

**STATEMENT OF THE
PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY
BEFORE THE SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES AND
ENERGY
HEARING ON SENATE BILL 1230 – PROPOSED WATER RESOURCES
CONSERVATION AND PROTECTION ACT
*March 13, 2002***

On behalf of its over 9,000 members, the Pennsylvania Chamber of Business and Industry welcomes the opportunity to provide the Senate Committee on Environmental Resources and Energy comments on Senate Bill 1230, the Water Resources Conservation and Protection Act.

The Pennsylvania Chamber of Business and Industry is the largest, broad based business association in Pennsylvania. Our more than 9,000 members employ about 50% of Pennsylvania's private workforce or approximately 1.5 million people. Eighty percent of our members have less than 100 employees. The Chamber is dedicated to advocating reasonable regulations that encourage economic growth while protecting Pennsylvania's environment and natural resources.

Over the past decade, the Pennsylvania Chamber has given concerted consideration to the important issues of water resource planning and management in the Commonwealth. There is absolutely no question that water resource issues are important and critical to the future economic, as well as environmental, well-being of Pennsylvania and its citizens. Water is one of this Commonwealth's greatest assets and is essential to virtually every enterprise and human endeavor. Many of our industries — including agriculture, steel, chemicals, petroleum refining, pharmaceuticals, food processing, and power production — could not exist absent abundant, relatively inexpensive, and high-quality water supplies.

With this in mind, the Chamber created a task force to focus exclusively on water resource issues in the Commonwealth. Members of the task force represent a cross-section of Pennsylvania businesses, including agriculture, mining, power generation, oil and gas, food processing, pharmaceuticals, and public water companies. This testimony, along with the

accompanying piece outlining the scope and principles of water legislation that merit consideration and enactment, are based on the consensus reached by the members of that task force.

We have also held discussions with the group spearheaded by George Wolff and are in basic agreement on what should and should not be part of water resources legislation.

We are a relatively water rich state, but that does not mean that we can waste this critical resource. No one of us “owns” that water, but we share it as citizens of the watersheds and river basins that we inhabit. We, each of us, are trustees of that resource, with the obligation to develop and use water wisely.

The stewardship of the Commonwealth’s water resources, to be effective, requires an integrated approach to water planning and management. Effective planning and management requires that government, working with private enterprise, take an active role in efforts to plan for, conserve, nurture, and develop Pennsylvania’s ground and surface water resources. The objective of that effort must be to balance and serve all of the many legitimate needs and demands placed on those resources. In doing so, we must recognize that government cannot do it all and is incapable of doing it all. A key component of any effective water resources program must be to encourage private actions to conserve and develop water resources.

COMMENTS AND CONCERNS WITH S.B. 1230

Lack of a Holistic Planning Vehicle

With the foregoing perspective, we respectfully suggest that the planning structure offered in Senate Bill 1230 is not sufficient to get the job done across the Commonwealth.

Under the concepts suggested by the Department of Environmental Protection, and reflected in S.B. 1230, the Department would develop and adopt a state water plan whose content is amorously defined as being “high level” – a plan that contains policies, programs, institutional arrangements and recommendations. While the Department has informed the Chamber that identification and analysis of data will be part of the State Water Plan, the

Department’s proposal omits the preparation of detailed and comprehensive basinwide regional plans – a process that the Chamber and many others believe is absolutely essential.

Instead, the Department proposes to identify a limited number of “critical water planning areas” and then turn over the real water resource evaluation and planning function (what it calls integrated water resource planning) to unnamed and unidentified entities, which are to be “nominated” and selected at some point down the road. Section 7 of the bill provides virtually no criteria or minimal qualifications for those who may be nominated or selected – they may be governmental organizations, private watershed associations, or any “other appropriate entity”, whatever that may mean. (We suppose the nominated and selected entity could even be a consulting firm.) Unlike other proposals before the General Assembly, the Department’s proposal does not assure a balanced participation by all stakeholders in the development of such sub-regional plans. On the one hand, Section 7(d) requires that one representative from every municipality in a watershed serve on an advisory committee – a requirement that could mean that in some areas, the advisory committee would be composed of a hundred or more municipal representatives. Yet, the bill indicates that representation by agriculture, public water supply, industry, commerce, energy, environmental and conservation organizations is only optional.¹ In other words, the Department has proposed language that allows the major stakeholders to be excluded from the planning and advisory process. Although the bill requires that such “integrated water resource plans” be submitted back to the Department for review, it provides scant criteria for approval or rejection of such plans. There is literally no requirement for balancing of regional and statewide interests, concerns, and priorities.

We believe the process envisioned in the Department’s proposal has several fundamental problems:

- It does not assure the development of plans that truly encompass the entire Commonwealth. The state is stuck with a “high level” plan – read, a plan without solid data or real substance; a plan which is long on policy, but short on analysis and focus.

¹ Page 12, line 24: the advisory committee “may” include representatives of other interests.

- Even in critical areas, there is no assurance that adequate organizations, with the requisite skills and experience, will come forward to perform the requested planned effort. It sets up an ad hoc, hodgepodge planning regime in which some areas may be able to develop plans (if competent local organizations come forward, and adequate funding is found to support their efforts), while other areas that may be less sophisticated or wealthy go without planning. This bill may be well suited to support the agendas of some of our wealthier suburban communities, but it leaves our urban centers and rural counties in a highly disadvantageous position.
- The process envisioned by S.B. 1230 is cumbersome and unlikely to get the job done within the timeframes required. The bill establishes a sequence for formulation of the state water plan, designation of critical planning areas, nomination of planning agencies for each area, followed by selection and designation of planning entities among multiple nominated organizations, potential appeals of those designations, development of critical area plans, state review of the critical area plans, and potential appeal of those approvals to the Environmental Hearing Board.

The Fragmentation of Water Planning and Management Functions

The proposed approach represents a major devolution of water resources planning responsibility from the state and basin level to what are best described as uncertain coalitions of local municipalities and interests. Rather than fostering an integrated basin and state level program for planning and managing water resources, this bill sets up a new splintering of water resources functions.

Management of water to maintain a sustainable economy in Pennsylvania requires a unified and cohesive approach that avoids a fragmentation and/or “balkanization” of authority and duplicative and overlapping authorities, and which recognizes the needs and priorities of each basin and the Commonwealth as a whole.

Under the scheme proposed in S.B. 1230, the Commonwealth’s 45,308 square miles (in five major river basins) could conceivably be subdivided into literally hundreds, if not thousands, of “watersheds,” each with its own separate plan. The concept of uniform treatment of all water

users without regard to political boundaries could rapidly devolve into a vast array of organs and agencies pursuing different agendas in the management of a shared resource.

Such an arrangement threatens to stimulate and foster an “us versus them” approach to the management of shared water resources. A majority vote in one watershed may well deny further water to serve the downstream requirements of metropolitan areas; or disfavor water for a particular industry; or promote a water management scheme, which significantly reduces stream flows because fish are viewed as a low priority.

The fact is that our Commonwealth is a highly interdependent array of water users and regions. Consider for a moment some examples:

- Delaware and southern Chester County derive a substantial portion of their water supply from sources in the *Susquehanna River Basin*. Currently, the Chester Water Authority diverts up to 60 million gallons per day from the Susquehanna River and Octoraro Creek for delivery to communities across southeastern Pennsylvania.
- The groundwater sources of multiple authorities, utilities and communities across Bucks and Montgomery Counties, in the Neshaminy and other subbasins, are all interconnected in an integrated system, where ground and surface waters are used interchangeably in what is known as a “conjunctive management scheme.”
- The communities of the State College area draw their water supply from an integrated series of well fields, operated by a single authority, which spans five municipalities, several watersheds and different groundwater aquifers.

“Watersheds” are not islands. They are not separate, distinct and independent hydrologic units. These watersheds are part of much larger river basins, whose resources are shared by millions of our citizens. This interrelationship and interdependency require integrated water planning and management at a much higher and more comprehensive level.

The Delaware and Susquehanna River Basin Compacts were developed with a recognition that thousands of separate municipal and county jurisdictions could not provide for orderly and fair management of shared water resources. Concern for the inefficiency of overlapping and inconsistent jurisdictions, each pursuing its own political lights, led to the declared need (now embodied in the compacts) for a single agency in each major river basin to manage the total basin resource. Although some may not always agree with the results, the fact is that the two compact agencies have gathered together expert, scientifically trained staff who

provide independent review based on hydrologic facts. It would be nearly impossible for groups of local municipalities or watershed associations to afford the long-term retention of staff with similar expertise; and even if they could afford them, could they hire and keep them, where (as in this bill) their long-term role is so amorphous?

A review of the history of failed management prior to the compacts, and the need for comprehensive planning and management envisioned by the compacts, led the Commonwealth Court to decide and our Supreme Court to affirm that water allocation decisions are not matters for municipal regulation. As stated by the Commonwealth Court, the basin commissions were created “in no small part to combat chaos and fragmentation in the management of the basin’s water resources.”² As currently structured, we fear that S.B. 1230 threatens a return to that era of chaos and fragmentation.

In contrast, we believe the planning structures outlined in the Chamber position statement, in S.B. 998, and in the testimony you have heard from other groups today, come much closer to achieving the goal of achieving a workable and integrated plan for our Commonwealth. Moreover, we believe that those proposals – which involve creation of a balanced State Water Resources Board and basin/regional boards – will help to build the types of institutional arrangements we will need in the long run to tackle the management challenges likely to be identified in the planning process.

Open-Ended Authority to Delegate Water Management Functions to Local Agencies

Section 3, subsection (11) allows DEP at its discretion to delegate any of its authority under this act to any local agency and would vest in such local agencies all of the Department’s powers and duties to the extent delegated. No criteria or limitations are placed on that broad power to delegate. As currently worded, DEP could grant to a single municipality the power to adopt the State Water Plan or to administer the water use registration program. With the reference to the Water Rights Act at the beginning of Section 3, this provision could hypothetically be used to delegate to municipalities the power to issue water allocation permits under the Water Rights Act or to take enforcement actions against public water supply entities.

For the reasons stated previously, such a devolution and splintering of water planning and management authority would be a huge step in the wrong direction, and this type of standard-less delegation of power to unnamed local agencies should not be permitted.

Defining and Designating Critical Water Planning Areas

S.B. 1230 creates a “chicken and egg” problem in terms of defining and designating critical water planning areas. On the one hand, Section 2 defines such areas as those “identified in an updated State Water Plan under Section 4, or designated by the department under Section 3(a)(14), where water availability does not meet current or projected future water resources needs.” To make the determinations required under this definition, one needs to have a process which assesses the safe yield of ground and surface water sources in a region and compares it to data and projections on current and future water uses. But, as structured by the Department, the State Water Plan would not engage in preparing such safe yield estimates or in projecting current and future water demands. Instead, such water budget analysis would be left to “integrated water resource plans” to be prepared for each critical water planning area.

In the Chamber’s view, S.B. 1230 has it backwards. One needs real data – a good inventory of sources and their safe yields and a sound database on current and projected uses – in order to identify and designate critical areas. Regional water plans and the State Water Plan need to undertake such analyses *before* critical areas are designated.

For this reason, we believe that the concept contained in §3(a)(14) of “petitioning” for designation of critical planning areas, “independent of identification of such areas in the State Water Plan,” is not well advised. The designation of critical areas should be based on data and science, not politics. The State Water Plan should provide the process for gathering together and analyzing that data, and we should not create a separate pathway around that science based process.

In recent discussions with the Chamber, the Department has implicitly acknowledged problems with the current provisions of S.B. 1230. The Department has proposed changes that

² *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063, 1076 (Pa. Cmwlth. 1995), *affirmed per curiam*, 689 A.2d 224 (Pa. 1997).

would more closely link Critical Water Planning Areas to the State Water Plan by including criteria for the designation of Critical Water Planning Areas in the State Water Plan.

Requirements for Metering

Chamber members, as well as members of the agricultural community and others, have expressed concern over the broad power granted to DEP in §§ 3 and 6 to require metering of water usage. There has clearly been a trend in the Commonwealth, and in river basin commission programs, to require meters in most *new* and larger water uses, in the belief that this is the most accurate means of determining water use. Since this bill proposes registration and reporting be made applicable to uses as small as 10,000 gallons per day, many companies are concerned about the prospect of having to retrofit metering to existing facilities even when alternative methods may be suitable for estimating use for planning purposes.

Metering is costly to install on a retrofit basis, involves large maintenance and calibration expenses, and is far from foolproof. Other methods may be equally suitable and may actually be more reliable. For example, many users may calculate their total usage based on pump rating curves and records of the number of hours that a pump operates. Others may calculate water usage based on established cooling tower rating curves. In our view, other methods for providing accurate estimation of water use should be given equal billing in these provisions, and we should not launch an expansive and expensive metering program absent a clear justification of the real need for, and a clear understanding of the cost of, that effort.

We are pleased that the Department has proposed giving itself discretion to reduce the frequency of reporting, to exempt certain classes of water users, and to increase the threshold for reporting.

Regulation by Administrative Fiat

As drafted by the Department, this bill contains a number of provisions that apparently allow DEP to rule by administrative fiat without following any of the prescribed processes for adoption of regulations. For example:

- §3(4) authorizes DEP to “require recordkeeping, metering, measuring, monitoring, registration and reporting” – with no suggestion that such requirements be propounded by regulation.
- §3(15) allows DEP to establish procedures for filing and review of petitions to designate critical water planning areas.
- §7(a) allows DEP to establish a process (again without rules) regarding how the public may nominate entities, and how the department will select entities, to prepare integrated water resource plans.
- §6(a) provides that registrations by water users must be accompanied by “data as prescribed by the department” (with no requirement that such data mandates be incorporated in rules).
- §6(b) authorizes DEP to require any person to install metering equipment to monitor withdrawals and to establish recordkeeping and reporting requirements (again with no provision for those mandates to be adopted via proper regulations).

The Chamber and others in the regulated community, along with many members of this General Assembly, have long been concerned about the trend toward regulation without rules – with agencies propounding what amount to mandatory requirements without following the procedural safeguards established in the Commonwealth Documents Law and the Regulatory Review Act. In our view, the adoption of *all requirements, policies, guidelines and plans* should be subject to public notice, comment, and review in accordance with the Commonwealth Documents Law and the Regulatory Review Act.

Protection of Confidential Business Information

Unlike many of the other water planning and management bills offered to date, notably absent from S.B. 1230 are any protections of confidential business information. DEP is given broad authority to require the collection and submission of data by businesses regarding water usage and “other information,” but no protection is granted to data that may disclose sensitive production or other information.

As with other environmental data collection efforts, this legislation should provide explicit protection for confidential business information – that is, for records, reports or information, that if made public would divulge production or sales figures or methods, processes or production unique to a person or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, including intellectual property rights.

Backdoor Amendments to Other Laws

Although this legislation was billed by the Department as a stand-alone water resources planning package, allegedly not intended to expand the agency’s authority, we find several provisions that involve what are, in essence, backdoor amendments to other statutes – amendments that are distinctly directed to expanding DEP’s authority beyond what is currently authorized in those laws.

Specifically, we note that the 1939 Water Rights Act has existed for over 60 years in its current form. Under that law, DEP has specific (and limited) powers over the allocation and permitting of water withdrawals from surface sources by public water supply agencies. This bill in fact contains a series of provisions which subtly attempt to expand DEP’s powers under the 1939 Water Rights Act, including: §3(4) (power to requiring metering, measuring and recordkeeping); §§3(7) and 11(c) (power to collect civil penalties for violations of the Water Rights Act); §§3(8) and 11(b) (power to issue administrative orders relating to the Water Rights Act). We believe that this bill should be limited to the stated subject matter of water resources planning and should not be used as a backdoor to expanding DEP’s authority under other statutes and programs.

Civil Penalty Authority

If, as we believe it should be, the enforcement tools provided in this bill are trimmed back to address the specific subject matter of this particular statute, then we question whether the proposed level of civil penalties found in §11(c) is commensurate with the “offenses” which they address. This water planning legislation is not designed as a typical command-and-control environmental regulatory bill, and tools that may be appropriate in the context of pollution abatement are not particularly appropriate here. The only mandatory obligations being created in

this bill relate to registration and reporting of water usage. In that context, a civil penalty of \$2,500 per day for each day of continuing violation (i.e., every day that a registration or report is late) is excessive.

Definitions Inconsistent with Accepted Basin Commission and Other Usage

S.B. 1230 contains a series of definitions of well-known terms that are at substantial variance with accepted usage and well-established basin commission regulations. A few examples may be provided:

“Consumptive Use”: S.B. 1230 contains an expansive definition of “consumptive use” that includes any situation where “water withdrawn from a water resource is not returned to the same water resource at or upstream from the point of withdrawals resulting in a diminution in quantity or quality of the water resource.” Under this definition, ostensibly anytime a person withdraws water, and returns it *below* the point of withdrawal, that would be a consumptive use. The Department is proposing substituting “near” for “upstream from.” “Near” is a subjective term, open to broad interpretation. Further, as this reads, anytime that the water is not returned in as pure a form as it was taken out, that would count as a “consumptive use.” Even if amended as proposed, this definition goes well beyond current SRBC and DRBC usage of the term. A definition closer to the currently accepted concept would be:

“Consumptive use.” The loss of water from a ground water or surface water source through a man-made conveyance system (including such water that is purveyed through a public water supply system), due to transpiration by vegetation, incorporation into products during their manufacture, evaporation, diversion out of a river basin, or any other process by which the water withdrawn is not returned to the waters of a basin undiminished in quantity.

“Diversion”: S.B. 1230 defines the term “diversion” to “take or impound or the direct or indirect taking or impoundment of water from any water source or to interfere, or the interference, with the prevailing hydrologic regime, whether or not the water is returned to its source, consumed, made to flow into another water source or discharged elsewhere.” Under this definition, virtually anything can constitute a diversion, including every run-of-river hydroelectric dam, or even a weir used to create a small fishing pool. This expansive definition, however, bears no relation to accepted usage of the term, as reflected in the DRBC and SRBC

compacts and other laws. While the Department has proposed removing the definition of “diversion” from the bill, the chamber would be satisfied with an amended definition reflecting language in the DRBC and SRBC compacts. The accepted definition would be:

“Diversion.” The withdrawal of water involving an interbasin transfer of water.

Drought Contingency

Pennsylvania recently revised its drought contingency regulations. They should be referenced in S.B. 1230 and incorporated into the State Water Plan and Integrated Water Resources Plans as the criteria used to determine drought contingency planning. A general drought contingency plan should first be adopted on a statewide basis by DEP and the Pennsylvania Emergency Management Agency.

Conservation

Section 9(b) of the bill requires PENNVEST to give priority to funding projects by any public water supply agency that address unaccounted-for water loss or that implement water conservation practices, if the agency has an unaccounted water loss rate exceeding 20 percent. This provision was addressed at length by the American Water Works Association in their testimony. The Chamber concurs that if priority should be given to funding projects that address unaccounted-for water loss, it should be limited to those cases where there is a new owner with proven performance elsewhere in reducing such water losses. As a condition of receiving funds, PENNVEST should require that those public water suppliers whose unaccounted-for water loss rate exceeds 20 percent have a rate structure in place that reflects the actual cost of service as well as an infrastructure maintenance plan.

Water Well Standards

The Chamber previously expressed its support of the provisions relating to water well drilling standards and licensing found in House Bill 1591, including a number of refinements to those proposals that were made as that bill was considered by the House. Although S.B. 1230

contains a number of concepts in common with H.B. 1591, we note that some of the focusing and refinements reflected in the House version are not reflected in the bill before you.

Specifically, we would note the following concerns that need to be addressed as you review Section 11 of S.B. 1230 and the corresponding definitions found in Section 2:

- Public water supply systems (including sources of bottled water) that are already intensively regulated under the Pennsylvania Safe Drinking Water Act and this bill should avoid duplication and overlapping of the standards governing design and construction of such sources. Accordingly, we recommend that the definition of “water well” in Section 2 be amended to add the following additional exception:
 - (iii) A spring or well otherwise regulated under the provisions of the act of May 1, 1984 (P.L.206, No.43), known as the Pennsylvania Safe Drinking Water Act, and the regulations adopted thereunder.
- The legislation should clearly reflect a recognition that different standards of design should apply to different types of wells, and that distinctions need to be made between wells uses for potable purposes and monitoring wells or piezometers used for monitoring groundwater conditions. Distinctions also need to be made between permanent and temporary wells. Monitoring devices need not be, and in some cases cannot be, constructed in the same manner as a potable well.

As reflected in §7(b) of H.B. 1591, we believe that any local regulations governing water well drilling should be identical to the state standards. The provisions found in Section 11(b) of S.B. 1230, suggesting that local agencies may adopt more stringent standards regarding water wells, is troublesome. There are few, if any, local conditions that would merit more stringent technical standards for well design and construction. However, this language invites, we believe, local governments to use well drilling regulations as a back door to local water allocation and withdrawal regulation. That would be a result which we believe threatens the type of splintering and fragmentation that must be avoided if we are to have a cohesive water management program in this Commonwealth.

CONCLUSION

As your Committee, and the General Assembly as a whole, considers these issues, there are a number of proposals and models that merit serious attention. We believe that the General Assembly should move forward in steps – starting with an update of the State Water Plan. In the attached document, we have put forward what we believe are constructive proposals for a comprehensive and workable program. While those proposals are in some respects more comprehensive and complete than those offered in the Department’s bill, they are built on solid experience of what has and has not worked in other states and basins. They are built on sound science and a holistic approach to water resource planning.

There is no doubt that water resources management is, and will remain, one of our most critical challenges; and the members of the Chamber are prepared to work constructively with you in that effort.