



**Pennsylvania Department of Environmental Protection
Policy Office**

**Policy for the Development and Review of Regulations
(DEP ID: 012-0820-001)**

COMMENT RESPONSE DOCUMENT

December 14, 2019

INTRODUCTION

Policy for Development and Review of Regulations

This policy explains the process the Department of Environmental Protection (DEP or Department) will follow to 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, DEP advisory committees, boards and councils, and based on comments received during the public participation process. Several updates to this policy were necessary to ensure that it remains relevant to current practice.

Public Comment Period

Notice of the public comment period on the draft policy was published in the *Pennsylvania Bulletin* on October 14, 2017 (47 Pa.B. 6443). The comment period opened on October 14, 2017 and closed on December 13, 2017.

This document summarizes the comments received during the public comment period. Each comment is listed with an identifying number for each commentator. A list of the commenters, including name and affiliation (if any) is provided below.

Copies of all comments are posted on eComment DEP's website at <http://www.dep.pa.gov>.

LIST OF COMMENTATORS

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COMMENTS AND RESPONSES

Extension of Public Comment Period for this Policy

- 1. Comment:** One commenter asserted that an extension of the public comment period for the Pennsylvania Grade Crude Development Advisory Council (CDAC) and other advisory committees was warranted as “formal advisory committee action on a matter under review will require a vote by a quorum or majority, as determined by committee bylaws or enabling acts, of advisory committee members.” The commenter asserts that there is no valid or reasonable basis for not granting the extension, which must be granted to afford the committees – as opposed to their individual members, who do not speak for the committee – an opportunity to provide comments.” (9)

Another commenter stated that “the proposed policy seeks to inform the process of how regulations, including those affecting the oil and gas industry of this Commonwealth, are developed. According to the CDAC Act, the DEP has the obligation to consult with CDAC as to the proposed policy and CDAC has the obligations to: 1) assist the DEP Secretary with the proposed policy; 2) provide written comments on the proposed policy; and 3) examine and make recommendations as to the existing policy that would be replaced.”

For CDAC to provide the assistance to the Secretary there must be interaction before the proposed policy is made final. Moreover, that assistance is presumably to unfold at the beginning of the process rather than after the policy is circulated for public comment, in that the CDAC Act makes separate reference to CDAC’s obligation to provide written comment. If the assistance constituted comment after the drafting of the policy, there would be no purpose in the legislation setting out the separate obligation of written comment.

CDAC can fulfill the obligations but there must be time allotted for DEP to bring the policy matter to CDAC for the assistance, and after the policy draft is issued the DEP must allot time (before the policy is made final) for CDAC to provide the written comments required of it. CDAC is required to meet at least semi-annually and a comment time frame of at least six months would provide the time necessary to meet the requirements of the CDAC Act. The public comment period provided for the proposed policy is therefore separate from and inadequate to meet CDAC’s and DEP’s obligations under the CDAC Act.” (3)

Response: The public comment period for this Policy was not extended. Advance notification was given to all advisory committees of the Department prior to publication and the opening of the public comment period. Please also see response to Comment 4.

Advisory Committee Review

- 2. Comment:** One commenter emphasized that communication between the Department, Committee staff/liaisons, and Committee Chairs is essential to ensuring that advisory committees are able to be more involved up-front in developing regulatory and policy guidance. Early communication with advisory committees will allow the Department to utilize the expertise of committee members and will aid in the development of well thought out policies and regulations.

To ensure that advisory committees are better able to participate in the review and comment period for proposed regulations, two commenters recommended that thirty days/four weeks is the

minimum amount of time materials should be made available for a volunteer-based advisory committee to have adequate time to read, consider, and provide substantive comment on lengthy regulatory documents. **(1, 10)**

Response: The Department makes every effort to provide adequate time for both our advisory committees and rulemaking Boards to review and consider materials. The standard amount of review time is two weeks. If extenuating circumstances exist in which two weeks is not deemed adequate, the Department will work to adjust the review time as necessary.

3. **Comment:** A commenter questioned the balance in the composition of members on advisory committees noting that advisory committees have additional reviews and early review in addition to time allotted to the public for review. The commenter states that “there needs to be more informed public interest seats at the table on some of these committees to represent the environment and community health over special interests in a meaningful and influential way. In other words, putting industry stacked with 1 or 2 public interest seats is not in the spirit of the Pennsylvania Constitution as it often sets up these advisory committees to have only a token “public interest or enviro” on the committee which is not fair or protective of the environment as it undermines these important rights of the public good.” **(11)**

Response: The Department acknowledges this comment. In addition, the Department makes every effort to ensure balance in all advisory committee assignments.

CDAC Review

4. **Comment:** A commenter stated, “Among its many duties, CDAC is required to review and comment on the formulation and drafting of all technical regulations proposed under 58 Pa.C.S.” The commenter avers that the new policy does not comport with the duties of CDAC as required by Act 52 of 2016. Further, other commenters note concern stating that CDAC should be provided the opportunity to draft regulatory amendments in consultation with DEP. Commenters offer concern that the process as currently written is reversed in that DEP brings amendments to CDAC asking for feedback and input into amendments that have already been crafted. **(4, 6, 9)**

One commenter stated that the draft Policy provided insufficient detail and “diminishes the goal of early and meaningful input. The commenter claimed that “under the proposed policy the advisory committee is no longer “consulted in the development of the regulation” as described in the existing policy; instead the proposed policy has the DEP developing the regulation and subsequently sharing it with the advisory committee.” The commenter also noted this same concern in the flowchart included in the draft Policy. “The first box has the DEP developing the draft regulation; the DEP then “presents” the draft to the advisory committees. It is a different process to receive and comment upon a regulation than it is to be consulted in its formulation. That CDAC is intended to be part of the formulation of new regulations is set out in the CDAC Act. **(4)**

Another commenter wished for additional explanation of the statutory duties of the Department as they relate to the “Oil and Gas Technical Advisory Board (TAB) and the Pennsylvania Grade Crude Development Advisory Council (known as “CDAC”) concerning the development of technical regulations. The statute creating TAB states that DEP “**shall consult** with the board in the **formulation [and] drafting** . . . stages of all regulations of a technical nature promulgated under,” Chapter 32 of the 2012 Oil and Gas Act.” The commenter states that “while the

Department's statutory duty to consult with CDAC is stated differently than its statutory duty to consult with TAB ["To consult with the council on all policies and technical regulations promulgated under 58 Pa.C.S. (relating to oil and gas) [Section 5(1) of Act 52 of 2016]," CDAC also has a statutory duty to "[r]eview and comment on the **formulation and drafting** of all technical regulations proposed under 58 Pa.C.S." Section 4(a)(5) of Act 52 of 2016 (emphasis added). The only way CDAC can carry out this duty, as with TAB, is by the Department's consulting with CDAC *as part of* the formulation and drafting process, which means *before* DEP drafts the proposal." (9)

The commenter states that the process, as outlined in this Policy, has the Department drafting and then sharing the already drafted language with CDAC and TAB. The Department then seeks advice and feedback on the draft proposed language. The commenter references the Advisory Committee Guidelines that "require DEP Deputy Secretaries and Bureau Directors to "ensure that program staff coordinate with DEP liaisons **to inform** advisory committees early in the process of developing DEP policies, guidance, regulations or other technical documents." The commenter contends that "'presenting" or "sharing" or "discussing" is not "consulting" – which means "to deliberate together: confer". The clear and unambiguous requirement in Section 3226(d) of the 2012 Oil and Gas Act is that DEP must deliberate and confer with TAB *as part of* the formulation and drafting process, which does not mean *after DEP drafts* the proposal. With respect to TAB, and CDAC, the Department does not have exclusive or sole authority to formulate and draft technical regulations. (9)

The commenter requests the editing of the Policy to acknowledge that the Department will consult with TAB and CDAC. The commenter requests language similar to what is suggested below, be written into all of the relevant sections that discuss advisory committee review:

"When necessary, DEP initiates the development of new or revised regulations **and, with respect to technical regulations, by consulting with the Oil and Gas Technical Advisory Board (TAB) and the Pennsylvania Grade Crude Development Advisory Council (CDAC), as part of the formulation and drafting of technical regulations as required by statute.**" (9)

Response: The Department is charged with implementing statute through regulation. Once drafted, regulatory amendments are shared with appropriate advisory committees for input, feedback, and advice. This is part of the drafting and development part of the regulatory review and development process. Advisory committees are provided this opportunity at both the beginning of the proposed rulemaking and the final rulemaking stages, prior to publication of regulations for public comment. Further, advisory committees as a body or individual members can also submit comments during the public comment period. As a result, advisory committees serve an important role in the rulemaking process.

With regard to the comment related to the CDAC Act, this guidance provides general direction that applies to all of DEP's programs and its 30 advisory committees. Moreover, there is nothing in this policy that is inconsistent with the CDAC Act. This policy describes the Department's protocol for staff to consult with the appropriate advisory committee(s), including TAB and CDAC, when developing and finalizing regulations. Specifically naming individual advisory committees would suggest that the protocol differs for those advisory committees and would create confusion. Thus, the Department does not believe that TAB, CDAC, or any other advisory committee, board, or commission required by law should be named specifically.

Further, this Policy is intended to inform the reader as to how environmental regulations move through the regulatory review process. It does not and cannot alter regulation or statute.

Small Business Considerations in Regulatory Review Act

5. **Comment:** Two commenters noted concern that the draft Policy did not adequately address updates made to the Regulatory Review Act in 2012 that specifically focused on regulatory relief for small businesses. One commenter stated, “the proposed TGD should be modified so that it is consistent with the process that is required under the Regulatory Review Act (RRA). That process includes an analysis of the economic impacts of new regulations and the consideration of alternatives for small businesses.” Further, commenters discussed having small businesses engaged in dialogue about potential regulatory amendments when the regulatory drafting is beginning. Commenters stated that compliance assistance is not enough. (4, 6)

One commenter stated concern that the draft Policy did not emphasize “changes made to the regulatory review process for the benefit of small businesses by Act 76 of 2012, commonly referred to as the Small Business Regulatory Review Act.” The act intended to “improve State rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses.” The act requires a regulatory flexibility analysis that demands that the Department consider each of the following factors to reduce the impact of the regulation on small businesses:

- the establishment of less stringent compliance or reporting requirements for small businesses;
- the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- the consolidation or simplification of compliance or reporting requirements for small businesses;
- the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
- the exemption of small businesses from all or any part of the requirements contained in the proposed regulation. (6)

Further, the commenter noted that “Act 76 first requires an agency to identify the types of small businesses that will be affected by a proposed regulation. Next, the agency is required to identify the “financial, economic and social impact” of the proposed regulation on small businesses and, when practicable, “an evaluation of the benefits expected as a result of the regulation.” Further, the agency must prepare an economic impact statement for any proposed regulation that may have an impact on small businesses. The commenter also noted that Act 76 requires the agency to prepare a regulatory flexibility analysis in which it “shall, where consistent with health, safety, environmental and economic welfare, consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses.” (6)

Another commenter also emphasized the importance of the development of a regulatory flexibility analysis with a small business focus. This analysis would require, “among other

things, the study of less stringent compliance and reporting requirements, alternative performance standards, and the exemption from requirements for small businesses.” The commenter believed that the draft Policy fell short by not describing how that analysis is conducted in regulatory development. This description would include “when in the process the less stringent compliance and performance standards are analyzed” and how “the small business alternatives, and costs of compliance with normal and alternative standards are first identified and second analyzed.” (4)

In addition, the commenter stated that the “small business analysis required under Act 76 puts focus upon acceptable data, a definition added to the RRA in July 2011. This definition requires that regulations are “supported by “empirical, replicable and testable data as evidenced in supporting documentation on, statistics, reports, studies or research.” The commenter stated that, “This definition has special significance in the small business context because the required data would form part of the basis by which to measure the viability of alternative compliance and performance standards or exemptions.” The commenter stated that the draft Policy did not include an overview of a process explaining how data is assembled, disseminated, and analyzed. The commenter noted concern that the proposed policy does not mention the regulatory flexibility analysis or the updated definition of acceptable data. (4)

Response: The Department acknowledges these comments. The development and drafting of every regulation require compliance with the Regulatory Review Act. The Department agrees and understands that Act 76 of 2012 updated the RRA to provide additional analysis and focus on small business. A regulatory analysis with small business focus is therefore conducted for every regulation. Specifically, that information is detailed in the regulatory analysis form (RAF) that is required for inclusion with every rulemaking package. Regulatory flexibility analysis is also incorporated in the RAF. While regulatory analysis is completed for every regulation, the process differs depending on the regulatory amendments proposed and the potential impact they will have on the whole of the regulated community, including small business, as well as the impact to the citizens of the Commonwealth. That analysis and accompanying process is determined on a case-by-case basis. Further, the population of what is considered a small business is also determined on a case-by-case basis, depending on the proposed regulatory amendments.

Policies, Regulations, and Statutes

6. **Comment:** One commenter stated that DEP should not be allowed “the discretion to deviate from the Regulations or their own guidance documents otherwise the environment will suffer and the time and effort to put these Regulations and guidance documents together will be wasted. Another commenter states “DEP should specifically identify the guidelines in this document from which DEP has discretion to deviate and those from which it cannot and should describe the circumstances under which such deviation may occur.” (2, 9)

Response: The disclaimer published on the cover page of this document states, “The policies and procedures herein are not an adjudication or a regulation. The Department does not intend to give these rules that weight or deference. This document establishes the framework, within which the Department will exercise its administrative discretion in the future. The Department reserves the discretion to deviate from this policy statement if circumstances warrant”. This disclaimer is necessary and acknowledges that individual scenarios may exist where different measures would be more appropriate or beneficial. Documents such as this will continue to

serve as a baseline to formally standardize guidance between the Department, the public, and regulated entities. Circumstances warranting deviation from content in guidance documents are unpredictable and assessed on a case-by-case basis. Further, guidance documents do not impose requirements. Rather, they are intended to provide instruction, information, and direction. Enforceable requirements are included in regulation and statute.

7. **Comment:** The commenter states the draft policy “gives insignificant consideration to the General Assembly’s finding that regulations are “being promulgated without undergoing effective review concerning cost benefits, duplication, inflationary impact and conformity to legislative intent.” The commenter avers that inadequate consideration is given by reducing the policy from 58 pages in the original to 18 pages in the draft update. The commenter contends that much of the “brevity is accomplished by jettisoning detailed steps contained in the existing policy. The detailed steps provide specific checklists and processes which give substance to important goals such as insuring regulations address a compelling public interest, that costs of regulations shall not outweigh their benefits, that regulations not unreasonably hamper Pennsylvania’s ability to compete with other states and that Pennsylvania’s regulations not normally be more stringent than federal regulations, and that regulations be drafted with early and meaningful input from the regulated community. These goals, and others, in the existing policy reflect Executive Order 1996-1, which was adopted to enforce and affirm the goals of the Regulatory Review Act (RRA). The proposed policy is not nearly as specific or clear as to the steps one would routinely employ to insure such goals are achieved.” Further, the commenter asserted that the draft Policy is “both sterile and inconsistent with law. It is sterile in that the policy generally recites the language of the RRA. One can already find that language in the statute and its repetition in the policy is not instructive. As CDAC conducts its duties as to regulations it will benefit from a potent policy that is instructive beyond the mere recitation of the RRA. For example, the existing policy gives instruction about the formulation of new regulation which instruction goes beyond the language of the RRA.” (4)

Response: This Policy, while shorter in length, includes all relevant information describing how the regulatory review process is carried out at DEP. Material taken out of the previous version was either reference to current internal DEP processes or referenced outdated processes or technology (e.g. storing data on floppy discs). Current internal processes removed from this document will be included in a standard operating procedure (SOP) for DEP staff. The Department believes a SOP is the appropriate document to outline explicit direction to staff regarding internal workflow processes. The intent of this policy is to highlight the overall requirements and implementation of processes included in the regulatory review process. This includes describing the process as it is directed by the Regulatory Review Act and other guiding statutes and orders.

Executive Order 1996-1

8. **Comment 8:** One commenter recommended that DEP incorporate a reference to Executive Order 1996-1 (relating to Regulatory Review and Promulgation) in the Policy itself or in Appendix A. The commenter noted that “Executive Order 1996-1 is a foundational document which has guided agencies, boards and commissions in the promulgation of rulemakings for many years. It contains essential criteria to be considered in the rulemaking process that are not necessarily captured in the current delineated lists contained in the policy.” (8)

Response: The Department appreciates this comment. Appendix B includes criteria incorporated in Executive Order 1996-1. Also, Appendix C was added to the Policy that includes links to statutes, regulations, policies, and Executive Order 1996-1.

Policy Development

9. **Comment:** A commenter stated disappointment in the process for development of this Policy, resulting in the request for the Department to begin the process anew. The commenter stated, “In a meaningful way the failures of the proposed policy detract from the successes of the CDAC experience. Instead of codifying those positive experiences the proposed policy establishes many new tensions. The trust between the persons now in place remains, but those persons will necessarily change, and the stark contrast between the proposed policy and the current practices in CDAC will be a tension born anew with every personnel turnover. CDAC strives to meet and honor that which is expected of it under the CDAC Act, the RRA, the Clean Streams Law and the other similar statutes that establish the legal expectations. To the extent the proposed policy seems to ignore key elements of those guiding statutes, the proposed policy not only misses an opportunity-it creates a tension surrounding the question of what are the objectives and duties of CDAC.” The commenter further stated that “the work necessary to pushback on the proposed policy creates tension; the proposed policy is already an object in motion and the significant work necessary to stop or divert an object in motion takes away from the time and capacity for other (hopefully more productive and cooperative) projects.” (4)

Response: The Department acknowledges this comment. With regard to the CDAC Act, this policy provides general direction that applies to all of the Department’s programs and its advisory committees. Moreover, there is nothing in this policy that is inconsistent with the CDAC Act.

Collaborative Processes

10. **Comment:** One commenter spoke to the Chapter 78 rulemaking process, underscoring the perceived failings of said process. The commenter stated a desire for a more collaborative approach to rulemaking development and views this draft policy update as a step backwards and a missed opportunity. Further, the commenter states that the draft policy does not succeed in providing meaningful updated information, particularly related to updates to the Regulatory Review Act in 2011 and 2012. The commenter also asserted that a lack of collaboration and stakeholder involvement in the Chapter 78 process led to incorrect cost assessments on industry, particularly small businesses. The commenter stated a willingness to “put in the time to fulfill that cooperative role and bring meaningful input on where regulations should be modified, bring real-world data concerning costs, bring new ideas and technologies for the mutual benefit of the environment and efficient operation, bring ideas and energy to the study of alternatives for small businesses, and bring applicable data such as testing done at the commenter’s expense.” With many of the details and checkpoints from the existing Policy removed, the commenter interpreted this update of the Policy to be “disheartening” and regressive. (5)

Response: The Department acknowledges this comment. This policy aptly describes the process by which the Department engages stakeholders in the rulemaking process.

Editorial Comments

11. **Comment 11:** The commenter requested that the title of the policy be amended. “For consistency with other Policies of the department, and as reflected under both the “Purpose” and “Applicability” sections of this page, the title should be modified as follows:

POLICY FOR Development and Review of Regulations” (8)

Response: The Department incorporated this recommended edit into the final policy document.

12. **Comment:** One commenter, referencing the cover page of the document, notes that “the “Disclaimer” section uses the terms “guidance document”, “rules”, and “policy statements” to refer to the document.” The commenter understands that Document 012-0820-001 is a Policy of the department, and offered that terms should be used consistently. Other commenters also made similar requests for consistency in language usage, particularly with regard to the disclaimer on the cover page. (7) (8) (9)

Response: The Department has elected not to alter the language on the cover page of the final document. The terminology for “Technical Guidance” and “Policy,” in this specific guidance document, are used to outline DEP’s established processes and practices (TGDs) and its internal protocol for making decisions (policy). Regarding the titles of documents, “Guidance Documents” are a subset of the more general category “Statements of Policy”. Documents titled “Guidelines” include plans for agency operation and the announcement of principles and standards, among other purposes. “Statements of Policy” is a broader category that includes documents interpreting or implementing a statute. These distinctions are explained further in 1 Pa. Code § 1.4, which defines both terms as applied to all Commonwealth agencies.

13. **Comment:** The commenter notes that the footnote 3 on Page I, referenced in subheading (B), should be modified as follows:

Information on most environmental laws administered by DEP ~~are~~ **IS** available in DEP’s eLibrary under “Environmental Laws of PA.” (8)

Response: The Department appreciates this comment and made this edit to the final policy document.

14. **Comment:** Commenters requested that the list of statutes be revised to “include the 2012 Oil and Gas Conservation Law. Please also ensure that this statute and the Oil and Gas Act are included on DEP’s eLibrary under “Environmental Laws of PA.” (7, 9)

Response: The Department appreciates these comments. The policy document was amended to include the Oil and Gas Conservation Law. DEP Policy Office staff will work with other appropriate DEP staff to ensure the list of environmental laws included on eLibrary is comprehensive.

15. **Comment:** Commenters notes that a reference to the flowchart is incorrectly noted as being on page 5 when it is actually on page 4 of the draft policy. Further, one commenter requested that

the flowchart provide an explanation or overview of the process should a regulation be disapproved by IRRC or the House and Senate Standing Committees. (7, 8, 9)

Response: The Department appreciates the comments and has replaced the flowchart with a more detailed version and moved the flowchart to an Appendix in the final document to allow for easier readability and access. Further, a new Appendix is added to the final Policy that provides links to IRRC's Regulatory Process Manual that explains the disapproval process in detail.

16. **Comment:** The commenter notes "the reference to the "criteria established in the Regulatory Review Act" should either be accompanied by a footnote or a parenthetical that provides the statutory citation to where those criteria are found." (7, 9)

Response: The Department acknowledges this comment. No amendments were made, as footnotes included in the policy document referencing the Regulatory Review Act are sufficient citations.

17. **Comment:** The commenter avers that the "statement that the General Assembly "defers" to the executive branch of the Commonwealth government is inaccurate. Rather, the General Assembly directs, empowers, and in some cases obligates agencies, boards and commissions of the Commonwealth to promulgate rules and regulations." Further, the policy states that "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. While it is true that DEP staff expertise is critical to the promulgation process, it is not the only entity envisioned or empowered by the General Assembly to play key, critical roles in evaluating the technical, scientific and policy issues that arise. Omission of other entities implies that DEP has the sole responsibility and opportunity to consider these issues. Indeed, the Regulatory Review Act and accompanying environmental statutes that authorize DEP and the EQB to promulgate regulations, and the process inherent in doing so, also recognize other entities that play critical roles, such as the Independent Regulatory Review Commission, various technical advisory committees, the Senate and House Environmental Resources and Energy Committee, and others." Therefore, the commenter recommends the following edits:

The General Assembly ~~defers to~~ **EMPOWERS VARIOUS ADMINISTRATIVE AGENCIES, BOARDS AND COMMISSIONS OF** the executive branch of the Commonwealth government to promulgate rules and regulations to implement Commonwealth laws. The General Assembly establishes the statutory framework and scope of the various environmental programs administered by DEP ~~AND, the General Assembly~~ relies on the expertise of DEP staff **AND OTHERS, SUCH AS THE INDEPENDENT REGULATORY REVIEW COMMISSION, DEPARTMENT ADVISORY COMMITTEES AND LEGISLATIVE OVERSIGHT COMMITTEES,** 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 departmental regulatory boards, with the Environmental Quality Board (EQB) being the board responsible for most **REGULATIONS THAT ARE ADMINISTERED BY DEP.** ~~DEP regulations.~~ 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, **EACH OF WHICH IS ADMINISTERED BY DEP.** 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. (8)

Response: The Department incorporated these recommended edits into the final policy document.

18. **Comment:** A commenter notes that language included in the draft Policy states, "For DEP, the above reviews are in addition to the review conducted by the appropriate departmental regulatory board." The commenter states, "In this section, the use of the term "review" in relation to a departmental regulatory board seems misplaced. The role of entities such as the EQB or Coal Mine Safety Board, for example, is not simply to review the contents of a rulemaking but indeed to take action and either approve or disapprove of the rulemaking. Clearly, these entities review the rulemaking prior to taking action, but this section would benefit from clarity to recognize properly their role in the rulemaking process. The commenter recommended language modification. (8)

Response: The Department made edits in response to this comment in the final policy document.

19. **Comment:** A commenter requests that a sentence related to public comments and the comment and response document be revised to state that not only do public comments become part of the public record, but DEP's responses to said comments also become part of the public record. (7, 8, 9)

Response: The Department incorporated this recommended edit into the final policy document.

20. **Comment:** Commenters request the addition of clarifying language to draw attention to the requirement for forms and/or reports to be included with rulemaking package submissions, per the Regulatory Review Act and the related Resolution adopted by IRRC on 12/15/16. The commenters requested that this language should be added to sections of the document where the Regulatory Analysis Form is referenced and described. Some commenters provided specific suggested language. (7, 8, 9)

Response: The Department appreciates these comments. Clarifying language was added to the final document noting that forms will be included as part of the regulatory analysis form for both proposed and final rulemakings. This additional language to the paragraph describing the RAF is sufficient language noting the necessity of the inclusion of forms.

21. **Comment:** The commenter notes that in the 2nd paragraph of Section III.I. "says that the DEP Policy Office will provide a link to the proposed Preamble and Annex A as published in the *Pennsylvania Bulletin* on DEP's website, but a link to the Regulatory Analysis Form (RAF) should also be provided on that same DEP website to facilitate public access for review and comment. The RAF contains important information and documents not otherwise available in the Preamble or Annex A, such as copies of proposed Forms, which should be made as readily available as Annex A itself." (7, 9)

Response: The Department acknowledges this comment. Public comment on regulations is intended for focus on regulatory amendment. The *Pennsylvania Bulletin* only publishes the Preamble and the Annex A. The Preamble provides a narrative explanation of the regulatory amendments, per IRRC's regulations, must include much of the same information that is included in an RAF. Further, the RAF and any corresponding forms are made available on IRRC's webpage. For these reasons, this section of the final policy was not amended.

22. **Comment:** One commenter requested an edit to a "reference to DEP's "public participation policy" (#012-1920-001). The commenter requested the following revision:

"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 guidelines (Technical Guidance Document #012-1920-001) or the use of regulatory negotiation or other participatory techniques." (7, 9)

Response: The Department has elected not to alter this language. It appropriate to refer to the referenced document as a Policy. Please see the response to Comment #6 (referring to why we are not changing the language on the cover sheet).

23. **Comment:** The commenter notes that "this section recognizes that regulations are also promulgated to ensure compliance with federal environmental laws, it may be beneficial to modify the heading of this section as follows:

Duties Under Pennsylvania **AND FEDERAL** Environmental Laws (8)

Response: The Department elected not to make this amendment. This section speaks to Pennsylvania statute and how Commonwealth laws authorize the Department to administer Federal law. It does not aim to enumerate responsibilities under Federal law.

Compelling Public Interest

24. **Comment:** The commenter states, referencing the Regulatory Drafting and Principles Appendix, "the concept of ensuring that regulations meet a "compelling public interest" is first mentioned in this TGD in Appendix A, with no basis or further explanation of that criteria or principle articulated anywhere else in the TGD. This "compelling public interest" criteria/principle appears to be based on language in Executive Order 1996-01 which addresses "Regulatory Review and Promulgation," which should be more clearly explained in the TGD if this "compelling public interest" is to be retained in it. There is some concern that a "compelling public interest" is open to substantial interpretation and differing opinions, and may or may not be consistent with statutory directives. Since regulations are to be based primarily on statutory authority and language, it's recommended that DEP consider the following revisions throughout Appendix A to rely less on the "compelling public interest" language and more on simply ensuring that the need for the regulations is properly identified."

The commenter suggested the following edits to the language in the Appendix.

~~Compelling public interest~~ **Need for the Regulation:** 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 an identified 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 intended purpose at the lowest possible cost.

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 intended purpose of the regulations compelling public interest. (7, 9)

Response: The Department declined to make the suggested edits to the referenced Appendix. Compelling public interest is established throughout the regulatory review process, in the drafting and the vetting of regulations through the various required agency reviews. In every regulatory package, compelling public interest is established and explained at length as required by statute and best practices.

Further, the Independent Regulatory Review Commission is directed by the Regulatory Review Act to determine whether regulations are in the public interest (will need citation here - Act of Jun. 25, 1982, P.L. 633, No. 181).

Role of Environmental Quality Board

25. **Comment:** The commenter recognizes “the department’s need to have a policy outlining the procedures for developing and reviewing regulations, as envisioned under Executive Order 1996-1 (relating to Regulatory Review and Promulgation), it is important to acknowledge that the vast majority of regulations administered by DEP are promulgated by the Environmental Quality Board (EQB), an independent board created by statute. While DEP acknowledges that the EQB is “*the board responsible for most DEP regulations*” (Section I (C)), it appears throughout the policy that DEP considers the EQB to be a “departmental regulatory board” whose role is to “review” proposed and final rulemakings (see Section III (F) (relating to Departmental Regulatory Board Review)). The commenter recommends the revision of this policy to recognize the EQB’s role in “promulgating – not simply reviewing - regulations and to outline in the policy the procedures by which the EQB develops and reviews regulations.” (8)

Response: The Department acknowledges this comment. No amendments were made to the policy in this regard. The policy clearly states the role of the EQB to be adopting regulations. Further, the EQB is charged specifically with adopting the regulations of DEP. The Board does not serve any other department of the Commonwealth.

Use of Regulation versus Rulemaking

26. **Comment:** The commenter notes that “this draft policy is entitled “Development and Review of Regulations”. The term “regulations” is used throughout the document in the description of the process and procedures undertaken by DEP pursuant to this policy.” The commenter also recognizes the term “regulation” to describe generically a legal obligation or other legally enforceable standard promulgated by an agency pursuant to its statutory authority and generally contained within the Pennsylvania Code. This policy outlines the process and procedures by which the regulations contained in the Pennsylvania Code are amended. The regulatory process

involves the creation of a unique document, referred to as a rulemaking, within which are contained new or modified “regulations”. The term “regulations” generally refers to the legal obligation or standard which is imposed, while the term “rulemaking” generally refers to the documents that move through the regulatory process in accordance with the Regulatory Review Act, the Commonwealth Documents Law, and other applicable statutes. Rulemakings are assigned unique document numbers (both by the EQB or other rulemaking board, as well as a separate document number by the Independent Regulatory Review Commission). It is the rulemaking that is subjected to the process and procedures laid out within this policy. Therefore, it may be helpful to clarify this distinction in the final policy. Partial recognition of this distinction is contained in Section II (page 2), but it would provide important clarity and consistency if included elsewhere in the document, including in the title.” The commenter further noted that the flow chart included in the Policy also should have consistent use of the terms rulemaking and regulation throughout the chart. (8)

Response: The Department appreciates this comment and made consistent the use of regulations and rulemakings throughout the policy document. The word regulation(s) is used when referring to the regulatory language either being added or amended. The word rulemaking(s) is used when referencing process or that package of supporting documentation required for submittal with regulatory amendments.

Pennsylvania Constitution

27. **Comment:** The commenter stated concern that “DEP appears to rely on this reference to the Constitution as basis for their wording in Sec. II.C. that regulations should “conserve and maintain the Commonwealth’s natural resources,” and that this reference could be misinterpreted. Other commenters discussed the definition of conservation and further articulated the history of the definition of conservation and interpretation by various leaders over time. One commenter noted that, “While this section outlines several (but not all) of the components found in the Pennsylvania Constitution relating to the inherent rights of mankind and to natural resources and the public estate, it is unclear from this section how these duties and rights relate specifically to the development and review of regulations. This section also speaks to the imposition of a duty on “the Commonwealth government” but it is unclear what is meant by “Commonwealth government” (i.e. state, county, municipal government).” The commenter recommended, acknowledging the rights enumerated in the Constitution, removing the section unless a direct correlation could be made between administrative regulatory procedures and the Constitution. (7, 8, 9)

Response: The Department understands the commenters concern and elected to remove this section.

28. **Comment:** The commenter asserted that “the rights afforded in the Pennsylvania Constitution mean that there needs to be less hold ups allowed by special interests when a rule or regulation has been found to be scientifically defensible by DEP technical staff and review but that is delayed in the final stages of the promulgation. Too often the political arms have been able to infiltrate the process to halt good science based on solid water quality standards and regulations to be promulgated. This delay is not in the spirit of the Pennsylvania Constitution as it undermines the public good and health to placate the special interests like that of the Oil and Gas industry. Through this process supporting and strengthening science-based claims over political

non science claims is critical to ensuring the protection of the common good and future generations.” (11)

Response: The Department acknowledges this comment.

29. **Comment:** The commenter believes that “some of the established advisory committees, like that established by Pennsylvania Grade Crude Development Act (June 23, 2016 P.L. 375, No. 52) known as CDAC...is clearly developed for the natural gas exploitation of the state at the expense of the health and welfare of the people and environment and the Constitutional rights that are afforded to both. This boom and bust mentality of the fossil fuel industry that has dominated influence is not acceptable nor appropriate to adhere to the state’s Constitutional protective duties. The polluted legacy of anthracite coal mining and the tax burden left to bear on private citizens to clean up the pollution of this industry and the more recent health studies indicating the harm and water contamination that comes from hydraulic fracturing activities, often right here in the state of Pennsylvania. (11)

Response: The Department acknowledges this comment.

30. **Comment:** The commenter made note of petition reports and recent situations where redesignation regulations were “challenged at the IRRC stage by private interests that see short term monetary goals to develop some of the cleanest watersheds remaining in the Basin. The lengthy process by PA DEP that employs existing use designation as an interim protection is in line with federal anti-degradation standards required under the Clean Water Act.” (11)

Response: The Department acknowledges this comment.

Advance Notice of Proposed Rulemaking Optional Process

31. **Comment:** Commenters, stating in the interest of enhanced public engagement, requested edits to Appendix B of the draft Policy, which provides an overview of the Advance Notice of Proposed Rulemaking (ANPR) and Advanced Notice of Final Rulemaking (ANFR) optional processes.

Regarding the ANPR process, two commenters took issue with language that states “advisory committee insight “is preferable” in lieu of an ANPR.” Commenters believe “that represents a DEP opinion that is not necessarily correct or consistent with the opinions of various affected stakeholders who are not directly represented on the relevant advisory committee. Commenters requested the following revision:

“In most instances, advisory committee insight is used 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 and useful option to ensure appropriate input.” (7, 9)

Response: The Department elected not to make the requested edits to this section. The existing language in the draft Policy sufficiently captures the intent and implementation of the ANPR process.

Advance Notice of Final Rulemaking Optional Process

- 32. Comment:** One commenter requested changes to these optional processes to include imposing “a requirement that DEP must provide comments received in response to an ANFR to both IRRC and the respective standing legislative committees. The current policy states that DEP is “not required” to submit such comments, but will do so nonetheless. While this is helpful, the department ought to formally commit itself to enhanced public engagement by stating that submitting comments - and DEP responses to those comments - to IRRC and the respective standing legislative committees is required under this Policy.” Commenters feared that “absent this, it is possible for substantive changes to be made to a proposed rulemaking via the ANFR process, while depriving IRRC of the opportunity to issue comments on the ANFR or IRRC and the respective standing legislative committees to review comments submitted by the public or regulated community in response to changes in the ANFR.” The commenter also requested that the imposition of a requirement that DEP “will issue an Interim Comment and Response Document, as part of the use of an ANFR, responding to comments received during the proposed rulemaking public comment period. Failure to do so deprives the public and the regulated community of their ability to understand the department’s rationale (for either policy or legal reasons) for making - or not making - changes as reflected in the ANFR. It also allows the public and regulated community that is preparing comments in response to the ANFR to more appropriately tailor and focus those comments by having the benefit of the department’s rationale or insight.” Two other commenters further stated, in support of this concept, that they believe it is important for commenters to “understand DEP responses to their comments as they review any revisions that were made (or not made) in the ANFR, in order to fully and properly consider any further comments on the ANFR.” Commenters requested the following edit:

“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, and will make available an Interim Comment and Response document concerning the comments in response to the ANFR.”

In addition to the request for an Interim Comment and Response Document, commenters requested that the finalized Comment and Response Document include all comments received on the ANFR. (7, 8, 9)

Response: The Department elected not to incorporate these suggested edits. Guidance documents do not impose requirements. Rather, they are intended to provide instruction, information, and direction. Enforceable requirements are included in regulation and statute. This document is intended only to provide guidance and an overview of the regulatory review process.

In addition, the ANFR process is optional and exists outside of the formal regulatory review process. It is used as a tool to collect additional data and feedback if major amendments are being considered for a regulation based on comments received during the formal public comment period. The ANFR itself serves as a response to comments, as the changes included therein highlight potential amendments to the proposed regulation that were made based on public comments received during the formal public comment period.

Comment and Response documents are part of the final-form rulemaking package. Until a draft final regulation is complete, the responses to comments could still be revised as the Department

reviews, discusses, and receives feedback on the amendments to the regulation through the normal regulatory review process. Therefore, the Department will not draft interim Comment and Response documents.

Public Participation

- 33. Comment:** The commenter recommends “that public participation be strengthened and extended to allow more time for the actual public to participate and provide important feedback.” The commenter believes in general more than 30 days would be a definite need to expand the ability and scope for the public to comment on proposed rulemaking.” The reasoning provided by the commenter for this request is that “rulemakings are often delayed by private interests or concerns”. Further, the commenter “believes that in addition to having comments being submitted on line through the DEP portal, it is still essential that written and post marked comments are also considered and advertised as some of the public sector does not have immediate or any access to the web and online submissions. Furthermore, as indicated in past comments there are other ways the PA DEP can solicit comments with new secure social media tools.” **(11)**

Response: The Department acknowledges this comment. Public participation concerns will be addressed in a revision to the Public Participation in the Development of Regulations and Technical Guidance Policy (#012-1920-001).