



Connecticut Business & Industry Association

**TESTIMONY OF ERIC J. BROWN
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BEFORE THE
COMMERCE COMMITTEE**

MARCH 16, 2010

Good afternoon. My name is Eric Brown and I am associate counsel with the Connecticut Business and Industry Association (CBIA). CBIA represents thousands of businesses of all sizes throughout Connecticut that provide hundreds of thousands of Connecticut citizens with good jobs and good benefits.

CBIA is pleased to have this opportunity to voice our

SUPPORT for H.B. No. 5359 (RAISED):

AN ACT REQUIRING PERMITS ISSUED BY THE EPARTMENT OF ENVIRONMENTAL PROTECTION BE ADOPTED IN ACCORDANCE WITH THE UNIFORM ADMINISTRATIVE PROCEDURES ACT

I. Background:

The legislature first authorized the Connecticut Department of Environmental Protection (DEP) to issue general permits in the early 1990s as a way to deal with the agency's massive backlog of permit applications due, in part, to laws that require discharge permits for virtually any release of a liquid that could potentially reach surface or groundwaters. For example, state water discharge statutes provide:

“No person or municipality shall initiate, create, originate or maintain any discharge of water, substance or material into the waters of the state without a permit for such discharge issued by the commissioner.” (C.G.S. 22a-430(a)).

The general permit program allows DEP to prescribe broadly applicable, legally enforceable requirements on categories of discharges such that one general permit may establish compliance requirements for many hundreds or even thousands of facilities across the state.

Initially, these general permits consisted of relatively few pages and defined modest requirements and best management practices which, if followed, insured the facility would be in "compliance" and therefore saddled neither the facility nor the DEP with the considerable time and expense associated with applying for and processing an individual permit application. (Ex. see Attachment 1: table of contents for 9-page, 2002 general permit for minor discharges of water associated with the maintenance of boilers, including condensate that drips from the boilers).

Over time, however, many of these general permits have become voluminous, complex compliance requirements applicable to any entity that registers under a general permit.

As an example, the current proposed revisions to the industrial stormwater general permit exceeds 60 pages and is virtually indistinguishable from a regulation in both form and substance. That document will have a huge impact on well over a thousand businesses across Connecticut. It prescribes requirements that include new reporting, record-keeping, monitoring, training and sampling requirements, among others. Yet this, like all general permits, is being developed and will be ultimately approved and implemented completely within the DEP. While DEP is required to hold a public hearing, there is no review or right of appeal to any administrative or legislative authority outside of DEP.

II. What constitutes a “regulation” in Connecticut?

The UAPA defines “regulation” as follows:

“Regulation” means each agency statement of *general applicability, without regard to its designation*, that implements, interprets, or *prescribes law or policy*, or describes the organization, procedure, or practice requirements of any agency. . .” (Emphasis added; see CGS 4-166(13)).

Additionally, the 2009 version of the “*State of Connecticut Manual for Drafting Regulations*” prepare by the Legislative Commissioners’ Office states:

“According to the [statutory] definition, if an agency drafts *any directive that has general applicability, whether or not it is designated a regulation, it is considered a regulation*. Thus, if an agency drafts “guidelines”, “procedures” or any other *statement that affects the rights of private persons or entities*, the agency should adopt such statement as a regulation in accordance with the procedures set forth in chapter 54 of the Connecticut General Statutes”. (Emphasis added).

As general permits issued by the DEP prescribe laws of general applicability to categories of activities that affect the rights of private persons or entities, they are “regulations” regardless of their designation as “general permits”. Accordingly, they should be adopted in accordance with the requirements of the Uniform Administrative Procedures Act as defined in Chapter 54 of the Connecticut General Statutes.

III. DEP’s anticipated arguments:

Our understanding is that DEP’s objections to the bill are two-fold. First, they claim it will greatly extend the time for getting general permits in place. CBIA is not sure when the DEP began developing its proposed revisions to the industrial stormwater general permit, but it noticed that their proposed revisions were

completed and ready for public comment over 8 months ago. The general permit still has not been finalized and there is a distinct possibility that the document will be the subject of a DEP adjudicatory hearing which could mean several more months before the revisions are finalized. We can see no credible basis to the argument that approval of a general permit through the regulatory adoption process would have taken nearly this long.

Secondly, we anticipate the DEP will argue that general permits are not required but are rather an option offered to facilities as an alternative to applying for an individual permit. CBIA disagrees. Returning to the example above of the general permit for minor boiler blowdown. It is unrealistic at best to expect that the DEP would be processing individual water discharge permit applications for things such as condensate dripping off of boilers (or air conditioners, for that matter) even if they had 10-times the staff they have now. Therefore, as a practical matter, industry must either register under the general permit or be in violation of the water discharge regulations and statutes of Connecticut. This reality is true for the vast majority of minor discharges permitted solely under the general permit program.

HB-5359's approach

CBIA is intrigued with the language of HB-5359 which, rather than require general permits to be adopted in accordance with the UAPA, instead requires the DEP to adopt regulations, "which shall include standards for issuance of general permits." CBIA is very open to further discussions and learning why the committee believes this approach is preferable. However, we struggle with the challenge that any such DEP regulations which prescribe procedures that deviate from those of the UAPA, would appear to conflict with the directive of the UAPA and the Legislative Commissioner's office that such documents must be adopted in accordance to the UAPA.

Conclusion

Finally, we question why there is such antagonism from DEP and some of the environmental advocacy groups towards this and other proposals that seek to insure DEP documents that have such a substantial impact on Connecticut's regulatory climate are adequately vetted by the executive and legislative branches of government before having the force of law. From our perspective, it is an issue of control. DEP too often sees itself as an agency where the client is the environment. It has little or no interest in the opinions of other agencies or the legislature with respect to the potential economic consequences of its actions.

CBIA suggests that the time is NOW to make legislative changes to insure those concerns can no longer be short-changed or ignored by the DEP. HB-5359 is an important step towards that end.

As the early framers wisely stated at the very outset of our environmental statutes stated in the "Declaration of Policy" (C.G.S. section 22a-1a):

" . . . it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Connecticut residents."

CBIA is very grateful to the committee for raising HB-5359 and providing us the opportunity to comment.

ATTACHMENT 1



STATE OF CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION



GENERAL PERMIT FOR THE DISCHARGE OF MINOR BOILER BLOWDOWN WASTEWATERS

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