Comments of the Independent Regulatory Review Commission

Department of Transportation Regulation #18-481 (IRRC #3425)

Access to and Occupancy of Highways by Driveways and Local Roads

March 5, 2025

The Independent Regulatory Review Commission submits for your consideration the following comments on the proposed rulemaking published in the January 4, 2025 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Transportation (Department) to respond to all comments received from us or any other source.

1. Legislative comments. – Determining whether the regulation is in the public interest.

Senator Judy Ward, Chair of the Senate Transportation Committee, and Representative Kerry Benninghoff, Republican Chairman of the House Transportation Committee, both submitted comments expressing concerns and questions related to this proposed regulation. Chair Ward questions automatic indemnification, the process for removal of unpermitted access, and the impact on landowners of allowing persons with an equitable interest in property to apply for and be approved preliminarily for permits. Additionally, Chair Ward asks the Department to consider concerns related to the financial impact of the new sight distance standard and the current truck parking shortage. She also asks why the Department is not collecting the size of a business applying for a permit, as well as information on small businesses. Republican Chairman Benninghoff likewise comments on adverse impacts from new sight distance requirements on property owners, as well as concerns related to Section 441.8 (related to driveway design requirements). We will review the Department's responses to the legislators' comments to determine whether the regulation is in the public interest.

2. Section 441.1. Definitions. – Clarity.

In the preamble to the proposed regulation, the Department explains that the definition of "owner" is being amended to clarify who may apply for a permit under the permit application procedure provided in Section 441.3 (relating to permit application procedure). A commenter seeks clarity related to public utilities which have certain rights under 15 Pa. C.S. § 1511(e). We ask the Department to clarify the definition of "owner" in the final regulation related to public utilities who have certain rights under 15 Pa. C.S. § 1511(e).

3. Section 441.3. Permit application procedure. – Determining whether the regulation is in the public interest; Economic or fiscal impacts; Clarity; Reasonableness of requirement, implementation procedures.

Subsection (c.1)

Subsection (c.1) states, in part, that "an applicant agrees to indemnify, save harmless and defend, if requested, the Commonwealth against all suits, damages, claims and demands of any type whatsoever **by the fee title holder** of the property because of granting the permit to the applicant." [Emphasis added.] Should the final regulation be amended to include an action by anyone with an interest in the property, not just the fee title holder (e.g., the holder of another easement)? We ask the Department to clarify this provision in the final regulation or explain why the proposed language is in the public interest.

Subsection (e)

A commenter raises concerns related to public utilities and the permit application procedures in Subsection (e). The commenter explains that when public utility members submit an application with the Department, they do so as owners of estates in property, with such estate in land derived from recorded easements, rights of way, license agreements, and leasehold interests which were negotiated with the current fee title owner (or his/her predecessor in title) such that they could place public utility facilities in, on, over, or under such property. The commenter explains that public utilities possessing an estate in land are authorized to act within the scope of their enumerated authority and should be exempt from having to obtain fee owner consent under paragraph (e)(iv) and providing notice to the application under paragraph (e)(v). The commenter asserts that, in fact, these requirements are "redundant and not in line with the Department's goal to streamline and simplify the permitting process under Chapter 441." We ask the Department to amend the final regulation or explain how the final regulation is reasonable as it relates to public utilities which apply for permits as owners of estates in property. If this provision in the final regulation remains as proposed, we ask the Department to address the fiscal impacts of requiring consent from the fee owner or notice to the application on public utilities which already possess estates in land.

4. Section 441.7 – General driveway requirements. – Reasonableness of requirements.

The Department proposes to add subsection (g) to allow for the issuance of temporary access permits for temporary driveways or local roads related to activities for which the property owner does not need to have permanent access. As proposed, applicants may request a temporary permit to accommodate access for up to one month, six months, or one year. A commenter asserts that these timeframes are "too rigid and not in step with current realities inherent in infrastructure projects and other construction jobs." The commenter notes, for example, that many construction jobs have Chapter 102 and Chapter 105 permits issued by the Pennsylvania Department of Environmental Protection (DEP) that cannot be terminated until there is 70 percent perennial growth, which may be slow, depending on the time of year. Can a permit be renewed or extended if needed? We ask the Department to amend the final regulation to include a process for modifying, renewing, or extending a permit for temporary occupancy of highway right-of-way by an access, or to explain why the requirements in the final regulation are reasonable.

5. Section 441.8. Driveway design requirements. – Economic or fiscal impacts; Clarity and lack of ambiguity; Reasonableness of requirements, implementation procedures.

The Department proposes to amend subsection (h) by deleting the existing language and establishing a general rule that "achieving optimal sight distance along the property frontage must be considered when determining the location of the driveway." How would the Department enforce the "consideration" of the optimal sight distance? We ask the Department to clarify the requirements related to "consideration" of the optimal sight distance, as well as any requirements related to choosing a location which meets the regulatory requirements but is not the location with optimal sight distance (as long as the optimal sight distance location was considered).

In response to question #18 of the Regulatory Analysis Form (RAF) the Department explains, "The section in the regulation on sight distance is being updated to reflect current national policy guidance and to be consistent with other [Department] documents." A commenter states that the revisions to subsection (h) represent a "shift to apply intersection sight distance requirements to all vehicular access points, representing a significant change. Historically, intersection sight distance has been used primarily for local roads, and not driveways." We ask the Department to address the reasonableness of applying intersection sight distance requirements to driveways.

The commenter also suggests that the change in subsection (h) may necessitate costly additional grading to achieve the sight distance requirement. As noted in comment #1, the legislators have similar concerns related to economic or fiscal impacts. Chair Ward asserts that a new sight distance standard "will increase costs on applicants, such as senior citizens, small businesses, and farmers, etc." Republican Chair Benninghoff is concerned that the proposed changes create "the potential for costly project redesign, or an outright loss of developable land, especially in areas of Pennsylvania that have several topographical profiles." We ask the Department to address economic or fiscal impacts resulting from the sight distance requirement in the RAF and preamble to the final regulation.

Additionally, paragraph (h)(2) proposes the following new language:

> For stopping sight distance, the stopping sight distance formula, as required by 23 CFR 625.4 and as set forth in the Department's Design Manual Part 2, may be used to determine the minimum acceptable sight distance values for a driveway only if it is **impractical** or **infeasible** to achieve intersection sight distance values by locating the driveway at any point within the property frontage boundaries. [Emphasis added.]

We note that the terms "impractical" and "infeasible" are subjective, leaving the regulated community with an ambiguous standard. Who determines what constitutes impractical or infeasible? We ask the Department to clarify the final regulation related to sight distance and include enforceable standards for the regulated community to implement.

6. Miscellaneous clarity.

In response to RAF question #15, the Department states that it does not collect information on the size of the business applying for the highway occupancy permit and has no practical way of verifying how many builders or other applicants submitting highway occupancy permit

applications are small businesses or otherwise. As noted in Comment #1, Chair Ward questions why the Department is not collecting the size of the business applying for the permit, including information on small businesses. We ask the Department to amend the final preamble and RAF, clarifying why it does not collect information on the size of the business applying for a highway occupancy permit. We also ask the Department to consider collecting this information going forward.