PIOGA
Pennsylvania Independent Oil & Gas Association

Northridge Plaza II
115 VIP Drive, Suite 210
Wexford, PA 15090

Office: 724-933-7306
Fax: 724-933-7310
www.pioga.org

3125

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.

---

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
Ronald Jumper, Esq., Executive Director-D, Senate Rules and Executive Nominations Committee
Denise Smyler, Esq., General Counsel, Governor's Office of General Counsel
Jim Welty, Vice President, Government Affairs, Marcellus Shale Coalition
Norina K. Blynn, Liquor Control Board
Fiona E. Wilmarth, Director of Regulatory Review, IRRC
Michelle L. Elliott, Regulatory Analyst, IRRC
All via email