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House of Representatives
Commonwealth of Pennsylvania
Harrisburg

February 17, 2016

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Chairman Mizner and Honorable Members of the Commission:

We wish to draw your attention to serious flaws that have spoiled the procedure used to develop the revised Chapter 78 regulations applying to Pennsylvania's conventional oil and gas industry. In the Regulatory Review Act (RRA), including recent amendment thereto, the legislature sets out a careful process designed to achieve a balance of protecting our environment while curbing excessive regulation and hidden costs; it also requires flexibility for small businesses. The RRA contains many procedural steps including the requirement that an analysis (containing, among other things, a statement of needs, financial analyses, data, required forms, and a regulatory flexibility analysis) be provided on "the same date that an agency submits a proposed regulation" for publication in the Pennsylvania Bulletin. RRA, Section 5 (a).

The statutory requirement regarding timing is key, because it is the foundation for the review process contemplated by the law, including public comment anticipated under the Commonwealth Documents Law and the many interactive steps set forth in the RRA, including the solicitation of "the ideas and comments of small businesses" (RRA Section 2 (c) (10)), the examination of "the impact of proposed and existing rules on such (small) businesses" (RRA Section 2(c)(10)), and the "reaching of a consensus among the commission, the standing committees, interested parties, and the agency" (RRA Section 2(a)). When the timing requirement is violated, the procedure is spoiled because the public cannot comment on, and the interactive process cannot revolve around, information which is not available. Likewise, IRRC's ability to perform its initial review and analysis is irreparably impaired.

It is plain that much of the necessary information was not available when the proposed Chapter 78 regulations were published in December, 2013. The accompanying Regulatory Analysis Form (RAF) was seriously deficient as to conventional oil and gas operations. The comments of the IRRC issued April 14, 2014, show these deficiencies. The IRRC noted that the RAF focused on needs generated by Pennsylvania's new unconventional shale industry; however, the IRRC noted the absence of information about Pennsylvania's long-existing conventional industry –

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information which, if provided, would have allowed a dialogue about the key balance between protecting the environment and avoiding excessive regulation. Information about data was also unavailable. The IRRC stated: “If data is not the basis for this regulation, how did EQB determine that the many standards being imposed are adequate?” We share this serious concern because without a basis in data how can one measure whether the proposed changes to conventional operations are excessive? The required regulatory flexibility analysis was not available. The IRRC stated: “...we agree that more information is needed in the RAF. We ask EQB to provide the required regulatory flexibility analysis for each section of the proposed rulemaking.”

The RRA is clear in its intent to foster small business opportunities, and the failure of the flexibility analysis handicapped a fundamental portion of the intended process. The majority of the regulatory sections applicable to conventional operations did not receive the required financial analysis; moreover, the RAF did not attribute any costs to bring Pennsylvania’s existing conventional wells into compliance with the proposed regulations. Finally, none of the forms required by the proposed regulations were made available at the time the proposed regulation was published. (Even today, when the final regulation is coming before you, none of the required forms has been made available!)

Now, at the end of the process, in an effort to rectify the procedural failure, the DEP published a 192 page RAF (some six times longer than the original). The new RAF sets forth revised cost estimates which the DEP claims were vetted with members of the conventional industry; however conventional industry trade groups and COGAC assert they were not consulted. Serious dispute over costs remains. In such a flawed process, how can the IRRC conduct its duty relative to costs? The new RAF provides a variety of “data” – which DEP previously admitted Right-To-Know Law responses was not the basis for the proposed regulations and so was not available. Such data cannot *now* be evaluated to determine if it is “acceptable data” as defined in the RRA. Q. 28, pages 162-185. As one example, a communication study that is meant to justify the Area of Review obligations considers two communication incidents involving conventional operations. P. 180-186. If the Department had provided this “study” in 2013, a useful discussion could have been undertaken regarding its significance, validity and reliability. No such review or discussion can be conducted now that the rule is “final.” And even in the revised RAF, there is no regulatory flexibility analysis for small business as clearly required by the legislature – and as IRRC expressly requested “for each section of the proposed rulemaking.” Failing to comprehend what it means to provide less stringent requirements for small businesses, the DEP points only to differences that are either required by Act 13 or are entirely justified by the nature of conventional operations, which are significantly different than unconventional operations. See Q. 24, 25, 26 and 27 pages 134-161.

We trust that the IRRC understands and respects the legislature’s requirement that the RAF information be provided on “the same date that an agency submits a proposed regulation” for publication in the Pennsylvania Bulletin. In the face of the failure to provide that information, it is not feasible to turn back the clock and determine how the requisite steps would have informed

the process or how the analyses would have affected the fabric of the proposed regulations. For these reasons the undersigned respectfully request the IRRC to disapprove the final-form Chapter 78 regulations and issue an order barring the DEP from promulgating the regulation, in accordance with procedures provided in the RRA.

Sincerely,



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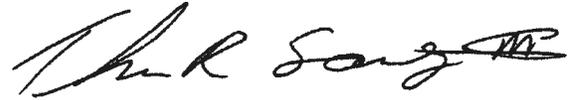
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