

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



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

05/21/2021

The United States Environmental Protection Agency (“EPA”) publishes a May 18th Federal Register Notice rescinding a rule adopted during the Trump Administration that established procedures and requirements for how the agency manages the development and issuance of guidance documents.

The rescinded rule had been published in the Federal Register on October 19, 2020. See 85 Fed. Reg. 66230.

The rescinded rule established procedures and requirements regarding EPA’s issuance, revision, and withdrawal of guidance documents.

In the May 18th Federal Register preamble associated with the rescission of the final rule EPA states that:

. . . revisions to the EPA’s policies and requirements surrounding guidance are matters of agency organization, procedure, or practice that lack the force and effect of law.

As a result, EPA takes the position that it is not engaged in a notice and comment process in issuing or revising internal procedures under the Administrative Procedure Act. Consequently, EPA states it is providing an immediate effective date for the rescission rule.

Guidance documents have been used by federal and state agencies since the enactment and/or promulgation of their companion statutes and regulations (i.e., for many years). They arguably provide agencies the ability to move quickly (because of the absence of notice and comment). However, guidance is sometimes challenged by regulated agencies 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 also 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.

EPA concludes that the rule adopted during the Trump Administration deprived:

. . . the EPA of necessary flexibility in determining when and how best to issue public guidance based on particular facts and circumstances, and unduly restricts the EPA's ability to provide timely guidance on which the public can confidently rely.

A copy of the Federal Register Notice can be downloaded [here](#).