



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

October 21, 2019

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: New Executive Orders on Guidance and on Rule of Law in Enforcement and Adjudications

FROM: Andrew R. Wheeler

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler".

TO: Assistant Deputy Administrator
Associate Deputy Administrator
General Counsel
Assistant Administrators
Inspector General
Chief Financial Officer
Chief of Staff
Associate Administrators
Regional Administrators

Last week, the President signed two new executive orders regarding agency guidance: one focused on public access and the development of new guidance, and the other focused on the use of guidance in enforcement and adjudications. Both EOs define “guidance document” as “an agency 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.” Exempted from the definition are “rules of agency organization, procedure, or practice,” along with “internal guidance . . . that is not intended to have substantial future effect on the behavior of regulated parties.”

Both EOs contain important implications to U.S. Environmental Protection Agency processes that we will need to think critically about to implement. To that end, the EPA will be quickly standing up two working groups to address interpreting and applying the EOs, one chaired by the Office of Policy and the other co-chaired by the Office of General Counsel and the Office of Enforcement and Compliance Assurance. The agency should continue normal operations on all issues affected by the EOs until further instructions from the working groups can be provided in the coming weeks. We look forward to strengthening the rule of law at the EPA as we tackle this important challenge.

The Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents states that guidance documents are to be treated as non-binding, formulated with public

input and made readily available to the public. The EO also directs the Office of Management and Budget to issue a memorandum implementing the executive order. Within 120 days of the issuance of the OMB memorandum, each agency or agency component must establish a website with “a single, searchable, indexed database that contains or links to all guidance documents in effect.” Within that same timeframe, each agency must review its guidance documents and rescind any that it determines should no longer be in effect. All retained guidance documents must be included in the website database. There is a provision for the agency to reinstate rescinded guidance documents within 240 days of the OMB implementing memorandum. In addition, within 300 days of the memorandum, the EO directs each agency to develop regulations setting forth procedures for developing guidance documents, which are to include a mechanism for the public to petition for the withdrawal or modification of guidance documents. For “significant guidance documents,” that includes OMB review along with a 30-day public comment period and response to major comments.

The Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication states that “guidance documents may not be used to impose new standards of conduct on persons outside the executive branch” and that enforcement actions must be established based on violations of statutes and regulations. In addition, the EO requires Federal Register publication of “any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction.” The EO also directs agencies to provide “an opportunity to be heard” before taking “any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice.” The EO also asks agencies to propose procedures for cooperative information sharing within 270 days. Finally, the EO includes certain exemptions for criminal actions and civil judicial actions.