

**The
Business
Council**



April 14, 2011

Pamela Bush
Secretary and Assistant General Counsel
Delaware River Basin Commission
P.O. Box 7360
25 State Police Drive
West Trenton, NJ 08628-0360

Re: Proposed Natural Gas Development Regulations

Dear Ms. Bush:

On December 9, 2011, the Delaware River Basin Commission ("DRBC") proposed a new Article 7 to the DRBC's Water Quality Regulations applicable only to the construction and operation of natural gas development projects ("Draft Regulations"). The Signatories to this letter appreciate the opportunity to provide these comments regarding the Draft Regulations and encourage the DRBC to work cooperatively with the natural gas industry to develop reasonable, science-based standards for the use and protection of the Delaware River Basin's ("Basin") water resources.

As proposed, the Draft Regulations appear to create substantial barriers to the exploration and development of natural gas resources within the Basin and to enlarge the regulatory and permitting jurisdiction of the DRBC in ways that overlap with existing and developing regulatory programs administered by the member states, particularly New York, as well as programs administered by the DRBC itself. Of particular concern to the Signatories are the overlap and inconsistency with state programs, the expanding jurisdiction of DRBC, the barriers to development, the duplication of existing DRBC programs and the excessive financial assurance requirements. These concerns are detailed more fully herein.

Overlap and Inconsistency with State Programs

The DRBC's Compact specifically acknowledges that one of the purposes of the member states is "to preserve and utilize the functions and duties of existing offices and agencies of government[.]" DRBC Compact, § 1.5. This includes the environmental agencies of the member

states. Yet, the Draft Regulations are broadly cast to govern many of the same features of natural gas development that are specifically within the purview of state regulation and are, in fact, being fully regulated by the member states. The Draft Regulations, therefore, needlessly duplicate and, in many ways, conflict with state-level requirements.

In New York, the Department of Environmental Conservation's ("NYSDEC") regulates natural gas development and production in the state. Specifically, it is the Division of Mineral Resources within the NYSDEC that is responsible for ensuring the environmentally sound development of New York's mineral resources and which regulates natural gas extraction gas. This regulation of the natural gas industry is long-standing in New York, beginning many decades ago.

The NYSDEC regulates the drilling, operation and plugging of natural gas wells to ensure that all natural gas activities are conducted in an environmentally safe manner and in accordance with the statutory mandates found in New York's Environmental Conservation Law (ECL). As set forth in ECL §3-0301(1), the NYSDEC's broad authority over natural gas development includes, among other things, the power to (1) manage natural resources to assure their protection and balanced utilization, (2) prevent and abate water, land and air pollution, and (3) regulate storage, handling and transport of solids, liquids and gases to prevent pollution. Also pertinent is Article 23 of the ECL, New York's Oil, Gas and Solution Mining Law, which sets forth the state's comprehensive requirements for drilling, operation and plugging, as well as the NYSDEC's implementing regulations found at Title 6 of the New York Code of Rules and Regulations, Chapter V, Subchapter B. Finally, various other regulatory programs administered by the NYSDEC govern natural gas development activities. *See, e.g.*, 6 NYCRR Parts 660-665 (wetlands); 6 NYCRR Part 750 (water discharge).

New York also regulates natural gas development activities under its State Environmental Quality Review Act ("SEQRA"). NYSDEC first evaluated its oil and gas regulatory program on a comprehensive basis in the late 1980s/early 1990s – a process which included over a decade of extensive public input and research by the NYSDEC. The culmination of this effort was a Generic Environmental Impact Statement ("GEIS"), and related Findings Statement, that the NYSDEC issued in 1992 and which set forth the parameters for reviewing oil and gas well permitting statewide. Major issues identified and addressed through the GEIS included impacts on water quality; impacts of drilling in sensitive areas, such as drinking water watersheds, freshwater aquifers and other sensitive habitats; and impacts caused by drilling and production wastes.

More recently, in 2008, the then-Governor of New York determined that some aspects of the current and anticipated application of horizontal drilling and high-volume hydraulic fracturing warranted further review under SEQRA and ordered the NYSDEC to supplement the 1992 GEIS. The goal has been to identify and impose appropriate regulatory requirements for the development of natural gas that will foster the efficient development of New York's abundant natural resources as well as ensure that all environmental and public health impacts are mitigated or avoided.

The NYSDEC therefore commenced another extensive effort to review oil and gas drilling activities in the context of a Supplemental Generic Environmental Impact Statement ("SGEIS").

After an extensive period of analysis, study, considerable public input and the receipt of thousands of comments, NYSDEC issued a draft SGEIS in September 2009. To date, the process continues with another draft expected in June 2011, which will be followed by additional public comment. In short, this SGEIS process has involved numerous consultants, scientific study, legal analysis, and public input, and is destined to result in a robust set of requirements for natural gas development in New York. Once finalized, the SGEIS will set additional parameters for the development of the State's mineral resources, and the NYSDEC will process and issue well permits for natural gas development in accordance with the ECL, its implementing regulations and both the 1992 GEIS and the SGEIS. As a result, New York will have the most comprehensive and extensive regulatory program governing natural gas exploration and development.

The Draft Regulations, however, create an additional framework that purports to regulate many of the same aspects of natural gas development already regulated by the NYSDEC. To illustrate, both the draft SGEIS and the DRBC's proposed regulations contain provisions applicable to well-site development stormwater management, flow-back treatment, transportation and disposal, well-site buffers and setbacks, pre-alteration reports and water well monitoring, and protection of floodplains and wetlands. Since these topics are fully and comprehensively regulated by New York, it is unnecessary for the DRBC to attempt to regulate them, particularly given New York's comprehensive regulatory programs and the success of its regulatory oversight.

The standards developed by the DRBC in the proposed regulations also conflict in many ways with the standards in the draft SGEIS that have been thoroughly investigated and vetted by the NYSDEC and found to be sufficiently protective of the environment. To name just two examples, the draft SGEIS proposes 150-foot setbacks for well sites near water bodies and 300-foot setbacks from reservoirs, while the Draft Regulations would require 500-foot setbacks from water bodies or reservoirs. Similarly, the draft SGEIS would permit development in 100-year floodplains subject to heightened state and local standards of development, while the DRBC purports to prohibit project sponsors from siting well pads in any 100-year floodplain.

In sum, the duplicative and conflicting provisions in the Draft Regulations engender unnecessary additional administrative expense, delays in project development, and uncertainty in the regulatory process for those investing in the development of the resource. Yet, there is no net benefit to the Basin's water resources by imposing requirements on the natural gas industry that duplicate or unnecessarily conflict with state-level requirements. Moreover, to impose such duplicating and conflicting provisions disregards the DRBC's stated purpose of preserving and utilizing resources of its member states. The Signatories, therefore, propose that the DRBC eliminate all provisions of the proposed Draft Regulations that are subject to regulation by the member states and, instead, defer to the member states with respect to the regulation of well-pad development.

Expanding Jurisdiction

The DRBC's jurisdiction is not limitless. Indeed, the DRBC Compact specifically delineates the jurisdiction of the DRBC. However, the Draft Regulations appear to ignore this reality by expanding on this jurisdiction and, therefore, should be reconsidered.

A substantial portion of the Draft Regulations focus on regulating land uses, including the clearing and alteration of areas and the construction, location, planning, and development of natural gas well pads. The Signatories are concerned that the proposed regulations greatly expand DRBC's review and approval authority to address basic land development issues that are not clearly tied to protection of the Basin's water resources. Extending jurisdiction in the context of natural gas development may lead inevitably to similar regulation for other land development. It also suggests equal protection concerns.

The proposed regulations broadly state that natural gas development activities are "projects" subject to review and approval by the DRBC, presumably under the theory that well site development will have a substantial effect on the Basin's water resources. The Signatories have two fundamental concerns with the proposed regulations in this regard.

First, the Compact does not authorize the DRBC to regulate land uses. Those matters are traditionally left to the states, and should be in this context as well. This is particularly true, when as detailed herein, the member states such as New York have a full and robust program regulating land uses.

Second, assuming the proposed regulations are both authorized and adopted as framed, they inevitably create precedent for the DRBC to require project review and approval for many activities that currently are not subject to DRBC review. DRBC's review and approval authority attaches to any "project" having a substantial effect on the water resources of the Basin. If there is a substantial effect, review is required. The problem created by the proposed regulations is that the process of developing a well pad involves land clearing and alteration activities that are not materially different in effect on the Basin's water resources than land clearing and alteration for other purposes. In fact, many other activities unregulated by the DRBC involve the clearing of forested areas and the alteration of land to the same or much greater extent than natural gas development. If natural gas development activities are deemed to have a substantial effect on the Basin's water resources, then these other activities also must necessarily have such effect. Given the limited and temporal disturbance associated with developing a natural gas well pad, the DRBC will find it very difficult moving forward to distinguish legitimately, and not require review and approval of, any other activity involving land clearing or alteration.

Accordingly, the Signatories submit that natural gas development activities should not be targeted for special rules and restrictions to prevent land clearing and alteration where other activities with same or greater impact are not regulated. The Signatories therefore propose that the DRBC remove provisions in the Draft Regulations that purport to regulate land use.

Barriers to Development

The Draft Regulations create a number of significant barriers to natural gas development within the Basin. One important example is the requirement for DRBC "docket" approval of a Natural Gas Development Plan ("NGDP") for all project sponsors having lease holdings in excess of 3.200 acres or the intent to develop more than five natural gas well pads in the Basin. This requirement, however, is simply unworkable and unreasonable. It is also unnecessary.

It would be extraordinarily difficult, if not impossible, for an operator to develop a five-year forward plan of development with the level of certainty and detail required by the Draft Regulations. The process of exploring for and producing natural gas is not conducive to a pre-determined master plan. Indeed, development is constantly changing based on factors such as leasehold interests, demands of landowners, recent well data, available risk capital, etc. The level of detail required for NGDP's in the Draft Regulations only compounds this problem. The Signatories recommend that the NGDP requirement be eliminated in its entirety.

The proposed measures that govern siting of well pads and setbacks also create substantial barriers to development by severely limiting, the areas in which natural gas development may occur in the Basin. The siting restrictions, for example, preclude development on a slope with a pre-alteration grade of 20 percent or greater even though well pads are routinely located on greater slopes, with no adverse environmental impacts. The proposed setbacks would require 500-foot separation from all water bodies and wetlands, surface water supply intakes, and water supply reservoirs. These setbacks greatly exceed the requirements of the member states and would substantially constrain areas of acceptable development. They also would require operators to leave gas untapped, an extremely unfortunate result given the country's energy needs as well as the economic needs of the member states, surrounding communities and local landowners. Accordingly, since these requirements do not apply to other industries, they should not be adopted in this context either.

Existing DRBC Regulatory Programs

The DRBC already has detailed programs and regulations that address covered activities. For instance, the DRBC has an entire program devoted to water withdrawals generally. Yet, the Draft Regulations contain provisions that duplicate existing DRBC programs. For instance, the proposed regulations address water withdrawals specific to the natural gas industry despite the DRBC's existing, generally applicable, program for water withdrawals. However, there has been no showing that special requirements are needed targeting water withdrawals from the natural gas industry. As such, the Signatories question the need for a special set of regulations for the natural gas industry and submit that the DRBC's existing, generally applicable programs should be utilized for any covered activity, including activities associated with natural gas development. Indeed, the DRBC has not singled out any other industry and imposed special requirements. To do so for the natural gas industry would be improper.

The Signatories further submit that, to the extent requirements, e.g., for water sources, contained in the Draft Regulations duplicate standards that now exist elsewhere in DRBC regulations, they are unnecessary and should be eliminated. If the DRBC believes that new or different standards are needed, the existing programs that focus on the use, management and control of the Basin's water resources should be amended and applied to all persons or entities engaged in the covered activity, not just those engaged in natural gas development.

Excessive Financial Assurance Requirements

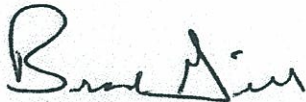
The Draft Regulations would require an operator to provide financial assurance in the amount of \$125,000 *per natural gas well*. For an operator with a significant leasehold position, the total bonding amount would be astronomical. At a hundred wells, the total bond amount would equal

\$12.5 million. At 500 wells, it would equal \$62.5 million. These amounts are unjustified and bear no relation to any risk to be mitigated. Even assuming that additional bonding beyond state requirements is warranted (a point with which we disagree), there should be a reasonable cap on an operator's bonding obligation. A similar concern exists for small operators who lack the resources to post such significant financial assurance for every well they drill in the Basin, particularly when they are already required to provide financial assurances under New York's regulatory program. Accordingly, the Signatories request that the DRBC revisit the proposed financial assurance requirements.

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We thank the Commission for the opportunity to submit these comments.

Yours very truly,



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