

**INDEPENDENT REGULATORY REVIEW COMMISSION
PUBLIC MEETING MINUTES**

10:00 A.M.

Thursday, June 28, 2018
14th Floor Conference Room
333 Market Street

I. CALL OF THE MEETING

The June 28, 2018 public meeting of the Independent Regulatory Review Commission (Commission) was called to order by Chairman Bedwick at 10:04 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg, PA.

Commissioners Present: George D. Bedwick, Chairman
 W. Russell Faber
 Murray Ufberg, Esq.

Telephone: John F. Mizner, Esq., Vice Chairman

Absent: Dennis A. Watson, Esq.

II. APPROVAL OF THE MAY 3, 2018 PUBLIC MEETING MINUTES

Chairman Bedwick asked for a motion for approval of the May 3, 2018 public meeting minutes, as submitted. Commissioner Faber made the motion and Commissioner Ufberg seconded, and the motion passed 4-0.

III. ANNOUNCEMENT OF REGULATION DEEMED TO BE APPROVED BY LAW SINCE THE COMMISSION'S LAST PUBLIC MEETING

1. No. 3187 Pennsylvania State Police #17-85: Procedures and Specifications for Firearm Record Forms Under the Uniform Firearms Act

III. NEW BUSINESS

A. ACTION ITEMS

1. No. 3170 Pennsylvania Liquor and Control Board #54-91: Return of Liquor

Corinne Brandt, Regulatory Analyst, explained the rulemaking provides guidance to licensees and permittees for returning liquor to the board in the ordinary course of business, and clarifies existing regulations governing the disposition of liquor and malt or brewed beverages under certain circumstances. She said no public comments were received.

Jason Worley, Deputy Chief Counsel, Norina Foster, Assistant Counsel and Doug Hitz, Director of Wholesale Operations, Pennsylvania Liquor Control Board, were present to answer any questions.

Ms. Foster thanked the Commission for being helpful in fine-tuning the regulation. Chairman Bedwick thanked the board for their cooperation.

Commissioner Faber made a motion for approval. Commissioner Ufberg seconded, and the motion passed 5-0, with Commissioner Watson voting by proxy.

2. No. 3173 Environmental Quality Board #7-492: Control of VOC Emissions from Industrial Cleaning Solvents; General Provisions; Aerospace Manufacturing and Rework; Additional RACT Requirements for Major Sources of NOx and VOCs

Michelle Elliott, Regulatory Analyst, stated the final regulation amends Chapters 121 and 129 to add Section 129.63a to adopt reasonably available control technology (RACT) requirements and RACT emission limitations for stationary sources of volatile organic compound emissions from industrial cleaning solvents that are not regulated elsewhere in Chapters 129 or 130. She said the regulation also has minor corrective amendments. No public comments were received on the final regulation.

George Hartenstein, Deputy Secretary for Waste, Air, Radiation, and Remediation, Kirshnan Ramamurthy, Director, Bureau of Air Quality and Jesse Walker, Assistant Counsel, Bureau of Regulatory Counsel, Environmental Quality Board, were present to answer any questions.

Commissioner Faber commented the Department is meeting Environmental Protection Agency Standards and they did the right thing.

Commissioner Faber made a motion for approval. Chairman Bedwick seconded, and the motion passed 5-0 with Commissioner Watson voting by proxy.

3. No. 3177 Environmental Quality Board #7-521: Safe Drinking Water; General Update and Fees

Jim Smith, Regulatory Analyst, explained the regulation amends existing permit fees, adds new fees, clarifies the regulatory basis for issuing permits, and addresses concerns related to gaps in monitoring, reporting and tracking of back-up sources of supply. Comments were received from the National Association of Water Companies (NAWC), the International Bottled Water Association (IBWA), Pennsylvania State Association of Township Supervisors (PSATS), and the Hospital Healthsystem Association of Pennsylvania. NAWC and IBWA seek disapproval.

Tim Schaeffer, Acting Deputy Secretary for Water Programs, Lisa Daniels, Director, Bureau of Safe Drinking Water and Bill Cumings, Assistant Counsel, Bureau of Regulatory Counsel, Environmental Quality Board, were present to answer any questions.

Commissioner Faber asked for a brief explanation of the testing schedule for the water systems. Ms. Daniels responded the systems are on different monitoring frequencies. She provided an example that acute contaminants have much more frequent monitoring, but most chemicals range from initial quarterly monitoring then can go once every three years or once every nine years.

Commissioner Faber inquired how often one sanitarian gets around to each of the water systems. Ms. Daniels stated because of the constraints the Department is under, they are barely meeting the minimum. Commissioner Faber asked how many sanitarians there are. Ms. Daniels said they are trying to fill 17 new sanitarian positions and currently have a range of 60 positions.

Commissioner Faber questioned if fees are collected now. Ms. Daniels replied they collect permit fees and collect fees through the officer certification program. The permit fees are about \$250,000 and the officer certification is about \$800,000. Commissioner Faber asked how many new sanitarians there would be with the fee increases. Ms. Daniels replied it would allow for 33 new staff with 17 being sanitarians. Commissioner Faber inquired why the Department has not done anything with fees in so many years. Ms. Daniels explained they did attempt a fee package in 2010, but due to circumstances out of their control, the package was withdrawn.

Commissioner Ufberg asked if the Department is satisfied with the people out there they can hire or if there needs to be substantial training. Ms. Daniels replied most of the hires are entry-level people with a degree but no practical experience. She said there is a two-year training plan.

Chairman Bedwick noted he is happy to see in the regulation that the committee would review fees every three years.

Vice Chairman Mizner made a motion for approval. Commissioner Faber seconded, and the motion passed 5-0 with Commissioner Watson voting by proxy.

4. No. 3200 Department of Transportation #18-479: Access to and Occupancy of Highways by Driveways and Local Roads

Ms. Brandt stated Chapter 411 exercises the Pennsylvania Department of Transportation's (PennDOT) statutory authority to promulgate a regulation controlling the location, design, construction, and maintenance of: driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way through highway occupancy permits. The proposed amendments clarify who can apply for such a permit and includes additional requirements for applicants that do not hold fee title to the property adjoining the state highway right-of-way.

Ms. Brandt stated they received a written statement from PSATS and that it has no issue with the proposal. Staff identified the following as remaining issues: definition of owner, permit application procedure notification, and fee title holder consent. The Department made no changes to the final regulation.

Michael Dzurko, Highway Occupancy Permit Program Manager, Karen Cummings, Assistant Counsel in Charge – Permits, Jason Sharp, Chief Counsel and Jeffrey Spotts, Regulatory Counsel and Assistant Counsel in Charge – Records, Regulations and Litigation, Department of Transportation, were present to answer any questions.

Mr. Dzurko explained the purpose of the regulation is to provide safe and reasonable access to state highways. He said location of a driveway is regulated at a safe sight distance and the designs of the driveway are regulated to make sure it functions with the highway system. Mr. Dzurko said the highway occupancy permit program mission is to provide consistent quality service by reviewing applications, issuing permits, and inspecting permit parts to ensure highway safety.

Mr. Sharp added they got here today because Representative Brett Miller (R-Lancaster) believed a policy done by PennDOT should have been promulgated as a regulation. He stated the Joint Committee on Documents (JCD) agreed and ordered PennDOT to move forward with the promulgation.

Mr. Sharp clarified that PennDOT is in no way looking to grant or adjudicate any property rights in the permitting process. He said property rights, when they get to PennDOT, have already been determined. Mr. Sharp added PennDOT is in no way asking to grant property rights, and it should not be constrained from issuing permits and denying property rights that someone already has.

Mr. Sharp noted a lot of what is driving this is utility condemnations regarding access to property. He said use is not relevant to PennDOT as the condemnation process is separate from the permit process. Mr. Sharp stated they have had 56 petitions to intervene in the application process since 2006 with only three being disputes between the easement holder and the fee title holder and all three were condemnations related to utilities. He added PennDOT only grants a permit if there is an agreement between the applicant and the fee owner.

Chairman Bedwick commented when IRRC deals with a controversial regulation they like to point out the Regulatory Review Act does not review the policy behind the regulation as that is a legislative matter. He explained that IRRC looks at the regulation as all or nothing.

Commissioner Ufberg asked to be walked through the procedure for the consideration of a claim by an equitable owner for a permit. In response to Commissioner Ufberg, Ms. Cummings explained the procedure for consideration of a permit application by an equitable owner.

Commissioner Ufberg questioned if there is any time requirement for a license holder to have interest for the application to be considered. Ms. Cummings responded she would look

what rights are granted. Commissioner Ufberg commented licenses are revocable and have time constraints so that is of concern to a fee owner. Ms. Cummings stated the fee owner would have the opportunity to bring that forward and say the permit has a time limit or should not be given. Commissioner Ufberg commented there should not be adjudication of property rights by PennDOT, but the language does not say what is being said today. He stated it should have that there has to be a consensual agreement between both parties or a permit is not granted until there is an agreement.

Chairman Bedwick noted he shares the same concerns. He asked what gives PennDOT the authority to say no as a license holder is defined as an owner in the regulation. Mr. Sharp stated the license agreement has to have the right to access in it. Chairman Bedwick replied that is not what is said in the written explanation. Mr. Sharp noted the concern but stated this is part of a larger package they wanted to put forward.

Commissioner Ufberg commented he would like some assurance for the fee owner. Mr. Sharp noted if someone buys interest in a property they only have the rights granted to them. He said that is why there is an agreement between them and it is limited to those that are provided right to access.

Chairman Bedwick quoted PennDOT from the case cited with Duquesne. Mr. Sharp stated that is specific to law of easements. Ms. Cummings added PennDOT is not going to evaluate the easement to that extent as if it has on its face the right to access, PennDOT will grant the permit. Chairman Bedwick commented the regulation should say a permit is issued only if it is clear on the face or if the fee owner has agreed.

Commissioner Ufberg commented he does not want to see controversy among landowners and criticism of PennDOT. Mr. Sharp stated they can address some of the concerns in a larger package. Commissioner Ufberg noted he would like PennDOT to come back within six months to discuss a larger package.

Chairman Bedwick inquired if PennDOT prior to 2006 and adoption of this policy faced any adverse condemnation proceedings. Mr. Sharp replied not that they are aware of any such proceedings.

Chairman Bedwick questioned if the fee owner has gotten an access permit to build their driveway now and if an easement holder has right of access and wants to alter that, how is that sorted out. Ms. Cummings said they would ask the parties to sort it out on their own.

Chairman Bedwick noted that IRRC's comments recommended that a process for notice be included in the regulation, but PennDOT chose not to. PennDOT's rationale for not specifying notice requirements was that it did not want to preclude any notice methods. Chairman Bedwick said the problem with PennDOT's approach is it makes the determination subjective rather than objective and provides notice only to the fee owner. He suggested PennDOT should protect itself by giving notice to everyone.

Chairman Bedwick asked whether someone who has intervened has the right to appeal an administrative decision. Mr. Sharp responded if it is a protestor they are not considered a party, but if someone intervenes they are considered a party.

Chairman Bedwick questioned why indemnification is provided to PennDOT only for actions by the fee owner and not any ownership interest. Ms. Cummings replied that makes sense. Commissioner Ufberg asked if there is any sense in providing that if the permit approval is rejected or overturned by the court of law if the applicant indemnifies the fee owner. Chairman Bedwick asked if PennDOT could require the non-fee owner applicant to post a bond in favor of the fee owner if there isn't fee owner consent to the permit. Mr. Sharp replied he does not know if they have that ability.

Chairman Bedwick suggested PennDOT consider conditional agreements of sale and options to purchase as if someone has the option to purchase they may want to be certain they have access to a permit. He said it could be similar to the gaming law as there is a distinction between approving a permit and issuing a permit.

Vice Chairman Mizner commented he hopes PennDOT has a sense of some of the issues that are out there and is aware of the citizens' concerns. He said as a lawyer he thinks about the clients and how frustrated some of them get.

Rep. Miller provided extensive comments on the regulation. He stated the offering of these new regulations by PennDOT strongly suggests a preference to those with a legal interest in a property and not those of the fee title holder, and dramatically altering the historic understanding and usage of who owns property is not a compelling public interest. Rep. Miller commented even if ownership rights of those with a legal interest in a property were to be considered on par with the ownership rights of fee title holders, this, in no way, abrogates the rights of the fee title holder. The issue at hand is not ownership, per se but access.

Rep. Miller continued in light of the fact that even PennDOT concludes that Pennsylvania's regulations are directly in alignment with the regulations of other states, and in particular to the states bordering Pennsylvania, there is, therefore, no compelling reason to change Pennsylvania's regulations concerning ownership of land, as there is no evidence that other states are doing the same. He said while it is true that PennDOT has the right to grant or deny access to the state's property or to a consenting owner's property, it does not have authority to grant access to another person's property without authorization. Rep. Miller noted that if the regulation should be changed, PennDOT will be placing itself in the position of granting access to the entity with a legal interest in a property while simultaneously engaging in a de facto taking without just compensation of the fee title holder's property.

Rep. Miller said that by granting the permit to the one, in terms of fee title owner and another entity with a legal interest in the property, PennDOT has cut off negotiations and essentially taken away negotiating rights from the fee title holder. He stated PennDOT should recognize the standing of the fee title holders and give great deference to their rights and needs. A concern related to the proposal's indemnification provision includes the fact that if PennDOT

mandates proof of indemnification for itself, then it should mandate that the entity with a legal interest in a property also indemnifies the fee title holder from any damages as well.

Regarding mandating notice, language does not specify or require that the fee title holder has actually received the notice, Rep. Miller commented. He noted another concern in the proposed regulations is that PennDOT does not require verification that the easement agreement that is provided to PennDOT is the most current agreement. Rep. Miller added PennDOT's argument that changing this language will avoid delays and potential litigation is conjecture and cannot be accepted at face value as evidenced by the fact that the current status of Pennsylvania's law, which is in keeping with adjoining states, has shown absolutely no record of such delays or litigation. He said it could be argued that if PennDOT's proposed regulations were to be approved, litigation may, in fact, increase.

Rep. Miller also stated that PennDOT's admission of not following the Regulatory Review Act for over a decade is troubling and does not present a strong track record of avoiding administrative problems by following legislative directives, nor does it evoke a sense of confidence in the agency's ability to avoid the same in the future. This is particularly true in light of the fact that PennDOT has admitted that it has twice before started to promulgate these regulations and twice before failed to follow through. He stated he is requesting the current regulation remain in place and to deny the final regulation.

Vice Chairman Mizner questioned if the Representative has discussed it with his fellow legislators. Rep. Miller stated he has not had much opportunity to discuss it with a multitude of colleagues but has discussed it with some of them. Vice Chairman Mizner commented IRRC appreciates hearing from members of the legislature.

Mr. Sharp commented the indemnification referenced by Rep. Miller is in reference to a different indemnification.

Commissioner Faber questioned what the process of denial for a regulation and resubmittance is. Ms. Leslie Lewis Johnson, IRRC's Chief Counsel stated if it is disapproved PennDOT has 40 days to return a final form regulation. Once it is submitted it can be approved or disapproved, and regardless of the second action by IRRC, the General Assembly has 14 calendar days to review it. It would be deemed approved if the General Assembly takes no action.

Commissioner Faber asked if a denial would conflict with the JCD. Ms. Johnson replied IRRC's denial is separate from JCD but it would impact PennDOT's ability to issue permits. Commissioner Faber also asked if IRRC approves the regulation how it can ensure that the concerns raised today are put on the record when PennDOT comes back with the additional package. Chairman Bedwick replied IRRC can prepare a letter.

Chairman Bedwick asked when the JCD original timeframe ran out. Ms. Johnson replied early June. Chairman Bedwick questioned what the process is if the regulation is approved. Ms. Johnson stated IRRC would be done in the process and PennDOT can proceed with promulgation.

Chairman Bedwick commented there is not a great gap between the concerns raised and where PennDOT is. Commissioner Faber added he is concerned with the issues but also concerned with PennDOT continuing in the permitting process.

Commissioner Ufberg noted he will be voting yes because it is clear PennDOT has shown they have the interest of the citizens in mind.

Chairman Bedwick stated he will vote yes because of the concern with the timeframe and because the differences are much less than they initially appeared.

Vice Chairman Mizner made a motion to disapprove the regulation and Chairman Bedwick seconded, but the motion failed by a vote of one to four.

Commissioner Ufberg made a motion for approval. Chairman Bedwick seconded, and Vice Chairman Mizner commented he would vote yes on the motion to approve the regulation because he agrees with what has been said about PennDOT and will take it at face value that they will work hard to address the concerns.

The motion passed 5-0 with Commissioner Watson voting by proxy.

IV. OTHER BUSINESS

Approval of Vouchers

Commissioner Faber made motions to approve vouchers and expenses for the period April 20, 2018 through May 3, 2018. Commissioner Ufberg seconded, and the motions passed 4-0.

V. DATE AND PLACE OF SUBSEQUENT MEETING

Chairman Bedwick announced the next public meeting is scheduled for Thursday, July 19, 2018, at 10:00 a.m. in the 14th Floor Conference Room, 333 Market Street, Harrisburg.

VI. EXECUTIVE SESSION ANNOUNCEMENTS

Chairman Bedwick announced that no executive session would be held.

VII. ADJOURNMENT

Chairman Bedwick announced the meeting adjourned at 12:30 p.m.