

AGENCY REGULATION THROUGH GUIDANCE DOCUMENTS, by Roger R. Martella, Jr.

Aside from formal regulations, guidance documents are among the most important and influential ways in which federal agencies act, and in some cases actively regulate. Guidance documents encompass a wide range of agency communications, including interpretive rules, agency guidance, memoranda of understanding, and other advisory opinions and documents. While guidance documents should not be legally binding on the regulated community, they often set standards for agency implementation and thus can function as de facto regulations.

When used properly, guidance documents can play an essential role in effective agency regulation by (1) clarifying an agency's interpretation of ambiguous statutory and regulatory language, (2) ensuring consistent implementation throughout decentralized agency bureaucracies, and (3) providing the public with notice of an agency's priorities and policies where the agency has discretionary authority.

In some cases, however, agency reliance on guidance documents can have a detrimental impact on regulated entities and on state regulators, particularly when guidance documents are used as a substitute for legislative rulemaking. Because they are not subject to the Administrative Procedure Act's notice and comment procedures, agencies relying on guidance documents can limit or avoid public participation and, in some cases, can avoid immediate judicial review as well. Further, agency reliance on guidance documents may raise federalism concerns for state regulators. First, agencies may use guidance documents as means of expanding their authority into areas traditionally reserved to the states. Second, when states administer federal programs under cooperative federalism, agency guidelines may be imposed on state-implemented programs without the consent or involvement of state regulators.

These federalism concerns are implicated in EPA's draft "Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels." Oil and gas development is traditionally regulated by the states and, in the Energy Policy Act of 2005, Congress prohibited EPA from regulating under the Safe Drinking Water Act's Underground Injection Control ("UIC") program "the underground injection of fluids of propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations." EPA's draft Guidance, which was subject to limited public participation and has already been the subject of one industry-led lawsuit, proposes an extremely broad definition of diesel fuel that would double the number of chemical classified as diesel fuels when compared to EPA's official definition under Title II of the Clean Air Act. 40 C.F.R. § 80.2(x). By adopting a broad definition of diesel fuels, EPA effectively expands its regulatory authority over oil and gas development—an area traditionally regulated by the states—by requiring federal permits for hydraulic fracturing activities using any of the chemicals defined as diesel fuels. Further, even for the 39 states that have been granted "primacy" to implement the UIC program under cooperative federalism, the draft Guidance may limit state autonomy. Although the guidance should not be legally binding on the states, EPA "encourages" states to use the draft Guidance to implement their own permitting programs. In addition, because the UIC program authorizes citizen suits against anyone "alleged to be in violation" of the UIC program, there is a risk that Guidance—and its broad definition of diesel fuels—could be judicially imposed on state regulators or private oil and gas developers through citizen enforcement actions. This would significantly limit a state's autonomy to adapt oil and gas regulations to the unique characteristics of the state and its energy reserves.

Given the limited opportunities for judicial review of guidance document, we urge the states to actively monitor the development of guidance documents by federal agencies. When guidance documents raise federalism concerns, we recommend that the states, individually and collectively, consider the full scope of legal and informal methods to protect their traditional power and autonomy.