

June 3, 2019

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

Re: PADEP Draft Revised Technical Guidance Document Number 562-4180-306, Civil Penalty Assessments for Coal Mining Operations

On behalf of the members of the Pennsylvania Coal Alliance, please accept the following comments to the Pennsylvania Department of Environmental Protection's draft proposed revisions to Technical Guidance Document ("TGD") Number 562-4180-306, *Civil Penalty Assessments for Coal Mining Operations*, which was published in the Pennsylvania Bulletin on May 4, 2019. PCA appreciates the opportunity to comment on the proposed TGD revisions.

Background

PCA is the principal trade organization representing underground and surface bituminous coal operators in Pennsylvania, as well as other associated companies whose businesses rely on coal mining and the coal economy. PCA member companies produce over 85% of the bituminous coal mined annually in Pennsylvania, making the Commonwealth the third largest coal producing state in 2018. Coal mining helps drive the Pennsylvania economy, producing 49 million tons of coal, 17,700 jobs, and \$6.9 billion in value in 2017. Coal mining has served as the financial cornerstone for economic development for many of Pennsylvania's coalfield communities since the mid-18th century.

General Comments

PCA has significant concerns regarding the draft TGD, and therefore believes it would be appropriate to refer the draft TGD to the Mining Reclamation Advisory Board's (MRAB) Legislative, Regulatory and Technical Committee for review and comment. In addition, PCA respectfully requests an extension of time to submit more detailed comments, and the opportunity to work directly with the Department to address our concerns and improve the draft TGD. With respect to the substance of the draft TGD, PCA is providing the below, high-level comments for initial consideration, which are as follows:

Specific Comments

1. Applicability

The first page of the TGD states that it applies to "violations of the Coal Mining Regulations, 25 Pa. Code Chapters 86 – 90 and the applicable statutes." It is PCA's understanding that the TGD does not apply to anthracite coal mining under Chapter 88.

2. Section V.B – Culpability of the Operator (25 Pa. Code § 86.194(b)(2))

- a. The narrative descriptions of degrees of culpability in the Department’s guidance policy for penalties in the oil and gas industry, TGD Number 550-4180-001, *Civil Penalty Assessments in the Oil and Gas Program* (“Oil & Gas TGD”), differs from those contained in the TGD. The descriptions in the Oil & Gas TGD of, for example, reckless, negligent and accidental conduct are clearer and provide better guidance to Department staff and the regulated community than the descriptions in the TGD. The Department should therefore revise the TGD to incorporate descriptions of degrees of culpability similar to those from the Oil & Gas TGD.
- b. Although the first paragraph of Section V.B acknowledges that the Culpability factor includes a “No Culpability” category, the section only lists and provides descriptions of the Willfulness, Recklessness, and Negligence categories. An “Accidental” or “No Culpability” category and description should be added to the TGD.

3. Section V.A – Seriousness (25 Pa. Code § 86.194(b)(1))

- a. The criteria for each of the categories of the Seriousness factor (Extraordinary Circumstances, High, Low) do not provide clear, objective guidance to Department staff and the regulated community on when a violation would be assigned to each category. Although this section was not substantially revised from the 2005 version of the TGD, PCA believes that it would be appropriate to revisit these criteria prior to issuance of the final TGD.
- b. Section V.A.1, Extraordinary Circumstances, is inconsistent with the regulations and will cause confusion among Department staff and the regulated community. This section indicates that penalties meeting the criteria may be assessed “from \$2,001 to the statutory maximum.” The TGD, as currently written, appears to indicate that Extraordinary Circumstances is merely a category of the Seriousness factor that is evaluated under the factors set forth in 25 Pa. Code § 86.194(b)(1)(i) – (v). In contrast, 25 Pa. Code § 86.194(b)(1) states that penalties will be assessed up to \$3,000 based on the seriousness of the violation. 25 Pa. Code § 86.194(b)(1)(vi) then states that “an additional amount up to the statutory maximum may be assessed in extraordinary circumstances.” The Department should revise this section to be consistent with the regulation.

4. Section VI.A – Seriousness of Water Quality Violations

Section VI.A of the TGD includes a table for determining the base penalty assessment for seriousness of water quality violations under the Clean Stream Law. The table includes magnitude categories of “Severe,” “Significant,” “Moderate,” “Low,” and “De minimus.” However, the TGD does not define these terms or provide criteria for what types of violations would fall under each category. In contrast, the Oil & Gas TGD contains the same magnitude categories but describes each and provides relatively straightforward criteria for assigning a violation to a specific category. The purpose of the TGD is to give both the Department and the regulated community clear, objective guidance on the assessment of civil penalties. The current draft of the TGD does not do so regarding the magnitude factor for water quality violations. PCA recommends that the Department revise the TGD to include descriptions of the magnitude categories similar to those contained in the Oil & Gas TGD.

5. Section VIII – Civil Penalty Process

The Department should add a provision to Section VIII.B stating that, upon request by the person issued the Notice of Proposed Assessment, the Department will provide the person with a copy of the completed civil penalty worksheet used to calculate the proposed penalty.

6. Other Provisions of TGD that are Inconsistent with the Regulations. In addition to those

identified above, in several other sections of the TGD the Department attempts to incorporate certain regulatory provisions but changes the language in a way that expands the scope of the TGD beyond what the regulations provide. As the Disclaimer states, the TGD shall not affect regulatory requirements and does not have the weight of a regulation. The Department may not use the TGD to expand its powers or impose requirements beyond what the regulations provide. For example:

- a. Section V.D, Costs to the Commonwealth (25 Pa. Code § 86.194(b)(4)): This section of the TGD provides examples of costs to the Commonwealth that may be included in the penalty assessment, “each of which may further incorporate, for example, contractor and consulting fees, overhead, travel costs, and equipment costs.” 25 Pa. Code § 86.194(b)(4) similarly provides a list of the types of costs to the Commonwealth that may be included in the penalty assessment but does not include the additional language cited above.
- b. Section V.F, History of Violation (25 Pa. Code § 86.194(b)(6)): This section states that a penalty may be increased by 5% for “each order which was issued on the site in question during the previous one-year period and which was included in a previously adjudicated proceeding, agreement, or consent decree.” This language is inconsistent with the regulation, which states that a 5% penalty increase may be assessed based on “previous violations of the applicable laws for which the same person or municipality has been found to have been responsible in a prior adjudicated proceeding, agreement, consent order or decree which became final within the previous 1-year period on the permit where the violation occurred.” The language in the TGD, as currently written, is unclear and could expand the circumstances under which a penalty amount may be increased based on history of violations beyond what the regulation allows. The Department should revise this section to bring it in line with the regulation.
- c. Section VI.A.2, Water Quality Violations: This section states that the Department will automatically increase the magnitude of a violation of effluent standards if there is an exceedance of limits for toxic pollutants. This provision is unclear, and neither the Clean Streams Law nor its applicable regulations provide for such an automatic increase in penalties for toxic pollutants.
- d. Section IX, Individual Civil Penalties: This section states that the Department may assess a penalty against “a corporate officer, director, or agent.” 25 Pa. Code § 86.195 only provides for the assessment of penalties against a corporate officer. The regulation does not provide for the assessment of penalties against a corporate director or agent. The Department should therefore remove the reference to directors and agents from the TGD.

Proposed Next Steps

PCA proposes the following next steps regarding the TGD:

1. That the Department refer the draft TGD to the Mining Reclamation Advisory Board's ("MRAB") Legislative, Regulatory and Technical Committee, and any other appropriate advisory committees and workgroups, for review and comment.
2. That the Department either withdraw the TGD for further consideration consistent with our comments or republish the TGD for a second notice and comment period.
3. That PCA will provide additional and more detailed comments on the TGD, including a redline showing PCA's proposed revisions.

Conclusion

The Pennsylvania Coal Alliance appreciates the opportunity to provide these comments and looks forward to working with the Department on these matters. Please contact me if we can be of assistance or if you would like to discuss our comments.

Sincerely,



Rachel Gleason
Executive Director
Pennsylvania Coal Alliance

cc: John Stefanko, Deputy Secretary for Active and Abandoned Mine Operations
Bill Allen, Director, Bureau of Mining Programs
Eric Oliver, Mineral Resource Program Specialist, Division of Permitting and Compliance