

# Comments of the Independent Regulatory Review Commission



## Department of Transportation Regulation #18-461 (IRRC #3083)

### Authorizing Appropriately Attired Persons to Direct, Control or Regulate Traffic

January 7, 2015

We submit for your consideration the following comments on the proposed rulemaking published in the November 8, 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 (71 P.S. § 745.5b) directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under § 745.5(a) in the Regulatory Analysis Form (RAF).

The explanation of the regulation in the Preamble and the information contained in the RAF are not sufficient to allow IRRC to determine if the regulation is in the public interest. In the Preamble and RAF submitted with the final-form rulemaking, the Department should provide more detailed information required under § 745.5(a) of the Regulatory Review Act, including a description of the language proposed for each section of the regulation and why the requirements or amendments are needed.

#### 2. Section 101.1. Purpose. – Clarity.

Section 101.1 states “this chapter indicates those persons, **other than** a uniformed police officer, sheriff, constable or, in an emergency, a railroad or street railway police officer, who are authorized to direct . . . traffic . . .” (Emphasis added.) However, Section 101.2 lists persons authorized to direct traffic and Paragraph (10) references persons authorized by 75 Pa.C.S. § 3102, which includes “any uniformed police officer, sheriff or constable or, in an emergency, a railroad or street railway police officer. . .” Therefore, Section 101.1 contradicts Paragraph 101.2(10) and should be amended to reconcile the two provisions.

**3. Section 101.2. Persons authorized to direct traffic. – Need; Protection of the public safety; Clarity; Reasonableness; Economic impact.**

*Flagging procedures training*

This section sets forth 10 categories of persons authorized to direct traffic. The persons described in Paragraphs (8) and (9) are required to “have successfully completed and participated in a formal flagging procedures and guidelines training course as defined and outlined by the Department.” It is not clear why two categories need training, whereas the remaining eight do not. If training is needed for persons controlling traffic at a parade, why is training not needed for traffic control persons at construction projects, school crossing guards, personnel of emergency organizations or highway service personnel? If a person is trained, what documentation of that training is acceptable to the Department? Why is training no longer required for Department of Conservation and Natural Resources personnel? How is the public safety adequately protected unless all categories of persons directing traffic are trained in flagging procedures? The Department should provide support for its determination of which persons need training and which persons do not need training.

Additionally, if a person is trained, what documentation of that training is acceptable to the Department? The regulation should provide direction regarding what documentation of training is acceptable.

*“Successfully completed and participated in a formal flagging procedures and guidelines training course as defined and outlined by the Department”*

This phrase, used in Paragraphs (8) and (9), is vague. The regulation does not provide the information needed to find a valid training course or determine whether a particular course would meet the Department’s standards. The final-form regulation should address the following concerns:

- What constitutes a “formal flagging procedures and guidelines training course”?
- How can a person determine whether a course is “as defined and outlined by the Department”?
- Does the Department maintain a list of approved courses and providers on its website? If so, that should be referenced in the regulation.
- Is training valid forever, or must the course be retaken after a certain period of time?
- Is a course provider required to produce documentation such as a certificate that the trained person can use to verify their training?

Another concern is that the regulation relies on information provided by the Department outside of the regulation. The regulation should define the course, its content and how a person can find an approved course.

We ask the Department to provide a full description of the training in the Preamble to the final-form regulation. We recommend amending the regulation to provide clear direction on courses a person can take to meet the Department's training requirement.

*Need, economic impact and reasonableness*

In regard to the training requirement in Paragraph (8), the Pennsylvania Funeral Directors Association commented that not all funeral personnel direct traffic and believes the regulation would unduly burden those who do not direct traffic. They assert that the regulation, as written, would apply to all licensees. The Department should explain whether the regulation applies to all funeral personnel and, if so, the Department should provide justification for the need to train all funeral personnel.

In addition, the response to Regulatory Analysis Form (RAF) 19 addresses the impact of the clothing requirements. It does not appear from this response, or other responses, that the costs of training were considered, both in the regulated community's time that must be devoted to training and the cost charged for the training course. The Department should include in the RAF responses the impact of training on the regulated community so that the need for and cost of training can be fully evaluated.

**4. Section 101.3. Minimum attire. – Statutory authority; Need; Clarity.**

*“Or an equivalent designated by the Department through publication in the Pennsylvania Bulletin”*

Paragraphs (1), (2) and (3) cite standards of the American National Standards Institute/International Safety Equipment Association (ANSI/ISEA), but conclude with the phrase “or an equivalent designated by the Department through publication in the *Pennsylvania Bulletin*” or similar language. These phrases do not comply with the requirements of the Regulatory Review Act (Act). 71 P.S. §§ 745.1-745.15. Under the Act, regulations cannot be amended without being subject to the regulatory review process. An alternative standard should be subject to review and comment by the public before adoption or implementation. In addition, codification cannot occur simply through notification in the *Pennsylvania Bulletin* without a regulation being reviewed and approved by both IRRC and the Office of the Attorney General, unless there is a legal authorization to do so. See *id.* at §§ 745.5b and 732-204(b). Therefore, this phrase should be removed from the final-form regulation.

*Including future amendments*

The citations to ANSI/ISEA in Paragraphs (1), (2) and (3) also include future amendments to ANSI/ISEA. Why does the regulation reference future amendments? The final-form regulation should either delete the language pertaining to future amendments or provide a justification for retaining it.