



ECOS

Environmental Council of the States

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June 19, 2020

Ms. Sharon Cooperstein
Public & Regulatory Analysis Division
Office of Regulatory Policy and Management
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Ms. Cooperstein:

The Environmental Council of the States (ECOS) appreciates the opportunity to comment on the proposed rule, *Guidance: Administrative Procedures for Issuance and Public Petitions*. As states implement many federal regulations through delegation of federal environmental statutes, ECOS members appreciate EPA's effort to increase transparency of its guidance practices and to improve management of its guidance documents. EPA's use of guidance is so important to state environmental agencies, that since 2011, ECOS has had a resolution, 11-8 On the Use of Guidance, focused solely on this topic.

ECOS supports the principle from *Executive Order 13891: Promoting the Rule of Law through Improved Agency Guidance Documents* identified in the background to this rule that "guidance documents should clarify existing obligations only; they should not be a vehicle for implementing new, binding requirements on the public." Over the years, ECOS has raised concerns about guidance being used to create new obligations or as a substitute for regulation. ECOS appreciates that this rule requires all guidance documents to include a disclaimer to this effect.

Additionally, ECOS appreciates that EPA now has all guidance easily accessible on the EPA Guidance Portal.

This proposed rule does not require any consultation with states. Given that state environmental agencies are co-regulators with EPA in the national environmental enterprise, ECOS requests that the final rule reflect that states, as co-regulators, have the opportunity for early, meaningful, and substantial involvement in developing the content of guidance that affects them whether it is directed at the state-EPA relationship or relates to federal regulations implemented by states. Similarly, in the *Federal Register Notice*, EPA indicates that it plans to inform the public that a new guidance document has been issued, an active guidance document has been modified, or an active guidance document has been withdrawn through a notice on the EPA Guidance Portal or other Agency website. As co-regulators with EPA, states request that EPA notify states directly when these changes occur.

The proposed rule indicates there will be a 30-day comment period on significant guidance. ECOS applauds EPA for requiring a comment period on significant guidance. However, as some

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guidance can be very lengthy and complex, ECOS requests that the rule allow longer comment periods when appropriate.

In reviewing the proposed rule, ECOS members found there were some issues they would like clarified in the final rule. First, the current language states that “internal guidance directed at the EPA or its components or other agencies that is not intended to have substantial future effect on the behavior of regulated parties” is excluded from this rule’s definition of guidance. States would like the final rule to clarify whether this means that guidance on interactions between states and EPA such as the memo, [Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work](#), is excluded from this rule.

Also, states would like additional clarification on what guidance is considered significant guidance. In the proposed rule, significant guidance is related to Executive Orders 12866 or 13891. While the \$100 million effect on the economy may seem like a clear bar, other parts of the “significant” definition are not as clear. For instance, nearly all guidances from EPA would meet the significant threshold described in E.O. 13891 as they “affect in a material way...the environment”.

Finally, ECOS encourages EPA to think about the potential resource implications of this rule. Given the relatively simple process for petitioning for a change or withdrawal of a guidance document, EPA may have to respond to many petitions. ECOS members ask the Agency to consider EPA resources that may be required to manage guidances, and state and regulated entity resources that may be affected if the final rule leads to frequent changes in guidance.

In conclusion, ECOS again thanks EPA for clarifying that guidance does not carry the legal weight of a regulation and for making EPA guidance more easily accessible on the EPA Guidance Portal but would raise some issues for additional consideration. If you would like to speak with ECOS about these comments, please contact me at dwelsh@ecos.org or 202-266-4929.

Sincerely,



Donald S. Welsh