Bloomberg Environment

Daily Environment Report™

Regulatory Policy

Practitioner Insights: Is Agency Guidance the Low-Hanging Fruit for Regulatory Reform?

Rolling back environmental regulations is a priority of the Trump administration, but revising or withdrawing guidance may be a faster and more effective means to achieve near-term change, Andrew J. Turner and Alexandra Hamilton of Hunton & Williams say in this analysis article.

The Trump Administration has pursued an ambitious goal to reduce federal regulation. The administration has slowed the promulgation of new rules, and in early 2017 a bevy of late-term Obama-era rules still subject to the Congressional Review Act were overturned by the GOP Congress.

But changes to many of the major environmental rules under this administration's review—such as the Clean Power Plan and Clean Water Rule—require traditional Administrative Procedure Act notice-and-comment rulemaking. Lawsuits challenging such new rules are certain, so changing major rules will be a complex, multi-year process. By contrast, changing agency guidance can be accomplished faster. Recent moves by the Justice Department signal a shift in that direction.

Rules: The Tip of the Regulatory Iceberg For every rule, federal agencies often issue dozens of informal guidance documents, each taking on a life of its own in practice and frequently cited as gospel by agency staff in the field. The U.S. Circuit Court of Appeals for the District of Columbia Circuit explained in its 2000 ruling in *Appalachian Power Co. v. EPA*.

''The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. . . . The agency may also think there is another advantage—immunizing its lawmaking from judicial review.''

Guidance can be issued, changed, or removed without notice-and-comment rulemaking. For example, in April 2017, when the White House Council on Environmental Quality withdrew its National Environmental Policy Act greenhouse gas guidance, it did so without requesting public comment. Instead, it simply published a notice on the same date the withdrawal took effect. Moreover, guidance is not typically subject to judicial review—provided the guidance is not a substitute for rulemaking. Agencies sometimes will invite comment on new or changed guidance, however, out of an abundance of caution or a desire to involve the public, as the U.S. Fish and Wildlife Service did in November 2017 when it requested comments on planned revisions to its mitigation policies.

Administration Targets Guidance Presaging a new focus on reducing use of guidance as a substitute for rulemaking, Attorney General Jeff Sessions issued a memorandum in late November establishing a new guidance policy for the Justice Department. Under the new policy, the Justice Department is prohibited from issuing guidance that purports to bind parties but is not adopted through the notice-and-comment rulemaking process. The policy further directs Justice Department sections to identify existing guidance documents that should be repealed, replaced, or modified for purporting to create binding rights or obligations. The policy identifies the following principles that should be adhered to to avoid circumventing rulemaking requirements:

- Guidance documents should identify themselves as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes or legislative rules.
- Guidance documents should clearly state that they are not final agency actions, have no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified at the department's complete discretion.
- Guidance documents should not be used for coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.
- Guidance documents should not use mandatory language such as ''shall,'' ''must,'' ''required,'' or ''requirement'' to direct parties outside the federal government to take or refrain from acting, except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance docu-

ments should clearly identify the underlying law that they are explaining.

■ To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not result in any enforcement action.

In December, demonstrating that it was serious about implementing the new policy, the Justice Department announced the rescission of 25 guidance documents it found to be either outdated or contrary to the new guidance policy.

Just last month, former Associate Attorney General Rachel Brand issued a new policy that implements—and goes a step farther than—the Sessions memo that instituted the guidance policy. Brand lead the Justice Department's Regulatory Reform Task Force, which was set up to identify regulations that should be modified or rescinded following President Donald Trump's Executive Order 13777 directing agencies to create such initiatives.

The Brand memo prohibits the Justice Department from using its civil enforcement authority to convert agency guidance documents, including other agencies' guidance documents, into binding rules. The announcement states that agencies have at times ''blurred the distinction between regulations and guidance,'' and that rulemaking requirements may not be evaded ''by using guidance memos to create de facto regulations.'' The new policy specifies that the Justice Department ''may not use its enforcement authority to effectively convert agency guidance documents into binding rules,'' such as by citing failure to follow guidance documents as a basis for alleging or establishing a violation of law. Beyond limiting the Justice Department's use of guidance, the new policy sends a strong signal to other regulatory agencies about limits on the role and use of guidance.

Although the Justice Department's new guidance policy may represent a marked shift from past practice, it squares with case law that draws the line between when a guidance document is in fact simply guidance and when it crosses the line into rule territory by creating substantive rights or duties. Several courts have had occasion to consider this distinction in recent years for agency policies that did not go through notice-and-comment rulemaking.

In *Appalachian Power*, for instance, the D.C. Circuit evaluated an Environmental Protection Agency guidance document that addressed standards for periodic monitoring under Clean Air Act Title V permit regulations. The D.C. Circuit found that the guidance directed ''State permitting authorities to conduct wide-ranging sufficiency reviews and to enhance the monitoring required in individual permits beyond that contained in State or federal emission standards,'' thus effectively amending the permit regulations. The court set aside the guidance for failure to comply with required notice-and-comment rulemaking procedures.

Similarly, in a 2002 ruling in *General Electric Co. v. EPA*, the D.C. Circuit considered another EPA guidance document. The guidance under review interpreted EPA regulations on cleanup and disposal of polychlorinated biphenyl (PCB) remediation waste and PCB bulk waste, detailing a risk assessment procedure to be used in determining the cleanup level required. General Electric challenged the guidance document, asserting that it had binding effect on both the agency and private parties, but the EPA failed to engage in notice-and-comment rulemaking. The D.C. Circuit agreed that the guidance document constituted a rule and set aside the guidance document for failure to comply with rulemaking requirements.

More recently, the EPA articulated policy statements about wastewater treatment processes at municipally owned sewer systems not through a ''guidance'' document per se, but in a set of letters written in response to questions from Sen. Chuck Grassley (R-Iowa) about regulatory requirements governing those systems. The letters expressed the EPA's policies on instream ''mixing zones'' for pollutants discharged from publicly owned treatment, as well as on blending partially treated wastewater with treated wastewater prior to discharging into receiving waters.

In a 2013 ruling in *Iowa League of Cities v. EPA*, the Eighth Circuit considered a challenge to these letters. The court held that the letters effectively modified the EPA's existing rules for water treatment processes at municipally owned sewer systems and set aside the letters for failure to follow requisite rulemaking procedures. Notably, the fact that the EPA's policy statements were made in letters rather than a ''guidance'' document did not affect the court's decision; they were a means of regulating without complying with the rulemaking process. Likewise, the Justice Department policy specifies that it applies to agency statements ''of general applicability and future effect'' that purport to establish legal rights or obligations, regardless of whether they are labeled as ''guidance.''

Focus May Turn to Regulatory Agencies The Justice Department's policy on guidance has set the stage, and focus is now likely to turn to federal regulatory agencies, which, by and large, rely on the Justice Department to defend their actions and prosecute their enforcement cases in court. Knowing the Justice Department's new policy and emphasis on guidance could lead these agencies to take a close look at their own existing and future guidance with these principles in mind.

To date, the Trump administration's regulatory reform agenda has focused on reducing regulations. If the Justice Department's actions are an indication, the administration may now be turning its sights on agency guidance as a target for efficient regulatory reform.

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The opinions expressed here do not represent those of Bloomberg Environment, which welcomes other points of view.

  DEN ISSN 1060-2976