

**PENNSYLVANIA CHAMBER OF BUSINESS & INDUSTRY**

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

**August 31, 2006**

On behalf of our thousands of members statewide, the Pennsylvania Chamber of Business & Industry welcomes the opportunity to provide comments on the proposed 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).

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.

There can be no doubt that the water resources of the basin are a vital natural resource and provide a foundation and engine of both the region’s economy and environment. Managed and used wisely, these waters are and can continue to be a strong base for economic development, providing a competitive advantage over other regions (such as the southwest) that are not blessed with such abundant supplies.

Access to the basin’s water resources, on a predictable and rational basis, is essential for the success of a vast range of business enterprises. In that regard, the Chamber’s members have generally enjoyed a positive working relationship with the Commission over the past three decades, as the SRBC’s programs have developed and matured; and we would hope that positive relationship would continue into the future as those programs are refined.

**1. “Change of Ownership” Provisions**

For a number of legal and practical reasons, the Chamber strongly objects to the “change of ownership” provisions in the proposed regulations.

For the past three decades, SRBC (like other regulatory agencies) has provided for the transfer of project approvals (the functional equivalent of permits) upon notification by the parties involved in a transaction, provided that the entity purchasing a facility holding a project approval docket acknowledged and agreed to abide by the terms and conditions of the project approval. So long as a change of ownership does not involve a change in the amount, location, manner or method of use, such an approval transfer process makes common sense. It provides SRBC with clear knowledge of the party responsible for compliance with project approval conditions, while providing the new owner of the facility with clear notice of the terms and conditions for which they are responsible.

SRBC's approach to project approval transfers to date has been consistent with the approach used by other environmental regulatory agencies. Indeed, other agencies such as the United States Environmental Protection Agency and Pennsylvania Department of Environmental Protection ("PaDEP") often have even more streamlined permit transfer procedures in the water sector. For example, with respect to transfer of NPDES permits, state and federal regulations provide that a permit may be automatically transferred to the new owner of a facility if (i) the current permittee notifies the issuing agency at least 30 days in advance of the proposed transfer date, (ii) the notice includes a written agreement between the existing and new permittee containing a specific date for transfer and assigning permit responsibilities before and after closing; and (iii) the agency does not notify the current and new permittee of an objection or intent to modify the permit within 30 days. *See* 40 C.F.R. §122.61; 25 Pa. Code §92.71a.

The proposed SRBC rule changes would basically eliminate any transfer of project approval dockets (with very narrow exceptions), essentially requiring that each time a business or facility changes ownership, a completely new project review application must be filed and approved. The proposed SRBC rule amendments would trigger such a review by changing the definition of "projects" subject to Commission approval in §803.4, such that any facility with an existing withdrawal greater than 100,000 gpd, or an existing consumptive use greater than 20,000 gpd, would be considered a new "project" if the facility undergoes a "change in ownership."

First, the Chamber seriously questions the legal basis for declaring that a change of ownership constitutes a "project" subject to SRBC review. Section 3.10 of the Susquehanna River Basin Compact provides for SRBC review of projects "affecting the water resources of the basin ...." The definition of "project" found in Section 1.2.7 of the Compact provides that a project means:

any work, service, or activity which is separately planned, financed, or identified by the commission, or any separate facility undertaken or to be undertaken by the commission or otherwise within a specified area, for the conservation, utilization, control, development, or management of water resources which can be established and utilized independently or as an addition to an existing facility and can be considered as a separate entity for purposes of evaluation.

While we understand that a change in the location, amount, manner or method of water withdrawal or use can be considered a "project" subject to a separate SRBC review, denominating a mere change in who owns a project to be a separate work, service, or activity or a separate facility subject to project review goes beyond SRBC's authority. The clear purpose of Compact §3.10 and the Compact's definition of "project" is to focus on activities that may have a significant effect on the basin's water resources. A change in the person or entity that owns or operates a property or facility is not an event that has any effect on the water resources of the Susquehanna River Basin. Moreover, a change in ownership is most certainly not an activity "for the conservation, utilization, control, development, or management of water resources"; and such a change of ownership cannot "be established and utilized independently" or viewed "as an addition to any existing facility" and it cannot be "considered as a separate entity for purposes of

evaluation.” In short, a change of ownership is not a separate activity that can be identified and reviewed independent of the existing facilities, and a change of ownership (without a change of some type in the use) cannot be considered a “project.”

Apart from the legal authority question, however, SRBC’s proposal would have a very serious negative impact on current and future investments in Basin industries and facilities. Commerce today is conducted in a highly competitive and ever changing business environment where transactions are frequently undertaken to gain access to capital, consolidate operations and/or improve efficiency. Many family-owned businesses find it desirable to sell all or a portion of the business to new investors when family members near retirement and there are none in the next generation willing or able to take over the business. At the same time, corporations frequently consider the purchase or sale of facilities to realign business operations, allowing some operations to be transferred to entities who are prepared to preserve, reinvest and expand opportunities.

The ability to pursue such transactions is not just a private enterprise concern, but such transactions frequently serve to foster public policy directions. For example, over the past 20 years, state 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, but few if any would have taken on such burdens if faced with the prospects that the water allocation approvals associated with them would be put in jeopardy in the process. Similarly, with regard to the Pennsylvania power industry, historic 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 not impossible, 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.

In order for business transactions to proceed, the process for transfer of associated governmental approvals needs to be predictable and proceed on an expedited time schedule. The time between when a “deal” is agreed to and closing is often limited (from a few weeks to perhaps 60 days). Parties are very reluctant to enter into transactions where the closing is hung up for many months while awaiting permit transfers. (The reason for such reluctance is readily understandable, in that business valuation, financing availability, and other factors can change in the interim.)

The framework of the proposed SRBC rules raises a serious specter that would strongly discourage transactions going forward within the Basin. A person seeking to purchase and invest in a water-using commercial property or manufacturing facility would face serious uncertainty as to whether SRBC would impose new or different conditions than contained in previously-issued project approvals for the facility. Indeed, as currently drafted, the SRBC proposed rule amendments would suggest that purchasers should anticipate new or different conditions, including possibly new or higher pass-by flows, limitations on withdrawal amounts, new

consumptive use makeup conditions, and other impositions. Because access to water is such a key factor in many business and commercial operations, until assured that project review conditions are known, final and acceptable, a rational purchaser would not close. Faced with this risk, coupled with what is now a six- to nine-month project review process, many prospective facility investors and purchasers would probably opt to take their money and invest elsewhere. At the very least, such unpredictability will be reflected in the amount purchasers will be willing to pay for facilities, and the attendant value of basin business and commercial properties that utilize water will be diminished.

The proposed SRBC rule changes would represent a virtual revolution in the manner in which water withdrawal approvals and rights are viewed in this basin. In place of what has been a stable and predictable framework that business has come to rely upon, the concept that a facility's ability to obtain water can change every time there is a change in ownership would convert predictability into complete insecurity; and such insecurity will have a serious marketplace, investment and employment impact.

## **2. Regulation of Pre-Compact Operations**

The Chamber's concerns regarding how the new regulations treat pre-Compact water uses parallel our comments on the issue of "change of ownership" in general. 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.

The SRBC's preamble is devoid of any explanation of why a revolutionary change in regulatory approach is justified. There is no mention of any "problem," let alone a justification as to why the proposed rule change is a "solution." If there is a "problem" (which frankly we do not perceive), SRBC needs to articulate it clearly, and then the regulated community can provide meaningful comment both on the validity and nature of the concern, and the possible alternative methods for addressing it.

## **3. §§ 803.4, 803.14 – Review of Water Withdrawals and Consumptive Use**

We would suggest that SRBC clarify the relationship between review of surface or groundwater withdrawals and review of consumptive use increases. For example, where the quantity of water withdrawal remains unchanged, but only consumptive use is increasing, it would be our understanding that only the consumptive use (and related consumptive use makeup) aspects of the activity would be reviewed; and that should not trigger review or modification of the water withdrawal quantity.

As an example, in some power plants, requirements for installing scrubbers will trigger potential increases in consumptive use, although the amount of withdrawals will not be impacted (*e.g.*, portions of water currently withdrawn and discharged will be recycled and used in the scrubber). In such a situation, the question becomes what information the SRBC will consider and review. Section 803.14 suggests that every application includes a broad description of the

“project,” including the amounts of water withdrawal, consumptive use amounts, aquifer tests, etc. It would appear, however, that the Commission’s review under the general standards (§803.21) and standards for consumptive uses (§803.22) should focus on the element of the project that triggers review – that is, the consumptive use, and not involve a wide-ranging review of past or current total withdrawal amounts.

#### **4. §803.21 – Suspension for Political Subdivision Actions**

The Chamber has concerns with certain aspects of §803.21, which would allow SRBC to suspend review of an application for a project which is subject to review by a political subdivision (i.e., a municipality) if the political subdivision has disapproved or denied a project. Our concern arises from the interplay between municipal and SRBC jurisdiction. As SRBC is aware, Pennsylvania courts have ruled that SRBC’s jurisdiction and approval of water withdrawal projects preempts municipal regulation as to the amount, location, timing, terms and conditions of water withdrawals. *State College Borough Water Authority v. Board of Supervisors of Halfmoon Township*, 659 A.2d 640 (Pa. Cmwlth. 1995); *Levin v. Board of Supervisors of Benner Township, Centre County*, 669 A.2d 1063 (Pa. Cmwlth. 1995), *aff’d per curiam*, 689 A.2d 224 (Pa. 1997). That preemption was reiterated in the Pennsylvania Water Resources Planning Act, which declares “no political subdivision shall have any power to allocate water resources or to regulate the location, amount, timing, terms or conditions of any water withdrawal by any person.” 27 Pa.C.S. §3136(b).

Unfortunately, the clear language of the Water Resources Planning Act and multiple decisions by Pennsylvania courts have not dissuaded some communities from attempting to regulate water withdrawals through either disapprovals of projects or imposition of unlawful conditions upon projects involving water withdrawals. Where municipalities attempt to use their powers in such a fashion, SRBC should **not** be withholding processing of a project approval. SRBC should exercise its jurisdiction and approve the project on its merits, applying the criteria established in the Compact and SRBC regulations.

#### **5. §803.22 – Standards for Consumptive Use**

##### **(a) Trigger Flow for Mitigation**

The current SRBC regulations provide a specific trigger flow for consumptive use makeup, pegged at the seven-day, ten-year (Q<sub>7-10</sub>) 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 triple up consumptive use makeup requirements for both existing and new facilities.

The trigger for consumptive use makeup requirements is a central element of the consumptive use standard, and that trigger should be explicit and clearly articulated. If the Commission is considering a change to the well-established trigger that has been in place for the past two decades, such a change should be adopted only after a clear and open process. 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.

**(b) Standard for Review of Mitigation Proposals**

While the Chamber understands that SRBC has a regulatory role in approving the acceptable manner of mitigation to be provided by project sponsors, §803.22 is unacceptable where it suggests that the Commission will determine the acceptable mitigation methods “in its sole discretion.” SRBC should be reviewing and approving mitigation proposals based upon the stated criteria of the regulation, and the Commission’s decision must be reasonable and supported by the facts. This regulation cannot change the rules of administrative law, or place SRBC above review by the courts.

**(c) Approval by Rule**

The Chamber supports in concept the approval-by-rule for consumptive uses whose source of water is a public water supply system. However, we would suggest that a 90-day notification and review period is a long time for such a permit-by-rule; and we can perceive of no reason that a 30- or 60-day period would not be sufficient for these purposes, since there is very little for SRBC staff to “review” in such a situation.

**6. §803.23 – Standards for Water Withdrawals**

The Chamber supports the basic concepts set forth in §803.23(b), but with some caveats. While we agree that SRBC needs to consider the potential for a new or increased withdrawal causing impacts on other water users (such as shallow nearby wells) and the means for mitigating such impacts, SRBC’s rules and policies need to be clear in avoiding any implication that all existing supply sources (no matter how inefficient) will be absolutely protected, and that drawdown in a neighboring shallow private well means that a new public water supply or industrial withdrawal must be denied. That certainly has not been SRBC’s past practice or policy.

The efficient use of our region’s aquifers requires that, in some cases, deeper wells must be allowed even if they may impact neighboring shallow wells. The solution to such interference is not to preclude the more efficient deeper well, but rather to provide replacement supplies or other compensation to those whose existing sources are impacted.

It is our understanding that the wording of §803.23(b)(2) is designed to list items to be “considered” and balanced in rendering a decision regarding impact, rather than establishing a prescribed standard of “no impact.” It would be helpful for the Commission to reiterate and express this understanding in the text of the regulation and/or in the preamble. In addition, at the beginning of the second sentence of (b)(2), we would recommend that the statement read: “The Commission may consider **and balance**, without limitation, the following in its consideration of adverse impacts ....” To complete this concept, we would suggest that SRBC add to the listing of considerations in (b)(2) the following additional factors: “the available methods for avoiding or mitigating such potential adverse impacts”, “the relative efficiency of competing supplies”,

“the relative needs and requirements of competing uses and alternatives available to meet those competing uses.”

## **7. §803.25 – Water Conservation Standards**

The Chamber clearly supports the implementation of reasonable conservation measures by all water uses, including industry, and in this regard we have strongly supported the type of water conservation programs reflected in the Pennsylvania Water Resources Planning Act, which emphasizes technology transfer, education and voluntary water conservation measures. Industries already have a strong economic incentive to pursue water conservation, reuse and recycling in light of the significant costs of water withdrawal development, water supply treatment and wastewater treatment. In most cases, such economic factors are a much stronger imperative toward water conservation than any regulatory pronouncements.

With respect to the specifics of §803.25(b), we question the meaning of item (3), which requires that all project sponsors using water for industrial purposes shall “install flow control devices which match the needs of the equipment being used for production.” Does this mean that each and every piece of equipment be equipped with a flow control device? What does the Commission mean by “flow control device”? Is this simply a valve that allows water to be turned on and off to a machine, or something more sophisticated?

## **8. §803.31 – Duration of Approvals and Renewals**

### **(a) Term of Project Approvals**

The §803.31(a) provisions regarding duration of approvals and renewals should provide greater flexibility to consider durations longer than 15 years that would match the timeframe for financing of larger projects, including public utility projects. Considering the importance of water as a critical element in many projects, having permits that expire in the middle of a financial payout period creates risks that potentially raise borrowing costs, imposing unnecessary burdens on basin industries. Since SRBC dockets already contain conditions that allow reopening to address unanticipated impacts, there is no need to have a “renewal” in order to address any critical water resource impact concerns that may arise during the term of a project approval.

The final sentence of §803.31(a) appears to create an irrational dichotomy. For projects approved by SRBC prior to May 1995, which did not specify a duration, this subsection establishes a duration of 30 years, but if there was a member jurisdiction license or permit regulating the same project and specifying a duration of up to 25 years, then the duration of the SRBC approval would be equal to the duration of the member jurisdiction approval. Why isn't the second part of this provision also 30 years?

We note that SRBC is proposing to impose after-the-fact term limits on previously issued project approvals. In fairness, SRBC should do more than simply do this in a regulation. Individual notifications should be provided to every such project approval docket holder, so that future confusion can be avoided.

**(b) Timeframe for Commencement of Withdrawal, Diversion or Consumptive Use**

Section 803.31(b)'s provision needs to account for the fact that some types of larger projects involve long permitting periods, followed by extended construction periods. Such projects may also become entangled in extended administrative or judicial proceedings, particularly as project opponents attempt to use such proceedings for purposes of delay. Since release of project financing is frequently contingent on the resolution of any such proceedings, the effect of a provision such as §803.31(b) is to provide opponents to a project with a potential weapon to kill a project simply by fostering delay to the point where construction cannot be completed within the timeframe of the SRBC project approval, causing the approval to evaporate.

This subsection should provide for greater flexibility in terms of considering potential extensions, so long as the project sponsor is diligently prosecuting the approval and implementation of the project.

**(c) Timeframe for Renewal Applications**

Section 803.31(e) requires the submission of an application for renewal no later than one (1) year prior to expiration of the approval. We seriously question the need for an application so far in advance of the expiration date. For example, applications for renewal of NPDES permits, which frequently involve complex technical issues, are due 180 days prior to permit expiration. This provision, as written, seems to signal that Commission staff estimates that it takes a year or more to review a renewal application, which is an incredibly discouraging signal to the regulated community. A far more expeditious process for review of renewal applications should be put in place, with a reasonable time frame that encourages efficient reviews and timely decisions.

**9. §804.2(a) – Registration**

The Chamber strongly endorses the addition of language that provides that compliance with the registration and reporting requirements of a state (such as that established under the Pennsylvania Water Resources Planning Act) will satisfy the registration requirements under Part 804. This provision will assist in avoiding duplicative efforts, and conserve the time and effort of both agency staff and the regulated community.

**Final Words**

The Chamber offers these comments in the hope that they will assist the Commission and member jurisdictions in implementing a water resource management program that continues to promote both a strong economy and a healthy environment within this basin. The Chamber and its Water Work Group are prepared to work with the Commission and its staff in positively addressing the concerns discussed above, and in helping to frame workable solutions that meet these twin objectives.