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Use of Policy Guidance Documents Recommendations of the Environmental Advisory Council January 30, 2009

Description of Current Practice

Various formal documents guide the Department of Environmental Quality (DEQ) operations. These guidance documents serve a variety of purposes from matters of internal procedures to interpretation and application of statutes and rules. They have taken many forms and are issued under various names, including policy statements, guidance, operational memoranda, and guidance letters. One subset of these documents, which we call policy guidance documents, describes the DEQ's interpretations of the statutes and rules it administers. Policy guidance documents provide guidance to staff on how the DEQ interprets its statutes and rules, and also serve to provide parties outside the DEQ with a similar understanding. Policy guidance documents recognize the need for the appropriate level of flexibility consistent with the discretion required by statute or rule. They are currently developed through a variety of processes, often with public notice and comment.

Discussion

It is important that the DEQ give carefully-crafted, accurate guidance to its staff as necessary to assure its programs are efficiently operated and administered in a fair and consistent manner throughout the state. It is also important that the regulated community and the public in general have a clear understanding of the presumptions the DEQ will apply in its execution of the statutes and rules it administers.

Over the years, various types of guidance documents have been used by the DEQ. These have had different titles, formats and uses, which at times has led to confusion. For purposes of this report, the Environmental Advisory Council (EAC) focuses on a subset, which we refer to as "policy guidance documents." These documents are those that describe how the DEQ will interpret and apply the laws it administers. (The DEQ can describe how it will interpret and apply the laws it administers in ways other than through a policy guidance document. The DEQ should notify the public of these descriptions.) Internal operating guidance documents, such as those establishing operating procedures that do not substantially affect parties outside the DEQ are not the subject of this discussion.

A policy guidance document is not enforceable. Statutes, rules, and final actions of the DEQ (such as permits and orders) are examples of enforceable documents. Policy

guidance documents are appropriately used in the development of enforceable documents or determinations issued by the DEQ (e.g. permits, orders, final remedial action plans). However, the presumptions and directions set forth in a policy guidance document do not have the force of law. Parties should have effective means to informally challenge the positions taken in a policy guidance document through the DEQ's chain of command.

Policy guidance documents impact the regulated community and the public in general, and accordingly it is important to provide adequate notice that a policy guidance document is being developed, opportunity to comment during the development process, and a meaningful opportunity to air and resolve differences before the document is adopted.

As regulatory programs mature and understanding of the appropriate application of laws and regulations change, the presumptions and directions set forth in policy guidance documents need to be updated as well. Notice and opportunity for comment should be provided for proposed modifications.

The DEQ needs to strike a balance in the use of policy guidance documents: the DEQ needs to have the ability to take into consideration new evidence, new scientific information, and site-specific differences in making its decisions while still affording the certainty and consistency that should result from conformance with the directions of a policy guidance document. The DEQ should administer its programs to allow discretion and flexibility at the staff level to afford the best solutions, while still facilitating the appropriate level of state-wide consistency—making like decisions in like circumstances.

In developing policy guidance documents, the following should be considered:

- A critical consideration in the decision to develop a policy guidance documents is “why” it is thought to be needed. These reasons should be clearly stated when presenting the draft to the public. The DEQ should evaluate alternatives to the development of a policy guidance document, assess whether impacted parties support or oppose its development, and consider how other states have dealt with similar situations.
- A collaborative process in determining the need for and the key provisions of the document is important to its success.
- Policy guidance documents should have consistent format and boilerplate background information and disclaimers, and be readily accessible on the DEQ's Web site.
- Outreach and training on the applicability of policy guidance documents is important.

At the request of the DEQ, the EAC reviewed the development and use of policy guidance documents and offers the following recommendations for the DEQ's consideration.

Recommendations

Policy guidance documents should be developed through a deliberate and public process, used for appropriate purposes, and actively managed as transparent regulatory tools.

Development of Policy Guidance Documents

1. The DEQ should initiate development through a documented “purpose statement” that describes the need for, purpose, and scope of a guidance document.
2. The development process should involve all affected DEQ divisions and include an opportunity for review by the Department of Attorney General.
3. The DEQ should use a common name for policy guidance documents used by the various divisions and should strive to use similar terminology for all types of guidance documents. Existing documents should be phased into these naming conventions over time.
4. The DEQ should also use a common template that ensures critical information is included in each policy guidance document and aides in understanding by affected parties. The purpose of the policy guidance document is part of this critical information.
5. Each policy guidance document should cite the statutory or administrative rule foundations for its content.
6. The DEQ should explicitly engage appropriate affected parties in developing the policy guidance document. This should include determining the need for, and considering alternatives to, a policy guidance document. There is flexibility in the nature and timing of this involvement. Ideally it should begin during early stages of drafting and be conducted interactively, such as through advisory groups.
7. The DEQ should document and consider comment by affected parties on the purpose statement and content of the policy guidance document before adoption.
8. The Director’s Office should approve adoption of each policy guidance document.
9. The DEQ should avoid using interim (or draft) policy guidance documents. However, in some cases it is necessary to provide consistent guidance to staff while a policy guidance document is being developed through public notice and comment and before it is finalized. In these cases, the document

should clearly be labeled “Interim” and its use should be approved by the Director’s Office. The DEQ should balance the need to minimize time operating under an interim policy guidance document with the need to fully involve affected interests in finalizing the document, especially on complex matters.

Use of Policy Guidance Documents

1. A policy guidance document should never be cited as the basis for a compliance or enforcement action.
2. Policy guidance documents are appropriately used in the development of enforceable documents or determinations issued by the DEQ (e.g. permits, orders, final remedial action plans). However, the presumptions and directions set forth in a policy guidance document are rebuttable and do not have the force of law. These presumptions may be rebutted informally through the DEQ chain of command, or through administrative or judicial proceedings.
3. The DEQ should only apply changes to guidance documents prospectively. That is, the DEQ should not reconsider regulatory decisions that have been made under a policy guidance document when that document is modified. When a party relies upon existing guidance that then or will change, the DEQ and party should discuss whether to continue under the previous or new guidance, balancing the reliance and stage in the decision-making process with the reason for the new guidance in relation to statutory and rule requirements.
4. The DEQ should train staff in the purpose and appropriate use of each policy guidance document as it becomes effective.
5. Each DEQ division should inform affected parties of the content and intended use of policy guidance documents within its program areas and, to the extent practicable, provide outreach and training to affected parties on those documents.
6. A policy guidance document cannot establish regulatory requirements for parties outside the DEQ. Each policy guidance document needs an explicit disclaimer to this effect.
7. To the extent that a policy guidance document interprets a rule, and that interpretation has been consistently applied for a period of time, the DEQ should consider updating the rules to directly incorporate the interpretation at the next opportunity.

Management of Guidance Documents

1. All current policy guidance documents that describe how the DEQ will interpret and apply the laws it administers should be readily available in an easily searchable Web location. A policy guidance document should be posted as soon as it is operative.
2. The DEQ should involve affected parties commensurate with the nature of changes being considered/made when a policy guidance document is amended. Affected parties should be notified when a policy guidance document is revised. The DEQ should clearly indicate revision dates on policy guidance documents, and ensure the most current version is used by DEQ staff and available to affected parties.
3. Policy guidance documents should be periodically reviewed to ensure they remain relevant and appropriate according to their purpose statement. Each policy guidance document should explicitly indicate the frequency with which it is to be so reviewed. At a minimum, this review should occur in conjunction with the updating of the DEQ's Quality Management Plan, which occurs on a five-year cycle. Any comment by affected interests on how the policy guidance document has been used should be considered by the DEQ in this review. The DEQ has flexibility as to how this review is conducted and the extent to which it involves affected interests.
4. The DEQ need not formally reconsider each existing policy guidance document in light of these recommendations. However, within a given period of time (e.g., one year) each division should inform the DEQ Director of any existing policy guidance document that, based on experience by staff and affected interests, should be reconsidered in light of these recommendations and revised as necessary according to the process described herein.

Closing

The EAC appreciates the opportunity to provide these recommendations to the DEQ and looks forward to the Director's response to them. We trust these recommendations will improve the process for the development and management of policy guidance documents, and help ensure their appropriate use. These recommendations are grounded in our belief that policy guidance documents are legitimately used in the administrative process and that affected parties outside the DEQ have a valid interest in the proper development and use of those documents.