



February 25, 2021

Delaware River Basin Commission
25 Cosey Road
P.O. Box 7360
West Trenton, NJ 08628-0360

Re: Comments on the Delaware River Basin Commission's Proposed Amendments to the Administrative Manual and Special Regulations Regarding Hydraulic Fracturing Activities and Additional Clarifying Amendments

Dear Commissioners:

Thank you for the opportunity to comment on the Delaware River Basin Commission's (the "Commission") Proposed Amendments to the Administrative Manual and Special Regulations Regarding Hydraulic Fracturing Activities ("draft regulations").¹ These comments are submitted on behalf of the Natural Resources Defense Council ("NRDC") and its over half a million members across the country. In brief, NRDC writes to urge the Commission to enact a full ban on fracking in the River Basin—including drilling, a ban on the treatment and disposal of fracking wastewater, and a ban on the withdrawal and export of Basin water for fracking elsewhere.

NRDC is a national, nonprofit, nonpartisan environmental advocacy organization with its principal office located in New York City. NRDC has a long history of litigating and advocating for clean water at both the federal level and in New York State. In 1972, for example, it helped enact the Clean Water Act, America's bedrock water-protection law, and most recently, in 2015, NRDC was a principal advocate for the issuance of the Clean Water Rule, which returned guaranteed protections under the Clean Water Act to hundreds of thousands of miles of streams and tens of millions of acres of wetlands across the country.

NRDC also has deep expertise on the issue of fracking. Among other work, NRDC launched the Community Fracking Defense Project to provide communities with policy, legal, and technical tools to protect themselves from the risks of fracking, including groundwater contamination; air, climate, noise and light pollution; toxic chemical and wastewater spills;

¹ Notice of Rule and Public Hearing, Administrative Manual and Special Regulations Regarding Natural Gas Development Activities; Additional Clarifying Amendments, 83 Fed. Reg. 1586 (proposed Jan. 12, 2018) [hereinafter "Proposed Regulations"].

induced seismicity; and the risk of catastrophic accidents, such as wellsite explosions. As part of this effort, NRDC and other stakeholders successfully advocated for the prohibition of high-volume hydraulic fracturing (“fracking”) activities in New York State, activities that the State found in 2015 significantly threatened New York’s water resources.

As the Commission is well aware, the Delaware River Basin helps provide drinking water for over 17 million people in the Northeast. Yet the basin — which extends from the Catskills in New York to parts of New Jersey, Pennsylvania, Delaware, and Maryland — has been at risk of fracking for over ten years. Recently, the Commission, composed of governors from New York, New Jersey, Delaware, and Pennsylvania, and one federal representative from the Army Corps of Engineers, released draft regulations banning fracking in the entire watershed.

But these new rules do not go far enough. While the draft regulations are an important step in the right direction, they could still open the watershed to the storage, treatment, and disposal of contaminated fracking wastewater—a toxic mix of water, sand, and as many as 1,000 chemicals. And they could also allow companies to draw freshwater from the watershed for use in fracking elsewhere. This will not fully protect public health and the environment. It is critical that the Commission also advance regulations that permanently ban fracking *and* protect the watershed and surrounding communities from all fracking-related activities.

We raise three main points in our comments. First, given the known risks of fracking on water quality, we strongly support the Commission’s proposal to ban fracking in the region. Second, while a ban on fracking is necessary to protect the River Basin from the harms of fracking, it is not sufficient on its own—a ban on fracking wastewater is necessary to ensure that the water quality, economy, and health of the residents of the River Basin are protected from the full harms of fracking. Finally, in order to protect the Delaware River Basin’s already historically low water levels,² we request that the Commission also ban the export of basin water for use for fracking elsewhere.

In support of these points, our comments are divided into five parts. Part I provides the background necessary to understand why fracking and its associated activities can and should be banned in the River Basin. Part II sets forth why fracking should be banned in the River Basin. Part III explains why a ban on the treatment and disposal of fracking wastewater is necessary to achieve the ends sought by the fracking ban. Part IV sets forth why water withdrawals for fracking purposes should also be prohibited in the River Basin. Finally, Part V explains how the bans we request would not violate the limitations on state activity set forth in the dormant Commerce Clause.

For years, NRDC has been studying the harms of fracking wastewater on water quality and human health.³ As part of this effort, we have retained an expert consultant, Judith

² Bruce Shipkowski, *Low Levels in Delaware River Could Keep Re-Enactors on Land*, U.S. News & World Report, Dec. 17, 2017, <https://www.usnews.com/news/best-states/new-jersey/articles/2017-12-17/low-levels-in-delaware-river-could-keep-re-enactors-on-land>.

³ See, e.g., NRDC, *In Fracking’s Wake: New Rules are Needed to Protect Our Health and Environment from Contaminated Wastewater* 6 (2012), <https://www.nrdc.org/sites/default/files/Fracking-Wastewater-FullReport.pdf> [hereinafter “NRDC, *In Fracking’s Wake*”].

Schreiber, Ph.D., former Chief Scientist at the Environmental Protection Bureau of the New York State Office of the Attorney General and former Section Chief of Environmental Research at the New York State Department of Health, to summarize the existing scientific research on this subject. Attached to this letter is a report prepared by Dr. Schreiber on this matter.⁴ Dr. Schreiber's report has formed the basis for the recommendations regarding fracking wastewater that are contained in this letter.

Finally, we thank the Commission for extending the comment period on the draft regulations from February 28, 2018 to March 30, 2018. This extension was helpful in allowing NRDC and many other members of the public to review the proposal in more detail and to comment more meaningfully on this enormously important set of new regulations.

I. Background

a. The Delaware River Basin

The Delaware River Basin is the catchment area of the United States' longest free-flowing river east of the Mississippi. It is remarkable for its pristine character, geographic scope, and singular utility to the Nation's most densely populated region, the Mid-Atlantic. From the headwaters in the Catskill Mountains to the mouth in the Delaware Bay, the Delaware River spans 330 miles, draws from 216 tributaries, and drains surface water from approximately 13,000 square miles across 42 counties in five U.S. states: 6,465 square miles in Pennsylvania, 2,969 square miles in New Jersey, 2,363 square miles in New York, 968 square miles in Delaware, and 8 square miles in Maryland. North to south, the Basin encompasses five, distinct physiogeographic provinces (Appalachian Plateaus, Valley and Ridge, New England, Piedmont, and Coastal Plain), which range in altitude from over 4,000 feet down to sea level.

The Delaware River Basin is also home to bass, spawning shad, trout, and one of the healthiest American eel populations in our country, and sits on top of the Marcellus Shale, the largest natural gas field in the United States.⁵ The Marcellus shale formation underlies about 36 percent of the Delaware River Basin,⁶ and spans six states: New York, Pennsylvania, Ohio, Maryland, Virginia, and West Virginia. To date, the reach of shale under the Delaware River Basin has remained untouched by fracking, preserving clean and safe water and a natural environment in a region that relies on these features for its livelihood.

b. The Environmental, Drinking Water, and Recreational Resources of the Delaware River Basin

The Lower Delaware is one of the most important shad, striped bass, and river herring fisheries in the east. Additionally, the Middle and Upper Delaware represent an unmatched blend of habitats for roaming striped bass, spawning shad, smallmouth bass, trout, and one of the

⁴ Judith S. Schreiber, *Synopsis of Public Health and Environmental Risks Associated with Fracking Wastewater* (2018).

⁵ U.S. Department of Energy, *Modern Shale Gas Development in the United States: A Primer* 17 (2009), http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

⁶ Delaware River Basin Commission, Natural Gas Drilling Index Page, <http://www.state.nj.us/drbc/programs/natural/> (Mar. 29, 2018).

healthiest American eel populations in our country. The Delaware’s drainages and surrounding environs also encompass a substantial oak hickory forest, northern mixed hardwoods, and isolated spruce fir zones that includes bog and fen habitats. And the Basin provides sanctuary to rare and endemic species of plants and animals including bears, bald eagles, native trout, and endangered timber rattle snakes.

The River Basin’s undeveloped, bucolic nature holds tremendous ecological and economic value. Altogether, approximately 17 million people (5% of the total U.S. population) depend on the Delaware River Basin for clean drinking water.⁷ This figure includes 8 million individuals who reside within the Basin,⁸ along with 7 million residents of New York City and Philadelphia, the first and seventh largest metropolitan economies in the United States, respectively.⁹

New York City gets nearly half of its water from three large reservoirs located on the tributaries to the Delaware.¹⁰ Due to the very high quality of drinking water from the Delaware River Basin, New York City is one of only five large cities in the country with a surface drinking water supply that does not need to filter their water prior to consumption, a measure that saves the City \$10 billion per year.¹¹ Philadelphia gets 100 percent of its water supply directly from the Delaware and Schuylkill Rivers.¹²

A clean and protected River Basin also contributes to the regional economy by supporting approximately 600,000 jobs (more than \$12 billion in annual wages) in the coastal, ecotourism, recreation, and water industries.¹³ Factoring in ecosystems services, the Basin’s annual contribution to regional and local economies totals at least \$16 billion¹⁴ — nearly five times the potential annual value of the natural gas industry (a mere \$3.3 billion).¹⁵

Congress has repeatedly recognized the Delaware River Basin’s unique status, taking action to protect it on at least four occasions. First, in 1965, Congress authorized the Delaware Water Gap National Recreation Area, a 104-square mile protected area and park encompassing the Delaware River’s middle passage, from just below the start of the River’s main stem down to

⁷ Gerald J. Kauffman, *Socioeconomic Value of the Delaware River Basin in Delaware, New Jersey, New York, and Pennsylvania*, Executive Summary (2011),

<http://www.state.nj.us/drbc/library/documents/SocioeconomicValueDRB-UDEL-FinalRpt.pdf> [hereinafter “Kauffman”].

⁸ *Id.*

⁹ New York City Dept. of Env. Prot., *New York City 2016 Drinking Water Supply and Quality Report* (2016), <http://www.nyc.gov/html/dep/pdf/wsstate16.pdf>.

¹⁰ U.S. Govt. Accountability Office, *Interstate Compacts: An Overview of the Structure and Governance of Environment and Natural Resource Compacts* 38 (2007), <https://www.gao.gov/assets/260/258939.pdf>.

¹¹ New York City Dept. of Env. Prot., *Final Impact Assessment Report: Impact Assessment of Natural Gas Production in the New York City Water Supply Watershed* 51 (2009), http://www.nyc.gov/html/dep/pdf/natural_gas_drilling/12_23_2009_final_assessment_report.pdf [hereinafter “NYC Assessment”].

¹² U.S. Govt. Accountability Office, *supra* note 10, at 38.

¹³ Kauffman, *supra* note 7, at T.E1, T.E3. These figures exclude jobs and wages generated from wastewater utilities.

¹⁴ *Id.*

¹⁵ *Id.*

the Water Gap at the New Jersey-Pennsylvania state line.¹⁶ Second, between 1978 and 2006, Congress added over two hundred miles of main-stem Delaware and tributaries to the National Wild and Scenic Rivers System.¹⁷ Third, in 1996, Congress added the Delaware Estuary to the National Estuary Program.¹⁸ Finally, in 2016, Congress passed the Delaware River Basin Conservation Act, establishing the Delaware River Basin Restoration Program to promote conservation, water management, and recreational opportunities in the Basin.¹⁹

c. The Delaware River Basin Commission

The Delaware River Basin Commission was formed in 1961 by an interstate compact between New York, New Jersey, Pennsylvania and Delaware, signed by President Kennedy, and ratified by Congress.²⁰ The Commission was formed to coordinate the overlapping water management concerns of the four states.²¹ It is the only Federal-state basin compact with authority in all areas of water supply, water quality, flood mitigation, and watershed management.²²

Significantly, the Compact states:

The commission may assume jurisdiction to control . . . pollution . . . in the waters of the basin, whenever it determines . . . that the effectuation of the comprehensive plan so requires. The standard of such control shall be that pollution by sewage or industrial or other waste originating within a signatory state shall not injuriously affect waters of the basin as contemplated by the comprehensive plan. . . . [T]he commission may adopt and from time to time amend and repeal rules, regulations and standards to control such future pollution and abate existing pollution, and to require such treatment of sewage, industrial or other waste . . . as may be required

¹⁶ An Act to Authorize Establishment of the Delaware Water Gap National Recreation Area, and for Other Purposes, Pub.L. 89-158, 79 Stat. 612 (1965).

¹⁷ These include the 73.4-mile long Upper Delaware Scenic and Recreational River, the 40-mile long Middle Delaware National Scenic and Recreational River, the 38.9-mile long Lower Delaware National Scenic and Recreational River, the 24.2-mile long Musconetcong National Wild and Scenic River, and the 14.7, 10.7, and 3-mile long Tinicum, Tohickon, and Paunacussing Creeks. National Park Service, *Delaware River Basin Wild and Scenic River Values* 7, 11 (2012), http://www.delawareriverkeeper.org/sites/default/files/resources/Reports/DelawareRiverBasin_Sept2012.Wild%20and%20Scenic%20River%20Report.NPS.pdf.

¹⁸ Gerald J. Kauffman, Partnership for the Delaware Estuary, Inc., *Economic Value of the Delaware Estuary Watershed Comprehensive Report* 12 (2011), <http://www.ipa.udel.edu/publications/DelEstuaryValueReport.pdf>.

¹⁹ Water Infrastructure Improvements for the Nation Act, Pub. Law No. 114-322, 130 Stat. 1628 (2016).

²⁰ Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) [hereinafter “Compact”]. The compact also is codified at N.Y. Env’tl. Conserv. Law §§ 21-0701 to -0723; 53 Delaware Laws, Chapter 71; New Jersey Laws of 1961, Chapter 13; Pennsylvania Acts of 1961, Act No. 268.

²¹ *New Jersey v. New York*, 347 U.S. 995 (1954).

²² Gerald J. Kauffman, *Governance, Policy, and Economics of Intergovernmental River Basin Management*, 29 *Water Resource Management* 5689 (2015), <http://www.wrc.udel.edu/wp-content/uploads/2016/09/GovernancePolicyandEconomicsofIntergovernmentalRiverBasinManagementGJKauffman2015.pdf>.

to protect the public health or to preserve the waters of the basin for uses in accordance with the comprehensive plan.²³

The Compact also states:

The commission may regulate and control withdrawals and diversions from surface waters and ground waters of the basin.²⁴

The Commission is composed of five members:²⁵ the governors of the four Basin states (New York, New Jersey, Pennsylvania, and Delaware), and the commander of the North Atlantic Division, U.S. Army Corps of Engineers.²⁶ Decisions of the Commission are made by vote of a majority of the membership.²⁷ Each Commissioner is entitled to one vote.²⁸

All proposed “projects”²⁹ having a “substantial effect” on the water resources of the basin require approval from the Commission.³⁰ With respect to natural gas drilling in the Marcellus Shale formation, the Commission has appropriately asserted authority to regulate several aspects of operations:³¹

- 1) Water withdrawal permitting, from both surface and ground water diversions;³²
- 2) On-site pollution control, to the extent that drilling operations could add, discharge or cause the release of water pollutants;³³ and
- 3) Treatment and disposal of recovered wastewater.³⁴

The Commission has made it clear that no project may begin water withdrawal, drill any well, construct any impoundment, or discharge to the ground or surface waters without approval from the Commission.³⁵

²³ Compact § 5.2.

²⁴ *Id.* at § 10.1.

²⁵ *Id.* at §§ 2.2 and 2.3.

²⁶ *Id.* at § 2.2.

²⁷ *Id.* at § 2.5.

²⁸ *Id.*

²⁹ A “project” is defined 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 specific 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 a separate entity for the purposes of evaluation. *Id.* at § 1.2(g).

³⁰ *Id.* at § 3.8.

³¹ Del. River Basin Comm’n, *Natural Gas Drilling in the Marcellus Shale Formation 2* (2008), <http://www.state.nj.us/drbc/NaturalGas10-24-08.pdf>.

³² Authority to manage ground and surface waters is conferred by article 4 of the Compact, and regulated under sections 2.10 and 2.20 of the Delaware River Basin Water Code, *available at* http://www.state.nj.us/drbc/regs/watercode_071608.pdf. Withdrawals exceeding 100,000 gallons daily require DRBC approval. 18 C.F.R. § 401.35(a)(2).

³³ *Id.*

³⁴ The Commission has authority to control water pollution under article 5 of the Compact. Regulations concerning pollution control are set out in article 3 of the Delaware River Basin Water Code, *supra* note 32.

³⁵ Del. River Basin Comm’n, *supra* note 31, at 2.

d. The Draft Regulations

In September 2017, the Commission passed a resolution announcing that they would reopen a process that may lead to banning fracking in the watershed.³⁶ In November 2017, the Commission issued draft regulations,³⁷ which include:

- A prohibition on fracking;³⁸
- A permit review process for the treatment, storage, and disposal of fracking waste;³⁹ and
- A permit review process for the withdrawal of water for fracking purposes.⁴⁰

Permanently banning fracking in the watershed would benefit millions of Americans, especially those who live in the basin states of New York, New Jersey, Pennsylvania, Delaware, and Maryland. But if the Commission moves forward with regulations opening the area up to fracking wastewater or to the export of water for fracking uses, the Delaware River would be vulnerable to water contamination, among many other harms, and would be poised to be the epicenter of the next national fracking fight.

e. The Movement Against Fracking in the Delaware River Basin

For over seven years, NRDC and our allies have advocated for a fracking ban in this important region. And since 2011, there has been a *de facto* moratorium on fracking and its associated activities, including the treatment, storage, and disposal of fracking wastewater.

Since then, the movement to ban fracking has grown—fracking is currently banned in New York, Vermont, and Maryland, and in municipalities in fifteen other states. Now, a wide and diverse coalition of environmental, community, and business groups across all five Basin states has organized together to push for a ban on fracking in the Delaware River Basin.⁴¹ This summer, members of the public submitted over 63,000 comments to the Delaware River Basin Commission, an interstate agency that is responsible for regulating water quality in the Delaware

³⁶ Del. River Basin Comm'n, Resolution for the Minutes (Sept. 13, 2017), *available at* http://www.state.nj.us/drbc/library/documents/ResforMinutes091317_natgas-initiate-rulemkg.pdf.

³⁷ Proposed Regulations, 83 Fed. Reg. 1586.

³⁸ *Id.* at 1590.

³⁹ *Id.* at 1591.

⁴⁰ *Id.*

⁴¹ Organizations that have publicly opposed fracking in the Delaware River Basin include: Berks Gas Truth, Bucks County Environmental Action, Catskill Mountainkeeper, Clean Water Action New Jersey, CREDO, Delaware Riverkeeper Network, Environment New Jersey, Food and Water Watch, Frack Action, Natural Resources Defense Council, Sierra Club Delaware Chapter, Sierra Club New Jersey Chapter, Sierra Club New York Chapter, Sierra Club Pennsylvania Chapter, 350 Bucks County. Press Release, Delaware Riverkeeper Network, Petitions for a Fracking Ban in Delaware River Watershed to be Submitted to Governors of Four States and the Army Corps of Engineers (July 27, 2017), http://www.delawareriverkeeper.org/sites/default/files/MEDIA_ADVISORY.Petition.del_FEDlead7.17.pdf.

River, asking for a fracking ban in the watershed.⁴² This included over 10,000 NRDC member comments demanding a full ban.

II. The Commission Rightly Proposes a Ban on Fracking in Order to Protect the Region’s Environment and Economic Livelihood

We thank the Commission for proposing a ban on fracking in the watershed.⁴³ As you know, there is a substantial body of scientific evidence documenting the harms that natural gas development presents to both water quality and the regional economy. Indeed, fracking activity can and has destroyed natural habitats and contaminated water. These, combined with fracking’s effects on local air quality and human health, have the potential to significantly harm a regional economy that relies on a healthy population, scenic wilderness, and robust tourism for its livelihood.

a. Fracking Would Significantly Alter Land Use in the River Basin

The most sweeping effect fracking would have in the River Basin would likely result from changes in land use, specifically, the conversion of forested ecosystems into roads, wells, and pipelines for extracting and exporting fracked gas.⁴⁴ Fracking-related development can and has harmed wildlife habitat, sensitive lands, and communities, as it tears up forest and pasture land and converts it to gravel and other unnatural and less permeable surfaces, for roads, well pads, and other fracking infrastructure. This activity contributes to habitat fragmentation, and increases stormwater runoff and erosion potential.⁴⁵ Fracking also requires heavy truck traffic, and generates noise and light pollution, among other things. Combined, these activities harm natural habitats and the living organisms that depend upon them.

The construction of fracking infrastructure in the River Basin would displace natural habitats. If fracking in the Delaware River Basin were to follow the pattern of shale development in the rest of Pennsylvania, the upper Delaware watershed might experience 2,000 wells on 300 to 600 well pads, with 17 to 23 acres of land cover disturbance each, the equivalent of building as many as 840 Walmart Supercenters in an area that is predominantly forest cover.⁴⁶

i. Impacts on Water Quality

It is well-established that land use significantly influences water quality throughout a watershed.⁴⁷ Indeed, construction impacts on natural resources such as the clearing of vegetation, erosion of land, compaction of soil, and destruction of forests all have the potential to degrade water quality. These activities can increase both stormwater runoff (i.e., water that ‘runs

⁴² Morgan McKay, *Petition Against Fracking Delivered to Gov. Cuomo*, News 10 ABC, Jul. 24, 2017, <http://news10.com/2017/07/24/petition-against-fracking-delivered-to-gov-cuomo/>.

⁴³ Proposed Regulations, *supra* note 1.

⁴⁴ Steven Habicht, et al., *The Potential Environmental Impact from Fracking in the Delaware River Basin* (2015), https://www.cna.org/CNA_files/PDF/IRM-2015-U-011300-Final.pdf.

⁴⁵ NYC Assessment, *supra* note 11, at 32.

⁴⁶ Habicht, et al., *supra* note 44, at 18, 25.

⁴⁷ See, e.g., U.S. Geological Survey, *Does Land Use Affect Our Streams?* (2002), available at <https://goo.gl/CtsSDx> [hereinafter “USGS”].

off the land instead of seeping into the soil) and soil erosion, which together can exacerbate the turbidity and sedimentation in nearby waterbodies, undermining the waterbodies' uses as suitable habitat or spawning area for fish and other aquatic species.⁴⁸

Soil compaction has well-established links to water quality. Compaction occurs at many stages during the construction process—whenever land is graded, or soil is excavated and stored, or when heavy construction equipment is driven over the soil, soil is compacted. Compaction, in turn, harms the ability of soil to absorb precipitation,⁴⁹ it also impedes plants from growing or regenerating.⁵⁰ When soil absorbs less water, and this effect is compounded by the presence of fewer plants to absorb water, stormwater runoff and erosion intensifies, and turbidity increases in nearby waterbodies.⁵¹ These are not short-term effects. Once soil is compacted, it is very difficult to restore it so that the absorption of surface water or the regrowth of healthy vegetation matches the rates that existed before construction.⁵²

While turbidity naturally occurs in rivers during storm events or spring melt, artificially high levels can directly harm fish, plants, and other organisms that dwell in the water.⁵³ Indeed, while natural erosion produces nearly 30 percent of the total sediment in the United States, human-caused erosion generated by changes in land use accounts for the remaining 70 percent.⁵⁴

ii. Impacts on Terrestrial Ecosystems

Vegetation holds soil in place and absorbs precipitation—when it is removed, it can no longer protect soil from the effects of wind and rain, increasing the volume and intensity of stormwater runoff, in turn increasing the potential for soil erosion.⁵⁵ The eroded soil then runs into waterbodies, a process known as sedimentation, which contributes to increased turbidity and possibly flooding and habitat loss.⁵⁶

Fracking is especially harmful when it takes place in forests, which must be cleared for roads and other fracking infrastructure. It is well-established in the scientific literature that forest cover is closely linked with nearby water quality—they filter contaminants, regulate stream

⁴⁸ New York State Dept. of Env. Conservation, Final Supplemental Generic Environmental Impact Statement of Regulatory Program for Horizontal Drilling and High-Volume Hydraulic Fracturing to Develop the Marcellus Shale and Other Low-Permeability Gas Reservoirs 6-14–15, 51 (2015), available at <https://goo.gl/EzY83S> [hereinafter “NYS SGEIS”].

⁴⁹ Meliora Environmental Design, Professional Review & Comment on DEIS 11 (2014), available at <https://goo.gl/L1jK46> [hereinafter, “Meliora”].

⁵⁰ Penn State College of Agriculture Sciences, *Effects of Soil Compaction* (2004), available at <https://goo.gl/ULQeHq>.

⁵¹ Meliora, *supra* note 49, at 11.

⁵² *Id.* at 9–10.

⁵³ John Sigler, et al., *Effects of Chronic Turbidity on Density and Growth of Steelheads and Coho Salmon*, 113 *Transactions of the Am. Fisheries Soc’y* 142 (1984), available at <https://goo.gl/sxTMAS>.

⁵⁴ Mid-America Regional Council, *What is Sediment Pollution? 2*, available at <https://goo.gl/1nTU7Q> (last visited Aug. 8, 2017) [hereinafter “Mid-America Regional Council”].

⁵⁵ *Id.*

⁵⁶ *Id.*

temperatures, and limit flow after a storm.⁵⁷ According to one study, opening the River Basin to fracking could lead to a 1 to 2 percent loss of total forest land in fracking areas, and between 5 and 10 percent loss of core forest,⁵⁸ or the loss of up to 40,000 acres of forest.⁵⁹ In addition to increased turbidity, reductions in forest cover provoke increases in nitrogen, phosphorus, sodium, chlorides, and sulfates in water.⁶⁰ In the River Basin, dense forest cover provides the region with a variety of ecosystem services, such as carbon sequestration, clean air, aquifer recharge, and recreation/eco-tourism.⁶¹ The forests also play a key role in maintaining the water quality of the Delaware River, which, as noted, supplies drinking water to over 17 million people.⁶²

iii. Impacts on Organisms

As water quality deteriorates, aquatic species, such as plants, fish, mollusks, crustaceans, and insects, may suffer—both in the short and long-term.⁶³ Fish, plants, and other aquatic species have evolved to thrive in habitats with particular characteristics. Aquatic species require narrow ranges of water temperatures, certain natural features for feeding and spawning, and particular levels of turbidity. Changes to any of these characteristics can significantly harm populations of fish, plants, and other organisms that rely on these qualities for survival.

For example, healthy streams typically have gravel bottoms and cobble bars free of mud and sediment. These provide fish and other aquatic animals with spawning areas.⁶⁴ They also provide benthic invertebrates, such as mussels and crustaceans, space for attachment, protection, feeding, and oxygen consumption.⁶⁵ When sediment settles, it smothers fish eggs, destroys the primary habitat for many benthic invertebrates, and deprives fish of a key food source (i.e., invertebrates).⁶⁶

Increased sedimentation and turbidity can also lead to increased water temperatures.⁶⁷ Compounding this effect, the loss of vegetation near streams can remove shade cover and

⁵⁷ See, e.g., Delphine Brogna et al., *Linking Forest Cover to Water Quality*, 9 Water 176 (2017), available at <https://goo.gl/dwzc6i>; U.S. Forest Services, *Watershed Services: The Important Link Between Forests and Water* (2007), available at <https://goo.gl/Sm7WDi>.

⁵⁸ Habicht, et al., *supra* note 44, at 17.

⁵⁹ *Id.* at 18.

⁶⁰ *Id.*

⁶¹ *Id.* at 19.

⁶² *Id.*

⁶³ J. M. Castro et al., *Risk-Based Approach to Designing and Reviewing Pipeline Stream Crossings to Minimize Impacts to Aquatic Habitats and Species*, 31 River. Res. & Application 767, 767 (2015), available at <https://goo.gl/5gtBgx> [hereinafter “Castro”].

⁶⁴ *Meliora*, *supra* note 49, at 13.

⁶⁵ Lucie Levesque & Monique Dube, *Review of the Effects of In-Stream Pipeline Crossing Construction on Aquatic Ecosystems*, 132 *Envtl. Monitoring & Assessment* 395, 400 (2007), available at <https://goo.gl/N2soGd> [hereinafter “Levesque”].

⁶⁶ *Id.* at 400–02.

⁶⁷ *Meliora*, *supra* note 49, at 13.

increase water temperatures.⁶⁸ Warmer waters can damage habitat for aquatic animals, rendering their habitats unlivable.⁶⁹ For instance, trout, a type of fish known to populate streams and rivers of the River Basin,⁷⁰ require clean, cold, fast-flowing water for survival.⁷¹ Activities such as the removal of upland forest can easily convert the natural habitat into “still, warm, silty waterways incapable of supporting trout.”⁷² Sedimentation hurts trout population in many ways—for example, trout rely on riffles for propagation.⁷³ And, as mentioned earlier, sedimentation, combined with the removal of protective vegetative cover, leads to increased water temperatures,⁷⁴ which is detrimental to trout populations in a number of ways—brook trout, for example, grow more slowly,⁷⁵ and are more likely to die of proliferative kidney disease, a parasitic infection, in higher water temperatures.⁷⁶ Additionally, as water temperatures rise, the level of dissolved oxygen decreases, depriving trout of oxygen needed to respire.⁷⁷

Fracking can also harm some song birds populations. In one study of the effect of fracking operations on songbird populations in Canada, researchers found that regional declines of some songbird species, especially sagebrush-obligates.⁷⁸ Decreases in certain songbird populations have been attributed to the introduction and spread of invasive species, like crested wheatgrass, and the creation of access trails to well pads, which can fragment native species’ habitats.⁷⁹

This new construction for fracking also encourages the growth and spread of invasive species. In a study of Pennsylvania forests that overlay the Marcellus and Utica shale formations, researchers found invasive plant species in over half of the new well pads constructed.⁸⁰

⁶⁸ Heidelinde Trimmel, et al., *Can Riparian Vegetation Shade Mitigate the Expected Rise In Stream Temperatures Due to Climate Change During Heat Waves In a Human-Impacted Pre-Alpine River?*, 22 *Hydrol. Earth Syst. Sci.*, 437, 437 (2018), <https://doi.org/10.5194/hess-22-437-2018>.

⁶⁹ U.S. Fish and Wildlife Service, *Habitat Suitability Information: Rainbow Trout* 4 (1984), available at <https://goo.gl/7FMk6u> [hereinafter “FWS”].

⁷⁰ Trout Unlimited, Upper Delaware Watershed Home Rivers Initiative, <https://www.tu.org/tu-projects/upper-delaware-watershed-home-rivers-initiative> (last visited Mar. 30, 2018).

⁷¹ DEC, *Trout*, <https://goo.gl/Eaj8XG> (last visited Aug. 8, 2017) [hereinafter “DEC Trout”].

⁷² *Id.*

⁷³ FWS, *supra* note 69, at 4.

⁷⁴ *Meliora*, *supra* note 49, at 13.

⁷⁵ Cailin Xu et al., *Context-Specific Influence of Water Temperature on Brook Trout Growth Rates in the Field*, 55 *Freshwater Biology* 2253 (2010), available at <https://goo.gl/iu67kE>.

⁷⁶ K. Bettge et al., *Proliferative Kidney Disease (PKD) of Rainbow Trout: Temperature- and Time-Related Changes of Tetracapsuloides Bryosalmonae DNA in the Kidney*, 136 *Parasitology* 615 (2009), available at <https://goo.gl/MHkiQq>.

⁷⁷ FWS, *supra* note 69, at 6.

⁷⁸ Michelle M. Gilbert & Anna D. Chalfoun, *Energy Development Affects Populations Of Sagebrush Songbirds In Wyoming*, 75 *The Journal of Wildlife Management* 816 (2011), <https://doi.org/10.1002/jwmg.123>.

⁷⁹ Sarah M. Ludlow, et al., *Oil and Natural Gas Development Has Mixed Effects on the Density and Reproductive Success of Grassland Songbirds*, 117 *The Condor* 64 (2015), <https://doi.org/10.1650/CONDOR-14-79.1>.

⁸⁰ Barlow et al., *Unconventional Gas Development Facilitates Plant Invasions*, 202 *Journal of Environmental Management*, 208 (2017).

Finally, for people living near fracking operations, residents complain of continuous noise and light pollution that is sustained for months.⁸¹ Financial and other strains on municipal services include those on law enforcement, road maintenance, emergency services, and public school administration have been reported. Drilling and fracking operations pose an inherent conflict with mortgage and property insurance due to the hazardous materials used and associated risks,⁸² and therefore may have a negative financial impact on homeowners.

b. Fracking Can and Has Contaminated Water

Fracking can and has harmed local water quality, including drinking water. The fracking process utilizes over 1,000 chemical additives, many of which are toxic and potentially carcinogenic.⁸³ Stray gas can also move into groundwater supplies, rendering drinking water flammable. Indeed, fracking's potential to harm surface and groundwater is one of the most harmful aspects of the fracking process, and as explained in Part III, can harm people and habitats far from the fracking well.

i. Fracking Fluid

The fracking process involves pumping fracking fluid, a mixture of water and other additives, into a fracking well in order to free methane trapped in the rock.⁸⁴ The ingredients used in fracking fluid consist primarily of fresh or recycled water, along with chemicals used to modify the water's characteristics (for example, to reduce friction or corrosion) and sand or other agents that hold open the fractures in a shale formation as gas is extracted.⁸⁵ Of the fracking fluid that is used at a fracking well, approximately 10 to 50 percent or more of it returns to the surface.⁸⁶ This water is then trucked offsite for treatment and disposal—approximately 600 to 865 truck trips per fracking well are used for the transport of water and wastewater alone.⁸⁷

Because each fracking event requires between 80 and 300 tons of chemicals,⁸⁸ fracking generates massive amounts of polluted wastewater that threaten the health of our drinking water supplies, rivers, streams, and groundwater. And threats to water quality are present not only at the fracking well—the transportation, treatment, and disposal of fracking wastewater can also degrade source water quality, impair long-term watershed health, and expose watershed residents to chronic low levels of toxic chemicals.⁸⁹

⁸¹ Concerned Health Professionals of New York & Physicians for Social Responsibility, *Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)*, Fifth Edition 126 (2018), <http://concernedhealthny.org/compendium/>.

⁸² *Id.* at 224.

⁸³ Elise G. Elliott, et al., *A Systematic Evaluation of Chemicals In Hydraulic-Fracturing Fluids and Wastewater for Reproductive and Developmental Toxicity*, 27 *Journal of Exposure Science and Environmental Epidemiology* 90 (2017).

⁸⁴ NYC Assessment, *supra* note 11.

⁸⁵ Schreiber, *supra* note 4, at 1.

⁸⁶ NYC Assessment, *supra* note 11, at 6.

⁸⁷ *Id.* at 33.

⁸⁸ *Id.*

⁸⁹ *Id.* at ES-3.

ii. Fracking Wastewater Composition

The fracking process generates two types of wastewater: “flowback” (the fracturing fluid injected into a gas well that returns to the surface during or closely after the time of drilling) and “produced water” (all wastewater emerging from the well after completion of drilling operations, much of which is brine contained within the shale formation).

A wide variety of chemicals are known to be used for fracking fluid, and can make up to 0.5 to 2 percent of the entire solution.⁹⁰ And while the relative proportion of chemicals in fracking fluid as compared to water or sand is low, the total amount of chemicals used is still very large, and just a small concentration of chemicals is sufficient to harm the health of water bodies. Assuming about 4 million gallons are used per fracking well, this means about 80 to 300 tons of chemicals are used per well.⁹¹

Because fracking companies can conceal the exact composition of their fracking fluid, the exact chemical composition of fracking wastewater that would be treated in the basin is unknown. Even if it were known, there is “very limited” compound-specific toxicity data for many of the over 1,000 chemicals present in fracking wastewater.⁹² This dearth of information makes it extremely difficult to know for certain what effect fracking wastewater will have on human health and the environment.⁹³

Generally speaking, however, the major constituents of concern that are present in wastewater are (1) salt, including metals, (2) organic hydrocarbons (sometimes referred to as “oil and grease”), (3) inorganic and organic additives, and (4) naturally occurring radioactive material (NORM). These pollutants can be dangerous if they are released into the environment or if people are exposed to them. Some contaminants (e.g., benzene, toluene, ethylbenzene, and xylenes) can be toxic to humans and aquatic life, radioactive, or corrosive.

iii. Fracking Wastewater Is Harmful to Human Health

While the components of fracking wastewater vary from well to well, a number of chemical additives commonly used in fracking have been associated with negative health effects. One study found that more than 75 percent of the chemicals used in fracking are associated with adverse effects on the skin, eyes, respiratory and gastrointestinal systems, about 40 percent could have effects on the brain/nervous system, immune and cardiovascular systems, the kidneys and endocrine system, and 25 percent are associated with cancer and mutations.⁹⁴ Even very low doses of certain chemicals in drinking water, especially known or suspected carcinogens and

⁹⁰ *Id.* at 5.

⁹¹ *Id.* at 33.

⁹² *Id.* at 36.

⁹³ Matthew McFeeley, *NRDC Issue Brief: State Hydraulic Fracturing Disclosure Rules and Enforcement: A Comparison* (2012), <https://www.nrdc.org/sites/default/files/Fracking-Disclosure-IB.pdf>. As of March 2017, Pennsylvania requires fracking operators to complete and submit a list of chemicals used during the fracking process on the website, FracFocus.org. However, operators are allowed to withhold these chemicals from public disclosure if they consider a chemical or the concentration of a chemical to be a trade secret. 58 Pa.C.S.A. § 3222.1.

⁹⁴ T. Colborn, et al., *Natural Gas Operations from a Public Health Perspective*, 17 *Human and Ecological Risk Assessment: An International Journal* 1039 (2011), <http://dx.doi.org/10.1080/10807039.2011.605662>.

endocrine disrupting compounds, can be dangerous to human health.⁹⁵ To date, no one has compiled a comprehensive inventory of all the components of fracking wastewater and their associated health risks.

A 2011 report by the Minority Staff of the U.S. House of Representatives Committee on Energy and Commerce identified at least 29 chemical additives known to be present in wastewater that are (1) known or possible human carcinogens (such as naphthalene, benzene, and acrylamide); (2) regulated under the Safe Drinking Water Act for their risks to human health (such as toluene, ethylbenzene, and xylenes, which can damage the central nervous system, liver, and kidneys⁹⁶); or (3) listed as hazardous air pollutants under the Clean Air Act.⁹⁷ That list, while significant, is just a portion of the chemicals in wastewater that are known to harm humans.

Significantly, the report omitted chemicals that have been associated with non-cancer health effects but that are not regulated by the Safe Drinking Water Act or the Clean Water Act. For example, the list does not include contaminants that are on EPA's Candidate Contaminant List, a list of unregulated contaminants that are known or anticipated to occur in public water systems and that may require regulation under the Safe Drinking Water Act.⁹⁸ At least 8 chemicals on the Candidate Contaminant List—1-butanol, acetaldehyde, benzyl chloride, ethylene glycol, ethylene oxide, formaldehyde, methanol, n-methyl-2-pyrrolidone—are known to have been used in fracking fluid.⁹⁹ In addition, chemicals like 2-butoxyethanol (2BE), which is also not included, has been shown to cause hemolysis (destruction of red blood cells) and damage to the spleen, liver, and bone marrow, and is easily absorbed and rapidly distributed in humans following inhalation, ingestion, or dermal exposure.¹⁰⁰

The following section provides just a small sample of the known components of fracking waste and their associated health risks:¹⁰¹

⁹⁵ NYC Assessment, *supra* note 11, at 36.

⁹⁶ EPA, *Basic Information about Toluene in Drinking Water, Basic Information about Ethylbenzene in Drinking Water, and Basic Information about Xylenes in Drinking Water*, <http://water.epa.gov/drink/contaminants/basicinformation/index.cfm> (accessed Oct. 14, 2010).

⁹⁷ These include: Methanol (Methyl alcohol), Ethylene glycol (1,2-ethanediol), Diesel, Naphthalene, Xylene, Hydrogen chloride (Hydrochloric acid), Toluene, Ethylbenzen, Diethanolamine (2,2-iminodiethanol), Formaldehyde, Sulfuric acid, Thiourea, Benzyl chloride, Cumene, Nitrilotriacetic acid, Dimethyl formamide, Phenol, Benzene, 3 Di (2-ethylhexyl) phthalate, Acrylamide, Hydrogen fluoride (Hydrofluoric acid), Phthalic anhydride, Acetaldehyde, Acetophenone, Copper, Ethylene oxide, Lead, Propylene oxide, and p-Xylene. U.S. House of Representatives, Committee on Energy and Commerce, Minority Staff, *Chemicals Used in Hydraulic Fracturing* 8-9 (2011), available at http://www.conservation.ca.gov/dog/general_information/Documents/Hydraulic%20Fracturing%20Report%204%2018%2011.pdf.

⁹⁸ 42 U.S.C. § 300g-1(b)(B)(i)(I).

⁹⁹ U.S. House of Representatives, *supra* note 99, at 8-9; Drinking Water Contaminant Candidate List 4—Final, 81 Fed. Reg. 81099-01.

¹⁰⁰ EPA, *Toxicological Review of Ethylene Glycol Monobutyl Ether* 4 (2010), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0500tr.pdf. See also U.S. House of Representatives, *supra* note 99, at 7.

¹⁰¹ Schreiber, *supra* note 4, at 9 – 14.

Acetone. In several studies, workers exposed to very high levels of acetone via inhalation complained of headache, lightheadedness, unsteadiness and confusion.¹⁰² Animals exposed to large amounts by ingestion had bone marrow hypoplasia (fewer new cells being produced), degeneration of the kidneys, increased liver weights, and listlessness.¹⁰³ Pregnant mice that swallowed acetone had lower body weights and produced fewer newborn mice.

Benzene. Eating foods or drinking liquids containing high levels of benzene can cause vomiting, irritation of the stomach, dizziness, sleepiness, convulsions, rapid heart rate, coma, and death.¹⁰⁴ Benzene causes effects on normal blood production and can lead to a decrease in red blood cells (anemia).¹⁰⁵ Excessive exposure to benzene can be harmful to the immune system, increasing the chance of infection and perhaps lowering the body's defense against cancer. Long-term exposure to benzene can cause cancer of the blood-forming organs (leukemia).¹⁰⁶ In addition, benzene may be harmful to reproductive organs and the developing fetus.¹⁰⁷

Cyanide. Cyanide enters air, water, and soil from both natural processes and industrial activities.¹⁰⁸ Many are powerful and rapid-acting poisons, affecting the nervous system and capable of causing death at high concentrations.¹⁰⁹ As the cyanide goes through the body, it can affect the thyroid gland, reducing the ability of the gland to produce hormones that are necessary for the normal function of the body.¹¹⁰

Total Trihalomethanes (TTHMs): Bromoform, Chloroform, Dichlorobromomethane and Dibromochloromethane. The main effect of swallowing or breathing large amounts of bromoform is a slowing of normal brain activities, resulting in sleepiness or sedation, which tends to subside after exposure ceases.¹¹¹ Some studies in animals indicate that exposure to high doses of bromoform or dibromochloromethane may also lead to liver and kidney injury, and can cause liver and kidney cancer.¹¹² The EPA classified bromoform as a probable human carcinogen and dibromochloromethane as a possible human carcinogen.¹¹³

¹⁰² Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile For Acetone* (1994), <https://www.atsdr.cdc.gov/toxprofiles/tp21.pdf>.

¹⁰³ *Id.*

¹⁰⁴ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Benzene* (2007), <https://www.atsdr.cdc.gov/toxprofiles/tp3.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Cyanide* (2006), <https://www.atsdr.cdc.gov/toxprofiles/tp8.pdf>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Bromoform and Dibromochloromethane* (2005), <https://www.atsdr.cdc.gov/toxprofiles/tp130.pdf>.

¹¹² *Id.*

¹¹³ U.S. Env. Prot. Agency, Fact Sheet: Bromoform (2016), <https://www.epa.gov/sites/production/files/2016-09/documents/bromoform.pdf>; U.S. Env. Prot. Agency, Integrated Risk Information System (IRIS):

Ethylbenzene. Exposure to high levels of ethylbenzene in air can cause eye and throat irritation, vertigo and dizziness.¹¹⁴ Relatively low levels of ethylbenzene in air resulted in potentially irreversible damage to the inner ear and hearing of animals.¹¹⁵ Rats exposed to large amounts of ethylbenzene by mouth had severe damage to the inner ear.¹¹⁶ There is also limited information suggesting minor birth defects and low birthweight in newborn animals whose mothers were exposed air containing ethylbenzene.¹¹⁷

Phenols. Ingestion of liquid products containing concentrated phenol can cause serious gastrointestinal damage and even death.¹¹⁸ Inhalation of high levels of phenol has caused irritation of the respiratory tract and muscle twitching in animals.¹¹⁹ Longer term inhalation exposure to high levels of phenol caused damage to the heart, kidneys, liver, and lungs in animals.¹²⁰ Drinking water with extremely high concentrations of phenol has caused muscle tremors, difficulty walking, and death in animals.¹²¹

Radium. The Marcellus Shale is also known to have high uranium content, which produces a decay product radium-226, at levels that can exceed 10,000 picocuries per liter (pCi/L) in the concentrated brine. As a result, radionuclides are present in drilling waste.¹²² Evaluation of drill cuttings and produced waters from Marcellus wells confirms that elevated levels of radioactivity are not uncommon for wastewaters associated with Marcellus Shale development.¹²³ While radium is naturally present in the environment, it is usually present at very low levels. At more elevated levels, radiation has been shown to cause adverse health effects such as anemia, cataracts, fractured teeth, cancer and death. Although there is some uncertainty as to how much exposure to radium increases your chances of developing a harmful effect, the greater the total amount of your exposure to radium, the more likely you are to develop one of these diseases.¹²⁴

Toluene. Toluene may have an effect on the nervous system (brain and nerves) after exposure; these effects may be temporary, such as headache, dizziness, or

Dibromochloromethane (1992),

https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/0222_summary.pdf#nameddest=woe.

¹¹⁴ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Ethylbenzene* (2010), <https://www.atsdr.cdc.gov/toxprofiles/tp110.pdf>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Phenol* (2008), <https://www.atsdr.cdc.gov/toxprofiles/tp115.pdf>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Schreiber, *supra* note 4, at 12 – 13. (citing A. Nelson, et al., *Understanding the Radioactive Ingrowth and Decay of Naturally Occurring Radioactive Materials in the Environment: An Analysis of Produced Fluids from the Marcellus Shale*, 123 *Environ. Health Perspect.* 689 (2015); V. Brown, *Radionuclides in Fracking Wastewater: Managing a Toxic Blend.*, 122 *Environ. Health Perspect.* A50 (2014).

¹²³ Marvin Resnikoff, et al., Residents for the Preservation of Lowman and Chemung (RFPLC), *Radioactivity in Marcellus Shale* (2010), <http://www.rwma.com/Marcellus%20Shale%20Report%205-18-2010.pdf>.

¹²⁴ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Radium* (1990), <https://www.atsdr.cdc.gov/toxprofiles/tp144.pdf>.

unconsciousness.¹²⁵ However, some effects such as incoordination, cognitive impairment, and vision and hearing loss may become permanent with repeated exposure, especially at high concentrations.¹²⁶ High levels of toluene exposure during pregnancy, such as those associated with solvent abuse, may lead to retardation of mental abilities and growth in children.¹²⁷ Other health effects of potential concern may include immune, kidney, liver, and reproductive effects.¹²⁸ Some studies in people have shown reproductive effects, such as an increased risk of spontaneous abortions, from high levels of toluene in the workplace.¹²⁹ Additionally, exposure to high levels of toluene could possibly cause liver and kidney damage.¹³⁰

Total Petroleum Hydrocarbons. Total Petroleum Hydrocarbons (TPH) is a term used to describe a broad family of several hundred chemical compounds that originally come from crude oil. Some of the TPH chemicals, such as the smaller compounds benzene, toluene and xylene (which are present in gasoline) can affect the human central nervous system, blood, immune system, liver, spleen, kidneys, developing fetus, and lungs.¹³¹

Xylenes. There are three forms of xylene, with very similar effects on health. Short-term exposure to high levels of xylenes can cause irritation of the skin, eyes, nose and throat; difficulty breathing; impaired function of the lungs; delayed response to a visual stimulus; impaired memory; stomach discomfort; and possible changes in the liver and kidneys.¹³² Both short-term and long-term exposure to high levels of xylenes can cause effects on the nervous system such as headaches, lack of muscle coordination, dizziness, confusion, and changes in one's sense of balance.¹³³ The results of animal studies indicate that large amounts of xylenes can cause changes in the liver and harmful effects on the kidneys, lungs, heart, and nervous system.¹³⁴ Long-term exposure of animals to low concentrations of xylenes has not been well studied, but there is some information that long-term exposure of animals can cause harmful effects on the kidney (with oral exposure) or on the nervous system (with inhalation exposure).¹³⁵

iv. Fracking Wastewater Is Harmful to the Environment

In addition to adverse effects on human health, fracking wastewater has also been found to harm the environment. Certain chemicals found in fracking wastewater, such as ammonia, can damage ecosystem health by depleting oxygen or causing algal blooms, or they can interact

¹²⁵ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Toluene* (2017), <https://www.atsdr.cdc.gov/toxprofiles/tp56.pdf>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Total Petroleum Hydrocarbons (TPH)* (1999), <https://www.atsdr.cdc.gov/toxprofiles/tp123.pdf>.

¹³² Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services, *Toxicological Profile for Xylene* (2007), <https://www.atsdr.cdc.gov/toxprofiles/tp71.pdf>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

with disinfectants at drinking water plants to form cancer-causing chemicals.¹³⁶ Some others are a concern because they can affect the beneficial use of the water downstream (e.g., sulfate, which can make drinking water taste bad), and still others can disrupt ecosystems (e.g., chloride, which alters fish reproduction).¹³⁷

Fracking wastewater has also been found to increase plant mortality and lower streambed diversity.¹³⁸ Exposure to wastewater has been shown to increase plant mortality of terrestrial plants, reduce juvenile mussel survival rates, and lower streambed microbial diversity.¹³⁹ Spills or intentional discharges of fracking waste into streams has adversely affected the ecology and aquatic biodiversity and populations of sensitive fish species, such as brook trout,¹⁴⁰ and the quantity and quality of aquatic, wetland, and terrestrial habitats and the biota that they support.¹⁴¹

Discharges of Total Dissolved Solids (TDS), sulfates, and chlorides into the receiving surface water are the primary cause of harm to aquatic species.¹⁴² Brine and fracking wastewater have high concentrations of TDS, which increase salinity and can rebound with other more toxic metals, increasing the toxicity of the receiving waters.¹⁴³ Several studies on the potential effect of discharges of TDS into water have found that the discharge of TDS lead to decreases in existing freshwater organisms in the receiving waters, and an increase in brackish water organisms, indicating a shift in biotic communities.¹⁴⁴

Moreover, salts, metals and organics are core components of most fracking wastewater, and are all known to induce oxidative stress in fish.¹⁴⁵ Other studies have also shown changes in fish gill morphology in response to waterborne metals, organic toxicants, and elevated salts.¹⁴⁶ In fact, acute exposure of fracking wastewater to rainbow trout was found to generate oxidative stress in the gills and liver, and morphological changes in the gills.¹⁴⁷

Given the known harms associated with fracking wastewater on plant survival, it is not a surprise that fracking wastewater has also been found to hurt farms. Soil quality, if contaminated

¹³⁶ NRDC, *In Fracking's Wake*, *supra* note 3, at 6.

¹³⁷ *Id.*

¹³⁸ Schreiber *supra* note 4, at 20 – 21.

¹³⁹ Kelly O. Maloney, et al., *Unconventional Oil and Gas Spills: Materials, Volumes, and Risks to Surface Waters in Four States of the U.S.*, 581-582 *Science of the Total Environment* 369 (2017).

¹⁴⁰ Concerned Health Professionals of New York & Physicians for Social Responsibility, *supra* note 81, at 48.

¹⁴¹ New York State Dept. of Health, *A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development* (2014), https://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf.

¹⁴² Pennsylvania Dept. of Env. Prot., *Permitting Strategy for High Total Dissolved Solids (TDS) Wastewater Discharges* (2009),

http://files.dep.state.pa.us/Water/Wastewater%20Management/WastewaterPortalFiles/MarcellusShaleWastewaterPartnership/high_tds_wastewater_strategy_041109.pdf.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ V. I. Lushchak, *Environmentally Induced Oxidative Stress in Aquatic Animals*, 101 *Aquat. Toxicol.* 13 (2011).

¹⁴⁶ *Id.*; Blewett, et al. *The Effect of Hydraulic Flowback and Produced Water On Gill Morphology, Oxidative Stress and Antioxidant Response in Rainbow Trout (Oncorhynchus Mykiss)*, 7 *Scientific Reports* 2 (2017), <https://www.nature.com/articles/srep46582>.

¹⁴⁷ *Id.*

or compacted by drilling or infrastructure, can reduce crop yield and quality.¹⁴⁸ Studies and case reports from across the country have also found instances of deaths, neurological disorders, aborted pregnancies, and stillbirths in animals that have come in contact with wastewater.¹⁴⁹

In California, farmers who used fracking wastewater for crop irrigation and livestock watering reported damage to the timber sector.¹⁵⁰ When studied, the wastewater in question was found to contain at least ten known or suspected carcinogens, as well as over a dozen chemicals with no available toxicological data, and many unidentified compounds currently classified as “trade secrets.”¹⁵¹ Changes in the number of working farms, as a result of drilling or contamination, was found in a Pennsylvania study where dairy farmers sold their property and moved.¹⁵²

Understandably, farmers have concerns that the fracking process and wastes could invalidate organic certification.

v. Wherever There is Fracking Fluid, There are Spills

Fracking fluid can spill into surface water bodies at every stage before, during, and after the fracking process—during transportation of the fracking fluid to the well site, during storage and handling of the fluid at drill sites, and afterwards, when fracking wastewater is being trucked from well pads for treatment and disposal.¹⁵³ Spills or releases can result from tank ruptures, piping failures, equipment or surface impoundment failures, overfills, vandalism, accidents (including vehicle collisions), ground fires, drilling and production equipment defects, or improper operations. From there, spilled, leaked, or released fluids could flow to a surface water body or infiltrate the ground, reaching subsurface soils and aquifers.¹⁵⁴ These chemicals can move beyond the fracking zone to groundwater, streams, reservoirs, and eventually water supplies.

The opportunities for spills are not theoretical. Spills have occurred wherever fracking or transport of fracking fluid or wastewater has occurred. In 2009, EPA conducted a study evaluating the impact of fracking on the water cycle, and found that fracking activities have caused contamination of water resources.¹⁵⁵

Indeed, spills and leaks account for many of the environmental violations cited in connection with shale gas development by the Pennsylvania Department of Environmental

¹⁴⁸ Delaware Riverkeeper Network, *Docket #PF14-8: Scoping Comment for the EIS for William’s Atlantic Sunrise Project* (2014), <https://goo.gl/LH1TEP>.

¹⁴⁹ Concerned Health Professionals of New York & Physicians for Social Responsibility, *supra* note 81, at 164.

¹⁵⁰ *Id.* at 163.

¹⁵¹ *Id.*

¹⁵² Delaware Riverkeeper Network, *supra* note 148, at 14.

¹⁵³ NYS SGEIS, *supra* note 48, at 6-14.

¹⁵⁴ *Id.* at 6-15. Spills or releases can occur as a result of tank ruptures, piping failures, equipment or surface impoundment failures, overfills, vandalism, accidents (including vehicle collisions), ground fires, drilling and production equipment defects, or improper operations. Spilled, leaked or released fluids could flow to a surface water body or infiltrate the ground, reaching subsurface soils and aquifers.

¹⁵⁵ U.S. Env. Prot. Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States* (2016), www.epa.gov/hfstudy.

Protection.¹⁵⁶ According to EPA, between May 2009 and April 2013, there were eight reported spills of fracking wastewater in Pennsylvania, ranging from more than 4,000 gallons to more than 57,000 gallons reached surface water resources. The spills were reported to have resulted in local impacts to environmental receptors, requiring remediation and monitoring. The number of reported spills is likely an underestimate. Legal action in Pennsylvania alleging long-term illegal dumping raises questions about the difficulty of detecting this behavior and quantifying it on a regional basis.¹⁵⁷

In another study of spills related to fracking activities across Colorado, New Mexico, North Dakota and Pennsylvania, from 2005 through 2014, 6,622 spills were reported in an area that contained 21,000 fracking wells, amounting to a 32 percent spill rate over the period.¹⁵⁸

In the province of Alberta, Canada, an estimated 2,500 fracking wastewater spills occurred from 2005 to 2012, with more than 113 of those spills entering directly into freshwater lakes and streams.¹⁵⁹

The effects of fracking wastewater spills are not abstract. In 2004, gas and other contaminants were found to have leaked from a nearby fracking wellbore into the drinking water of residents of Garfield County, CO. The drinking water was found to be contaminated with methane and BTEX compounds. Some domestic water wells were also found to have concentrations of arsenic that exceeded health-based standards and concentrations of chloride, iron, manganese, and/or total dissolved solids (TDS) which exceeded aesthetic-based standards.¹⁶⁰

In 2009, over the span of less than one week, three significant spills of hydraulic fracturing fluid occurred at the same natural gas well pad in Dimock, totaling 8,000 gallons. The leaks resulted from faulty supply pipes, and seeped into wetlands and a stream, killing fish. The fracking fluid included a liquid gel produced by Haliburton known as, “LGC-35,” which can lead to skin cancer and may cause headaches, dizziness, and other central nervous system effects. As a result of multiple accidents in Dimock, residents reported their water turning brown, suffering

¹⁵⁶ See, e.g., *3,400 Gallons of Frack Water Spilled in Accident*, Lockhaven Express, Feb. 22, 2011, <http://www.lockhaven.com/page/content.detail/id/529606/3-400-gallons-of-frack-water-spilled-in-accident.html>; see also New York State Water Resources Institute, *Spills and Leaks Associated with Shale Gas Development* 4 (2011), http://wri.eas.cornell.edu/gas_wells_20_690970228.pdf.

¹⁵⁷ Jonathan D. Silver, *State Charges Local Company for Dumping Wastewater and Sludge*, Pittsburgh PostGazette, Mar. 18, 2011, <http://www.post-gazette.com/pg/11077/1132812-454.stm>; Kaitlynn Riely, *Greene County Man Pleads Guilty to Illegally Dumping Liquid Waste*, Pittsburgh Post-Gazette, Feb. 11, 2012, <http://www.post-gazette.com/pg/12042/1209625-503.stm>.

¹⁵⁸ Kelly O. Maloney, et al., *Unconventional Oil and Gas Spills: Materials, Volumes, and Risks to Surface Waters in Four States of the U.S.*, 581-582 *Science of the Total Environment* 369 (2017).

¹⁵⁹ D. S. Alessi et al., *Comparative Analysis of Hydraulic Fracturing Wastewater Practices in Unconventional Shale Development, Water Sourcing, Treatment, and Disposal Practices*. 42 *Can. Wat. Resour. J.* 105 (2016).

¹⁶⁰ Briana Mordick, *Risks to Drinking Water from Oil and Gas Wellbore Construction and Integrity: Case Studies and Lessons Learned*, <https://www.epa.gov/sites/production/files/documents/riskstodrinkwaterfromoilandgaswellboreconstructionandintegrity.pdf> (last accessed Mar. 28, 2018).

from headaches and skin sores from showering, and observing hair and fur loss in horses and pets.¹⁶¹

In 2013, a natural gas well pad operated by Carrizo Gas Company burst in Tunkhannock, Wyoming County, releasing thousands of gallons of fracking fluid into the local environment and nearby wetlands, and causing the evacuation of several nearby homes. The spill occurred because bolts within the wellhead were too loose and became unfastened, allowing a liquid mixture of water, sand, hydrochloric acid and other hazardous chemicals to flow out. At one point, 800 gallons of fluid were spewing out per minute, and the overall rate was between 25,000 and 35,000 gallons per hour. The flow lasted for as long as 18 hours, during which the road leading to the site was blocked off and several families were asked to evacuate for fear that methane gas could escape the well and explode.¹⁶²

In 2015, a four-inch pipeline operated by Summit Midstream Partners LP burst north of Williston, North Dakota, leaking almost 3 million gallons of saltwater brine, a byproduct of hydraulic fracturing.¹⁶³ The fracking brine spilled into Blacktail Creek, which flows into the Missouri River, the drinking water source for Williston.¹⁶⁴ Later that month, officials found chloride concentrations in the creek to be as high as 92,000 mg/L, much higher than normal concentrations of about 10 to 20 mg/L.¹⁶⁵ In samples taken a year later, soil and sediment downstream of the spill site had radium concentrations up to 100 times as great as in samples upstream.¹⁶⁶

In 2009, after conducting a thorough assessment of the environmental impacts of fracking, New York City concluded that “[i]t is reasonable to expect that development of natural gas resources in the watershed will be accompanied by an increased frequency of chemical, wastewater and fuel spills at or near wellpads.”¹⁶⁷ And strict regulations are not enough to prevent these spills—“Even with appropriate BMPs and regulations . . . mechanical failures,

¹⁶¹ Amy Mall, *Dimock, Pennsylvania: A Community Paying the Price for Natural Gas Production With Hydraulic Fracturing Fluid Spills*, NRDC Expert Blog, Sept. 23, 2009, <https://www.nrdc.org/experts/amy-mall/dimock-pennsylvania-community-paying-price-natural-gas-production-hydraulic>; Press Release, Pennsylvania Dept. of Env. Prot., DEP Orders Cabot Oil and Gas to Cease All Gas Well Fracking in Susquehanna County (Sept. 25, 2009) http://www.uppermon.org/news/Other/PA-DEP-DEP_Orders_Cabot_2_Cease_Fracking-25Sept9.html; Press Release, Pennsylvania Dept. of Env. Prot., Company Must Properly Clean Up Susquehanna County Gel Spill (Sept. 23, 2009), http://www.uppermon.org/news/Pgh-Alleg/PA-DEP_Release_Cabot_Spill-23Sept09.html.

¹⁶² Marie Cusick, *After Fracking Wastewater Spill, Residents and Regulators Believe Water Is Safe*, State Impact, Mar. 19, 2013, <https://stateimpact.npr.org/pennsylvania/2013/03/19/after-fracking-wastewater-spill-residents-and-regulators-believe-water-is-safe/>.

¹⁶³ Rebecca Jacobson, *Fracking Brine Leak In North Dakota Reaches Missouri River, Prompts State Democrats to Call For More Regulation*, PBS News Hour, Jan 26, 2015, <https://www.pbs.org/newshour/nation/fracking-brine-leak-north-dakota-reaches-missouri-river-prompts-state-democrats-call-regulation>.

¹⁶⁴ *Id.*

¹⁶⁵ Katie Valentine, *Nearly 3 Million Gallons Of Drilling Waste Spill From North Dakota Pipeline*, Think Progress, Jan. 22, 2015, <https://thinkprogress.org/nearly-3-million-gallons-of-drilling-waste-spill-from-north-dakota-pipeline-3690ea16c937/>.

¹⁶⁶ Deirdre Lockwood, *Toxic Chemicals From Fracking Wastewater Spills Can Persist For Years*, Chemical & Engineering News, May 20, 2016, <https://cen.acs.org/articles/94/web/2016/05/Toxic-chemicals-fracking-wastewater-spills.html>.

¹⁶⁷ NYC Assessment, *supra* note 11, at 39.

human errors, and accidents are inevitable.”¹⁶⁸ In the end, New York City determined that fracking was “incompatible” with its reservoir system, and that it would pose “unacceptable risks” to the city’s drinking water supply.¹⁶⁹

The list goes on, and would invariably include accidents in the River Basin if tracking were permitted there.

c. Fracking Pollutes the Air

In accordance with the Compact, the Commission is empowered to regulate water flow and quality in order to, among other things, protect the public health in the region.¹⁷⁰ As explained below, air pollution generated from fracking activities can and has directly harmed human health. Indeed, there are 143 air pollutants released by the fracking process and from fracking wastewater. Fracking emits PM and ozone, two of the six “criteria pollutants” regulated by the EPA because of their harmful effects on health and the environment. In 2014, NRDC released a report detailing the harmful effects of fracking on air quality and public health.¹⁷¹ In short, it found that the fracking process emits airborne pollutants at and near fracking sites that are known to cause cancer and harm the nervous, respiratory, and immune systems.

Fracking sites release a toxic stew of air pollution that includes chemicals that can cause severe headaches, eye, nose, and throat irritation, asthma symptoms and other respiratory illnesses, cancer such as childhood leukemia, central nervous system damage, cardiac problems, birth defects, and premature death.¹⁷² Indeed, people and communities in areas with many hydraulically fractured wells report health problems consistent with these types of exposures.¹⁷³ Toxic air pollutants originate from direct and fugitive emissions of hydrocarbons at the well and from associated infrastructure such as condensate tanks, dehydrators, wastewater impoundment pits, and pipelines.¹⁷⁴

¹⁶⁸ *Id.*

¹⁶⁹ New York City, (2009), http://www.nyc.gov/html/dep/pdf/natural_gas_drilling/nycdep_comments_final_12-22-09.pdf; *see also* NYC Assessment, *supra* note 11.

¹⁷⁰ Compact, at 2, §§ 4.2, 5.2.

¹⁷¹ Tanja Srebotnjak and Miriam Rotkin-Ellman, Natural Resources Defense Council, *Fracking Fumes: Air Pollution from Hydraulic Fracturing Threatens Public Health and Communities* (2014), <https://www.nrdc.org/sites/default/files/fracking-air-pollution-IB.pdf> [hereinafter “NRDC, *Fracking Fumes*”].

¹⁷² Adgate et al., *supra* note 182.

¹⁷³ Elizabeth Ridlington, John Rumpel, Environment America Research & Policy Center and the Frontier Group, *Fracking by the Numbers: Key Impacts of Dirty Drilling at the State and National Level* (2013); Charles W. Schmidt, *Estimating Wastewater Impacts from Fracking*, 121 *Env. Health Persp.* 4 (2013); Roxana Z. Witter et al., *Potential Exposure-Related Human Health Effects of Oil and Gas Development: A Literature Review (2003- 2008)* (2008), <http://www.aph.gov.au/DocumentStore.ashx?id=d4314bfd-05e6-493c-942b-3c5ebf065f74>; Roxana Z. Witter, et al., *Health Impact Assessment for Battlement Mesa, Garfield County Colorado, Aurora, CO* (2010), <https://goo.gl/qgHBEz>; Peter M. Rabinowitz, et al. *Proximity to Natural Gas Wells and Reported Health Status: Results of a Household Survey in Washington County, Pennsylvania*, 123 *Environmental Health Perspectives* 21 (2014), <https://goo.gl/Tq5q1F>.

¹⁷⁴ The Wyoming Department of Health identified 15 different fracking processes and sources—including the drilling process, wastewater, and condensate tanks—that can release air contaminants. Wyoming Dept. of Health, *Associations of Short-Term Exposure to Ozone and Respiratory Outpatient Clinic Visits — Sublette County, Wyoming, 2008–2011* (2013), <https://fossil.energy.gov/app/DocketIndex/docket/DownloadFile/162>.

The fracking process involves dozens of chemicals and the process returns gas, fracking chemicals, formation brines, and mobilized compounds, including heavy metals and naturally occurring radioactive materials (NORM) to the surface. Hydrogen sulfide (H₂S) is a toxic and explosive gas that may be present in oil and gas formations and is produced along with the hydrocarbons. It is damaging to the central nervous system and can be lethal at higher concentrations (~1000 ppm).¹⁷⁵

Benzene, toluene, ethylbenzene, and xylene (BTEX) and other toxic hydrocarbons, such as formaldehyde, released from gas operations and equipment can lead to health impacts ranging from irritation of eyes, nose, mouth, and throat to aggravated asthma and other respiratory conditions, blood disorders, harm to the developing fetus, immune system-related diseases, and cancer (e.g., leukemia, non-Hodgkins lymphoma).¹⁷⁶

Silica—the main component of ‘frac sand’—is used widely and in large quantities to hold open the fractures created during the fracking process.¹⁷⁷ Inhalation of respirable silica can cause silicosis, an irreversible lung disease,¹⁷⁸ as well as lung cancer in miners, sandblasters, and foundry workers.¹⁷⁹

Fracking-related processes and other stages of the oil and gas production process release nitrogen oxides and VOCs, which react in the presence of sunlight to form ozone (‘smog’). Exposure to ozone is associated with a variety of respiratory and cardiovascular effects, including shortness of breath, reduced lung function, aggravated asthma and chronic respiratory disease symptoms, inflammatory processes, and premature death.¹⁸⁰ For example, in many rural areas, the boom in oil and gas activity has been linked to unhealthy spikes in ozone concentrations.¹⁸¹

Exhaust from diesel engines, which are used in heavy trucks and machinery used during well site preparation, drilling, and production, contains hundreds of toxic chemicals. Of greatest concern is the fine diesel soot particles, which can lodge deep within the lungs, increasing health risks including: emergency room visits, hospital admissions, asthma attacks, cardiopulmonary disease (including heart attack and stroke), respiratory disease, adverse birth outcomes, and premature death (from pneumonia, heart attack, stroke and lung cancer).¹⁸² Indeed, truck

¹⁷⁵ Eric J. Esswein, et al., *NIOSH Field Effort to Assess Chemical Exposures in Oil and Gas Workers: Health Hazards in Hydraulic Fracturing* (2012), <https://www.cdc.gov/niosh/docs/2010-130/pdfs/2010-130.pdf>.

¹⁷⁶ NRDC, *Fracking Fumes*, *supra* note 171 at 18.

¹⁷⁷ According to industry representatives, hydraulic fracturing companies use up to 10,000 tons of silica sand to hydraulically fracture a single well. See Kanika Sikka & Sneha Banerjee, U.S. *Silica Sees Sand Demand Piling up as Fracking Goes Super-Sized*, Reuters, Sept. 19, 2014, <https://goo.gl/KauDom>.

¹⁷⁸ Long-term exposure can lead to chronic silicosis, while short-term exposure to very large amounts of silica can cause acute silicosis.

¹⁷⁹ OSHA, *Silica, Crystalline*, <https://www.osha.gov/dsg/topics/silicacrystalline/> (Mar. 30, 2018).

¹⁸⁰ U.S. Env. Prot. Agency, *Health Effects of Ozone in the General Population*, <https://www.epa.gov/ozone-pollution-and-your-patients-health/health-effects-ozone-general-population> (Mar. 30, 2018).

¹⁸¹ Detlev Helmig et al., *Highly Elevated Atmospheric Levels of Volatile Organic Compounds in the Uintah Basin, Utah*, 48 *Environmental Science & Technology* 4707 (2014).

¹⁸² Seth B. Shonkoff et al., *Environmental Public Health Dimensions of Shale and Tight Gas Development*, 122 *Environmental Health Perspectives* 787 (2014), <https://ehp.niehs.nih.gov/wp->

impacts from fracking activity is quite significant—the total travel distance by trucks ranges from about 9,600 miles to 22,000 miles per well.¹⁸³

While it is difficult to measure actual exposures to pollutants from nearby fracking operations and establish clear links to adverse health outcomes, some studies found associations between air pollutants that are present at oil and gas production sites and health impacts observed in nearby communities.¹⁸⁴ In 2008 and 2011, increased ozone concentrations in Wyoming’s Sublette County were associated with subsequent increases in outpatient clinic visits for respiratory problems.¹⁸⁵

And in Colorado, an evaluation of birth defects in areas with high concentrations of oil and gas activity found that mothers who lived near many oil and gas wells were 30 percent more likely to have babies with heart defects.¹⁸⁶ Similarly, preliminary results from a study in Pennsylvania show impacts among newborns that could be linked to air pollution such as increases in low birth weight.¹⁸⁷ Researchers who looked at air pollution levels near fracking sites in Colorado also found an increased risk of chronic and sub-chronic effects mainly stemming from oil and gas related pollutants, which can harm the respiratory and neurological systems and lead to symptoms like shortness of breath, nosebleeds, headaches, dizziness, and chest tightness.¹⁸⁸

Indeed, it cannot be reasonably disputed that fracking has made people sick. If the Commission were to permit fracking in the River Basin, it has been estimated that up to 45,000 residents in the River Basin could also face air quality issues,¹⁸⁹ or sixty percent of the population would have their health harmed by drilling and fracking in their communities.¹⁹⁰

III. The Commission Should Ban the Treatment and Disposal of Fracking Wastewater

In proposing a ban on fracking, the Commission states that advances this proposal to “control future pollution.”¹⁹¹ But this goal cannot be achieved without also banning the treatment and disposal of fracking wastewater.

[content/uploads/122/8/ehp.1307866.pdf](https://ehp.niehs.nih.gov/wp-content/uploads/122/8/ehp.1307866.pdf); John L. Adgate et al., *Potential Public Health Hazards, Exposures and Health Effects from Unconventional Natural Gas Development*, 48 *Environmental Science and Technology* 8307 (2014).

¹⁸³ U.S. Env. Prot. Agency, *Hydraulic Fracturing for Oil and Gas*, *supra* note 155, at E-81.

¹⁸⁴ Lisa M. McKenzie et al., *Human Health Risk Assessment of Air Emissions from Development of Unconventional Natural Gas Resources*, 424 *Science of the Total Environment* 79 (2012); Lisa M. McKenzie et al., *Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado*, 122 *Environmental Health Perspectives* 412 (2014), <https://ehp.niehs.nih.gov/wp-content/uploads/122/4/ehp.1306722.pdf>.

¹⁸⁵ Wyoming Dept. of Health, *supra* note 174.

¹⁸⁶ McKenzie et al., *Birth Outcomes and Maternal Residential Proximity to Natural Gas Development in Rural Colorado*, *supra* note 184.

¹⁸⁷ Adgate et al., *Potential Public Health Hazards, Exposures and Health Effects from Unconventional Natural Gas Development*, *supra* note 182.

¹⁸⁸ Wyoming Dept. of Health, *supra* note 174.

¹⁸⁹ Habicht, et al., *supra* note 44, at 75.

¹⁹⁰ *Id.*

¹⁹¹ Proposed Regulations, *supra* note 1.

Under the Commission’s draft regulations, fracking wastewater would be allowed to be transferred to, treated by, and discharged from new or existing centralized waste treatment facilities (CWTs) within the Delaware River Basin provided that the facility is issued a docket by the Commission, or the facility is operating in accordance with a state permit issued pursuant to an administrative agreement between the Commission and a host state.¹⁹² While the draft regulations also provide for additional effluent limitations for total dissolved solids (TDS), whole effluent toxicity (WET), as pollutants of concern as listed by the EPA in the *Technical Development Document for the Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category*,¹⁹³ this is insufficient to protect the watershed from the harmful chemicals present in fracking wastewater.

As explained above in Part II.b., fracking generates massive amounts of polluted wastewater that threaten the health of our drinking water supplies, rivers, streams, and groundwater. And these threats to water quality are present well beyond the footprint of the fracking well, even into areas where fracking itself is banned. The transportation, treatment, and disposal of fracking wastewater, even without fracking wells nearby, can also degrade source water quality, impair long-term watershed health, and expose watershed residents to chronic levels of toxic chemicals.¹⁹⁴ Indeed, a fracking ban alone, without a complementary ban on fracking wastewater, is not sufficient to protect the River Basin. For this reason, the Commission should also ban the treatment and disposal of fracking wastewater in the River Basin.

a. Transportation, Treatment and Disposal of Wastewater Can and Has Contaminated Water Bodies

Even where fracking is banned outright, the handling, storage, and transport of wastewater can and has led to spills and other releases of pollutants that contaminate land and water with toxic or radioactive material. At any of the locations where produced water is handled, the potential exists for releases due to accidents, inadequate facilities management or staff training, or illicit dumping.¹⁹⁵

Water used in the fracking process is typically taken from surface water bodies and trucked to the drill site.¹⁹⁶ After the fracking wastewater returns, the produced water is generally trucked off-site for treatment or disposal.¹⁹⁷ This hauling of water and wastewater to and from the drill site can require between 600 and 865 truck trips per well.¹⁹⁸ It is this practice—the transportation of produced water to and from the fracking site hundreds of times per well—that

¹⁹² *Id.*

¹⁹³ U.S. Env. Prot. Agency, *Technical Development Document for the Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category* (2016), <https://goo.gl/MxRwGL>.

¹⁹⁴ NYC Assessment, *supra* note 11, at ES-3.

¹⁹⁵ Charles G. Groat & Thomas W. Grimshaw, *Fact-Based Regulation for Environmental Protection in Shale Gas*, report prepared for the Energy Institute (2012) 25, http://energy.utexas.edu/images/ei_shale_gas_regulation120215.pdf; see also NYC Assessment, *supra* note 11, at 35.

¹⁹⁶ NYC Assessment, *supra* note 11, at ES-1.

¹⁹⁷ NRDC, *In Fracking’s Wake*, *supra* note 3, at 6, 58.

¹⁹⁸ NYC Assessment, *supra* note 11, at 33.

has the most significant potential to pollute water bodies.¹⁹⁹ As such, the greatest risk pathway for water contamination occurs not at the fracking site, but where produced water is transported, including in areas where fracking itself is banned.²⁰⁰

Wherever produced water is being transported, pollutants in wastewater can be unintentionally released directly to the environment, either with or without appropriate treatment and safeguards to limit pollution discharges. These spills may result from accidents, from inadequate management or training, or from illicit dumping. Like the risks of fracking wastewater near the wellsite, the risks posed by the transportation, treatment, and disposal of fracking wastewater are not theoretical.

In 2010, a truck carrying oil and gas wastewater overturned in the small Ohio town of Barnesville. It spilled 5,000 gallons of wastewater into a stream only a few hundred yards from where the stream runs into a drinking water reservoir. While it is unclear whether the wastewater was produced water from a producing well, rather than fracking wastewater, both can contain materials quite toxic to human health, including radioactive materials, heavy metals, and hydrocarbons.²⁰¹

In 2014, two fracking water tankers were rear-ended by a third, larger tanker truck carrying diesel fuel in West Virginia. Fracking water and diesel fuel both spilled onto the road. About 1,300 gallons of diesel fuel and 400 gallons of fracking water leaked into Chartiers Creek and the sewer drains. The spill was a concern to aquatic life in the creek, and required HAZMAT crews, DEP, and town officials to clean up.²⁰²

Based on its review of the risk of spills generated from truck trips alone, New York City concluded in its 2009 report, that “acute spill scenarios are realistic and should be expected.”²⁰³

b. Even Industrially-Treated Wastewater Can Harm Water Quality

Even fracking industrially-treated fracking wastewater poses threats to humans and the environment, as centralized waste treatment facilities do not adequately remove all dangerous contaminants from wastewater. As New York City has observed, “the development of natural gas resources will present a significant waste disposal challenge for which there is no clear or viable solution evident at this date.”²⁰⁴

If fracking wastewater is to be discharged into surface waters, it must first be treated at dedicated brine or industrial wastewater facilities, also called centralized waste treatment (CWT)

¹⁹⁹ NRDC, *In Fracking’s Wake*, *supra* note 3, at 6, 58.

²⁰⁰ *Id.*

²⁰¹ Amy Mall, *Drinking Water Reservoir Contaminated by Oil and Gas Wastewater in Ohio*, NRDC Expert Blog, Mar. 11, 2016, <https://www.nrdc.org/experts/amy-mall/drinking-water-reservoir-contaminated-oil-and-gas-wastewater-ohio>.

²⁰² Christine D’Antonio, *HAZMAT Crews Called To Wash. Co. Tanker Crash*, CBS Pittsburgh, Apr. 21, 2014, <http://pittsburgh.cbslocal.com/2014/04/21/hazmat-crews-called-to-wash-co-crash/>; Jackie Cain, *3 Tanker Trucks Crash In Canton Township, Spilling Fracking Water, Diesel Fuel*, Pittsburgh’s Action News 4, Apr. 21, 2014, <http://www.wtae.com/article/3-tanker-trucks-crash-in-canton-township-spilling-fracking-water-diesel-fuel/7465904>.

²⁰³ NYC Assessment, *supra* note 11, at 37.

²⁰⁴ *Id.* at 48.

facilities.²⁰⁵ These plants use many of the same treatment processes that are found in municipal sewage treatment plants (also known as publicly owned treatment works, or POTWs), which are designed to treat pollutants found in municipally-generated, not industrial, wastewater. CWTs may also add coagulation and precipitation techniques to remove dissolved solids. However, while CWTs may be designed to remove more pollutants from wastewater than POTWs do, their discharges may still contain high levels of pollutants that are harmful to both people and the environment.

CWTs are subject to federally established effluent limitation guidelines (ELGs) limiting the pollutants that they may discharge.²⁰⁶ However, these ELGs are out of date; they were developed prior to the emergence of hydraulic fracturing methods of shale gas extraction and do not address all pollutants of concern in the wastewater generated by such operations.²⁰⁷

While the Commissions' draft regulations propose regulating some of these contaminants, an unknown number of contaminants may be released in the River Basin without regulation. As mentioned earlier, the absence of regulatory attention to a chemical does not guarantee safety. Only some of these chemicals are regulated by laws such as the Clean Water Act and the Safe Drinking Water Act, and as more evidence demonstrating the harms associated with fracking chemicals increases and as public health concerns associated with these same chemicals continues to grow, the number of contaminants known to harm human health and the environment will expand. For example, 1,4-dioxane, a chemical identified by EPA as a "likely carcinogen,"²⁰⁸ has been found in fracking fluid and fracking wastewater,²⁰⁹ and is currently not regulated under the Safe Drinking Water Act.

Because fracking wastewater contains many chemicals that are known to harm human health and the environment, because untreated wastewater can and has been inadvertently released into local waterbodies, and because even wastewater treated by CWTs contain chemicals that can adversely affect the River Basin and its residents, in order to fulfill the Compact's directive to "control future pollution and abate existing pollution in the waters of the

²⁰⁵ 40 C.F.R. § 435.33.

²⁰⁶ 40 C.F.R. Pt. 437.

²⁰⁷ The ELGs were adopted in 2000 and revised in 2003, yet large-scale shale gas extraction was not practiced at all until 1997 and did not become common until the mid-2000s. Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Centralized Waste Treatment Point Source Category; Final Rule, 65 Fed. Reg. 81,241 (Dec. 22, 2000) (codified at 40 C.F.R. Pt. 437); Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Centralized Waste Treatment Point Source Category, 68 Fed. Reg. 71,014 (Dec. 22, 2003) (codified at 40 C.F.R. Pt. 437). *See generally* U.S. Department of Energy, National Energy Technology Laboratory, Shale Gas: Applying Technology to Solve America's Energy Challenges, March 2011, 3, http://www.netl.doe.gov/technologies/oilgas/publications/brochures/Shale_Gas_March_2011.pdf (summarizing the history of shale gas development).

²⁰⁸ U.S. Env. Prot. Agency, Technical Fact Sheet—1, 4-Dioxane (2017), https://www.epa.gov/sites/production/files/2014-03/documents/ffro_factsheet_contaminant_14-dioxane_january2014_final.pdf.

²⁰⁹ NYS SGEIS, *supra* note 48, at 6-20, T. 6-1.

[Delaware River] basin,”²¹⁰ the Commission should ban the treated or discharged in the River Basin.

IV. The Commission Should Ban Water Withdrawal for Fracking Use

Water withdrawals that total less than an average of 100,000 gallons per day (per 30-day period) do not currently require a Commission permit. The proposed regulations would eliminate this loophole, requiring all water withdrawals for oil and gas extraction to first obtain Commission review and approval. While this change helps to regulate a harmful, and previously unregulated, activity, it would still allow the Delaware River Basin’s freshwater to be used for fracking where it is permitted.²¹¹ Water exports would also exacerbate the risk of droughts and other harmful events across the region. As such, the Commission should ban the export of freshwater for fracking entirely.

The removal of water for fracking would cause irreparable harm. Fracking is a highly water-intensive process that requires between three and eight million gallons of water per well in the Marcellus region.²¹² And unlike other activities in the Delaware River Basin, such as domestic and commercial use, where 90 percent of water is returned, fracking results in 70 to 90 percent of the water used to be permanently removed from the water cycle.²¹³ For example, in the nearby Susquehanna River Basin, approximately 96 percent of the water withdrawn by the gas industry is not returned to its source.²¹⁴ Such a removal from the Delaware River Basin would disrupt its natural hydrologic cycle, since water used for fracking would be exported out, and not returned to the River Basin.

According to the Delaware River Basin Water Code, “the waters of the Delaware River Basin are limited in quantity and the basin is frequently subject to drought warnings and drought declarations due to limited water supply storage and streamflow during dry periods. Therefore, it shall be the policy of the Commission to discourage the exportation of water from the Delaware River Basin.”²¹⁵ The Commission should follow the policy of its own code and not allow the withdrawal of water for fracking. Given the highly variable and limited freshwater supply in the Basin, it should ban the exportation for water to be used for fracking.

Moreover, the Commission has proposed banning fracking from the basin because it has rightly deemed it to be unsafe. As the Commission well knows, fracking is dangerous and harmful. It causes health problems and risks to water quality.²¹⁶ Fracking’s risks are the same

²¹⁰ Compact § 5.2.

²¹¹ Proposed Regulations, *supra* note 1.

²¹² B. Wright, et al., *Impact Assessment of Natural Gas Production in the NYC Water Supply Watershed* 5 (2010).

²¹³ Proposed Regulations, *supra* note 1; U.S. Env. Prot. Agency, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States* 12 (Fig. ES-4(a)).

²¹⁴ J. Richenderfer, et al., *Water Use Associated with Natural Gas Shale Development: An Assessment of Activities Managed by the Susquehanna River Basin Commission July 2008 through December 2013*, 38 (2016).

²¹⁵ Delaware River Basin Water Code, DELAWARE RIVER BASIN COMMISSION, § 2.30.2.

<http://www.nj.gov/drbc/library/documents/watercode.pdf>.

²¹⁶ Delaware River Basin Commission, *Frequently Asked Questions (FAQs) Revised Draft Rules Addressing Hydraulic Fracturing Activities within the Delaware River Basin*,

http://www.state.nj.us/drbc/library/documents/HydraulicFracturing/FAQ_HydraulicFracturingPRM_012218.pdf.

whether it occurs in the Basin or elsewhere, and the Basin should not facilitate other areas to take on this risk where it has deemed fracking to be wrong for its own environment.

a. Exporting Water for Fracking Would Harm the Watershed

Withdrawing Delaware River Basin freshwater would be devastating to a region that relies on a clean and healthy watershed for its livelihood.

First, these exports can create low-flow conditions, which have been linked to increased water temperature, decreased dissolved oxygen and decreased biodiversity, which would in turn harm aquatic habitats, including sensitive wetlands.²¹⁷ For example, low-flow conditions reduce the capacity of a waterway to transport silt and fine sediment, leading to sedimentation and the smothering of benthic habitat.²¹⁸ Low-flow conditions have also been documented to lead to decreased insect biomass due to limited habitat, which has implications for fish communities and other species which rely on insects for food.²¹⁹

Effects on native trout fisheries in the upper Delaware, which rely on upstream releases of cold water from reservoirs in New York State, would be particularly troubling. In 2010, trout fisheries in the Delaware River generated more than \$29 million in economic activity across the region while at the same time supporting an intricate web of life throughout the watershed.²²⁰ But example, low-flow conditions and corresponding increases in temperature have led to increased competition for food and reduced body mass among trout populations.²²¹ Exporting water out of the watershed would lead to a decline in the availability of upstream freshwater releases, which would irreparably harm the trout fisheries and all that depend on them.

Second, a decrease in the supply of freshwater in the Delaware River would reduce the waterway's ability to dilute and assimilate pollutants. When water enters a waterway through tributaries, it helps naturally dilute point sources of pollution (for example, a sewage outfall). In China, for example, where access to water is highly variable, pollution loads have exceeded the natural assimilative capacity of certain waterways, meaning the rate by which waterways can naturally dilute pollution has decreased.²²² Should freshwater be extracted from the Delaware River Basin, there will be a decreased supply of freshwater to assimilate downstream sources of pollution. A decline in the ability of a waterway to dilute pollutants may lead to an increased number of water quality impairments.²²³

²¹⁷ Robert J. Rolls, et al., *Mechanistic Effects Of Low-Flow Hydrology On Riverine Ecosystems: Ecological Principles And Consequences Of Alteration*, 31 *Freshwater Science*, 1163, 1170 (2012).

²¹⁸ *Id.* at 116.

²¹⁹ Annika Walters & David Post, *How Low Can You Go? Impacts Of A Low Flow Disturbance On Aquatic Insect Communities.*, 21 *Ecological Applications* 163, 172 (2011).

²²⁰ Gerald J. Kauffman, *Economic Value of Nature and Ecosystems in the Delaware River Basin*, 158 *Journal of Contemporary Water Research & Education* 98, 108 (2016), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1936-704X.2016.03222.x>.

²²¹ The Nature Conservancy, *Ecosystem Flow Recommendations for the Delaware River Basin*, 26 (2013), http://www.state.nj.us/drbc/library/documents/TNC_DRBFlowRpt_dec2013.pdf.

²²² Dabo Guan, et al. *Lifting China's Water Spell*, 48 *Environmental Science and Technology*, 11048 (2014).

²²³ *Proceedings of the 2007 Georgia Water Resources Conference*, held March 27–29, 2007, at the University of Georgia, <http://www.gwri.gatech.edu/sites/default/files/files/docs/2007/5.2.3.pdf>.

Third, and most critically, removing freshwater for fracking would threaten regional drinking water security. As mentioned in Part I, the Delaware River Basin provides drinking water for over 17 million Americans, including residents of Philadelphia and New York City. Removing water from the basin would decrease the amount of water available for drinking, especially during seasonal droughts. DRBC acknowledged this risk, stating that “withdrawals from surface and groundwater in the amounts required for [fracking] may adversely affect aquatic ecosystems and river channel and riparian resources downstream, including wetlands, and may diminish the quantity of water stored in an aquifer or a stream’s capacity to assimilate pollutants.”²²⁴ These risks are not nearly worth the potential rewards.

New York City plays a critical role in managing regional fresh water supply through three Delaware watershed reservoirs: the Pepacton, Cannonsville, and Neversink Reservoirs (“City Reservoirs”).²²⁵ The City Reservoirs supply approximately 50 percent of the New York City’s daily water needs and are cooperatively managed by the Flexible Flow Management Program (FFMP), an agreement between New York City and New York State, New Jersey, Pennsylvania and Delaware.²²⁶ The FFMP was developed to manage New York City’s large water needs and release excess water to downstream states. These releases underscore the Delaware Basin’s role in meeting the region’s water needs.

Should the Commission allow the exportation of water for fracking, upstate surface water withdrawals could reduce flow to the City Reservoirs and decrease the probability that those reservoirs refill, especially during seasonal droughts.

Additionally, groundwater withdrawals could deplete freshwater aquifers, threatening streams and wetlands throughout the watershed, and downstream withdrawals could require upstream reservoirs to release additional water to meet in-stream flow and release requirements.²²⁷ Understanding the unique and delicate hydrologic relationship between surface and groundwater resources is essential as the Commission considers opening the Basin up to exports of water for fracking where it is permitted. In 2008, streams in Washington County, Pennsylvania were pumped dry to provide water for drilling in the Marcellus shale.²²⁸ Opening the Delaware River Basin to exports of fracking water could create conditions by which New York City and the entire region’s drinking water supply could be similarly constrained.

b. Climate Change Will Exacerbate Impacts of Water Exports

The harms of decreased water supply due to the exportation of water for fracking are further heightened by the threat of anthropogenic climate change. Studies show that climate

²²⁴ Proposed Regulations, *supra* note 1.

²²⁵ United States Geologic Survey (USGS), *Agreement of the Parties to the 1954 U.S. Supreme Court Decree Effective June 1, 2012*, 3 (2012), https://water.usgs.gov/osw/odrm/documents/FFMP_FINAL.pdf.

²²⁶ City of New York, *NYC’s Reservoir System*, <http://www.nyc.gov/html/nycwater/html/drinking/reservoir.shtml> (Mar. 30, 2018); USGS, *Agreement For A Flexible Flow Management Program* (2017), <https://water.usgs.gov/osw/odrm/ffmp/FFMP2017.pdf>.

²²⁷ NYC Assessment, *supra* note 11, at 33.

²²⁸ *Team 4: PA Streams Drained Dry By Drillers*, Damascus Citizens for Sustainability, Nov. 13, 2008, <http://www.damascuscitizensforsustainability.org/2008/11/team-4-pa-streams-drained-dry-by-drillers/>.

change will cause unpredictable precipitation and increased temperatures, resulting in loss of snowpack, prolonged droughts and sea-level rise.²²⁹ The combination of average temperatures increasing, loss of upstream water supply due to decreased snowpack and sea-levels rising will facilitate an increase in the rate of saltwater intrusion into inland water supplies.²³⁰

In the Delaware River, the “salt line,” the invisible zone dividing freshwater and seawater, fluctuates based upon tidal activity and upstream reservoir water releases. Although the salt line typically hovers around Wilmington, Delaware, during the “drought of record” in 1963, it pushed to just south of Philadelphia’s drinking water intakes.²³¹ In a climate-disrupted future, as upstream supply of freshwater decreases due to decreased snowpack in New York, and sea-levels increase, the salt line will move upstream, risking impairment of drinking water intakes and infrastructure throughout the watershed. This hydrologic dynamic would be exacerbated further by water exports, as there would be reduced supply to push the “salt-line” toward the sea.

V. Neither a Fracking Wastewater Ban Nor a Ban on Water Withdrawal for Fracking Purposes Would Violate the Dormant Commerce Clause

Finally, neither a ban on fracking wastewater nor on water withdrawals for fracking purposes would violate the dormant Commerce Clause. First, the Commission, as a state/federal agency acting in accordance with a Congressionally-approved interstate compact, may not even be subject to the dormant Commerce Clause. But even if it is, such bans would not run afoul of the dormant Commerce Clause, as the bans would not discriminate against interstate commerce, and the public interest in such a ban outweighs any burden on interstate commerce.

In 2014, Governor Christie vetoed a New Jersey bill proposing to ban fracking wastewater, claiming that such a ban would have violated the dormant Commerce Clause.²³² Several legal experts and scholars have explored the credibility of his claim, all ultimately concluding that a ban on fracking waste would not violate the dormant Commerce Clause.²³³ This section serves to just briefly expand these analyses to the case of the Delaware River Basin.

The dormant Commerce Clause is rooted in Article 1 of the Constitution, which states that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among

²²⁹ R. Horton, et al., *The Third National Climate Assessment: Climate Change Impacts in the United States*, ch. 16 (2014), <https://goo.gl/mUWpiB>.

²³⁰ Atlantic Climate Adaptation Solutions Association, *Saltwater Intrusion and Climate Change* 11 (2011), http://www.gov.pe.ca/photos/original/cle_WA1.pdf.

²³¹ Jon Hurdle, *As Drought Persists, DRBC Steps Up Efforts to Repel Salt Front In Delaware River*, NPR, Nov. 28, 2016, <https://stateimpact.npr.org/pennsylvania/2016/11/28/as-drought-persists-drbc-steps-up-efforts-to-repel-salt-front-in-delaware-river/>.

²³² Brent Johnson, *Christie Vetoes Bill Aiming To Ban Fracking Waste in N.J.*, NJ.com, Aug. 8, 2014, http://www.nj.com/politics/index.ssf/2014/08/christie_vetoes_bill_aiming_to_ban_fracking_waste_in_nj.html.

²³³ Eric Michel, *Discrimination in the Marcellus Shale: The Dormant Commerce Clause and Hydraulic Fracturing Waste Disposal*, 88 Chi. Kent. L. Rev. 213, 228 (2012); Stephen Miller, *Hydraulic Fracturing and the Emergent Dormant Commerce Clause*, 9 American Bar Association Section of Environment, Energy, and Resources Constitutional Law Committee Newsletter 6 (2013); Letter from Albert Porroni, Legislative Counsel, New Jersey State Legislature Office of Legislative Services, to Bob Smith, New Jersey State Senator (Mar. 19, 2012), available at <https://goo.gl/IGBPsc>.

the several States.”²³⁴ While this language explicitly provides Congress an affirmative grant of regulatory power over states, it has “long been understood to have a ‘negative’ aspect,” known as the “dormant” Commerce Clause, that prohibits states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce.²³⁵ The Supreme Court has found that the dormant Commerce Clause prohibits states from passing laws that economically isolate or arbitrarily discriminate against articles of commerce from outside its borders.²³⁶ The purpose of this prohibition “reflected a central concern of the Framers . . . the conviction that in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”²³⁷

As a preliminary matter, because the Delaware River Basin Commission would be acting to implement an interstate compact ratified by Congress, it could be argued that any act taken pursuant to the Compact, such as a ban on fracking wastewater or water withdrawals for fracking purposes, would be insulated from the limitations of the dormant Commerce Clause. In 1945, the Supreme Court recognized the “undoubted” power of Congress to “permit the states to regulate the commerce in a manner which would not otherwise be permissible” under the dormant Commerce Clause.²³⁸ In *Cuyler v. Adams*, the Supreme Court found that a Congressionally approved interstate compact falling within the Compact Clause of the U.S. Constitution *is* federal law.²³⁹ Therefore, while state actions are generally subject to the limits of the dormant Commerce Clause, “congressional approval of a compact eliminates the concern over a dormant commerce clause challenge to state water policy, since any affect [sic] on interstate commerce has been sanctioned by the federal government.”²⁴⁰ One need not reach that analysis, however, because even if the Commission’s actions are subject to the dormant Commerce Clause, bans on fracking wastewater and on water withdrawal for fracking purposes would still not run afoul of state’s limits on interstate commerce.

To determine whether a state law runs afoul of the dormant Commerce Clause, courts undertake a two-step analysis, as outlined by the Supreme Court in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*.²⁴¹ First, the court looks to the text of the law to determine whether it facially discriminates against interstate commerce.²⁴² If the court finds that the state law provides for “differential treatment of in-state and out-of-state economic

²³⁴ U.S. CONST. art. I, § 8, cl. 3.

²³⁵ *Or. Waste Sys. V. Dep’t of Envtl. Quality*, 511 U.S. 93, 98 (1994).

²³⁶ *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); Eric Michel, *Discrimination in the Marcellus Shale: The Dormant Commerce Clause and Hydraulic Fracturing Waste Disposal*, 88 Chi. Kent. L. Rev. 213, 228 (2012).

²³⁷ *Hughes v. Oklahoma*, 441 U.S. 322, 325 – 26 (1979).

²³⁸ *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

²³⁹ 449 U.S. 433, 440 (1981); *see also Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The Compact Clause provides: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.” U.S. Const. art. I, § 10, cl. 3; *see also Tarrant Reg’l Water Dist. v. Herrmann*, 656 F.3d 1222, 1235 (10th Cir. 2011), *aff’d*, 569 U.S. 614 (2013)

²⁴⁰ Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. Colo. L. Rev. 405, 452 (2006).

²⁴¹ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Note that this test for facial discrimination emerged long before this case.

²⁴² *Id.* at 138.

interests that benefits the former and burdens the latter,”²⁴³ the law is struck down unless the state shows that there is a legitimate local purpose that cannot be achieved without discrimination.²⁴⁴ For example, a New Jersey law that prohibited the importation of garbage that originated outside the state was determined to be facially discriminatory and was struck down by the Supreme Court.²⁴⁵

Second, for laws that are found not to be facially discriminatory, courts undertake a “*Pike*” balancing test, whereby the law is upheld “unless the burden imposed on the course of interstate commerce outweighs the state regulatory concern.”²⁴⁶ Under this test, a law does not violate the dormant Commerce Clause if it: (1) is an even-handed regulation drafted to protect a legitimate public interest; (2) its effects on interstate commerce are merely incidental; and (3) the burden imposed on interstate commerce is clearly not excessive as compared to the local benefits that result.²⁴⁷ This is an extremely fact-dependent analysis. However, courts approach burden review with considerable deference, and few laws are struck down under this prong of the analysis unless the stated public interest seems nearly unconnected to the challenged rule.²⁴⁸ For example, the U.S. Supreme Court invalidated an Iowa state law that excluded trucks beyond a certain length from its highways after Iowa was unable to muster any serious evidence that its law promoted safety.²⁴⁹

NRDC believes a proposed ban on fracking wastewater in the Delaware River Basin would pass the two-part test. First, such a ban would not on its face discriminate against interstate commerce, as *all* wastewater, produced in any state, would be prohibited in the Delaware River Basin. While it may be true that, in the case of New York, New Jersey, and Delaware, because fracking does not take place in these states, all wastewater would necessarily originate from out of the state, the Supreme Court has previously found the mere fact that only out of state businesses are affected by the law does not, by itself, establish facial discrimination.²⁵⁰ A ban on fracking wastewater would also satisfy the second part of the two-part test, since, as explained in Parts II.b. and III, fracking wastewater is harmful to both public health and the environment, and a ban would serve to protect those interests. Finally, the burden on interstate commerce would not be significant.

Additionally, a proposed ban on water withdrawals in the Delaware River Basin for fracking purposes would also pass the two-part test. First, such a ban would not on its face discriminate against interstate commerce, as water withdrawals for fracking in any state would be prohibited. While it may be true that, states where fracking does not place, such as New York, New Jersey, and Delaware, would not be limited by this regulation, as explained above, the Supreme Court has previously found the mere fact that only out of state businesses are

²⁴³ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S. Ct. 1786, 1793, 167 L. Ed. 2d 655 (2007)

²⁴⁴ *See Maine v. Taylor*, 477 U.S. 131, 151.

²⁴⁵ *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

²⁴⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

²⁴⁷ *Id.*

²⁴⁸ *See Daniel Francis, The Decline of the Dormant Commerce Clause*, 94 Denv. L. Rev. 255, 266 (2017).

²⁴⁹ *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 671-74 (1981) (plurality opinion).

²⁵⁰ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (upholding a law barring petroleum producers from owning gas stations where no producers operated in the state).

affected by the law does not, by itself, establish facial discrimination.²⁵¹ A ban on water withdrawal would also satisfy the second part of the two-part test, since, for the reasons explained in Part IV, water withdrawals for fracking could harm both human health and the environment, and a ban in water withdrawals for fracking would serve to protect those interests.. Finally, the burden on interstate commerce would not be significant.

For the reasons stated above, neither a ban on fracking wastewater, nor a ban on water withdrawal for fracking purposes would violate the dormant Commerce Clause.

Conclusion

NRDC thanks the Commission for proposing a ban on fracking in the watershed. While an important step, a ban on drilling alone is insufficient to fully protect the Delaware River Basin. For the reasons stated above, we request that the Commission enact a full ban on fracking in the River Basin that is inclusive of a ban on the treatment and disposal of fracking wastewater and on the withdrawal and export of water from the River Basin for fracking purposes.

Sincerely,

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²⁵¹ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (upholding a law barring petroleum producers from owning gas stations where no producers operated in the state).