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January 26, 2018

Via Email & Hand Delivery

The Honorable Darryl Metcalfe
PA House of Representatives
Chair
House State Government Committee
144 Main Capitol Building
Harrisburg, PA 17120

The Honorable Matthew Bradford
PA House of Representatives
Minority Chair
House State Government Committee
323 Main Capitol Building
Harrisburg, PA 17120

The Honorable Jake Corman
Senate of Pennsylvania
Chair
Senate Rules and Executive Nominations Committee
350 Main Capitol Building
Harrisburg, PA 17120

The Honorable Jay Costa
Senate of Pennsylvania
Minority Chair
Senate Rules and Executive Nominations Committee
535 Main Capitol Building
Harrisburg, PA 17120

Vincent C. DeLiberato, Jr.
Chairperson, Joint Committee on Documents
641 Main Capitol
Harrisburg, PA 17120

RE: Comments on Final-Form Regulation
Independent Regulatory Review Commission Rulemaking #3125
Regulation # 70-9
Amendments to 1 Pa. Code Chapters 301, 303, 305, 307, 309, 311, 311a and 315

Dear Chairmen Metcalfe and Corman, Minority Chairs Bradford and Costa, and Chairperson DeLiberato:

On December 15, 2016, the Independent Regulatory Review Commission (IRRC) adopted a policy (*copy attached*) to address the irreparable harm caused by an agency's failure to comply with a clear and significant Regulatory Review Act (RRA) requirement that IRRC's existing procedures have been shown to be inadequate to enforce. The Pennsylvania Independent Oil & Gas Association (PIOGA) hereby requests that the House State Government Committee, the Senate Rules and Executive Nominations Committee and the Joint Committee on Documents (JCD) recommend that IRRC revise Section 305.1(b)(1) of its final-form regulation as follows to

give this policy the force of law to ensure that agencies comply with the RRA Section 5(a)(5) requirement *to include with proposed rulemakings* copies of all forms, guidance documents and instructions that will be required for implementation of the regulation if it is promulgated:

> § 305.1. Delivery of a proposed regulation.
>
> . . . .
>
> (b) The agency shall include the following material with the regulation:
>
> > (1) A completed regulatory analysis form. Failure to include paper copies or links to electronic versions of all documents, such as forms, guidance documents and instructions, which will be required for implementation of the regulation will constitute a faulty delivery of the regulation and shall result in the regulation being returned as incomplete to the promulgating Board, Commission, or Agency.[1]

An agency's forms and instructions as well as "guidance" documents are significant for the day-to-day implementation of a regulation and have the potential to expand and alter obligations created by the regulations themselves.[2] Compliance with this straightforward RRA requirement is essential for the RRA process to work as intended by the General Assembly. IRRC's failure to uniformly enforce compliance with this requirement by allowing these documents to be developed or provided *after* the close of the proposed rulemaking public comment period or, even worse, *after promulgation* of a final-form rulemaking as with the Department of Environmental Protection's (DEP) recently promulgated Chapter 78 regulations (IRRC #3042),

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[1] Section 5. Proposed regulations; procedures for review.

(a) ***On the same date*** that an agency submits a ***proposed*** regulation to the Legislative Reference Bureau for publication of notice of proposed rulemaking in the Pennsylvania Bulletin as required by the Commonwealth Documents Law, ***the agency shall submit*** to the commission and the committees a copy of the proposed regulation and ***a regulatory analysis form which includes the following***:

. . . .

(5) "A statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, **including copies of forms or reports, which will be required for implementation of the regulation** and an explanation of measures which have been taken to minimize these requirements." (Emphasis added).

[2] The legal significance of an agency's forms, and why the RRA requires them to be included with a proposed regulation, is shown by the Commonwealth Court's January 2017 decision in *Lester v DEP*, 153 A.3d 445 (Pa.Cmwlth. 2017), as explained in PIOGA's January 17, 2017 letter to IRRC (*also attached*). The potential of these documents to expand and alter obligations created by the regulations themselves is shown by the extensive discussion of DEP's *draft* forms at the March 31, 2016 Oil & Gas Technical Advisory Board (TAB), concerning the final-form regulations that had already been submitted to IRRC on March 3, 2016:
http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/TechnicalAdvisoryBoard/2016/June%2023/Meeting%20Minutes%20-%20TAB%20-%2003-31-2016%20(revised).pdf , pp.3-8.

causes irreparable harm to interested stakeholders, the agency's legislative oversight committees, IRRC and, ultimately, the public:

> •To stakeholders – by precluding interested parties from developing comprehensive informed and reasoned comments to a proposed rulemaking, whether in favor of or against the proposal
>
> •To the agency's legislative oversight committees – by depriving the committees of informed and reasoned comments to help the members fully understand the proposed rulemaking so they can "convey to the agency and the commission their comments, recommendations and objections to the proposed regulation" in accordance with RRA Section 5(d)
>
> •To IRRC – by depriving IRRC of comprehensive informed and reasoned comments to help IRRC determine whether the proposed regulation is in the public interest
>
> •To the public – by depriving the general public of the results of the regulatory review process prescribed by the General Assembly in no uncertain terms

The harm is obviously irreparable because the consequences of not providing these documents *upfront* with the proposed regulation cannot be cured by providing the documents later in the regulatory review process, or *after* the process is concluded.

The inadequacy of IRRC's existing procedures to enforce the straightforward Section 5(a)(5) requirement is explained below. But the policy adopted by IRRC's December 2015 Resolution is also inadequate to enforce the RRA Section 5(a)(5) requirement for a number of reasons. First and foremost, as IRRC should know, a policy does not have the force and effect of law and is not binding on third parties, i.e., the agencies required to comply with the RRA:

> Statements of policy (SOP), unlike regulations, provide guidance by which agency personnel carry or will carry out their duties authorized by state law. They can contain instructions based on the agency's interpretation of statutory requirements which can be applied on a case by-case basis, and give the agency the discretion to deviate from their terms. See also 45 P.S. § 1102(13). ***An SOP*** does not expand upon the plain meaning of a statute and ***is not binding upon third parties. The agency issuing the SOP cannot apply or rely upon it as law*** because it is merely a policy document.[3]

[3] IRRC Regulatory Review Process Manual, http://www.irrc.state.pa.us/resources/docs/Regulatory_Review_Process_Manual.pdf, p. 6 (footnotes omitted). While PIOGA certainly appreciates IRRC's addition to #22 of the RAF ("Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty

Second, the policy states that (emphasis added):

> •RRA Section 5(a)(5) provides that the RAF "accompanying a regulation ***should*** include a copy of forms that will be required by the regulation;
>
> •The RRA "is ***unclear*** as to whether failure to include such forms with the Regulatory Analysis Form was intended to constitute a faulty delivery of the regulation or whether it was intended to be the subject of Commission Comment on the proposed regulation; and
>
> •IRRC "believes that the ***spirit*** of Section 5(a)(5) can be met by requiring a promulgating agency to submit with the regulatory package a paper or electronic version of the required forms, or a detailed description of the information required to be reported on the form

While PIOGA also certainly appreciates IRRC's adoption of the policy, PIOGA respectfully asserts that all these statements are legally incorrect. It is difficult to imagine a more clear statutory directive than RRA Section 5(a)(5): "[T]he agency ***shall*** submit . . . a regulatory analysis form ***which includes . . . copies of forms or reports, which will be required for implementation of the regulation.***" The "letter" of the law, not its spirit, requires the submission of these documents *with the proposed regulation* and there is no mention of providing a "detailed description of the information required to be reported on the form" in lieu of the actual forms themselves. A description – no matter how detailed – is no substitute for the actual documents the agency intends to use to implement the regulation.

Third, *it is clear* that the failure to include the forms with the proposed regulation was *not* "intended to be the subject of Commission Comment on the proposed regulation" because the harm described above for failure to comply cannot be cured by IRRC's identification of the failure *after* the public comment period has ended and by IRRC's direction to the agency to comply when it submits the final-form regulation. That is way too late, and not what Section 5(a)(5) requires..

This third point is demonstrated most emphatically by the record of DEP's recent Chapter 78 rulemaking (IRRC #3042). This record also shows the inadequacy of IRRC's existing regulations and procedures to enforce the RRA Section 5(a)(5) requirement – and why the language should be added to the regulation as requested by PIOGA. The RAF for DEP's proposed regulation contained absolutely ***no*** forms despite DEP's statements that "[t]hese proposed regulations include new planning, reporting and record keeping requirements" and "[t]he regulated community will need to meet new reporting requirements in these proposed regulations" and described them in seven (7) bullets [http://www.irrc.state.pa.us/docs/3042/AGENCY/3042PRO.pdf, pp. 21-22 (#22)]. Not surprisingly, IRRC's comments state ***nothing*** about this glaring deficiency [http://www.irrc.state.pa.us/docs/3042/IRRC/3042%2004-14-14%20COMMENTS.pdf].

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delivery of the regulation."), this statement does not have the force and effect of law unless it is included in IRRC's regulation.

DEP's RAF for the final-form regulation again stated that "[t]he regulated community will need to meet new reporting requirements in the final regulation" and described them in 30 – not 7 – bullets [http://www.irrc.state.pa.us/docs/3042/AGENCY/3042FF.pdf, pp. 127-29 (#22)] and listed 29 documents "that either need to be updated or development [sic] to implement the final-form rulemaking" [pp. 129-30]. DEP also provided a number of reporting forms and instructions *all labeled "DRAFT"* [pp. 191-313] – but no "technical guidance documents" or TGDs – and stated that "[t]he Department will make forms and guidance documents available prior to adoption of the final rule." PIOGA is unaware that any forms were finalized before IRRC's approval in #3042 in April 2016. And *after* the final rule was adopted/promulgated on October 8, 2016, DEP was *still developing* forms, instructions and guidance documents to implement *new* requirements in the final rule.[4] Indeed, the proposed regulations were formally submitted on *December 4, 2013*, but DEP has publicized how much time its staff spent on developing the proposals prior to formal submission, and yet here we are in 2018 and DEP continues to work on finalizing implementation documents to this day, *more than four (4) years after Section 5(a)(5) required these documents to be submitted.* In a massive rulemaking such as IRRC #3042 with significant new requirements, compliance with Section 5(a)(5) was even more essential for all interested parties to be able to fully understand and provide informed comments on the proposed regulation.

It should be beyond dispute that what happened and continues to happen concerning DEP's failure to comply with RRA Section 5(a)(5) in IRRC #3042 is contrary to both the letter and spirit of the regulatory review process directed by the General Assembly in the RRA. Our Supreme Court described the impediment our notice-and-comment rulemaking and regulatory review process working as intended by the plain words of the RRA (and the Commonwealth Documents Law) by quoting with approval what the Court described as the "often-quoted comments" of the United States Court of Appeals for the District of Columbia Circuit:

> The phenomenon . . . is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, **the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations**. One guidance document may yield another and then another and so on. **Several words in a regulation**

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[4] Amended Meeting Minutes from November 22, 2016 TAB meeting (approved at TAB April 13, 2017 meeting) – http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/TechnicalAdvisoryBoard/2017/Meeting%20Minutes-TAB-11-22-2016.pdf, p.8:

The final topic discussed by Klapkowski pertained to the forms that are being developed to implement the various provisions of the rulemaking. DEP has received comments from industry related to the forms and has been making necessary adjustments. Klapkowski stated that if there are any additional questions remaining about the forms that are under development to please contact the Office of Oil and Gas Management. (Emphasis added).

> **may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities.** Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Northwestern Youth Services, Inc. v. Com., Dept of Public Welfare, 66 A.3d 301, 314 (Pa. 2013) (emphasis added) (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, 341 U.S.App.D.C. 46 (D.C. Cir. 2000)).

Including the language requested by PIOGA is consistent with the comments of the Marcellus Shale Coalition, members of the House State Government Committee, and Representative Daryl Metcalfe individually. As Representative Metcalfe observed in his March 1, 2016 comments, the basis of JCD's objection to PIOGA's request for regulation language stating when a proposed regulation submission is invalid or defective – that the Regulatory Analysis Form is a statutory requirement – is actually the reason "that the regulations must include a mechanism for invalidating a proposed regulation if the regulation is accompanied by an incomplete Regulatory Analysis Form."

In its final-form rulemaking, IRRC opposed PIOGA's proposed regulation language on the basis that "the new language . . . will only create further ambiguity and is not necessary." PIOGA suggests IRRC's rationale applies to PIOGA's proposed new definition of "completed regulatory analysis form" and "10-day review" and "cure" process, and not to the concept embodied in IRRC's policy adopted in December 2016 stating when a proposed regulation submission is invalid or defective. PIOGA also suggests that these proposed new definitions and process obscured the fundamental point of PIOGA's (and the other commentators') complaint about an agency's failure to comply with RRA Section 5(a)(5) – the irreparable harm caused as described above on pages 2-3.

Adding the language PIOGA now requests on page 2 above will not and cannot "create further ambiguity" when the purpose of IRRC's own policy was to clarify" when a proposed regulation submission is invalid or defective, and IRRC believed the policy "should promote the broadest public input." The proven inadequacy of IRRC's existing regulatory language and procedures to avoid the irreparable harm described above shows that the language requested by PIOGA is indeed necessary. In other words, rejection of PIOGA's initially suggested new definition of "completed regulatory analysis form" and "10-day review" and "cure" process is not a reason to reject the language requested by PIOGA now.

Finally, including the language now requested by PIOGA is necessary to ensure that an agency's proposed regulation satisfies the RRA definition of a "proposed regulation":

> A document **intended for promulgation as a regulation** which an agency submits to the commission and the committees and for which the agency gives notice of

proposed rulemaking and holds a public comment period pursuant to the act of July 31, 1968 (P.L.769, No.240), referred to as the Commonwealth Documents Law.

RRA Section 3 (emphasis added). By this definition and the requirements of Section 5(a) of the RRA, the General Assembly necessarily intends that an agency's proposed regulation be ready for implementation as a final-form regulation ***when proposed***. As the agency controls the development of its proposed regulation, there is no credible reason why an agency cannot comply with RRA Section 5(a)(5) by developing the implementation forms and their instructions, TGDs, guidelines, *etc.* at the same time the agency is developing its proposed regulation.

Of course, the RRA anticipates there may be changes to a proposed regulation, but that does not provide a reason for an agency – or IRRC – to ignore or excuse noncompliance with RRA Section 5(a)(5) on the basis that the agency can't develop the implementation documents *until* it knows what the final approved regulation language is. Changes to the implementation documents required by changes to the proposed regulation should be relatively simple, again because agencies control changes to both the proposed regulation and the implementation documents.[5] Changes to these implementation documents to reflect changes to a proposed regulation as a result of the comment and review process is what the plain words of the RRA require – not the development of these implementation documents outside the comment and review rulemaking process, and thus separated from consideration as an integral part of the whole rulemaking package.

Accordingly, PIOGA requests that:

(i) the committees and JCD request that IRRC toll their time for review of the final-form regulation per RRA Section 5.1(g)(1);

(ii) per RRA Section 5.1(j.2) the committees notify JCD and IRRC that they intend to review the final-form regulation;

(iii) the committees recommend to IRRC and JCD that IRRC revise Section 305.1(b) of the final-form regulation as requested herein by PIOGA;

[5] If an agency asserts the inability to comply with Section 5(a)(5) because of the possibility of substantial changes to implementation documents based on substantial changes to the proposed regulation – such as proposed provisions that were not part of the initially proposed regulation – that assertion raises the question whether the substantial changes to the proposed regulation "enlarge its original purpose" as initially published, in which case the enlarged proposed regulation must be republished as a proposed regulation pursuant to Section 1202 of the Commonwealth Documents Law, 45 P.S. § 1202. In this situation, the agency is required to submit an RAF with implementation documents corresponding to the changes, so the agency's assertion would not provide an acceptable reason for noncompliance.

(iv) that the committees disapprove the final-form regulation if the revision requested herein by PIOGA is not made; and

(v) JCD not approve the final-form regulation unless IRRC revises Section 305.1(b) of the final-form regulation as requested herein by PIOGA.

PIOGA is concurrently submitting a request to IRRC to toll the committees' and JCD's time for review of IRRC's final-form regulation to enable the committees and JCD to consider PIOGA's requests.

On behalf of PIOGA and its members, thank you for considering these requests.

Sincerely,

Kevin J. Moody, General Counsel
PIOGA

cc: Susan Boyle, Executive Director-R, House State Government Committee
Kim Hileman, Executive Director-D, House State Government Committee
Anna Fitzsimmons, Executive Director-R, Senate Rules and Executive Nominations Committee
Ronald Jumper, Esq., Executive Director-D, Senate Rules and Executive Nominations Committee
Leslie Lewis Johnson, Esq., Chief Counsel, IRRC
David Sumner, Executive Director, IRRC
Denise Smyler, Esq., General Counsel, Governor's Office of General Counsel
All via email

WHEREAS, Section 5(a)(5) of the Regulatory Review Act provides that the Regulatory Analysis Form accompanying a regulation should include a copy of forms that will be required by the regulation; and

WHEREAS, the Regulatory Review Act is unclear as to whether failure to include such forms with the Regulatory Analysis Form was intended to constitute a faulty delivery of the regulation or whether it was intended to be the subject of Commission Comment on the proposed regulation; and

WHEREAS, when the Regulatory Review Act was enacted more than thirty years ago, Section 5(a)(5) did not contemplate future technological advances that now make electronic transmissions and reporting customary; and

WHEREAS, this Commission believes that the spirit of Section 5(a)(5) can be met by requiring a promulgating agency to submit with the regulatory package a paper or electronic version of the required forms, or a detailed description of the information required to be reported on the form; and

WHEREAS, this Commission desires to adopt a Policy to be applied consistently to all regulations delivered to the Commission; and

WHEREAS, this Commission believes that such a Policy should promote the broadest public input;

NOW THEREFORE, this Commission adopts the following policy to clarify that:

> Failure to include copies of forms that will be required by a regulation with a Regulatory Analysis Form, in a format acceptable by the Commission as referenced above, will be deemed to be a faulty delivery of the regulation under Section 5(a)(5) of the Regulatory Review Act and shall result in the regulation being returned as incomplete to the promulgating Board, Commission, or Agency.

Adopted 12/15/16

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January 17, 2017

Via email to: ljohnson@irrc.state.pa.us
Leslie Lewis Johnson, Esq.
Chief Counsel
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Supplemental Comments
Independent Regulatory Review Commission Proposed Rulemaking #3125
Amendments to 1 Pa. Code Chapters 301, 303, 305, 307, 309, 311, 311a and 315

Dear Chief Counsel Johnson:

The Pennsylvania Independent Oil & Gas Association ("PIOGA") believes that the Independent Regulatory Review Commission (IRRC), the Joint Committee on Documents (JCD), the House State Government Committee, the Senate Rules and Executive Nominations Committee and commentators in this rulemaking proceeding should be made aware of a Commonwealth Court decision issued this past Friday that addresses an important issue raised in this rulemaking proceeding.

The court's decision in *Lester v DEP*, No. 1778 C.D. 2015 (Commonwealth Court January 13, 2016) (copy attached), demonstrates the legal significance of the forms that agencies use to implement and enforce their regulations. This court decision thus confirms the legal significance of the Regulatory Review Act (RRA) requirement [Section 5(a)(5)] – implemented by Regulatory Analysis Form (RAF) Item # 22 – that all proposed regulations include "copies of any forms or reports which will be required in the implementation of the proposed regulation." This court decision therefore also confirms the legal correctness of the policy adopted by IRRC by Resolution on December 15, 2016:

> Failure to include copies of forms that will be required by a regulation with a Regulatory Analysis Form, in a format acceptable by the Commission as referenced above, will be deemed to be a faulty delivery of the regulation under Section 5(a)(5) of the Regulatory Review Act and shall result in the regulation being returned as incomplete to the promulgating Board, Commission, or Agency.

The Commonwealth Court's decision in *Lester* demonstrates the legal significance of forms that agencies use to implement and enforce their regulations by the following statements with respect to the Department of Environmental Protection (DEP):

- "The EHB [Environmental Hearing Board] also noted that DEP relied heavily on various forms that Andrew Lester signed to support its belief that he met the definition of an operator of the tanks under the Storage Tank Act and its regulations." (p.8).

- "The EHB explained it was not clear that Andrew Lester truly understood the nature of the forms or that his designation on the forms would impose legal obligations on him." (p.9).

- "The EHB did not find the various forms indicating Andrew Lester to be "Manager" or "Operator" of the tanks to be dispositive, but on the whole, it stated, the evidence from these forms weighed in favor of DEP." (p.10).

In affirming the EHB's determination that Andrew Lester was an "operator" under the Storage Tank Act, the Commonwealth Court observed that the various forms along with other documentary evidence and proof supported EHB's determination. (pp.25-27).

Judge Cohn Jubelirer concurred in affirming the EHB's determination but wrote separately to express her concern, "similar to the EHB's, that **the language on DEP's storage tank forms does not clearly communicate the responsibilities and potential liabilities under the Storage Tank Act and the applicable regulations that would arise by designating oneself as an "operator" on such forms**, as Andrew Lester did at times in this case." Cohn Jubelirer, J., concurring, pp. 1-2 (emphasis added). Judge Cohn Jubelirer described the problems with the forms at issue and stated she would have required "the EHB to more thoroughly consider **the confusing nature of the forms**" if EHB and the court had relied on the forms to the exclusion of the other evidence in the record upon which the EHB relied. Cohn Jubelirer, J., concurring, p.5 (emphasis added).

The *Lester* decision squarely supports IRRC's policy adopted December 15, 2016. PIOGA commends IRRC's adoption of this policy and respectfully submits that this policy not only satisfies the spirit of Section 5(a)(5) but also implements the General Assembly's intent expressed in the plain words of the RRA. **Accordingly, PIOGA requests that IRRC implement this policy in its final-form regulations.**

Placing this policy in IRRC's regulations is consistent with the comments of PIOGA, the Marcellus Shale Coalition, the House State Government Committee and Representative Daryl D. Metcalfe, Chairman of the State Government Committee. As Representative Metcalfe observed, the basis of JCD's objection to the comments that request such a change to be made to IRRC's regulations – that the Regulatory Analysis Form is a statutory requirement – is actually the reason "that the regulations must include a mechanism for invalidating a proposed regulation if the regulation is accompanied by an incomplete Regulatory Analysis Form." PIOGA adds that it's unclear how the basis of the JCD's objection actually supports its objection.

Placing this policy in IRRC's regulations is necessary to ensure that agencies' proposed regulations satisfy the very definition of a "proposed regulation":

> A document **intended for promulgation as a regulation** which an agency submits to the commission and the committees and for which the agency gives notice of

> proposed rulemaking and holds a public comment period pursuant to the act of July 31, 1968 (P.L.769, No.240), referred to as the Commonwealth Documents Law.

RRA Section 3 (emphasis added). By this definition and the requirements of Section 5(a) of the RRA, the General Assembly necessarily intends that an agency's proposed regulation be ready for implementation as a final-form regulation ***when proposed*** – how is an agency to comply with the requirements of RRA Section 5(a) and submit a completed RAF unless the proposed regulation is sufficiently developed to be ready for implementation as a final-form regulation, as required by the definition?

The requirement of RRA Section 5(a)(5) has a sound basis and addresses a real and substantial impediment to our state's notice-and-comment rulemaking and regulatory review process working as intended by the plain words of the statutes (the RRA and the Commonwealth Documents Law). Our Supreme Court described this impediment by quoting with approval what it described as the "often-quoted comments" of the United States Court of Appeals for the District of Columbia Circuit:

> The phenomenon . . . is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then **as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations**. One guidance document may yield another and then another and so on. **Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities**. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

Northwestern Youth Services, Inc. v. Com., Dept of Public Welfare, 66 A.3d 301, 314 (Pa. 2013) (emphasis added) (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, 341 U.S.App.D.C. 46 (D.C. Cir. 2000)).

There is no credible reason why agencies cannot comply with RRA Section 5(a)(5). The implementation forms and their instructions, technical guidance documents (TGDs), guidelines, *etc.* must be based upon the proposed regulations – which are developed under the control of the agencies. Of course the RRA anticipates there may be changes to a proposed regulation, but that does not provide a reason for agencies or IRRC to ignore or excuse noncompliance with RRA Section 5(a)(5). Changes to the implementation documents required by changes to the proposed regulation should be relatively simple, again because agencies control changes to both the proposed regulation and the implementation documents.[1] Changes to these implementation

[1] If an agency asserts that substantial changes to implementation documents are required, but cannot be submitted as required by the RRA, because of substantial changes to the proposed regulation – such as proposed provisions that were not part of the initially proposed regulation – that raises the question whether the substantial changes to the proposed regulation "enlarge its original purpose" as initially published, in which case the enlarged proposed regulation must be republished as a proposed regulation pursuant to Section 1202 of the Commonwealth Documents Law, 45 P.S. § 1202. In this situation, the

documents to reflect changes to a proposed regulation as a result of the comment and review process is what the plain words of the RRA require – not the development of these implementation documents outside the comment and review rulemaking process, and thus separated from consideration as an integral part of the whole rulemaking package.

A recent example of this situation is DEP's Chapter 78 and 78a rulemaking. DEP's responses to RAF Item # 22 for the *proposed* regulation stated that "[t]hese proposed regulations include new planning, reporting and record keeping requirements" and described the additional requirements, *but provided no copies of the implementation documents.* http://www.irrc.state.pa.us/docs/3042/AGENCY/3042PRO.pdf, PDF p. 21-22.

DEP's responses to RAF Item # 22 for the *final-form regulation* again stated that "[t]he regulated community will need to meet new reporting requirements in the final regulation" and, in addition to describing the additional requirements, this time stated:

> **Many of the forms needed to implement this final-form rulemaking exist** and are currently part of the regulatory program. **Below is a list of forms that either need to be updated or development** [*sic*] **to implement the final-form rulemaking.** The Department will make forms and guidance documents **available prior to adoption of the final rule.**

http://www.irrc.state.pa.us/docs/3042/AGENCY/3042FF.pdf, PDF p. 131 (emphasis added). The RAF lists 29 forms and includes some forms *in draft* at PDF pages 191-312 following "Appendix A — Table Summarizing Costs and Savings From Final-Form Rulemaking." There is no acceptable reason for an agency not to submit the required implementation documents with its *proposed* regulation when the proposal requires changes to *existing* forms/instructions, TGDs, guidelines, *etc* – yet DEP even failed to submit with its final-form regulation *final* implementation documents *based on existing documents*. DEP's failure to provide the final implementation documents deprived IRRC of the information necessary for IRRC to determine – per RRA Sections 5.2(b)(1)(iii) and (b)(3)(iv) – whether the final-form regulation is in the public interest. PIOGA acknowledges that IRRC determined DEP's final-form regulation to be in the public interest, but respectfully submits that the deficiencies described here are not the way the General Assembly intended the RRA to operate.

The RRA recognizes the legal significance of documents used to implement agency regulations and wisely requires implementation documents to be an integral part of the consideration of a rulemaking ***from the beginning***. This enables the regulated community, the public, the General Assembly oversight committees and, of course, IRRC and its staff, to have *all* the information necessary for a complete understanding of the regulatory proposals. There can be no reasonable dispute that not providing *any* implementation documents with a *proposed* rulemaking and then providing final implementation documents only *after* IRRC's public interest determination concerning the final-form regulation is contrary to both the letter and spirit of the RRA.

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agency is required to submit an RAF with implementation documents corresponding to the changes, so the agency's assertion would not provide an acceptable reason for noncompliance.

In summary, placing the policy adopted December 15, 2016 in IRRC's final-form regulations would put agencies on clear notice that compliance with the Section 5(a)(5) requirement is necessary to enable IRRC to carry out the effective oversight and review of proposed regulations required by the RRA and for the RRA to work for all interested stakeholders in accordance with the plain words of the statute.

On behalf of PIOGA and its member companies, I thank you for considering these supplemental comments. PIOGA also suggests that this issue is so crucial to this rulemaking that providing other commentators an opportunity to respond to these supplemental comments is in the public interest, as the Commonwealth Court's *Lester* decision was not available before the end of the public comment period.

Sincerely,

Kevin J. Moody, General Counsel
PIOGA

cc: David Sumner, Executive Director, IRRC
Vincent C. DeLiberato, Jr., Chairperson, Joint Committee on Documents
Honorable Daryl Metcalfe, Chair, House State Government Committee
Honorable Greg Vitali, Democratic Chair, House State Government Committee
Susan Boyle, Executive Director-R, House State Government Committee
Kim Hileman, Executive Director-D, House State Government Committee
Honorable Jake Corman, Chair, Senate Rules and Executive Nominations Committee
Honorable Jay Costa, Democratic Chair, Senate Rules and Executive Nominations Committee
Anna Fitzsimmons, Executive Director-R, Senate Rules and Executive Nominations Committee
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