

# Comments of the Independent Regulatory Review Commission



## Department of Transportation Regulation #18-433 (IRRC #2968)

### Access to and Occupancy of Highways by Driveways and Local Roads

October 24, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the August 25, 2012 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Transportation (Department) to respond to all comments received from us or any other source.

#### **1. Section 441.3. Permit application procedure. – Clarity; Implementation procedures.**

Subsection (b)(1) requires an applicant that is not the fee owner of a property or a local government to notify the fee owner that an application has been submitted. In addition, the applicant must either secure the approval of the fee owner to submit the application or indemnify the Commonwealth against an action which the fee owner may bring against the Commonwealth relating to the permit or application. We have two concerns. First, under Subsection (b)(1)(i), what are the requirements for securing the approval of the owner? Must consent be given in writing? This should be clarified in the final-form regulation.

Second, Subsection (b)(1)(ii) states that the indemnification must be “in a form acceptable to the Department.” This phrase is vague and does not establish a standard that provides clear guidance to the regulated community. We recommend that the final-form regulation be amended to specify the type of indemnification that would be acceptable to the Department.

We note that similar vague phrases can be found in the following sections of the proposed rulemaking and recommend those phrases be amended in accordance with the suggestion above: § 441.3(b)(2); § 441.3(e)(3); § 441.3(h); and § 441.6(16)(i).

#### **2. Section 441.4. Permit fees. – Fiscal impact; Need; Implementation procedures; Reasonableness; Clarity.**

Proposed amendments to this section delete the existing fee structure and replace it with language that states that the fee schedule for application processing, review of the application and associated materials, permit inspection, permit supplement and miscellaneous fees will be established via publication of the schedule in the *Pennsylvania Bulletin*. The fees will not exceed the approximate reasonable costs of the Department in the administration of the permit.

In addition, the Department may periodically review and revise the schedule by publishing a revised schedule in the *Pennsylvania Bulletin*. We have four concerns with this section of the proposed rulemaking.

First, the Preamble to the proposed rulemaking explains what the changes to this section are, but fails to explain the need for the changes. When the final-form rulemaking is submitted, the Department should include an explanation of why the changes are needed.

Second, we are unable to determine what the fiscal impact of these changes will be to the regulated community. We ask the Department to estimate what the new fee schedule will be and to quantify what the costs will be to the regulated community. We also ask the Department to provide information on how much revenue the existing fee schedule has generated. This information should be included in the Regulatory Analysis Form submitted with the final-form regulation.

Third, the existing fee schedule states the fees collected will be used to “defray costs incurred by the Department” for the various tasks it must perform in conjunction with issuing the permits. The proposed language indicates that the fees “will not exceed the approximate reasonable cost” to issue the permits. The difference between “defraying” costs and “approximate reasonable” costs could be significant. In addition, the proposed language does not specify how the Department will calculate the costs associated with issuing permits. We suggest that the final-form regulation provide more detail on what it considers to be “approximate reasonable” costs and what factors will be used to calculate the amount of the fees.

Finally, we question if this approach to setting and raising fees is reasonable. We are concerned that the regulated community will not have an opportunity to review and comment on fee increases. Why has the Department decided to remove the fee schedule from its regulations? We recognize that adjusting the fees through the regulatory review process is not as expedient as adjusting fees through publication in the *Pennsylvania Bulletin*. However, we believe that the regulatory review process provides a certain level of accountability and transparency that outweighs expediency. For this reason, we suggest that the fee schedule remain in the Department’s regulations.