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Expert Analysis

Recent Developments Concerning Agency Guidance Documents

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Administrative agencies occasionally find it useful to communicate with the regulated community or other stakeholders without devoting time and finite resources to rulemaking. Federal and state agencies charged with protecting human health and the environment seem to be especially reliant on guidance in the form of interpretative rules, technical memoranda and advisory opinions. Such guidance can help effectively communicate an agency's views on ambiguous or conflicting statutory provisions or judicial decisions to the regulated community, and to counsel and technical consultants on all sides of an issue. Agencies called upon to regulate emerging industries or issues can use guidance to provide direction without locking themselves into final positions while experts debate the available facts.

In addition, well-crafted guidance documents can aid agency staff in the consistent interpretation and application of complex and cumbersome regulations. Such consistency can be especially helpful to a regulated entity when dealing with agencies like the U.S. Environmental Protection Agency (EPA) or the New York State Department of Environmental Conservation (DEC), which rely upon decentralized decision-makers.

However, guidance is not subject to formal public notice and comment. When agencies move beyond explaining existing rules and rely on guidance as a substitute for rulemaking they can run afoul of the notice requirements in the Administrative Procedure Act (APA), 5 U.S.C. §§551-559, and its New York counterpart, the State Administrative Procedure Act (SAPA), as well as the New York State Constitution's requirement that all rules be filed with the New York Department of State before taking effect. N.Y. Const. art. IV, §8.

Moreover, when guidance on the federal or state level controls agency action and enforcement decisions, it amounts to illegal rulemaking. Over the past several months both the Trump administration and courts in New York have attempted to strike a balance between the tendency of agencies to use guidance to expand their authority without the protections associated with notice and comment rulemaking and the benefits of informal agency guidance. In this column we explore these developments and what they might mean as a practical matter for EPA and DEC.

Executive Orders

On Oct. 9, 2019, President Trump issued a pair of executive

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orders intended to change how federal agencies announce and use guidance. **Executive Order 13892**, titled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," 84 Fed. Reg. 55239 (Oct. 15, 2019), is not limited to rulemaking. Nevertheless, §3 reinforces existing law by stating that agencies "may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation" and requires that agencies only make enforcement decisions based upon interpretative guidance that is publicly available and posted on the agency website.

There are also two provisions in this executive order that do not deal directly with guidance but which could especially impact EPA. Section 7 requires agencies to publish rules for conducting inspections by March 1, 2020, and §9 gives agencies 270 days to adopt policies that encourage self-reporting of violations by establishing reductions or waivers of civil penalties. Although EPA published guidance titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" back in 2000 (65 Fed. Reg. 19618 (April 11, 2000)), and **announced** a "renewed emphasis" on its self-disclosure violation policies as recently as May of last year (Press Release, EPA, **EPA Announces Renewed Emphasis on Self-Disclosed Violation Policies** (May 15, 2018)), the Transparency and Fairness Order may fuel calls for EPA to provide further incentives for regulated entities to voluntarily discover and fix violations of federal environmental laws and regulations without any penalty.

President Trump's other **executive order** is titled "Promoting the Rule of Law Through Improved Agency Guidance Documents." Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 15, 2019). Section 4 introduces a new requirement by mandating that all agencies establish procedures enabling interested parties to petition for withdrawal or modification of any guidance document. This order also reprises the concept of special treatment for "significant" guidance. The concept of significant guidance was first advanced by the Office of Management and Budget (OMB) back in 2007. See OMB Bulletin No. 07-02 (Jan. 18, 2007).

Under the Improved Agency Guidance Order, a guidance document is "significant" if it is reasonably expected to have an adverse economic impact of $100 million; create serious inconsistency between actions planned by other agencies; have an impact on entitlements, user fees or loan programs; or raise novel legal or policy issues. Unlike mere guidance, which is traditionally announced without a formal opportunity for public comment, significant guidance documents will, after OMB establishes procedures, require a 30-day public notice-and-comment period. It is reasonable to expect that many of EPA's proposed guidance documents will qualify as significant and that numerous existing EPA interpretative rules, technical memoranda and advisory opinions will be subject to petitions seeking modification or withdrawal. If the Improved Agency Guidance Order gains traction, EPA will likely need to devote substantial staff to defending past guidance.

Moreover, agencies in general, and EPA in particular, may quickly conclude that significant guidance should simply be duly promulgated as rules by following the APA. Of course, EPA might also simply refrain from providing significant guidance, leaving the regulated community to speculate about the Agency's views on many important issues.

It is noteworthy that the President's Improved Agency Guidance Order also adopts an approach already found in §202-e of New York's SAPA requiring the public listing of all guidance documents on which any agency currently relies, not less than once each year. This requirement might come as a surprise to some environmental practitioners in New York because DEC is exempt from this section of SAPA. As a

result, when dealing with DEC the regulated community is forced to scour the department's website for guidance and can seldom be certain that they have considered all relevant documents.

State Level

Recent developments concerning use of guidance have not been confined to the federal government. On Aug. 27, 2019, the Albany County Supreme Court invalidated DEC's Household Cleansing Product Information Disclosure Program as a rule which the agency failed to expose to notice and comment in accordance with SAPA. Last year in this publication, we **explored** the background and major components of this DEC ingredient disclosure program. See Michael B. Gerrard & Edward McTiernan, *NY's Expanded Ingredient Disclosure Requirements for Household Cleaning Products*, N.Y.L.J., Sept. 13, 2018, at 3.

Shortly thereafter, in October of last year, two trade associations filed a lawsuit claiming that by announcing the cleaning product disclosure program, DEC had adopted a de facto rule in violation of SAPA. In deciding *Household & Commercial Products Association v. DEC*, 2019 N.Y. Misc. LEXIS 4973 (Sup. Ct. Aug. 27, 2019), the court relied heavily on the seminal 1985 New York decision concerning when agency guidance constitutes a binding rule, *Roman Catholic Diocese of Albany v. New York State Department of Health*, 66 N.Y.2d 948 (1985), in which the Court of Appeals announced that "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" must be treated as a rule and undergo SAPA notice-and-comment rulemaking.

The inquiry into whether guidance slips over the line and becomes a fixed general principle that, in essence, dictates the outcome of a particular agency decision is often fact intensive. In *Household & Commercial Products Association*, the court focused on the absence of an "opt out" option to conclude that DEC's ingredient disclosure program was mandatory and therefore constituted a rule which took effect without complying with SAPA's notice-and-comment requirements.

A similar analysis was used to reach a different conclusion in a long-running dispute concerning DEC's decision to build a bridge to facilitate snowmobiling over a wild and scenic river. *Adirondack Wild v. New York State Adirondack Park Agency*, 75 N.Y.S.3d 681 (App. Div. 2018), aff'd on other grounds, 2019 NY LEXIS 2993 (Oct. 22, 2019), the Third Department concluded that DEC was free to ignore certain publicly announced policies concerning such construction projects because DEC had left itself the option of considering site-specific facts. At this time, if DEC wishes to advance its ingredient disclosure program without SAPA notice and public comment, it will need to follow the approach in *Adirondack Wild* and develop a meaningful alternative which allows the regulated community to opt out of the prescriptive disclosure provisions that were previously announced.

Conclusion

These recent developments demonstrate how elected officials and courts are continuously attempting to strike a balance between curtailing the use of guidance to expand the authority of administrative agencies and the legitimate use of informal guidance documents to engage the public and regulated community on complex technical or policy issues. Recent pronouncements by the president and decisions by courts in New York confirm that EPA and DEC can expect to find themselves at the center of this balancing act.