

# Comments of the Independent Regulatory Review Commission



## Department of Transportation Regulation #18-437 (IRRC #3071)

### Rail Freight Grants

October 29, 2014

We submit for your consideration the following comments on the proposed rulemaking published in the August 30, 2014 *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. Determining whether the regulation is in the public interest.**

Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact, reasonableness and the impact the regulation will have on small businesses. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under Section 5 of the RRA in the Regulatory Analysis Form (RAF) (71 P.S. § 745.5(a)).

The Preamble submitted with the proposed regulation provides a description of each section of the proposal. The descriptions explain what the regulation states. However, the descriptions do not provide the rationale for the language that is being proposed. This Commission is unable to determine if the regulation is in the public interest without this information. For example, Section 511.14, pertaining to limits of funding, specifies various maximum contribution and funding limit percentages related to grants issued under this chapter. It also limits how funds can be used. What is the basis for the percentages and limits included in this section of the rulemaking? In the Preamble to the final-form regulation, we ask the Department to provide the rationale for Section 511.14 and each section of the rulemaking and why that language is needed.

In addition, Sections 15 and 24 of the RAF ask an agency to provide specific information related to how the regulation will affect small businesses. We are aware that time and effort required are to answer the questions in these sections of the RAF and that there is a cost to an agency associated with providing the information. However, we note that this information is required by the RRA and ask the Department to provide complete answers to the questions posed in these sections so that this Commission can determine if the regulation is in the public interest.

## **2. Section 511.2. Definitions. – Clarity.**

*Local government* – This term is defined, but not used in the body of the regulation. We recommend that it be deleted from the final-form regulation.

*Railroad user* – A commentator has suggested that this definition be amended to include a corporation seeking to have rail service. Would an entity seeking to provide rail service be eligible for a grant under this chapter? If so, this definition should be amended to include this category of potential eligible grantees.

## **3. Section 511.3. Eligibility. – Need; Clarity.**

Subsection (c) describes the types of projects eligible for grants. Subsection (c)(1) pertains to maintenance projects. “Maintenance project” is a defined term and the language of Paragraph (c)(1) restates that definition. We recommend that Subsection (c)(1) be deleted or written in a manner similar to Subsection (c)(2), which relates to capital projects.

## **4. Section 511.4. Limits of funding. – Implementation procedures; Reasonableness; Clarity.**

Subsection (a) requires funding for projects under this chapter to be approved and appropriated by the General Assembly. A commentator has noted that Act 89 of 2013 provides dedicated, annual funding to the Rail Freight Assistance Program (RFAP). Would this funding require approval and appropriation by the General Assembly? We ask the Department to consider the impact Act 89 of 2013 may have on this chapter and to amend Subsection (a) accordingly, if needed.

Subsection (b) states that the maximum Commonwealth contribution for projects funded under this chapter is 70% of the total project cost. This requirement would be applicable to both RFAP projects and Rail Transportation Assistance Program (Rail TAP) projects. Since Subsection (c)(1), establishes maximum Commonwealth contribution limits for RFAP projects and Subsection (d)(1) establishes maximum Commonwealth contributions for Rail TAP projects, what is the need for Subsection (b)? We recommend that the Department delete Subsection (b) or explain why it is necessary in addition to the provisions in Subsections (c)(1) and (d)(1).

Additionally, when read together, Subsections (b) and (c)(1) lack clarity. Does the “maximum Commonwealth contribution” mean the total amount of money available to fund all RFAP grants for the year? Or, is the intent of Subsection (c)(1) to allow the Department to change the 70% set forth in Subsection (b) by publishing a different percentage in the *Pennsylvania Bulletin*? If a different percentage is published in the *Pennsylvania Bulletin*, it would conflict with Subsection (b) creating a confusing regulatory environment for those applying for grants. Furthermore, if the intent of Subsection (c)(1) is to amend Subsection (b) by publishing a notice in the *Pennsylvania Bulletin*, we note that regulations have the full force and effect of law and cannot be changed by publishing a notice in the *Pennsylvania Bulletin*. In order to change a regulatory requirement, a new rulemaking is necessary. We suggest that the Department revise Subsection (c)(1) to provide greater clarity and more regulatory certainty.

Under Subsection (d), Rail TAP grants will be determined by a line item in the Capital Budget.

How will this provision work with the application process provisions found in the remainder of this chapter? Would a potential project have to be included in the Capital Budget before an applicant could apply for a grant with the Department or would an applicant apply for a grant first and then secure a line item in the Capital Budget? This should be clarified in the final-form regulation.

**5. Section 511.5. Application period and deadlines. – Clarity.**

Under Subsections (b) and (c), the Department will determine the open application periods for RFAP grants and Rail TAP grants by annually publishing a notice in the *Pennsylvania Bulletin*. Regulations create binding norms and certainty for the regulated community. These provisions create neither and should be deleted from the rulemaking. We suggest that the open application periods for both types of grants be specified in the final-form regulation.

**6. Section 511.6. Application submission procedure. – Reasonableness; Implementation procedures; Need; Clarity.**

This section of the rulemaking explains how to submit RFAP and Rail TAP grant applications. We have four concerns. First, Subsection (a) states that applications must be filed electronically “or as otherwise determined by the Department.” This provision is non-regulatory and should be deleted from the final-form regulation. Instead, the Department should specify in the final-form regulation other acceptable methods for submitting a grant application.

Second, Subsection (b) lists information that must be included on the application. This provision includes the phrase “among other criteria specified on the particular application.” In order to create regulatory certainty, all criteria that must be included on an application should be included in the final-form regulation. We recommend that this subsection be amended to include all information that must be included on an application and that the phrase noted above be deleted.

Third, we question the need for Subsection (c), which states that applications must be “completed in accordance with Department grant application policies and procedures in place at the time the application period opens.” The purpose of this rulemaking is to establish the procedures for applying for a RFAP or Rail TAP grant and would take precedence over any policy in place. We recommend that this subsection be deleted.

Fourth, Subsection (d) allows the Department to reject an application that does not include information required by “the grant application, this chapter, grant program policies or other applicable laws or regulations.” This provision is vague and does not provide meaningful guidance to the regulated community. We recommend that the reference to “grant program policies” be deleted and that specific laws or regulations that need to be complied with be listed in the final-form regulation.

**7. Section 511.7. Public records. – Clarity.**

This section states that “submissions” to the Department are subject to the requirements of the Right-to-Know Law (65 P.S. §§ 67.101 – 67.3104). The term “submissions” is vague and should be clarified in the final-form regulation.

**8. Section 511.8. Grant selection process and criteria. – Implementation procedures; Clarity.**

Subsection (a) explains that the Bureau of Rail Freights, Ports and Waterways (Bureau) will evaluate each eligible RFAP and Rail TAP program in terms of its potential to meet certain enumerated goals and objectives. Subsection (b) states that the Department has discretion in the selection of projects and other aspects of a grant application. We have three concerns. First, Subsection (a) identifies factors that will be considered in making determinations related to projects, but Subsection (b) allows for discretion. The purpose of a regulation is to establish a binding norm that provides certainty to both the regulated community and an agency. The discretionary language of Subsection (b) does not provide for that certainty and the language that provides for discretion should be deleted.

Second, under Subsection (a), the Bureau is responsible for the evaluation of eligible projects, but under Subsection (b), the Department has discretion for the selection of projects. Does the Bureau or the Department make the final determination? This should be clarified in the final-form regulation.

Third, once the Department or Bureau is in receipt of a complete application, when will the applicant be notified if they were awarded a grant? Timeframes associated with reviewing an application should be included in the final-form rulemaking.

**9. Section 511.9. Offer and acceptance. – Implementation procedures; Clarity.**

Under Subsection (d), the Bureau Director may extend the deadline for acceptance of a grant offer made by the Department to an applicant. Would an applicant have to specifically request such an extension? Under what circumstances would an extension be granted? We recommend that the final-form regulation include more detail on how extensions of this nature will be implemented.

**10. Section 511.10. Standards, methods, techniques, designs and special conditions; Section 511.11. Prevailing wage. – Need; Reasonableness; Fiscal impact; Consistency with other statutes.**

Section 511.10(d) requires steel products used in projects funded by a grant under this chapter to be in compliance with the Steel Products Procurement Act (73 P.S. §§ 1881 – 1887). Similarly, Section 511.11 states that projects funded by grants awarded under this chapter are subject to the prevailing wage requirements under the Pennsylvania Prevailing Wage Act (43 P.S. §§ 165.1 – 165.17). Are the grants issued under this chapter considered contracts for public works as defined by or contemplated by both of these acts? If so, the regulated community would have to comply with both of these acts regardless of whether those acts are cited in the rulemaking. What is the need for including citations to these acts in the regulation? If these grants are not considered contracts for public works, we ask the Department to explain why these citations are being included in the rulemaking and ask for a more detailed fiscal analysis of how these requirements will impact the regulated community.

**11. Section 511.12. Audits and recordkeeping. – Reasonableness; Clarity.**

Subsection (a) describes general requirements of a grant recipient. We have two concerns. First, Subsection (a)(4) requires a grant recipient to maintain control and accountability for “all funds, property and other assets.” To improve the clarity of this provision, we suggest that the final-form regulation include language specifying that the control and accountability be linked to the funds, property and assets associated with the grant.

Second, Subsection (a)(6) requires a grant recipient to include a clause in any contract related to the grant that allows the Department access to the applicant’s contractor’s records for the purposes of accounting and auditing. We suggest that the final-form regulation specify that the access be limited to accounting and auditing of matters related only to the grant.

**12. Section 511.13. Inspection. – Implementation procedures; Need.**

Subsection (a) provides the Department “or an agency of the Commonwealth, or both, or a person designated or authorized by the Department” an absolute right to inspect various aspects of a project funded by this chapter. We have three concerns with Subsection (a). First, what specific statutory language allows another Commonwealth agency to conduct inspections of this nature? Second, we question how this provision would be implemented. Would another agency of the Commonwealth need permission from the Department to conduct an inspection of this nature? Would that inspection have to be coordinated with the Department? Finally, we question the need for this provision. We ask the Department to provide further explanation of this provision as it relates to the concerns raised above.

**13. Section 511.16. Waiver. – Reasonableness; Need; Clarity.**

Under Subsection (a), the Bureau Director may waive requirements to submit specific information or data required for a grant application. Under what circumstances will waivers be granted? To provide certainty to the regulated community, the criteria the Bureau Director will use to evaluate waiver requests should be included in the final-form regulation.

The Secretary of the Department may waive any or all requirements of this chapter in the event of an emergency or other event that is of critical concern to the Commonwealth under Subsection (c). We have the same concern with this subsection as we do with Subsection (a) and ask the Department to clarify what types of emergencies or events would result in a waiver.

**14. Miscellaneous clarity.**

Under § 511.8(a), the word “objections” should be changed to “objectives.”