

December 12, 2017

Via Email: ecomment@pa.gov & hjeffords@pa.gov

Hayley Jeffords
Policy Office
Department of Environmental Protection
400 Market Street
Harrisburg, PA 17101

Re: Draft Technical Guidance—Substantive Revision
DEP ID: 012-1920-002, Advisory Committee Guidelines

Dear Ms. Jeffords:

The Pennsylvania Independent Oil & Gas Association (PIOGA)¹ submits these comments to the Department’s proposal to add new language to its existing “technical guidance” or “policy” or “guidelines” document to clarify what it asserts (1) are common areas of confusion for advisory committee members and (2) are the roles of the Department, advisory committee members and the public when planning and holding advisory committee meetings.

As a threshold matter, PIOGA notes that the phrases “departmental advisory committees” and “its advisory committees” and “DEP’s advisory committees” is incorrect, as not all the advisory committees listed in Appendix A are established within DEP. The Pennsylvania Grade Crude Development Advisory Council (known as “CDAC”) is established within the Department of Community and Economic Development (DCED). Accordingly, these phrases should be changed to “advisory committees to the Department.”

PIOGA agrees with and supports the comments submitted by Arthur Stewart that this document must be revised to account for the different circumstances of CDAC, and emphasizes two of his points: (1) the differences between DCED’s interpretation of the Sunshine Law re CDAC and the Department’s stated in this document must be resolved; and (2) an extension of the comment period for CDAC, as well as for the other advisory committees, must be granted to afford the committees – as opposed to their individual members, who do not speak for the committee – an

¹ PIOGA is a nonprofit trade association comprising approximately 500 members, including oil and natural gas producers, drilling contractors, service companies, manufacturers, distributors, professional firms and consultants, royalty owners, and other individuals, all with interests in the safe and environmentally responsible development of Pennsylvania’s oil and natural gas resources to support local economies and national energy independence. PIOGA’s members include advisory committee members affected by these guidelines.

opportunity to provide comments. The document itself supports this request, as it acknowledges in Section VI.B. that “[f]ormal 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.” Accordingly, there is no valid or reasonable basis for not granting the extension.

As a general comment, PIOGA observes that the notice of issuance of this document describes it as a “technical guidance” document and the document itself describes it as “guidelines” and “policy.” While all of these terms differentiate the document from “regulations,” or “legislative rules,”² the Department should describe the differences between “technical guidance” and “guidelines” and “policy” documents and use consistent terms throughout rather than different ones.

PIOGA provides the following comments concerning specific provisions.

1. On the 1st page of the document (page i) in the “Policy” section, “guidance documents” and “forms” should be included as one of the items for which DEP will seek advice from advisory committees, as follows:

Δ “The Department of Environmental Protection (DEP) will seek advice from departmental advisory committees when developing policies, guidance documents, forms, and regulations to protect public health, safety and welfare, and to conserve and maintain public natural resources.”

2. On the 1st page of the document (page i), the “Disclaimer” refers to this document as containing “policies” while the Title of the document states that these are “guidelines.” Consistent with our comment immediately below, the references to “policies” should be changed to be consistent with the Title, as follows:

Δ “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.”

As a fundamental matter, 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.

3. On the 1st page of the document (page i) the “Purpose” statement should be revised as shown below, to reflect that this document is being issued as a “Technical Guidance Document”:

² *Northwestern Youth Services, Inc. v. Com., Dept of Public Welfare*, 66 A.3d 301, 310-11 (Pa 2013).

Δ “This guidance document policy explains the process DEP will follow to coordinate with departmental advisory committees to develop the policies, guidance, regulations and other technical documents necessary to effectively implement State and Federal environmental laws in Pennsylvania.”

More importantly, the document states that DEP “values the technical advice provided by the members of its numerous advisory committees.” However, in practice these words have been just that – words – with respect to the Oil and Gas Technical Advisory Board (TAB). Despite clear direction in the statute creating TAB 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,³ the actual process that the Department has established and follows is that the Department creates the regulatory language and merely *presents* the already formulated and drafted language to TAB – or informs TAB of the language – for acceptance.

This established practice is reflected in the language of the Department’s “Public Participation” guidelines⁴ as well as in Section VI.C. (DEP Liaisons/Managers/Staff) of this guideline document, requiring 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.” “Presenting” or “informing” is not “consulting” – which means “to deliberate together: confer”.⁵ The clear and unambiguous direction in Section 3226(d) of the 2012 Oil and Gas

³ 58 Pa.C.S. § 3226(d). 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], but CDAC 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) (emphasis added). Accordingly, 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 does not mean *after DEP drafts* the proposal.

⁴ DEP ID: 012-1920-001, Public Participation in the Development of Regulations and Technical Guidance, Section III.1. (emphasis added):

The Department will use its advisory committees in the development of regulations and technical guidance documents and in the review of public comments. The Department will provide **timely briefings and consult** with the appropriate advisory committee on **regulations prior to Environmental Quality Board (EQB) consideration**. For proposed regulations, the Department will consult with the appropriate advisory committees early in the drafting stage of proposed regulations. **Advisory committee members will be provided with a copy of a draft regulation in advance of an advisory committee meeting to provide members with adequate time to review the proposal.**

⁵ <https://www.merriam-webster.com/dictionary/consult> (intransitive verb). The word “consult” in Section 3226(d) is an intransitive verb, which is a verb “that does not take a direct object. In other words, it is not done to someone or something. It only involves the subject.” http://www.grammar-monster.com/glossary/intransitive_verbs.htm . It is beyond dispute that words in a statute “shall be

Act is for DEP to deliberate and confer with TAB *as part of* the formulation and drafting process, which means *before* 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.

Below concerning Sections VI.B. and VI.C, PIOGA provides language to require the Department to comply with the clear legislative direction in Section 3226(d) to consult with TAB, and the requirement in Act 52 of 2016 to consult with CDAC. In its comments to the other two TGDs proposed at the same time as this one,⁶ PIOGA is also providing language to require the Department to comply with these statutory requirements.

4. On the 1st page of the document (page i) the “Applicability” statement should be revised as shown below, to reflect that this document is being issued as a “Technical Guidance Document”:

Δ “This guidance document ~~policy~~ applies to DEP’s coordination with all departmental advisory committees during the development of policies, guidance, regulations and other technical documents necessary to implement State and Federal environmental laws administered by DEP.”

5. *Section IV. MEETING NOTICES AND SCHEDULES; Section IV.A. Sunshine Act.* This section states that “[s]ome advisory committee meetings are subject to the Sunshine Act and must be open to the public in accordance with the law [and that] DEP will assist advisory committees in setting meeting schedules and providing adequate public notice for all advisory committee activities.” As there is confusion if the Sunshine Act applies to conversations between committee members outside the framework of formal meetings, this guidance document should address when the Sunshine Act applies to such conversations, including telephone conversations, and whether such conversations require prior public notice.
6. *Section V. MEETINGS, MEETING AGENDAS, AND MEETING MATERIALS; Section V.A. Agenda Development, and Section VI. ROLES AND RESPONSIBILITIES; Section VI.A. Committee Chair.* Section V.A. states that “DEP will consult with the advisory committee chair to discuss and finalize the agenda for the meeting,” and Section VI.A. states that “[t]he committee chair is responsible for coordinating with the DEP liaison to schedule and plan advisory committee meetings.” These provisions clearly acknowledge the important role of the advisory committee chair in developing the matters to be addressed at the committee meeting – which is appropriate – but appear to give DEP absolute control over the agenda, which in practice negates the chair’s ability to carry out the chair’s and the committee’s responsibilities. The role of the committee chair in establishing the agenda should be made

construed according to rules of grammar and according to their common and approved usage.” 1 Pa.C.S. § 1903.

⁶ DEP ID: 012-0900-001, Policy for the Development and Publication of Technical Guidance and DEP ID: 012-0820-001, Policy for the Development and Review of Regulations.

effective by specifically authorizing the chair to add agenda items which DEP may not have included, as follows in Section V.A.:

Δ “DEP will consult with the advisory committee chair to discuss and finalize the agenda for the meeting, which may include, in the chair’s discretion, matters designated by the chair that DEP has not included.”

7. *Section V.B. Member & Non-Member Participation.* The title of this Section V.B. is “Member & Non-Member Participation,” but this section as drafted only contains information related to “member” participation; there is nothing in the section related to “non-member” participation.

Δ Either the title should be revised to read only “Member Participation” or information should be added to address non-member participation.

8. *Section V.C. Non-DEP Presentations.* For clarity on where non-DEP presentations will be posted, the last sentence of Section V.C. should be revised to read:

Δ “The presenter should have copies available for everyone attending the advisory committee meeting, and DEP will post these materials to the advisory committee page of its website following the meeting.”

6. *Section V.E. Public Comment at Meetings.* To make clear that DEP personnel are generally actively engaged in committee meeting discussions, the 1st sentence of the 2nd paragraph in Section V.E. should be revised as follows:

Δ “During the rest of an advisory committee meeting, speaking and discussion are generally limited to advisory committee members, DEP personnel, and ~~their~~ invited guests or speakers.”

7. *Section VI. ROLES AND RESPONSIBILITIES; Section VI.A. Committee Chair.* This Section VI.A., as well as Sections III & VI.B., refers to Robert’s Rules of Order for conducting committee meetings, but DEP should not assume that committee members or other meeting participants are familiar with, or know what is expected from, those rules.

Δ Either a link should be provided to website where *Robert’s Rules of Order* can be accessed and reviewed, or the relevant provisions of those rules should be included as an Appendix to this TGD, similar to how the relevant Sunshine Act and regulations are appended.

8. *Section VI.B. Committee Members.* The 1st sentence of this section states that the committee bylaws should state the purpose of the committee “consistent with applicable statutory authority,” but not all of the committees listed in Appendix A have a corresponding “statutory” authority listed (such as the Environmental Justice Advisory Board). Therefore, the 1st sentence of Section VI.B should be revised as follows:

Δ “The advisory committee bylaws should state the purpose of the advisory committee consistent with the applicable statutory authority.”

More importantly, as explained above, this section of the guidance document doesn't properly reflect the statutorily required consultation between the Department and TAB and CDAC. Accordingly, this section should be changed as follows:

Δ Each advisory committee member is responsible for actively participating on the committee to provide DEP with advice on how to effectively administer Pennsylvania's environmental laws and, with respect to the Oil and Gas Technical Advisory Board (TAB) and the Pennsylvania Grade Crude Development Advisory Council (CDAC), to provide DEP with advice as part of the formulation and drafting of DEP policies, guidance, regulations or other technical documents. Effective participation requires regular attendance at advisory committee meetings and prior review of materials to be considered at each meeting and, with respect to TAB and CDAC, participation in the formulation and drafting of DEP policies, guidance, regulations or other technical documents.

9. *Section VI.C. DEP Liaisons/Managers/Staff*

Δ The 3rd sentence of the 1st paragraph of this section contains a typographical error where an apostrophe should be a comma, between the words "members" and "paperwork."

Importantly, this section states that "[t]he DEP liaison will work with the advisory committee chair, DEP program staff, and the DEP Policy Office to ensure effective communication between DEP and the advisory committee members [and that] DEP Deputy Secretaries and Bureau Directors will 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."

What this section does not address is how DEP will ensure effective communication between DEP and advisory committee members concerning DEP policies, guidance, regulations or other technical documents that involve or affect more than one program, as well as informing advisory committees during the development process. This guidance document should provide for effective communication for such continuous information and cross-program matters as follows:

Δ "DEP Deputy Secretaries and Bureau Directors will 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, and to provide continuous information during the development process. When such matters involve or affect more than one program, program staff and DEP liaisons shall, at a minimum, provide information-only briefings to each advisory committee concerning those matters that involve or affect that committee's program even if the committee is not authorized to provide advice on the matters.

More importantly, as explained above, this section of the guidance document doesn't properly reflect the statutorily required consultation between the Department and TAB and CDAC. Accordingly, this section should be changed as follows:

Δ DEP will designate an appropriate agency employee to serve as a liaison to each advisory committee. The DEP liaison will work with the advisory committee chair, DEP program staff, and the DEP Policy Office to ensure effective communication between DEP and the advisory committee members. With respect to TAB and CDAC, effective communication requires participation of TAB and CDAC in the formulation and drafting of DEP policies, guidance, regulations or other technical documents.

Δ DEP Deputy Secretaries and Bureau Directors will 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. With respect to TAB and CDAC, DEP Deputy Secretaries and Bureau Directors will ensure that program staff coordinate with DEP liaisons to enable their participation of TAB and CDAC in the formulation and drafting of DEP policies, guidance, regulations or other technical documents.

10. *Appendices.* Appendices B, C, & D appear to contain the full text of the Sunshine Act and the corresponding Regulations and Management Directive 250.1, but are not referenced anywhere in the TGD Sections I through VI to explain the what those appendices contain or why they are included.

Δ Appropriate references to those three appendices should be included somewhere in the document, such as in Section IV.A. related to the Sunshine Act, to explain why those appendices are included and what relevant information they contain.

Please contact me if you have any questions concerning these comments or if you want additional information.

Respectfully submitted,



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PIOGA