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2015 DEC 29 AM 9:14

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December 28, 2015

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: Independent Regulatory Review Commission Proposed Rulemaking
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”) is the principal nonprofit trade association representing oil and natural gas producers, drilling contractors, service companies, manufacturers, distributors, professional firms and consultants, royalty owners, and other individuals with an interest in Pennsylvania’s oil and natural gas industry. PIOGA currently has approximately 750 members. PIOGA submits these comments to the above-referenced proposed rulemaking.

PIOGA member companies are primarily “small businesses” as defined in the Act 76 of 2012. Act 76 amended the Regulatory Review Act (“RRA”) “to improve State rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses in accordance with” legislative findings. RRA, Section 2(c).

In view of the pervasive regulation of our members’ activities, PIOGA has been and continues to be actively involved in many administrative rulemakings and has observed first-hand the deficiencies in agency proposed rulemakings – particularly with respect to the requirements added by Act 76. The Independent Regulatory Review Commission (“Commission” or “IRRC”) has also identified these deficiencies in its comments to various proposed rulemakings.

PIOGA commends the Commission for proposing amendments to its regulations to clarify definitions and what is required to be included in agency rulemaking packages, and to ensure consistency with the RRA and the Commission’s current practices and procedure.

While the proposed amendments address several of these observed deficiencies, PIOGA suggests that IRRC has the authority to go further to ensure consistency with the Commonwealth Documents Law and, most importantly, to ensure the effective oversight and review intended by the RRA “to curtail excessive regulation and to require the executive branch to justify its

exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania.” RRA, Section 2(a).

As IRRC is well aware, it has the power to promulgate and enforce regulations necessary to carry out the purposes of the RRA. In addition to the purposes identified in the previous paragraphs, the purposes of the RRA include:

- Establishing a method for ongoing and effective review and oversight of proposed regulations to foster executive branch accountability;
- Providing for primary review by a commission with sufficient authority, expertise, independence and time to perform the effective review and oversight function;
- Assisting the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions; and
- Encouraging – *to the greatest extent possible* – the resolution of objections to a regulation and the reaching of a consensus among IRRC, the General Assembly’s standing committees, interested parties and the agency promulgating the regulation.

RRA, Section 2(a).

Specific to small businesses, the purposes of the RRA include:

- Ensuring that small businesses do not bear a disproportionate share of regulatory costs and burdens;
- Making agencies more responsive to small businesses without compromising the agencies’ statutory missions;
- Requiring agencies adopting regulations to protect the health, safety and economic welfare of the Commonwealth to do so as effectively and efficiently as possible without imposing unnecessary burdens on small businesses;
- Requiring agencies to recognize differences in the scale and resources of regulated businesses to (i) not adversely discourage innovation and restrict improvements in productivity, and (ii) avoid inefficient use of regulatory agency resources, enforcement problems and actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;
- Requiring agencies to minimize the significant economic impact of regulations on small businesses through the use of alternative regulatory approaches that do not conflict with the stated objectives of the agencies’ applicable statutes;
- Requiring agencies to solicit the ideas and comments of small businesses and to examine the impact of proposed and existing rules on small businesses; and
- Requiring agencies to review the continued need for existing regulations.

RRA, Sections 2(c)(2),(3),(4),(6),(8),(9), and (10).

With the above as the foundational background, PIOGA offers the following comments and suggestions to improve the Commission's ability to ensure agencies' compliance with the RRA and thereby ensure the Commission's ability to perform its oversight and review function.

1. Sections 305.1(b)(4) and 307.2(c)(5)

PIOGA agrees with and supports, and hereby incorporates by reference, the recommendation of the Marcellus Shale Coalition ("MSC") to change the proposed text of these provisions as follows:

The preamble, which must include the information ~~described~~ **CONTAINED IN THE DEFINITION OF PREAMBLE FOUND** in §301.1 (relating to definitions).

2. Sections 305.1(b)(1), 305.3(b) and 307.2(c)(1)

PIOGA agrees with and supports, and hereby incorporates by reference, the MSC's comments and recommendations concerning the regulatory analysis form ("RAF") requirements in these provisions.

However, PIOGA recommends additional changes consistent with those recommended by the MSC. The RAF is an integral part of the proposed rulemaking package that provides much of the information that enables the Commission to perform its oversight and review function. As stated on the Commission's FAQs webpage:

What is a Regulatory Analysis Form and where can I find it?"

The Regulatory Analysis Form, or RAF, is an informational form that accompanies all regulations submitted to the Commission and committees. The RAF identifies the pertinent background information the agency is required to provide under Section 5(a) of the Regulatory Review Act, including statutory authority, estimates of costs or savings, recordkeeping requirements and affected parties.

Indeed, without a properly completed RAF it is simply impossible for IRRC to evaluate the following criteria to determine whether the regulation is in the public interest:

- Economic or fiscal impact;
- Protection of the public health, safety, and welfare, and effect on natural resources;
- Feasibility, clarity, and reasonableness;
- Whether the regulation is supported by acceptable data;
- Whether a less costly or less intrusive alternative method of achieving goals has been considered for a regulation impacting small business; and
- Compliance with the RRA and IRRC's regulations.

RRA, Section 5.2(b).

Clearly, an incomplete RAF precludes interested parties from developing appropriate and reasoned comments to a proposed rulemaking – whether in favor of or against the proposal. A properly completed RAF is particularly crucial with regard to an agency's analysis of the costs of the regulation to the regulated community and the agency. Indeed, the RAF for a proposed

regulation that would increase the costs of government should explain the source of funding for both the initial and long term implementation of the regulation.

As the Commission is aware, all too often the RAF responses are incomplete or objectively inadequate, again, particularly with respect to the requirements related to small businesses but also with respect to the forms and reports – specifically required by #22 of the RAF – that will be required for implementation of the regulation. The forms and their instructions as well as “guidance” documents are significant for the day-to-day implementation of the regulation, and have the potential to expand and alter obligations created by the rules themselves. Accordingly, these documents are critical for effective review and understanding of the *proposed* regulation by all stakeholders. These documents cannot be allowed to be developed or provided after the close of the comment periods or only as part of the final-form rulemaking package, something that happens much too frequently.

There can be no reasonable dispute that a properly completed RAF is necessary to carry out the purposes of the RRA, particularly with respect to a proposed regulation. PIOGA acknowledges that the Commission may provide comments, recommendations and objections pointing out the deficiencies in a proposed regulation RAF and may disapprove a final-form regulation if the agency fails to adequately respond to the Commission’s comments, recommendations and objections per Section 5(g) of the RRA. PIOGA also acknowledges that the legal reviews by the Office of General Counsel and the Office of Attorney General include completeness of the RAF. However, in practice these legal reviews of proposed regulation RAFs have not resulted in properly completed RAFs for proposed regulations, as shown by IRRC’s comments concerning incomplete proposed regulation RAFs. As the Commission knows, its disapproval of a final-form regulation does not prevent its promulgation. And even if an agency provides a properly completed RAF as part of its final-form rulemaking package, that is too late in the process to advance the purposes of the RRA with respect to a *proposed regulation*.

Accordingly, IRRC has the authority per Section 11(a) of the RRA to promulgate regulations that ensure submission of a properly completed RAF for a proposed regulation in accordance with the RRA – which means an RAF without deficiencies must be delivered *on the same date* the proposed regulation is delivered per Section 5.1(a) of the RRA and Section 305.1 of IRRC’s regulations. Such additional regulations would do much to prevent agencies from continuing to disregard with impunity, as a practical matter, RAF requirements where they choose – for whatever reason – to not provide complete and adequate responses with respect to proposed regulations.

PIOGA suggests that the Commission add a definition for “completed regulatory analysis form” and requirements to ensure submission of a properly completed RAF with a proposed regulation because a properly completed RAF is a prerequisite (i) for the thorough and comprehensive Commission review of a proposed regulation required by the RRA and (ii) to enable interested parties to provide informed comments. Accordingly, PIOGA recommends the following provisions, which include the changes recommended by the MSC with respect to proposed regulations:

§ 301.1. Definitions.

COMPLETED REGULATORY ANALYSIS FORM—A REGULATORY ANALYSIS FORM THAT INCLUDES ALL REQUESTED DOCUMENTS AND INFORMATION PROVIDED IN SUFFICIENT DETAIL FOR THE COMMISSION TO MAKE AN INITIAL DETERMINATION THAT THE RESPONSES WILL ENABLE THE COMMISSION TO DETERMINE WHETHER REGULATION IS IN THE PUBLIC INTEREST IN ACCORDANCE WITH THE REGULATORY REVIEW CRITERIA.

§ 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 DELIVER A COMPLETED REGULATORY ANALYSIS FORM IS CONTRARY TO THE ACT AND RENDERS THE PROPOSED REGULATION INVALID. WITHIN TEN CALENDAR DAYS OF DELIVERY, COMMISSION STAFF WILL REVIEW THE DELIVERED REGULATORY ANALYSIS FORM AND NOTIFY THE AGENCY OF ANY DEFICIENCY IN COMPLIANCE WITH THE DEFINITION IN § 301.1 (RELATING TO DEFINITIONS). FAILURE OF THE AGENCY TO CURE ANY DEFICIENCY WITHIN TEN CALENDAR DAYS OF THE COMMISSION’S NOTICE RENDERS THE PROPOSED REGULATION INVALID.**

....

(4) The preamble, **which must include the information described CONTAINED IN THE DEFINITION OF PREAMBLE FOUND in § 301.1 (relating to definitions).**

3. Formalize the “Advance Notice of Final Rulemaking” process

The MSC comments that agencies use an “informal Advance Notice of Final Rulemaking (ANFR) process to introduce substantive new regulatory requirements after the rulemaking was published as a proposed rulemaking and subjected to formal comment by the public, IRRC and the standing legislative committees.” As stated above, PIOGA agrees with this comment. PIOGA points out that the Commission also agrees:

Similar to an ANPR, an advance notice of final rulemaking (ANFR) is used by some agencies to provide notice of intended changes from the proposed version of a regulation to the final version. It is not a part of the formal rulemaking process under the RRA. However, it is occasionally done when, based on feedback received at the proposed stage or other factors, the agency has made substantial changes to the final regulation. When publishing an ANFR in the Pennsylvania Bulletin, agencies generally explain the purpose of the changes and may request additional public input.

IRRC Regulatory Review Process Manual, “The Regulatory Review Process in Pennsylvania,” p. 25.

While the ANFR is not part of the formal rulemaking process, what the ANFR may do is addressed by the Commonwealth Documents Law:

The agency text of any administrative regulation or change therein as finally adopted may contain such modifications to the proposed text as published pursuant to section 201 as do not enlarge its original purpose, but modifications which enlarge the original purpose of a proposal as published under section 201 shall be republished thereunder prior to final adoption by the agency.

CDL, Section 202, 45 P.S. § 1202. PIOGA agrees with the MSC's comment that it's "implausible" the General Assembly intended that the specific obligations imposed on an agency when publishing and delivering a proposed regulation could be effectively neutered and completely sidestepped through the use of the ANFR process.

PIOGA believes that the ANFR typically has not been accompanied by an updated and revised RAF related to the additional changes. This shortcoming imposes a severe disadvantage on interested parties, who can only review the revisions in a vacuum because they lack information about the rationale, data, costs or impacts of the additional changes being proposed. PIOGA therefore agrees with the MSC's recommended addition to § 305.3(b).

However, PIOGA also recommends that the Commission recognize the ANFR process in its regulations as part of the formal rulemaking process by including a definition and imposing publication, delivery and public comment requirements. Accordingly, PIOGA recommends the Commission consider adding the following provisions, which include the changes recommended by the MSC, with some additional changes:

§ 301.1. Definitions.

"ADVANCE NOTICE OF PROPOSED RULEMAKING"—A NOTICE OF INTENDED CHANGES FROM THE PROPOSED VERSION OF A REGULATION TO THE FINAL VERSION.

§ 305.3(b)(1)

When an agency extends or reopens the public comment period, if the agency is requesting comments on a text of the proposed regulation different from that previously published, the revised text shall also be published in the Pennsylvania Bulletin AS AN ADVANCE NOTICE OF PROPOSED RULEMAKING WITH A PUBLIC COMMENT PERIOD OF AT LEAST 30 DAYS and an updated and revised COMPLETED regulatory analysis form shall ACCOMPANY THE NOTICE FOR DELIVERY AS REQUIRED BY § 305.1(a) (RELATING TO DELIVERY OF A PROPOSED REGULATION) ~~be provided to the Commission.~~

§ 307.2(c)(1)

A completed regulatory analysis form relating to the final-form regulation UPDATED AND REVISED TO CORRESPOND WITH THE CHANGES MADE TO THE PROPOSED REGULATIONS.

4. Section 307.2(c)(4)

PIOGA agrees with the Commission's decision to define "preamble" and with the proposed definition. However, the Commission proposes to amend Section 307.2(c)(4) to give an agency the option of providing its responses to comments, commonly known as a "Comment and Response" document, as a separate document – as done now – or as part of the preamble.

The Commission's proposal makes sense when an agency receives few comments and the responses can be provided in a couple of pages. But because of the scope and volume of information the Commission proposes to be included in the preamble, responses to comments exceeding two pages should continue to be required to be provided as a separate document.

Accordingly, PIOGA recommends that proposed Section 307.2(c)(4) be amended as follows: "This response may be included in the preamble **UNLESS IT EXCEEDS TWO PAGES** ~~or in a separate document submitted with the regulation.~~"

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

Sincerely,



Kevin J. Moody, General Counsel
PIOGA

cc: Honorable Mike Folmer, Chair
Senate State Government Committee
Honorable Anthony Williams, Democratic Chair
Senate State Government Committee
Honorable Daryl Metcalfe, Chair
House State Government Committee
Honorable Mark Cohen, Democratic Chair
House State Government Committee
All via email