



July 9, 2015

Laura Henry, Technical Guidance Coordinator
PA Department of Environmental Protection
Office of Policy
Rachel Carson State Office Building
P. O. Box 2063
Harrisburg, PA 17105-2063

Re: Policy for Development and Publication of Technical Guidance
Submitted via ecomment@pa.gov

Dear Ms. Henry:

The Marcellus Shale Coalition (MSC) appreciates the opportunity to comment on the interim final Policy for Development and Publication of Technical Guidance. We applaud the Department of Environmental Protection (DEP) for seeking to adopt a DEP-wide, standard process for developing, revising, approving and publishing Technical Guidance Documents.

We offer the following specific comments for your consideration.

1. Policy (page i)

The statement of policy of following a department-wide, standard process refers only to "Technical Guidance Documents" (TGDs). However, the interim final policy makes reference elsewhere to additional documents and publications of the department, including guidance manuals, internal guidelines and other non-regulatory documents. The MSC urges the department to clarify this policy statement so that it is clear it is applicable to all non-regulatory documents.

2. Applicability (page i)

The applicability provisions state that this policy shall apply to DEP's non-regulatory documents as identified in Governor's Executive Order 1996-1. The non-regulatory documents covered under Executive Order 1996-1 are broader than just TGDs. The Policy and Applicability provisions of the final policy should be clarified so that both department staff and the regulated community have a clear understanding of its scope and applicability. Depending upon the final scope and applicability, the title of the policy may also need to be revisited.

3. Section I – When to use this document

The MSC agrees with the statement that TGDs are not to be used as a substitute for regulations, and that TGDs must not mandate actions unless a statute or regulation authorizes

the department to do so. Similarly, other non-regulatory documents of the department, including internal guidelines, policy statements, guidance manuals and other written materials that provide directives, guidance, or other relevant compliance related information to the public should not be used as a substitute for regulations. Therefore, it may be necessary and appropriate to broaden this statement depending upon the final scope and applicability of this policy.

4. Section II – Definitions

The MSC recommends that the department include a definition of “Technical Guidance Documents” within the definitions section. Absent a definition, it is unclear if TGDs, which historically have been a specific category of documents issued by the department, are inclusive of guidance manuals, internal guidelines, policy statements and non-regulatory documents. If the policy is intended to be applicable to more than just TGDs, it may be appropriate to simply rely upon the existing definition of “Non-regulatory Documents”. Moreover, given the increased reliance upon Frequently Asked Questions (FAQ) by the department for the benefit of the public, regulated community, and department staff, it may be advisable to include FAQs under the definition of “Non-regulatory Documents.”

5. Section II – Definition of “Policy statements”

The definition of “Policy statements” includes any policy that DEP publishes in the *Pennsylvania Code*. Again, the MSC urges the department to clarify the scope and applicability of this policy, which will determine whether the definition of “Policy statements” is necessary.

6. Section III – Non-Regulatory Agenda

The MSC commends the department for pledging to publish a non-regulatory agenda twice a year. The phrase “*it plans to amend and/or develop on an annual basis*” may lead to some confusion. The MSC recommends that “*on an annual basis*” be revised to state “*during the coming year*” or some similar variation. This will be consistent with the remainder of the paragraph, which references the development of department policy “*for the coming year.*”

In addition, as discussed in the MSC’s comments on the scope and applicability of this policy, it is unclear if the use of the phrase “non-regulatory documents” includes just TGDs or other documents as well.

7. Section III – eComment

The first sentence refers to “technical guidance”. It may be more appropriate to refer to “Non-regulatory Documents” or “TGDs” for purposes of this document.

8. Section IV

The second sentence of the introductory paragraph states, “*If these issues are not clearly addressed in the guidance document transmittal memo as required in Section V, the Policy Office may ask for additional details during the review process.*” This could allow for a transmittal memo which does not address all of the required elements that, by this policy, are to be addressed “clearly.” The MSC recommends this section be revised as follows:

“~~If these~~ THE issues ~~are not~~ LISTED BELOW MUST BE clearly addressed in the guidance document transmittal memo, ~~as~~ FURTHER DESCRIBED ~~required~~ in Section V, ~~the Policy Office may ask for additional details during the review process.~~”

9. Section IV.A – Necessity

The second sentence should be revised as follows to ensure consistency with the department’s recognition on the limitation of guidance documents stated earlier in the policy:

“Guidance documents should not be redundant nor impose procedures or requirements that are NOT AUTHORIZED BY STATUTE OR REGULATION OR ARE no longer necessary or effective.”

10. Section IV.D – Economic impacts

The MSC agrees with the department that TGDs should not diminish Pennsylvania’s competitive economic advantage, and that the department should provide flexibility and encourage innovative technology wherever practical. This reference should be broadened to include other non-regulatory documents depending on the scope and applicability of the final policy.

11. Section V – Contents of a technical guidance package

The MSC appreciates the department’s requirements necessary for approval of a guidance document. The MSC suggests that “guidance document” be revised to reference TGDs or other non-regulatory documents, as appropriate, to ensure consistency with the scope and applicability of this policy. The MSC also supports the requirement for a red-lined TGD, and strongly urges the department to make the red-lined TGD or other non-regulatory document available to the public as well during the public comment period. The red-lined document is intended to ease and inform the department’s own staff in their review of proposed revisions to the TGD or other non-regulatory document. The public would similarly benefit from viewing a red-lined version of proposed changes to the document. Making the red-lined version available to the public would be consistent with the department’s stated goals of further increasing transparency in policy-making.

Similarly, the department seeks to require a comment response document “if necessary”. The MSC encourages the department to revise this section to state “if any comments were

received” so that the public is able to understand the department’s rationale for accepting or not accepting comments.

Finally, the last sentence of the introductory paragraph reads *“If the below outlined information is not contained in the formal package, this could lead to delays in approval and publication.”* The MSC recommends that this sentence be revised as follows:

*“~~If~~The below outlined information is not **MUST BE** contained in the formal package,~~this could lead to delays in~~ **IN ORDER TO RECEIVE** approval and **AUTHORIZE** publication.”*

12. Section V.A – Transmittal memo

This section lays out the minimum required information for a technical guidance package routed for approval. The MSC recommends that, in addition to the information listed in Section V.A, the transmittal memo also reference the specific statutory or regulatory citation and issue that the package seeks to address or implement.

Additionally, Section V.A.9 (Potential opposition to the TGD) appears to be entirely speculative and seems unnecessary. The comment period will afford the public and regulated community the opportunity to express support, opposition or constructive comments for the department’s consideration.

13. Section V.A.7 – Transmittal memo (Advisory committee input)

The MSC commends the department for requiring consultation with the relevant advisory committees as early in the process as practical.

14. Section V.B.7 – Technical guidance document (Applicability)

The second sentence states *“Note also the circumstances under which the Guidance would be enforced.”* This sentence implies that TGDs and other non-regulatory documents have the same force and effect as a statute or regulation, which is not the case. The MSC suggests that this sentence be struck.

15. Section V.B.8 – Technical guidance document (Disclaimer)

The second paragraph states, in part, *“The policies and procedures herein are not an adjudication of a regulation. There is no intent on the part of the Department to give these rules that weight or deference.”*

The use of the term “rules” is often synonymous with “regulation.” Since the documents covered by this policy are non-regulatory in nature, the MSC suggests that the term “rules” be replaced with “guidance.”

16. Section VI.A.2.h – Procedures for review and approval (Preparation of the Comment-Response Document)

This subsection implies that comments received after the deadline may be considered in revising the final technical guidance or other non-regulatory documents, but will not be included in the comment-response document. Given the department's enhanced efforts to ensure that all comments received, and responses made by the department, are available to the public, the MSC suggests that this subsection be revised to direct that any comment which is considered shall be addressed in the comment-response document.

17. Section VI.A.3 – Procedures for review and approval (Interim final TGDs)

The first sentence should be modified to read, in part, “*Program staff in consultation with Policy Office staff will make the determination as to whether a DRAFT TGD is appropriate to be considered for publication as Interim Final.*” The use of the term “draft” simply clarifies that the TGD is not yet finalized.

Additionally, the second sentence states that an interim final guidance may be used “*to meet a statutory deadline or other appropriate circumstance approved by the Policy Director.*” It appears clear that the department seeks to utilize the interim final guidance process, which provides for abbreviated review and consideration of comments, only in certain circumstances. It may be beneficial to include examples of what other appropriate circumstances the department envisions as appropriate to utilize the interim final process.

18. Section VI.A.3.b – Procedures for review and approval (Review of interim final)

This subsection title should be changed to “Review of DRAFT interim final” since the document is still in the pre-publication phase.

19. Section VI.A.4.d – Procedures for review and approval (Routing/approval of final)

The MSC recommends that the second sentence be clarified as follows:

“Final TGD packages should include a transmittal memo, the guidance document, a proposed notice for publication in the Pennsylvania Bulletin, a redline version of the document outlining any changes from ~~proposed~~ THE DRAFT OR INTERIM FINAL and the Comment-Response document (see Section V above).”

20. Section VI.A.4.e – Procedures for review and approval (New guidance and substantive revisions to existing guidance – Finalizing for publication)

The MSC recommends that the last sentence be clarified as follows:

“Document Management will reformat and publish the ~~draft~~ FINAL document on the Department's eLibrary by COB the Thursday before publication in the Pennsylvania Bulletin.”

21. Section VI.A.4.f – Procedures for review and approval (Distribution of the comment-response document)

This subsection makes reference to distribution of both the comment-response document and the final TGD, so it may be advisable to revise the title of the subsection accordingly. Additionally, to ensure awareness and consistent application of the final TGD or other non-regulatory document, the MSC suggests that this subsection be revised to provide for distribution of the final document to regional department program staff.

22. Section VI.B.3 – Procedures for review and approval (Minor revisions to existing guidance – Finalizing for publication)

The MSC recommends that the last sentence be clarified as follows:

“Document Management will reformat and publish the ~~draft~~ FINAL document on the Department’s eLibrary by COB the Thursday before publication in the Pennsylvania Bulletin.”

23. Section VI.C.1.b – Procedures for review and approval (Removal)

This subsection provides for the removal of a TGD when a bureau director of the department determines that a more appropriate format is preferable, such as a fact sheet or brochure. The MSC requests that the department clarify whether a more preferable format, such as a fact sheet or brochure, are considered non-regulatory documents, and therefore should be subjected to the requirements of this policy, particularly related to public notice, review and comment.

24. Section VI.C.2 – Procedures for review and approval (Preparation of the Notice of Intent to Rescind or Remove Technical Guidance)

It may be helpful to include a reference to Appendix D in this section (related to Notice of Intent to Rescind or Remove Guidance). Note that the title of Section VI.C.2 refers to “technical guidance” while Appendix D simply refers to “Guidance”. The department may wish to be consistent in its references between the section and the appendix.

On behalf of the Marcellus Shale Coalition, we appreciate the opportunity to submit these comments for your consideration. Please do not hesitate to contact us should you require additional information or clarification.

Sincerely,



Jim Welty
Vice President, Government Affairs
Marcellus Shale Coalition

