Guidance on the Administration's Two Executive Orders on Guidance

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The White House has issued two executive orders to constrain the use of guidance by federal agencies. They could have important implications for practitioners and their clients. President Trump, in announcing E.O. 13891 and 13892, said they would address "unelected, unaccountable bureaucrats . . . imposing their own private agenda on our citizens." But critics wondered aloud whether this was a lot of sound and fury signifying nothing.

Rhetoric aside, environmental practitioners can attest that the agencies they deal with, including EPA, Interior, Army Corps, and NOAA, rely heavily on guidance documents to inform the regulated community and the public at large of their interpretations of regulatory standards, requirements, and procedures.

Sound and fury signifying nothing or a step toward openness and fideltity to law

Indeed, if there were a pyramid depicting the sources of environmental law, statutes would be the tiny tip, with regulations the next largest category. The vast majority of the structure, however, would consist of informal guidance documents — including letters, memos, bulletins, opinions, interpretive rules, and manuals — none of which undergo the rigorous public notice-and-comment process that the Administrative Procedure Act requires of legislative rules, which have the force and effect of law.

As most practitioners would attest, guidance documents are not inherently good or bad. Professor David Zaring comments, "Industry may complain about guidance, but it also depends upon it." Without guidance, agency enforcement would be far less predictable. Moreover, this administration is pursuing many of its deregulatory objectives through guidance.

In any event, the Trump executive orders purport to impose a number of significant changes.

First, the orders require agencies to undertake important housekeeping measures. By the end of February, each agency is required to create a web site with a single, searchable, indexed database of its guidance documents — a step that will be welcomed by practitioners who have spent endless hours searching for esoteric measures. Each agency must undertake a comprehensive review of its guidance documents and rescind those that should no longer be in effect. Furthermore, by the end of April, agencies must enact regulations setting forth procedures for issuing such documents. Among other things, there must be a procedure for petitioning the agency to withdraw or modify its guidance.

Second, executive agencies (but not independent agencies) are required to adopt certain procedural safeguards when issuing "significant" guidance documents, including a requirement to take and respond to public comment before issuance. Such documents also must be approved by a presidential appointee and reviewed by the Office of Management and Budget. *Significant* guidance is defined to include not only documents with a $100 million annual effect on an economic sector, but also any documents that "raise novel legal or policy issues."

Third, the orders limit the role that guidance may play in enforcement. In particular, "when an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination" with "legal consequence" for a party, it may only establish violations by applying statutes or regulations. "The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation," and may not enforce unpublished standards of conduct that would "cause unfair surprise."

Fourth, the orders constrain the ability of agencies to claim expanded jurisdiction through guidance. In particular, the orders provide that "any decision in an agency adjudication, administrative order, or agency document on which an agency relies to . . . regulate a new subject matter" must be published in the Federal Register or on the agency's indexed web site for guidance. They also limit the circumstances in which agencies may seek judicial deference for interpretations of statutes or regulations announced for the first time in litigation.

Finally, with respect to enforcement matters more generally, the orders provide that, before an agency takes any action that has legal consequence for a person, including "a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard . . . regarding the agency's proposed legal and factual determinations." Further, "the agency must respond in writing." Each agency is also directed, "as appropriate," to propose procedures to encourage voluntary self-reporting in exchange for reductions or waivers of civil penalties and to provide pre-enforcement rulings to regulated parties.

Critics have characterized the executive orders as restating existing law. Others see needed reform. Environmental lawyers will be closely watching how they are implemented in practice.