

INDEPENDENT REGULATORY REVIEW COMMISSION



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**Testimony on House Bill 1576
Before the House Environmental Resources & Energy Committee
and House Game & Fisheries Committee**

September 17, 2013

The Independent Regulatory Review Commission (IRRC) thanks you for the opportunity to submit testimony on House Bill 1576, the Endangered Species Coordination Act. This legislation would require rulemakings and other actions by the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, and the Department of Conservation and Natural Resources to comply with the Commonwealth Documents Law and Pennsylvania's Regulatory Review Act. The bill would also make changes to permitting and work approvals as they pertain to listed species.

IRRC was created to provide an impartial review of regulations based upon the criteria set forth by the General Assembly in the Regulatory Review Act. In keeping with its impartial role in the regulatory review process and its role of applying the review criteria as determined by the General Assembly, IRRC does not take a position in support of or opposition to any legislation that affects the review process. Rather, we stand ready to review regulations based upon whatever criteria, and from whatever agencies, the General Assembly believes are relevant in that process. This testimony provides background on the review process which we hope will be useful in the Committees' consideration of this legislation. Our testimony also contains some observations regarding certain provisions of the bill which the Committees may wish to review for possible clarification.

Overview of the Regulatory Review Process

Pennsylvania adopted the Regulatory Review Act in 1982. At that time, the General Assembly sought to provide independent oversight of the rulemaking process in Pennsylvania. IRRC was established by this statute to provide an ongoing and effective review of Commonwealth agency regulations. IRRC's mission is to review agency rulemakings to determine whether they are in the public interest. In doing so, IRRC's Commissioners apply criteria established by the General Assembly and set forth in the Regulatory Review Act. The criteria include: whether the agency has the statutory authority to promulgate the regulation; the economic or fiscal impacts of the regulation; the protection of public health, safety and welfare and effect on the Commonwealth's natural resources; need, reasonableness, and clarity of the regulation; acceptable data; comments, objections or recommendations of a Standing Committee; and impact on small businesses.

When the Regulatory Review Act was enacted, certain rulemakings were specifically exempted from its provisions. These include regulations from Pennsylvania's Courts, the Pennsylvania House and Senate, Pennsylvania's Game Commission, and the

agency currently known as the Fish & Boat Commission. With the exception of regulations promulgated by these entities, IRRC reviews virtually all rulemaking proposals from agencies under the Governor's jurisdiction, independent agencies, and other Commonwealth Boards and Commissions, ranging from the Pennsylvania Commission on Crime and Delinquency to the Philadelphia Parking Authority.

Under the Regulatory Review Act, most regulations are subject to a two-stage review process. The proposed rulemaking stage allows individuals to provide the agency with suggestions on how the regulation may be improved. During the proposed rulemaking stage, an agency must publish its regulation in the *Pennsylvania Bulletin* with a public comment period of at least 30 days. The public, the legislative Standing Committees, and IRRC may submit comments on the agency's proposal. Some regulations receive no comments while others can receive dozens or even thousands of public comments. Similarly, IRRC may not issue any comments on a proposed regulation if it finds that the criteria of the Regulatory Review Act have been satisfied by the regulation. In other cases, IRRC's comments can be extensive.

An agency must review all comments submitted on a proposed regulation and must respond to each comment when it develops the final-form regulation. In other words, an agency can either adopt a suggested change to the regulation or explain why it did not adopt the suggestion. The final-form regulation must be delivered to IRRC and the Standing Committees within two years of the close of the public comment period for the proposed regulation. In most cases, they are delivered well before this two-year deadline. During the final-form stage, the Standing Committees and IRRC may vote to approve or disapprove the final regulation in its entirety. Members of the public may comment in support of, or in opposition to, the final regulation prior to action by IRRC and at IRRC's public meeting.

IRRC currently has nine employees, including three regulatory analysts, who conduct a comprehensive review and analysis of all regulations delivered to our agency. In 2012, IRRC reviewed a total of 99 regulations. Copies of these regulations, all comments filed on the regulations, and information on actions taken concerning each regulation can be found on IRRC's website: www.irrc.state.pa.us. Through our review of agency rulemakings and careful evaluation of their public benefit, we believe that IRRC serves a valuable role in achieving a favorable regulatory balance and ensuring the integrity of Pennsylvania's regulatory process.

Comments Regarding House Bill 1576

Definition of “Acceptable Data” & Scope of IRRC and Legislative Review

The criteria for IRRC’s review of a regulation were expanded by Act 60 of 2011 to include “[w]hether acceptable data is the basis of the regulation.” Under Act 60, acceptable data is defined as “[e]mpirical, replicable and testable data as evidenced in supporting documentation, statistics, reports, studies or research.”

We note that the definition of acceptable data in the Regulatory Review Act differs from House Bill 1576’s proposed definition of the term. The Committees may wish to consider whether a uniform definition in both statutes would lead to greater consistency and efficiency in agency rulemakings and species designations.

Also, as noted above, IRRC’s review currently includes a wide range of criteria to determine whether a regulation is in the public interest. Sections 5(a) and (c) of the proposed legislation state that actions under HB 1576 shall be promulgated as regulations in accordance with the act, *solely on the basis of acceptable data*. This language could be interpreted to limit IRRC’s review, and that of the Standing Committees, to the acceptable data used by agencies in species designations. We ask whether the exclusion of other criteria currently considered, such as public health and welfare and economic impact, is intended for regulatory reviews performed under HB 1576.

Definition of “Action”

Action is a defined term used in three Sections of HB 1576. In Sections 3 and 5, the promulgation of regulations is required for designation actions. In Section 4, compliance with the Regulatory Review Act and Commonwealth Documents Law is required for designation actions.

We question the inclusion of “enforcement” activities in this definition since neither the Commonwealth Documents Law nor the Regulatory Review Act set forth a process governing enforcement actions by agencies. We also have questions regarding the inclusion of “listing” in this definition since listing activities are not used in Section 3 or 5, but Section 4 would require compliance with the Commonwealth Documents Law and Regulatory Review Act under this definition. How would listings occur under this legislation? If listings could be done in some way other than a regulation (a policy statement?) then the Regulatory Review Act again would not apply to those situations.

Existing Designations

We note a possible conflict between the provisions of Section 3 *Coordination of Designation* and Section 4(d) *Removal*. Section 3 states that no species designation shall occur unless designated under the Endangered Species Act or this legislation. Section 4(d) states that any species designated under provisions of state law (Titles 30 or 34) shall be removed after two years unless redesignated in accordance with this legislation. Does this mean that only designations made under state law must be redesignated and that existing designations made under the Endangered Species Act remain in place?

Database Access & Penalties

Under HB 1576, “persons” as defined by the act would have access to the database established by Section 8 of the legislation. However, this access does not appear limited to any particular project, permit, or geographic area where work will occur or the person does business. The Committees may wish to consider whether such limits on this information make sense. Also, while HB 1576 would establish a free-standing act with penalties for violations of the data access provisions, the legislation does not appear to specify which agency would be responsible for assessing and collecting those penalties. The Committees may wish to include language designating a single enforcement authority or, alternatively, indicating that each agency has the authority to enforce and collect penalties for violations involving species listed under that agency’s designation actions.

Undefined Terms.

In our review of this legislation, we also encountered some terms which the Committees may wish to clarify or define in order to assist affected agencies and the regulated community. In Section 5(b)(1), we would ask: what constitutes “a significant portion of its range” and what constitutes “likely”?

Thank you again for the opportunity to provide testimony on this issue. Please be assured that IRRC will continue its role as an independent oversight body reviewing agency regulations and determining whether the important criteria set forth in Pennsylvania’s Regulatory Review Act have been satisfied.