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September 14, 2010

VIA E-MAIL

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

Re: Response of Northern Wayne Property Owners' Alliance to Request of Damascus Citizens for Sustainability, Delaware Riverkeeper, and Delaware Riverkeeper Network for Supersedeas Concerning Reservation Provisions of Supplemental Executive Director Determination

Dear Ms. Bush:

At a few minutes before 5:00 on Friday afternoon, September 10, I received on behalf of this firm's client, the Northern Wayne Property Owners' Alliance ("NWPOA") a copy of a request by Damascus Citizens for Sustainability ("DCS"), the Delaware Riverkeeper, and the Delaware Riverkeeper Network ("DRN") for a "supersedeas concerning reservation provisions of Supplemental Executive Director Determination." DCS and DRN seek an order from the Commission subjecting seven exploratory natural gas wells to Commission review, at least until completion of a hearing on the Supplemental Executive Director Determination ("SEDD") currently scheduled to begin on December 13, 2010.

NWPOA is a coalition of more than 1500 landowner families who have worked jointly to lease mineral rights under approximately 100,000 acres of their property for natural gas development. The five exploratory wells being developed by NWPOA's lessee Newfield Appalachia PA, LLP ("Newfield"), along with the two wells being developed by Hess Corporation are necessary to allow development of the natural gas resource owned by NWPOA's members. Failure to complete the exploratory wells at issue here promptly puts at risk approximately $100 million in bonus payments for the "production period" under NWPOA's members' leases, the text of which has previously been provided to the Commission, as well as their royalties from gas production. NWPOA has been named as an interested party to the hearing currently scheduled on the SEDD.

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NWPOA opposes this request, and asks that the Commission table it or deny it for several reasons:

- The Commission has no authority to issue a "supersedeas" under its rules. Even if the Commission had the power of common law supersedeas, which it does not, a supersedeas stays a proceeding in another forum (such as execution on a judgment under appeal) and has no application to *initiation* of a proceeding, which is what DCS and DRN seek here.

- Even if a supersedeas were available to preserve the legal positions of the parties pending proceedings before the Commission – which it is not – the legal positions of the parties have *never* required Commission review of the exploratory well projects at issue; the *status quo ante* is that these wells may proceed provided they obtain permits from the Commonwealth of Pennsylvania and at no time has it ever been different.

- DCS and DRN apparently do not want to say so, but they really request a finding by the Commission under Section 2.3.5 B.18 of the Commission's Rules of Practice and Procedure to the effect that each of these exploratory wells poses "a potential substantial water quality impact on waters classified as Special Protection Waters." Sophisticated lawyers who use the word "supersedeas" to camouflage a request for reconsideration should be held to what they ask for, and that is not available. Even if the Commission were to consider this matter under Section 2.3.5 B.18, which it should not, the Commission has already determined that it requires a hearing to develop a factual record on which to test that determination as made in the SEDD. The Commission therefore cannot have a sufficient factual record now unilaterally to modify the SEDD. Moreover, the Commission surely cannot do so based on the absence of any factual record provided in the request actually submitted by DCS and DRN; they offer nothing approaching evidence, and nothing at all new.

As a preliminary matter, the Commission should deny or table the supersedeas request of DCS and DRN because it is untimely. The request was made too late to allow fair consideration at the September 15, 2010, Commission meeting. There was no reason for this late request. The Commission made its intention not to require Commission approval for the wells at issue by announcement at the July 14, 2010, Commission meeting. Both Mr. Zimmerman and Ms. Brown, counsel for DCS and DRN, were present at that time.[1] They had formulated the plan to request a "supersedeas" by the September 2 conference

[1] One could say that formal notice was not made of the inclusion of two of the wells within the "reservation" until July 23 when the Executive Director issued an Amended Supplemental Executive Director's Decision, but the point is the same. It is a long time from July 23 to September 10, and there is no reason for the Commission to take up such a delayed request.

with the hearing officer, as described in their September 10 letter. And yet, no actual request was made until the close of business on the Friday before a Wednesday morning Commission hearing. DCS and DRN took for themselves at least 58 days (July 14 to September 10) to formulate their request and left all other interested parties, the public, and ultimately the Commission two business days to consider the supersedeas request and to respond. Fundamental fairness requires that the request not be considered on September 15.

1. The Commission Has No Power to Issue a "Supersedeas."

The Commission's Rules of Practice and Procedure do not include the word "supersedeas," and neither does the Administrative Procedure Act, 5 U.S.C. §§ 101-913. "Supersedeas" is a common law writ issued by a superior court to an inferior court requiring that some proceeding not continue. In its most common usage, an appeal to a federal court of appeals can act as a stay on execution of a district court judgment, but only if the judgment debtor posts a "supersedeas bond."

DCS and DRN ask the Commission to order private parties to cease work on seven exploratory wells. Those wells are not subject to Commission review or approval under any provision of the Commission's rules. They are not subject to review in particular under the 2009 EDD or the 2010 SEDD. Thus, DCS and DRN do not seek to have a proceeding suspended; they seek to have a proceeding – Commission review – *initiated*.

The Commission is not a court. It does not have the power of the common law writ of supersedeas. The Commission has no statutory power of supersedeas under its rules. Even if the Commission did have that power, a writ of supersedeas cannot issue to a private person to stop private activity.

2. The Requested Supersedeas Would Alter the *Status Quo Ante* Rather Than Preserve It.

The Commission should not read the request of DCS and DRN more expansively than they drafted it. Both parties are represented by experienced counsel. If what they wanted was a "stay," they could have asked for it. If they wanted a further finding under Section 2.3.5 B.18, they could have asked for it. They asked for a "supersedeas." That is not a common word in federal administrative practice.[2] The Commission and the other interested parties should not have to guess at what they meant.

[2] Pennsylvania state administrative procedure uses the term "supersedeas." In most contexts, it would be called an preliminary injunction under federal procedure. Experienced practitioners know the difference

Even if the Commission were to treat the request of DCS and DRN as a generalized request for a stay, which the Commission should not, there is nothing to stay. DCS and DRN do not complain of an action of the Executive Director, they complain of a non-action – the decision *not* to subject exploratory wells to regulation. The Commission cannot stay a decision not to act.

What DCS and DRN really request is for the Commission to reverse the Executive Director's SEDD and to subject these wells to the Commission's review and approval. That would not preserve the prior legal relations of the parties. It would alter those relations. That is not a conventional request for a stay. It is a request for a wholly new executive director's determination. There is no reason for the Commission to make that wholly new determination on short notice with no new evidence in the record on the basis of a short letter from counsel.

The wells at issue here are vertical exploratory wells. Their development does not require a material water withdrawal or water discharge in excess of any of the Commission's regulatory thresholds. Prior to the May 19, 2009, EDD, these wells did not require Commission review or approval.

After the EDD, they did not require Commission approval either. The EDD specifically provides that "[w]ells intended solely for exploratory purposes are not covered by this Determination."

After the June 14, 2010, SEDD, these wells did not require Commission approval. The SEDD provides: "this Supplemental Determination does not prohibit any exploratory natural gas well project from proceeding if the applicant has obtained a state natural gas well permit for the project on or before the date of issuance set forth below." On July 23, the ASEDD confirmed that this provision applied not only to the Newfield exploratory wells that unambiguously held state permits, but also to the two Hess wells.

Therefore, at no time did any of these wells ever require Commission approval. They are like any project that does not require approval under the Commission's rules or determinations. DCS and DRN might prefer to subject these projects to Commission review, but doing so would change the legal relations of the parties, not preserve them.

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between Pennsylvania and federal administrative procedure, and know that federal administrative tribunals typically cannot grant preliminary relief without statutory authority.

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3. The Commission Has No Evidence Before It Upon Which it Could Grant the Requested Supersedeas.

Even if the Commission were to entertain the request of DCS and DRN – which it should not – the Commission has no new evidentiary basis on which to grant the request. To do so would be to act literally capriciously.

As the Commission is aware, the EDD and SEDD subject certain natural gas wells to Commission approval even though the wells do not require withdrawals in excess of Commission regulatory thresholds. Section 2.3.5 B.18 of the Rules of Practice and Procedure provides the authority for an action of this sort when the project has "a potential substantial water quality impact on waters classified as Special Protection Waters."

The SEDD states that the Executive Director "recognizes the risks to water resources, including ground and surface water that the land disturbance and drilling activities inherent in any shale gas well pose." However, at no point did the Executive Director state what those risks in fact are. Indeed, at the September 2 conference with the hearing officer, counsel for the Commission took the position that the rationale for the SEDD need not be fully developed even now, and that the Executive Director need not state her reasons until October 15 in outline and November 1 in full expert reports. I believe that you personally represented that the Executive Director's reasons could not be fleshed out immediately because some of the experts on which she intended to rely were not available due to their engagement in the Gulf of Mexico.

The Commission will recall that on July 12 NWPOA requested that the Commission reverse the SEDD at the July 14 meeting because the Executive Director made no specific finding of risks to special protection waters, and those risks were not obvious; indeed, NWPOA took the position that they were not sufficiently substantial to warrant the extension of regulatory authority to exploratory wells at all. The Commission declined to reverse the SEDD, finding that the Commission required an evidentiary hearing to make the determination whether exploratory wells posed risk to special protection waters.

DCS and DRN offer nothing that would change that conclusion. Their request for a supersedeas is not supported by any evidence, even under the relaxed standards of the Commission. The only materials provided are statements of counsel. The environmental harms cited on page 3 of the request are not risks to the Commission's special protection waters: "These activities have subjected our organizations' members to noise, dust, disturbance by heavy truck traffic, loss and/or interruption of sleep from high intensity lighting and drilling activity during night hours, and disruption of their lives and enjoyment of their property and community." No other specific risks are even mentioned.

Moreover, DCS and DRN acknowledge in their request that some, and perhaps most, of the activity of which they complain has already taken place or is already underway.

Nothing in the submission allows the Commission to make a finding that the work yet to be done on those few wells would pose an incremental risk to special protection waters requiring Commission approval. Indeed, stopping a construction project in the midst – if that is what DCS and DRN intend – can often pose more environmental risk (and more expense) than simply finishing the work. DCS and DRN offer no evidence suggesting that that would not be true in this case.

In order to grant DCS and DRN their supersedeas, the Commission would have to subject the exploratory wells in question to Commission approval. DCS and DRN want the Commission to do that on September 15 without a hearing. They offer no evidentiary support for the proposition that the Commission's affirmative decisions *not* to regulate these wells are wrong. DCS and DRN argue that if the Commission does not reverse the SEDD without a hearing and without evidence, the integrity of the evidentiary hearing will be compromised. That just does not follow. The Commission cannot make a determination for which it has said it requires an evidentiary hearing before that hearing in order to preserve the integrity of the hearing. That would be arbitrary and capricious. The request for a supersedeas should be tabled or denied.

I am authorized to state that Allan J. Nowicki and the interested parties related to him – Pennswood Oil & Gas, LLC, Pleasant Mount 10, LLC, Stockport Associates, Dyberry 33, LLC, and Preston 38, LLC – join in this submission.

Respectfully submitted,

David G. Mandelbaum
(transmitted electronically)

David G. Mandelbaum
Attorney for
Northern Wayne Property Owners'
Alliance, LLC

cc: All counsel