



Allegheny Defense Project

Protecting and Restoring the Forests of the Allegheny Bioregion

Cryptobranchus alleganiensis, the Hellbender

July 26, 2010

Via Electronic Mail and Certified Mail, Return Receipt Requested

John Hanger, Secretary
Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

Dear Secretary Hanger:

Marcellus Shale gas drilling poses significant risks to Pennsylvania's waterways, both in terms of water quality and quantity. Drilling a Marcellus Shale gas well requires millions of gallons of water that drilling companies withdraw from our streams and rivers. According to the Pennsylvania Department of Environmental Protection's (DEP) website, in addition to several media reports and documents obtained through recent file reviews, the DEP is purportedly authorizing water withdrawals for Marcellus Shale gas drilling under an allegedly comprehensive regulatory scheme that protects Pennsylvania's waterways. The fact is, however, that any purported "approval" or "authorization" or "permitting" by the DEP of a surface water withdrawal in western Pennsylvania would be clearly illegal, beyond the DEP's statutory authority and in direct contravention of the rights of those who hold valid surface water rights under Pennsylvania law. At best, the DEP's recent conduct discussed below amounts to the DEP intentionally ignoring and facilitating illegal water withdrawals by numerous Marcellus shale drilling operations. At worst, the DEP is, in direct violation of its authority under Pennsylvania law, purporting to authorize the withdrawal of water by entities that in fact also have no legal right to make such withdrawals under Pennsylvania law.

There are two major problems with the DEP's actions with regard to "approvals" of water withdrawals by Marcellus shale drillers. First, any notion that the DEP has a comprehensive regulatory scheme in place to keep a check on water withdrawals for Marcellus Shale gas drilling is simply erroneous. In fact, water resources law in Pennsylvania "is not guided by any comprehensive statutory or regulatory program."¹ Second, and most importantly, *the DEP actually has no authority whatsoever to authorize or permit water withdrawals in Pennsylvania.* In other words, if the DEP "authorizes" or "permits" water withdrawals for Marcellus Shale gas drilling, it is acting without authority and encouraging unlawful conduct.

The body of law that continues to govern surface water withdrawals in western Pennsylvania, outside of the Delaware and Susquehanna watersheds, is riparian rights common law.² Riparian water rights are those rights "derived from ownership of the banks of a watercourse that allow the use by riparian property owners of the water flowing in the watercourse."³ Under this doctrine, domestic needs of the riparian owner have priority and only have a right to use the water on the

¹ Craig M. Wilson, "Water Resources," ch. in Pa. Environmental Law and Practice, Terry R. Bossert & Joel R. Burcat, eds. (5th Ed. 2008), PBI No. 5203, p. 189.

² *Id.*

³ *Id.*

riparian land.⁴ Diversions by non-riparian owners or for uses elsewhere are not protected by Pennsylvania common law.⁵ Put another way, as the DEP is well aware,⁶ under Pennsylvania law it simply is not legal for just anyone to put a hose into the Allegheny River or Tionesta Creek and withdraw hundreds of thousands of gallons of water. Only individuals or entities that actually own real property along the banks of the Tionesta Creek have the legal right to withdraw water from that creek.

According to the DEP's "Water Management Plan Example Format Instructions For Marcellus Shale Gas Well Development,"⁷ Marcellus Shale gas developers are told to:

Describe location of proposed source relative to nearby roads or landmarks. *For sources not subject to SRBC or DRBC approval, attach a copy of the notification letter provided to municipality and county where source is located.*

For sources subject to SRBC and DRBC approval, notification to the county and municipality per the SRBC and DRBC procedures suffices. *For sources not subject to SRBC and DRBC approval, a one-time notice letter must be provided to the county and municipality where the source is located prior to submission of the Water Management Plan or supplement to the plan first listing that source. For water sources **previously approved** by DEP which are being included in a plan, no additional county and municipal notification is required.* (emphasis added)

This is repeated on the DEP's "Water Management Plan For Marcellus Shale Gas Well Development Example Format" application that operators fill out and submit to DEP:

For sources in Susquehanna River Basin, refer to a water withdrawal and consumptive use metering and monitoring plan meeting SRBC requirements. For sources in Delaware River Basin, refer to a water withdrawal and use monitoring plan meeting DRBC requirements. ***Water withdrawal and use monitoring plans approved meeting SRBC and DRBC requirements may be incorporated by reference and are accepted by DEP.***

For sources in other basins, provide a water source and use monitoring plan.⁸ (emphasis added)

⁴ *Id.*

⁵ *Id.* Note: A distinction, of course, must be made between water withdrawals in the Susquehanna and Delaware River watersheds and withdrawals outside those watersheds. The Susquehanna River Basin Commission (SRBC) and the Delaware River Basin Commission (DRBC) are authorized to permit water withdrawals within their respective watersheds through federal interstate compacts. The Ohio River Watershed, which covers much of the western third of the Commonwealth, has no such commission; therefore, water withdrawals there are subject to riparian rights common law as will be explained in greater detail below.

⁶ Pamela Bishop, "A Short Review of Pennsylvania Water Law," Feb. 2006. Available here:

[http://docs.google.com/viewer?a=v&q=cache:AQmAjVs5EZ8J:www.portal.state.pa.us/portal/server.pt%3Fopen%3D18%26objID%3D440039%26mode%3D2+pamela+bishop.+a+short+review+of+pennsylvania+water+law&hl=en&gl=us&pid=bl&srcid=ADGEESH35TXsB0TVpGxFrGei44Wh9o7VXIsp96quTwpAY8XQ1Xn1wxQUr0zJVQueDmL-e96wIaWnBCidmFc5eu1AG781Cx9v6OM3jhgoe-](http://docs.google.com/viewer?a=v&q=cache:AQmAjVs5EZ8J:www.portal.state.pa.us/portal/server.pt%3Fopen%3D18%26objID%3D440039%26mode%3D2+pamela+bishop.+a+short+review+of+pennsylvania+water+law&hl=en&gl=us&pid=bl&srcid=ADGEESH35TXsB0TVpGxFrGei44Wh9o7VXIsp96quTwpAY8XQ1Xn1wxQUr0zJVQueDmL-e96wIaWnBCidmFc5eu1AG781Cx9v6OM3jhgoe-8m9rUxhtCVX09g_fz2QPTfrqoKZTeESIRj&sig=AHIEtbSryIPHn9vBtyqb6wXDD0xfN3Zhw)

[8m9rUxhtCVX09g_fz2QPTfrqoKZTeESIRj&sig=AHIEtbSryIPHn9vBtyqb6wXDD0xfN3Zhw](http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-73440/3920-FS-DEP4107.pdf). See also, <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-73440/3920-FS-DEP4107.pdf> (stating "under [the Water Rights Act of 1939], public water supply agencies must obtain Water Allocation Permits from the [DEP] to acquire rights to use surface water sources in Pennsylvania. *All other withdrawals of surface and groundwater are subject to common law rules that govern landowners' rights to withdraw water from sources on their land for their uses on that property.*") (emphasis added).

⁷ Available here: <http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-10554> (Form 5500-PM-OG0087, 4/2009 Instructions).

⁸ <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-74084/5500-PM-OG0087%20Application%20Example.pdf>

This alleged DEP authority to approve water withdrawals has been covered by local media. For instance, the Johnstown *Tribune-Democrat* recently reported that:

Chief Gas & Oil, under a *permit* from the Department of Environmental Protection, recently opened a second natural gas extraction well site in Jefferson Township, Somerset County.

DEP spokeswoman Helen Humphreys said the company had been *approved* to pull water from the Casselman River for the drilling of its Saylor Well in Middle Creek Township, opened in 2009.

But the *permit* did not include this latest endeavor.

“They said they misunderstood,” Humphreys said. “They thought they were *approved* to remove water for these wells and they will be coming in to discuss this with us.”

[...]

The violation is not expected to impact the Jefferson Township well development because the company has the water it needs through *other approved sources*, [Chief Gas & Oil spokeswoman Kristi] Gittins said.

[...]

The Casselman situation has generated concerns from [Casselman River Watershed Association President Roger] Latuch and others regarding the *amount of water the state permits allow the companies to withdraw from the rivers and benchmarks for when the levels get low due to drought*.

DEP Secretary John Hanger said the state is aware of the water issues, and his department has made water a top priority with Marcellus drilling.

“(Companies) have to file a *water plan* establishing where the water is coming from and the amount,” Hanger said.

The new regulations went into effect in fall 2008. Since that time, there have been few problems, he said.

“*Water withdrawals are something we have good regulation on, and we are enforcing them*,” Hanger said.⁹ (emphasis added)

In November 2008, Pittsburgh’s WTAE News investigated the legal authority for water withdrawals for Marcellus Shale gas drilling in western Pennsylvania. That investigation led WTAE to conclude that drilling companies were simply withdrawing water from western Pennsylvania’s streams, rivers, and reservoirs without anyone’s permission. At most, the report stated that:

DEP says it will attempt to use the state Clean Streams Law to regulate water withdrawals from streams and rivers, but we asked, so far not one permit has been denied for that reason.¹⁰

As will be explained further below, however, the Clean Streams Law does not provide the DEP

⁹ Mellott, Kathy. *State: Water withdrawal violated drilling permit*. May 1, 2010. See,

<http://tribune-democrat.com/local/x537291141/State-Water-withdrawal-violated-drilling-permit>

¹⁰ WTAE Team 4: *Pa. Streams Drained Dry By Drillers: Western Pa. Streams Emptied By Natural Gas Drilling*. Nov. 13, 2008. See, <http://www.thepittsburghchannel.com/news/17973811/detail.html>

authority to permit water withdrawals.

In December 2009, WTAE followed up on the water withdrawals associated with Marcellus Shale gas drilling and reported the following:

It takes millions of gallons of water to drill into the Marcellus Shale beneath western Pennsylvania, and there's a lot of contaminated water to get rid of after the drilling, but Team 4 has discovered that the state Department of Environmental Protection is not collecting reports from drillers about where they're getting water to fracture the Marcellus Shale or where they're disposing contaminated water after drilling.

Water withdrawal reports are supposed to be filed with DEP quarterly, while disposal reports are supposed to be filed every two years.

"Have any been filed yet?" Parsons asked DEP spokeswoman Helen Humphreys.

"Well, they haven't been using it for two years yet, so the answer is no," Humphreys said.

"So, Helen, the DEP has really no idea what's really happening on the ground, real time?" Parsons asked.

"I don't think that's true at all," Humphreys said.

"How would you, if you aren't getting these reports?" Parsons asked.

"Well, because we have a good idea what's in the water," Humphreys said. "Again, this information is available to the department any time we ask for it."¹¹

If there is any doubt that the DEP is approving large-scale water withdrawals for Marcellus Shale gas drilling, when it in fact has no authority to do so, documents that ADP obtained during recent file reviews at the DEP's Northwest Regional Office dispel that myth. These documents reveal that the DEP is conflating its duties under the Water Resources Planning Act and the Clean Streams Law to delegate unto itself authority that neither statute provides.

The first document, a Marcellus Shale gas well drilling permit application for East Resources, identifies "Special Permit Conditions" that include:

The permittee shall not withdraw or use water from water sources within the Commonwealth of Pennsylvania, for well fracing activities, unless the permittee does so in accordance with a Water Management Plan approved by the Department.¹²

This language is clearly intended to convey to gas companies drilling into the Marcellus Shale that once they receive a drilling permit pursuant to the Oil and Gas Act, as long as the "Special Permit Conditions" language is incorporated into that drilling permit, they have also been "permitted" by DEP to withdraw water "from water sources within the Commonwealth of Pennsylvania."

As stated above, however, the DEP lacks any authority to actually approve, authorize, or permit any

¹¹ WTAE Team 4: *No Marcellus Shale Drilling Water Reports On File With Pa.: Range Resources Says Drillers Keeping Track, Reports Are Available*. Dec. 16, 2009. See, <http://www.thepittsburghchannel.com/news/21984162/detail.html>

¹² Attachment A.

such withdrawals. The Water Resources Planning Act of 2002 (WRPA), the statute authorizing the development of Water Management Plans, is strictly a *planning* statute. The WRPA requires that “each regional committee shall guide the development of and recommend to the Statewide committee a regional plan component for review, approval and incorporation into the State water plan.”¹³ Nothing in the WRPA authorizes or expands DEP’s authority to regulate, permit, or control water allocations or water withdrawals.¹⁴

Another document, a May 7, 2010 DEP Inspection Report, identifies the Allegheny River as the water source for East Resources’ Marcellus Shale gas drilling operations. The report indicates that East Resources is “approved” to withdraw 600,000 gallons of water per day (gal/day). The report also states that:

Access to Allegheny River *acceptable* from any of the 4 possible withdrawal points on T415 (Boyer Crossing Rd.) (emphasis added)¹⁵

A few days later, on May 11, 2010, the DEP sent a letter to East Resources, notifying the company that its Water Management Plan was “approved” and it could withdraw the above-referenced 600,000 gal/day from the Allegheny River. The DEP’s letter invokes the Clean Streams Law in this so-called “approval” letter:

Pursuant to the Clean Streams Law, *as amended*, 35 P.S. Section 691.1 et seq., this approval does not authorize and shall not be construed as an approval to authorize diminution that is causing or may cause pollution.¹⁶ (emphasis original)

This is a remarkable statement. First, it implies that the Water Management Plan is being “approved” (at least in part) pursuant to the Clean Streams Law. There is nothing in the Clean Streams Law, however, that provides the DEP any authority to permit water withdrawals. The Clean Streams Law is almost entirely concerned with water quality, not quantity. In fact, the word “quantity” appears only twice in the substantive body of the Clean Streams Law.¹⁷

Second, it is important to note that DEP’s disclaimer that “this approval does not authorize...diminution that is causing or may cause pollution,” while invoking the underlying purpose of the Clean Streams Law (i.e., preventing water pollution) is actually contained in a letter approving a Water Management Plan, which is authorized by the Water Resources Planning Act. As stated above, however, that statute is a planning statute that does not delegate any substantive regulatory obligations to the DEP. In other words, the DEP appears to knowingly conflate its duties under the Clean Streams Law and Water Resources Planning Act to essentially invent a new authority that has not been delegated by the Pennsylvania Legislature nor signed into law by the Governor.¹⁸

¹³ 27 Pa.C.S. § 3111(a).

¹⁴ 27 Pa.C.S. §§ 3111(c); 3136.

¹⁵ <http://alleghenydefenseproject.wikispaces.com/file/view/Inspection+Report+Port+Allegheny+May+7%2C+2010+reduced.pdf>

¹⁶ <http://alleghenydefenseproject.wikispaces.com/file/view/DEP+Approval+Letter+for+Amendment+reduced.pdf>

¹⁷ The first is in reference to the Clean Water Fund for certain discharges (Sec. 8(b)(2)) and the second is in reference to the operation of coal mines (Sec. 315(c)).

¹⁸ Just to be clear, what ADP questions and challenges here is the DEP’s authority to authorize or permit a withdrawal of surface water in the first instance and contrary to existing Pennsylvania riparian law principles. If a riparian owner in fact has the right to withdraw water from a surface source, ADP believes that the DEP likely has some authority under the Clean Streams Law to regulate the amount of such otherwise valid surface water withdrawals by a riparian owner in order to protect in-stream flows and overall water quality in a particular water body. However, what DEP clearly has no

Other documents further demonstrate the DEP's unlawful conduct related to water withdrawals for Marcellus Shale gas drilling operations. For instance, a May 7, 2010 Inspection Report regarding Pennsylvania General Energy's (PGE) proposed Marcellus Shale gas drilling shows that the DEP considered "approving" a withdrawal amount of nearly 1 million gallons per day from the Allegheny River.¹⁹ Other documents reveal that the DEP "approved" Hanley & Bird to withdraw 126,720 gal/day from Little Sandy Creek in Jefferson County, 1.4 million gal/day from Redbank Creek in Jefferson County, and 4.32 million gal/day from the Clarion River in Clarion County.

ADP is especially troubled by the differences between what information the DEP requires and what duties it imposes on applicants when it "approves" a Water Management Plan and when it approves an actual permit to drill for natural gas under the Pennsylvania Oil and Gas Act. For instance, an applicant for a gas-drilling permit must provide proof that it has notified the surface owner and nearby property owners, including in particular owners of nearby drinking water sources, who may be impacted by such drilling.²⁰ This in effect requires the applicant to have a legitimate right to drill and allows the surface owner and other potentially impacted property owners to object. In contrast, when approving water withdrawal plans the DEP requires no proof whatsoever that the applicant in fact has the legal right to make any of the water withdrawals listed in the proposed plan and the DEP does not require the applicant to notify the actual riparian owners along the stream or rivers where the applicant proposes to withdraw water. This omission is particularly striking with regard to riparians who are located directly downstream from the very large withdrawals by Marcellus drillers and who are therefore much more likely to be directly impacted by those illegal withdrawals. The only explanation that ADP can think of for these different approaches to "permitting" is that the DEP simply does not want to know or does not care that it is "authorizing" patently illegal water withdrawals by Marcellus drillers. Such a head-in-the-sand approach to "water regulation" is certainly not "comprehensive" and is not what Pennsylvanians have the right to expect from the agency created to protect the Commonwealth's environment, including its surface water resources.

Even if we were to assume that the so-called "comprehensive program" the DEP has in place for water withdrawals associated with Marcellus shale gas drilling had a legitimate basis in the law, which again it does not, it certainly could not be said, as the DEP has claimed on its website and in media reports, that it is actually effective in protecting Pennsylvania's waterways. First and foremost, there is no indication that the DEP is considering the cumulative impacts of all these multiple water withdrawals. For instance, despite the fact that the DEP either "approved" or was about to "approve" Water Management Plans for both East Resources and PGE to withdraw a combined total of 1.6 million gal/day from the Allegheny River in Liberty Township, McKean County, there is no indication that the DEP actually considered the cumulative impact of those withdrawals on the Allegheny River. Rather, it appears that the DEP analyzed both withdrawals in isolation even though it was "approving" both withdrawal rates along the same stretch of river for a similar 5-year period. Nor is there any indication that the DEP is considering reasonably foreseeable impacts from future Marcellus Shale gas drilling and associated water withdrawals, despite the fact that the natural gas industry plans to drill thousands of Marcellus Shale gas wells

legal authority to do is to "authorize" a water withdrawal, in any amount, by an individual or entity that is not a riparian owner and otherwise has no legal right to withdraw water from a particular water body.

¹⁹ Available here: <http://alleghenydefenseproject.wikispaces.com/file/view/Port+Allegheny+Inspection+reduced.pdf>.

Note: We do not know whether DEP has actually approved this amount, but in light of all the other records we reviewed, it would seem unlikely that DEP did not approve PGE to withdraw this or a similar amount.

²⁰ 58 P.S. § 601.201(b)

over the next couple decades.

Other documents further highlight concerns about the veracity of the DEP's monitoring and enforcement. For instance, in a recent file review, ADP found the following in an email correspondence between DEP employees Donald Luttmann and Derek Smith on April 29, 2010 regarding East Resources' use of water from three reservoirs in McKean County:

[...]There appear to be some permit compliance issues. In addition to the comments below the permit required them to participate in a study with the Fish and Boat Commission to determine conservation release flows from all three reservoirs. The study was conducted but there is no other correspondence in the files. The permit doesn't require them to implement the results of the study.

[...]

It appears that Special Condition 6 of the WA Permit "The permittee shall continue to operate and maintain measuring and recording devices to determine the amount of water withdrawn from the Heffner, Marilla and Gilbert Reservoirs" is not being met. Apparently, they are saying they are meeting requirement because flows from all three reservoirs are metered at one location. Is water from Marilla and Gilbert Reservoirs being pumped to Heffner Reservoir? Do you agree they are not complying with Condition 6 and that meters are required at each Reservoir individually?

It appears that the leak and loss for 2009 and 2008 was 28.1% and 26.7%[.] Should they be required to reduce to less than 20%?

They are indicating "N/A" to question whether they are reporting conservation releases. Do you know why? Permit requires conservation release from Heffner Reservoir, however permit says "A continuous flow of not less than 0.16 cfs/square mile from 6.6 square miles of watershed area above the dam shall be maintained at all times in Tunungwant Creek at a point immediately below the junction of the spillway channel and the creek." This should say West Branch Tunungwant Creek. Therefore, the[y] cannot comply with permit because it is written incorrectly.²¹

Another DEP employee, Ronald Lybrook, responded to both Mr. Smith and Mr. Luttmann on May 10, 2010 by stating:

Our preliminary review of the Bradford Water Allocation Permit indicates non-compliance. Don Luttmann and I intend to conduct a field inspection within the next two weeks.

My recommendation is that the WMP not be approved until a compliance determination is made.²²

Several issues are raised by these emails. First, if the DEP requires an approved "Water Management Plan" (WMP), why is East Resources withdrawing water without an approved WMP? Second, if East Resources was required to participate in a study to determine conservation release flows, why are the results of that study not enforceable, especially if those results indicate measures for protecting water resources? It would be a complete waste of taxpayer money to conduct studies that end up having no real-world consequences once they are completed. Third, how can the DEP allow water withdrawals to occur from reservoirs when it does not even know how those reservoirs are being metered?²³ Fourth, it is less than comforting that when the DEP is aware of non-compliance issues, it will investigate "within the next two weeks." This less-than-urgent approach

²¹ <http://alleghenydefenseproject.wikispaces.com/file/view/Correspondence+East+May+10%2C+2010+reduced.pdf>

²² *Id.*

²³ Again, this paragraph assumes the DEP has authority to permit water withdrawals, which it does not.

toward investigating possible water quantity and/or quality issues underscores ADP's long-standing assertion that the DEP simply does not have the workforce to monitor the oil and gas drilling activities that it is permitting all over the Commonwealth.

ADP requests the following information regarding the DEP's regulatory authority to permit water withdrawals for Marcellus gas drilling and fracing from western Pennsylvania waterways:

1. List the specific regulatory authority of the DEP to permit water withdrawal from a Pennsylvania waterway by a Marcellus drilling company who is not a riparian owner along that waterway.
2. List the specific authority of the DEP to permit a Marcellus drilling company to withdraw water in one watershed and remove it for use in another watershed.
3. Why is the DEP not giving notice to riparian owners, especially downstream riparians, of water withdrawals in their watersheds by Marcellus drilling companies and why is the DEP not requiring proof of a right to withdraw water for each of the proposed withdrawals included in a proposed Water Withdrawal Plan?

In conclusion, whatever "program" the DEP supposedly has in place to manage water withdrawals associated with Marcellus Shale gas drilling, it is not reflective of the kind of comprehensive management scheme that the DEP promotes on its website and in the media. Furthermore, it is of no consequence what program the DEP has in place because it lacks the authority to authorize, permit, or otherwise approve water withdrawals in the Commonwealth. The SRBC and DRBC manage water withdrawals within their respective river basins while much of the remainder of the Commonwealth is regulated under riparian rights common law – and under that doctrine, only the riparian owner has the right to make reasonable use of the water on the riparian land.

Sincerely,

/s/ Bill Belitskus
BILL BELITSKUS
ADP Board President

cc: Leanne Marten (Allegheny National Forest)
Robert Fallon (Allegheny National Forest)
Anthony Scardina (Allegheny National Forest)
Shawn Garvin (U.S. EPA)
Kent Connaughton (U.S. Forest Service, Eastern Region)
David Densmore (U.S. Fish & Wildlife Service)
John Quigley (PA DCNR)
John Arway (PA Fish & Boat Commission)
James Delaney (PA Game Commission)