

**TESTIMONY SUBMITTED BY THE
PENNSYLVANIA CHAMBER OF BUSINESS & INDUSTRY**

**REGARDING REVISED AMENDMENTS TO SUSQUEHANNA RIVER BASIN
COMMISSION REGULATIONS CONCERNING REVIEW AND APPROVAL OF
PROJECTS; SPECIAL REGULATIONS AND STANDARDS;
HEARINGS/ENFORCEMENT ACTIONS**

December 5, 2006

Honorable Members of the Commission:

I am Tim Weston, Co-Chair of the Water Work Group of the Pennsylvania Chamber of Business & Industry. In that capacity, and on behalf of the Chamber's thousands of members statewide, I have been requested to come before you today to provide the Pennsylvania Chamber's comments concerning the November 27, 2006 draft of "final rulemaking" amendments to the Susquehanna River Basin Commission ("SRBC") regulations concerning project review and approval, special regulations and standards, and hearings/enforcement actions (18 C.F.R. Parts 803, 804, and 805).

As noted in the Chamber's extensive comments on the proposed rulemaking released for public comment in July, the Pennsylvania Chamber's members represent entities employing over 50% of the private workforce across Pennsylvania. Within the Susquehanna River Basin, the Chamber's membership includes many, if not the majority of, industries and commercial enterprises subject to the SRBC project review procedures.

In the short time we have today, I want to share with you our continuing serious reservations concerning certain elements of the proposed rules as e-mailed on November 27. We have some key concerns both with respect to process and substance, but also want to offer some suggestions on a path forward to address those issues.

1. Process Concerns

We understand that the revised version of the SRBC project review regulations was sent out to commentors on the afternoon of Monday, November 27. Obviously, this has provided those interested in the issues very scant time to review, absorb and provide meaningful input on whether the substantially revised draft adequately addresses the key concerns raised during the previous comment process, or whether the revised wording creates new (and unintended) problems.

As noted below, our review of the 11/27 revised draft indicates that while some improvements have been made on several items, several very significant problems remain with the revised language. We believe some real dialogue is required to concurrently address the Commission's objectives and the concerns of the regulated community in a thoughtful manner. We had hoped, after the submission of our comments back in August, that such a dialogue would be instituted - bringing together the best minds from both the agencies and the regulated community. Indeed, the Pennsylvania Chamber asked for and offered to provide a vehicle for such a dialogue. We were disappointed that such a discussion did not ensue prior to some

discussions during just the past week. Presentation of this revised draft, barely a week before the Commission was scheduled to hold both a hearing and act on the rules is not what we anticipated.

We understand the potential desire to move forward with some of these regulatory updates before the end of the year, when administrations in several of the member States are slated for transition. We sympathize with that issue, but equally feel it imperative that “we get this one right.” Weighing the concerns, we believe that it would be prudent to defer final actions on these rules for a few months, and in the interim, convene a stakeholders group that includes both representatives of the regulated community and signatory party agency staff to make sure that the issues and language have been fully vetted. We would hope to come back with a refined version that everyone can support.

2. Transfer of Project Approval Dockets / “Change of Ownership” Provisions

Our first significant concern is that the 11/27 draft’s provisions concerning transfer of project approvals create a very narrow window for transfers during the course of transactions -- and will require that many, if not most, facilities holding outstanding project approvals come back before the Commission before transactions can close. Further, the draft language seems to hold the prospect that properties and businesses in transition between owners could be subject to drastic changes in terms of the terms and conditions of their docket conditions and water rights -- which will put a serious chilling effect on transactions that are necessary to keep the Basin’s commerce moving forward.

First, as noted below, the "change of ownership" exceptions are extremely narrow -- and leave some significant gaps. Second, §803.6(b)(4) would bar a transfer unless seven separate conditions are all satisfied. As those conditions are stated in the 11/27 draft, if a project has a groundwater withdrawal that initiated prior to 1978 or a surface water withdrawal commenced before 1995, the project would be ineligible for project approval transfer -- even if the project approval had covered that groundwater and surface water withdrawal (e.g., because there had been a subsequent docket due to an increase or additional source). Paragraph (vi) would kick out any project where the quantity of water use changes -- thus, if the buyer were planning to reduce water use due to employment of water recycling or other conservation measures, this would ostensibly make the project approval ineligible for transfer. As we read the revised rule’s language, failure to meet any of these conditions would bar the transfer of the existing project approval, requiring instead an application for and issuance of an entirely new docket.

Assuming that the Commission’s concern is that it may want to review some aspects of a previously issued docket under certain circumstances, the way §803.6 is drafted uses a blunt instrument to accomplish that objective. Over the past week, we have shared with Commission staff other options to approach that objective. Workable approaches are provided in other environmental programs, such as the NPDES permit system, where notice of a proposed change of facility ownership is provided at least 30 days before the transaction is to close, and the transfer of the permit is automatically approved unless agency staff notify the parties that some aspect of the transferred permit needs to be reconsidered.

Another alternative to be considered may be a tiered approach. As Group I, there may be certain circumstances where transfers can be automatic. In other instances (Group II), notice to SRBC may be required, providing a period of time within which staff would notify the current permittee and applicant that the transfer can proceed, but that SRBC wants to review (post transfer) certain terms and conditions. (This would allow the transaction parties to determine whether to proceed at risk of a future change in the project approval or not -- their choice). Finally, in Group III, there may be some instances (albeit likely rare) where the staff notice would state that the transaction cannot proceed to close without SRBC formal review and approval of the docket.

Other options may be some form of conditional transfer approach – where transactions could go forward, with the caveat that the Commission reserves the right post-closing to review some particular issues (such as concerns about reported impacts on other users). However, to make that approach workable, the rules must be focused and clear regarding the nature of issues that may be reopened post closing, and provide the parties fair warning of the risks they may take in proceeding.

At the same time, let me note that the Commission has historically preserved in all docket decisions the right to reopen any docket for cause if conditions warrant (such as where unanticipated impacts occur). Thus, there is some substantial question as to why we need a special process at the time of property transfer to reopen and reexamine dockets, where the nature and amount of water use is not changing.

This issue of project approval transfers is clearly one where the specific language used in the rules is critical.

3. Change of Ownership.

The §803.6(b)(1) provisions exempting certain change of ownership situations is still very troublesome. Some serious consideration needs to be given to various types of transactions, such as corporate mergers, employee stock ownership plans (“ESOP”) and management buyouts, and the like – do they trigger a need for project approval transfers or cause a reopening of existing dockets, or not? For example, in the case of one of the Basin’s major paper mills, the facility most recently changed ownership via an ESOP, where the facility’s employees acquired ownership and control of the business. It is ironic that as currently drafted, SRBC would freely allow transfers in a corporate reorganization where most of the shareholders ultimately remain the same, but would disfavor or place at risk the docket and water rights of same facility if it is taken over its long-standing employees.

Of particular (but certainly not exclusive) note are transactions involving public companies, where the scheduling of closings are almost always confined to a very narrow window because of pricing based on share prices within a particular window period and stock market dislocation issues.

4. Grandfathering and Change of Ownership.

We understand that SRBC has some concerns regarding perpetual grandfathering of pre-compact uses, and has sought some vehicle to (over time) bring grandfathered withdrawals into the management scheme.

As a starting point, the Chamber previously posed the question (but has not received a cogent response) as to what problem we are really trying to solve. Since adoption of the Compact and SRBC's project review and consumptive use regulations, the rules of the road have been well-understood and relied upon by Basin businesses. Many facilities that have not experienced an increase in water withdrawals or consumptive use (from quarries to power plants, and from food processors to commercial buildings) have changed "ownership" with no requirement to bring their operations before SRBC for review and approval. In written comments and in testimony at hearings, Chamber members asked the question as to what was the "problem," and why the proposed rule change is a "solution." So that members of the regulated community can respond appropriately and help solve it, we really need a cogent explanation of the nature and scope of the perceived problem. At that point, the regulated community could provide meaningful comment both on the validity and nature of the concern, and the possible alternative methods for addressing it.

To the extent that grandfathering presents a "problem," we believe that the current vehicle reflected in the 11/27 draft – of making any change of ownership trigger an immediate requirement for project approvals – is extremely troublesome.

As currently worded, §803.4, coupled with §806.13, would require that a person buying a property or business that involves a "grandfathered" withdrawal submit a complete application for an approval no later than 90 days after closing on the purchase; and then the rules appear to treat that applicant as if it were an entirely new project (subject to the full panoply of standards as if one were building on a greenfield site.

This structure creates both structural and practical problems:

- As literally worded, a facility is allowed to continue its water use only if the application is "complete" – containing all of the information required for a new project. This would ostensibly require all engineering studies, pumping tests, etc. to be prepared and completed in just 90 days after a buyer obtains possession of the property. If a facility was previously grandfathered, it is highly unlikely that such studies will be complete, and it will be nearly impossible to develop a truly complete application in just 90 days.
- Instead of creating a transition process for grandfathered facilities, the rules create the very real fear for buyers that they may face extremely costly changes to their water rights in the near term – for example, imposing new pass-by flows that might cut off access to water historically relied upon to support facility operations. Faced with such a threat, many buyers would be reluctant to close, and/or the value paid for such businesses could be seriously affected by the risk.

- The lack of a clear roadmap for transition is not just a private enterprise concern. Change of ownership transactions frequently serve to foster public policy directions. Over the past 30+ years, state environmental and public utility agencies have strongly pushed for the consolidation of public water supply systems, eliminating a plethora of small, undercapitalized and poorly-managed municipal, investor-owned, and homeowner association systems. Larger entities were strongly encouraged to take over these systems. Few would have taken on such burdens if faced with the prospects that the water allocation approvals associated with the systems they were acquiring would be put in jeopardy, or be subjected to major changes, in the process. Similarly, with regard to the Pennsylvania power industry, electric utilities were required over the past 10 years to divest their generation assets, as other entities stepped forward to invest in those facilities. Those transactions would have been hindered if water withdrawal approvals associated with the facilities had been at risk. More recently, the refinancing of many power generation fleets have involved significant restructuring, consolidation and joint-venturing arrangements – not just internal corporate reorganizations. Those financings are crucial to the maintenance and development of a more reliable generation base to meet growing energy demand, but such efforts will be impeded if the status of permits for the involved facilities is put at risk.

Assuming, without conceding that grandfathering presents a problem in search of a solution, if existing facilities are to be brought into the regulatory scheme after owners change, we need a rational step-by-step transition process. Perhaps certain requirements typically imposed on project sponsors (such as withdrawal monitoring and reporting) could be triggered in the near term, while the evaluations of current operations and potential impacts proceed in a rational and planned manner. However, in order to allow amortization of investments and avoid spooking buyers, such existing uses should be allowed to continue to operate for some extended period (perhaps 10 years or so) before imposing materially new conditions (such as pass-by flows), absent situations imposing palpable and serious impacts on other water users.

5. §803.22 – Standards for Consumptive Use

As we previously commented, the Pennsylvania Chamber cannot support the proposed change of §803.22 which leaves wide open the central issue of what trigger level is to be used for benchmarking consumptive use makeup requirements.

The current SRBC regulations provide a specific trigger flow for consumptive use makeup, pegged at the seven-day, ten-year (Q₇₋₁₀) low flow. The proposed rules would delete reference to any specific trigger flow, and instead provide that mitigation must be provided “[d]uring low flow periods as may be designated by the Commission.” This would ostensibly leave the trigger for consumptive use compensation to the complete discretion of the SRBC, on a case-by-case basis. It leaves those planning and operating projects with no predicable guidance to determine potential risks and costs, and could alter consumptive use makeup requirements for both existing and new facilities.

In this regard, we are not particularly assuaged by the response in the Comment/Response document, suggesting that elimination of the Q₇₋₁₀ criterion would not change much since most uses opt to pay water charges in lieu of providing in-kind compensation. The trigger for consumptive use makeup requirements is a central element of the consumptive use standard. That trigger should be explicit and clearly articulated. SRBC should explicitly propose any new trigger it is considering, so that the impacts of such a proposal on the regulatory community can be evaluated and subjected to appropriate public review and comment.

6. §803.31 – Duration of Approvals and Renewals

The revised language of §803.31(a) creates a very odd discrepancy. The first sentence states that where a project has a state approval, the SRBC project approval will be issued for the same time period, but not longer than 15 years (with no exceptions). However, if there is no counterpart state approval or the state approval has no time limit, the SRBC approval will be allowed a duration of 15 years “unless an alternative period is provided for in the Commission approval.” There appears to be no good reason why the same language (“unless an alternative period is provided for in the Commission approval”) should not apply in both cases. If the state approval is for 30 years, why should the SRBC approval be rigidly limited to 15 years; but if the state approval is silent, more flexibility is allowed?

Final Words

In sum, the Pennsylvania Chamber believes that some key work remains to refine certain elements of these project review rules – including the project approval transfer and grandfathering provisions. We don’t believe it prudent to try to amend these rules “on the fly,” by trying to draft and review new language before you vote at this meeting. Learning from hard experience, we’d suggest that any possible solutions and language we come up with should be thoroughly vetted to make sure we don't create unexpected and undesirable side effects.

Thus, as we said back in August, and I repeated at the outset of this testimony, the Chamber and its Water Work Group are prepared to work with the Commission and its staff in positively addressing the concerns discussed above. We have been and remain prepared to roll up our sleeves and help to frame workable solutions that will assure a water resource management program that continues to promote both a strong economy and a healthy environment within this basin.