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June 11, 2010
Corrected, June 14, 2010

Via E-Filing
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Post Office Box 3265
Harrisburg, PA 17105

Re: *En Banc* Hearing of the Pennsylvania Public Utility Commission on Jurisdictional Issues Related to Marcellus Shale Gas Development, Docket No. I-2010-2163461

Dear Ms. Chiavetta:

On behalf of the undersigned organizations, Earthjustice thanks the Pennsylvania Utility Commission (the "PUC" or the "Commission") for the opportunity to submit this testimony for inclusion in the record of the June 16, 2010, *en banc* hearing on PUC jurisdictional issues related to Marcellus Shale gas development. In our view, the economic promise of the Marcellus Shale can be realized only if development is pursued responsibly, with adequate regulatory protections for the public and the full range of public utilities within PUC jurisdiction. We are grateful that the Commission is taking the time now—before construction of potentially thousands of miles of gas pipelines—to examine how intensive development in the Marcellus Shale will affect core PUC functions.

In recent years, shale gas exploration has grown exponentially both nationally and in Pennsylvania. On the national level, the U.S. Department of Energy expects such production to increase from 1.2 trillion cubic feet ("tcf") in 2007 to 4.2 tcf by 2030.[1] In Pennsylvania, economical gas production from horizontally drilled and hydraulically fractured gas wells in the Marcellus Shale began in 2005.[2] The Pennsylvania Department of Environmental Protection ("DEP") reports that drilling increased by

[1] Energy Information Administration, U.S. Department of Energy, Annual Energy Outlook 2009 77, *available at* http://www.eia.doe.gov/oiaf/archive/aeo09/index.html.
[2] National Energy Technology Laboratory, Office of Fossil Energy, U.S. Department of Energy, Modern Shale Gas Development in the United States: A Primer 21 (2009), *available at* http://www.dep.state.pa.us/dep/deputate/minres/oilgas/US_Dept_Energy_Report_Shale_Gas_Primer_2009.pdf.

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nearly 400 percent between 2008 and 2009, and at the current rate, new drilling is on target to surpass 1,000 wells in 2010.[3]

The thousands of Marcellus Shale gas wells that industry anticipates drilling every year do not function in isolation from their surrounding communities or other public utilities. As PUC Chair James H. Cawley recognized at the Commission's April 22 *en banc* hearing, lack of adequate environmental regulation of gas wastewater disposal in Pennsylvania already has caused water quality violations that have adversely affected water utilities under PUC jurisdiction as well as sewage treatment plants.[4] Moreover, every producing wellsite requires the use of an extensive system of pipelines to gather the gas from the well, to transmit the gas to Pennsylvania markets, and to distribute the gas to the consumer. When production begins at a new wellsite, the gas industry must excavate previously undisturbed land for construction of gathering lines, and increasing development is generating incentives for the construction of new transmission lines as well. The new pipeline construction, and the associated new road construction, increase the risk of erosion and sedimentation that will impair water utility service or increase its operating expenses. Gas development also may increase safety risks from excavation of unregulated gathering lines, under-regulated leaks from pipelines in populated areas, and vehicular accidents involving inadequately insured heavy trucks. We discuss each of these issues in this testimony.

To ensure that any economic benefits of the gas rush do not come at the expense of safe and reliable utility service at reasonable rates, the PUC must implement a regulatory structure that keeps pace with industrial development. In doing so, the Commission should recognize that such development will affect core PUC functions beyond those related only to gas pipelines. We therefore respectfully urge the Commission to take a comprehensive view of PUC jurisdictional issues and to implement all measures necessary to safeguard the public and public utilities, especially regulated water utilities, from inadequately controlled gas exploration and production.

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[3] *See* Pennsylvania Department of Environmental Protection, Maps of Permits Issued and Wells Drilled, http://www.dep.state.pa.us/dep/deputate/minres/oilgas/ 2010PermitDrilledmaps.htm (follow the links to "Wells Drilled in 2008," "Wells Drilled in 2009," and "Marcellus Permits Issued and Wells Drilled January – May 2010") [hereinafter "Maps"] (DEP reports that 195 wells were drilled in the Marcellus Shale in 2008 compared with 768 wells in 2009. DEP also reports that 564 new wells were drilled in the Marcellus Shale in the first five months of 2010 alone.).

[4] James H. Cawley, Chairman, Pennsylvania Public Utility Commission, Remarks at Marcellus Shale *En Banc* Hearing on PUC Jurisdictional Issues, Docket No. I-2010-2163461 (Apr. 22, 2010), audio *available at* http://www.puc.state.pa.us/naturalgas/naturalgas_marcellus_Shale.aspx [hereinafter "April 22 Remarks of PUC Chair Cawley"].

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A broad vision of the Commission's protective mandate would not require PUC ratemaking for gas producers or pipeline companies that do not seek public utility status, but it would encourage the industry as a whole to internalize the costs of its operations rather than shifting them to Pennsylvania's ratepayers and taxpayers.

I. The Commission Should Adopt Additional Public Safety Regulations and Seek Legislative Authority to Regulate Gas Pipelines and Facilities That Are Essential to Public Utility Services.

Because the Commission's questions to invited witnesses focus heavily on gas pipeline operations and applicable PUC standards, we begin our testimony with a discussion of pipeline safety issues. The Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the United States Department of Transportation has promulgated minimum safety standards for the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities.[5] These regulations govern most gathering lines, transmission lines, and service lines in more populated Class 2, 3, and 4 locations,[6] but PHMSA does not regulate gathering lines in Class 1 locations—areas where fewer than ten buildings intended for human occupancy are located within 220 yards of either side of a continuous mile-length of pipeline.[7] States may promulgate rules governing intrastate pipelines to the extent they incorporate the minimum federal standards,[8] and the PUC administers Pennsylvania's gas safety program in compliance with PHMSA requirements.[9]

Pennsylvania currently does not regulate gathering lines laid in Class 1 locations, even though PHMSA has acknowledged that "many of the Marcellus related gathering lines are and will be in Class 1" areas.[10] Moreover, "PHMSA anticipates that most of the pipeline facilities associated with the Marcellus development will fall within the Type A

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[5] 49 C.F.R. Parts 190-99 (2010).
[6] *Id.* § 192.5.
[7] *Id.* § 192.5(b)(1)(ii) (defining Class 1 locations); *id.* § 192.8 (excluding onshore gathering lines from regulation when they are in Class 1 locations).
[8] *See* 49 U.S.C. § 60105 (2010).
[9] Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, State Pipeline Safety Programs – CY 2010 (2010), http://www.phmsa.dot.gov/pipeline/state-programs (follow "State Pipeline Safety – CY 2008" hyperlink under heading "Legislative Authority").
[10] Statement of Jeffrey D. Wiese, PHMSA, 2 (Apr. 15, 2010), for inclusion in record of PUC *En Banc* Hearing on Marcellus Shale Jurisdictional Issues, Docket No. 1-2010-2163461 (Apr. 22, 2010).

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classification."[11] Type A pipelines are the more highly pressured of two categories of pipelines and are subject to more stringent safety standards.[12]

Under federal and Pennsylvania law, the gas industry is not required to mark gathering lines in Class 1 locations, even if they are higher-risk Type A pipelines.[13] As a result, excavations in Class 1 areas with producing wells present risks of damage to the lines and injuries to people and property in the vicinity. PHMSA has identified excavation as the most significant source of serious pipeline incidents over the past 20 years.[14] Because gas wells may be drilled as close as 200 feet to residences in Pennsylvania, without consent of the owner,[15] the risks to rural residents and their homes must be taken seriously. To ensure that the Commonwealth's citizens are informed about and protected from the dangers presented by buried pipelines, the Commission should seek authority to regulate gathering lines in Class 1 locations, including by requiring their participation in the One-Call system.

Experience in other states with intensive gas development, including shale gas development, suggests that standards more protective than those required under federal law may be needed for gathering lines in Class 1 locations and Type B gathering and production lines in populated areas. Colorado and Texas have promulgated such public safety regulations.[16] We respectfully urge PUC to consider the Colorado and Texas regulations as examples of how it might act to maintain public safety without impeding gas development. To the extent necessary, we urge the Commission to seek the legislative authority it needs to regulate gas pipeline owners or operators that do not qualify as public utilities, when the pipelines are links in the public utility service chain.

A. Colorado

In October 2008, the Colorado Public Utilities Commission adopted regulations that go beyond requirements of 49 C.F.R. Part 192 to address the safety of gathering

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[11] *Id.*
[12] 49 C.F.R. §§ 192.8, 192.9.
[13] *See id.* §§ 192.8(b), 192.9, 192.707.
[14] Pipeline and Hazardous Materials Safety Administration, PHMSA Pipeline Safety Program, Stakeholder Communications, Damage Prevention, http://primis.phmsa.dot.gov/comm/DamagePrevention.htm (last visited June 8, 2010).
[15] 58 Pa. Stat. Ann. § 601.205 (2010).
[16] *See* 4 Colo. Code Regs. § 723-4:4952(c) (2010); 16 Tex. Admin. Code §§ 8.1, 8.101 (2010).

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lines in Class 1 locations.[17] The rules require that operators of gathering lines in Class 1 locations: (1) telephonically report emergency repairs and gas leaks and promptly repair and document any hazardous leakage or conditions that could lead to a hazardous facility order, (2) notify authorities if any such line is located in a public road or railroad right-of-way, and (3) install and maintain Class 1 gathering line markers at crossings of public roads, highways, and railroads.[18] The Colorado Public Utilities Commission adopted these regulations upon finding that the amended regulations were "necessary to protect the public health, safety, and welfare."[19] DCP Midstream, one of the nation's largest natural gas gatherers and processors, submitted comments on the proposed rulemaking stating that it did not find the additional requirements overly burdensome and in fact had already installed line markers on all gathering lines.[20] In addition, Colorado added requirements for leakage surveys on Type B gathering lines in Class 2, 3, and 4 locations.[21]

B. Texas

More recently, in February 2009, the Railroad Commission of Texas ("RCT") adopted amendments to its regulations establishing more comprehensive standards for production and flow lines connecting to gathering lines, including requirements that such pipelines be regulated for safety, design, construction, pressure, testing, and emergency response.[22] The RCT noted that because gas exploration and production increasingly were taking place in urban areas, standards were needed for production lines in populated areas where only gathering lines were regulated.[23] Specifically, the RCT sought to provide for enhanced safety in urban areas, such as Fort Worth, the site of intensive Barnett Shale development, by ensuring that all pipelines located in heavily

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[17] 4 Colo. Code Regs. § 723-4:4952(c).
[18] *Id.*
[19] Recommended Decision of Administrative Law Judge Dale E. Isley Adopting Rules, No. 08R-226GPS, slip op. at 3 (Colo. P.U.C. Aug. 25, 2008).
[20] DCP Midstream, Comments to Proposed Rules Regulating Gas Utilities and Pipeline Operators, Colorado Public Utilities Commission Docket No. 08R-226GPS, at 2 (Jul. 31, 2008), *available at* https://www.dora.state.co.us/pls/efi/EFI_Search_UI.Search (search for Documents in Proceeding Number 08R-226GPS, then follow "Gas Pipeline Safety Rulemaking" hyperlink).
[21] 4 Colo. Code Regs. § 723-4:4952(b).
[22] *See* 16 Tex. Admin. Code §§ 8.1.
[23] Press Release, Texas Railroad Commission, Commissioners: "New Pipeline Safety Rules Approved Today," Requirements Place Texas at the Forefront of Pipeline Safety Initiatives Nationwide (Feb. 10, 2009), http://www.rrc.state.tx.us/pressreleases/2009/021009a.php. (quoting Railroad Commission of Texas Chairman Victor Carillo).

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populated areas "continue to be under the watchful eye of the state's regulatory agency."[24]

Specifically, the amended RCT standards regulate Type A and Type B production pipelines in Class 2, 3, and 4 areas in the same manner that Type A and Type B gathering pipelines already were regulated.[25] The RCT was the first state agency in the nation to regulate all pipelines, including production and flow lines, in heavily populated areas.[26] The RCT's objective in adopting these amended regulations was to regulate optimally the pipelines likely to pose the greatest risk.[27]

Additionally, in October 2008, the RCT adopted rules that increase the frequency by which operators of pipelines in Class 2, 3, and 4 locations must inspect leaks and shorten natural gas leak repair time frames.[28] Grade 1 leaks continue to require immediate repair, and the RCT amended its rules to require that Grade 2 leaks be reevaluated monthly and repaired within six months, and Grade 3 leaks be reevaluated within 15 months and repaired within thirty-six months.[29] In February 2009, at the same time that the amended regulations governing production lines were issued, the RCT adopted a rule requiring operators to submit all leak reports online.[30]

C. State-of-the-Art Pipeline Safety

The Commission wisely convened these hearings before Marcellus Shale gas development fully ramps up in Pennsylvania to ensure that PUC regulations adequately protect the public as drilling intensifies. To meet that goal, the Commission needs the authority to regulate gas pipelines owned or operated by persons or corporations that do not qualify as public utilities and do not seek that status, especially gas producers laying gathering lines in Class 1 locations. Those entities should not be compelled to seek certificates of public convenience, but the Commission should seek legislative authorization to regulate the safety of all gas pipelines directly or indirectly linking to the delivery system operated by public utilities transmitting and distributing the gas. The Commission also should exercise the authority it already has to improve safety regulations governing public utilities that operate gas pipelines in Class 2, 3, and

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[24] *Id.*
[25] 16 Tex. Admin. Code § 8.1(a)(1)(B).
[26] *See id*.
[27] 34 Tex. Reg. 1417 (Feb. 27, 2009).
[28] 16 Tex. Admin. Code § 8.206.
[29] *Id.* § 8.207.
[30] *Id.* § 8.210(e).

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4 locations. The regulations adopted in Colorado and Texas should provide a baseline for new rules, but the Commission should not hesitate to adopt additional regulations dictated by Pennsylvania's specific needs, which should be investigated fully in the public rulemaking process.

II. The Commission Should Consider the Impacts of Marcellus Shale Gas Development on Public Utilities Other Than Gas Utilities.

The Commission is charged with establishing a regulatory framework for *all* public utilities to ensure that they provide "adequate, efficient, safe, and reasonable service and facilities."[31] To fulfill that mandate, the Commission must consider how Marcellus Shale gas development will affect not only public utilities transmitting or distributing gas but also public utilities furnishing water or property transportation services. We address each of these potential impacts in turn below.

A. The Gas Industry, Not Pennsylvania's Water Utility Ratepayers, Should Finance Any Additional Operating or Maintenance Costs That the Industry's Activities Impose on Water Utilities.

Although the Commission does not regulate water quality, it does have jurisdiction over companies that receive compensation for furnishing water to business and the public. Industrial gas development, including both well drilling and waste disposal, already has contaminated Pennsylvania's water supplies. Construction activities associated with such development, including construction of gas pipelines under PUC jurisdiction, inevitably will cause significant land disturbance, which in turn potentially increases erosion and sedimentation rates into the streams and rivers from which many water utilities draw their supplies. If the PUC is to keep water costs down for consumers, it cannot ignore the impact on water utilities of water pollution caused by gas development in the Marcellus Shale.

Gas wastewater and methane leaked from gas wells repeatedly have caused water pollution in Pennsylvania.[32] In 2008, DEP issued a drinking water advisory for

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[31] 66 Pa. Stat. Ann. § 1501.

[32] *See* Jad Mouawad & Clifford Krauss, *Dark Side of a Natural Gas Boom*, N.Y. Times, Dec. 9, 2009, at B1; *see also* Division of Mineral Resources, New York Department of Environmental Conservation, Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas, and Solution Mining Regulatory Program 5-99, 5-103 – 5-108 (2009), *available at* ftp://ftp.dec.state.ny.us/dmn/download/OGdSGEISFull.pdf [hereinafter "DSGEIS"] (Each well in the Marcellus Shale produces approximately 216,000 to 2.7 million gallons of wastewater, which often contains elevated levels of heavy metals, organic compounds, total

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325,000 Pittsburgh customers of public water supplies, after elevated levels of Total Dissolved Solids ("TDS") in Marcellus Shale gas wastewater caused the Monongahela River to violate water quality standards.[33] As a result, at least one water company incurred costs educating its customers about the problem.[34] Methane released as a result of gas drilling has contaminated drinking water wells in at least seven Pennsylvania counties since 2004, and, in one case, methane was detected in water sampled over 15 square miles.[35] In April 2010, after Cabot Oil & Gas failed to fix defective well casings, DEP fined the company $240,000 for causing water contamination in 14 homes.[36] Cabot also was responsible for spilling 8,500 gallons of hydraulic fracturing fluid into Stevens Creek in Susquehanna County in 2009.[37]

The risks of surface water contamination from gas wastes or spills only will increase as development intensifies throughout the Marcellus Shale region, and it may be just a matter of time before water utilities drawing supplies from groundwater suffer incidents of methane intrusion. PUC regulatory mechanisms are needed to ensure that water utilities adversely affected by such contamination are fully reimbursed by the gas development companies and that such costs are not unfairly shifted to water utility customers.

High TDS levels in Marcellus Shale wastewater impose additional treatment requirements on water utilities with intakes on TDS-contaminated waterways. At least one water utility has suggested that the Commission regulate facilities that accept the

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dissolved solids, normally occurring radioactive materials, and a myriad of chemicals incorporated into hydraulic fracturing fluids.).

[33] News Release, DEP, Test Results on Monongahela River Show No Major Threat to Human Health from High Level Metal Contamination (Oct. 24, 2008), http://www.portal.state.pa.us/portal/server.pt/community/newsroom/14287?id=2051&typeid=1; Joaquin Sapien, *What Can Be Done with Wastewater? Rapid Expansion of Gas Drilling Has Led to Problems with Disposal, Contamination*, Pittsburgh Post-Gazette, Oct. 4, 2009, at A3, *available at* http://www.post-gazette.com/pg/09277/1002919-113.stm.

[34] *See, e.g.*, Brochure, Pennsylvania American Water, Learning About Total Dissolved Solids (Dec. 2009), http://www.amwater.com/files/PA%20-%20TDS%20-%20December%202009.pdf.

[35] Abrahm Lustgarten, *Water Problems from Drilling Are More Frequent Than PA Officials Said*, ProPublica, July 31, 2009, http://www.propublica.org/feature/water-problems-from-drilling-are-more-frequent-than-officials-said-731.

[36] John Hurdle, *Update 2 - Cabot Oil to Plug 3 Marcellus Gas Wells, Pay Fine*, Reuters.com, Apr. 15, 2010, http://www.reuters.com/article/idUSSGE63E0K620100415.

[37] Steve McConnell, *Fracturing Fluids Spill into Susquehanna County Stream*, Wayne Independent, Sept. 17, 2009, http://www.wayneindependent.com/archive/x576510049/Fracturing-fluids-spill-into-Susquehanna-County-stream.

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residuals from such treatment for disposal.[38] PUC-regulated sewage treatment plants that upgrade their systems in order to accept Marcellus Shale wastewater also may welcome regulation of such disposal facilities.

Leaks, spills, and fluid waste associated with gas development are not the only sources of contamination potentially threatening water utility supplies. Construction activities associated with Marcellus Shale development, including construction undertaken by PUC-regulated gas utilities, also carry risks of contaminating water supplies. For example, land clearance and excavations required for new pipelines or pipeline maintenance or replacement create "an increased potential for accelerated erosion and sediment pollution."[39] Although DEP requires that the gas industry implement best management practices ("BMPs") for erosion and sediment control when pipeline and other construction disturbs more than five acres, there is no oversight of construction sites that disturb smaller areas.[40] Moreover, DEP does not regulate the potential erosion and sedimentation from construction on numerous sites of fewer than five acres each, which cumulatively may adversely impact the quality of water utility supplies.

In addition to the construction, maintenance, or replacement of pipelines, the construction of new or upgraded access roads capable of supporting the weight of heavy trucks used to transport gas industry materials and equipment will increase erosion and sedimentation potential.[41] The New York State Department of Environmental Conservation ("NYSDEC") estimated that access roads necessary to construct pipelines within the New York Marcellus Shale region will be wider than those needed for well construction, which are estimated to be 150-3,000 feet long and 20-40 feet wide.[42] Constructing roads of this size throughout the Pennsylvania Marcellus Shale region ultimately will require the removal of thousands of acres of topsoil, which threatens major erosion and sedimentation increases in the surrounding

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[38] Presentation of Kathy L. Pape, Pennsylvania American Water, at Public Utility Bar Bench Conference (May 11, 2020) (on file with Earthjustice).

[39] DEP, Comment and Response Document, Erosion and Sediment Control and Stormwater Management for Oil and Gas Exploration, Production, Processing, Treatment Operations or Transmission Facilities, 5500-PM-OG0005 4 (2008), http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-67458/05%20Comment%20and%20Response%2003%2028%2008.pdf (recognizing the potential impact of "pipelines for the gathering and transport of natural gas").

[40] *Id.*

[41] *See* DSGEIS, *supra* note 32, at 5-6.

[42] *See id.*

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areas. Such increases also are likely when local roads "are significantly damaged or completely destroyed," by "overweight and oversize vehicles."[43]

Finally, the construction of thousands of acres of access roads will require increased truck traffic to transport the excavation and paving materials and equipment. Truck traffic and transportation of construction materials contributes "large amounts of sediment and silt to runoff waters, which can deteriorate water quality."[44] Heavy metals, oils, and debris from construction traffic and spillage associated with construction also can be absorbed by soil and carried by runoff water to surface and ground waters.[45]

Water utilities must treat water contaminated by sedimentation with costly chemicals and coagulants prior to distributing it to consumers.[46] All water utilities, including those with sophisticated equipment, must purchase these chemicals and coagulants to remove sedimentation, increasing the total cost of water production.[47] One study based on 430 large utilities throughout the United States estimated that the costs of treating turbidity and sedimentation, including operating and maintenance costs, were $113.12 per million gallons of water.[48] The utility also will incur increased costs for disposal of the residuals removed from the contaminated water.[49]

The Commission sets the water rates that utilities may charge their consumers in a manner that reflects all "prudently incurred costs of providing service"[50] Increased costs associated with treating contamination, including increased sedimentation, from pipeline and other gas development construction activities doubtlessly qualify as "prudently incurred costs." Consequently, when such costs are incurred, the

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[43] Testimony of David M. Sanko, Pennsylvania State Association of Township Supervisors, at 1, for inclusion in record of PUC *En Banc* Hearing on Marcellus Shale Jurisdictional Issues, Docket No. 1-2010-2163461 (Apr. 22, 2010).
[44] U.S. Environmental Protection Agency, Erosion, Sediment and Runoff Control for Roads and Highways (Dec. 1995), http://www.epa.gov/nps/education/runoff.html (last updated Jan. 13, 2010).
[45] *Id.*
[46] Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category, 74 Fed. Reg. 62,996, 62,998 (Dec. 1, 2009).
[47] David Dearmont, Bruce A. McCarl & Deborah A. Tolman, *Costs of Water Treatment Due to Diminished Water Quality: A Case Study in Texas*, 34 Water Resources Research 849, 852 (1998).
[48] *Id.*
[49] *See* Presentation of Kathy L. Pape, *supra* note 38.
[50] PUC, Water: We All Always Need It 2 (2005), https://www.puc.state.pa.us/general/consumer_ed/pdf/waterbrochure.pdf.

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Commission may be asked to increase rates that water utilities may charge their customers.

Permitting a rate increase when Marcellus Shale gas development activities contaminate water utility supplies would unfairly shift costs from the industry to the ratepayers. The Commission should consider regulatory mechanisms, such as bonds or other financial guarantees tied to the extent of potentially polluting activity, that will encourage the industry collectively to minimize potential water contamination and will compel the industry fully to internalize the costs of development activities that adversely affect water utilities. Such payments would not be duplicative of DEP penalties assessed for environmental harms outside PUC jurisdiction.

B. The Commission Should Require Use of Certificated Common Carriers for Transportation of Gas Development Materials and Equipment.

Gas development in the Marcellus Shale creates an enormous amount of truck traffic. The NYSDEC estimated that a single well in the Marcellus Shale will require between 890 and 1,340 truck trips throughout its life cycle and ten truck trips to complete the pipeline construction necessary for each well.[51] Given the thousands of wells that may be drilled in the Marcellus Shale in Pennsylvania every year, the process of gas pipeline construction alone will add tens of thousands of truck trips to Pennsylvania's roadways. Moreover, the trucks transporting industry materials and equipment, including pipeline equipment, are heavy tankers and flatbed trucks, which place a severe burden on Pennsylvania's current transportation infrastructure.

The significantly increased heavy truck traffic necessitated by gas development creates serious safety hazards for other motorists and residents in the Marcellus Shale region of Pennsylvania. Many Marcellus Shale wells are located in rural areas without paved roads or other areas without roads fit to handle heavy trucking activities. Increased truck traffic in these areas poses significant risks of accidents on these underdeveloped roadways. These risks are augmented further by the fact that many of these trucks operate in violation of PUC's regulations designed to maintain safe roadways.[52]

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[51] *See* DSGEIS, *supra* note 32, at 6-138 to 6-139.

[52] *See* PUC, Regulation of Motor Common Carriers of Property, No. P-00940884, 1995 WL 945467, at *6 (Dec. 20, 1994) [hereinafter "Final Decision"].

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Trucking companies that transport materials to and from Marcellus Shale well and pipeline construction are deemed "common carriers" subject to PUC's jurisdiction.[53] All common carriers employed by the gas industry must obtain certificates of public convenience, which ensure that they maintain adequate insurance and comply with the Commission's safety regulations.[54] To obtain a certificate of public convenience, every trucking company must submit an Application for Motor Common Carrier of Property and comply with all associated procedural requirements.[55] These applications are not noticed in the Pennsylvania Bulletin, and existing carriers and members of the public are not permitted to protest motor carrier of property applications.[56] The Commission may issue a certificate of public convenience to the applicant once it determines independently that all safety issues have been addressed and once it has received proof of insurance from the applicant.[57] Trucking companies operating unlawfully without certificates of public convenience are subject to enforcement proceedings and fines of $1,000 per day for noncompliance with PUC's regulations.[58]

At the Commission's April 22 *en banc* hearing, the PUC Chair expressed concern that the gas industry is using trucks that have not obtained certificates of public convenience.[59] Because issuances of certificates for motor carriers of property are not noticed in the Pennsylvania Bulletin, it is prohibitively difficult for existing carriers and members of the public to determine whether any given trucking company employed by the gas industry is operating lawfully pursuant to a certificate. Given that over 1,500 wells, each requiring over hundreds to thousands of truck trips, have been drilled in the Marcellus Shale since January 2008, a large number of trucks may be operating without certificates in defiance of PUC safety requirements.[60]

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[53] *See* 52 Pa. Code §§ 37.201, -.202.

[54] Final Decision, *supra* note 52, at *6, 10; *see also* 49 U.S.C. § 41713(b) (1997) (preempting PUC from regulating the rates, routes, and services of common carriers but allowing PUC to regulate common carriers in matters of safety and insurance).

[55] Final Decision, *supra* note 52, at *9-10.

[56] 28 Pa. Bull. 2143 (May 9, 1998); 52 Pa. Code. § 5.51(b).

[57] Final Decision, *supra* note 52, at *10; PUC, Fact Sheet for Pennsylvania's Regulation of Intrastate Carriers of Property and Household Goods 1 (rev. Apr. 2009), *at* http://www.puc.state.pa.us/general/onlineforms/pdf/T&S_Property_FSheet.pdf.

[58] 52 Pa. Code § 37.291(a); 66 Pa. Stat. Ann. § 3301(a)-(b).

[59] April 22 Remarks of PUC Chair Cawley, *supra* note 4.

[60] *See* Maps, *supra* note 3 (indicating that 195 wells were drilled in the Marcellus Shale in 2008, 768 wells were drilled in the Marcellus Shale in 2009, and 564 wells were drilled in the Marcellus Shale between January and May 2010); DSGEIS, *supra* note 32, at 6-138 – 6-139 (indicating that an estimated 890 to 1,340 truck trips are required per well for natural gas development in the Marcellus Shale in New York).

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Further compounding PUC's enforcement challenges is the fact that there is a limited number of officers employed by the Bureau of Transportation and Safety to enforce PUC's regulations. As of June 8, 2010, the Bureau of Transportation and Safety employed a total of 26 officers and three supervisors charged with enforcement of its requirements and regulations throughout the entire state of Pennsylvania.[61] These enforcement officers have limited resources through which to determine whether motor carriers are operating lawfully, and they generally rely on tips from certificated carriers to identify carriers operating without a certificate.[62]

Allowing the gas industry to use uncertificated motor carriers is contrary to the policy of the Public Utility Code.[63] The Commission must make additional efforts to ensure that every truck transporting materials to and from well and pipeline construction sites is safe and fully insured. At present, hundreds to thousands of trucks may be operating without certificates of public convenience, and this lack of certification presents a serious threat to public safety. At the very least, the Commission should employ additional enforcement officers and create stronger policies for enforcement of its regulations, and those costs should be borne by the industry. The Commission also should require that any gas utility under its jurisdiction, including pipeline companies, certify that it uses certificated trucks for property transportation.

III. The Commission Should Oversee Siting of Gathering Lines and Other Intrastate Gas Pipelines.

As the foregoing analysis demonstrates, the construction of pipelines carries significant risks for public safety, consumer protection, and the economic interests of PUC-regulated public utilities, including water utilities and common carriers by motor vehicle. With every additional mile of pipeline construction, these risks necessarily increase. Moreover, the location of pipelines is not neutral with respect to any of these jurisdictional concerns. Pipelines constructed near occupied buildings create dangers not presented by those located reasonable distances from people and property.

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[61] Telephone conversation with Wendy Yoag, PUC Bureau of Transportation & Safety, Compliance Office (June 8, 2010). Ms. Yoag indicated that the Pittsburgh & Altoona District Office of the PUC Bureau of Transportation and Safety has eight officers and one supervisor, the Philadelphia District Office has five officers and one supervisor, and the Harrisburg and Scranton District Offices share 13 officers and one supervisor between the two offices.

[62] *See id*.

[63] *See* 66 Pa. Stat. Ann. § 1501 (stating that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities").

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Pipelines located near water supplies, or run through forests that protect water supplies, threaten more contamination than those affording generous buffers or avoiding unnecessary land and topsoil clearance. The Commission therefore cannot fulfill its statutory mandate if it does not oversee the siting of pipelines within the Commonwealth.

Failure to oversee the siting of pipelines virtually guarantees that both gathering lines and transmission lines will proliferate dangerously. The risk is evident from the comments of Bluestone Pipeline Company of Pennsylvania, for example, which expressly acknowledges that "its proposed service territory will likely overlap with those of one or more providers of similar services" but opposes the creation of exclusive certificated service territories.[64] Exclusive service territories may not be ideal, but there must be some coordination mechanism for pipeline construction that prevents competitors from building redundant and unnecessarily destructive lines. Without PUC oversight of pipeline siting, water utilities and their customers will be placed at unnecessary risk because there will be no means to prevent gratuitous land clearance or to direct lines away from water sources.

At the very least, PUC siting authority should be exercised over gas utilities to protect public safety and water utility ratepayers. Any certificate of public convenience issued to an entity that may construct pipelines of any sort should include a condition that, before construction commences, the utility obtain PUC approval certifying the need for both the extent and specific location of any proposed pipeline, and no approval should be granted without at least 30 days' notice, directly to affected landowners and published in the Pennsylvania Bulletin, and a period for public comment and hearing. Similarly, no gas utility seeking to appropriate land for pipeline construction should be permitted to initiate eminent domain proceedings against a landowner until the Commission certifies that need, and no certification should be granted without at least 30 days' notice, directly to the landowner and published in the Pennsylvania Bulletin, and a period for public comment and hearing.

Some companies providing gathering services for gas producers have urged the Commission to undertake "streamlined" regulation of such services, arguing that the providers should receive the benefits of public utility status "but should not be

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[64] Comments of DTE Pipeline Company and Bluestone Pipeline Company of Pennsylvania, LLC., at 3 (Apr. 16, 2010), for inclusion in the record of Marcellus Shale En Banc Hearing on PUC Jurisdictional Issues, Docket No. I-2010-2163461 (Apr. 22, 2010) [hereinafter "Bluestone Comments"].

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burdened by full-scale economic regulation."[65] For example, ETC Northeast Pipeline seeks the eminent domain power of public utilities, while objecting to any PUC requirements with respect to affiliated interest filings, security certificates, annual reports, rates, service, terms and conditions of service, or pipeline siting.[66] Earthjustice and the undersigned organizations strongly object to the extension of eminent domain power to any entity not fully regulated as a public utility and emphasize the need for PUC oversight of pipeline siting, even when construction is undertaken by a fully regulated utility. Moreover, the Commission should not consider developing any special regulatory package to accommodate gathering service provider requests for "streamlined" regulation, even without granting eminent domain power, unless the package includes regulation of pipeline siting.

We recognize that pipeline siting potentially raises jurisdictional issues for both the Commission and DEP. We urge the Commission to consider creation of a joint task force to investigate options and make recommendations for a planning process and siting regulations that address the mission and concerns of both agencies. Ideally, the task force would develop public participation procedures that would offer it the benefit of input from scientific experts, local government, industry, landowners, environmental and consumer groups, and other concerned citizens.

Conclusion

At the April 22 *en banc* hearing, Commissioners repeatedly disallowed any interest in building a regulatory empire, but the Commission should not shrink from exercising its rightful authority, when its mission so demands. That broad mission, stated succinctly on the PUC website, provides:

> The Pennsylvania Public Utility Commission balances the needs of consumers and utilities to ensure safe and reliable utility service at reasonable rates; protect the public interest; educate consumers to make independent and informed utility choices; further economic development;

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[65] Comments of ETC Northeast Pipeline, LLC , at 4, 6 (Apr. 16, 2010) [hereinafter "ETC Comments"], for inclusion in the record of Marcellus Shale En Banc Hearing on PUC Jurisdictional Issues, Docket No. I-2010-2163461 (Apr. 22, 2010); *see also* Bluestone Comments, *supra* note 64, at 4-7.
[66] ETC Comments, *supra* note 65, at 4.

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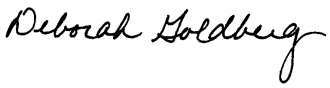
> and foster new technologies and competitive markets in an environmentally sound manner.[67]

The PUC mission statement affirms the Commission's legislative charge and institutional commitment to act in the public interest and confirms that, although DEP has primary jurisdiction over water quality and other environmental regulation, the Commission cannot fulfill its own mandate without factoring those considerations into its regulation of public utilities. Indeed, rather than excluding those issues from its deliberative calculus, the PUC previously has insisted that it "takes its environmental obligations seriously."[68] Taking its environmental obligations seriously in the context of Marcellus Shale gas development requires that the Commission seek legislative authorization to regulate *all* intrastate gas pipelines and exercise that authority over pipeline siting. Vigilant oversight of pipeline siting will protect water utilities and ratepayers from water quality degradation, while also enhancing public safety, without impeding economic development in the Commonwealth.

Respectfully submitted,



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[67] PUC, Website Home Page, http://www.puc.state.pa.us/Home.aspx (last visited June 11, 2010); *see also In re 717 Area Code Relief Plan*, No. P-00961071, 1998 WL 34068165 (Pa. P.U.C. Apr. 9, 1998) (referring to the Commission's "mission serving the public interest").

[68] *In re Application of Trans-Allegheny Interstate Line Co.*, 103 Pa. P.U.C. 554, slip op. at 24 (Dec. 12, 2008).

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