

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Policy Office

DOCUMENT NUMBER: 012-0820-001

TITLE: Development and Review of Regulations

EFFECTIVE DATE: Upon publication of notice as final in the *Pennsylvania Bulletin*

AUTHORITY: Regulatory Review Act (71 P.S. § 745.1 et seq.); Commonwealth Documents Law (45 P.S. §§ 1102, 1201-1208); Commonwealth Attorneys Act (71 P.S. §§ 732.204(b) and 732.301(10)); Administrative Code of 1929 (71 P.S. § 232)

POLICY: The Department of Environmental Protection (DEP) will develop regulations necessary to effectively implement Commonwealth and Federal environmental laws for promulgation as appropriate, based on the expertise of DEP and other Commonwealth agency staff, departmental advisory committees, boards and councils, and comments received during the public participation process.

PURPOSE: This policy explains the process DEP will follow to develop regulations necessary to effectively implement State and Federal environmental laws in Pennsylvania.

APPLICABILITY: This policy applies to the development of proposed and final regulations necessary to implement State and Federal environmental laws administered by DEP.

DISCLAIMER: The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures will affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework, within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

PAGE LENGTH: 18 pages

I. PURPOSE OF ENVIRONMENTAL REGULATIONS

A. Duties Under the Pennsylvania Constitution

The people of the Commonwealth of Pennsylvania have established through the Pennsylvania Constitution a structure for governing the Commonwealth and declared the rights that are reserved to the people as their government carries out its functions. Among those reserved rights are the inherent rights of the people to enjoy and defend life and liberty, to acquire, possess and protect property and reputation, and to pursue their own happiness.¹ The people have also reserved their right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment.² They have also declared the Commonwealth's public natural resources to be the common property of all the people, including generations yet to come, and have imposed a duty on the Commonwealth government to conserve and maintain these resources as their trustee for the benefit of all the people.

B. Duties Under Pennsylvania Environmental Laws

The Pennsylvania General Assembly has enacted numerous environmental laws to ensure that the people's rights under the Pennsylvania Constitution are guaranteed. These laws are implemented by the executive branch of the Commonwealth government, under the direction of the Governor. DEP is the executive agency charged with implementing most of the Commonwealth's environmental laws, including Pennsylvania's Clean Streams Law, Air Pollution Control Act, Solid Waste Management Act, Safe Drinking Water Act, Dam Safety and Encroachments Act, Sewage Facilities Act, Surface Mining Conservation and Reclamation Act, Bituminous Mine Subsidence and Land Conservation Act, Noncoal Surface Mining Conservation and Reclamation Act, Land Recycling and Environmental Remediation Standards Act, Hazardous Sites Cleanup Act, Storage Tank and Spill Prevention Act, Oil and Gas Act, Radiation Protection Act, and numerous other environmental laws.³ These Commonwealth laws also authorize DEP to administer environmental programs established under Federal laws such as the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, and Surface Mining Control and Reclamation Act.

C. DEP Implementing Regulations

The General Assembly defers to the executive branch of the Commonwealth government to promulgate rules and regulations to implement Commonwealth laws.⁴ While the General Assembly establishes the statutory framework and scope of the various environmental programs administered by DEP, the General Assembly relies on the expertise of DEP staff to consider the wide range of technical and scientific issues that will arise during implementation of these programs. When necessary, DEP initiates the development of new or revised regulations. These proposals are then considered by

¹ Article I, Section 1 of the Pennsylvania Constitution, PA. CONST. I, § 1 (relating to inherent rights of mankind).

² Article I, Section 27 of the Pennsylvania Constitution PA. CONST. I, § 27 (relating to natural resources and the public estate).

³ Information on most environmental laws administered by DEP are available in DEP's eLibrary under "Environmental Laws of PA".

⁴ Section 506 of the Administrative Code of 1929, 71. P.S. § 186 (relating to rules and regulations).

departmental regulatory boards, with the Environmental Quality Board (EQB) being the board responsible for most DEP regulations.⁵ The Board of Coal Mine Safety is the departmental board responsible for DEP coal mine safety regulations, and the Coal and Clay Mine Subsidence Insurance Board is responsible for DEP subsidence insurance regulations.⁶ *This policy will generally refer to the EQB in describing the rulemaking process, but regulations involving subject matter for which other departmental regulatory boards are responsible would be considered by those boards.*

In most cases, new or revised regulations are promulgated in response to changes in Commonwealth or Federal law, decisions issued by Commonwealth or Federal courts or the Environmental Hearing Board (a departmental board established to review appeals of DEP final actions), rulemaking petitions submitted to the EQB, or issues that have arisen during DEP's implementation of existing regulations.

II. OVERVIEW OF THE RULEMAKING PROCESS

The rulemaking process typically occurs in two stages over the course of two or more years from the beginning of the proposed stage to publication of a final rulemaking. The proposed rulemaking process is the first stage and concludes with publication of the proposed rulemaking for public comment. The final rulemaking process, which involves many of the same reviews required during the proposed rulemaking process, occurs after the close of the public comment period. An overview of the proposed and final rulemaking processes is provided in the flowchart on page 5. For optional processes, please see Appendix B.

A. Regulatory Review Requirements

The General Assembly has enacted laws governing the process for the development of regulations by the executive branch of the Commonwealth government. Under the Regulatory Review Act, the General Assembly requires review of all department rulemakings by the Independent Regulatory Review Commission (IRRC) and the appropriate standing legislative committees.⁷ The Pennsylvania House and Senate Environmental Resources and Energy (ERE) Committees are the legislative committees that review DEP's rulemakings. All rulemakings must also be reviewed by the Governor's Office of General Counsel (OGC)⁸ and the Office of Attorney General (OAG).⁹ Other review requirements or procedures may be established by the Governor's Office, the Joint Committee on Documents or IRRC. For example, proposed and final rulemakings must be reviewed by the Governor's Policy Director and the Secretary of the Budget.¹⁰ For DEP, the above reviews are in addition to the review conducted by the appropriate departmental regulatory board.

⁵ Sections 471, 1920-A and 1930-A of the Administrative Code of 1929, 71 P.S. §§ 180-1, 510-20 and 510-30 (relating to the Environmental Quality Board)

⁶ Bituminous Coal Mine Safety Act, 52 P.S. §§ 690-106 and 690-106.1 (relating to the Board of Coal Mine Safety); Sections 3 and 19 of the Act of August 23, 1961, P.L. 1068, No. 484, as amended, 52 P.S. §§ 3202 and 3219 (relating to the Coal and Clay Mine Subsidence Insurance Board).

⁷ 71 P.S. §§ 745.5 and 745.5a (relating to procedures for review of proposed, final-form and final-omitted regulations).

⁸ Section 301(10) of the Commonwealth Attorneys Act, 71 P.S. § 732-301 (relating to the General Counsel).

⁹ Section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(b) (relating to the legal advice from the Attorney General on Commonwealth agency rules and regulations); Section 205 of the Commonwealth Documents Law, 45 P.S. § 1205 (relating to approval by Attorney General as to legality).

¹⁰ 4 Pa. Code § 1.374 (relating to review by Governor's Office).

B. Regulatory Drafting Criteria and Principles

When developing regulations, DEP considers criteria established in the Regulatory Review Act for the review of regulations by IRRC, as well as principles established by the Governor. In general, these criteria and principles require consideration of:

- Statutory authority for the proposed regulation;
- Protection of public health, safety and welfare, and the environment;
- Economic and fiscal impacts, including impacts on small businesses;
- Clarity, feasibility and reasonableness of the regulation;
- Relationship to Federal and other state regulations;
- Non-regulatory alternatives; and
- Acceptable data available to support the regulation.

Appendix A contains additional details related to these criteria and principles.

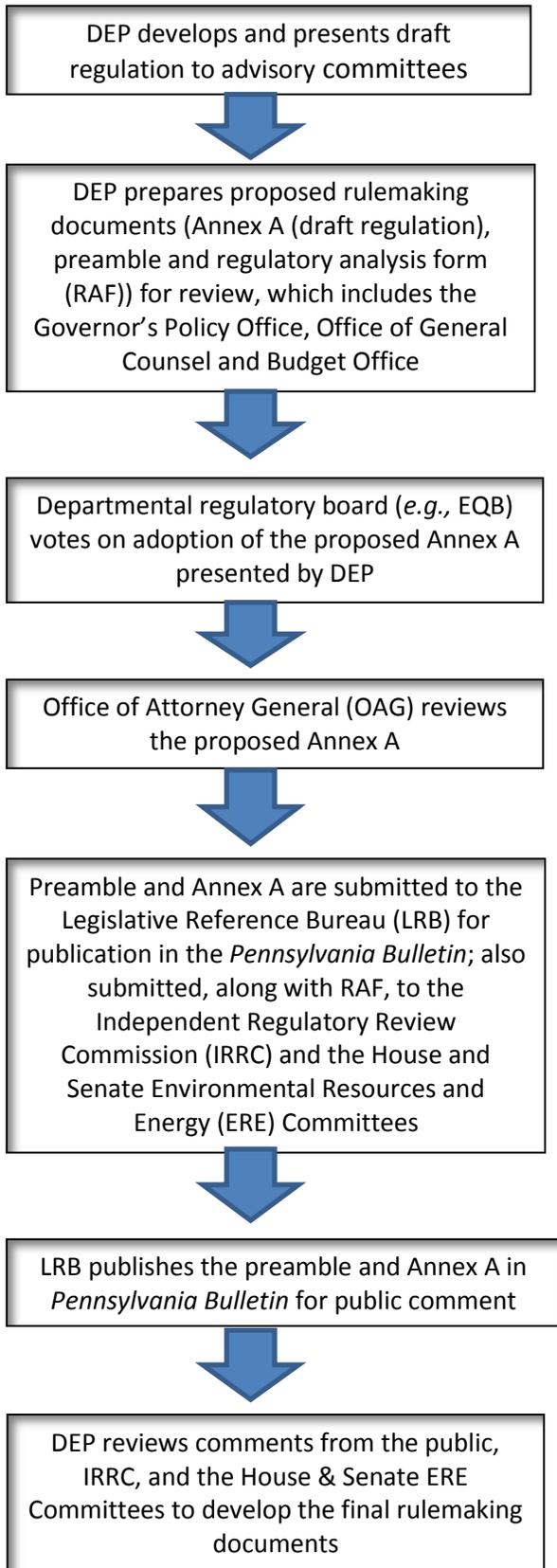
C. Advisory Committees

DEP works with advisory committees in developing proposed and final rulemakings. Many of the departmental advisory committees are established by law, while others have been established by the Governor or DEP. When developing a new or revising an existing regulation, DEP will seek advice from the appropriate committees during the formal proposed and final rulemaking processes. While advisory committees are not authorized to approve or disapprove a rulemaking, their advice can ensure that regulations provide clear, reasonable requirements that can be readily implemented to protect public health and safety and conserve and maintain the Commonwealth's natural resources. Advisory committees are encouraged to provide substantive comments, as well as supporting data and information, for DEP to consider during the rulemaking process. DEP will include any written comments submitted by an advisory committee chairperson on behalf of the committee in the rulemaking package submitted to the EQB, IRRC and the House and Senate ERE Committees for review.

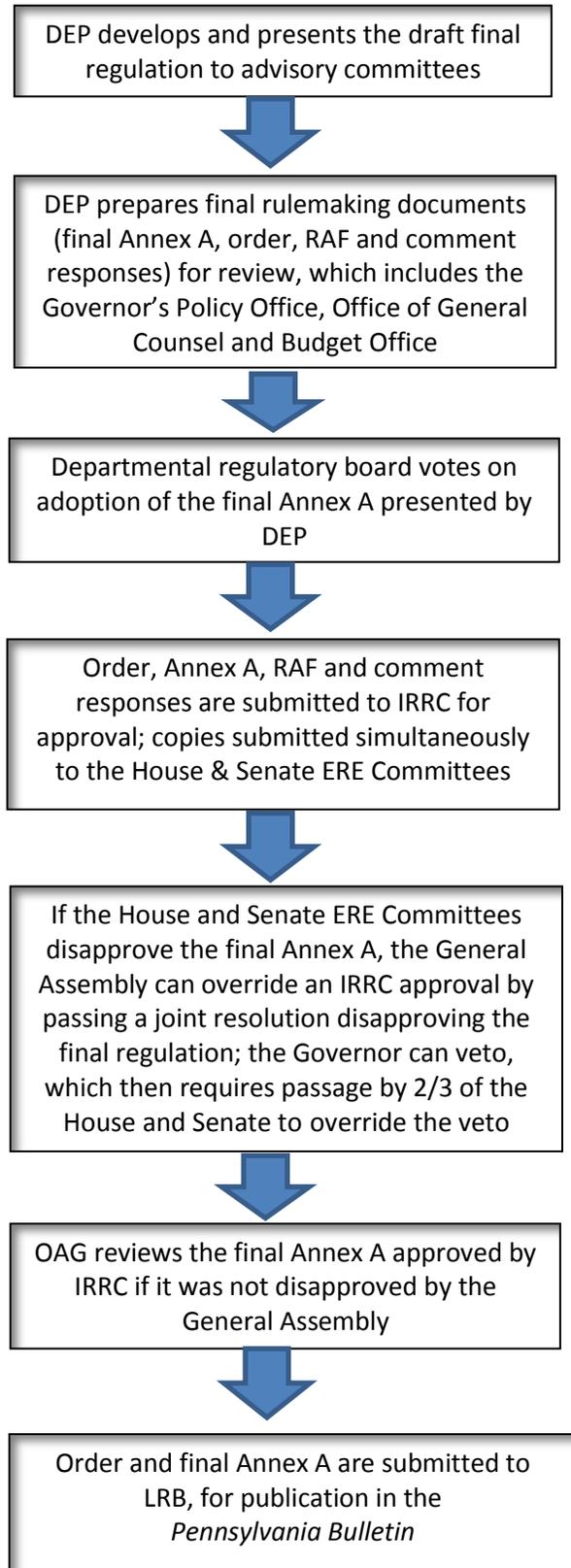
D. Public Participation

In addition to seeking advice on rulemakings from its advisory committees, DEP values formal and informal participation by the public. Every proposed rulemaking will be published in the *Pennsylvania Bulletin* to solicit public comment for a period of at least 30 days. This notice will advise the public on the methods available to submit comments and of any scheduled public hearings. Comments can be submitted to DEP online, which are then available for review by anyone interested in the rulemaking. DEP will respond to all comments submitted during the formal public comment period as part of the final rulemaking process. These comments become part of the public record associated with the rulemaking.

Proposed Rulemaking Process



Final Rulemaking Process



In addition to submission of comments during the formal public comment period, the public has additional opportunities to obtain information or provide input on proposed and final rulemakings, including the following:

- *Advisory Committees:* Meetings of department advisory committees are open to the public and provide an opportunity for informal discussion with DEP staff on rulemakings.
- *IRRC:* The public can submit comments to IRRC prior to its public meeting to consider final rulemakings.
- *Advance Notice of Proposed Rulemaking (ANPR):* An ANPR is an **optional** procedure to formally publish and solicit public comments and information on a draft regulation prior to presenting a proposal to the appropriate departmental regulatory board. An ANPR is recommended when an advisory committee does not have members that have expertise in the activity to be regulated and/or additional information would be helpful in developing the proposed regulations. The DEP Policy Office will provide notice of the ANPR to the appropriate departmental regulatory board and advisory committee members. Please see Appendix B for more information regarding this optional process.
- *Advance Notice of Final Rulemaking (ANFR):* An ANFR is an **optional** procedure to solicit public comments on a draft final regulation prior to presenting a final rulemaking to the appropriate departmental regulatory board. The ANFR is recommended when substantial changes are made to a proposed rulemaking in response to the public comments or other new information and additional public comment on the revised regulatory language would be helpful. Please see Appendix B for more information regarding this optional process.
- *Other Submissions:* Anyone can submit information related to a rulemaking to DEP at any time for consideration. For example, a person may choose to provide information to DEP related to the cost of implementing a proposed regulation outside of the formal public comment period because the submission contains confidential proprietary information that the person does not want included in the public record. Similarly, a person may provide DEP with information containing trade secrets or confidential proprietary components. Requests to protect such information may be made, and DEP will not disclose information identified as confidential proprietary information or a trade secret in accordance with the Right-to-Know Law.¹¹

III. PROPOSED RULEMAKING PROCESS

This section describes the steps in the proposed rulemaking process. The process begins with DEP's evaluation of the need for a new regulation or a revision to an existing regulation. This evaluation involves discussions with appropriate advisory committees and stakeholders and the drafting of a regulation and supporting documents, which become the proposed rulemaking. The proposed rulemaking then undergoes formal program, legal and policy review before DEP

¹¹ 65 P.S. §§ 67.101-67.3104.

presents it to the appropriate departmental regulatory board. When adopted by the board, the proposed rulemaking is published in the *Pennsylvania Bulletin* for public review and comment.

A. DEP Secretary Authorization to Proceed

DEP begins the regulatory process with the Secretary's approval of a memorandum submitted by the appropriate program. The memorandum explains the need and statutory authority for the regulation and provides a preliminary assessment of the costs and benefits, the schedule for development and final promulgation, programmatic impacts, and the recommended public participation process. The DEP program staff develop this memorandum based on experience implementing existing regulations, changes in environmental laws, availability of updated data, and discussions with those interested in the regulations about necessary improvements. If the DEP program staff recommend solicitation of public comment and additional information through publication of an ANPR to develop the draft regulation, the memorandum will also include this recommendation and the rationale.¹²

B. DEP Regulatory Agenda

After the DEP Secretary approves the rulemaking memorandum, the DEP program staff begin developing the proposed rulemaking. The DEP Policy Office will add a summary of the proposed rulemaking to DEP's Regulatory Agenda, which is available on DEP's website.¹³ In addition, the DEP Policy Office will submit the summary of the proposed rulemaking to the Governor's Policy Office for inclusion in the regulatory agenda published in the *Pennsylvania Bulletin* in February and July of each year.¹⁴

C. Draft Proposed Regulation & Advisory Committee Review

Advisory committee review is an important step in the regulatory review process to ensure that DEP considers multiple perspectives when developing a regulation. When DEP program staff has developed a draft regulation (referred to as an Annex A¹⁵), staff will share it with the Citizens Advisory Council (CAC)¹⁶ and the advisory committee with substantive knowledge of the activity being regulated. The DEP Policy Office will post the draft Annex A under the appropriate committee page on DEP's website at least two weeks prior to the committee meeting to allow committee members and the public sufficient time to review it prior to the meeting.

When a draft Annex A will regulate agriculture, the DEP program staff will also notify the Agricultural Advisory Board (AAB)¹⁷ as soon as possible, but not less than

¹² See Appendix B for additional information regarding the ANPR process.

¹³ <http://www.dep.pa.gov/PublicParticipation/Pages/Regulatory-Agendas-.aspx>.

¹⁴ 4 Pa. Code § 1.378 (relating to regulatory agendas).

¹⁵ When a proposed regulation is published in the *Pennsylvania Bulletin*, it will appear as Annex A following the preamble. The final regulation will also appear as Annex A to the order of the departmental regulatory board that adopted the final regulation when published in the *Pennsylvania Bulletin*.

¹⁶ Sections 203, 448(p) and 1922-A of the Administrative Code of 1929, 71 P.S. §§ 63, 158(p) and 510-22; Section 7.6 of the Air Pollution Control Act, 35 P.S. § 4007.6.

¹⁷ 27 Pa.C.S. § 702 (relating to establishment of the AAB).

120 days prior to presenting the proposed rulemaking to the EQB.¹⁸ DEP will also provide the AAB with the opportunity to review draft regulations that affect, but do not regulate, agriculture prior to presenting them to the EQB.

D. Proposed Rulemaking Documents

When DEP program staff has discussed a draft Annex A with the appropriate advisory committees and is ready to present the draft Annex A to the appropriate departmental regulatory board (e.g., the EQB), staff will assemble the proposed rulemaking documents for formal review in preparation for this presentation. The proposed rulemaking documents include the draft Annex A and the supporting documents described below, which explain the purpose of the regulation, how that purpose will be achieved, and the anticipated impacts on those being regulated and the general public.

Annex A – Draft Regulation: As previously noted, Annex A is the actual text of the draft regulation that will be published in the *Pennsylvania Bulletin*. When an existing regulation is proposed to be revised, the new additions will be shown in bold type and may also be underlined. Deletions will be shown in bold type and will be bracketed.¹⁹

Executive Summary: A brief summary (two pages or less) of the proposed rulemaking that provides an overview for the members of the departmental regulatory board.

Preamble: A clear and concise description of the proposed rulemaking that will be published in the *Pennsylvania Bulletin* with the Annex A. The preamble will provide the statutory authority for the proposed rulemaking, its background and purpose, a summary of the proposed regulatory requirements, and a brief discussion of the anticipated benefits and costs of the proposed rulemaking. If the proposed regulatory requirements are more stringent than those required by Federal law, the preamble will explain why the more stringent requirements are necessary. If DEP published an ANPR to solicit comments or information for use in developing the proposed Annex A, DEP will summarize the comments and information received in the preamble.

Regulatory Analysis Form (RAF): DEP will prepare the RAF using the form created by IRRC. The form includes 30 questions that ask agencies to explain the need for the regulation and identify impacts to the proposing agency, other state agencies, the general public, the regulated community, local government, and small businesses. The form is available on IRRC's website.

Fee Report: When a regulation is proposed to revise fees, a separate document is included in the proposed rulemaking to explain the need for the new or revised fee.

¹⁸ 27 Pa.C.S. § 704 (relating to review of regulations by the AAB). When DEP is under a mandatory duty to issue regulations on a timeline that precludes providing the AAB with notice at least 120 days in advance of EQB consideration, DEP is not required to provide such notice, but will strive to provide as much notice as possible.

¹⁹ For additional detail on the formatting of regulations, see the *Pennsylvania Code & Bulletin Style Manual* published by the Pennsylvania Legislative Reference Bureau.

Stream Reports: When a regulation is proposed to change the designated uses for a stream in Chapter 93, the report prepared by the program to support the change is also included as part of the proposed rulemaking.

Petition Reports: When a petition is submitted to adopt new or to amend existing regulations, a report is prepared by the respective DEP program to either support the addition or change or to explain why the addition or amendment is not recommended.

E. Preliminary Review

When the DEP program staff completes preparation of the proposed rulemaking documents, the documents are submitted to the DEP Policy Office, which coordinates the reviews that must occur prior to presentation of the proposed rulemaking to the departmental regulatory board. The proposed rulemaking is reviewed by the DEP Policy Office, Office of Chief Counsel, and Secretary, as well as the Governor's Policy Office and OGC, prior to being provided to members of the departmental regulatory board for review. The proposed rulemaking documents must be submitted to the DEP Policy Office at least 12 weeks prior to the meeting at which they will be considered by the departmental regulatory board to allow sufficient time for these preliminary reviews.

F. Departmental Regulatory Board Review

Upon completion of the above review process, the DEP Policy Office provides the proposed rulemaking to the members of the departmental regulatory board at least two weeks prior to the board's meeting. The EQB typically meets the third Tuesday of each month, provided DEP has rulemakings that are ready for consideration. Typically, the Board of Coal Mine Safety meets quarterly, and the Coal and Clay Mine Subsidence Insurance Fund Board meets annually. The DEP Policy Office posts the proposed rulemaking documents on the departmental regulatory board page of DEP's website and sends the documents electronically to the board members and their alternates. At EQB meetings, the DEP Deputy Secretary, Bureau Director and program regulatory counsel typically present the proposed rulemaking to the EQB and answer questions. The board members then vote on whether to adopt the Annex A.

The departmental regulatory board meetings are open to the public; however, public comments are not accepted by the boards during their meetings. The opportunity to submit public comments will occur when the Annex A adopted by the board is published in the *Pennsylvania Bulletin*.

G. Post Regulatory Board Adoption of Regulations

After the appropriate departmental regulatory board adopts the Annex A, the DEP Policy Office submits the proposed rulemaking to OGC and the Governor's Budget Office for review and formal approval. After a fiscal note has been issued by the Budget Office and OGC completes its form and legality review, OGC will forward the regulation to OAG for review for form and legality.

H. Office of Attorney General Review

OAG must approve or object to the Annex A within 30 days.²⁰ If OAG has questions that need to be addressed before it can approve the Annex A, it will advise OGC through a tolling memorandum that halts the 30-day review period until the questions have been satisfactorily addressed.

I. IRRC, House and Senate ERE Committee and Public Comment

Upon OAG approval of the Annex A, the DEP Policy Office will submit the preamble and Annex A to the Legislative Reference Bureau (LRB) for publication in the *Pennsylvania Bulletin* to begin a formal public comment period of at least 30 days. The rulemaking will be published under the name of the appropriate departmental regulatory Board (*e.g.*, EQB). At the same time, the DEP Policy Office will submit these documents, as well as the RAF, to IRRC and the House and Senate ERE Committees for review. The DEP Policy Office will provide any comments received from the public during the formal public comment period to IRRC and the House and Senate ERE committees within five days of receipt.²¹

The preamble published in the *Pennsylvania Bulletin* will explain how the public can submit comments on the proposed rulemaking, both electronically and in hard copy. The DEP Policy Office will also link to the proposed Preamble and Annex A as published in the *Pennsylvania Bulletin* on DEP's website. During the public comment period, DEP may conduct public information meetings to explain the proposed rulemaking and/or the EQB may hold public hearings to accept comments on a proposed regulation.

IRRC may submit comments on the proposed rulemaking within 30 calendar days after the close of the public comment period. The House and Senate ERE Committees may submit comments on the proposed rulemaking at any time prior to DEP submitting the final Annex A to IRRC for approval during the final rulemaking process.

Final-Omitted Regulation

DEP can proceed directly to the final rulemaking process without first going through the steps of the proposed rulemaking process in certain limited circumstances. A regulation that proceeds in this manner is referred to as a final-omitted regulation. A final-omitted regulation can be promulgated when:

- (1) The regulation relates to (i) military affairs; (ii) agency organization, management or personnel; (iii) agency procedure or practice; (iv) Commonwealth property, loans, grants, benefits or contracts; (v) the interpretation of self-executing statutes or regulations; or
- (2) All persons subject to the regulation are named in the regulation and either personally served with notice of the proposed regulation or otherwise have actual notice of the regulations; or

²⁰ Section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(b) (relating to legal advice on regulations).

²¹ Section 5 of the Regulatory Review Act, 71 P.S. § 745.5 (relating to review procedures for proposed regulations).

- (3) DEP determines that the proposed rulemaking process is impracticable, unnecessary or contrary to the public interest and the departmental regulatory board order adopting the regulation incorporates DEP's findings.²²

IV. FINAL RULEMAKING PROCESS

This section describes the steps in the final rulemaking process, which are similar, but not identical, to those described above for the proposed rulemaking process. DEP begins the final rulemaking process following the close of the formal public comment period. DEP program staff make appropriate changes to the Annex A in response to comments received, as well as any new information provided; revise the supporting documents as necessary; and develop written responses to comments. The final rulemaking documents must be submitted to IRRC within two years of the close of the public comment period or the rulemaking will be considered withdrawn.²³

A. Draft Final Regulation and Advisory Committee Review

After the close of the public comment period on the proposed rulemaking (or the close of the ANFR public comment period²⁴), DEP program staff will develop a draft final Annex A and discuss it with the CAC and the appropriate department advisory committees in the same manner as discussed above for the proposed rulemaking.

B. Final Rulemaking Documents

As with the proposed rulemaking, the final rulemaking includes an Annex A, executive summary, and regulatory analysis form. The proposed rulemaking documents are revised as necessary in response to comments and any new information received. In addition, the final rulemaking includes the order of the departmental regulatory board adopting the final Annex A and a document that summarizes comments received and provides DEP's responses. These documents are described further below.

Annex A – Final Regulation: Annex A is the actual text of the final regulation that will be published in the *Pennsylvania Bulletin*. Provisions that are being added that were not included in the proposed Annex A will be shown in bold type and in all capital letters. Provisions that are being deleted from the proposed Annex A will be shown with strikes through the text.

Executive Summary: A brief summary (two pages or less) of the final rulemaking that provides an overview for the members of the departmental regulatory board.

Order: The order of the departmental regulatory board that adopts the final Annex A provides a clear concise description of the final rulemaking and will be published in the *Pennsylvania Bulletin* with the Annex A. Like the preamble for the

²² Section 204 of the Commonwealth Documents Law, 45 P.S. § 1204 (relating to omission of notice of proposed rulemaking).

²³ Section 5.1 of the Regulatory Review Act, 71 P.S. § 745.5a (relating to review procedures for final-form regulations and final-omitted regulations).

²⁴ See Appendix B for additional information regarding the ANFR process.

proposed rulemaking, the order will provide the statutory authority for the final rulemaking, its background and purpose, a summary of the final regulatory requirements, and a brief discussion of the anticipated benefits and costs. The order will also include summaries of the changes from the proposed rulemaking and the major comments and responses. If DEP publishes an ANFR prior to proceeding through the final rulemaking process, DEP will provide an overview of the major comments received during the ANFR comment period, along with DEP's responses to the comments. The order will conclude with the findings of the departmental regulatory board and order adopting the final Annex A.

Regulatory Analysis Form (RAF): The final RAF is an update of the RAF described in Section III for the proposed rulemaking that addresses changes included in the final rulemaking.

Comment and Response Document: This document includes a list of all commentators who submitted written comments, or provided verbal comments at a public hearing, during the public comment period established by the notice of the proposed rulemaking published in the *Pennsylvania Bulletin*. IRRC and the Senate and House ERE Committees are also included on the list if they submitted comments on the proposed rulemaking. DEP summarizes and consolidates, to the extent appropriate, the comments received from the listed commentators and provides responses to all comments received. If DEP publishes an ANFR prior to proceeding through the final rulemaking process, DEP will include summarized and consolidated comments and responses on the ANFR as well.

C. Preliminary Review

After DEP program staff completes preparation of the final rulemaking documents, the documents are submitted to the DEP Policy Office, which coordinates the reviews that must occur prior to presentation of the final rulemaking to the departmental regulatory board. As occurs during the proposed rulemaking process, the final rulemaking documents are reviewed by the DEP Policy Office, Office of Chief Counsel, and Secretary, as well as the Governor's Policy Office and OGC, prior to being provided to members of the departmental regulatory board for review. The final rulemaking documents must be submitted to the DEP Policy Office at least 12 weeks prior to the meeting at which they will be considered by the departmental regulatory board to allow sufficient time for these preliminary reviews.

D. Departmental Regulatory Board Review

Upon completion of the preliminary review process, the DEP Policy Office will provide the final rulemaking documents to the members of the appropriate departmental regulatory board at least two weeks prior to the board's meeting. This review follows the same process described above under the proposed rulemaking process.

E. Post Regulatory Board Adoption of Regulations

After the appropriate departmental regulatory board adopts the final Annex A, the DEP Policy Office submits the final rulemaking to OGC and the Governor's Budget Office for review and formal approval. The Budget Office will complete a fiscal note and OGC will complete a review for form and legality.

F. IRRC and House and Senate ERE Committee Review

Upon completion of the above reviews, the DEP Policy Office will submit the final rulemaking to IRRC and the House and Senate ERE Committees. IRRC has until its next scheduled public meeting, which occurs no less than 30 days after receipt of the final rulemaking, to approve or disapprove the final Annex A. The House and Senate ERE Committees have at least 20 days from receipt of the final-form regulation, and up to 24 hours prior to the start of IRRC's public meeting, to convey to DEP and IRRC its approval, disapproval, or intent to review the regulation.²⁵

A final rulemaking cannot be submitted to IRRC or the House and Senate ERE Committees for review after the adjournment or expiration of a legislative session, which typically occurs in November of even-numbered years. DEP will submit the final rulemaking when the new legislative session begins and the House and Senate ERE Committees are designated, typically in February of odd-numbered years.

If IRRC determines that a final rulemaking does not meet its regulatory review criteria, it can disapprove the final rulemaking.²⁶ When this occurs, DEP has 40 days from receipt of IRRC's disapproval order to submit a report to IRRC explaining its response. IRRC must take action on the report at its next scheduled public meeting that occurs no less than 15 days from receipt of the report. If IRRC disapproves again, but neither the House nor Senate ERE Committee takes action, the final order and Annex A can be promulgated through publication in the *Pennsylvania Bulletin*.²⁷

The House or Senate ERE Committee can take action to prevent a final Annex A approved by IRRC from being promulgated if the Committee notifies IRRC of its disapproval or intent to review the regulation before IRRC takes action. When this occurs, or when IRRC disapproves a regulation, the Committee has 14 days from receipt of IRRC's order to report to the House or Senate a concurrent resolution disapproving the regulation. The House and Senate then each have 30 calendar days or 10 legislative days, whichever is longer, from the date the concurrent resolution is reported to adopt the concurrent resolution. If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House, the concurrent resolution is presented to the Governor, who may either veto or sign the

²⁵ Section 5.1 of the Regulatory Review Act, 71 P.S. § 745.5a (relating to procedures for review of final regulations).

²⁶ When IRRC disapproves a final regulation, it typically issues an order that bars an agency from promulgating the final regulation. However, IRRC cannot bar promulgation when (1) the Attorney General certifies that the final regulation is required pursuant to a decree of any court or to implement the provisions of a Federal statute or regulations, or (2) the Governor certifies that the regulation is required to meet an emergency which includes conditions that may threaten public health, safety or welfare; will cause a budget deficit; or will create the need for supplemental or deficiency appropriations of greater than \$1,000,000. 71 P.S. § 756.6(d).

²⁷ Section 7 of the Regulatory Review Act, 71 P.S. § 745.7 (related to procedures for subsequent review of disapproved final regulations).

resolution within 10 calendar days of when the resolution is presented. If the Governor chooses to veto the resolution, the House and Senate may override the Governor's veto by a two-thirds vote in each house within 30 calendar days or 10 legislative days, whichever is longer.²⁷

G. Office of Attorney General Review

When IRRC approves the final Annex A and neither the House nor Senate ERE Committee has disapproved it, the DEP Policy Office submits it to the OAG for review as to form and legality. The OAG has 30 days to approve or object to a final Annex A.²⁸ If OAG has questions that need to be addressed before it can approve the Annex A, it will advise OGC through a tolling memorandum that halts the 30-day review period until the questions have been satisfactorily addressed. If OAG objects to all or part of a final Annex A, the regulatory provisions objected to cannot be promulgated.²⁹

H. Promulgation of the Final Regulation

Upon receipt of the OAG's approval of the final Annex A, OGC transmits the order and final Annex A to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. The rulemaking will be published under the name of the appropriate departmental regulatory Board (e.g., EQB). The final regulation becomes effective upon publication in the *Pennsylvania Bulletin* unless otherwise noted in the order. The DEP Policy Office posts the final regulations, as published in the *Pennsylvania Bulletin*, to DEP's website. The final Annex A published in the *Pennsylvania Bulletin* will be the official version of the regulation until the LRB publishes it in the *Pennsylvania Code*. Such publication typically requires approximately 12 weeks.

²⁸ Section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(b) (relating to legal advice on regulations).

²⁹ Section 205 of the Commonwealth Documents Law, 45 P.S. 1205 (relating to approval as to legality).

APPENDIX A

Regulatory Drafting Criteria and Principles

- **Statutory authority:** DEP will develop regulations that conform to the intent of the General Assembly in the enactment of the statute(s) upon which they are based.
- **Compelling public interest:** DEP will explain why the regulation is needed to address issues of compelling public interest without enlarging the scope of statutory provisions upon which the regulations are based. The DEP Secretary will evaluate each regulation and attest that the regulation addresses a compelling public need that can be best remedied by the promulgation of the regulation.
- **Economic or fiscal impacts:** DEP will develop regulations that achieve the compelling public interest at the lowest possible cost. Specifically, regulations should be drafted as to reduce paperwork, minimize administrative burdens, and save time for both the regulated community and agency staff. When evaluating economic or fiscal impacts of the regulation, DEP will consider the following:
 - Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector;
 - Adverse effects on prices of goods and services, productivity or competition;
 - The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organization in the public and private sectors;
 - The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur;
 - The impact on the public interest of exempting or setting lesser standards of compliance for individuals or small businesses when it is lawful, desirable and feasible to do so.
- **Clarity, feasibility and reasonableness:** DEP will promulgate regulations that do not conflict with or duplicate statutes or existing regulations, including those of the Federal government. DEP will draft regulations that are clear and unambiguous to minimize the potential for uncertainty and misinterpretation. DEP will ensure the requirements in the regulation are reasonable and can be implemented within the established timetable using the established procedures.
- **Public health, safety or environmental risks:** To the extent possible, DEP will develop regulations that achieve a desired level of performance and give maximum flexibility to achieving the desired outcome rather than prescribing the use of specific technologies or equipment. DEP will describe any data used to establish such performance levels or quantify risks and explain its reliability.
- **Consistency with Federal regulations:** DEP will develop regulations that contain standards, procedures or other requirements consistent with Federal requirements and will only recommend more stringent regulations when needed to address a problem of Commonwealth concern.

- **Compliance assistance:** DEP will identify regulation early in the development process that affect small businesses, local governments and individuals directly and will develop compliance assistance programs to help them.
- **Nonregulatory alternatives:** DEP will only develop regulations when nonregulatory alternatives (*e.g.*, providing technical and financial assistance) are not available or have not been successful in achieving the necessary compliance with Commonwealth environmental laws.
- **Public participation:** Before drafting a regulation, DEP, when practical, will undertake extensive public outreach to those who are likely to be affected by the regulation. Specifically, DEP will obtain early and meaningful input from affected interests through the use of department advisory committees in accordance with the DEP's public participation policy (#012-1920-001) or the use of regulatory negotiation or other participatory techniques. DEP will continue to consult with those to be affected by the regulation during the drafting process. When appropriate, members of the regulated community should be involved with the formulation of regulatory language, the development of standards and other areas in which the regulated community has an interest or can provide insight, or both.
- **Commonwealth's ability to compete effectively with other states:** DEP will draft regulations in a manner that does not place the Commonwealth at a competitive disadvantage with other states, to the extent possible, while still achieving the compelling public interest. DEP will strive to develop performance-based regulations to provide those regulated with the flexibility to achieve the regulatory objective in a cost-effective way.

APPENDIX B

Optional Processes Available

ADVANCE NOTICE OF PROPOSED RULEMAKING

The Advance Notice of Proposed Rulemaking (ANPR) procedure is optional as it is not required by the Commonwealth Documents Law or the Regulatory Review Act. The ANPR procedure enables DEP to solicit comments on draft regulations prior to presenting a proposed rulemaking to the relevant departmental regulatory board. This procedure precedes the proposed rulemaking process and involves publishing a notice in the *Pennsylvania Bulletin* that DEP is soliciting comments on draft regulations. The ANPR is an action taken by DEP and will thus be published in the *Pennsylvania Bulletin* under the Department of Environmental Protection.

A program may recommend to the Secretary to use this procedure when input from a specific regulated community is needed to advise on the drafting of new regulatory requirements. In most instances, advisory committee insight is preferable in lieu of an ANPR; however, if an advisory committee does not exist or does not have the appropriate representation of parties affected by the regulation, an ANPR is an available option. Following the Secretary's approval to use this procedure and DEP's completion of the draft proposed regulation, notice is provided in the *Pennsylvania Bulletin* that an ANPR is available for comment. The published notice will include a summary of the proposal and draft proposed regulatory language.

The DEP Policy Office will forward the notice and the draft proposed regulations to the appropriate departmental regulatory board. Also, if an advisory committee exists, the program should forward a copy of the ANPR to the advisory committee members for comment.

Interested parties may access DEP's website, as will be noted in the ANPR publication, to view draft regulations and submit comments to DEP. Comments submitted to DEP on draft regulations as a result of an ANPR will be summarized by DEP in the preamble of the proposed rulemaking.

ADVANCE NOTICE OF FINAL RULEMAKING PROCEDURE

The Advance Notice of Final Rulemaking (ANFR) is optional as it is not required by the Commonwealth Documents Law or the Regulatory Review Act. Prior to initiating the final rulemaking process, DEP should publish an ANFR for additional public comment only when DEP is recommending significant changes to Annex A in response to comments received on the proposed rulemaking or based on the availability of new information. When the DEP Secretary determines that publication of an ANFR is warranted, the DEP Policy Office will submit the ANFR with the revised Annex A developed by the DEP program staff to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin* for additional public comment. The ANFR will include a summary of the changes made in the revised Annex A and explain how and when public comments can be submitted. The ANFR is an action taken by DEP and will thus be published in the *Pennsylvania Bulletin* under the Department of Environmental Protection.

The DEP Policy Office will also forward the ANFR and revised Annex A to the appropriate departmental regulatory board. The DEP program staff will notify the appropriate advisory committees as well as those who provided comments on the proposed rulemaking of the availability of the ANFR.

Because the ANFR is an optional process, DEP will summarize and respond to the comments received during the ANFR public comment period separately from comments received during the formal public comment period on the proposed rulemaking. While DEP is not required to submit comments received in response to the ANFR to IRRC or the House and Senate ERE Committees, the DEP Policy Office will provide comments received as part of the related documents submitted with the final rulemaking documents.