, monitoring, and managing the millions of gallons of flowback water (and formation brines) and produced water that returns up the well bore to the surface. The plan will be designed to manage the wastewater to conserve and protect the water resources of the Basin. This plan has not yet been prepared. Holko Letter at WLMG 2233; Mouser at 8-17; WLMG Interrogatory Answers at 5.

28. Even when developed and operated in accordance with applicable regulations, fracking activities have resulted in impairment to water resources, the environment, human health and ecosystem health. Mouser at 15-18; Mouser Supplemental at 2.

29. As shown above, WLMG plans to conduct activities and operate structures and equipment for the purpose of the management, control, collection or storage of water resources, i.e. wastewater, or to conserve and protect water resources including groundwater and surface water from wastewater spills, leaks and releases. Based on the Compact's definitions set forth in paragraph 9 above, these activities and facilities are a "project." In addition, the Compact's drafting and legislative history, the Commission's course of performance, and the implementation of another closely related compact support the conclusion that WLMG's planned wastewater management activities and facilities are a project.

V. COMPACT DRAFTING HISTORY

30. The Compact's drafting history evidences the drafters' intent to include within the definition of "facility" and "project" structures and equipment designed to prevent surface water and groundwater pollution.

31. The Compact was drafted principally by the Delaware River Basin Advisory Committee ("DRBAC") whose members included representatives from the four Basin states, New York City and Philadelphia. DRBC 1963 Annual Report

at 4 (Exhibit 1 to Bush Declaration). The DRBAC retained attorney William Miller to undertake much of the drafting work. DRBAC Fourth Annual Report at 1, attached to the Bush Declaration as Exhibit 2.

32. Pollution of the Delaware River was a long-standing concern of the Basin states. The 1931 U.S. Supreme Court Decree allocating the waters of the Basin required New York State, among other things, to ameliorate the effect of its diversion of water to New York City by treating wastewater discharges from Port Jervis, New York to the Delaware River. *New Jersey v. New York*, 283 U.S. 336, 346 (1931); *see also New Jersey v. New York*, 283 U.S. 805 (1931). The 1954 Supreme Court Decree modifying the Court's 1931 Decree contained a similar provision. *New Jersey v. New York*, 347 U.S. 995, 1000-1001 (1954).

33. Approximately two decades before constituting the DRBAC, the Basin states formed the Interstate Commission on the Delaware River ("INCODEL") to address pollution and other Basin issues. INCODEL's primary focus before 1948 was on pollution. *Delaware River Basin, New York, New Jersey, Pennsylvania, and Delaware*, H.R. Doc. No. 87-522, Vol. I at 7 (Report of the Board of Engineers for Rivers and Harbors, Aug. 9, 1961 ("Board of Engineers") (1962), attached to the Bush Declaration as Exhibit 3; U.S. Army Engineer District, Philadelphia, *Report on the Comprehensive Survey of the Water Resources of the Delaware River Basin*, 2 (1960, rev 1961) ("Corps Survey"),

attached to the Bush Declaration as Exhibit 4. INCODEL lacked "teeth" in that it was dependent on the Basin states to separately adopt and enforce its water quality and other proposals. Syracuse University Research Group, *The Problem of Water Resources Administration with Special Reference to the Delaware River Basin* 100, 468 (1959) ("Syracuse Report") attached to the Bush Declaration as Exhibit 5. Although INCODEL had made progress in addressing water pollution problems in the Basin, the Compact drafters understood that an organization with greater authority was needed to achieve water quality objectives. DRBAC Second Annual Report, Appendix A, 2 (1958) attached to the Bush Declaration as Exhibit 6.

A. A survey conducted by the U.S. Army Corps of Engineers identified the water resources needs of the Basin.

34. While the Compact was being drafted, the U.S. Army Corps of Engineers ("Corps") at the direction of Congress undertook a study of the water resources needs of the Basin. As noted in the report of DRBC's expert historian Douglas Littlefield, Ph.D., Congress instructed the Corps to update the results of its study conducted twenty years earlier (known as a "308 report") by undertaking "a review of the plans for flood control and other water resources developments in the Delaware River Basin." Exhibit 1 to Declaration of Douglas R. Littlefield, Ph.D., attached to this Motion as Exhibit H (Douglas R. Littlefield, Ph.D., *Report on the History of the Delaware River Basin Compact with Specific Focus on Sections 1.2(g) and 3.8*, 12 (Oct. 2, 2019) ("Littlefield")).

35. As an agency federally authorized to implement civil works programs to enhance navigability, provide flood control and develop hydropower, the Corps released a study report proposing a plan for a series of dams and reservoirs on the Delaware River to serve multiple purposes. Given its limited federal jurisdiction, however, the Corps also emphasized that state programs to complement the Corps' proposed reservoirs and dams were essential to the success of its reservoir plans. Board of Engineers at 8, 10, 17; Corps Survey at 87-88. Pollution abatement and groundwater protection were among the identified water resource problems for which state action was needed. *Id*.

36. The Corps emphasized the importance of state programs for removal of pollution loads as a means of protecting drinking water and fisheries. Board of Engineers at 8, 15, 17; Corps Survey at 91-92. According to the Corps, pollution problems were particularly acute in portions of the Delaware River Estuary where dissolved oxygen levels had decreased at times to zero. Corps Survey at 70-74. A fish and wildlife plan was included as part of the Corps' plan for development of the Basin's water resources. Board of Engineers at 18.

37. As part of its water resource analysis, the Corps also noted the need to preserve surface soils and prevent sedimentation, once again, a state and local function. Corps Survey at 75.

38. The Corps Survey report recommended "measures" in "three distinct categories": major dams and reservoirs, small dams and reservoirs, and related programs including land management, soil conservation, reforestation, restrictions on flood plain use, conservation of water by reuse in industries, improvement of water quality by removal of pollutant loads, and data collection. Corps Survey at 79. Such programs would be comprised of, among other things, projects. *See*, *e.g.*, Corps Survey at 165; *See* Greenwald Dep. 63:9-17, Mar. 3, 2020 attached to this Motion as Exhibit I. The Corps expressly acknowledged that the Basin's water resource needs could not be satisfied by reservoirs alone. Corps Survey at 158.

39. The Corps noted that to provide sufficient water to meet public water supply and industrial needs, repetitive use of water by downstream users and the use of groundwater were required. Corps Survey at 59-60, 87-88. As the Corps recognized, consumptive uses preclude and therefore interfere with repetitive use of water. Corps Survey at 77.

40. Regarding groundwater, the Corps recognized the limitations of its proposed infrastructure projects and that programs related to groundwater are a matter of state responsibility. Board of Engineers at 17; Corps Survey at 87-88. For the Commission's comprehensive plan to be truly comprehensive, it would need to encompass groundwater development, conservation, and management in addition to the dams and reservoirs the Corps proposed.

41. As will be shown, the various areas of water resources management which the Corps considered to be a state responsibility were placed within the scope of authority of the Basin agency soon to be created, the DRBC.

B. The Study by Syracuse University of the best form of governance for the Delaware River Basin emphasized the need for coordinating State and Federal powers, including management of pollution, in the DRBC.

42. In conjunction with the work of the DRBAC, a non-profit entity known as the Water Research Foundation was created to receive a Ford Foundation grant and procure a study on the form of government best suited to administer the water resources of the Basin. The Water Research Foundation retained Syracuse University to perform the study. Water Research Foundation, *A Brief Report on the Study of Governmental Organization for the Water Resources of the Delaware River Basin by the Maxwell Graduate School, Syracuse University* 5 (1959) ("WRF Brief Report"), attached to the Bush Declaration as Exhibit 7.

43. In its 1959 report, The Problem of Water Resource Administration, the Syracuse Report recommended, among other things, the creation of a federal-interstate agency to administer the water resources of the Basin. Littlefield at 14-15; *See* WRF Brief Report at 17-20. This agency became the DRBC. *See* DRBC 1963 Annual Report at 5 (Exhibit 1 to Bush Declaration).

44. The Syracuse Report also outlined the role of private enterprise in "performing part of the task of water resource development." An example of water

resource development was the use of "enormous amounts of water for cooling purposes" by electric utilities. Syracuse Report at 64-65. In other words, like the Corps, the Syracuse study considered water use to be a form of water resource development.

45. The Syracuse Report also recognized the need to control pollution at its source either through absolute prohibition or by specifying standards of treatment. Syracuse Report at 97. And it recognized the increasing demand for a unified pollution program applying fairly uniformly throughout the Basin, at that time (before formation of the DRBC) to be administered by the Public Health Service. Syracuse Report at 100.

46. In its own report issued in 1959, the Water Research Foundation referenced the role of the Corps as preparing a physical plan of development for surface water control. Consistent with the Corps' Survey report, the structural measures would serve as a "point of departure" to be supplemented by non-structural measures. WRF Brief Report at 4-6.

47. Noting that the Supreme Court had focused on "which states will get how much water," the Water Research Foundation identified a very different role for the DRBC as an administrative agency. Its role would be planning and administration to address "how can the water resources best be used." WRF Brief Report at 11.

48. Activities and facilities to prevent pollution of the Basin's waters were among the non-structural water use and control measures discussed by the Foundation. WRF Brief Report at 6. To perform this and other agency tasks, "Legally all powers available to the states individually are available to them collectively through the compact." WRF Brief Report at 10. DRBC's review of planned wastewater management activities and facilities of industrial water users to ensure that appropriate pollution controls are in place fits squarely within this collective exercise of state authority.

C. The legislative and drafting history shows that activities, structures and equipment to control water pollution are for the development, utilization, management, conservation and control of water resources and therefore are projects.

49. In a letter to the Senate Judiciary Committee, then Department of the Interior Secretary Stewart Udall noted that areas of control and development of water resources include pollution control, and that the Commission would have authority over these areas. S. Rep. No. 87-854, 28-29 (1961), attached to the Bush Declaration as Exhibit 8. A report from Columbia University on the constitutionality of the Compact reiterated that water quality and pollution control are examples of development of the Basin's navigable waters. *Id*. at 38-39. It follows from these statements that an activity or facility to control pollution is an activity for the conservation, utilization, control, development, or management of water resources, i.e. a project.

50. At a hearing before the House Judiciary Committee on the Compact bill, then Philadelphia City Solicitor David Berger noted that responsibility for water quality control would be centralized in a single interstate body which, in addition, would serve the function of promoting storage of water in reservoirs. He noted that quality management was separate from the quantity management embodied in the Corps reservoir plan. Yet he emphasized that quality and quantity must be managed together, with all future developments in the basin undertaken in accordance with the DRBC's comprehensive plan. *Delaware River Basin Compact: Hearings before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 87th Cong. 43-47 (1961), attached to the Bush Declaration as Exhibit 9. At the same hearing, a statement by the Governors of the Basin states reiterated that the Commission would be the principal planning body for water resource development in the Basin, and that among its concerns would be control of pollution. *Id*. at 75-76.

51. A Senate report on the Compact bill employs similar language. The report states that under the legislative authorizations in effect at the time, the federal government focuses on navigation, flood control, hydroelectric power, irrigation and river basin surveys, while the responsibility of the states includes water supply, sewage disposal, drainage and fish and wildlife. According to the report, these are interdependent functions representing alternative, and potentially

conflicting, development, use or control of water resources. S. Rep. No. 87-854, 15-17 (1961) (Exhibit 8 to Bush Declaration). Storage reservoirs and pollution control would be managed together through development and control measures taken in combination. *Id*. at 17. The DRBC would be a single agency empowered to cut across political boundary lines and coordinate the functions of federal, state and local government. *Id*. at 14. Its areas of control and development would include water supply, pollution control, and watershed management, among others. *Id*. at 29.

52. The Senate recognized that the DRBC would integrate all available federal and state powers. *Id*. at 17. The DRBC's comprehensive plan would provide the framework in which federal, state and private enterprise may operate. *Id*. at 1. In that respect, Section 3.8 of the Compact would serve as a screening tool. *Id*. at 26.

53. In a hearing before the Senate Committee on Public Works regarding the Compact bill, Pennsylvania Governor Lawrence likewise stated his view that the Commission would facilitate common action against pollution. He further characterized the Commission as a planning agency with power to enforce its plans. *Delaware River Basin Compact: Hearing before a Subcomm. of the S. Comm. On Public Works*, 87th Cong. 49-52 (1961), attached to the Bush Declaration as Exhibit 10. At the same hearing, Philadelphia Water Commissioner

Samuel Baxter made a statement on behalf of Mayor Richardson Dilworth regarding DRBC's authority over both water quality and water quantity similar in substance to the statement of Solicitor David Berger described in paragraph 50 above. *Id*. at 64-65.

54. In testimony at a Pennsylvania Senate committee hearing, Compact draftsman William Miller clarified the intent of the Compact drafters with respect to review of industrial activities. Miller testified that a new industrial oil or coal operator would not fall under the Commission's jurisdiction for those operations. But an existing industrial water user or a new industry using water must submit plans to the Commission for approval if the plans would have a substantial effect on the water resources of the Basin. *Delaware River Basin Compact: Hearing before PA S. Legislative Committee*, 46-47, 57-58 (Mar. 28, 1961), attached to the Bush Declaration as Exhibit 11. In other words, DRBC's project review jurisdiction extends to the use and management of water resources by industry but not to other aspects of industrial operations that do not implicate water resources.

55. Miller also contemplated that future water resource activities unknown when the Compact was drafted should fall within DRBC's jurisdiction. He described drafting the Compact as "writing a constitution," *Delaware River Basin Compact: Hearing Before PA S. Legislative Comm.*, 57 (Mar. 28, 1961), which, as WLMG's expert historian retained for this litigation Dr. Emily

Greenwald testified, demonstrates that "the Compact was aiming to be sufficiently broad to address things that might occur many years down the road that you couldn't necessarily anticipate at that time." Greenwald Dep. 165:13-18, Mar. 3, 2020 (Exhibit I). Miller's testimony and Greenwald's interpretation are consistent with the minutes of the DRBAC which noted that the Compact was midway between a statute and a constitution so as "not to throttle the freedom of the organization in those periods beyond the present" by producing "a very flexible arrangement." *Record of the Meeting of the Delaware River Basin Advisory Committee*, 1 (Nov. 23, 1959), attached to the Bush Declaration as Exhibit 12.

56. As explained by DRBC's expert historian retained for this litigation Dr. Douglas Littlefield, the definition of "project" was broadened during the drafting to encompass far more than dams and reservoirs. Exhibit 2 to Declaration of Douglas R. Littlefield, Ph.D., attached to this Motion as Exhibit H (Douglas R. Littlefield, Ph.D., *Supplemental Report on the History of the Delaware River Basin Compact with Specific Focus on the Report by Emily Greenwald, Ph.D., Entitled "The Meaning of 'Project' in the 1961 Delaware River Basin Compact,"* 7-16 (Jan. 7, 2020) ("Littlefield Supplemental")). The initial draft of the Compact used the language "for control or development of water resources" and also limited "projects" to those undertaken by the signatory states. Littlefield at 30. The definition was modified during the drafting process by the addition of the words

"conservation," "utilization," and "management" and by deletion of the language confining the definition to only projects undertaken by the Commission. As a result of these changes, wastewater management structures and activities undertaken by industry fit squarely within the definition. Littlefield at 37.

57. The definition of "facility" encompasses a structure or equipment used to conserve and protect water resources of the Basin or any existing or future water supply source. Thus, the structures and equipment described in paragraph 26 above are facilities. The definition of "project" includes both activities identified by the Commission, and any facility that can be considered as a separate entity for purposes of evaluation. As such, the wastewater management facilities and activities may be viewed separately or in combination as one or more projects.

VI. COMMISSION IMPLEMENTATION AND COURSE OF PERFORMANCE

58. The Commission's earliest actions make clear that from its inception, the Commission was concerned with protecting water quality in the Basin, including through the exercise of its project review authority.

59. In one of the Commission's earliest amendments to the Comprehensive Plan, the five Commissioners unanimously approved "A resolution to amend the Comprehensive Plan with respect to ground waters" which provided:

> The underground water resources of the Basin shall be utilized, conserved, developed, managed and controlled in view of the needs of present and future generations, and of the resources available to them.

> To that end, the use, interference, impairment, **penetration** or artificial recharge of **an aquifer** or of any other underground water resource **shall be subject to review and evaluation under the Compact**.

DRBC Resolutions 64-8 and 64-11 (1964) (emphasis added), attached to the Bush Declaration as Exhibit 13. As noted in paragraphs 18 and 26(c), above, WLMG plans to penetrate an aquifer with its well bore and is therefore subject to this resolution, which was adopted as Section 2.20.6 of DRBC's Water Code and incorporated into DRBC's Comprehensive Plan.

60. The Commission's early implementation of its project review authority pursuant to Section 3.8 of the Compact supports the Commission's position that undertakings that incorporate features designed to conserve and protect water resources are or contain projects.

61. Within the first few years following the formation of the Commission, its project review branch approved the water resources aspects of several petroleum products pipelines, pier, mooring and dock facilities, landfills, highways and bridges, electrical generation facilities, industrial facilities, and groundwater penetration activities.

62. Key individuals who participated in the drafting, negotiation, and enactment of the Compact were among the early staff of the DRBC, and were implementing the intent of the Compact's drafters. For example, the principal draftsman of the Compact, William Miller, was retained as the Commission's first

general counsel, and a planner for the Delaware River Basin Advisory Committee staff, W. Brinton (Buzz) Whitall, was retained as the first Commission secretary. In addition, several individuals who represented the states and the federal government in the drafting of the Compact or participated in the drafting as consultants were appointed to serve as the first DRBC Alternate Commissioners. These individuals include Maurice Goddard (Pennsylvania), Norman Lack (Delaware), and Harold Wilm (New York). *See* DRBC 1963 Annual Report, 2-3 (Exhibit 1 to Bush Declaration); DRBAC Fourth Annual Report at Appendix A; Littlefield at 32.

63. On February 21, 1964, the Commission approved an application by the Colonial Pipeline Company for a 10-inch petroleum products pipeline crossing the Delaware River between Tinicum Township, Pennsylvania and West Deptford Township, New Jersey. Docket D-63-15, attached to the Bush Declaration as Exhibit 14. The Commission approved the project subject to conditions intended to minimize the threat of pollution to surface water and groundwater, including requiring certain design criteria and professional engineer certifications prior to operation. The Commission's project review focused on whether the pipeline would constitute a threat to water resources through failure or "other adverse effect." Memorandum from T. Briganti to H. A. Howlett and J. F. Wright, 3 (Feb. 13, 1964), attached to the Bush Declaration as Exhibit 15.

64. On March 26, 1964, the Commission granted another docket to the Colonial Pipeline Company, this time approving pipeline stream crossings in New Jersey. Docket No. D-63-23, attached to the Bush Declaration as Exhibit 16. The Commission concluded that, "inadequate design of the pipeline or improper installation could endanger life, health and property, and be a source of pollution of public water supplies," and imposed technical, operational, and reporting conditions on the project approval to prevent any such adverse impacts to water resources. Docket D-63-23 at 5-7.

65. Consistent with its review of petroleum pipelines in its early years, the Commission has repeatedly reviewed pipelines transporting hydrocarbons as projects to ensure that the technical and operational designs and plans are adequately protective of water resources. *See*, *e,g,*, Docket D-80-77, attached to the Bush Declaration as Exhibit 17; Docket D-98-35, attached to the Bush Declaration as Exhibit 18; Docket D-2016-010-1, attached to the Bush Declaration as Exhibit 19. The Commission's Rules of Practice and Procedure ("RPP") classify these pipelines as reviewable projects when they meet criteria specified in the RPP. 18 C.F.R. § 401.35(11)-(13).

66. On March 26, 1964, the Commission approved Docket D-1963-022 to Tidewater Construction Corporation on behalf of E. I. DuPont de Nemour and Company and Texas Gulf Sulphur Company for "approval of plans to construct a

pipeline trestle, two barge mooring cells and an acid barge loading platform in the Delaware River on property owned by E. I. DuPont de Nemour & Company." Docket D-1963-022, attached to the Bush Declaration as Exhibit 20.

(a) The approval described "facilities" to transport liquid sulphur from barges through a pipeline to a 375,000-gallon storage tank on shore. Similarly, sulphuric acid manufactured at the plant was to be stored in a 300,000-gallon tank and pumped to the barges from the plant through a steel pipeline. *Id*.

(b) Concerned with the effect of spills of pollutants on the water resources of the Basin, Commission staff met with the project applicant "to discuss the procedures used by the company in preventing spills of chemicals into streams during the transfer of liquids from ship to shore and vice versa." See Memorandum from J. Boardman to T. Briganti (Dec. 6, 1963), attached to the Bush Declaration as Exhibit 21. Similarly, prior to granting approval of this project, the Commission staff conducted a scientific "analysis of the possible effects of acid spills on water quality at the Du Pont Cornwells Heights Plant," and determined that such spills "would not result in significant quality problems for municipal water users, provided municipal plant personnel are afforded sufficient notice of such a spill." See Memorandum from Robert A. Buckingham to T. Briganti (Feb. 19, 1964), attached to the Bush Declaration as Exhibit 22.

67. On April 30, 1964, the Commission issued Docket D-1964-013 to the Kaiser Gypsum Company, Inc. for a pier to serve its gypsum wallboard plant in Delanco, New Jersey. Although the project involved no new impoundments or withdrawals of surface or ground water, and the applicant intended to procure all water from a municipal water source and utilize existing municipal treatment facilities for waste disposal, the project was subject to Commission review and approval because it involved activities and facilities to conserve and protect water resources during its operation. Docket D-1964-013, attached to the Bush Declaration as Exhibit 23.

68. On May 28, 1969, the Commission approved Docket No. D-69-11 issued to Morris County Landfill, Inc. for the expansion of a local dump into a larger sanitary landfill in Mount Olive Township, New Jersey. The Commission reviewed the interceptor ditch structures "constructed to carry all surface water around and away from the landfill site and discharge to the head waters of Willis Brook," a tributary to a river at the site of a proposed reservoir. Docket No. D-69-11, attached to the Bush Declaration as Exhibit 24.

69. On September 25, 1963 the Commission approved an application by the Delaware River and Bay Authority for construction of a second Delaware Memorial Bridge 250 feet upstream of the existing bridge. Docket D-1963-12, attached to the Bush Declaration as Exhibit 25. The Commission approved the

project subject to the condition that "all water bearing formations encountered during the construction will necessarily be sealed off in order to permit the work to proceed. This construction requirement should protect the underground water bearing formation from infiltration of surface waters." *Id*.

70. These early actions of the Commission clearly demonstrate that the Commission's project review function was intended to review planned water resource related industrial and other development activities and facilities that could impair water quality or interfere with a water use set forth in DRBC's Comprehensive Plan.

71. The Commission's first annual report published in 1963 details the various industrial, municipal and other projects reviewed by DRBC. As an initial matter, one of the first actions of the new Commission was to incorporate INCODEL's water quality standards into the Comprehensive Plan, although it was understood that DRBC would later adopt its own pollution abatement policies. DRBC 1963 Annual Report at 10 (Exhibit 1 to Bush Declaration). In a section discussing the Commission's project review activities during its first year of existence, the report offers the following examples of projects that "could alter the natural flow of water, its quality and even the cost of water downstream," and that required review for compatibility with the Comprehensive Plan: "dams, waste disposal installations, water supply systems and *water using industries*." *Id*. at 19

(emphasis added). The project review highlights from that year include, "two sewage treatment projects, six water supply operations, three multi-purpose watershed development programs, a pumped storage hydroelectric power plan [*sic*], and a high voltage line through a future reservoir site." *Id*.

72. Similarly, DRBC's 1964 annual report identifies thirty-nine projects the Commission reviewed, including surface and ground water supplies, sewerage and sewage treatment facilities, industrial waste treatment operations, petroleum pipeline installations, docks and wharfs, bridge and ferry boat operations, and stream encroachments, and notes that "water using industries" must be screened as projects under Section 3.8 for compatibility with the Comprehensive Plan. DRBC 1964 Annual Report at 8, attached to the Bush Declaration as Exhibit 26.

VII. OTHER COMPACTS

73. The Susquehanna River Basin Commission's ("SRBC") review of unconventional natural gas development projects pursuant to statutory authority nearly identical to that of DRBC supports DRBC's assertion of project review authority over fracking activities.

74. The Susquehanna River Basin Compact, P.L. 91-575, 84 Stat. 1059 *et seq.* ("SRB Compact"), was enacted in 1968 by the Commonwealth of Pennsylvania, the states of New York and Maryland and the federal government in order to place the comprehensive, multiple purpose planning of the conservation,

utilization, development, management, and control of the water resources of the Susquehanna River Basin under the administration of a single, basin wide agency—the SRBC. SRB Compact, Preamble, Section 2.1.

75. The SRB Compact definition of "project" is nearly identical to the definition of "project" in the Compact. Section 1.2(7) of the SRB Compact defines the term "project" as:

> any work, service, or activity which is separately planned, financed, or identified by the commission, or any separate facility undertaken or to be undertaken by the commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources which can be established and utilized independently or as an addition to an existing facility and can be considered as a separate entity for purposes of evaluation.

76. Further, the SRB Compact provides for project review in much the same way as the Compact. See SRBC Compact, Section 3.10.

77. The SRBC by regulation has expressly identified both hydrocarbon development generally, and unconventional natural gas development specifically, as projects:

> ***Hydrocarbon development project.*** A **project** undertaken for the purpose of extraction of liquid or gaseous hydrocarbons from geologic formations, **including but not limited to the drilling, casing, cementing, stimulation and completion of unconventional natural gas development wells**, and all other activities and facilities associated with the foregoing or with the production, maintenance, operation, closure, plugging and restoration of such wells or drilling pad sites that require water for purposes including but not limited to, re-stimulation and/or re-completion of wells, fresh water injection of production tubing, use of coiled tubing units, pumping, cement

> hydration, dust suppression, and hydro-seeding or other revegetation activities, until all post-plugging restoration is completed in accordance with all applicable member jurisdiction requirements. The project includes water used for hydro-seeding or other revegetation activities, dust suppression and hydro-excavation of access roads and underground lines, as well as cleaning of tanks, related to a drilling pad site and centralized impoundments.
>
> ***Unconventional natural gas development project.*** A hydrocarbon development **project** undertaken for the purpose of extraction of gaseous hydrocarbons from low permeability geologic formations utilizing enhanced drilling, stimulation or recovery techniques.

18 CFR § 806.3 (emphasis added).

78. "Projects requiring review and approval" by the SRBC include, among others, "Any unconventional natural gas development project in the basin involving a withdrawal, diversion or consumptive use, regardless of quantity. 18 C.F.R. § 806.4(a)(8). This provision requiring review of all unconventional natural gas development projects regardless of the quantity of water used (as set forth in paragraph 24 above, all such projects use water consumptively) differs from SRBC's review of other projects which are subject to a consumptive use quantity threshold. 18 C.F.R. § 806.4(a)(1).

79. The SRBC regulations establish an approval by rule process which imposes conditions under which unconventional natural gas development projects and other hydrocarbon development projects may operate. 18 C.F.R. § 806.22(f). This process applies regardless of the source or sources of water being used consumptively. 18 C.F.R. § 806.22(f)(1). For example, the project sponsor

must comply with metering, daily water use monitoring and quarterly reporting, satisfy the mitigation requirements set forth in section 806.22(b), obtain all necessary federal, state and local approvals, and certify to the SRBC that all flowback and production fluids have been re-used or treated and disposed of in accordance with applicable state and federal law. 18 C.F.R. §§ 806.22(f)(4), (5), (7) and (8). The project sponsor may only use water at its well pad site originating from sources approved by the SRBC. *See, e.g.,* 18 C.F.R. §§ 806.22 (f)(9), and (11)-(14).

80. Based on similar statutory authority as that granted to the DRBC, the SRBC has been reviewing unconventional natural gas drilling activities as projects for nearly a decade to "ensure the appropriate management controls were in place to allow unconventional natural gas development activity to occur, while avoiding impacts to competing water uses and the aquatic ecosystems of the [Susquehanna River] Basin." SRBC, *Water Use Associated with Natural Gas Development: An Assessment of Activities Managed by the Susquehanna River Basin Commission, July 2008-March 2016*, 1 (2016), attached to the Bush Declaration as Exhibit 27; 18 C.F.R. § 806.4 (a)(8). SRBC's course of performance provides strong support for the conclusion that the Compact drafters also intended activities like fracking to be considered projects and thus subject to the Commission's project review jurisdiction.

VIII. ADDITIONAL INTERPRETIVE TOOLS

81. Pennsylvania's regulations governing the extraction of natural gas through fracking reinforce the conclusion that many of the activities WLMG plans to undertake and facilities it plans to employ are required by Pennsylvania law for the conservation, utilization, control, development, or management of water resources. For example, a natural gas well operator is required to:

(a) "Control and dispose of fluids, residual waste and drill cuttings, including tophole water brines, drilling fluids, drilling muds, stimulation fluids, well servicing fluids, oil, production fluids, and drill cuttings in a manner that prevents pollution to waters of [Pennsylvania]." 25 Pa. Code § 78a.54.

(b) Develop a plan for implementing § 78a.54, with such plan to identify the control and disposal methods the well operator intends to use. 25 Pa. Code § 78a.55.

(c) Contain pollutional substances and drilling wastes, including brines and drilling fluids, in one or more pits or tanks designed to prevent leakage. 25 Pa. Code § 78a.56(a). The temporary storage of wastes generated at the site, and control, storage, and disposal of production fluids, are also regulated by PADEP. 25 Pa. Code § 78a.56-57.

(d) Design and construct the well site using secondary containment in accordance with § 78a.64a. 25 Pa. Code § 78a.64a.

(e) Report to PADEP releases of regulated substances as required by § 78a.66(b). 25 Pa. Code § 78a.66.

(f) Develop a water management plan that demonstrates "the withdrawal and use of the water sources protects those water sources as required by law and protects public health, safety and welfare." 25 Pa. Code § 78a.69.

(g) Equip the well with casings "of sufficient cemented length and strength to attach proper well control equipment and prevent blowouts, explosions, fires and casing failures during installation, completion and operation." 25 Pa. Code § 78a.71.

(h) Prevent pollution or diminution of fresh groundwater by fluids or materials from below the casing seat. 25 Pa. Code § 78a.73.

IX. ARGUMENT

82. The structures, machinery and equipment WLMG plans to construct or place on its well pad as identified in paragraph 26 above are facilities designed for the control, collection or storage of water resources or to conserve and protect water resources.

83. As set forth in paragraph 9(c) above, a facility includes any real property, structure, machinery, equipment or other item identified in the definition of facility "*for* the control, collection, storage, withdrawal, diversion, release, treatment, transmission, sale or exchange of water," or "*to conserve and protect* the

water resources of the [B]asin or any existing or future water supply source." Compact, § 1.2(e) (emphasis added). Facilities may be "projects." *See* paragraph 9(b) above (definition of "project").

84. The Third Circuit concluded that the definition of "project" is ambiguous with respect to the extent to which the word "for" in the definition has a limiting effect. *Wayne II* at 529-530. Because the definition of "facility" uses the term "for" in a similar manner, it follows that the ambiguity may be the same in both definitions.

85. WLMG contends that the word "for" in the definition of "project," (and as we now understand WLMG's argument, it likewise contends that the word "for" in the definition of "facility") means "for the purpose of." *Wayne II* at 529. In contrast, DRBC contends that the word "for" means "deliberately planned to." As shown below, this ambiguity need not be resolved in the context of the present Motion because the Motion succeeds under either interpretation.

86. WLMG plans to use the structures, machinery and equipment identified in paragraph 26 above for the purpose of the control, collection, and storage of wastewater and to conserve and protect the water resources of the Basin, including the drinking water aquifer under the well pad site, the surface water which the wastewater may pollute, and the related uses of land which may be adversely impacted by the wastewater. Whether "for" means "for the purpose of"

as WLMG contends, or means "deliberately planned to" as DRBC contends, each feature described in paragraph 26 above fits squarely within the definition of "facility."

87. Even under Plaintiff's interpretation of the word "for," because these facilities are *for the purpose of* the "conservation, utilization, control, and management of water resources" and "can be established and utilized independently or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation," they may each be a project, or in combination constitute a larger wastewater management project.

88. The conclusion derived from the definitional sections is supported by the use of the term "project" in other sections of the Compact. For example, the term "project" in Sections 5.1, 7.1, 7.2 and 7.3 is not limited to the types of projects constructed by the Corps. Greenwald Dep. 151:21-157:21, Mar. 3, 2020 (Exhibit I). And nothing in the literal language of Sections 3.8, 13.1 or 13.2, which likewise use the term "project," suggests that Corps projects were all that the drafters contemplated.

89. The drafting history, DRBC's course of performance, and SRBC's implementation of its compact also support the conclusion that although some projects may be of the type constructed by the Corps, others may be very different. In light of (i) the concern for pollution control evidenced throughout the historical

record, including among other things the Supreme Court Decrees, DRBAC meetings, the Corps' Basin study, and Syracuse Report discussed above, (ii) DRBC's review since its inception of projects threatening or designed to control and manage potential water pollution, and (iii) SRBC's review of all unconventional natural gas development projects, wastewater management activities and facilities employed as part of unconventional natural gas development activities are clearly a project.

90. In addition, as one of its earliest actions, DRBC in 1964 instituted project review of any use, impairment, or penetration of an aquifer or any other underground water resource. DRBC Resolutions 64-8 and 64-11 (Exhibit 13 to Bush Declaration). Because WLMG plans to penetrate an aquifer with its well bore, its project is subject to review in accordance with Section 2.2.6 of DRBC's Water Code.

91. As set forth in Section IV above, Uncontested Facts Following Fact and Expert Discovery, the fracking activity WLMG plans to undertake is known to have polluted groundwater and surface water sources due to, among other things, spills and leaks of chemicals used and wastewater created during fracking, migration of fracture fluids, wastewater and gases through defective casings and cementing, blowouts, and spills and leaks from wastewater storage, handling and transportation facilities. Mouser at 15-18. WLMG's planned activities pose these

risks. Mouser Supplemental at 10-11. DRBC's project review authority under Section 3.8 of the Compact is designed to protect DRBC's Comprehensive Plan by authorizing review of, among other things, wastewater management activities and facilities the operation of which may degrade groundwater supplies, impair drinking water sources and aquatic habitat, and impair uses of water resources protected by the Comprehensive Plan.

X. CONCLUSION

92. Based on the language of the Compact, the drafting history, the Commission's course of performance, and administration of the SRB Compact, WLMG's planned waste management activities and facilities comprise one or more waste management projects. As such, DRBC is entitled to judgment as a matter of law on these aspects of WLMG's planned undertaking.

WHEREFORE, Defendant Delaware River Basin Commission respectfully requests that partial summary judgment be entered in its favor, and that this Court conclude and declare that WLMG's planned activities and planned facilities including structures, machinery and equipment, to be undertaken, constructed or operated for the purpose of managing wastewater and related uses of land, are a "project" within the meaning of the Delaware River Basin Compact.

Respectfully submitted,

WARREN ENVIRONMENTAL COUNSEL LLC

s/ Kenneth J. Warren

Dated: April 6, 2020

Kenneth J. Warren, PA 30895
Mark L. Greenfogel, PA 323757
975 Mill Road
Millridge Manor House Suite A
Bryn Mawr, PA 19010
(484) 383-4830

Attorneys for Defendant Delaware River Basin Commission

CERTIFICATE OF SERVICE

I, Kenneth J. Warren, hereby certify that I have on this 6th day of April 2020, electronically filed the Defendant Delaware River Basin Commission's Motion for Partial Summary Judgment using the CM/ECF system which will send notification of such filing via electronic service to the following:

Attorneys for Plaintiff, Wayne Land and Mineral Group, LLC:

David R. Overstreet, Esquire
Overstreet & Nestor, LLC
461 Cochran Road, Box 237
Pittsburgh, PA 15228
david.overstreet@palawgroup.com

Christopher R. Nestor, Esquire
Overstreet & Nestor, LLC
1425 Crooked Hill Road
#62066
Harrisburg, PA 17106-2066
christopher.nestor@palawgroup.com

Jeffrey Belardi, Esquire
Belardi Law Offices
TekRidge Center
50 Alberigi Drive, Suite 114
Jessup, PA 18434
jeff@beldardilegal.com

Attorneys for Intervenors-Defendants, Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper:

Mark L. Freed, Esquire
Joanna A. Waldron, Esquire
Curtin & Heefner LLP
Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
mlf@curtinheefner.com
jaw@curtinheefner.com

Dated: April 6, 2020 ____s/ Kenneth J. Warren_____