

## Proposed Action Memo: EPA, DOI, and DOE Guidance Rollbacks

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\*This memorandum was prepared for the [Reversing Environmental Rollbacks](#) project led by the Center for Law, Energy and the Environment (CLEE) at UC Berkeley School of Law in partnership with Governing for Impact. The project seeks to track, analyze, and develop strategies to reverse the environmental policy rollbacks of the previous federal administration, offering a comprehensive database and targeted analyses to complement the efforts of peer institutions. CLEE thanks Dan Farber (Berkeley Law) for thoughtful review and feedback on this memorandum.

## I. Summary

In October 2020, the Environmental Protection Agency (EPA) finalized a rule requiring the agency to follow notice-and-comment procedures for all “significant” guidance documents as defined in two previously issued executive orders. The Department of the Interior (DOI) issued a similar interim final rule in October 2020, and the Department of Energy (DOE) proposed a similar rule in July 2020. These rules have the potential to place significant limits on the agencies’ future capacity to issue new guidance and to withdraw previously issued guidance, although certain of the rules’ informational components may be beneficial and worth retaining. ***This memorandum primarily describes the EPA Guidance Rule, but its analysis should apply equally to equivalent elements of the DOI and DOE rules.***

### Rollback

- EPA Guidance: Administrative Procedures for Issuance and Public Petitions, [85 Fed. Reg. 66230](#) (EPA Guidance Rule) (final rule)
- Procedures for Issuing Guidance Documents, [85 Fed. Reg. 67666](#) (DOI Guidance Rule) (interim final rule)
- Procedures for the Issuance of Guidance Documents, [85 Fed. Reg. 39495](#) (DOE Guidance Rule) (notice of proposed rulemaking)

### Agencies

- Environmental Protection Agency (EPA)
- Department of the Interior (DOI)
- Department of Energy (DOE)
- Office of Information and Regulatory Affairs (OIRA)

### Impact

- Required agencies to conduct conform to the procedures notice-and-comment rulemaking for all “significant” agency guidance (and withdrawal of guidance) that may have an annual economic impact over \$100 million, have any material adverse economic impact, conflict with other agencies’ actions or plans, materially alter existing budgetary programs, or raise novel legal or policy issues—hampering agencies’ ability to issue new guidance in a timely fashion and redirect the agency after a change in administration
- Created a public right to submit petitions for withdrawal of guidance documents or reinstatement of withdrawn guidance documents—potentially adding a significant new flow of petitions that could slow agency operations

### Recommended Actions

- Issue guidance and interim final rule immediately withdrawing notice-and-comment and public petition requirements
- Issue guidance setting new protocols for public information and participation
- Issue final rule to formally remove the notice-and-comment and public petition requirements from the Code of Federal Regulations

## **II. Justification**

The Guidance Rules require EPA, DOE, and DOI to take on potentially burdensome new notice-and-comment obligations for a significant class of agency guidance documents, which could substantially slow the agency's ability to issue new internal guidance (or withdraw older guidance) to change regulatory and enforcement direction and implement early executive orders under a new administration. They also allow the public, including regulated industry parties, to submit petitions regarding agency guidance and require the agencies to publicly post and respond to these petitions within 90 days, adding strain to staff resources. These requirements have no basis in historical agency practice and are in excess of, and potentially in conflict with, the Administrative Procedure Act (APA) and EPA's general rulemaking authority. While their legal status is questionable and they are not enforceable by third parties, they could require the agencies to engage in time-consuming and potentially infeasible creation of an evidentiary/decision-making record to support guidance documents and could potentially expose the agencies to litigation risk over historically routine practices. Failure to correct the onerous notice-and-comment and petition requirements of the Guidance Rules could hamper the agencies' capacity to set their desired regulatory direction in 2021 and to implement the policies of the incoming administration.

## **III. Background & Current State**

In September 2019, President Trump issued Executive Order [13891](#), "Promoting the Rule of Law Through Improved Agency Guidance Documents," which required (among other things) federal agencies to maintain complete records of all guidance documents, implement notice-and-comment procedures for "significant" guidance, and allow the public to petition agencies with regard to their guidance.<sup>1</sup>

EPA issued its final Guidance Rule, implementing E.O. 13891, in October 2020.<sup>2</sup> The rule requires EPA to take a number of procedural steps in connection with the issuance or withdrawal of any agency guidance document, defined as any "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," excluding a number of document types such as rules promulgated under APA notice-and-comment requirements, internal guidance not intended to have an effect on regulated parties, statements of specific applicability, and adjudication decisions.<sup>3</sup>

The rule imposes three core procedural requirements:

- "Significant" guidance documents (defined below) and withdrawals of significant guidance must undergo notice-and-comment procedures similar to those required for rulemakings under the APA.<sup>4</sup>

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<sup>1</sup> E.O. 13891 (President Donald J. Trump, Oct. 9, 2019); 84 Fed. Reg. 55235 (Oct. 15, 2019).

<sup>2</sup> 40 C.F.R. § 2.501 et seq.; 85 Fed. Reg. 66230 (Oct. 19, 2020).

<sup>3</sup> 40 C.F.R. § 2.503; 85 Fed. Reg. at 66238.

<sup>4</sup> 40 C.F.R. § 2.506; 85 Fed. Reg. at 66239.

- All guidance documents must be approved by the relevant EPA assistant administrator, be submitted to OIRA for significance review, avoid use of mandatory language, and include a specified set of identifying and summary information.<sup>5</sup>
- The public is allowed to submit petitions to EPA calling for modification or withdrawal of guidance documents or reinstatement of prior guidance documents.<sup>6</sup>

#### A. Significant Guidance Notice-and-Comment Requirements

The rule defines “significant guidance document” as any document deemed “significant” under Executive Orders [12866](#) and 13891.<sup>7</sup> This definition includes any guidance that “may reasonably be anticipated to:

- lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.”<sup>8</sup>

Executive Order 12866, issued by President Clinton in 1993, used this definition for any “significant regulatory action that is likely to result” in a rule that has such impacts, directing agencies to conduct advance planning and information-sharing for significant actions and directing the Office of Information and Regulatory Affairs (OIRA) to conduct enhanced review of these’ actions costs and benefits.<sup>9</sup> Executive Order 13891 applied the same definition to “significant guidance documents” that “may reasonably be anticipated” to have these impacts, substantially expanding both its operative impact (by covering internal guidance documents) and its likely scope (by shifting from a “likely” to “reasonably anticipated” standard).

For all such guidance documents, EPA must make publicly available (via Federal Register notice) a draft version of the guidance or announcement of agency intent to withdraw guidance; accept public comment for at least 30 days; and respond to major concerns and comments in the final guidance (or withdrawal) or a companion document, also published in the Federal Register.<sup>10</sup> These procedures broadly match the often time-consuming procedures required of rulemakings under the APA, and could have the effect of slowing and discouraging the use of agency guidance in general

<sup>5</sup> 40 C.F.R. § 2.505; 85 Fed. Reg. at 66238.

<sup>6</sup> 40 C.F.R. § 2.507; 85 Fed. Reg. at 66239-40.

<sup>7</sup> 40 C.F.R. § 2.503; 85 Fed. Reg. at 66238. The DOE and DOI Guidance Rules independently state the same criteria without reference to the Executive Orders. See 10 C.F.R. § 1061.2, 43 C.F.R. § 51.13.

<sup>8</sup> E.O. 13891, § 2(c).

<sup>9</sup> E.O. 12866, §§ 4(c), 6 (President William J. Clinton, Sept. 30, 1993); 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>10</sup> 40 C.F.R. § 2.506; 85 Fed. Reg. at 66239.

by adding unnecessary burdens to the process.<sup>11</sup> In particular, while encouraging public involvement and comment is valuable, requiring EPA to engage in a uniform notice-and-comment procedure—including development of a detailed decision-making record and responding to all major comments—is out of step with the purpose of agency guidance and the need to develop and implement it flexibly and rapidly.<sup>12</sup> Requiring EPA to develop a detailed record of the kind used in rulemaking would not only slow policy development and implementation, but could also substantially and harmfully limit the substantive scope of guidance documents.

## B. General Requirements

For all guidance documents, including those that do not meet the “significant” threshold, the Guidance Rule requires EPA to:

- title the guidance, provide a document identification number, date the issuance, and include the term “guidance”;
- identify the issuing office and the activities covered and provide a short summary;
- cite to appropriate U.S. Code or Code of Federal Regulations (CFR) provisions applied or interpreted, and identify any prior guidance being modified or replaced;
- include a disclaimer stating that the guidance does not have force of law except as authorized by law, and avoid mandatory language such as “shall” or “must” or “requirement”;
- obtain approval from the relevant presidentially appointed official for regional guidance; and
- seek a significance determination from OIRA under E.O. 12866.<sup>13</sup>

In addition, EPA is required to post all active guidance documents to its Guidance Portal, a public website that many commenters lauded as a positive development, and even suggested expanding it (though through voluntary agency action, not a formal rule).<sup>14</sup>

While these requirements are broadly unobjectionable, commenters took particular issue with the requirement for presidential appointee (i.e., assistant administrator) approval of all guidance adopted at the regional level, stating it would render routine agency action unnecessarily vulnerable to political concerns and it will limit necessary regional flexibility.<sup>15</sup>

## C. Petition Requirement

The Guidance Rule also creates a public right to petition EPA for the modification or withdrawal of a guidance document or the reinstatement of rescinded guidance, subject to certain format and filing

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<sup>11</sup> See Comments of Environmental Protection Network on EPA’s Proposed Rule entitled “EPA Guidance: Administrative Procedures for Issuance and Public Petitions” (June 22, 2020), pp. 7-8, available at <https://beta.regulations.gov/comment/EPA-HQ-OA-2020-0128-0027>

<sup>12</sup> Id. at pp. 8-9.

<sup>13</sup> 40 C.F.R. § 2.505; 85 Fed. Reg. at 66238-39.

<sup>14</sup> 40 C.F.R. § 2.504; 85 Fed. Reg. at 66238; see Comments of Environmental Defense Fund, Docket No. EPA-HQ-OA-2020-0128 (June 22, 2020), p. 3, available at <https://beta.regulations.gov/comment/EPA-HQ-OA-2020-0128-0050>; Comments of Environmental Protection Network, *supra*, at p. 11.

<sup>15</sup> See Comments of Environmental Defense Fund, *supra*, at pp. 2-3; Comments of Environmental Protection Network, *supra*, at p. 10.

requirements. EPA is required make publicly available and respond within 90 days to all properly filed petitions (with the ability to extend for a second 90-day period where necessary).<sup>16</sup> While this requirement may promote general public involvement in the guidance process, it fails to do so in a manner that will legitimately promote transparency, as it sets no substantive standards for EPA's review of petitions, and since (as a purely internal agency guidance document) it creates no legally enforceable right for the public.<sup>17</sup> At the same time, agency staff have a duty to following binding rules even the absence of judicial enforcement. Creating a uniform public right to petition and requiring EPA to respond to all petitions could overwhelm the agency with requests, taking valuable time away from other regulatory processes—particularly if industry groups take full advantage of the new procedure.<sup>18</sup>

#### D. Exceptions

The rule includes two important potential exceptions from these requirements:

- The OIRA Administrator, without apparent limitation, may create exceptions to the procedures for all guidance documents, including the notice-and-comment and petition processes (“The procedures in this subpart apply to guidance documents...excluding those...otherwise excepted by the Administrator of OIRA.”).<sup>19</sup>
- The EPA Administrator may exempt significant guidance documents from the comment process (but not from the Federal Register publication requirement) if doing so is not feasible due to immediate public health, safety, environmental, or other emergency concerns; or based upon a good cause finding that public comment would be impracticable, unnecessary, or contrary to public interest.<sup>20</sup>

These two exceptions afford a fair amount of latitude for both OIRA and EPA to exclude particular guidance from the potentially onerous procedures of the Guidance Rule, but themselves could require a fair amount of agency consideration and staff time, particularly in the case of EPA exceptions which require a public statement regarding the “good cause” finding. (The DOE and DOI Guidance Rules include similar provisions for “good cause” exceptions based on agency consultation with OIRA.<sup>21</sup>)

#### E. Legal Effect and Deficiencies

Multiple legal deficiencies in the Guidance Rule's adoption indicate that its legal effect is questionable and it may not be legally binding on the agency, and that EPA should be able to withdraw the rule's problematic elements without significant legal risk.

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<sup>16</sup> 40 C.F.R. § 2.507; 85 Fed. Reg. at 66239-40.

<sup>17</sup> See Comments of Center for Biological Diversity on Docket ID No. EPA-HQ-OA-2020-0128 (June 22, 2020), pp. 1-2, available at <https://beta.regulations.gov/comment/EPA-HQ-OA-2020-0128-0037>.

<sup>18</sup> See Comments of Environmental Protection Network, *supra*, at p. 8.

<sup>19</sup> 40 C.F.R. § 2.502(a); 85 Fed. Reg. at 66238. As a further method of eliminating any possible effect from the rules, OIRA could broadly exempt agencies from the rule.

<sup>20</sup> 40 C.F.R. § 2.506(D); 85 Fed. Reg. at 66239.

<sup>21</sup> 10 C.F.R. § 1061.3(d), 43 C.F.R. § 51.17(b).

EPA stated that it adopted the rule pursuant to the agency’s federal Housekeeping authority to generally establish regulations for departmental governance and management, considering it “a rule of agency organization, procedure, or practice that lacks the force and effect of law” which was submitted for notice-and-comment rulemaking solely “as a matter of good government” and not because it was required to do so under the APA.<sup>22</sup> Multiple commenters noted, however, that the substantive elements of the Guidance Rule exceed EPA’s Housekeeping authority, since they will affect the substance of future guidance documents and extend beyond internal management of the agency.<sup>23</sup> In particular, the notice-and-comment and public petition requirements, which expressly relate to public involvement in agency processes and not just internal management, exceed this authority.<sup>24</sup>

These deficiencies, in addition to EPA’s language stating that the rule is a purely internal measure, indicate that even if validly adopted the rule may be withdrawn rapidly and without a notice-and-comment procedure—and potentially dictate that it is legally invalid and must be withdrawn. (In addition, EPA stated that the rule was “not significant” under Executive Order 12866.<sup>25</sup>)

While the Guidance Rule implements E.O. 13891’s instruction and is directly tied to its definition of “significant guidance document,” the rule states that it will remain in force if E.O. 13891 or any portion of it is rescinded, suggesting that simple rescission of E.O. 13891 by a new president would not deactivate the Guidance Rule by operation of law.<sup>26</sup> (The DOE and DOI Guidance Rules do not refer to E.O. 13891’s definition.) However, at least one commenter expressed that such a statement, given the rule’s direct link to the language of E.O. 13891, is likely without legal effect.<sup>27</sup>

As of the date of this memorandum, the Guidance Rule does not appear to have become the subject of any litigation.

#### **IV. Proposed Action**

##### **1. Withdraw Notice-and-Comment, Petition, and Certain Other Requirements of Guidance Rule**

As described above, while some elements of the Guidance Rule may beneficially promote public involvement in the regulatory process, the notice-and-comment and petition requirements as currently crafted could seriously hamper agency management, particularly in the early days of a new administration. Since the rule’s requirements ostensibly apply to all subsequent guidance documents, it is important that EPA correct the rule’s problematic aspects prior to adopting other guidance

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<sup>22</sup> 85 Fed. Reg. at 66230-31; 5 U.S.C. § 301 (housekeeping authority); 5 U.S.C. § 553(b)(3)(A) (APA requirements for agency statements of policy or procedure).

<sup>23</sup> See Comments of Environmental Protection Network, *supra*, at pp. 1-4; Comments of Earthjustice on Docket ID No. EPA-HQ-OA-2020-0128 (June 22, 2020), p. 1, available at <https://beta.regulations.gov/comment/EPA-HQ-OA-2020-0128-0047>; Comments of Center for Biological Diversity *supra*, at pp. 2-5.

<sup>24</sup> Comments of Environmental Protection Network, *supra*, at p. 4.

<sup>25</sup> 85 Fed. Reg. at 66237.

<sup>26</sup> 40 C.F.R. § 2.502(d); 85 Fed. Reg. at 66238.

<sup>27</sup> Comments of Center for Biological Diversity, *supra*, at p. 5.



documents. EPA should take this action in two related, parallel forms—agency memorandum and interim final rule—because it is vital to both a) immediately establish the agency’s formal position that the Guidance Rule has no legally binding effect, prior to issuance of any subsequent near-term agency guidance; and b) issue a rulemaking that formally withdraws the Guidance Rule, despite the fact that EPA acted erroneously in the first place by implementing it as a final rule. Since issuance of an interim final rule could potentially require even a short time interval between drafting and publication in the Federal Register, and EPA may wish to issue guidance documents during this period, the agency should publicly state its position on the Guidance Rule and reference the immediately forthcoming interim final rule.

Thus, as soon as possible after January 20, 2021, EPA should concurrently issue both an agency memorandum and an interim final rule addressing the Guidance Rule by:

- Stating that the Guidance Rule has no binding effect on the agency other than as voluntary, internal guidance because its provisions exceed EPA’s legal Housekeeping authority.
- Stating that withdrawal of the Guidance Rule is not subject to APA notice-and-comment requirements—despite its adoption as a “final rule” and entry into the Federal Register—because EPA expressly adopted it as “a rule of agency organization, procedure, or practice that lacks the force and effect of law,” which is exempt from APA notice-and-comment requirements.<sup>28</sup>
- Withdrawing, and stating EPA’s intent not to treat as legally binding on the agency, the notice-and-comment requirement for “significant” guidance, the obligation to respond to all public petitions, the presidential appointee approval requirement for regional guidance, and the restrictions on mandatory language in guidance documents.<sup>29</sup>
- Referring to the contemporaneous repeal of Executive Order 13891, including its definition of “significant guidance document.”
- Emphasizing EPA’s authority under the Guidance Rule (to the extent it does have any legally binding effect) to issue case-by-case exceptions from the notice-and-comment process for “significant” when it is impracticable, unnecessary, or contrary to the public interest;<sup>30</sup> and OIRA’s authority to exempt guidance documents from the scope of the Guidance Rule altogether.<sup>31</sup>
- Stating EPA’s intent to maintain the Guidance Portal, continue to post new guidance documents to the Portal, and follow the informational requirements of the Guidance Rule.<sup>32</sup>
- Stating EPA’s intent to develop new internal guidance to propose flexible, adaptable public notice and public petition requirements for issuance of future guidance, including affording the agency discretion to elect when to engage in notice-and-comment processes and making agency response to public petitions optional, based on case-by-case analysis of a guidance document’s purpose, scope, impact, and urgency.

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<sup>28</sup> 85 Fed. Reg. at 66230-31; 5 U.S.C. § 553(b)(3)(A).

<sup>29</sup> 40 C.F.R. §§ 2.505(b) (regional guidance approval); 2.505(c) (mandatory language), 2.506 (significant guidance requirements), 2.507(g) (petition response requirements).

<sup>30</sup> 40 C.F.R. § 2.506(d)(2).

<sup>31</sup> 40 C.F.R. § 2.502(a).

<sup>32</sup> 40 C.F.R. §§ 2.504 (Guidance Portal), 2.505(a) (informational requirements).



The preliminary agency memorandum can refer to EPA's legal position that the Guidance Rule has no binding effect, the agency's intent to treat it as not legally binding, and the agency's interim final rule which will effect the withdrawal; the interim final rule can follow by formally doing so. EPA could issue the interim final with a post-promulgation comment period (as DOI did for its iteration of the Guidance Rule), citing an APA good cause exception to the notice-and-comment requirement based on lack of necessity due to the Guidance Rule's lack of legally binding effect and improper adoption.<sup>33</sup>

## 2. Issue Guidance Creating Flexible Public Information and Participation Standards

Following issuance of the immediate guidance withdrawing the Guidance Rule and detailing its lack of legally binding effect, EPA should develop and issue new agency guidance adopting appropriate, flexible measures to enhance public information and participation in the guidance process. These measures could include:

- Maintaining and bolstering the Guidance Portal, committing to posting all final guidance documents to the portal, and identifying other agency document categories (such as notices of violation) that should be included as well.
- Requiring all final guidance documents deemed by EPA to have broad public significance to be published in the Federal Register.
- Directing all final guidance documents to include the identifying information included in the Guidance Rule, and highlighting the importance of avoiding mandatory language where improper.
- Encouraging, but not requiring, use of notice-and-comment processes for guidance documents where practicable and in furtherance of EPA's statutory purposes and the public interest. These processes may match those in the Guidance Rule, although EPA should avoid imposing strict response timelines.
- Emphasizing that while disclosure is encouraged, the agency is not required to develop or make public full evidentiary and decision-making records to support guidance documents.

## 3. Fully Withdraw Guidance Rule

Finally, in the interest of promoting certainty, EPA should fully withdraw the Guidance Rule from the Code of Federal Regulations via a final rule issued following the interim final rule and post-promulgation comment period discussed above. While, as noted above, the Guidance Rule likely was adopted in excess of legal authority and is of no legal effect, it has been entered in the CFR and will remain there after the issuance of new corrective guidance. Removing the Guidance Rule from the CFR will ensure the new guidance described above is given exclusive effect and minimize any risk of adverse litigation over the erroneous CFR text. EPA should make clear that this rulemaking is purely a clean-up measure intended to correct the agency's prior misstep, and describe how the Guidance Rule was improperly adopted under EPA's Housekeeping authority. However, to effect the proper amendment to the CFR, it should be done via issuance of a final rule.

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<sup>33</sup> 5 U.S.C. § 553(b)(3)(B). See Governing for Impact's APA Primer on Direct Final Rules for additional information on interim final rule adoption.