

<b>Regulatory Analysis Form</b>		<b>This space for use by IRRC</b> RECEIVED 2005 APR -5 PM 1:51 REVIEW COMMISSION  <b>IRRC Number: 2474</b>	
(1) Agency Transportation			
(2) I.D. Number (Governor's Office Use)  # 18-401			
(3) Short Title  Administrative Practice and Procedure			
(4) PA Code Cite  67 Pa. Code, Chapter 491		(5) Agency Contacts & Telephone Numbers  Primary Contact: Andrew H. Cline (717) 772-8397 Secondary Contact: Stephen Martin (717) 787-5079	
(6) Type of Rulemaking (Check One)  <input checked="" type="checkbox"/> Proposed Rulemaking <input type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Proposed Rulemaking Omitted		(7) Is a 120-Day Emergency Certification Attached?  <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and nontechnical language.  The purpose of this rulemaking is to clarify the separation of the adjudicatory and adversarial functions performed by Department attorneys and officials in the conduct of administrative hearings. The rulemaking also clarifies that the Secretary of Transportation has discretion to direct that an administrative record be certified to the Secretary for decision without the preparation of a proposed report. The rulemaking also clarifies that proposed orders of any appropriate type are to be forwarded to the Secretary with the record when exceptions to a proposed report are filed..			
(9) State the statutory authority for the regulation and any relevant state or federal court decisions.  Authority for this regulation is contained in 2 Pa. C.S. §§ 501—508 and 701—704 (relating to administrative law and procedure).			

(10) Is the regulation mandated by any federal or state law or court order, or federal regulations? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulation is not mandated by any federal or state law or court order or federal regulation.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulation is needed to clarify the roles of Department officials and attorneys in the conduct of administrative proceeding before the agency so that no commingling or appearance of commingling of the adjudicatory and adversarial function occurs.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Amendment of these regulations will further ensure that due process is afforded in the conduct of administrative proceedings.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Individuals and attorneys who become involved in administrative proceedings before the Department will benefit in the increased clarity of the division between the adjudicatory and the adversarial function of Department officials and attorneys. The precise number of individuals who will benefit cannot be determined.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There should be no adverse impact on any individuals from this amendment to the regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Department personnel involved in matters brought to administrative hearing will be required to comply with the amended sections of this regulation. Any persons, and their counsel, who have occasion to request administrative review of a Department determination will be required to comply with the provisions of the Chapter generally.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

These proposed amendments were not developed with input from the public.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

The costs and/or savings to the regulated community resulting from these amendments are marginal and cannot be calculated with any precision.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

There should be no costs and/or savings to local governments resulting from these amendments to the regulation.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

There should be no costs and/or savings to state government resulting from these amendments to the regulation.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY + 1 Year	FY + 1 Year	FY + 3 Year	FY + 4 Year	FY + 5 Year
SAVINGS:	\$ N/A	\$	\$	\$	\$	\$
Regulated Community:	N/A					
Local Government:	N/A					
State Government:	N/A					
Total Savings	N/A					
COSTS:	N/A					
Regulated Community	N/A					
Local Government	N/A					

State Government	N/A					
Total Costs	N/A					
REVENUE LOSSES:	N/A					
Regulated Community	N/A					
Local Government	N/A					
State Government	N/A					
Total Revenue Losses	N/A					

(20a) Explain how the cost estimates listed above were derived.  
N/A

(20b) Provide the three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Approp. 191 General Gov't Operations	\$46,258,000	\$47,020,000	\$48,047,000	\$47,022,000

(21) Using cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

N/A

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

There were no nonregulatory alternatives considered.

(23) Describe alternative regulatory schemes and the costs associated with those schemes.

Provide the reasons for their dismissal.

No alternative regulatory schemes were considered.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

There are no applicable federal standards governing the agency's conduct of administrative hearings.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

This regulation will not put Pennsylvania at a competitive disadvantage vis a vis other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These amendments will not affect other Department regulations or the regulations of any other Commonwealth agency.

(27) Will any public hearings or informal meetings be scheduled? Please provide the dates, times and locations, if available.

No public hearings on these amendments are scheduled at this time. Should public comment on these proposed amendments warrant, public hearings may be held.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

These amendments will not change any paperwork requirements.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

These amendments are not designed to meet the particular needs of affected groups or persons.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

These amendments will become effective upon publication in final form in the *Pennsylvania Bulletin*.

(31) Provide the schedule for continual review of the regulation.

These provisions will be reviewed periodically as appropriate.

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<p><b>FACE SHEET FOR FILING DOCUMENTS WITH THE LEGISLATIVE REFERENCE BUREAU</b></p> <p>(Pursuant to Commonwealth Documents Law)</p>	<p>2005 APR -5 PM 1:51</p> <p>LEGISLATIVE REFERENCE BUREAU REVIEW COMMISSION</p> <p><b>DO NOT WRITE IN THIS SPACE</b></p>
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<p>Copy below is hereby approved as to form and legality. Attorney General.</p> <p>By: <u><i>Amy M. Elliott</i></u> (Deputy Attorney General)</p> <p style="text-align: center;"><u>MAR 29 2005</u> Date of Approval</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy of below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:</p> <p style="text-align: center;"><u>Department</u> <u>of</u> <u>Transportation</u> (Agency)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>18-401-----</u></p> <p>DATE OF ADOPTION _____</p> <p>BY <u><i>Allen D. Buelles</i></u> Secretary of Transportation</p>	<p>Copy below is hereby approved as to form and legality. Executive of Independent Agencies.</p> <p>By: <u><i>[Signature]</i></u></p> <p style="text-align: center;"><u>3.8.05</u> (Date of Approval)</p> <p><u>EXECUTIVE</u> (Deputy General Counsel) (<del>Chief Counsel, Independent Agency</del>) (Strike Inapplicable Title)</p> <p><input type="checkbox"/> Check if applicable. No attorney General Approval or Objection within 30 days after submission.</p>
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**TITLE 67. TRANSPORTATION**  
**Part I. DEPARTMENT OF TRANSPORTATION**  
**Subpart B. NON-VEHICLE CODE PROVISIONS**  
**ARTICLE III. HIGHWAYS**  
**ARTICLE V. GENERAL PROCEDURES**  
**CHAPTER 491. ADMINISTRATIVE PRACTICE AND PROCEDURE**  
**Proposed Rulemaking**

**TITLE 67. TRANSPORTATION**

**Part I. DEPARTMENT OF TRANSPORTATION**

**Subpart B. NON-VEHICLE CODE PROVISIONS**

**ARTICLE III. HIGHWAYS**

**ARTICLE V. GENERAL PROCEDURES**

**CHAPTER 491. ADMINISTRATIVE PRACTICE AND PROCEDURE**

**Notice of Proposed Rulemaking**

**Preamble**

The Department of Transportation, Office of Chief Counsel, pursuant to the authority contained in 2 Pa. C.S. §§ 501—508 and 701—704 (relating to administrative law and procedure), proposes to amend title 67 of the Department of Transportation regulations by amending Chapter 491, Administrative Practice and Procedure, as set forth in Annex A to this Notice.

***Purpose of this Chapter***

The purpose of Chapter 491 is to supplement 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure) (General Rules). In accordance with 1 Pa. Code § 31.1(c) (relating to scope), Chapter 491 supercedes any inconsistent provisions in the General Rules in proceedings before the Department.



### ***Purpose of this Rulemaking***

The purpose of this rulemaking is to clarify the separation of the adjudicatory and adversarial functions performed by Department attorneys and officials in the conduct of administrative hearings. The rulemaking also clarifies that the Secretary of Transportation has discretion to direct that an administrative record be certified to the Secretary for decision without the preparation of a proposed report. The rulemaking also clarifies that proposed orders of any appropriate type are to be forwarded to the Secretary with the record when exceptions to a proposed report are filed.

### ***Persons and Entities Affected***

This rulemaking will affect all Department personnel involved in matters brought to administrative hearing as well as any persons, and their counsel, who have occasion to request administrative review of a Department determination.

### ***Fiscal Impact***

These regulations will not result in any increased costs to individuals, local governments or to the Commonwealth. The proposed amendments will not require the development of additional reports or result in other additional paperwork.

### ***Regulatory Review***

Under Section 5(a) of the Regulatory Review Act, the Act of June 25, 1982 (P.L. 633, No. 181), *as amended*, 71 P.S. § 745.5(a), the agency submitted a copy of these proposed regulations, on April 5, 2005 to the Independent Regulatory Review Commission and to the Chairpersons of the House and Senate Transportation Committees. In addition to submitting

the regulations, the agency has provided the Commission and the Committees with a copy of a detailed Regulatory Analysis Form. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review, prior to final publication of the regulation, by the Department, the General Assembly and the Governor of comments recommendation, or objections.

***Sunset Date***

The Department of Transportation is not establishing a sunset date for these regulations, as these regulations are needed to administer provisions under 2 Pa. C.S. §§ 501—508 and 701—704 (relating to administrative law and procedure). The Department of Transportation, however, will continue to closely monitor these regulations for their effectiveness.

***Public Comment***

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to Andrew H. Cline, Deputy Chief Counsel, Office of Chief Counsel, 9<sup>th</sup> Floor, Commonwealth Keystone Building, 400 North Street, Harrisburg, Pennsylvania 17120, within 30 days of publication of this notice in the *Pennsylvania Bulletin*.

***Contact Person***

The contact person for this proposed rulemaking is Stephen F. J. Martin, Regulatory

Counsel, Office of Chief Counsel, 9<sup>th</sup> Floor, Commonwealth Keystone Building, 400 North Street, Harrisburg, Pennsylvania 17120, telephone number: (717) 787 5079.

Allen D. Biehler, P.E.

Secretary of Transportation

ANNEX A

TITLE 67. TRANSPORTATION

Part I. DEPARTMENT OF TRANSPORTATION

Subpart B. NON-VEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

ARTICLE V. GENERAL PROCEDURES

CHAPTER 491. ADMINISTRATIVE PRACTICE AND PROCEDURE

\* \* \* \* \*

**[§ 491.2a. Separation of adjudicatory function from representation  
of the Department.] (Reserved.)**

[(a) *Separation of adjudicatory function.* The adjudicatory function performed in accordance with this chapter and the General Rules will be separated from the function of representing the Department in administrative hearing matters. This chapter prescribes that an administrative hearing officer will preside over any hearing and, if exceptions are filed by any party, the decision ultimately is made by the Secretary. The Department's Chief Counsel advises the Secretary in his adjudicatory capacity.

(b) *Ex parte discussions.* Under no circumstances may any Department attorney representing the Department in an administrative hearing matter, or any Department employee involved in such a matter, discuss the case ex parte with the Administrative Hearing Officer, the Chief Counsel or the Secretary.

(c) *Prohibited discussions with employees.* The Administrative Hearing Officer, the Chief Counsel and the Secretary may not discuss with, or exercise any supervisory responsibility over, any employee with respect to an administrative hearing matter with which that employee is involved.

(d) *Designation by Chief Counsel and Secretary.* If it becomes necessary for the Chief Counsel or the Secretary to become involved on behalf of the Department in any administrative hearing matter, they are prohibited from participating in the adjudication of the case and shall designate appropriate individuals to exercise their adjudicatory functions.]

**§ 491.2b. Separation of adjudicatory and adversarial functions.**

(a) *Adjudicatory function and officials.* The adjudicatory function in proceedings under this chapter and the General Rules shall be performed by the Secretary, or his designee, and such Department hearing officers as he shall appoint. The Secretary's review of the actions of subordinate officers, including the proposed reports of Department hearing officers, shall be *de novo*. The Department's Chief Counsel, or his designee, shall serve as legal counsel to the Secretary in the performance of his adjudicatory function.

(b) *Due process.* The adjudicatory function in a proceeding shall be performed in a manner that is fair, impartial, and separated from any adversarial function in such proceeding.

(c) Restrictions on activities and communications. The following restrictions shall be observed in proceedings under this chapter and the General Rules:

(1) A person who has been significantly involved in a matter prior to the initiation of a proceeding may not perform adjudicatory functions with respect to that matter.

(2) Adjudicatory officials may not exercise substantive supervisory responsibility over Department staff or staff counsel with respect to a matter before them.

(3) Ex parte communications between Department staff or staff counsel and adjudicatory officials that may create an appearance of impropriety in a matter shall be avoided.

(d) Supplementation. This section supplements 1 Pa. Code § 35.188 (relating to restrictions on duties and activities of presiding officers).

\* \* \* \* \*

**§ 491.11 Proposed report.**

(a) *General.* Following the hearing and the timely submission of any posthearing filings, the Department hearing officer, unless directed by the Secretary to certify the record without a proposed report, will prepare and file a proposed report with the docket clerk.

\* \* \* \* \*

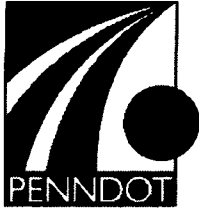
**§ 491.12 Exceptions.**

\* \* \* \* \*

(c) *Record*. When timely exceptions are filed, the docket clerk will forward the following to the Secretary:

\* \* \* \* \*

(4) Any [A] proposed orders to grant or deny the exceptions submitted by the parties [that is prepared for the Secretary's signature].



**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF CHIEF COUNSEL  
GENERAL LAW DIVISION  
POST OFFICE BOX 8212  
HARRISBURG, PA 17105-8212  
TELEPHONE: (717) 787-5299  
FACSIMILE: (717) 772-2741**



April 5, 2005

Robert E. Nyce  
Executive Director  
14<sup>th</sup> Floor Harrisstown 2  
333 Market Street  
Harrisburg, PA 17101

**Re: Proposed Rulemaking  
Regulation # 18-401, 67 Pa. Code Chapter 491 —  
Administrative Practice and Procedure**

Dear Mr. Nyce:

Enclosed please find a copy of the Face Sheet, Preamble, Annex A and Regulatory Analysis Form for amendment to Chapter 491 of Department regulations which the Department of Transportation intends to adopt following proposed rulemaking in accordance with the provisions of Section 204 of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, 45 P.S. § 1204.

Copies of these materials were also delivered today to the majority and minority chairpersons of the Pennsylvania House and Senate Transportation Committees and to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

The Department of Transportation will provide you with any assistance you require to facilitate a thorough review of this regulation. Thank you for your attention.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. F. J. Martin", with a long horizontal flourish extending to the right.

Stephen F. J. Martin  
Regulatory Counsel



**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT**

I.D. NUMBER: #18-401

SUBJECT: 67 Pa. Code Chapter 491 — Administrative Practice  
and Procedure

AGENCY: Department of Transportation

**TYPE OF REGULATION**

- X Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor

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 REGULATORY COMMISSION

**FILING OF REGULATION**

DATE	SIGNATURE	DESIGNATION
4/5/05	<u>Shelby Weaner</u> for Majority Chair	HOUSE COMMITTEE ON TRANSPORTATION
4/5/05	<u>Kate McMullen</u> for Minority Chair	
4/5/05	<u>Patricia E. Gilroy</u> for Majority Chair	SENATE COMMITTEE ON TRANSPORTATION
4/5/05	<u>Mary E. Leaherty</u> for Minority Chair	
4/5/05	<u>Sam J. Hoff</u>	INDEPENDENT REGULATORY REVIEW COMMISSION
4.5.05	<u>[Signature]</u>	LEGISLATIVE REFERENCE BUREAU

Date: April 5, 2005