

June 22, 2020

VIA ELECTRONIC FILING

Sharon Cooperstein
Office of Regulatory Policy and Management
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

**RE: EPA Guidance; Administrative Procedures for Issuance and Public Petitions
Proposed Rule, 85 FR 31104 (May 22, 2020); Docket No. EPA-HQ-OA-2020-0128**

Dear Ms. Cooperstein:

The American Public Gas Association, Association of American Railroads, National Rural Electric Cooperative, U.S. Chamber of Commerce, and The Fertilizer Institute appreciate the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed rule titled, "EPA Guidance; Administrative Procedures for Issuance and Public Petitions," hereafter referred to as the "Proposed Rule," to establish administrative procedures for the issuance of guidance documents that are subject to the requirements of Executive Order 13891.¹

We applaud EPA's efforts to formalize a process for creating new guidance and managing existing guidance to promote transparency and openness in the regulatory development and implementation process. Guidance can serve the important purpose of interpreting existing law or clarifying how the agency intends to implement particular legal requirements. Establishing a more transparent and open process for issuing guidance will help provide more predictability for regulated entities when making the investments and decisions necessary to meet regulatory requirements.

I. We Support EPA's Efforts to Establish More Standard Processes For Issuing Guidance

In accordance with good government practice, EPA has the responsibility to establish clear and consistent processes that inform the public concerning the development, revision, and rescission of guidance. Creating transparent and consistent guidance processes will help the public and regulated entities understand the various steps involved in their development and their potential impacts on the economy and the environment. Moreover, businesses rely on transparency and consistency in the regulatory implementation process to make sound decisions with respect to planning, investment, and compliance with requirements set by EPA and other federal, state, and local agencies. Additionally, creating opportunities for public input into guidance development and revisions will help provide more certainty to regulated entities that need to make long-term business planning and investment decisions.

¹ Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" (84 FR 55237, October 15, 2019).

a. We Support Most of EPA’s Proposed Petition Procedures, But Suggest EPA Remove The Mandatory 90-Day Response Deadlines

We support most of the provisions of EPA’s proposed petition process² by which the public can request that the agency consider revising or withdrawing existing guidance. Creating a process where substantive petitions can be submitted and reviewed by the agency may provide another useful means of public input.

The proposal correctly recognizes the possibility that the guidance petition process could be abused or overwhelmed by duplicative petitions submitted as part of mass petitioning efforts. If the agency decides to finalize these petition process provisions, the agency should develop an automated or other process to identify unique requests and treat mass petition efforts as a single request. The agency may want to consider including sunset provisions or periodic review requirements (e.g. every five years) in the final rulemaking that would require the Administrator to periodically evaluate the effectiveness of the petition process.

Out of concern for the petition process to be abused by mass petitions, we recommend that the agency not include the mandatory agency response deadlines in the petition process. The Proposed Rule included deadlines of responding to petitions within 90 calendar days, with the ability to extend the response deadline for an additional 90 calendar days. EPA should strive to provide prompt responses to petitioners, but the agency can establish best practices outside of the rulemaking.

II. We Agree That Guidance Should Be Labeled As Non-Binding And Not Impose New Obligations On Regulated Parties

We agree with the principle that guidance documents as defined by EO 13891³ should be non-binding and should include that disclaimer up front in the guidance document. Disclaimers should continue to state that the contents of the guidance document are non-binding and “do not have the force and effect of law and that the guidance does not bind the public in any way.” Such disclaimers will help clarify the intent of the document to provide clarification of existing obligations. This will help avoid confusion concerning the agency’s intent and the potential for the guidance to be used in a threatening manner in enforcement.

The Administrative Procedure Act (APA) treats guidance documents separately from “legislative” rulemakings that require public notice and comment and thereafter establish legally binding requirements. Guidance documents can take the form of “interpretative rules” or “general statements of policy,” but also take on many other forms.⁴ Regardless of whether the guidance document is an interpretive memorandum, policy statement, manual, bulletin, or advisory, all forms of guidance should only be used to clarify existing obligations.

At times in the past, EPA and other agencies have used guidance documents to stretch the boundaries of the agency’s legal authority. It is a problematic practice as the agency has

² 85 FR 31104 (May 22, 2020), § 2.507.

³ Executive Order 13891, Sec. 3(b)-(c), (84 FR 55237, October 15, 2019).

⁴ See 5 U.S.C. § 553 (b)(A)

thousands of pages of guidance, which sometimes have been used to impose significant burdens on the public without having gone through the public notice and comment requirements laid out in the APA. Similarly, guidance documents have sometimes been used by regulatory agencies to inappropriately pressure the regulated community into settlement agreements and consent decrees otherwise beyond the agency's legal authority. Below are a few examples of where courts have determined that guidance went beyond the bounds of clarifying existing obligations to imposing new obligations on regulated entities:

- *Summit v. EPA*, Nos. 09-4348; 10-4572 (6th Cir. Aug. 7, 2012) where the court ruled that EPA's guidance expanded the definition of 'single source' for the Title V air permitting program beyond the language in their regulatory requirements;
- *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) where the court ruled that a guidance document issued by the EPA that advised the public of how to engage in risk assessments in order to comply with EPA regulations qualified as a legislative rule;
- *Appalachian Power v. EPA*, 208 F.3d 1015 (D.C. Cir. April 14, 2000) where the court ruled that EPA guidance that included periodic monitoring and reporting requirements to satisfy Title V permitting mandates amounted to a legislative rule despite language in the guidance denying compulsory compliance.
- *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) where the court held a directive issued by the Occupational Safety and Health Administration that specified that certain industries would be subject to inspection absent adoption of specific procedures was a legislative rule);
- *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95-96 (D.C. Cir. 1997) where the court ruled that a Food and Drug Administration document notifying the public that certain industries must comply with statutory requirements that were previously exempt was a legislative rule.

As described in an Administrative Conference of the United States (ACUS) report, short-circuiting the administrative rulemaking process by giving guidance the same authority as a legally binding rulemaking is an unfair practice that should be prohibited.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of section 553 [of the Administrative Procedure Act]. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend the policy statement is unlawful or unwise, or that an alternative policy should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find the policy is given deference by the courts. The practical consequence is this process may be costly and protracted, and affected parties have neither the opportunity to participate in the process of policy development nor a

realistic opportunity to challenge the policy when applied within the agency or on judicial review.⁵

To partially address this issue, the Proposed Rule correctly clarifies that guidance documents will not include mandatory language such as "shall," "must," "required," or "requirement" as these terms create an obligation of following some type of mandate. As EPA references, the only exceptions to the use of this language would be if the agency were describing existing statutory or regulatory requirements. Agencies should refrain from using mandatory language in guidance to formulate policy changes and be disciplined about reserving such language for the notice and comment rulemakings.

III. EPA Should Revise The Final Rulemaking To Make The Vast Majority Of Guidance Documents Subject To The Public Notice And Comment Process Steps

EPA should include in the final rulemaking language that would require that all guidance documents, except for those guidance documents that are needed for emergency purposes,⁶ systematically go through the public notice and comment process to increase transparency and stakeholder input. The Proposed Rule requires just that "significant" and "economically significant" guidance be subject to public notice and comment requirements,⁷ but this unnecessarily limits the number of guidance documents that will be noticed in draft form to the public.

If the policy were applied as proposed, the vast majority of guidance documents would be posted on EPA's guidance portal without the opportunity for public notice as OIRA would likely not designate many guidance documents as "significant," the trigger for the agency to post the draft guidance for public comment.

From 2009-2018, OIRA has only designated 16 percent⁸ of all agency rulemakings as "significant" by their authority under EO 12866,⁹ thus requiring those rules to go through OIRA's centralized review process. The other 84 percent of rulemakings that OIRA does not review are still published in the Federal Register at the proposed rule stage for public comment. Even if OMB were not to designate an EPA rulemaking as "significant," EPA would still be required to publish the proposed rulemaking in the Federal Register to allow for public notice and comment at the proposed rule stage before finalizing.

This practice of publishing all proposed rules in the Federal Register would not be mirrored for guidance documents based on the criteria included in the Proposed Rule. EPA should expand the requirement in the final rulemaking to ensure that all guidance, except guidance that is exempted for emergency purposes, is published in draft form for public comment. The agency should then

⁵ Agency Policy Statements, Recommendation 92-2, Administrative Conference of the United States, June 18, 1992. <https://www.acus.gov/sites/default/files/documents/92-2.pdf>

⁶ 85 FR 31104 (May 22, 2020), § 2.506(c).

⁷ 85 FR 31104 (May 22, 2020), § 2.506(a).

⁸ Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register, Congressional Research Service, September 3, 2019, <https://crsreports.congress.gov/product/pdf/R/R43056>

⁹ Exec. Order No. 12866, 58 FR 51735 (1993).

follow the same procedure for “significant” guidance and respond to public comments when issuing the final guidance.

a. EPA Should Better Characterize The Exceptions To The Public Notice Requirements In The Final Rulemaking

The Administrator should have the discretion to address emergencies that require immediate attention such as the current pandemic facing the nation, or provide immediate guidance in response to natural disasters like hurricanes, flooding, or severe storms. But, we are concerned that the proposed emergency exception¹⁰ to the public comment process is too vague and would allow the agency to declare an emergency to address long-term policy goals.

We suggest revising the proposed exemption from public notice requirements to clarify it applies only to guidance issued for emergency purposes and must be timely, targeted, and temporary. Further clarifying the definitions in the final rulemaking will provide the appropriate flexibility to the agency to respond to emergencies, but curtail the abuse of this exception to implement long-term policy changes through guidance. For these reasons, we suggest EPA better define what constitutes public health, safety, environmental, or other emergencies requiring immediate issuance of guidance documents.

IV. Providing The Opportunity For OIRA To Review Significant Guidance Will Help Provide More Consistency Amongst The Various Agency Offices

We are also supportive of guidance being subject to OIRA review as it will help formalize the guidance development process and enforce EPA’s practices of providing public notice. OIRA will help coordinate and potentially address divergent approaches between EPA and other agencies, in particular when EPA shares the same or similar statutory authorities or implementation responsibilities. OIRA’s interagency coordination function could also help drive the development of more Memoranda of Understanding between agencies such as the one signed between the Occupational Safety & Health Administration and EPA that requires the “fullest possible cooperation and coordination” between the agencies in their compliance and enforcement activities related to the protection of workers, the public, and the environment.¹¹

We support OIRA’s review of guidance as it will contribute to more consistency across EPA and other agencies ultimately benefiting the regulated community who often comply with requirements from multiple regulatory agencies.

V. Conclusion

The undersigned associations appreciate the opportunity to comment on the Proposed Rule and applaud EPA’s efforts to formalize a process for creating new guidance and managing existing guidance. Establishing a more transparent and open guidance management process with more

¹⁰ 85 FR 31104 (May 22, 2020), § 2.506(c).

¹¹ Memorandum of Understanding between the U.S. Department of Labor Occupational Safety and Health Administration and the U.S. Environmental Protection Agency Office of Enforcement (Feb. 13, 1991). <https://www.osha.gov/laws-regs/mou/1991-02-13>

public participation will help provide more predictability for regulated entities who are making the long-term investment decisions needed to meet regulatory requirements.

Sincerely,

American Public Gas Association

Association of American Railroads

National Rural Electric Cooperatives

U.S. Chamber of Commerce

The Fertilizer Institute