

Guidance Document Development/Management: U.S. Environmental Protection Agency Issues Final Rule



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Environmental Protection Agency (“EPA”) issued on September 14th a prepublication final rule (“Rule”) establishing procedures and requirements for how the agency manages the development and issuance of guidance documents.

EPA states the purpose of the final rule is to ensure its guidance documents are:

- Developed with appropriate review;
- Accessible and transparent to the public; and
- Benefit from public participation in the development of significant guidance documents.

The Rule is stated to have been developed in accordance with White House Executive Order 13891 which is titled:

Promoting the Rule of Law Through Improved Agency Guidance Documents

The Executive Order directed federal agencies to finalize regulations that “set forth processes and procedures for issuing guidance documents.”

Components of the Rule include:

- Provides a definition of guidance documents for purpose of the Rule
- Establishes general requirements and procedures for certain guidance documents issued by EPA
- Incorporates additional requirements for guidance documents determined to be significant guidance
- Provides procedures for the public to petition for the modification or withdrawal of active guidance documents as defined by the Rule
- Provides procedures for the public to petition for the reinstatement of a rescinded guidance document

Guidance documents have been used by federal and state environmental agencies since the enactment and/or promulgation of their companion statutes and regulations (i.e., for many years). They provide agencies the ability to move quickly (because of the absence of notice and comment). However, guidance is sometimes challenged by regulated entities arguing they are being treated as binding regulations. This frustration can be amplified if a judicial challenge is dismissed on the basis that the guidance memo is not a final agency action.

Nevertheless, an argument can be made that making the process of issuing guidance too onerous can pose problems for the regulated community. Such documents can quickly provide clarification of complex rules. They can fill in gaps and provide agencies needed flexibility. Inhibiting the ability of an agency to maintain memo databases such as EPA's "RCRA Online" would arguably remove a key information source.

A link to the prepublication version of the Rule can be found [here](#).