

GUIDANCE ON GUIDANCE: THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S INTERIM FINAL POLICY FOR DEVELOPMENT AND PUBLICATION OF TECHNICAL GUIDANCE DOCUMENTS

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The Pennsylvania Department of Environmental Protection routinely issues technical guidance documents ("TGDs"), which help to illustrate how it interprets and applies the statutes and regulations that it administers. Like other statements of policy, "[t]he value of a [TGD] is that it communicates, in advance of a discrete agency action, how the agency interprets a law and intends to give it effect." *Borough of Bedford v. Dep't of Env'tl. Prot.*, 972 A.2d 53, 61–62 (Pa. Cmwlth. Ct. 2009). Unlike regulations, TGDs are not "binding norms" and, therefore, in issuing them, the Department is not required to follow Pennsylvania's statutory processes for the issuance of regulations—or, for that matter, any processes at all. The Department has, therefore, taken differing approaches over time, and across program areas, in issuing TGDs.

On May 29, 2015, in an effort to standardize the system, the Department issued an Interim Final Policy for Development and Publication of Technical Guidance ("Policy"). The Policy seeks to "create a uniform process for developing, approving, and publishing" TGDs. In doing so, it sets out the types and purposes of TGDs and establishes guidelines and protocols for developing them. It also identifies which of the Department's proposed actions concerning TGDs are subject to public comment and which ones are not. The Department will accept public comment on the Policy until July 14, 2015.

TYPES AND PURPOSES OF TGDS AND CONSIDERATIONS FOR DRAFTING THEM

The Policy defines the TGDs that it covers as "non-regulatory documents as identified in Governor's Executive Order 1996-1," which means "internal guidelines, policy statements, guidance manuals, decisions, rules and other written materials that provide directives, guidance, or other relevant compliance related information to the public."^[1] The Policy, on the other hand, does not apply to administrative operating procedures, such as personnel rules, procurement processes, or the administrative handling of contracting.

The Policy provides that TGDs should be used for the following purposes:

- Summarizing what statutes and regulations require.

- Explaining how the Department interprets a given statute or regulation.
- Explaining technical or administrative procedures that assist in compliance with statutes or regulations.
- Establishing policies.

The Policy stresses that TGDs cannot "be used as a substitute for regulations" and "must not mandate actions unless a statute or regulation specifically authorizes the Department to do so."^[2]

The Policy indicates that, as the Department develops TGDs, it will ensure that they (i) are "up-to-date and necessary to help implement current laws and regulations," (ii) contain "clear and concise language" and use "non-technical language" as much as possible, (iii) "streamline applicable Departmental administrative and approval procedures," (iv) minimize costs and avoid diminishing "Pennsylvania's competitive economic advantage," and (v) conform with statutes and regulations and "promote consistency among the regional offices, and district oil and gas and mining offices, to the maximum extent practical."

The Policy establishes detailed guidelines for the Department to follow in drafting and reviewing drafts of TGDs, including guidelines for the contents of a proposed technical guidance package and the "route" that the package should take, within the agency, in order to be approved.

PUBLIC COMMENT (OR NOT) ON PROPOSED ACTIONS CONCERNING TGDS

The Policy identifies several types of proposed actions concerning TGDs and, for each one, indicates whether the Department will accept public comment on it.

The Policy, for example, states that when the Department proposes to create "new guidance" or make a "substantive revision" to an existing TGD, the Department will accept public comment on the proposal "for no less than 30 calendar days from the publication of the document's availability in the *Pennsylvania Bulletin*["]. The Policy defines "new guidance" as "DEP guidance that has not previously existed in any form" and defines "substantive revision" as "any other category of change made to guidance that is neither development of new guidance nor a minor revision."

The Policy defines a "minor revision" as a change to a TGD that:

- Affects a small portion of the existing guidance without fundamentally altering its content;
- Deals with minor editorial improvements such as revised dates, changes in Departmental staff, updates of old information, clarification of examples, or typographical issues;
- Changes the layout, format, or sequence of information in the existing guidance without affecting its content; or
- Reflects a non-substantive change in the regulatory or statutory parent.

The Policy states that proposed minor revisions to TGDs "need not be published as a draft, nor must they include a public comment period."

The Policy, similarly, does not call for public comment on any proposal to rescind or remove a TGD. It provides, instead, that a Bureau Director within the Department may determine that a TGD "is no longer necessary," in

which case it is rescinded, or that its content should be maintained in a different format, in which case it is removed from the Department's official inventory of TGDs and, depending on the circumstances, may be converted into "a fact sheet or brochure" or the like. This approach can be problematic because, while a Bureau Director might conclude that the elimination of a given TGD is warranted, the public might believe otherwise, resulting in a sense of disenfranchisement and leaving members of the regulated community and other stakeholders without notice, "in advance of a discrete agency action, how the agency interprets a law and intends to give it effect." *Borough of Bedford*, 972 A.2d at 62.

On a related note, several months ago, the Department rescinded its Guidance for Civil Penalties Calculations for Effluent Violations, stating that those TGDs "describe methods for assessing civil penalties under section 605 of The Clean Streams Law (35 P. S. § 691.605) that are no longer used by the Department."^[3] At the same time, it announced that "[n]ew procedures for assessing civil penalties under The Clean Streams Law (35 P. S. §§ 691.1–691.1001) developed by the Department are contained in *internal Standard Operating Procedures* and the continued availability of the technical guidance may create confusion."^[4] Those "internal Standard Operating Procedures" are *not* available to the public, which stands in discord with the Department's recent emphasis on increasing its transparency and public accountability.

STATUS OF THE POLICY

As the Policy notes, "[i]ssuing a document as Interim Final allows for use of the draft document by the Department while it accepts public comments." The Department has classified the Policy itself as Interim Final guidance and, therefore, it has already taken effect.

The Department will accept public comment on the Policy until July 14, 2015. Members of the public can submit their comments through traditional channels (e.g., mail and e-mail), as well as the Department's new eComment system, an online portal for the submission of comments regarding pending policy, technical guidance, and general permit documents.^[5]

NOTES:

^[1] Governor's Executive Order 1996-1.

^[2] It is not clear that a statute or regulation can authorize the Department to "mandate actions" through a TGD. See, e.g., *Borough of Bedford*, 972 A.2d at 63 (binding norms must be issued in accordance with statutory processes for issuing a regulation).

^[3] 45 Pa.B. 1178 (March 7, 2015).

^[4] *Id.* (emphasis added).

^[5] <http://www.ahs.dep.pa.gov/eComment/>

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