PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 3, 2004

Honorable Allen D. Biehler, P.E., Secretary
Department of Transportation
Keystone Building, 8th Floor
400 North Street
Harrisburg, PA 17120

Re: Regulation #18-378 (IRRC #2434)
Department of Transportation
Access to and Occupancy of Highways by Driveways, Local Roads and Structures

Dear Secretary Biehler:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. We will send a copy to the standing committees when they are designated.

If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director
evp
Enclosure

Comments of the Independent Regulatory Review Commission

on

Department of Transportation Regulation #18-378 (IRRC #2434)

Access to and Occupancy of Highways by Driveways, Local Roads and Structures

January 3, 2005

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Department of Transportation (Department) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on December 1, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

1. General. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.

Actions or requests by the Department

Multiple provisions throughout the proposed regulation indicate that the Department will take or require applicants or permittees to take some type of action. For example, the traffic impact study must include a description of proposed remedies pursuant to Section 441.3a(c)(5)(iii). Clause (B) states the Department will determine if a proposed remedy is acceptable. It is unclear when this determination will be made, and how the Department will notify an applicant of its determination.

Similar provisions in the regulation direct the Department to make determinations, request additional information or changes, approve actions, issue opinions or take actions that become mandates with which a permittee, applicant or other regulated party must comply. Additional examples of these provisions include:

§ 441.3(g)(5)	§§ 441.3a(c)(2)(ii)-(vi)	§ 441.6(14)(ii)
§ 441.3(g)(5)(ii)	§ 441.3b(a)(3)	§ 441.6(16)(i)
§ 441.3(i)	§ 441.3b(b)(2)	§ 441.7(e)(3)
§ 441.3(s)(1)(iii)	§ 441.3b(b)(4)(iii)	§ 441.8(a)(2)
§ 441.3a(a)(3)	§ 441.4(d)(2)	§ 441.10(b)(2)
§ 441.3a(c)(2)(i)(A)	§§ 441.5(f)(1)-(3)	
§ 441.3a(c)(2)(i)(C)	§ 441.6(1)(vii)(C)	

We recognize that discretion and flexibility are necessary because each access by a property to a state highway may be unique and raise different concerns with traffic flow and other conditions. However, discretion and flexibility to respond to unique conditions must also be balanced with a format that provides some direction concerning when and how objectives will be accomplished. We have two concerns.

First, there is no indication of when the Department will take specific actions. For example, when would the Department notify an applicant or permittee of the need for a "curb or other approved structures to be constructed" under Section 441.8(g)(3). The regulation should clearly indicate the time periods in which the Department may act under these various provisions.

Second, there is no indication of how the Department will notify applicants, permittees or other affected parties of its actions. At a minimum, the regulation should state that the Department will notify the affected parties in writing.

Section 441.3a(b) Scoping meeting

Section 441.3a(b)(4) states: "The applicant will receive direction from the Department at the scoping meeting." From discussion with the Department, many of the items noted above are discussed with the applicant at the scoping meeting. However, these meetings are at the request of the applicant. In addition, Section 441.3a(b)(5) limits the subject matter at a scoping meeting to concerns involving the traffic impact study. The Department should consider expanding these meetings to cover other areas in the regulation where the Department needs to provide direction to an applicant.

Improving state highways and fair cost distribution

A commentator raises the concern that the traffic impact study requirements in Section 441.3(s) will impose unfair costs on permittees. The proposed regulation could compel permittees to pay for improvements of existing poor road conditions. If the road is in poor condition before the access project is initiated, the permittee is not the only one who will benefit from improvements in the highway. The Department should consider other methods to equitably distribute the costs of improving poor road conditions among property owners and others who will benefit.

2. Section 441.1. Definitions. - Reasonableness; Clarity.

AASHTO and TRB

The definitions of the "American Association of State Highway and Transportation Officials (AASHTO)" and "Transportation Research Board, National Research Council (TRB)" include the phrase "currently located in Washington, D.C." This phrase is not helpful to the reader. The definitions should provide the full current address like what was done in the definition of the "central permit office."

Highway, local road, and roadway

The proposed regulation and existing language in Chapter 441 contain definitions of "highway," "local road" or "roadway." We have concerns with each definition and with their relationships to each other.

First, the term "highway" is defined in the existing portion of Chapter 441 as "[A] highway or bridge on the system of State highways and bridges, including the entire width between right-of-way lines, over which the Department has assumed or has been legislatively given jurisdiction." This definition is circular since the term "highway" is used to define itself.

The definition of "local road" includes the statement "[a] public highway other than a State highway . . . ." The term "public highway" is not defined. In addition, the word "highway" is already defined as part of the "State highways." Hence, the use of the term "highway" in this definition is confusing. A commentator has expressed an additional concern with new language in the definition of "local road" that includes "an access for which the owner intends to transfer or dedicate ownership to a governmental body after completion of the permitted work." This language is problematic since it is local ordinances that would allow such a transfer under certain conditions. The owner's intent would not be sufficient to accomplish the transfer. The Department should explain this new language or delete it.

The definition of "roadway" is "[t]hat portion of a highway or local road improved, designed or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder." The Department has indicated that a "roadway" also includes auxiliary lanes. The definition should be amended to reflect this fact. In addition, does a "highway" or "local road" include a "roadway"? If so and since "roadway" is defined with more detail than "highway" or "local road," the term "roadway" could be used in part to define "highway" and "local road."

Plans

The definition of "plans" ends with the phrase "and other details the Department deems appropriate." Instead of using this phrase, the "other details" should be included in the substantive provisions of the regulation with a cross-reference in the definition.

3. Section 441.3. Permit application procedure. - Consistency with the statute; Reasonableness; Clarity.

Subsection (b) Authorization of local governments to issue permits

This subsection allows the Department to enter into agreements with "local governments" to issue permits. The authorizing statute (36 P.S. § 670-420) uses the term "municipality" instead of "local governments." For consistency with the statute, the final-form regulation should use the term "municipality."

Subsection (e) Submission of a completed application

Applicants are instructed by this subsection to submit applications to either the district or county office or the municipality. How can an applicant determine where to submit the application?

Subsection (m) Impact on other property owners

Under this subsection, two commentators expressed concerns related to Paragraph (3). One commentator believes local governments should be exempt from the additional security requirements. Another believes the provision relating to "a form and amount acceptable to the Department" is too vague. We have three questions. What is the reason for not exempting local governments from this requirement? How will the Department determine what is an acceptable form and amount of security? How will the applicant be notified?

Subsection (n) Impact on sensitive or unique property

The phrase "State and Federal environmental requirements" is used in this subsection. A cross-reference should be provided that specifies these requirements.

Subsection (o) Review by governmental bodies

This subsection relates to review by governmental bodies. The phrase "governmental bodies" should be defined in the final-form regulation. Also, the phrase "municipalities and their political subdivisions" is not clear because municipalities do not have political subdivisions.

Under Subsection (o)(5), a governmental body can request to review an application. The Department has indicated that the request to review should be made before the permit is issued and the work begins because it is the only time the governmental body can submit meaningful input. Therefore, final-form regulation should include a timeframe in which governmental bodies can request to review an application.

Subsection (p) Impact on archeological and historic property

This subsection requires the applicant to notify the Pennsylvania Historical and Museum Commission if the proposed work will require the construction or widening of a lane or right-of-way 60 days prior to submission of the application. A commentator questioned the need for a 60 day review period and noted the potential time delay this requirement could cause. What is the need for this review period that must occur before the submission of the application? Would a shorter or concurrent period suffice?

Subsection (s) Traffic impact study

Subsection (s)(1)(iii) states that a traffic impact study will be required, if "[i]n the opinion of the Department, the development is expected to have significant impact on highway safety or traffic flow even though it does not meet subparagraph (i) or (ii)." What is meant by a "significant impact"?

4. Section 441.3a. Preparation of a traffic impact study. - Reasonableness; Clarity.

Traffic impact studies assist the Department in determining if the plans or proposals of the applicant are acceptable. The regulation does not specify when the Department must make these determinations. How long will the Department need to analyze a traffic impact study and how

will the Department notify the applicant if it is acceptable? What are the criteria for acceptable plans and proposals?

Subsection (a) General rule

Subsection (a)(2) details who must conduct a study and includes the phrase "other persons authorized by law." The Department should either list all the other professions that are allowed to conduct a study or delete this phrase from the final-form regulation. The same phrase appears in Section 441.3b(a)(2), relating to preparation of drainage impact study, and we recommend that this section likewise be amended.

Subsection (c) Traffic impact study contents and scope

Subsections (c)(3) and (c)(4) pertain to future traffic conditions with and without development. They require the applicant to describe the ability of the roadway network within the study area to accommodate traffic for the ensuing ten years beyond the opening of the development and other time periods as directed by the Department. What is the "roadway network" and how is the study area determined? Furthermore, why should the study be based on the ability of the roadway to accommodate traffic ten years into the future as opposed to when the development is completed?

Under Subsection (c)(3)(i), what are Metropolitan Planning Organizations or Local Development Districts? These terms should be defined in the final-form regulation.

Subsection(c)(5) references certain "Levels of Service." The Department explained that levels of service range between A and F and rate how a roadway handles traffic. This phrase should be defined in the final-form regulation.

5. Section 441.3b. Preparation of drainage impact report. - Reasonableness; Clarity.

Subsections (b)(1) and (b)(6)(iii) contain the phrases "other pertinent information" and "pertinent policy directives." This information should be listed in the final-form regulation.

Subsection (b)(6)(iv) states that hydraulic computations must be developed "in accordance with procedures and criteria acceptable to the Commonwealth or governmental bodies." The final-form regulation should list the various state agencies or governmental bodies that would have oversight and list or cross-reference the procedures and criteria that would be acceptable.

Under Subsection (b)(7), the drainage impact report must include a description of proposed actions that will remedy identified deficiencies related to flow rate and flow velocity. It states that remedies "may not include projects programmed by the Commonwealth or other governmental bodies." This differs from Section 441.3a(c)(5)(iii)(A), relating to traffic impact studies, which allows remedies to include "projects programmed by the Commonwealth or governmental bodies." We recommend that this subsection be amended to provide for collaboration or integration with other projects that have completion dates that coincide with the applicant's access project.

6. Section 441.4. Permit fees and costs. - Reasonableness; Implementation procedure; Clarity.

In Subsection (d), the Department can assess additional fees if it anticipates that its costs will exceed by a "significant amount" the application or permit fees. How will the Department decide what is a "significant amount"?

7. Section 441.5. Issuance of permits. - Reasonableness; Implementation procedure; Clarity.

Subsection (f) Permit requiring agreement/security

Subsection (f)(2) is one long sentence that contains 116 words. The sentence describes the contents of an agreement between the Department and an applicant. The contents should be set forth with shorter sentences and enumeration as recommended in Section 2.8 and Chapter 7 of the *Pennsylvania Code and Bulletin Style Manual.*

Subsection (j) Photo documentation

Subsection (j)(3) allows the Department to create its own photo documentation and charge the permittee for the costs. This occurs after the Department receives photos from the permittee that are not discernible or otherwise acceptable. As written, the paragraph allows the Department to return the photos to the permittee for resubmission or obtain its own photo documentation and charge the permittee for the cost. Rather than give the Department the option, the regulation should require that the Department notify the permittee of the need to submit better photo documentation before the Department obtains its own photos and charges the permittee for the expense.

8. Section 441.6. General conditions. - Reasonableness; Implementation procedure; Clarity; Statutory Authority.

Paragraph (1) Scope of permit

Under Paragraph (1)(v), the permittee and the property owner will be liable for failure to comply with the permit and this chapter. Section 441.5(b) states that permits will be issued only to the owners of the property. Since permits can only be issued to property owners, what is the need to list both "permittee and the property owner" in this paragraph? We note this phrase is used throughout this chapter and suggest that the Department be consistent with any changes it makes to this phrase.

Paragraph (1)(vii) allows the Department to require changes to an access, structure or associated highway work or improvements. Can these changes be mandated after the permitted work has been completed?

Clause (B) of Paragraph (1)(vii) states that the Department may require a new application. Will an additional application fee be charged?

Paragraph (4) Permittee responsibilities

Paragraph (4)(viii) describes actions the Department could take if a permittee or property owner does not pay an invoice for work performed by the Department. It states that an unpaid bill will "constitute a first lien on the real and personal property of the permittee or owner of the property on which the access or structure is located." If a lending institution or other party already has a "first lien" on a property, what is the Department's statutory authority for replacing that lien with its own?

In addition, this paragraph states that the Department may also "revoke and annul the permit." We have three questions. What is the difference between revoking and annulling a permit? Will the permittee or property owner have an opportunity for a hearing before their permit is revoked and/or annulled? Under what circumstances would a permit be annulled?

Paragraph (16) Future additional driveways

Paragraph (16)(iv) includes a sentence that states, in part, the following: "If the applicant demonstrates that a release cannot be reasonably obtained from each affected property owner . . . ." How will an applicant demonstrate that its attempt has been reasonable?

9. Section 441.8. Driveway design requirements. - Reasonableness; Implementation procedure; Fiscal impact; Clarity.

Subsection (a) General

Subsection (a)(1) states that the design of a driveway must take into consideration the amount and type of traffic it is expected to serve and the type and character of the road it accesses. This rulemaking adds the phrase "and other nearby highways" to the last provision. How will the applicant know what other highways to consider?

Subsection (h) Sight distance

Subsection (h)(1)(iv) includes the following sentence: "The owner should locate a driveway at a point which provides optimal sight distance." The word "should" indicates that this provision is optional. Optional provisions should not be included in regulations. Therefore, the word should be changed to "shall."

Subsection (i) Grade of access

Subsection (i)(5)(i) states, in part, the following: "Depressed curb is preferable to the alternative of extending curb around the driveway radii . . . ." This language is not regulatory language and should be deleted from the regulation or replaced with a mandate.

Subsection (k) Access pavement

Subsection (k)(2) relates to low, medium and high volume driveways and local roads which provide access to paved highways. It requires these accesses to be paved "from the pavement edge to at least 20 feet beyond the right-of-way and joints shall be sealed." A commentator

noted that the current regulations do not require local roads to comply with this provision. Will these requirements apply to existing roads? If so, who is responsible for paying for these improvements?

Subsection (m) Medians

Subsection (m)(3) states the following: "Requests for removal of a median divisor will not be granted without approval of the district executive or higher Departmental authority." When and why would approval of a higher Departmental authority be required? How will the permittee know to whom they should make the request?

Subsection (p) Required right-of-way

This subsection states that the Department may require the applicant to acquire additional right-of-way and "may require the applicant to utilize property acquisition policies, practices and procedures of the Department." The final-form regulation should provide cross-references to the appropriate policies, practices and procedures.

10. Section 441.10. Penalties and enforcement. - Reasonableness; Implementation procedure; Clarity.

Subparagraph (a)(4)(ii) states that written notice will not have to be provided to a permittee or property owner if it is "impracticable." Under what circumstances would it be impractical for the Department to notify a permittee or property owner of an action?

11. Miscellaneous Clarity.

The phrase "in a form acceptable to the Department" or "techniques acceptable to the Department" or variations of these phrases are used throughout the regulation. The regulation should provide guidance on what is considered an acceptable form. Examples of these phrases can be found in the following sections: 441.3 (m)(1)-(m)(3); 441.3a(c)(2)(i)-(vi); 441.6(16)(iv); and 441.8(j)(4), (m)(4) and (p).

The phrase "applicant or Department" is used throughout the regulation. How will the affected parties know when they have a duty to act? Examples of this phrase can be found in the following sections: 441.3 (m)(1), (n), (p); 441.3a(c)(2); 441.6(16)(iv); 441.7(d); and 441.8(j)(5).

In Section 441.6(4)(iii)(C), what is "flowable fill material"? The term "crashworthy" is used in Section 441.6(10). What does this term mean?

Under Subsection 441.8(d), the word "must" should be replaced with the word "may."

Facsimile Cover Sheet

Kristine M. Shomper
Administrative Officer

Phone: (717) 783-5419
Fax #: (717) 783-2664
E-mail: kriss@irrc.state.pa.us
Website: www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Stephen Martin
Agency: Department of Transportation
Phone: 7-5079
Fax: 2-2741
Date: January 3, 2005
Pages: 10

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REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Transportation's regulation #18-378 (IRRC #2434). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: _____ **Date:** January 3, 2005

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