



Testimony

Submitted on behalf of the  
Pennsylvania Chamber of Business and Industry

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**Public Hearing on Burdens, Abuses and Legislative Oversight of the  
Regulatory Review Process**

Before the:  
**House State Government Committee**

Presented by:  
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My name is Kevin Sunday, Director of Government Affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy organization in the commonwealth, and we represent thousands of employers of all sizes in every commercial and industrial sector. Our goal is improving the business climate for job creators by advocating for pro-growth policies.

In recent years, the regulatory process at both the state and federal level has been disruptive to business planning, and continually evolving requirements, particularly as they relate to energy and environmental issues, have resulted in a lack of certainty and a discouragement to new investment. We appreciate the opportunity to briefly discuss some of these issues and identify a few remedies.

The PA Chamber continues to support thoughtful enhancements to legislative oversight over the regulatory development process, and the uniform and reasonable implementation of regulations throughout the state via a properly funded permitting program. In addition, we advise that state lawmakers and policymakers should be aware of the impacts of the “sue and settle” dynamic and, more broadly, the federal regulatory development process in general, on regulatory requirements for the state and businesses. State lawmakers and policymakers should support efforts to increase transparency and accountability in the regulatory process at the federal level.

**In Order to Ensure the Faithful Exercise of Any Delegated Powers or Duties, the General Assembly Must Strengthen Its Ability to Intervene in the Regulatory Development Process**

In 1970, the Administrative Code was amended to establish an Environmental Quality Board (EQB) to develop and adopt regulations in order for the state’s environmental agency to accomplish its goals. In 1982, the Regulatory Review Act established a fairly thorough process that all agencies must follow when developing new regulatory requirements, with formal rulemakings to be considered for approval by the Independent Regulatory Review Commission and for form by the Office of Attorney General. The Regulatory Review Act did not amend the composition of the Environmental Quality Board. The majority of the seats on EQB are filled by the Governor’s Cabinet, with the remainder from the legislature and the Citizens Advisory Council, which provides guidance to DEP on its mission and policies.

While the process to move a formal rulemaking through the EQB and IRRC reviews is lengthy and involved, with a general expected timeframe of about two years for a regulation to take shape and be finalized, it must be noted that state agencies can, in limited circumstances, fast-track rulemakings through a “final-omitted” rulemaking process. In addition, some policy documents, such as technical guidance documents that interpret existing regulatory requirements, can also be finalized and instituted without EQB or IRRC review. In some cases in recent years, technical guidance documents have in effect established new regulatory requirements without the documents having gone through a traditional regulatory review process.

Further, for rulemakings that are subject to the Regulatory Review Act, it must be noted that the current process allows for rulemakings to proceed even if all or a majority of the five-member Independent Regulatory Review Commission votes in disapproval of a final-form regulation. IRRC can be overruled by the Office of Attorney General in certain circumstances. Perhaps more egregiously, the agency promulgating a regulation can decide to simply notify IRRC that it will proceed with finalizing the regulation despite a disapproval vote. The only outcome of a disapproval vote by IRRC is the authorization of the relevant standing committees in the House or Senate, who have jurisdiction over the issues relevant to the agency in question, to exercise the option to quickly begin moving a concurrent resolution to reject the rulemaking – but the resolution can only successfully halt the regulation should both chambers pass the resolution and the Governor signs it (or the House and Senate muster enough votes for a two-thirds veto override).

It should be apparent that the regulatory development process is flawed, given that for all intents and purposes the administration has both the first and final say on when the regulatory development process begins and ends. There is no meaningful way for the General Assembly to intercede in the regulatory development process should the legislature believe an agency is not faithfully exercising the powers or duties it has delegated to the agency, absent bringing suit in court after the fact or enacting legislation that abrogates a given final regulation.

The PA Chamber believes a remedy is in order. Last session, we strongly supported Senate Bill 562, introduced by Senator Gordner, which would allow the legislature to have meaningful input in the regulatory development process. The bill passed through the Senate unanimously, then, after consideration by this very committee, was approved by the House, only to be ultimately vetoed by Gov. Wolf. We understand this legislation will soon be again introduced, and that some changes will be made to address some of the administration's concerns regarding timing of review by standing committees when the legislature is out of session. We urge that this committee, and, more broadly the House to again vote in support of this important legislation, should it pass the Senate. We believe it is reasonable for the General Assembly to have the option to intervene in the rulemaking process should it be apparent agencies are not faithfully exercising powers and duties with respect to legislative intent.

The PA Chamber also encourages this committee to monitor the agencies' implementation of legislation, even in cases where there is not a formal rulemaking proceeding. In 2014, the PA Chamber, along with several other industry groups, successfully advocated for the passage of Act 162, which was authored with express intent to allow for flexibility for development near so-called special protection waterways. Existing water quality regulations at the time obligated a mandatory, 150-foot buffer zone around such waterways, allowing for waivers in limited circumstances. The enacted legislation afforded project sponsors the option to encroach on such buffers should the impact be offset elsewhere. While the existing regulations under Chapter 102 still explicitly authorize waivers, DEP has developed draft technical guidance that effectively eliminates this option. The guidance was issued for comment nearly three years ago and has yet to be finalized, leaving developers in a regulatory quagmire. We understand some regional offices have been instructed to implement the guidance even though it has not been published as final. We maintain that DEP's interpretation of the Act is incorrect but understand the Department's concerns, given the agency's obligations to defend permitting decisions. To that end, we support legislation introduced this session, House Bill 784, sponsored by Rep. Santora, which would provide certainty regarding the waiver issue to all parties involved.

As a final example of good policy where the General Assembly asserted a more meaningful role in the development of policy, the PA Chamber, along with a multitude of consumer groups, trade unions, and other stakeholder groups, supported the passage and enactment of Act 175 of 2014 (and subsequent updates to the timing of its obligations). The Act required DEP to submit for review its plan to implement the Clean Power Plan, a sweeping set of regulatory requirements for the power generation sector. The Clean Power Plan is a radical departure from the traditional notions of how to regulate particular industrial sources and, if implemented, would have had a major detrimental impact on the state's economy. Despite this, the review process at the time would not have allowed any meaningful input by the General Assembly on one of the most important public policy issues of the day. While the Clean Power Plan may ultimately be reconsidered by the Trump administration, pending actions by the courts, we continue to support a meaningful role for the General Assembly in the debate regarding controlling emissions from the state's power generation sector, which is the second largest among any state in the nation.

**State Lawmakers and Policymakers Should Be Aware of the Impact on the Federal Regulatory Process and Support Meaningful Reform in Order to Alleviate the Burden on States**

State lawmakers and policymakers should also be aware that, to a great extent, many of the regulatory obligations the state and its industry are required to implement and comply with are informed by the machinations of the federal government and its agencies. The current regulatory development process at the federal level is in dire need of modernization, given that the main legislation establishing the process, the Administrative Procedure Act, has not been meaningfully updated since 1946, despite the outsized growth of the administrative state and federal bureaucracy since that time. Legislation introduced in Congress, the Regulatory Accountability Act (H.R. 5), would require federal regulations to be narrowly tailored, supported by credible science and data, conform to Congressional intent and impose the least burden possible. The PA Chamber is one of more than 600 state and local business groups across the nation that have signed on in support of this legislation,<sup>1</sup> which already passed the House of Representatives in a bipartisan vote.

In recent years, special interest groups have successfully used litigation tactics that essentially fast-track the regulatory development process and impose significant new obligations on industry and on state regulators without meaningful input by the regulated community or state regulators – and often without meaningful funding for state agencies to implement these requirements. This dynamic has been dubbed “sue and settle,” in which a federal agency decides not to defend itself but instead enter into a court approved settlement that results in legally binding requirements. According to the most recent analysis by the U.S. Chamber of Commerce,<sup>2</sup> the Obama administration entered into nearly 140 sue and settle agreements, several of which resulted in major costs and new regulatory impositions to the Commonwealth of Pennsylvania. Among the costly new regulatory burdens that have been imposed as the result of sue and settle agreements are the Chesapeake Bay clean-up requirements, the Clean Power Plan, the Mercury and Air Toxics Rule or Utility MACT, amendments to federal National Ambient Air Quality Standards for ozone and fine particulate matter (PM 2.5), and huge tranches of hundreds of species to be listed as threatened or endangered by the U.S. Fish and Wildlife Service. Collectively, these new requirements have imposed hundreds of millions of dollars in costs to industry and citizens in Pennsylvania, and state regulators have had to grapple with the complexity of enacting these requirements without meaningful increases in federal funding.

The current sue and settle process does not allow for meaningful input from stakeholders until after the settlement agreement is proposed. As an example specific to Pennsylvania, the stringent and costly Chesapeake Bay TMDL obligations were established in just seven months, without input from the state of Pennsylvania or its industries. The amount of spending necessary to achieve compliance with these obligations has been estimated to be several billion dollars, at a time when the state faces persistent and chronic budget shortfalls due to structural imbalances from the key cost-drivers. Further, the deadlines imposed by the obligations also leave the state and its industries under perpetual threat of litigation should the state not achieve its required reductions on nitrogen, phosphorus and sediment.

Legislation has been introduced in the current Congress to provide more transparency and stakeholder involvement in the development of any proposed settlement that would establish new regulatory obligations, the Sunshine for Regulatory Decrees and Settlements Act (H.R. 469 / S. 119). In addition, the federal Environmental Protection Agency and other federal agencies have continually missed deadlines imposed by the Clean Water Act and Clean Air Act, allowing interest groups to file suit and leverage the development of

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<sup>1</sup> Joint Stakeholder Letter to Majority Leader McConnell and Democratic Leader Schumer, Feb. 6, 2017. [http://www.pachamber.org/advocacy/priorities/energy\\_environmental/environmental/testimony/pdf/2.6.17-multi-association\\_letter\\_to\\_senate\\_supporting\\_the\\_regulatory\\_accountability\\_act.pdf?1496348699](http://www.pachamber.org/advocacy/priorities/energy_environmental/environmental/testimony/pdf/2.6.17-multi-association_letter_to_senate_supporting_the_regulatory_accountability_act.pdf?1496348699)

<sup>2</sup> Sue and Settle: Regulating Behind Closed Doors. U.S. Chamber of Commerce, May 26, 2017. <https://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>

new obligations. Our partners at the U.S. Chamber of Commerce have also advised Congress to consider amending these acts to allow for a more reasonable series of deadlines to review, update and implement various regulatory requirements.

We encourage this committee and General Assembly to contemplate communicating to Congress its support for the Regulatory Accountability Act and the Sunshine for Regulatory Decrees and Settlements Act in the form of a resolution. It is important that Congress hear from state governments, such as ours, the negative impact that the current regulatory process in Washington, D.C. is having on states.

Thank you for the opportunity to speak before you this morning, and I look forward to answering any questions you may have.