



The DEP Releases a Trio of Draft Technical Guidance Documents

On October 14, 2017, the DEP published notices of availability for a trio of draft Technical Guidance Documents (TGD) in the *Pennsylvania Bulletin*. Each of these TGDs proposes policy departures from current practices in both the form and substance of the respective TGD. Two of them, *Policy for the Development and Publication of Technical Guidance* and *Policy for the Development and Review of Regulations*, are significantly less detailed than their predecessor TGDs. For instance, the draft TGDs omit internal procedural steps and checkpoints involved in the DEP's promulgation of new technical guidance documents and regulations. The revisions, if finalized, will affect those regulated and public entities who routinely participate in the DEP's TGD and regulatory development process.

Overview

1. *Policy for the Development and Review of Regulations (012-0820-001)*

The draft policy proposes substantial formatting changes – including a name change – from the current *Policy for Development, Approval, and Distribution of Regulations*, which was published by the DEP in 1996 and last updated in November 1999. The proposed TGD is notably shorter in the current version because it abandons 11 extensive attachments that provide guidance on both form and substance the DEP is to follow throughout the rulemaking process. Key differences in the proposed TGD include:

- A new section entitled “Purposes of Environmental Regulations,” which refers to Constitutional rights, including the Environmental Rights Amendment of Article I, Section 27. The DEP refers to its duty, as an agency of the Commonwealth, as a trustee to conserve and maintain public natural resources.
- A statement that the General Assembly establishes the framework and scope of the environmental programs administered to the DEP but that it “defers” to the DEP to implement the laws.
- A statement that “anyone can submit information related to a rulemaking to the DEP at any time...” for the DEP's consideration outside the formal public comment period.
- Far less rigorous scrutiny of economic impacts and no mention of steps for the DEP to comply with Executive Order 1996-1.
- Little to no acknowledgement of the substantive amendments in 2012 to the Regulatory Review Act, which require considerations and flexible provisions for small businesses.
- Removal of a provision for sunset review, which required the DEP to publish an annual sunset schedule on the first Saturday of January in the *Pennsylvania Bulletin* to determine whether existing regulations effectively fulfill the goals for which they were intended.

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2. *Advisory Committee Guidelines (012-1920-002)*

The draft guidelines address the role and function of advisory committees and modify the functions filled by the DEP, the advisory committee and the general public. Notably, this draft TGD was not provided or presented to all advisory committees for their review and comment prior to the start of the public comment period. The proposed TGD provides that:

- Agendas would be developed by the DEP, after consultation with the advisory committee chair, rather than “developed by the committee chair and the Department liaison” as described in the current policy and contradictory to the roles and responsibilities of the committee chair proposed by the DEP in the TGD.
- The DEP will continue to prepare the minutes, and if the DEP records meetings, such recordings will only be retained until the meeting minutes are approved by the committee, unless otherwise stated at the meeting being recorded.
- The current simple statement that “public comment from attendees is encouraged” is replaced with detailed provisions reminding the public that they are there to “learn about DEP,” should be respectful, and that public comment should be limited to ensure the committee can complete its agenda.
- Committee members are advised to “clearly indicate” when they speak at other advisory committee meetings if they have been allowed by vote to speak on behalf of their respective committees.
- Additionally, committee members’ participation is limited to providing the DEP with advice on how to “*effectively* administer Pennsylvania’s environmental laws.”

The DEP plans to discuss this draft TGD at several advisory committee meetings that are scheduled in the next several weeks, but it is not certain that this draft TGD will be discussed with all of the advisory committees listed in proposed Appendix A of the TGD before the close of the public comment period.

3. *Policy for the Development and Publication of Technical Guidance (012-0900-001)*

The draft policy explains the DEP’s process for developing TGDs. The draft retains several sections from an Interim Final TGD from May 30, 2015, which the DEP withdrew with its October 14th notice, but eliminated most of the procedures outlined for the DEP’s staff. The current version includes far less direction or insight as to how the DEP will proceed internally when it develops a TGD. Additionally, it maintains confusing language from the Interim Final TGD whereby the DEP can rescind TGDs that are “no longer necessary” but “better suited” for an alternative, non-TGD format of a fact sheet, brochure, or manual (which are not defined in the draft).

Opportunity to Comment

TGDs are both policy statements and an important part of the DEP’s compliance framework and are intended to clarify existing requirements. TGDs do not take the place of statutory or regulatory requirements and cannot supplement or exceed the authority provided to the DEP by the General Assembly. Comments will be accepted on each of the three proposed TGDs until December 13, 2017. For more information regarding these three proposed TGDs, please contact Sean M. McGovern at (412) 394-5439 or smcgovern@babstcalland.com and Jean M. Mosites at (412) 394-6468 or jmosites@babstcalland.com.

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