

Testimony of Patrick McDonnell
Secretary, Pennsylvania Department of Environmental Protection
State Government Committee Public Hearing on State Government Regulations
June 6, 2017

Good morning. Chairman Metcalfe, Chairman Bradford, and members of the State Government Committee, thank you for the invitation to appear before you to share the Department of Environmental Protection's (DEP) perspectives on the regulatory review process.

As you know, DEP's regulatory review process is bound by the Regulatory Review Act, the Administrative Code, the Commonwealth Documents Law, and the Commonwealth Attorneys Act. These four statutes specify the development, input and oversight of the process, and have worked well. We also follow Executive Order 1996-1, which outlines Regulatory Review and Promulgation, and all guidelines and regulations of the Independent Regulatory Review Commission (IRRC).

As guided by statute and policy, the DEP regulatory process is designed for the input of many interested stakeholders – including legislators, industry organizations, individual companies, small businesses, advocacy organizations, and all residents of the Commonwealth who have a stake in the protection and preservation of public health and the environment.

Stakeholder engagement and public comment are essential to the process. We meet with stakeholders both formally and informally. Engagement with interested stakeholders formally begins when the Governor's Regulatory Agenda is published twice a year. The purpose of that publication is to be as transparent as possible about the Department's focus. Further, DEP provides and regularly updates the department's regulatory agenda. This rolling regulatory agenda provides a snapshot of where DEP regulations are in the regulatory review process, including when regulations are scheduled to be presented to advisory committees or considered by one of our rulemaking boards.

Following publication of the Governor's Regulatory Agenda in the *Pennsylvania Bulletin*, DEP undertakes an outreach process to those who are likely to be affected by the regulation. More than 25 established Advisory Committees meet regularly with DEP staff. In addition, the Citizen's Advisory Council performs non-partisan, independent oversight of the operations, management and policy of DEP. Through their diverse representation, these committees provide DEP with invaluable input during the development of a rulemaking. Further, these formal advisory committees don't include the informal discussions DEP staff have with other companies or groups of companies around specific policies and regulations.

DEP carefully develops regulations, taking into consideration feedback received from interested stakeholders. Further, all rulemaking packages must include the following analysis:

- A brief, nontechnical explanation of the regulation;
- The statutory mandate for the regulation;
- The compelling public need of the regulation;

- The public health, safety, or environmental risks associated with nonregulation;
- Individuals or groups that are likely to benefit from the regulation;
- Individuals, groups, or entities that will be required to comply with the regulation;
- The outreach conducted by the agency with the regulated community;
- An estimate of the costs and/or savings associated with compliance and implementation;
- A cost/benefit analysis of the regulation;
- Nonregulatory alternatives considered and their reason for their dismissal;
- Alternative regulatory schemes considered and the reasons for their dismissal;
- A statement of the compelling Pennsylvania interest if the regulation exceeds federal standards;
- Any requirements that would place Pennsylvania at a competitive disadvantage compared to other states; and
- An intra-agency review schedule for the regulation.

DEP must also include a brief preamble that describes the compelling public need the regulation is designed to address, what the regulation requires in legal and practical terms, and who the regulation is likely to affect.

All rulemakings must be submitted for review to the Governor's Office of General Counsel (OGC), the Secretary of the Budget, and the Governor's Policy Secretary. Once formally adopted by one of DEP's three rulemaking Boards, the regulation is submitted for formal sign-off by the OGC and the Secretary of the Budget.

DEP's three rulemaking Boards include the Environmental Quality Board (EQB), the Board of Coal Mine Safety (BCMS), and the Coal and Clay Mine Subsidence Insurance Fund Board (MSI Board). The EQB is a 20-member board, chaired by the Secretary of DEP, and representative of 11 agencies, which include transportation interests, labor interests, agriculture interests, public health, fish and boat, game interests, historical interests, public utility interests; the four Chairmen of the House and Senate Environmental Resources and Energy Committees; and five members of the Citizen's Advisory Council to represent the public interest. As prescribed by the legislature, the BCMS is comprised of three members who represent mining companies, three members who represent mining worker unions, and is chaired by the Secretary of DEP. The MSI Board includes the Pennsylvania State Treasurer and Insurance Commissioner as members.

The function of a DEP regulation is to provide specific requirements for activities that the legislature has given one of the rulemaking boards authority to develop. These activities include earth disturbance, air emissions, natural gas well construction, sewage treatment, landfill operations, and coal mining -- to name only a few of the myriad regulated activities that take place daily throughout the Commonwealth.

If the rulemaking boards choose to adopt a proposed rulemaking, after OGC and the Secretary of the Budget signs off, it is sent to the Attorney General for review. If the Attorney General approves the rulemaking for form and legality, the regulation is transmitted to the legislative oversight committees, IRRC, and the Legislative Reference Bureau for publication in the *PA Bulletin*. This kicks off the public comment period. Public comment periods are typically 30 to 60 days, but several have been substantially longer. In 2013, DEP piloted a "Reg Comments" system that allowed all comments to be submitted and viewed publicly for enhanced transparency. In 2015,

DEP unveiled the eComment System, which applies that concept across all of DEP's regulations, technical guidance documents, policies, general permits, and other reports.

DEP often receives hundreds, or sometimes thousands, of comments on any particular regulation, including comments from legislators and IRRC. Under the Regulatory Review Act, DEP staff review each submitted public comment carefully, and consider modifications or adjustments to a proposed regulation. All comments are responded to in a separate document.

Public comment and constructive criticism are essential to this process. It is good public policy for DEP staff to understand as much as we can about these highly technical topics, and we rely on our stakeholders to provide constructive comments to achieve balanced regulations that protect public health and the environment while allowing, and even helping, the economy to thrive.

After the regulation is amended by DEP, the stakeholder outreach process is commenced again, with formal advisory committees and informal stakeholder meetings, if necessary. Many times, additional clarifications are made before the rulemaking is reviewed by the Governor's Office and considered again by the appropriate rulemaking board for adoption as final. After this process, it is formally considered by the Legislative Oversight Committees and IRRC.

In 2012, the Regulatory Review Act was amended to include small business considerations in the development of rulemakings. DEP consults regularly with our Small Business Compliance Advisory Committee, Small Business Ombudsman, and small businesses in impacted industries. Overall, this approach has helped to develop regulations that are smarter for small and large businesses alike.

On March 19, 2013, this committee held a hearing on the Regulatory Review Process, and received testimony from Debra Borie-Holtz, Ph.D., a faculty member of the Bloustein School of Planning and Public Policy at Rutgers University. She and colleague Stuart Shapiro have since published a textbook titled, *The Politics of Regulatory Reform*. In developing their book, the researchers evaluated 28 states similar in geography, political context, size, and transparency in their regulatory processes for their regulatory reforms -- meaning those processes put in place by legislatures and governors.

They found that Pennsylvania ranked as one of the lowest volumes of rulemaking in the United States and is consistently low year to year. In 2007, Pennsylvania promulgated 68 regulations, and in 2016, 75, across all of state government. By comparison, in 2007, Washington State promulgated 993 regulations.

The researchers also rated all 50 states on three criteria of regulatory reforms: executive review, legislative review, and fiscal analysis, and found that Pennsylvania and North Carolina have the most regulatory reviews of any state in the nation. They found that Pennsylvania's current regulatory process is more complex and has more "veto points" than the federal government does -- which is why they wrote a chapter on Pennsylvania. Dr. Borie-Holtz's testimony notes the uniqueness of IRRC, the existence of a timeline for finalization of rulemaking, and the reviews by three separate entities to ensure the rulemaking does not exceed statutory authority.

It should be noted that DEP's regulations are not static. They are reflective of the needs of the Commonwealth. In fact, DEP technical and legal staff are always mindful of the changing science,

technologies, and toxicology advances; and regularly evaluate regulations to ensure DEP's standards keep pace appropriately. We also must keep pace with new industry developments, while being careful to not constrain economic development.

Codified into most of Pennsylvania's regulations are permits and inspections. The permit approval process occurs prior to an industrial activity (or during modification); and inspections occur as specified in regulations throughout the life of the permitted activity. Both permits and inspections cover almost every industry and are often a requirement to maintain primacy of certain Federal programs, such as Safe Drinking Water, Air Quality, and Mining.

There are two main types of permits: individual and general. Individual permits require in-depth reviews by permit writers to ensure that the activity does not unnecessarily impact public health or the environment. Depending on the type of permit applied for, the permit process can often include public comment so DEP can evaluate concerns by interested stakeholders, such as residents who live near the activity being permitted.

General permits (GPs) are intended to be "out-of-the box" solutions that can be easily applied to any site in the Commonwealth, whereas individual permits can apply unique technologies to site-specific conditions. General permits are not mandatory to obtain; individual permits are always an option. Typically, it is a business decision to seek a GP. Though not required, GPs can streamline requirements of both Federal and State regulations, such as the case with the proposed Air Quality GP5 and GP5a.

Not every program can develop and issue GPs as a permitting option. Some of the programs that use GPs are:

- For National Pollutant Discharge Elimination System and water quality permits, statutory authority is found in the Clean Streams Law, 35 P.S. 691.402 and the regulatory authority of 25 Pa. Code 92a.54. and 25 Pa. Code 91.27. Additional federal regulatory authority from 40 CFR 123.25 is incorporated by reference into Chapter 92a3.
- For waterways engineering and wetlands, statutory authority is found in Section 7(b)-(d) of the Dam Safety and Encroachments Act, 32 P.S. 693.7(b)-(d) and Subchapter L of the 25 Pa. Code Chapter 105 regulations, 25 Pa. Code 105.441-449.
- For air quality, the general permit statutory authority is found under Section 6.1(f) of the Air Pollution Control Act, 35 P.S. Section 4006.1(f) and the regulatory authority is found under 25 Pa. Code Chapter 127, Subchapter H.
- For erosion and sediment control and stormwater, statutory authority is found in the Clean Streams Law generally for permitting in sections 401 and 402, and the regulatory authority is found in 102.5(m).
- For waste management, the authority is found in the Solid Waste Management Act, under the Powers and Duties of the Department, Section 6018.104(18), which states, in relevant part: "The department shall establish waste regulations to effectuate the beneficial use of municipal and residual waste, including regulations for the issuance of general permits for any category of beneficial use or processing of municipal waste or residual waste..."

General permits follow a similar process for stakeholder engagement as DEP's technical guidance process. DEP staff typically reach out to impacted industries during the development or revision of

the GP, including the established advisory committees. After a robust internal review, the GP is opened for at least 30 days of public comment.

Recently, our Proposed Air Quality General Permits were open for 120 days of public comment. During that period, DEP staff met with many interested stakeholders, including representatives of industry trade organizations, individual companies, and environmental advocacy organizations; and private citizens who live near drilling activities. Our staff received invaluable input and will continue to review all comments received to ensure that we develop GPs that work for both the regulated industry and our permit review process. We have also committed to continue to work with interested stakeholders as we finalize these General Permits.

To conclude, I'd like to reiterate that we at DEP consider constructive criticism essential to all of our processes. We likely have the most advisory committees of any state agency, and we actively seek the counsel of these interested and committed volunteers. But we don't stop there. We convene public hearings, stakeholder listening sessions, regional roundtables, industry quarterly meetings, and advisory committee work groups to ensure that we are continually engaging in constructive dialogues.

Thank you for your time today. I'd be happy to answer any questions you may have.