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### EPA's Online Guidance Database—A Makeover for the Agency's Guidance Documents

The U.S. Environmental Protection Agency (EPA) recently adopted a final regulation governing the issuance of guidance documents, which the agency historically has used to provide direction to agency staff, other governmental agencies, the regulated community, and interested stakeholders on a wide variety of technical and regulatory matters under its purview. In this update, we discuss the impetus for the new rule, what the rule aims to accomplish, and potential implications for the regulated community, environmental groups, and others who may be affected by the new rule.

## **Background**

EPA's new final rule, which was published in the Federal Register on October 19, 2020, "establishes the procedures and requirements for how [EPA] will manage the issuance of guidance documents consistent with the Executive Order 13891." [85 Fed Reg. 66230 \(Oct. 19, 2020\)](#). This October 2019 executive order directed all federal agencies to "set forth processes and procedures for issuing guidance documents." See [84 Fed. Reg. 55235](#), Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" (Oct. 15, 2019). EPA's final rule does four key things:

- Defines "guidance document" as "an Agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation" subject to a few specific exclusions
- Establishes general requirements and procedures for issuing certain guidance documents
- Carves out a category of "significant guidance" documents, as defined in E.O. 13891, which require at least a 30-day public notice and comment period, and a follow-up public response by the agency to major concerns (with some exceptions for exigency, safety, health and similar)
- Establishes procedures for the public to petition for the modification or withdrawal of active guidance documents or alternatively, for reinstatement of a rescinded guidance document; and requires that EPA respond to such petitions within 90 days of receipt

Whether a document is classified as "significant" is based on the following criteria as set forth in E.O. 13891: (1) an annual effect on the economy of \$100 million or more; (2) creation of a serious inconsistency or interference with planned or executed actions of another agency; (3) a material alteration of the impacts on the budget of entitlements, grants, user fees, or loan programs or the rights and obligations of recipient of such; and (4) novel legal or policy issues of legal mandates or the president's priorities, or established processes of regulatory planning and review. The determination of whether a guidance document is "significant" will be made in consultation with the EPA Office of Information and Regulatory Affairs. Additionally, all guidance issued by EPA's regional offices must go through the presidentially appointed EPA official tasked with administering the national program under which the guidance arises.

According to Administrator Andrew Wheeler, the goal of this rule is to improve agency transparency. Speaking at an online event, Administrator Wheeler touted the agency action as "probably the biggest change in at least a generation," stating that "[t]he American public has a right to this information. They have a right to a seat at the table and they have a right to understand what the government is doing, why they're doing it, how it will affect them."

There are thousands of EPA guidance documents, which the agency historically has used to clarify EPA regulations and technical matters. In many cases, however, where guidance documents were either abandoned or

replaced by newer guidance, the status of the older guidance remained unresolved. In establishing the new online database, EPA explicitly defined an "active guidance document" as "a guidance document in effect that the EPA expects to cite, use or rely upon," and will affirmatively rescind guidance that is no longer applicable. Only active guidance documents will be posted to the online database.

### **Effect on Challenges to Agency Guidance**

Challenges to agency guidance have routinely been dismissed by the courts because such guidance is not legally binding and therefore is not considered final agency action subject to judicial review. For agency action to be reviewable by a court, the U.S. Supreme Court has established that the action must constitute "final agency action" under the federal Administrative Procedure Act, which means that the action (1) must represent the "consummation" of the agency's decision-making process; and also (2) must determine legal rights and obligations or give rise to direct and appreciable legal consequences. *Bennett v. Spear*, 520 U.S. 154 (1997).

One of the more notable recent court cases involved a [2018 guidance memorandum](#) from the then-assistant administrator for EPA's Office of Air and Radiation that backtracked on EPA's longstanding "once in, always in" policy for classifying "major" sources under Section 112 of the Clean Air Act. The U.S. Court of Appeals for the District of Columbia Circuit held that while the guidance articulates what EPA believes to be the only permissible interpretation of Section 112, it "does not revoke or amend or single permit," nor does it "bind state permitting authorities or assure regulated entities of the ability to reclassify" their sources of air emissions. The court thus found that the guidance memorandum "does not have a single direct and appreciable legal consequence." *California Communities Against Toxics v. Environmental Protection Agency*, 934 F.3d 627, 637-38 (D.C. Cir. 2019). As a result, it was not judicially reviewable.

In a similar case, the Sierra Club challenged [another 2018 guidance memorandum](#) issued by EPA under the Clean Air Act, which advised on how to determine whether an air emissions source exceeds a "significant impact level" for purposes of the Prevention of Significant Deterioration permitting program. Relying on its decision in the *California Communities* case, the D.C. Circuit found that the guidance did not constitute judicially reviewable final agency action, on the ground that state permitting authorities retained discretion on whether to use the guidance on a case-by-case basis and were not bound to follow it. *Sierra Club v. Environmental Protection Agency*, 955 F.3d 56, 63-65 (D.C. Cir. 2020).

Because these cases predated the EPA's final rule, the courts did not have an opportunity to address whether the challenged guidance documents would be classified as "significant." But going forward, it is possible that EPA guidance that historically has been deemed judicially unreviewable will be subject to court review based on whether the guidance meets the significance threshold, and if so, whether the process for adopting the guidance meets the requirements for public notice and comment and for responding to any major concerns raised in the comments.

### **Pros, Cons, and Implications**

EPA's new rule has received mixed reviews. Proponents argue that guidance documents—while not legally binding—affect compliance practices by providing greater clarity to the regulatory community on how EPA is likely to interpret and enforce its rules. Under this line of reasoning, the effect of the new rule should be to produce guidance that provides greater clarity and direction to the regulated community.

Opponents of the new rule fear that it may impose heavier burdens on EPA, which may in turn reduce the amount of new guidance and the rate at which it is issued. Specifically, where EPA guidance materially impacts compliance practices, it may very well meet the definition of "significant," thus triggering public notice and

comment and a duty on EPA's part to respond to substantial issues raised in the comments. This would minimize the distinctions between the process for adopting guidance documents and the process for a formal rulemaking, which may incentivize the agency to proceed by way of regulations instead of issuing informal guidance. In turn, this may blunt the utility of EPA's long-standing practice of issuing guidance to provide greater clarity and direction on complex regulatory and technical issues. Additional criticisms of the rule suggest that the online database reflects an attempt to "clean house" on guidance documents issued by previous administrations.

## **Takeaways**

A number of significant questions persist. A new administration could seek to rescind the new rule, potentially as part of a broader realignment of environmental priorities. If the new rule stands, it remains to be seen how the identification of "current guidance" will be used to be limit the effectiveness of older guidance documents. It also remains to be seen how the new petition process for modifying, withdrawing, or reinstating guidance might affect agency resources and practices, and whether this process could result in fewer active guidance documents or generate increased litigation to challenge EPA guidance decisions in response to such petitions. Despite the preexisting restraints on judicial review of EPA guidance, courts may also be called on to determine whether new guidance qualifies as "significant" under the new rule, and if so whether the notice and comment requirements have been satisfied prior to adoption.

Regardless of what the future holds, in these early stages of EPA's implementation of its new rule, interested parties should engage with EPA to help determine which guidance is applicable for their specific projects and programs.

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