

Comments of the Independent Regulatory Review Commission



Department of Transportation Regulation #18-467 (IRRC #3139)

Hauling in Excess of Posted Weight Limit

April 27, 2016

We submit for your consideration the following comments on the proposed rulemaking published in the February 27, 2016 *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 if the regulation is in the public interest.

The Preamble included with this proposal does not provide enough information to allow for a proper evaluation of the rulemaking. In addition, many of the provisions use the word “may” and include language that is more appropriate for a guidance document or statement of policy. As written, it is unclear if these provisions are optional or required. This approach is not appropriate for a regulation because regulations have the full force and effect of law and establish binding norms.

The lack of information in the Preamble, coupled with the non-regulatory language in the rulemaking itself, prevent this Commission from determining if the rulemaking is in the public interest. In the preamble to the final-form regulation, we ask the Department to include a more detailed explanation of the intent and need for each definition and for all new language included in the rulemaking. As the Department develops the final-form of this rulemaking, we suggest that it consult with the Legislative Reference Bureau to ensure that language is written and formatted in a manner appropriate for a regulation.

2. Section 189.2. Definitions. – Implementation procedures; Clarity.

At-risk industry sector

The first part of this definition is based on statutory language found at 75 Pa.C.S.A. § 4902(a)(4) and reads as follows, “Industry sectors defined by the Department of Labor and Industry as having experienced a 20% or more decline in Statewide employment between March 2001 and March 2011....” The remainder of this definition continues to state, “...and additional industry sectors that the Department determines, in consultation with the Department of Labor and industry, to show evidence of economic decline.” We have three concerns with the second part

of this definition. First, what is the Department's specific statutory authority for this provision? The statute allows the Department of Labor and Industry to identify industry sectors that experienced a decline between March 2001 and March 2011, but does not contemplate any additional determinations to be made by the Department. Absent specific authority granted to it by the General Assembly, we recommend that this provision be deleted from the final-form regulation.

If the Department can demonstrate that it has the statutory authority for this provision, we question how it will be implemented. What criteria will be used to make that determination? We recommend that the final-form regulation specify the type of evidence that will be evaluated in making that determination. The criteria should be included in the body of the regulation, not the definition.

Third, we recommend that the final-form regulation specifically identify where a person can find out if an industry sector qualifies as an "at-risk industry sector" under this rulemaking.

Commercial site

This term is defined as, "A place including the rooms, buildings and interior or exterior places where commodities or services are exchanged, bought or sold." Would structures that fall under this definition have to be permanent in nature? This should be clarified in the final-form regulation.

Develop

This term is defined as, "The processes associated with conventional and unconventional oil and gas development." This section of the rulemaking provides a definition for "unconventional oil and gas development" that explains what processes are associated with that industry. However, there is not a corresponding definition for "conventional oil and gas development." To improve the clarity of this definition and the regulation, we recommend that the term "conventional oil and gas development" be defined.

Excess maintenance

The phrase "caused by use of over-posted weight vehicles" is being deleted from this existing definition. Commentators have suggested that instead of deleting the phrase, it should be replaced with the phrase "caused by user vehicles." We believe the suggestion offered would improve the clarity of the regulation and make it consistent with the statutory changes on which this rulemaking is based. We ask the Department to amend the final-form regulation as suggested.

Extract

The proposed definition for this term is: "The processes associated with gathering or removal of minerals, wind and other natural resources from the air, surface or subsurface, including, but not limited to, coal, stone, water and related site preparation, construction and onsite stockpiling."

We have three concerns. First, how can wind be gathered or removed? Second, the proposed definition of “natural resources” includes wind and minerals. Therefore, there is no need to include wind and minerals in this definition. Third, the overall meaning of this definition is unclear. We recommend that it be amended to improve its clarity.

Freeze-thaw period

This term is defined as: “The calendar period between February 15th and April 15th during which time thawing of previously frozen roadbed materials compromises the structural integrity of the pavement system. The posting authority may alter or modify this time period based on recent and anticipated weather conditions for a permit or agreement.” We have two concerns. First, the second sentence is substantive and is not appropriate for the definitions section of a regulation. If this provision is retained in the final-form rulemaking, we recommend that it be moved to the body of the regulation. Second, how will the regulated community know if a freeze-thaw period has been changed by a posting authority? We recommend that notice provisions be included in the final-form rulemaking.

Industry sector

This term is defined as, “Sectors included in the North American Industry Classification System.” Commentators believe that these sectors can be broad and not specific enough for proper implementation of this rulemaking. When making determinations pertaining to “at-risk industry sectors”, will the Department and Department of Labor and Industry use the subsector stratification that is also part of the North American Industry Classification System? If so, this definition should be amended to reflect that fact.

Letter of local determination

This definition states, “A determination made by the Department identifying particular vehicles, routes or uses as local in nature.” We have two concerns. First, we note that 75 Pa.C.S.A. § 4902(a)(3) allows the Department to issue a statement of policy “adopting an appropriate methodology to provide letters of local determination that identify particular vehicles, routes or uses as local in nature.” The Department is also charged with promulgating regulations to implement the statutory provisions of 75 Pa.C.S.A. § 4902. *See* 75 Pa.C.S.A. § 4902(c)(3). What methodology has the Department developed to provide letters of local determination? Since local governments can also issue letters of local determination, we believe it is important to establish a defined methodology that all posting authorities can use to make these determinations. This will create consistency throughout the Commonwealth. We ask the Department to include the methodology in the body of the final-form regulation.

Second, commentators have suggested the term “Department” be changed to “posting authority.” We agree that this change would improve the clarity of the regulation. We note that the term “Department” is also used in § 189.4(b)(1)(ii),(iv), and (vi). We ask the Department to review these provisions to ensure that the term “Department” is appropriate compared to using the term “posting authority.”

Permanent coal reprocessing or preparation plant

Paragraph (ii) states the following, “The term does not include ancillary facilities located separately from the initial processing facility site or at the coal extraction site.” A commentator has noted that certain constraints prohibit ancillary facilities from being located adjacent to a plant. In the Preamble to the final-form rulemaking, we ask the Department to explain the rationale for the language included in Paragraph (ii).

Permanent forest product processing mill

We have three concerns with this definition. First, under Paragraph (ii), what is meant by “log stockpile facility”? A commentator questions if this means any facility where forest products can be stockpiled or does it mean a permanent facility. We ask the Department to clarify this provision.

Second under Paragraph (iii), portable saw mills are not to be included in this definition “unless the portable sawmill has become permanently affixed to the real estate.” Once the portable sawmill becomes permanently affixed to real estate, it is no longer portable. Therefore, we recommend that this provision be deleted from the final-form rulemaking.

Third, as noted above, the definition of “permanent coal reprocessing or preparation plant” includes a paragraph addressing ancillary facilities located separately from the initial processing facility.” When drafting this proposed rulemaking, did the Department consider adding a similar provision for this definition? In the Preamble to the final-form regulation, we ask the Department to explain the rationale for including ancillary facilities in the preceding definition, but not this definition.

Reachable only through posted highways

Commentators have expressed concern with the clarity of this definition and how this definition and the definition of “local traffic” will be implemented. As an example, one commentator believes this definition may be interpreted in two ways. The first is to absolutely prohibit the use of posted highways as part of the “most direct route.” The second is to allow the use of posted highways as part of the “most direct route” if an alternative nonposted highway is either not available or not reasonable to use. We ask the Department to revise the definition to provide greater clarity and consistency with definition of “local traffic.”

Unconventional oil and gas development

A commentator has suggested that the following language be added to this definition to improve clarity, “These activities do not include routine maintenance or operational activities of constructed assets.” Would these activities fall under this definition? This should be explained in the Preamble, and if appropriate, the suggested language should be added to the final-form regulation.

3. Section 189.3. Local traffic. – Reasonableness; Implementation procedures; Clarity.

Subsection (c) Self-certification; proof of local traffic status.

Subsection (c) pertains to self-certification and proof of local traffic status. It specifies the types of documents the operator of a user vehicle can use to prove that it is allowed to be traveling on a particular highway. A commentator notes that the types of documents are all hard-copy paper documents. Since a user vehicle's destination can change during the course of a route, they suggest that electronic documents also be allowed as evidence. Under this provision, would electronic copies of documents be considered acceptable proof?

4. Section 189.4. Use under permit. – Whether the regulation is consistent with legislative intent; Reasonableness; Implementation procedures; Clarity.

Subsection (a) General rule.

We raise two concerns with this subsection. First, commentators believe it is unreasonable for users to carry an original or copy of the issued permit in the vehicle at all times. They note that it is impractical for bonded users that engage the services of multiple contractors. Under the rulemaking, can a bonded user allow its contractors to operate under its permit? If so, we agree with the commentators' concern and ask the Department to revise the final-form rulemaking to accommodate a bonded user that may use multiple contractors.

Second, the last sentence of Subsection (a) states the following: "The Department may determine through policy to allow use of electronic permits and self-certification documents to be utilized as acceptable proof of authorized hauling." This is non-regulatory language and should be deleted from the rulemaking. We believe the use of electronic permits and self-certification documents is appropriate and should be included in regulation and not implemented through non-regulatory documents.

Subsection (b) Permit categories.

We have 11 concerns with this Subsection. First, Paragraph (b)(1) includes the phrase "local determination highway." A commentator has noted that highways are not local determinations, rather, users of highways are designated as such. This phrase is also used in Paragraph (b)(vi). To improve the clarity of these provisions, we ask the Department to revise this terminology.

Second, can user vehicles qualify for more than one type of permit under Paragraph (b)(1)? This should be explained in the Preamble to the final-form rulemaking.

Third, a commentator believes that the inclusion of the phrase "in accordance with § 189.3" in Paragraph (b)(1)(i) is confusing and could lead to misinterpretation by some local authorities. In the Preamble to the final rulemaking, we ask the Department to explain how this provision will be implemented.

Fourth, 75 Pa.C.S.A. § 4902(a)(4) provides an exemption for at-risk industry sectors that haul on posted highways. This exemption is included under Paragraph (b)(1)(ii) of the proposed rulemaking. Per 75 Pa.C.S.A. § 4902(a)(5), the exemption expires on December 31, 2018. Neither the Preamble nor Annex of this proposal reference the expiration of the exemption. To improve the manner in which this regulation is implemented, we suggest that statutory expiration of the exemption for at-risk industry sectors that haul on posted highways be included in the Preamble and Annex.

Fifth, under Paragraph (b)(1)(ii), should “at risk” permits require clarification similar to “minimum use” permits found in Paragraph (b)(1)(iv) regarding use during the freeze-thaw period? We ask the Department to explain why minimum use permits are restricted during the freeze-thaw period, but at-risk permits are not.

Sixth, under (b)(1)(ii), a commentator has stated that the phrase “and is hauling on a posted highway currently bonded by an unconventional oil and gas development company” is not consistent with 75 Pa.CSA § 4902(a)(4) and should be deleted. Why is the quoted phrase included in this regulatory provision? This should be explained by the Department in the Preamble to the final-form regulation.

Seventh, Paragraph (b)(1)(iii) states that hauling activity, as defined by Chapter 190, a statement of policy that is currently being revised by the Department, may be authorized as a local determination permit category. We recommend that the definition of hauling activity be included in this rulemaking and the reference to Chapter 190 be deleted.

Eighth, a commentator has asked how would one qualify for a minimum use permit under Paragraph (b)(1)(iv). We recommend that the final-form regulation provide more detail on how a user can qualify for this type of permit.

Ninth, a commentator has asked why the nonbonded local determination categories in subparagraphs (b)(1)(ii)-(iv) do not apply to local authorities and why those authorities would need to enact an ordinance to make those subparagraphs applicable. We ask the Department to explain the rationale for this provision in the Preamble to the final-form regulation.

Tenth, Paragraph (b)(1)(vi) pertains to the use of local determination permits. It prohibits the use of a permit by anyone other than the owner or operator of the permit. A commentator notes that this prohibition is impractical because many industries use contractors to perform various tasks. What is the basis for this provision and how will the Department implement it? Will contractors be allowed to operate under the permit of a user? This should be explained in the Preamble to the final-form regulation.

Lastly, Paragraph (b)(2) establishes annual and seasonal bonded permits. Commentators have questioned the need for two separate permits and suggest that both be replaced with one bonded permit. In the Preamble to the final-form regulation, we ask the Department to explain the difference between the two types of permits and why both are needed.

Subsection (d) Security

The duration security must be kept is addressed under Paragraph (d)(1)(ii). We have two concerns with this paragraph. First, in addition to bonds, users may purchase or make available “any bond or other acceptable security for any appropriate duration for use during annual bonded or seasonal bonded permit periods.” This standard is vague and does not establish a binding norm. We recommend that it be deleted or amended to provide more direction to the regulated community as to what is acceptable. Second, the last sentence of this paragraph states, “The security will remain in effect until it is released by the posting authority.” A commentator has stated that there should be criteria related to the release of the security or the result would be that the authority could hold the security indefinitely. We agree and recommend that the final-form regulation be amended to include a mechanism for the release of the security.

Subsection (e) Multiple users

Paragraph (e)(2) is being amended to state that a posting authority “may” make certain determinations if multiple bonded users cannot agree on their relative responsibilities. Commentators believe the existing regulatory language, which states that posting authorities “will” make those determinations, should be retained. We agree that the original language, that requires a posting authority to act, is more appropriate for a regulation and suggest that it be retained in the final-form regulation.

Subsection (f) Determination of highway condition

This subsection establishes how inspections and reinspections will be conducted. We have two concerns. First, commentators have suggested that the subsection be amended to incorporate or reference Department publications that provide more specificity on how inspections are to be performed. To assist with the implementation and clarity of the provisions of this subsection, we ask the Department to include more detail, consistent with its existing practice and procedure, in the final-form regulation.

Subsection (f)(3) allows posting authorities to conduct roadway condition surveys and Subsection (f)(5) requires costs associated with the surveys to be paid for by the users. A commentator notes that since users must pay for the surveys, users should be notified of the surveys and be allowed to participate in those surveys. We find this suggestion to be reasonable and ask the Department to amend the final-form regulation to allow for notification and participation by the users.

5. Section 189.5. Investigations and audits. – Whether the regulation is consistent with legislative intent; Reasonableness; Implementation procedures; Clarity.

This new section implements statutory language found at 75 Pa.C.S.A. § 4902(i), relating to authority to conduct investigations and audits. Commentators note that the terms “investigations” and “audits” are not defined. They also note that this section allows for investigations for any permit category, yet the statute and this rulemaking limit audits to local determination permit categories. Will permit holders be notified of an investigation in writing?

In the Preamble to the final-form rulemaking, we ask the Department to explain how it will implement this section, as it pertains to investigations.

6. Section 189.6. Suspending, revoking or denying agreements or permits. – Reasonableness; Need; Implementation procedures.

This section allows a posting authority that determines that a user has violated a legal or contractual obligation to suspend, revoke and/or deny current and future agreements and permits “under its jurisdiction.” We are concerned that the inclusion of the phrase “under its jurisdiction” would prevent other posting authorities, such as the Department or other local governments from suspending, revoking and/or denying agreements when they have knowledge that a user violated a legal or contractual obligation under the jurisdiction of another posting authority. What is the rationale for including “under its jurisdiction” in this section of the regulation? Would a posting authority reviewing an application for a new agreement or permit be precluded from considering a violation of a user that occurred under the jurisdiction of a different posting authority? We ask the Department to explain how this provision is to be implemented.

7. Section 189.7. Use of special hauling permits for certain vehicles. – Implementation procedures; Clarity.

This section reads as follows: “Users using permits under Chapter 179 (relating to oversize and overweight loads and vehicles) may be exempt from obtaining a permit under this chapter if adequate security is otherwise provided.” We have three concerns. First what is meant by “adequate security”? Second, what process what would a user follow to request an exemption? Third, what criteria will be used to determine if an exemption will be granted? We suggest that the final-form regulation be amended to provide greater clarity on how this provision will be implemented.