

Pennsylvania Chamber of Business and Industry Comments on Draft Water Use Registration, Monitoring and Reporting Regulations (25 Pa. Code Ch. 110)

On behalf of its over 9,000 members, representing the spectrum of Pennsylvania industry, business, and commercial enterprises, the Pennsylvania Chamber of Business & Industry is taking this opportunity to provide comments to the members of the Statewide Water Resources Committee ("Committee") and the Pennsylvania Department of Environmental Protection (DEP) on the draft regulations governing water use registration, monitoring and reporting, as circulated at the March meeting of the Committee. Although we understand that the draft regulations have not been formally released for public comment, we believe it would be helpful to share with the Committee and DEP the perspectives of the industrial and commercial sector as efforts move forward toward refinement of these draft regulations.

As the Department and many members of the Committee are aware, the Chamber (along with a coalition of many other interested organizations) was actively involved in the development of, and strongly supported, the passage of the Water Resources Planning Act (Act 220 of 2002). We believe that a cogent and comprehensive water resources planning process is essential for Pennsylvania's economic and environmental future. We recognize that an essential part of that process is the collection of reasonably reliable data regarding the nature, location and amount of significant water withdrawals and uses across the Commonwealth, in order to lay the groundwork for assessment of current and future needs. One element of that data collection effort involves the water use registration and reporting system envisioned in §3118 of Act 220; and during the process of drafting and negotiating the language in the bill that ultimately became Act 220, a good deal of thought was given to the scope and direction of that aspect of the program. It is with that perspective that we offer the following comments.

1. Fees for registration and reporting

During the course of discussion at the March 2005 Committee meeting, a concept was broached of imposing fees upon registrations and annual reports in order to raise funds to help support the planning process. While the Chamber is sympathetic regarding the need for adequate appropriations and funding to complete the State Water Plan, the concept of imposing fees on registration and reporting contravenes clear understandings made during the development and negotiation of Act 220, and would seriously undermine the credibility of the Department and many others who supported passage of the Act to an extent that it would, frankly, make it extremely difficult to ever again obtain the trust of many parts of the agricultural, business and other water use sectors. That future trust is essential if we are going to be able to adopt and implement the recommendations to be developed as part of the State Water Plan.

The only fees authorized by Act 220 are fees for the use of the water data system, as set forth in §3117(c). The limitation on such fees is further reflected in §3131(a) of the Act, which provides that the Department "shall use fees collected **from the use of the Statewide data system** to defray the reasonable costs of administering sections 3117 (relating to Statewide data system) and 3118 (relating to water use registration and reporting)." §3131(a) (emphasis added). No provision in Act 220 even suggests authority for collecting a fee on water use registrations, nor does any provision of Act 220 allow DEP to deposit such a fee into a special fund or use such a fee for any purpose.

During the process of drafting and developing the Water Resources Planning Act, the issue of whether or not registration fees would be authorized was explicitly discussed and addressed. All of those concerned, including the Department, the coalition of organizations supporting the legislation, and the members of the General Assembly agreed that no provisions would be included in the bill that authorized the establishment of registration and reporting fee. In explaining the bill, the Department issued express statements that “[t]here will be no fees associated with registration and reporting.” (See DEP, *Pennsylvania’s Water – Executive Summary Proposed Water Resources Planning Act*, a copy of which is attached.)

Those assurances, coupled with the fact that there are no provisions in Act 220 even hinting at any authority to impose registration fees, was absolutely essential to gaining the support of the agricultural, industrial, and other sectors of the affected water user community. Many organizations representing those sectors made it abundantly clear that they would adamantly oppose the act if authority for such fees were included. At the same time, the Department and others recognized that were the objective is to obtain submission of accurate and timely information, imposing fees would tend to discourage users from participating.

With due respect, the Chamber’s position is that in the absence of explicit authority in the act authorizing the Environmental Quality Board to set registration and fees, such legal authority does not exist. The Chamber would oppose any effort to bypass the General Assembly and impose such fees by administrative agency action alone; and given the history of the Act, we believe it is highly imprudent to further raise and debate this concept at this point.

2. *Registration and reporting by users without direct withdrawals*

Section 110.7(3) of the draft rules would require registration and reporting by not only those who make direct withdrawals of water from surface or ground water sources in amounts greater than 10,000 gpd, but also by any entity that is connected to a public water supply system who engages in a consumptive use (such as evaporative air conditioning) that consumes more than 10,000 gpd. This proposal represents a major departure from the initial registration program, where those connected to public water systems were exempted.

The Chamber seriously questions both the need for imposing this requirement, and the effectiveness of such a requirement in terms of garnering the information sought. If one thinks for a moment about any of the major metropolitan area water systems (such as serve southeastern Pennsylvania or the Pittsburgh area), this provision would affect we believe literally hundreds of enterprises and commercial buildings connected to the public systems. Virtually every high rise building with air conditioning units would be required to register, but very few of those facilities have the monitoring devices to actually calculate their individual consumptive uses. In terms of measuring what we are really concerned about for purposes of water budgeting – that is, the location of where water is withdrawn and the amount withdrawn, and where it is returned and the amount returned – the registration and reporting by individual users within a public system is not likely to add much in terms of either accuracy or completeness. The best data on water withdrawals and return flows will come from public water supply agencies and relates sewage system operators. We suspect that the rate of actual compliance by customers of those public systems will be troublesome, and the data provided will be far less accurate than the information provided by the public system operators.

3. *Pre-registration step*

We question the need for maintaining a two-step registration process, where users must first file a pre-registration form, and then a real registration. If users are submitting their registrations on a written form, the pre-registration step seems to be unnecessary. Moreover, it appears to have resulted in considerable confusion among the regulated community, where some have thought that their “pre-registration” was a registration that satisfied the Act. The Chamber would suggest that the pre-registration step be made optional only for those who want to use an electronic filing method, and that to avoid confusion, the name of the process be changed from “pre-registration” to instead refer to obtaining an identification number for completing electronic registration.

4. *Data required for registration*

It's not clear from §110.10 as to what precise information required for registration or how it will be used:

- Is it to show actual usage over a particular time period, historical usage, or potential usage?
- How will a new user be able to provide such detailed information?
- If an annual report shows higher usage figures than the original registration, would that be considered a violation? Would the registration have to be amended?

Several types of information requested in §110.10 go beyond the ambit of a registration under the act. For example, the requirement for submission of the date of peak flow (§110.01(4)(vi)) is irrelevant for registration purposes since it will likely change year-to-year. The Act does not require information on the capacity of the surface water source (as requested by §110.01(5)) for registration/reporting. Similarly, the Act does not require information on the type of water use (§110.01(6)) other than if it is consumptive or non-consumptive.

Section 110.10(7) would require that registering parties also identify their point of wastewater disposal. For those who do not have their own wastewater systems, but rather are connected to public sewers, this would ostensibly require each user to identify where the public sewer system disposes of wastewater and how much is disposed at that location. As noted above, requiring such information from users connected to public systems is redundant and burdensome, particularly given the fact that the same information is more readily available from the sewage system operators (who are already required to report location and flow information to DEP under their respective NPDES permits).

Further, we would suggest that “disposal” is not the proper description for the information requested in §110.01(7), nor are the items listed after “type” consistent with the Act. The Act requires submittal of information on locations and amounts waters returned, discharged and transferred via interconnections, which basically represents non-consumptive use. The Act only requires submittal of the total quantity of consumptive use, not quantities of all individual non-consumptive uses, as proposed by DEP. Quantities discharged to public sewer systems are included in this section, but this is not required by the Act, nor is it relevant since such the source of the water for these discharges is typically a public water supply. Finally, to provide all of the detailed information requested by DEP for each use would be burdensome, if not impossible. An alternative would be to require detailed information on larger volume

returns/discharges/transfers (*i.e.*, >50,000 gal/day), with limited information required for smaller volumes.

The Act only requires submittal of the quantity of withdrawal/usage of groundwater. The detailed well information requested by DEP is not consistent with the Act, nor is it particularly relevant to water resources planning.

5. *Transfer of registration*

The transfer of registration provisions found in §110.11 can be streamlined. Given that a registration is only an information gathering tool, not a regulatory instrument, we would question whether there is a need for requiring (as suggested by §110.11(2)(ii)) the submission of a written agreement concerning the transfer of registration and delineation of record-keeping and reporting responsibilities. In the case of transfers associated with transactions involving the sale of a facility, to the extent there is some need to delineate how records relating to pre-closing use will be kept and reported in the next annual round of reports, that could be addressed by simply having some options (with check boxed) listed in the registration transfer form, and having the respective parties sign the form.

6. *Voluntary registration and its implications*

Although §110.13 provides for voluntary registrations for those who withdrawal or use less than 10,000 gpd, it does so in a manner that will strongly discourage parties from entering the program. This proposed section would impose on any volunteer who registers the full panoply of requirements for metering, monitoring and annual reporting. The rationale for imposing this burden is not apparent. If small users want to submit registrations to let DEP know that they are “out there,” that in an of itself is useful information, and we do not need to go to the next level of requiring metering and annual reporting.

7. *Annual reporting requirements – types of information required*

The annual reporting requirements found in Section 110.18 are extremely vague regarding the amount and type of information that must be reported each year. For example, what do we mean by: (i) ownership “type and code”; (ii) surface water source “*type and status*”; (iii) groundwater source “name” and “type and status”; and (iv) interconnection “name” and “type and status”?

Section 110.18 singles out industrial users to provide information regarding “source adequacy.” It is unclear what the rules mean by “source adequacy,” and what information is being solicited. Assuming that the rule is intended to seek data concerning the safe yield of surface or groundwater sources, industrial users should not be required to conduct such assessments of source yield on an annual basis. If the goal of this section is to seek information regarding problems actually experienced in terms of shortfalls in water quantity or quality (to help identify potential problem areas), then the description of the information sought should be recrafted.

We are particularly concerned regarding the reference to reporting of “operating information” with no further definition or explanation of what that means. To some, it might

mean reporting just about water use, but read literally it would encompass a vast amount of information, including the amount of product produced (such number of pills or tons of steel), the amount of electricity consumed, the entire operating cost structure of the business enterprise, etc. While we respect the common-sense and integrity of the Department's personnel, we would suggest avoiding regulations that might be read to create a wide-open authority for a fishing expedition into company data. The focus of this effort should be upon gathering water withdrawal and use information, and the scope of any additional data to be submitted should be carefully spelled out.

The reference in §110.18(5)(ii) to the capacity of each "intake (including truck capacity)" seems incomprehensible. An intake is not a truck, and a truck is not an intake. Moreover, if one is looking to gather information about the amount of water that is transferred from a water source to another location by tanker truck (as, for example, may occur in some bottled water operations), the size of each truck used over the year is really not helpful, as it may vary. The real issue is the amount of water withdrawn, where it is taken to be used, and the nature of the use.

8. *Metering and other methods for monitoring and calculation of water withdrawals and use*

Section 110.21, as currently written, would require all users who withdraw more than 50,000 gpd to install and use meters to measure their water withdrawals and use. This provision appears to ignore language that was meticulously negotiated in Act 220, calling for the use of alternative methods for estimating water use where such alternative methods can provide accurate estimates.

Section 3118(b)(1) of the Act provides for use of alternative methods of water use monitoring both for those withdrawals between 10,000 gpd and 50,000 gpd, and those uses of greater than 50,000 gpd. The pertinent language of §3118(b)(1) states:

(1) Each public water supply agency and each hydropower facility, irrespective of the amount of withdrawal, and each person whose total withdrawal or withdrawal use from one or more points of withdrawal within a watershed operated as a system either concurrently or sequentially exceeds an average rate of 10,000 gallons a day in a 30-day period shall comply with recordkeeping and periodic reporting requirements established by regulations. Such regulations shall require water users subject to the registration requirements of this section to monitor, maintain records and submit to the department periodic reports regarding the source, location and amount of withdrawals or uses or both from surface waters and groundwaters, including the amount of consumptive and nonconsumptive uses, the locations and amounts of any waters returned and discharged and the amounts of water transferred between public water supply agencies via interconnections. Such regulations shall not require submission of periodic reports more frequently than annually. ***Where alternative methods exist to obtain a reasonably accurate evaluation of withdrawals or withdrawal uses, consumptive or nonconsumptive uses and return flows, such regulations shall allow for use of the alternative methods to obtain a reasonable estimate or indirect calculation of such in lieu of direct metering or measurement.*** With respect to withdrawal uses, other than public water supply agency withdrawals and hydropower facilities, involving a

withdrawal of less than 50,000 gallons per day in a 30-day period, the regulations shall provide for the use of alternative methods to obtain a reasonable estimate of indirect calculation of such in lieu of direct metering or measurement.

(emphasis added). Although the final sentence of subsection (1) applies to those withdrawals involving less than 50,000 gpd, the highlighted sentence applies to withdrawals both above and below 50,000 gpd. In other words, the statute commands that where alternative methods exist to obtain a “reasonably accurate evaluation” of the withdrawal, the consumptive or non-consumptive use, and/or return flows, the regulations **must** allow for use of such methods to provide a reasonable estimate or indirect calculation in lieu of direct metering or measurement.

The Chamber notes that alternative methods of calculating water withdrawals have been in active use for a range of water uses, including agriculture, large cooling water intakes, and other settings. For example, the calculation of flows via pump curves and meter data regarding hours of use is widely recognized as accurate without requiring the unnecessary capital expense of metering multiple large intake pumps. Pump curve and hour meter data should never **underestimate** flows, since pump curves are typically based on assumed maximum efficiency, and any decrease in efficiency occurring in actual installations would only tend to result in perhaps an overstatement of withdrawals. For purposes of planning, however, the degree of over-reporting resulting from use of pump curve/hour meter data should be insignificant (particularly given the margins of error involved with other assumptions and projection techniques inherent to the water use projection process).

To address this specific issue, we would recommend that the Committee and DEP convene a working group composed of technical representatives from various water use sectors to work on developing and identifying guidance regarding the available alternative methods to be used for providing reasonable estimates and indirect calculations of water withdrawals and use. The Chamber would be happy to assist in this process.

9. Recording frequency

Section 110.24 indicates that all uses in excess of 10,000 gpd equipped with meters will be required to record their water use on a daily basis. This requirement seems to be overly stringent, particularly for smaller users. Given the constraints in the staffing of many business and commercial enterprises, requiring that personnel take daily meter readings is burdensome. Given the realistic level of detail needed for planning purposes, daily readings are probably no more helpful than weekly readings.

10. Recordkeeping and record retention

Section 110.19 mandates the maintenance of records of all “items required under Subchapters B and C”, which includes every aspect of not only water use, but also plant “operational information” (whatever that means). Section 110.20 requires that all such records be maintained for a period of at least five years.

The rules need to be much clearer about what types of records need to be maintained. The current vague nature of the information described in §§110.7-110.18 leaves a regulated entity faces with the prospect of guessing what records are really required.

At the same time, requiring that the records be maintained for five years seems overly long. A shorter period, such as three years, should be considered.

11. Definition and calculation of “consumptive use”

Based on experience in other contexts, considerable attention needs to be given to the definition of, and methods for calculating, “consumptive use.” The incorporation of water into products, or the loss of water through processes such as cooling towers, are concepts that are readily apparent. However, there are a number of “gray areas” where it is less than clear whether and to what extent an activity constitutes consumptive use. The definition in §110.1 refers to a “loss of water through a manmade conveyance system.” In applying that definition, the key issue becomes what constitutes a “manmade conveyance system” and where does the loss occur. This formulation, which is used in SRBC regulations, has created some considerable confusion in the past. Examples of areas where disputes have arisen include (i) evaporation from the surface of public water supply or private on-stream reservoirs; (ii) evaporation from the surface of off-stream impoundments; and (iii) evaporation from quarry or coal surface mine pits. The definition of consumptive use in the draft regulations does not clearly answer these situations, and to avoid confusion, some degree of additional thought and guidance needs to be developed.

12. Definition of “monitor”

The draft rules use the term “monitor” in a number of places (see §110.3(a)), but no definition is provided for the term. It would be helpful to include such a definition, so that those regulation can know what provisions and requirements are being referenced.

13. Benefits of registration

The current draft rules do not provide any explanation (or even hint) as to the benefits of submitting a registration of water withdrawal to the Department. The formulation of §110.6, for example, appears to stress the negative – emphasizing that the registration is not to be construed as a determination of water rights or an approval of withdrawal and use. That may be technically correct; however, in the rules or preamble it would be helpful to suggest how a registration benefits the user. Among other matters, it would be our understanding that by registering water use, the Department and river basin commissions are given valuable information regarding the location and current uses of existing users. That information, in turn, can be utilized to help protect those users against interference when new projects (such as proposed withdrawals subject to SRBC or DRBC review) are under consideration. It may seem obvious, but we need to explain that we can’t adequately consider existing users in the planning process, or provide any degree of protection to their water rights and investments, if we don’t know where they are or how much they use.