

October 20, 2005

VIA OVERNIGHT MAIL

Kelly A. Johnson  
Acting Assistant Attorney General  
Environmental and Natural Resources Division  
P. O. Box 7611  
U.S. Department of Justice  
Washington, DC 20044-7611

Re: U.S. v. Union Corp. et al.,  
Civil Action No. 80-1589 (E.D. Pa.)  
Comments of Delaware River Basin  
Commission on Consent Decrees

Dear Ms. Johnson:

I am writing on behalf of the Delaware River Basin Commission ("DRBC" or "Commission"), consisting of the states of Pennsylvania, New Jersey, Delaware and New York and the federal government. The legislation establishing the DRBC confers upon it authority to administer the water resources of the Basin. Because the proposed Consent Decrees directly impact the Delaware River ("River"), the Commission is intensely interested in this proceeding.

The Commission respectfully submits these comments on the proposed Consent Decrees lodged with the United States District Court for the Eastern District of Pennsylvania in the above-captioned matter. In general, the Commission is pleased that a remedial action will be implemented at the Metal Bank Superfund Site ("Site") and commends the Department of Justice and the Environmental Protection Agency for their efforts over many years to achieve this result. The Commission further appreciates the consideration that EPA has given to comments submitted by the Commission over the years regarding EPA's selection of the remedy for the Site.

Although the Commission is largely satisfied with the terms of the settlement, as discussed more fully below there are two specific deficiencies that in our view should be corrected before the United States requests the Court to enter the Decrees. First, the Utility Group Consent Decree ("Utility Decree") as currently drafted disregards the total maximum daily load ("TMDL") requirements of section 303(d) of the Clean Water Act, 42 U.S.C. § 1319(d), and similar provisions contained in the DRBC's Comprehensive Plan and regulations.

PHL:5236199.1/DEL143-156856

In December 2003, EPA promulgated the TMDL for total polychlorobiphenyls ("PCBs") in the Delaware River Estuary ("Estuary")<sup>1</sup> pursuant to section 303(d), in part to comply with an Order of the United States District Court for the District of Delaware mandating issuance of the TMDL by that date. The Utility Decree in the above-captioned litigation (the "Metal Bank Action") should be fashioned to require the remedy to meet the load allocations in the existing Stage 1 and future Stage 2 TMDL, to allow the DRBC and Pennsylvania to implement the TMDL at the Site, and to require compliance with the DRBC's Comprehensive Plan.

Second, the Utility Decree fails to provide for sufficient monitoring to determine the effectiveness of the remedy, particularly where the remedy proposed in the Utility Decree deviates from EPA's Record of Decision ("ROD") for the Site. The ROD, as amended by two explanations of significant difference ("ESDs"), requires among other things the excavation of contaminated sediments at certain locations in the River near the Site.<sup>2</sup> The remedy proposed in the Utility Decree includes the construction of an aqueous cap over a portion of the sediments that the ROD designated for excavation. The Commission believes excavation to be more appropriate than capping because of the significant risk that the cap will become compromised by the tidal flow of the River. If, despite our views, the capping alternative is adopted, it is essential that it be accompanied by a comprehensive monitoring program that evaluates the effectiveness of the cap and triggers further remedial action if shown to be necessary.

#### BACKGROUND

Because the Department of Justice may not be familiar with the central role that the DRBC plays in managing water resources in the Basin, some background may be helpful. As noted above, the DRBC is a federal-interstate compact agency created by concurrent legislation in the United States and the states of Pennsylvania, New Jersey, Delaware and New York. The Delaware River Basin Compact ("Compact") as adopted by the Congress in 1961, 75 Statutes at Large 688<sup>3</sup>, and the Basin states is the statute under which the federal government and the Basin states jointly manage water resources within the Basin. The Compact integrates federal and state authorities in a single entity subject to the control of the DRBC Commissioners. The

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<sup>1</sup> The DRBC has divided the Estuary into six Zones. The Site is located in Zone 3 close to the boundary with Zone 2. EPA's TMDL issued in December, 2003 encompasses Zones 2 through 5. The TMDL for Zone 6 (Delaware Bay) is scheduled to be issued in December, 2005.

<sup>2</sup> The Site is located in Northeast Philadelphia on the banks of the Delaware River. The main toxic contaminant at the Site is PCBs that were released at the Site during the dismantling of transformers. The River sediments in the vicinity of the Site contain high concentrations of PCBs. PCBs continue to enter the river from the Site through stormwater that comes into contact with contaminated soils and through groundwater that seeps into the River.

<sup>3</sup> A copy of the Compact is easily accessible at the DRBC's website, [www.state.drbc.nj.us](http://www.state.drbc.nj.us).

Commissioners consist of a representative of the President and the governors of each of the four Basin states.<sup>4</sup>

The Compact grants the Commission multifaceted authority to control pollution. Pursuant to Section 5 of the Compact, the Commission may issue regulations to abate existing pollution and control future pollution. The Commission also controls pollution through its authority to preclude public or private projects that conflict with the Commission's Comprehensive Plan. Pursuant to Section 3.8 of the Compact, any project having a substantial effect on the water resources of the Basin must first secure Commission approval. The Commission issues approvals after notice and hearing if but only if the project under review would not substantially impair or conflict with the Commission's Comprehensive Plan. Section 11 of the Compact expressly subjects federal projects affecting the water resources of the Basin to Commission review and approval. As discussed in the next section of this letter, the Commission's water quality objectives for PCBs in the Estuary are incorporated into the Commission's Comprehensive Plan. The Utility Decree conflicts with the Compact and Comprehensive Plan in that it neither provides for Commission review of the remedial project as Congress mandated in the Compact nor requires compliance with the Commission's Comprehensive Plan, including its water quality objectives for PCBs.

As part of or in addition to performing its regulatory and adjudicatory functions, the Commission undertakes scientific and consensus building activities. For example, Commission scientific professionals performed the extensive watershed and water quality modeling needed to develop the PCB TMDL and drafted the TMDL that EPA issued. Similarly, the Commission hosts a TMDL implementation committee, a toxics advisory committee, and other advisory committees comprised of members representing divergent interests. The Commission has found that employing a consensus building approach reduces litigation and produces results that are supported by a broad range of public and private interests. As discussed below, unless modified to provide for implementation of the PCB TMDL at the Site, the Utility Decree threatens to handicap or preclude the TMDL implementation options under consideration by the advisory committee and interfere with the attainment of the water quality objectives for PCBs contained in the Commission's Comprehensive Plan.

#### REGULATION OF PCBs IN THE DELAWARE RIVER

Control of PCB discharges from the Site to the main stem of the Delaware River implicates the core of the DRBC's mission of protecting the Basin's interstate water resources.

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<sup>4</sup> The Compact recognized the drawbacks of "the duplicating overlapping and uncoordinated administration of some forty-three State agencies, fourteen interstate agencies, and nineteen federal agencies which exercise a multiplicity of powers and duties resulting in a splintering of authority and responsibilities." As a solution, Congress and the legislatures of the Basin states agreed to form the DRBC and confer upon it the power to promulgate a Comprehensive Plan to which all private parties and government agencies (including federal agencies) must adhere.

Regulation of PCB discharges is also of vital concern to Pennsylvania, New Jersey and Delaware which have issued fish consumption advisories on account of the concentration of PCBs in fish tissue in the Estuary. In the previous section of this letter we described the DRBC's statutory authority. Because the Commission understands DOJ to be familiar with the requirements of the Clean Water Act, the administration of which has been delegated to the Basin states, we address these requirements only briefly.

The Clean Water Act reflects Congress's goals of restoring the biological and chemical integrity of the nation's waters. Pursuant to the Clean Water Act, states are required to designate uses for waterbodies within their jurisdictions. As the boundary between Pennsylvania and New Jersey, the Delaware River is subject to the jurisdiction of both states. Pennsylvania and New Jersey have designated fishing and recreation as among the uses for the tidal portion of the River including the segment of the Estuary area that includes the Site.

Pursuant to the Clean Water Act, states establish water quality criteria, subject to EPA approval, that implement the established designated uses. The DRBC similarly issues water quality objectives pursuant to the Compact that are analogous to state water quality criteria. The current numeric water quality criterion for total PCBs in Zones 2 and 3 of the River near the Site is approximately 44 picograms per liter. The actual, measured concentrations in the River are several orders of magnitude higher.

Pursuant to section 303(d) of the Clean Water Act, 42 U.S.C. §1319(d), each state is required to submit to EPA a list of those waterbodies within the state that are not achieving the water quality standards. Following compilation of the Section 303(d) list, the state or EPA must promulgate a TMDL for each pollutant for which existing effluent limitations and other pollution control requirements are insufficient to achieve the water quality standards. The TMDL reflects the total load of a pollutant that a river can assimilate without violating water quality standards. The TMDL in this case is composed of wasteload allocations (for the most part assigned to point sources consisting of traditional industrial facilities discharging wastewater through a pipe), load allocations (assigned largely to nonpoint source discharges including stormwater laden with PCBs that flows off contaminated sites during storm events) and a margin of safety.

#### The PCB TMDL

Pursuant to a Consent Decree issued by the United States District Court for the District of Delaware in an action encaptioned American Littoral Society et al. v U.S. EPA et al., Delaware was required to promulgate a TMDL for the Delaware portion of the Estuary by December 15, 2003, except for Zone 6 (Delaware Bay) for which the deadline is December, 2006. Pursuant to the Court's Order, if Delaware failed to meet the December, 2003 deadline, EPA was obligated to develop and promulgate the TMDL by December 15, 2003. Because the entire Estuary failed to meet water quality standards, the Clean Water Act also required that PCB TMDLs be established for the Pennsylvania and New Jersey portions of the Estuary. See American Littoral Society et al. v. United States et al., C.A. No. 96-489 (E.D. Pa.) (EPA obligations regarding Pennsylvania waterbodies), and 1999 Memorandum of Agreement between New Jersey and EPA Region II (New Jersey waterbodies).

At the request of EPA and the Estuary states, the DRBC performed the technical work necessary to develop the TMDL for total PCBs for Zones 2 through 5 of the Delaware River Estuary. The DRBC scientists and policymakers developed the TMDL with considerable input from outside experts and the entire Basin community. EPA promulgated the TMDL on December 15, 2003. As EPA's TMDL recited, "In September of 2000, the Commission established a panel of scientists expert in the modeling of hydrophobic contaminants such as PCBs to advise it and the TAC [DRBC's Toxic Advisory Committee] on the development of the complex hydrodynamic and water quality model required to develop the TMDLs. The Commission also initiated an extensive program of scientific investigations and data collection efforts." TMDL at vi. In May of 2002 the Commission engaged a consultant experienced in water quality modeling to work closely with Commission staff to develop the model. Id.

Most of the steps that the DRBC undertook were performed in consultation with the DRBC's Toxics Advisory Committee ("TAC"), a group comprised of representatives from the Basin states, EPA Regions II and III, municipal and industrial dischargers, academia, agriculture, public health, environmental organizations and fish and wildlife interests. The Commission also established and has actively been engaged with a TMDL Implementation Advisory Committee ("IAC") to develop strategies for reducing PCB loads to the Estuary and achieving the TMDLs. The IAC is a critical component of the DRBC's overall approach because it provides a mechanism for involving diverse interest groups in the TMDL implementation process. The IAC's mission is to develop a common strategy that will produce measurable reductions of PCB loads in the River, hopefully without contentious litigation that has characterized other pollution reduction efforts that have not engaged all of the necessary stakeholder groups throughout the process.

As promulgated, EPA's TMDL groups the Site with other contaminated sites that contribute PCB loads to the River. Nonpoint source loads including contaminated sites are assigned an aggregate "load allocation," as opposed to the "wasteload allocations" assigned to individual point sources. Because existing loadings to the River are roughly two to three orders of magnitude higher than the TMDL, substantial reductions of both point and nonpoint source loadings of PCBs must be achieved for the water quality standards to be met and the fish consumption advisories removed. Even if all other sources of PCBs to Zone 3 of the River could be eliminated, an impossible task, current discharges from the Metal Bank Site alone would cause water quality standards for PCBs to be exceeded.<sup>5</sup>

Although at present the Site is a component of a larger group of contaminated sites, it alone discharges PCB loads that exceed the allocation to the entire group by an order of

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<sup>5</sup> EPA estimates that the Site releases  $9.90924 \cdot 10^{-5}$  kg/day of penta-PCB to the Delaware River. DRBC estimates that the Site releases  $9.83124 \cdot 10^{-7}$  kg/day through the groundwater pathway. Compare TMDL at 29 and 39-40 with TMDL at Appendix Table 4-1 page XV. The total PCB load from the Site is estimated to be four times the estimates in the TMDL for the penta-PCB homologue. These estimates do not include the releases from contaminated sediments at the Site.

magnitude. In addition, the Site may in the future receive an individual load allocation. The TMDL recognizes the need for ongoing scientific investigations and data collection efforts to further characterize PCB sources, concentrations and pathways in the estuary ecosystem. *Id.* at vii. The approach of taking steps now to improve conditions while engaging in monitoring and further evaluation is an iterative process known as adaptive management. This process, which is highly dependent upon ongoing data collection, was recommended by the National Resources Council of the United States Scientific Advisory Board as the preferred method of developing and implementing TMDLs. As EPA stated in the TMDL, "EPA expects that additional monitoring data and modeling results will be collected and developed following issuance of the Stage 1 TMDLs. This additional information will enable a more refined analysis to form the basis of the Stage 2 TMDLs. EPA will continue to work with the Commission and the states to develop and complete the Stage 2 TMDLs. Until the Stage 1 TMDLs are amended or replaced, the Stage 1 TMDLs are the final and effective TMDLs for purposes of the CWA [Clean Water Act]." *Id.* at vii. The Consent Decree should take into account the need to satisfy the Stage 1 TMDL now and afford flexibility to implement the Stage 2 TMDL and additional iterations.

The DRBC's regulations contain provisions similar to the TMDL regulations under the Clean Water Act. Section 4.30.7.A of the DRBC's Administrative Manual - Part III Water Quality Regulations authorizes the Commission to allocate the waste assimilative capacity of the receiving waters among individual dischargers. Section 4.30.7.B.2 specifically provides for allocations within the Estuary. In the course of partnering with EPA and the Basin states to implement the TMDL, the DRBC intends to utilize its own regulatory authority in consultation with its advisory committees to attain PCB water quality standards in the Estuary. The Utility Decree should not be drafted to interfere with this process.

THE UTILITY DECREE SHOULD BE MODIFIED TO CONFORM TO THE PCB TMDL,  
THE CLEAN WATER ACT AND THE COMPACT

The PCB TMDL that EPA promulgated in December, 2003 sets forth the necessary TMDL loading reductions. The TMDL states, "In order to achieve the reductions required by the TMDLs, EPA and the State would need to undertake a concerted effort using the authorities under CERCLA, RCRA and the related state statutes." *Id.* at xiii. The TMDL further notes that "the Delaware River Basin Commission may separately require actions to implement these TMDLs" including directing data collection efforts. *Id.* at xix - xiii. The TMDL states that "EPA will engage in discussions on the subject of the TMDL Superfund interface and the appropriate means to achieve WQS [water quality standards]" *Id.* App . 3 at 11. The TMDL also notes the ongoing work of the IAC to develop creative and cost-effective strategies for achieving load reductions. *Id.* at xiv.

The Utility Decree is inconsistent with the requirements of the PCB TMDL, the Clean Water Act, and the Compact because it does not require attainment of the load allocation for contaminated sites in the Stage 1 TMDL and any future stage, because it does not ensure consistency with the DRBC's Comprehensive Plan and because it may preclude further agency or judicial mandates to achieve load reductions sufficient to meet water quality standards. The Utility Decree also conflicts with the Decree of the American Littoral court because it precludes full implementation of the PCB TMDL that was issued to comply with that Decree.

Ordinarily, a CERCLA consent decree would require implementation of the remedy that EPA selected in the ROD. It would then state that for purposes of §113(j) of CERCLA, 42 U.S.C. §9613(j), the Remedial Action and the Work constitute a response action ordered by the President. This statutory provision limits "judicial review of any issues concerning the adequacy of any response action taken" to the administrative record to be evaluated under the arbitrary and capricious standard. Section I.X of the Utility Decree contains the standard CERCLA references to section 113(j) and also provides CERCLA contribution protection to the settling utilities. Nevertheless, presumably on the ground that RCRA does not require the Utility Decree to implement the ROD, the Utility Decree incorporates a remedy that deviates from the ROD that EPA issued for the Site by providing for capping of sediments in certain locations that the ROD designated for excavation. This change based upon a selective use of CERCLA and RCRA provisions compromises the ability of the remedy to satisfy the TMDL. The remedy should provide that the aggregate PCB discharges from the Site will be reduced below the applicable TMDL load allocation. In addition, rather than limiting judicial review, the Utility Decree should acknowledge the Court's authority under RCRA to perform a de novo review of the remedy and incorporate TMDL, Clean Water Act and Compact requirements into the remedy.

The TMDL promulgated by EPA in December, 2003, DRBC's water quality objectives and state water quality standards comprise part of the legal landscape that should be incorporated into the Performance Standards in the Utility Decree. In CERCLA parlance, the standards, limitations and obligations imposed by these statutes and regulations are legally applicable or relevant and appropriate requirements ("ARARs") to which the remedy should but fails to conform. See 42 U.S.C. §9621(d) and 40 C.F.R. §300.400(g). The Court is also authorized to consider these laws when reviewing the remedy proposed in the Utility Decree. The Commission suggests that the Utility Decree is not fair, adequate or reasonable if it does not incorporate these standards and if it abrogates the authorities of the DRBC and the Basin states.<sup>6</sup>

The Utility Decree likewise should but does not provide that the remedy must be consistent with DRBC's Comprehensive Plan. As discussed above, in the Compact Congress and the Basin states charged the DRBC with developing a Comprehensive Plan to which all public

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<sup>6</sup> The DRBC regards the remedy set forth in the Utility Decree as a good first step toward achieving reductions of PCB loading from the Site. Nevertheless, because after completion of the remedy PCBs will remain in the soils, sediments and groundwater at the Site, and the remedy proposed in the Utility Decree deviates from EPA's own ROD by failing to require excavation of certain contaminated sediments, there is considerable risk that discharges from the Site will continue to exceed the TMDL load allocation. Consequently, provisions of the Utility Decree that precludes further remedial action at the Site conflict with the TMDL and the Delaware River Basin Compact. Even if EPA believes that after completion of the remedy, the Site will not violate water quality standards or the TMDL, a proposition the DRBC rejects, the Utility Decree would still be deficient for failing to make compliance with the TMDL and water quality standards part of the Performance Standard.

and private projects must adhere. The DRBC reviews projects under §3.8 of the Compact to determine whether they conflict with the Comprehensive Plan. In this respect, the EPA-approved remedy is no different than any other federal project subject to DRBC review. Although CERCLA contains a permit waiver provision, this provision does not apply where the Court conducts a de novo review of the remedy under RCRA. In any event, DRBC's decision on whether the project is, or how it should be modified to be, consistent with the Comprehensive Plan is not a permit. The Commission believes that the Utility Decree should require the utilities to apply to the DRBC for §3.8 approval and comply with the results of the §3.8 review. In the event that the Department of Justice rejects this position, without waiver thereof and at a minimum, the Utility Decree should afford DRBC the opportunity to provide the Court with the results of DRBC's review of the remedy set forth in the ROD, and the material changes to the ROD that the Utility Decree proposes, and afford the Court discretion to incorporate the results of DRBC's review into the Court's Decree.

In response to the DRBC's concern, by letter dated February 5, 2002 from EPA's Deputy Regional Administrator to the DRBC, a copy of which is attached hereto as Exhibit A, EPA stated that "EPA does not believe that DRBC is precluded from using its own regulatory authority to pursue further activities at the Site." See, letter from EPA Region 3 Deputy Regional Administrator at page 2. EPA's position, if set forth in the Utility Decree, would largely resolve the objections raised herein by providing a mechanism for DRBC (and the Basin states) to ensure that the remedy does not conflict with the DRBC's Comprehensive Plan (including its water quality objectives), state water quality standards and the PCB TMDL. Unfortunately, EPA's position is not embodied in language in the Utility Decree.

In the absence of language preserving the authority of the DRBC and the states to issue further orders to clean up PCBs that may remain at the Site, existing case law may produce a result contrary to EPA's intent. Although the Court of Appeals for the Third Circuit has not directly decided the issue, some other appellate courts and some district courts have held that entry of a judicial decree has the effect of barring government agencies from ordering additional remedies, even under statutory programs not embodied in the decree. See, e.g., U.S. v. Akzo Coatings of Am., 949 F.2d 1409 (6th Cir. 1991). In contrast, other courts have allowed a state to impose requirements not set forth in the decree. See e.g., U.S. v. Colorado, 990 F.2d 1556 (10th Cir. 1993), cert. denied, 510 U.S. 1092 (1994). In light of district court decisions in the Third Circuit limiting the ability of government agencies to impose remedial requirements not set forth in the decree, see, e.g., NJDEP v. Gloucester Env'tal Man. Serv., Inc., 264 F. Supp. 2d 165 (D. N.J. 2003), the United States should include an express provision in the Utility Decree embodying EPA's intent to reserve the authorities of the Government Commenters to order further actions. Notably, there are several provisions of the Utility Decree addressing the scope of EPA's reserved authority, yet the authority of EPA's federal and state partners is not addressed at all.

Indeed, as currently drafted, the Utility Decree may limit even the Court's authority to require remedial actions necessary to satisfy the TMDL. As noted in NJDEP, "under CERCLA, once a Consent Decree containing a specific remedy is entered by the federal court, neither the parties themselves, the non-parties, nor the Court can alter that remedy, absent a modification of the Consent Decree itself." Id. at 179. Because the remedy set forth in the Utility Decree makes

no provision for the TMDL, if the Utility Decree is entered in its present form the Court's discretion (absent modification of the Decree) as well as the authority of the Commission may be improperly limited.

The Monitoring Provisions of the Utility Decree Should Be Enhanced

By letter dated November 9, 2004 to EPA and DOJ, a copy of which is attached as Exhibit "B", the DRBC expressed its suggestions concerning the monitoring aspects of the remedy. Monitoring is a critical component of TMDL design and implementation and is also essential to determine the effectiveness of the remedy. As noted above, the proposed remedy deviates from the ROD by, among other things, providing that certain sediments identified for excavation in the ROD be left in place and capped. The tidal River may erode the cap. Absent a monitoring regime, releases from the sediments due to failure of the cap may remain undetected.

By letter dated November 30, 2004, a copy of which is attached hereto as Exhibit "C", EPA responded to the DRBC's concerns.<sup>7</sup> Although EPA declined to alter the monitoring provisions, it recognized that additional monitoring may be appropriate for purposes of a 5-year review of the remedy. The Commission respectfully disagrees that the Utility Decree is fair, adequate and reasonable in the absence of an express, comprehensive monitoring plan. Monitoring is needed to ensure the remedial effectiveness of the changes to the ROD that EPA is requesting the Court to endorse without following the administrative procedures designed to evaluate whether the remedy will work. Monitoring is also required pursuant to the Clean Water Act and the Compact to ensure that discharges from the Site do not continue to cause violations of water quality standards and that the TMDL is not exceeded.

Thank you for your consideration of these comments. The Commission believes that with the changes recommended herein, the proposed remedy is a good first step toward a suitable cleanup of the Site.

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<sup>7</sup> EPA's November 30, 2004 letter references and attaches the 1991 Memorandum of Agreement between DRBC and EPA. Section IV.4 of the Memorandum states that "Nothing in this MOA shall be construed to restrict in any way DRBC's authority to fulfill its responsibilities under the Delaware River Basin Compact and DRBC's Comprehensive Plan." Similarly, the Memorandum states that "DRBC is the Party responsible for ensuring that projects within the Delaware River Basin do not substantially impair or conflict with its Comprehensive Plan." *Id.* at § V.2. The Memorandum also cites DRBC's water quality standards (which are part of the Comprehensive Plan) as ARARs. *Id.* at § V.9. In light of these provisions, regardless whether or not the remedial project for the Site falls within the ambit of the Memorandum, the Memorandum cannot serve as a basis for disregarding DRBC's regulatory authority or the Comprehensive Plan.

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Very truly yours,

Kenneth J. Warren  
For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP  
General Counsel, Delaware River Basin Commission

cc: Carol Collier, Executive Director, DRBC  
DRBC Commissioners