

**TESTIMONY**  
**HOUSE STATE GOVERNMENT COMMITTEE**  
**DELAWARE RIVER BASIN COMMISSION**  
**HARRISBURG, PA**  
**JUNE 11, 2018**

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For the record, I am Joe Garner, President of the PA Septage Management Association (PSMA).

**PA Septage Management Association** represents firms that install and service onlot septic systems and also perform other services such as application of biosolids (treated waste) to farms. In addition, many of our member firms serve municipality facilities that discharge into the Delaware River and tributaries. Our members have both professional and personal interests in conserving natural resources and the quality of Pennsylvania's waters. Many of our members live in the Delaware River Basin and are themselves outdoors people who fish, hike, boat, hunt, and otherwise appreciate a quality outdoors environment.

However, PSMA believes that the Delaware River Basin Commission has exceeded its authority beyond its original mission in trying to keep waters pure and unpolluted.

### **This Is Not Just About Fracking**

Thus far, attention has focused on the anti-fracking regulation that the Delaware River Basin Commission is going to approve. Not surprisingly, fracking foes regard the regulation as a critical issue. Not surprisingly, supporters of natural gas development feel just as strongly on the other side. House members may recall the debate on House Resolution 515 which ended up being a debate between pro and anti-fracking legislators.

**The issue is far larger than this one regulation and this one industry.**

**PSMA asks that this committee examine the larger picture, one of state sovereignty.**

Whether or not a lawmaker supports fracking, the fact is that there is a Pennsylvania law, Act 13, which regulates fracking. PSMA's issue with the fracking regulation is that it is an example where the Delaware River Basin Commission decides that it can do what it wants even if it conflicts with Pennsylvania law.

We do not believe the Commission should be able to ignore enacted PA legislation. This is a matter of state sovereignty.

The original enabled legislation which entered Pennsylvania into the Delaware River Basin Commission is Act 268 of 1961. Section 7.4 Water Management reads:

#### Section 7.4. Cooperative Planning and operation

- (a) The commission shall **cooperate with the appropriate agencies of the signatory parties** and with other public and private agencies in the planning and effectuation of a coordinated program of facilities and projects authorized by this article.
- (b) The commission **shall not operate any such project or facility unless it has first found and determined that no other suitable unit or agency is available** to operate the same under reasonable conditions... (*Emphasis added*)

Ignoring Pennsylvania's Act 13 simply because the Delaware River Basin Commission is anti-fracking does not show willingness to cooperate with other public and private agencies if one includes the PA General Assembly or the Department of Environmental Protection as interested parties. In addition, (b) says that **the Commission cannot act on a "project" unless no other suitable unit or agency is available.** *The Delaware River Basin Commission is asserting that banning fracking is a "project", something which is being litigated.*

PA Department of Environmental Protection and the Environmental Quality Board are quite "suitable" and should the General Assembly change Act 13, DEP will implement those changes.

### **Future Commission Precedent Expansion Concerns**

As an expansion of the Delaware River Basin Commission's power, the anti-fracking regulation establishes a precedent. In the name of protecting water, the Commission could now:

- Restrict or prohibit application of biosolids on farmland even though normal activities of farming which include application of these treated wastes are regulated by Pennsylvania's Right to Farm Act and by ACRE. This activity is also performed through a regulated permitting process.
- Restrict or ban installation of onlot septic systems. These systems are a natural way to dispose of human waste and installation is also a regulated process by Pennsylvania. Act 537 gives DEP regulatory authority over septic systems and local officials, the Sewage Enforcement Officers (SEOs), also have legal authority to review local projects.

Currently, DEP is implementing Act 26 of 2017. This sets standards for approval of what are termed 'alternate systems'. These are newer ways to install septic systems that are used in other states. PA law specifies that the Department of Environmental Protection working in conjunction with the Sewage Advisory Committee, shall develop standards by which to review these technologies. The Delaware River Basin Commission should not be able to take away Pennsylvania's authority to decide which alternate systems are acceptable simply because it decides to.

PSMA asks that members of the State Government Committee review a sponsorship memo circulated by Representative Jonathan Fritz which asks you to sign on to legislation which expressly prohibits the Delaware River Basin Commission from regulating or restricting installation and maintenance of onlot septic systems since Pennsylvania already has a regulatory system in place. Rep. Fritz' bill would prevent the 'mission creep' now taking place by the Commission from expanding into the regulation of onlot septic systems.

### **Conclusion**

We hope that a takeaway from this hearing will be that you understand the real and present danger to state legislative regulatory authority that the Delaware River Basin Commission poses. Members of the PA Septage Management Association are businesses regulated under the laws of the Commonwealth. We would like to keep it that way.

Following are several resources for your consideration:

- ~ Appendix A: Act 13
- ~ Appendix B: Act 26
- ~ Appendix C: Sections of the PA enabling 1961 law Act 268 enabling PA participation in the Delaware River Basin Commission relevant to this testimony
- ~ Appendix D: Rep. Fritz' Sponsorship Memo

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### **Appendix A: Act 13**

The Commission action clearly violates this section of the Compact. Pennsylvania's Act 13 sets forth a regulatory framework for extraction of natural gas in all of Pennsylvania. It does NOT exempt the Delaware River Basin Commission as taking precedence over Pennsylvania law.

(Source:

<http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/2012/act13.pdf>)

### APPENDIX TO TITLE 58 OIL AND GAS

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Supplementary Provisions of Amendatory Statutes

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2012, FEBRUARY 14, P.L.87, NO.13

#### § 5. Application of law.

The addition of 58 Pa.C.S. Ch.23 shall apply to **all oil and gas deposits and oil and gas development activities and operations subject to the jurisdiction of the Commonwealth.** With respect to oil and gas deposits on national forest lands identified under section 17(o) of the Mineral Leasing Act (106 Stat. 3108, 30 U.S.C. § 226(o)), the application of regulations and statutes adopted by the Commonwealth shall be the exclusive method and means by which any requirements may be imposed on any feature, aspect or process of oil and gas operations pertaining to the development of the deposits. (*Emphasis added*)

### **Appendix B**

#### **Pennsylvania Statute Regulating Onlot Septic Alternate Systems (Act 26 of 2017)**

[http://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2017&sind=0&body=S&type=B&bn=144](http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2017&sind=0&body=S&type=B&bn=144)

AN ACT

Amending the act of January 24, 1966 (1965 P.L.1535, No.537), entitled, as amended, "An act providing for the planning and regulation of community sewage systems and individual sewage systems; requiring municipalities to submit plans for systems in their jurisdiction; authorizing grants; requiring permits for persons installing such systems; requiring disclosure statements in certain land sale contracts; authorizing the Department of Environmental Resources to adopt and administer rules, regulations, standards and procedures; creating an advisory committee; providing remedies and prescribing penalties," further providing for official plans.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5 of the act of January 24, 1966 (1965 P.L.1535, No.537), known as the Pennsylvania Sewage Facilities Act, is amended by adding subsections to read:

Section 5. Official Plans.--\* \* \*

(c.1) When proposing a plan supplement or plan revision for a new land development, the applicant may submit and the department shall accept, for the purpose of satisfying general site suitability requirements, any conventional or alternate on-lot system permittable by a sewage enforcement officer.

(C.2) (1) WITHIN 180 DAYS OF THE EFFECTIVE DATE OF THIS SUBSECTION, THE DEPARTMENT SHALL, IN CONSULTATION WITH THE SEWAGE ADVISORY COMMITTEE, DEVELOP SCIENTIFIC, TECHNICAL AND FIELD TESTING STANDARDS UPON WHICH AN EVALUATION OF EACH ONLOT SEWAGE SYSTEM THAT HAS BEEN CLASSIFIED AS AN ALTERNATE SYSTEM IN ACCORDANCE WITH 25 PA. CODE § 73.72 (RELATING TO ALTERNATE SEWAGE SYSTEMS) SHALL BE BASED.

(2) THE DEPARTMENT SHALL, IN CONSULTATION WITH THE SEWAGE ADVISORY COMMITTEE, REVIEW THE SCIENTIFIC, TECHNICAL AND FIELD TESTING DATA FOR EACH INDIVIDUAL ONLOT SEWAGE SYSTEM AND EACH COMMUNITY ONLOT SEWAGE SYSTEM THAT IS CLASSIFIED AS AN ALTERNATE ONLOT SEWAGE SYSTEM.

(3) IF, BASED ON THE REVIEW SPECIFIED IN PARAGRAPH (2), THE DEPARTMENT DETERMINES THAT THERE IS SUFFICIENT SCIENTIFIC, TECHNICAL AND FIELD TESTING DATA TO RECLASSIFY AN ALTERNATE SYSTEM AS A CONVENTIONAL SYSTEM, THE DEPARTMENT SHALL ECLASSIFY THE ALTERNATE SYSTEM AS A CONVENTIONAL SYSTEM.

(4) IF, BASED ON THE REVIEW SPECIFIED IN PARAGRAPH (2), THE DEPARTMENT DETERMINES THAT THERE IS INSUFFICIENT OR INADEQUATE SCIENTIFIC,

TECHNICAL OR FIELD TESTING DATA TO CONTINUE CLASSIFYING THE ONLOT SEWAGE SYSTEM AS AN ALTERNATE SYSTEM, THE DEPARTMENT MAY UNDERTAKE A RULEMAKING TO REMOVE THE SYSTEM'S CLASSIFICATION AS AN ALTERNATE SYSTEM.

\* \* \*

### **Appendix C: Limits to Commission Authority**

The original 1961 Compact as ratified by Pennsylvania Act 268 of 1961 (July 7, 1961) suggests that the Commission is supposed to work in cooperation with states rather than deciding for itself what a state will do.

### **Delaware River Basin Compact Act 268 July 7, 1961**

#### Article 1: 1.3 Purpose and Findings

( c ) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; **to provide for cooperative planning and action by the signatory parties with respect to such water resources**; and to apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.

<http://www.state.nj.us/drbc/library/documents/compact.pdf> (*Emphasis added*)

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## **Appendix D: Sponsorship memo from Rep. Fritz**

Dear Colleague;

I respectfully ask that you join me in sponsoring legislation that clarifies the role of the Delaware River Basin Commission (DRBC) as it relates to protecting waters in the Delaware River Basin region.

Regrettably, the DRBC appears to be disregarding terms of the Interstate Compact by overruling the authority of the PA Department of Environmental Protection (DEP) when it comes to the proposed regulation that would permanently ban hydraulic fracturing in the Delaware River Basin. This action by the DRBC is a classic example of what is called “mission creep”.

My proposed legislation is a measure to prevent a further expansion of that self-assumed authority (“mission creep”) by the DRBC.

It is foreseen that the Delaware River Basin Commission will likely attempt to regulate installation and maintenance of onlot septic systems. These systems are regulated by DEP under the authority of Act 537. The technology used to install an onlot septic system must be approved by the Department, per Act 26 of 2017. A permit is issued by DEP to approve the construction. Compliance with these rules is also governed by DEP along with help of Sewage Enforcement Officers (SEOs), local officials or contractors whose activities are also regulated by Act 537 and DEP. This fear that Act 537 and the Department of Environmental Protection’s regulatory authority will be ignored by the Delaware River Basin Commission is real and, as such, necessitates legislative safeguarding.

Jonathan Fritz, 111th District

**COMMENTS TO**  
**DELAWARE RIVER BASIN COMMISSION**  
**Proposed New 18 CFR Part 440 – Hydraulic Fracturing in Shale and Other**  
**Formations**  
**Subchapter B – Special Regulations**  
**March 29, 2018**

**From**  
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Dear Mr. Tambini and Ms. Bush:

Thank you for receiving these comments from the Pennsylvania Septage Management Association (PSMA) relative to the proposed regulation that would ban fracking in the Delaware River Basin and tightly regulate water transport if used for the development of natural gas in the Delaware River Basin or elsewhere.

**PA Septage Management Association** represents firms that install and service onlot septic systems but also perform other services such as application of Biosolid (treated waste) to farms. In addition, many of our member firms serve municipality facilities that discharge treated waste water into the Delaware River and tributaries. A good number of our member firms also help service the development of natural gas by transporting water.

PSMA members service customers in Pennsylvania, New York, New Jersey, Delaware, and Maryland, all of which are states included in the Delaware River Basin.

Our members have both professional and personal interests in conserving natural resources and the quality of Pennsylvania's waters. A good number live in the Delaware River Basin area and appreciate the value of pure water as consumers, as people devoted to the outdoors, and as conservationists who want to protect this resource.

## **Initial General Comment**

PSMA was hesitant to submit comments because it appears that the proposed regulation's approval is a foregone conclusion.

PA Governor Tom Wolf stated during his campaign what his views were on the moratorium. In voting for the draft resolution September 13, 2017, PA Governor Tom Wolf filled a campaign promise to continue a moratorium that he made in a May 8, 2014, interview with WITF and State Impact Pennsylvania.

***Q: Do you support any changes to any of the current moratoriums?***

*A: There's a moratorium on the Delaware River Basin. I support continuation of that moratorium and I support a moratorium on drilling in any state lands...*

*(Source: <https://stateimpact.npr.org/pennsylvania/2014/05/08/meet-the-candidates-tom-wolf>)*

New Jersey's Governor made it clear during his 2017 campaign exactly how he would vote on the proposed regulation. Then Governor-elect Phil Murphy attacked Governor Christie's September 13 abstention on the 3-1 vote by the Delaware River Basin Commission to push forward with an anti-fracking regulation. Murphy said "*New Jersey may not have any fracking, but our connection to the Delaware River would force us to live with the environmental harm it causes. When I am governor, New Jersey will proudly vote for the final rule to implement this ban.*"

New York's Governor has also made it clear where he stands relative to fracking.

Our concern is that this regulatory review process being undertaken by the Delaware River Basin Commission is being done to follow a regulatory procedure but not to gain meaningful input from stakeholders since a majority of the Governors on the Delaware River Basin Commission are already committed to voting for this ban, thus rendering comments like ours something to be read and tossed. That is our concern. Frankly, PSMA hopes that this process is real, that the Delaware River Basin Commission listens to these constructive comments.

## **Specific Comments**

### **Geographic Scope**

While the proposed regulation is clear in that it holds the view that fracking is inherently bad for the Basin's water and is also clear on what it intends to do – ban fracking, there appears to be uncertainty in its application.

*Article 2 of the 1961 Compact states:*

*2.7 Jurisdiction of the Commission.*

*The commission shall have, exercise and discharge its functions, powers and duties within the limits of the basin.*

The phrase “*Within the limits of the basin*” may lead to confusion about to what geographic areas the regulation pertains.

The DRBC website says that of the PA counties in the basin, eight have Marcellus Shale formations. This covers well over 2/3 of the ground area in the Basin. (Source: DRBC <http://www.nj.gov/drbc/basin/map> Map Showing DRBC Special Protection Waters (SPW), SPW Drainage Area, and Marcellus Shale Formation )

A ban is self explanatory in counties such as Pike and Wayne since their entire geographic area is in the Delaware River Basin. However, there are portions of Lackawanna County, Luzerne County, Carbon County, and Schuylkill County which are in the Delaware River Basin and which have Marcellus Shale formations.

What that means is that fracking can occur in some parts of those counties but not the eastern portions. Has the Delaware River Basin Commission surveyed those areas to determine whether or not active Marcellus Shale development is taking place now in those segments? Does the previous moratorium spell out specifically in which townships or fragments of townships fracking is prohibited? Do those communities know that? Do the energy companies know that?

In other words, independent of the regulation's merits or lack thereof, there may be workability issues and confusion.

**Scope: What Marcellus Shale activities are governed by the proposed regulation?**

The proposed regulation prohibits fracking and prohibits water taken from the Basin relative to natural gas development without a permit. However, there are other Marcellus Shale gas activities -- pipelines. Getting to domestic and international markets requires pipelines, some of which cross or will cross the Delaware River Basin.

Is the Delaware River Basin Commission taking the position that it has veto power over pipeline routing or even whether or not a pipeline can be constructed?

If so, it would be a major expansion of the Commission's authority into areas where other agencies already have primacy. In Pennsylvania, the Department of Environmental Protection regulates pipeline construction permits and safety evaluations. The Federal Government (FERC, Environmental Protection Agency, Army Corps of Engineers, and probably the Energy Department etc.) also exercises regulatory authority over pipelines. The Army Corps of Engineers already voted no to the proposed regulation September 13, 2017, possibly for this reason.

The regulation should clearly state that pipelines are not governed by this proposed regulation or state that it does but be prepared to justify the new authority the Commission seeks to give to itself.

## **Jurisdiction**

### **Limits to Commission Authority**

Anti-fracking advocates claim that the Commission has carte blanche to do what it wants in the name of protecting water and the wording of the Compact does provide wide discretion.

However, the original 1961 Compact as ratified by Pennsylvania Act 268 of 1961 (July 7, 1961) suggests that there are limits to this authority as shown by the following references:

#### *Delaware River Basin Compact*

*Act 268 (PA) July 7, 1961*

#### *Article 1: 1.3 Purpose and Findings*

*( c) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries.*

<http://www.state.nj.us/drbc/library/documents/compact.pdf>

Many of the words used in the Compact are not heeded in what the Delaware River Basin Commission is seeking to do.

*“To remove causes of present and future controversy?” “To provide for cooperative planning?”* Clearly, something like fracking does not reduce controversy. Cooperative planning is not represented by the Commission’s decision to impose this regulation by arbitrary fiat.

Another section of Act 286 addresses jurisdictional overlap.

### *Article 5: Pollution Control*

#### *5.5 Further Jurisdiction.*

*Nothing in this compact shall be construed to repeal, modify or qualify the authority of any signatory party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of waters within its jurisdiction.*

The Commission action violates this section of the Compact. Pennsylvania’s Act 13 sets forth a regulatory framework for extraction of natural gas in all of Pennsylvania. It does NOT exempt the Delaware River Basin Commission as taking precedence over Pennsylvania law.

Source:

<http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/OilGasReports/2012/act13.pdf>

APPENDIX TO TITLE 58 OIL AND GAS

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Supplementary Provisions of Amendatory  
Statutes  
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2012, FEBRUARY 14, P.L. 87, NO. 13

§ 5. Application of law.

The addition of 58 Pa.C.S. Ch. 23 shall apply to **all oil and gas deposits and oil and gas development activities and operations subject to the jurisdiction of the Commonwealth.** With respect to oil and gas deposits on national forest lands identified under section 17(o) of the Mineral Leasing Act (106 Stat. 3108, 30 U.S.C. § 226(o)), the application of regulations and statutes adopted by the Commonwealth shall be the exclusive method and means by which any requirements may be imposed on any feature, aspect or process of oil and gas operations pertaining to the development of the deposits. (Emphasis added)

The original enabling legislation which entered Pennsylvania into the Delaware River Basin Commission is Act 268 of 1961.

Section 7.4 Water Management reads:

*Section 7.4. Cooperative Planning and operation*

- (a) *The commission shall cooperate with the appropriate agencies of the signatory parties and with other public and private agencies in the planning and effectuation of a coordinated program of facilities and projects authorized by this article.*
- (b) *The commission shall not operate any such project or facility unless it has first found and determined that no other suitable unit or agency is available to operate the same under reasonable conditions... (Emphasis added)*

Trying to ignore Pennsylvania's Act 13 simply because the Delaware River Basin Commission is anti-fracking does not show "*willingness to cooperate*" with other public and private agencies such as the PA Department of Environmental Protection.

Another entity that should have been consulted is the PA General Assembly. The General Assembly passed legislation regulating fracking and development of natural gas within the Commonwealth. There is no evidence that the Delaware River Basin Commission has reached out to the PA General Assembly. In fact, the PA House of Representatives adopted House Resolution 515 on October 17, 2017, showing its displeasure of the Commission's unilateral approach with this proposed regulation.

In addition, (b) says that the Commission cannot “*operate any such project*” unless there is no “*suitable*” agency.

PA Department of Environmental Protection is quite suitable to regulate Marcellus Shale natural gas development and extraction. That is what it does now. How is DEP unsuitable is a question the Delaware River Basin Commission must answer before adopting this proposed regulation.

Another issue is whether a “project” is defined as including a prohibition on economic activity. The legal definition of “project” is currently being litigated but the Delaware River Basin Commission has argued in court that fracking and Marcellus Shale activities are “projects” that the Commission can regulate.

If the final court decision upholds this view, the Delaware River Basin Commission does not have this authority to regulate this “project” because a suitable unit or agency is already suitable and clearly available since Act 13 is already implemented.

The burden of proof falls on the Commission to show that Pennsylvania’s regulators are not up to the task of protecting PA waters as relating to fracking. It has not done so.

## **Property Issues**

Property owners in the Delaware River Basin and elsewhere believe that they have property rights relative to exploration and development of natural resources on their property insofar as those uses of property do not conflict with state or local law. Use of the term property here means using land for an economic purpose. Farming, for example, is an economic use of property. Having agritourism or a stable where people pay to ride is an economic activity. So is the leasing of property for Marcellus Shale natural gas extraction.

The proposed regulation is silent on property rights. In ignoring them, the Delaware River Basin Commission opens itself up to extensive judicial and legislative challenges.

Questions the Commission should address might be:

- Does prohibition of leasing/fracking constitute a violation of property rights?
- Does the proposed regulation amount to a “taking” of property since this available economic use is disallowed?
- Should there be just compensation to property owners because of their future economic loss due to the prohibition?
- Although the Commission maintains that it is permitted to regulate underground water as well as surface water, what if there are conflicts with mineral rights laws or court decisions? If natural gas is legally governed by mineral rights laws, exploiting these particular mineral resources would involve water, thus creating more conflict and more litigation.

## **Conclusion**

To PSMA, the issue is not the assertion that fracking is an economic boon to a depressed region. Neither is the assertion that fracking means systematic degradation of water quality.

Our issue is the authority the Delaware River Basin Commission feels that it has to impose this regulation.

The Pennsylvania Septage Management Association believes that the extension of this authority per 18 CFR Part 440—Hydraulic Fracking in Shale and Other Formations is not supported by the 1961 Compact or by Act 286, the enabling statute that joined Pennsylvania to the Commission.

We further hold the position that this proposed regulation should be either withdrawn or halted until these substantive questions are fully answered.