



Office of Policy

**Policy for the Development and Publication of Technical Guidance
012-0900-001**

Comment-Response Document

July 28, 2018

INTRODUCTION

Policy for the Development and Publication of Technical Guidance

This policy explains to the public and the regulated community the Department of Environmental Protection's (Department or DEP) process for developing Technical Guidance Documents (TGDs). The purpose of this policy is to outline the Department's key considerations for the development of TGDs, the tools available to enhance transparency in the TGD process, public comment periods, and the maintenance and distribution processes of TGDs. On October 14, 2017, the Department published a notice of availability of the draft Policy for the Development and Publication of Technical Guidance (012-0900-001) with a 60-day public comment period.

The Department received comments from seven organizations and individuals listed below. Each comment submitted on this Draft Policy is summarized below, followed by the Department's response.

Commentators:

1. Michele Nestor, Chair
Solid Waste Advisory Committee
2. Chad Eisenman, Legislative and Regulatory Advocacy
Chevron
700 Cherrington Parkway
Coraopolis, PA 15108
3. Jim Welty, Vice President
Marcellus Shale Coalition
500 North Street, Suite 1102
Harrisburg, PA 17101
4. Stephanie Catarino Wissman, Executive Director
Associated Petroleum Industries PA
300 North 2nd Street, Suite 902
Harrisburg, PA 17101
5. Kevin J. Moody, General Counsel
Pennsylvania Independent Oil and Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101
6. Stephen Klesic
Pennsylvania Resident
241 McAleer Road
Sewickley, PA 15143
7. Lee Ann Murray, Executive Director
Citizens Advisory Council of DEP
400 Market Street
Harrisburg, PA 17101

COMMENTS AND RESPONSES

1. **Comment:** The commentator appreciates the Department's acknowledgement of the value of advisory committee input during the process and concurs that advisory committees should be made aware and become involved in the earliest possible stages of development. In the interest of transparency, advisory committees should be informed when technical issues and changes suggested by the industry could initiate or influence the need for development of new or modification to existing TGDs. (1)

Response: The Department requires all program staff to consult with the appropriate advisory committee(s) when developing and finalizing TGDs. To address inconsistencies with this requirement, the Department has outlined this obligation in this policy, the Advisory Committee Guidelines (012-1920-002), and internal Standard Operating Procedures.

2. **Comment:** In neither draft documents: Policy for the Development and Publication of Technical Guidance or Policy for the Development and Review of Regulation is there mention of the Department's use of Frequently Asked Questions (FAQs). The Policy for the Development and Publication of Technical Guidance should in some way address the use of FAQs. The Department has been utilizing FAQs as a means of compliance with regulations. Currently there is no governance around the usage of FAQs that we are aware of. Additionally, there is lack of input from Advisory Councils, the public, and or the Oil and Gas industry. The Department should consider bringing FAQs into scope for this policy to provide governance around current methods of utilization of FAQs. (2)

Response: The scope of this policy is limited to the development and publication of technical guidance documents. TGDs provide specialized information to regulated entities, the public, and DEP staff regarding compliance with environmental statutes and regulations whereas FAQs are used to highlight changes and address questions about new regulations. The Department will consider outlining the use of FAQs in the Policy for the Development and Review of Regulations (012-0820-001), if appropriate.

3. **Comment:** Having been involved in the Environmental Industry for over forty years I found that many of the PADEP's technical guidance documents were well written and easy to understand along with being quite helpful in navigating through the regulations. The major problem I have faced however is that while these documents are easily understood, the PADEP is reluctant when it came to enforcing these guidelines and have repeatedly claimed deference. (6)

Response: The Department appreciates the commentator's feedback on the content and quality of its TGDs. While TGDs outline possible avenues for compliance, they do not provide the sole means to achieve compliance. An individual may achieve compliance through various methods and because the Department does not regulate through guidance documents, all TGD Standard Element Pages are published with the following disclaimer, "This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP has the discretion to deviate from this policy statement if circumstances warrant."

4. **Comment:** As a business owner in the industry along with being a concerned citizen I became a whistle blower when I would encounter violations related to these guidance documents and the Regulations. While the PADEP would agree with me on the issues they would not require my

competitors to meet the same stringent requirements that they made me abide by and as a result I was forced to close my doors thus causing irreparable harm to the environment and denying my rights under the Constitution. The PADEP has to stop protecting the powerful entities and enforce the Regulations and their own guidelines set forth in the guidance documents if they are truly working to protect the environment. (6)

Response: The Department acknowledges this comment.

5. **Comment:** If the intent is to provide a policy that is to protect the environment then you should not allow the PADEP the discretion to deviate from this policy since this then creates favoritism and discrimination. Considering it is a Constitutional Right of the Citizens of PA to a clean Environment and the State employees are classified as trustees we must require everybody to abide by the same Regulations and Guidance documents without allowing the PADEP to deviate if they desire. (6)

Response: The scope of this policy is limited to the development and publication of TGDs. TGDs do not affect regulatory requirements and all TGD cover sheets are published with the following disclaimer, “this document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP has the discretion to deviate from this policy statement if circumstances warrant.”

6. **Comment:** According to Section VI (A)(1) and (2), the Department may rescind or withdraw technical guidance documents if deemed no longer necessary. The Department should ensure that notification of such rescission or withdrawal be accompanied by some notice to provide transparency. If possible, the Department may want to allow for public comment prior to recession or withdrawal to ensure the document is no longer useful. (7)

Response: The Department agrees that rescissions and withdrawals of TGDs should be publicized for transparency. It is the Department’s current procedure to publish actions on TGDs including withdrawals of draft TGDs, announcements of public comment periods on draft and interim-final TGDs, finalizations of TGDs, renumbering of existing TGDs, and rescissions of TGDs in the *Pennsylvania Bulletin*. For additional transparency, the Department publishes a Non-Regulatory Agenda twice a year in February and July to forecast planned actions on TGDs. Additionally, all DEP program staff are directed to confer with the appropriate advisory committee(s) when such substantive changes are expected on TGDs.

7. **Comment:** The commentator would like further clarification on the Department’s process for determining when the use and/or creation of a Standard Operating Procedure replaces a more open and transparent process, such as in the case of Technical Guidance. Council believes it is imperative for the Department to foster the perception of consistency for the regulated community. Such things as penalty calculations and enforcement should be made public and could help to facilitate the resolution of enforcement matters by allowing citizen’s and the regulated community to have a greater understanding of the Department’s approach. (7)

Response: TGDs provide specialized information to regulated entities, the public, and DEP staff regarding *compliance with environmental statutes and regulations*. All active TGDs are publicly available on DEP’s eLibrary website. DEP uses Standard Operating Procedures (SOPs) to outline step-by-step procedures for Department staff with the intent to *standardize internal workflow processes*. SOPs are for internal use and do not direct the public or regulated

communities with guidance as how to comply with environmental statutes or regulations. SOPs are available to the public upon request and may be available on individual Bureau webpages.

8. **Comment:** The commentator recommends that the Department, either in this section on Policy or another appropriate place, reinforce that TGDs should adhere to this policy unless there are extenuating circumstances that require deviation from the policy and the public input processes outlined within it. Specifically, use of Interim Final TGDs should be a rarity necessitated by unforeseen circumstances. (3)

Response: The Department believes a standard operating procedure is the appropriate document to outline explicit direction to staff regarding internal workflow processes, including direction regarding the use of Interim Final TGDs. Interim Final guidance may be used to meet a statutory deadline, accompany a final regulatory package, or other circumstances approved by the Policy Director. Additionally, all DEP programs should confer with the appropriate advisory committee(s) when such actions are planned for guidance.

9. **Comment:** The applicability provisions state that TGDs “provide compliance related information to the regulated community and the public.” The commentator believes this applicability should be clarified to include a reference to DEP program staff as well, as TGDs provide direction to staff charged with ensuring compliance with Pennsylvania’s environmental statutes and regulations. (3, 4, 5)

Response: The Department agrees with this comment and has revised the Standards Elements Page to reflect this suggestion.

10. **Comment:** The commentator agrees with the statement that TGDs do not establish binding legal documents and do not alter statutory or regulatory requirements. The commentator requests that this section be strengthened by further noting that TGDs cannot mandate actions of the regulated community unless a statute or regulation expressly authorizes the department to do so. (3)

Response: To provide additional clarification, the Department enhanced the existing language describing the relationship between technical guidance and statutory and regulatory requirements.

11. **Comment:** The definition of “Interim Final TGD” should be modified as follows: “Issuing Interim Final TGDs allows for the use of the document by the Department and the regulated community while it undergoes public review.” (3)

Response: The Department agrees with this comment and revised the definition to reflect this suggestion.

12. **Comment:** The definition of “Rescission” be modified as follows: “The removal of a Technical Guidance Document from use due to statutory or regulatory changes, outdated information, or conversion to an alternative publication format.” (3)

Response: The Department agrees with this comment and revised the definition to reflect this suggestion.

13. **Comment:** The definition of “Technical Guidance Documents” should be modified as follows: “A document developed under this policy that provides methods, practices, procedures, or other relevant information to assist the regulated community and DEP program staff in ensuring compliance with environmental statutes and regulations.” (3)

Response: The Department agrees with this comment and revised the definition to reflect this suggestion.

14. **Comment:** The term “Technical Guidance Inventory” is not used anywhere in this policy, so this definition should be used or removed. (3, 4, 5)

Response: The Department agrees with this comment and has removed the definition from the TGD to reflect this suggestion.

15. **Comment:** The use of the term “acceptable” in section III (A) may be interpreted by members of the regulated community, or DEP staff, to suggest that strict conformance with the TGD is the only acceptable means of compliance and that any deviation from this policy is “unacceptable.” The commentator recommends the term “acceptable” be replaced with “preferred” or “suitable” to distinguish that TGDs recognize that there are other suitable methods or procedures by which the regulated community can comply with state statutes or regulatory requirements. (3)

Response: The Department revised this section to provide clarity and prevent misinterpretation.

16. **Comment:** Section III (B) provides direction to DEP staff that TGDs should not “be redundant or impose procedures or requirements that are not authorized by statute or regulation.” As acknowledged earlier in the Policy, TGDs are not a substitute for a statute or regulation. As such, a TGD should not impose any requirement upon the regulated community, even if the text of the requirement is consistent with the underlying statute or regulation. Imposing a requirement suggests that a TGD has the force and effect of a statute or regulation and therefore is not optional for a member of the regulated community. The commentator recommends that the phrase “impose procedures or requirements” should be replaced with recommended procedures.” (3)

Response: The Department believes this section expresses the relationship between TGDs and statutory and/or regulatory requirements and reinforces the following language as stated in Section I, “TGDs do not establish binding legal obligations and do not alter statutory or regulatory requirements. Technical guidance provided by the Department does not prescribe mandated action to regulated entities”. However, for added consistency the Department replaced the phrase “impose procedures or requirements” from Section III (B) with “suggested procedures”.

17. **Comment:** The commentators recognize the benefits of the eComment online public comment system. The system is user-friendly and enhances transparency by hosting all rulemakings, TGDs and other policies open for comment in one location. (3, 4)

Response: The Department acknowledges this comment.

18. **Comment:** The commentators recommend this policy be amended to recognize the need to engage affected stakeholders separately and distinctly from the advisory committee process

when appropriate. The commentators also recommend that this policy encourage DEP policy and program staff to work with the DEP Director of External Affairs Stakeholders for additional stakeholder engagement. (3, 4, 5)

Response: The Department agrees and has revised Section IV(C) to incorporate these suggestions.

19. **Comment:** The definition of “Interim Final TGD” should be revised as follows: “Interim Final TGD - A DEP Technical Guidance Document for which a public comment period has not yet been completed, but which that may be used upon publication in the *Pennsylvania Bulletin* to meet a statutory deadline, accompany a final regulatory package or, in other circumstances approved by the Policy Director. Issuing Interim Final documents allows for the use of the document by the Department while it undergoes public review.” (4, 5)

Response: The Department has elected not to make the suggested change. An Interim Final TGD is available for use immediately upon publication of the notice of its interim final status, which also opens the public comment period. An Interim Final TGD can remain in effect for an extended period while the Department considers any comments received before finalizing the TGD.

20. **Comment:** To recognize that this Agenda may include some Non-Regulatory resources other than TGDs, this definition should be revised as follows: “Non-regulatory Agenda - The list of Technical Guidance Documents or other non-regulatory resources DEP plans to amend and/or develop within the next year. This agenda, modeled after the existing regulatory agenda, is updated on a rolling basis and available on DEP’s website under “Public Participation”. (4, 5)

Response: The Department agrees with this comment and revised the definition to reflect this suggestion.

21. **Comment:** The definition of “Technical Guidance Documents” refers to TGDs providing “methods, practices, procedures, or other relevant information,” but the wording within TGDs often refers to them also as “Policies”. If TGDs are also intended at times to be “Policies” rather than just “Technical Guidance,” then “policies” should be added to the 1st sentence of this definition, and a separate definition of “Policies” should be included as well, to clarify the difference, if any, between a “Policy” and a “TGD.” (4)

Response: 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.

22. **Comment:** The introductory sentence in section VI (A) should be modified to ensure that TGDs posted on the eLibrary page no later than the date of publication. This is important to ensure that all stakeholders have access to Final TGDs as of the date they typically become effective. (4, 5)

Response: It is the Department’s protocol to publish all TGDs on eLibrary in coordination with the *Pennsylvania Bulletin* publication date and/or the effective date listed in the *Pennsylvania*

Bulletin notice. This protocol is outlined in DEP's internal standard operating procedure for technical guidance.

23. **Comment:** For consistency with Section III (B) regarding "Necessity," which states that TGDs should be rescinded when no longer necessary, the first sentence of this Section VI (A)(1) should be revised as follows: "Rescission: If an existing TGD is no longer necessary it should be rescinded." (4, 5)

Response: The Department agrees and has reworded the first sentence of Section VI(A)(1) from "may" to "should" to be consistent with its use throughout the TGD.

24. **Comment:** The "Disclaimer" Statement in Appendix A should refer to TGDs as guidelines or guidance, and not as "policies," as follows: "The guidelines policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the guidelines policies or procedures will affect regulatory requirements. The guidelines policies and procedures herein are not an adjudication or a regulation and DEP has no intent to give this document 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 guidance document policy statement if circumstances warrant." If TGDs are also intended at times to be "Policies" rather than just "Technical Guidance," then "policies" should be added to the 1st sentence of this definition, and a separate definition of "Policies" should be included as well, to clarify the difference between a "Policy" and a "TGD." (4, 5)

Response: Appendix A has been removed from the TGD because the content of the guidance document does not necessitate a reference to the Standard Elements Page. 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.

25. **Comment:** Some TGDs are used to guide applicants who are applying for permits under the environmental statutes and the Program staff who review these applications. For completeness, the definition of "Technical Guidance Documents" should refer to permitting, not just compliance. To be consistent with Section I, which we believe to be the correct description, the definition should be changed as follows: Technical Guidance Documents (TGDs) – Written materials that provide methods, practices, procedures, or other relevant information to Program staff, the public, and the regulated community regarding compliance with or obtaining permits under environmental statutes and regulations. (5)

Response: The Department believes that the current definition is accurate. Obtaining permits falls within the category of "compliance under environmental statutes and regulations" and adding the suggested language would create confusion.

26. **Comment:** Section III references the "key considerations" DEP uses to develop its TGDs and states that these criteria "must be clearly addressed in the guidance document transmittal memo when routed for Departmental approval." However, it is not clear that DEP will provide the

transmittal memo to the public. Accordingly, the introductory paragraph should be amended as follows: “DEP develops its TGDs using the guidelines listed below. The criteria below must be clearly addressed in the guidance document transmittal memo when routed for Departmental approval. If the guidance document is approved, the Department will make the transmittal memo publicly available with the approved guidance document. When a guidance document is provided for public comment or is approved, the Department will make the transmittal memo publicly available”. (5)

Response: Transmittal memos are intended for internal routing procedures and provide informational summaries detailing the background and purpose of the document during internal review. Section III was revised to reduce confusion regarding the purpose of the transmittal memo. The “key considerations” listed in Section III assist the public and regulated community with understanding DEP’s review process and the additional, non-technical factors considered by staff and when drafting or revising TGDs.

27. **Comment:** Section IV (C) does not acknowledge the scope of consultation that is required by statute with respect to the Oil and Gas Technical Advisory Board (TAB) and the Pennsylvania Grade Crude Development Advisory Council (CDAC). Accordingly, language should be added to make this clear, as follows: “DEP Program staff consults Advisory Committees and other relevant stakeholders during the development of TGDs and, with respect to the Oil and Gas Technical Advisory Board (TAB) and the Pennsylvania Grade Crude Development Advisory Council (CDAC), during the formulation and drafting of TGDs. Program staff should involve the Advisory Committees as early in the development process as practicable when new TGDs, substantive revisions to TGDS, and Interim Final TGDs are being developed and must involve TAB and CDAC in the formulation and drafting of new TGDs, substantive revisions to TGDS, and Interim Final TGDs”. (5)

Response: This guidance provides general direction that applies to all of DEP’s programs and its 30 advisory committees. It is the Department’s protocol for staff to consult with the appropriate advisory committee(s), including TAB and CDAC, when developing and finalizing TGDs. 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.

28. **Comment:** As a fundamental matter, DEP should 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. (5)

Response: The disclaimer published on the Standard Elements Page of TGDs 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. TGDs 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 TGDs are unpredictable and assessed on a case-by-case basis.