



# The Regulatory Process and Proposals for Reform

Environmental Law Forum  
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## Regulatory Review Process Overview

- Under their respective enabling statutes, Commonwealth agencies promulgate regulations.
- Depending upon the circumstances, an agency may have to:
  - Create, amend, or repeal a regulation to implement legislation;
  - Ensure that existing regulations do not conflict with a recently enacted or amended federal or state regulation or statute;
  - Comply with a decision of a state or federal court; or
  - Clarify an existing regulation.

## Regulatory Review Process Overview

- Outside of the enabling statutes, DEP has four statutes that govern the regulatory review process.
  - **Commonwealth Documents Law** (“CDL”), 45 P.S. §§ 1102–1208, which outlines the procedural steps in the preparation of a regulation;
  - **Administrative Code**,
    - 71 P.S. § 232, which requires the Office of the Budget to prepare a fiscal note for proposed regulations;
    - 71 P.S. § 510-20, which established the Environmental Quality Board.
  - **Commonwealth Attorneys Act**, 71 P.S. §§ 732-101–732-506, which provides for legal review and approval by the Offices of General Counsel and Attorney General; and
  - **Regulatory Review Act** (“RRA”), 71 P.S. §§ 745.1–745.15, which provides for oversight and review by IRRC and the General Assembly.



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## Regulatory Review Process Overview

- Entities included in the regulatory review process are
  - The promulgating agency,
  - The Environmental Quality Board (“EQB”),
  - Independent Regulatory Review Commission (“IRRC”),
  - Legislative standing committees,
  - Office of General Counsel,
  - Office of the Budget,
  - Office of Attorney General,
  - Legislative Reference Bureau (“LRB”),
  - Joint Committee on Documents (“JCD”), and
  - Members of the public, the regulated community, and their representatives.



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## Development of Proposed Regulation

- Authorization given by the agency Secretary to move forward with development of regulation.
- DEP staff develop proposed rulemaking documents:
  - Annex A
    - Regulatory changes
  - Preamble
    - Narrative explanation
  - Regulatory Analysis Form (“RAF”)
    - Need, costs, alternatives
  - Regulation presented to Advisory Committees
- Proposed Rulemaking to EQB for approval.



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## Development of Proposed Regulation

- The Administrative Code, 71 P.S. § 510-20, established the EQB, which is a 20-member independent board that adopts all of the Department of Environmental Protection's regulations.
- It is chaired by the Secretary of the Department of Environmental Protection.
- The Board includes eleven state agencies:
  - Department of Environmental Protection, Agriculture, Health, Community and Economic Development, the Public Utility Commission, the Fish and Boat Commission, the Game Commission, Labor and Industry, the Governor's Office of Policy, the Historical and Museum Commission, Transportation;
  - five members of the Citizens Advisory Council; and
  - four members of the Senate and House.



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## Development of Proposed Regulation

- The CDL requires an agency to publish notice of its intention to promulgate, repeal, or amend a regulation.
- This notice, which is published in the *Pennsylvania Bulletin*, must include:
  - The text of the proposed regulation, indicating any changes in the language of the existing regulation;
  - The agency’s statutory authority to propose the regulation;
  - A brief explanation of the proposed regulation or any amendments;
  - A request for comments with a deadline for submittal of comments; and
  - Any other statement required by law.
- Before taking any action on a regulation, the agency must review and consider written comments submitted.



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## Development of Proposed Regulation

- The Administrative Code directs the Office of the Budget to prepare a fiscal note for regulatory actions that receive money from the State Treasury.
- The fiscal note must state the costs of the proposed action.
- It must be published in the *Pennsylvania Bulletin* at the same time as the proposal and contain the following information:
  - The fund or appropriation source providing the expenditures for the proposal;
  - The probable cost of implementing the proposal in its first fiscal year, and a projected cost estimate for each of the next five fiscal years;
  - The fiscal history of the program expenditures;
  - The probable loss of revenue for the fiscal year of its implementation, and the projected loss of revenue for each of the next five fiscal years; and
  - The recommendation, if any, of the Secretary of the Budget.



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## Development of Proposed Regulation

- The Commonwealth Attorneys Act provides for the review of a regulation as to form and legality.
- Before publication in the *Pennsylvania Bulletin*, a regulation must be in
  - proper form,
  - statutorily authorized, and
  - constitutional.
- The General Counsel and the Office of Attorney General (“OAG”) both perform this function, but do so independently of each other.
- They both review regulations first as proposed, and then again in final-form.



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## Development of Proposed Regulation

- During the OAG 30-day review period, the Attorney General must convey any legal concerns related to the regulation to the General Counsel or the independent agency counsel.
- If the Attorney General approves the regulation, it can be published in the *Pennsylvania Bulletin*.
- But if legal issues are raised, the time for Attorney General review is put on hold or “tolled.”
- During this period, the agency and OAG reach a consensus or resolution.



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## Development of Proposed Regulation

- If the issues raised by the OAG during this review period are not resolved, the OAG may disapprove the regulation.
- Upon disapproval, the OAG must notify the General Counsel or independent agency, the Secretary of the Senate and the Chief Clerk of the House of Representatives of the reasons for the disapproval.
- A disapproved regulation may be published with or without revisions.
- However, if the agency chooses to publish the regulation without revisions, it must also publish the Attorney General's objections.
- The OAG may appeal the agency's decision to Commonwealth Court and may request a stay to prevent the implementation of the regulation.



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## Development of Proposed Regulation

- Review under the RRA starts after OAG approval.
- Proposed rulemaking package distributed to Environmental Resources and Energy Committees ("ERE"), IRRC, and the Legislative Reference Bureau ("LRB") on the same day.
- A completed RAF and preamble must accompany the regulation.
- The LRB publishes the preamble and regulation in the *Pennsylvania Bulletin*.
- The RAF is not published in the *Pennsylvania Bulletin* but it is posted on IRRC's website with the proposed regulation.



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## Review of Proposal Under the RRA

- The RRA was enacted in 1982 to address concerns by the legislature regarding the promulgation of regulations.
- The RRA establishes IRRC which has five commissioners and a staff of 11 persons.
- The RRA applies to every department, departmental administrative board or commission, independent board or commission, agency, or other authority of this Commonwealth,
  - except the Senate, the House of Representatives, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, or any court, political subdivision, or municipal or local authority.



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## Review of Proposal Under the RRA

- In 2018, IRRC reviewed a total of 64 regulations, including 29 proposed and 35 final regulations.
- More than 2,500 public comments were submitted on pending regulations in 2018.
- No comments were submitted by legislative standing committees, however 101 members of the House and Senate submitted comments on these regulations.
- DEP published 12 final regulations and 4 proposed rulemakings.



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## Review of Proposal Under the RRA

- Under the RRA public comment periods must, in general, be at least 30 days.
- Anyone may submit comments to the agency during the public comment period set forth in the preamble.
- The RRA requires the agency to forward copies of all comments it receives to the Committees and IRRC within five business days of receipt.
- IRRC Review
  - conducts independent outreach to notify groups and individuals who might be impacted by a proposed regulation.
  - forwards comments to agency that were submitted to IRRC.
  - must submit its comments, recommendations, and objections within 30 days of the close of the public comment period.
- Committees may submit comments, recommendations, and objections to the agency and IRRC at any time prior to the agency's delivery of the final-form regulation.



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## Review of Proposal under the RRA

- IRRC must determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intent of the General Assembly.
- To determine whether a regulation meets the statutory authority and legislative intent, IRRC examines:
  - Language used in the authorizing statute;
  - Comments of the Committees and members of the General Assembly;
  - Comments in the *Legislative Journal*;
  - Pertinent legal precedents; and
  - Attorney General opinions.



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## Review of Proposal Under the RRA

- IRRC must also consider the following criteria to determine if 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;
  - Substantive need for legislative review;
  - 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;
  - Comments, objections, or recommendations of a Committee; and
  - Compliance with the RRA and IRRC's regulations.



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## Draft Final Rulemaking

- Agency reviews comments.
- Draft final regulation (Annex A) is prepared.
- Draft final regulation discussed with Advisory Committees.
- DEP prepares final rulemaking documents:
  - Comment and Response Document
  - Revised Annex A, Preamble, RAF
  - Preliminary review (same as proposed review process)



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## Draft Final Rulemaking

- As a result of input received during the proposed stage or on its own initiative, the agency may modify the text of the final-form regulation.
- Under the CDL, modifications may not enlarge the scope of the proposed regulation. 45 P.S. § 1202.
- However, Pennsylvania’s courts have interpreted the phrase “enlarge the scope” very broadly. *Brocal Corp. v. PennDOT*, 528 A.2d 114 (1987).
- Generally, the courts have found that the scope has not been enlarged as long as the final-form regulation deals with the same subject matter as the proposed regulation. *Community Services Management Corp. v. DPW*, 482 A.2d 1192 (1984).



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## Final Rulemaking

- Upon EQB adoption, draft final rulemaking becomes a final rulemaking.
- Final rulemaking sent to OGC and Budget.
- Final rulemaking submitted to House and Senate ERE Committees, OAG, and IRRC.
- Following delivery, IRRC cannot act for at least 20 days so that the Committees have an opportunity to review the regulation.
- A regulation is deemed approved if –
  - IRRC did not file comments on the proposed regulation, the agency has not made any changes to the regulation from proposed to final form, and a Committee has raised no concerns.



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## Review of Final Rule Under the RRA

- Committees can take action on a final-form regulation at any time up to 24 hours before IRRC's public meeting that considers the regulation.
- A Committee can approve, disapprove, or notify the agency and IRRC of its intent to review the regulation.
- If a Committee takes no action prior to IRRC's public meeting, the Committee is deemed to have approved the regulation.
- If a Committee disapproves or notifies IRRC and the agency of its intent to review the regulation, the Committee will have 14 days after it receives IRRC's order to take action.
- If the Committee does not act during its 14-day review period, the regulation is deemed to be approved and the agency may proceed with the promulgation of the regulation.



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## Review of Final Rule Under the RRA

- There is a 48-hour blackout period before IRRC's public meeting.
- Unsolicited public comments relating to the substance of a regulation on IRRC's current public meeting agenda will be embargoed during the final 48 hours prior to the start of the meeting.
- The public comments will be provided to IRRC at the public meeting.
- The blackout period does not apply to communication between IRRC and agency staff, members of the General Assembly, and legislative staff.
- IRRC may also request and receive information from outside sources during the blackout period.



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## Review of Final Rule Under the RRA

- After delivery to IRRC, an agency may withdraw a final-form regulation at any time before IRRC's public meeting.
- In this case, the agency must notify the Committees and IRRC that it is withdrawing the final regulation and IRRC must stop its review and not take any action on the regulation.
- The agency may redeliver the final regulation at a later date to the Committees and IRRC, as long as it is done within the remainder of the two-year period.
- Upon redelivery, the final review process starts anew.
- If the agency does not deliver a final-form regulation within two years from the close of the public comment period, the rulemaking is deemed to be withdrawn.



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## Review of Final Rule Under the RRA

- The RRA limits the scope of IRRC's review of a final-form regulation, and such review can relate only to the following areas:
  - Comments, recommendations, or objections raised by IRRC to the proposed version of the regulation;
  - Amendments, additions, revisions, or deletions to the proposed version; or
  - Recommendations, comments, or objections conveyed by a Committee to the agency or IRRC.
- At the public meeting, IRRC will vote to either approve or disapprove the regulation.
- If IRRC takes no action or if there is a tie vote, the regulation is deemed to be approved.



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## Review of Final Rule Under the RRA

- IRRC and Committee approval of the regulation concludes the review process under the RRA.
- The agency may then submit the regulation to the Attorney General for final review.
- Upon the Attorney General's approval for form and legality, the agency may submit the regulation to the LRB for publication in the *Pennsylvania Bulletin*.
- The regulation becomes effective on the date of publication or on a later date specified by the agency in its order adopting the regulation.



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## Review of Final Rule Under the RRA

- If IRRC approves the regulation and either one or both of the Committees disapproves the regulation or notifies IRRC and the agency of its intent to review the regulation, the agency may not promulgate the regulation for 14 days after the Committees receive IRRC's order.
- During the 14-day review period, the Committee(s) that took action may report a concurrent resolution disapproving the regulation.
- If a concurrent resolution is not reported within 14 days, the agency can deliver the regulation to the Attorney General for review.
- Upon the Attorney General's approval for form and legality, the agency may submit the regulation to the LRB for publication in the *Pennsylvania Bulletin*.
- The regulation becomes effective on the date of publication or on a later date specified by the agency in its order adopting the regulation.



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## Review of Final Rule under the RRA

- If IRRC disapproves a regulation, it issues an order specifying which criteria have not been satisfied.
- The order is delivered to the Committees, the agency, and the LRB.
- An IRRC disapproval temporarily bars the agency from promulgating the regulation pending subsequent review.
- The subsequent review provides the opportunity for further explanation or amendment of the regulation by the agency relating to IRRC's disapproval order or, at the agency's option, withdrawal of the regulation.



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## Review of Final Rule Under the RRA

- The agency may resubmit the regulation with or without modifications.
- In either case, the agency must submit on the same day a report to the Committees and IRRC within 40 days of receipt of the disapproval order.
- The report must contain the original or revised final-form regulation and IRRC's disapproval order.
- If the regulation is submitted without revisions, the report must respond to the concerns raised in the order.
- If the regulation is revised, then the report must contain a detailed explanation of how the revisions respond to IRRC's concerns.



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## Review of Final Rule Under the RRA

- IRRC will then vote to either approve or disapprove the regulation.
- After IRRC acts on the regulation a second time, IRRC notifies the Committees of its action.
- Both Committees have 14 calendar days to report a concurrent resolution.
- If either Committee does not report out a concurrent resolution within 14 calendar days, the agency may proceed with final promulgation.



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## Review of Final Rule Under the RRA

- If a Committee reports a concurrent resolution disapproving the regulation, promulgation is suspended until the concurrent resolution process is completed.
- Both chambers must adopt the concurrent resolution by majority vote to continue the bar on the promulgation of the regulation.
- If both chambers adopt the concurrent resolution, it is presented to the Governor for consideration.
- If one chamber does not adopt the concurrent resolution within the 14 day time period, the General Assembly is deemed to have approved the regulation.



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## Review of Final Rule Under the RRA

- The Governor has ten calendar days to act on the concurrent resolution.
- If the Governor signs the concurrent resolution, or if the Governor does not veto the concurrent resolution within ten calendar days, the concurrent resolution is approved and the regulation is permanently barred.
- If the Governor vetoes the concurrent resolution, the Senate and the House of Representatives may override the veto.
- A veto override requires a two-thirds majority vote in each chamber, and must be passed within 30 calendar or ten legislative days, whichever is longer.
- A successful veto override will permanently bar the regulation.
- However, if either chamber takes no action, or does not override the Governor's veto, the General Assembly is deemed to have approved the regulation.



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## Review of Existing Regulations

- IRRC may review any existing regulation that has been in effect for at least three years.
- This review may be undertaken either at IRRC's own initiative or at the request of any person or member of the General Assembly.
- IRRC performs an advisory role in the review of an existing regulation.
- If IRRC finds that the regulation is contrary to the public interest because it does not satisfy the regulatory review criteria outlined in Section 5.2 of the RRA, it may recommend changes to the agency.
- IRRC may also recommend statutory amendments to the Governor and General Assembly.



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## Review of Existing SOP

- Under the RRA, the JCD, which oversees and directs the functions of the LRB and publication of the *Pennsylvania Bulletin*, reviews IRRC's regulations and serves as the arbiter as to whether a Statement of Policy ("SOP") or agency document should be promulgated as a regulation.
- If IRRC or a Committee finds that an SOP or agency document should be promulgated as a regulation, IRRC or the Committee may present the matter to the JCD for review.
- If the JCD determines that the SOP or other document is being used improperly, it may order the agency either to promulgate it as a regulation within 180 days or stop using it altogether in the business of the agency.



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## Regulatory Agendas

- Six-Month Regulatory Agenda for all Commonwealth agencies:
- Governor's Office publishes in the PA Bulletin twice per year (February/March and July/August)
- Most recent agenda was published August 4, 2018
- DEP's Rolling Regulatory Agenda:
- Provides a snapshot of regulations both active and complete
- Available on DEP website



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# Thank You

## Speaker Contact Information

Robert “Bo” Reiley

[rreiley@pa.gov](mailto:rreiley@pa.gov)

- These materials do not necessarily reflect the views of the Commonwealth, the Office of General Counsel or the Pennsylvania Department of Environmental Protection.

