

August 19, 2019

EPA Office of Water Rescinds All Previously Issued Draft Guidance and Policy Documents

On August 6, 2019, the EPA Office of Water issued a policy memorandum to all of the Office of Water Program Directors advising them that any draft guidance and policy documents that were more than two years old are immediately rescinded.

The Office of Water took this action in response to concerns that numerous draft documents exist that have never been formalized or withdrawn and that the existence and uncertain status of these draft documents causes confusion for regulators, the regulated community, and the general public.

The Office of Water says that it “surveyed the universe of guidance and policy documents issued by headquarters” and identified more than 2,500 interim or final policy documents and approximately 70 draft documents. (While saying all drafts that are two or more years old are rescinded, the Office of Water did not state how many of the approximately 70 drafts are now rescinded.)

This “Office of Water Policy Memorandum” appears designed to emphasize certain legal principles that are sometimes forgotten or de-emphasized when it comes to policy and guidance, specifically listing the following two principles:

1. No agency guidance or policy documents, whether issued in draft, interim, or final have the force and effect of law; and,
2. Agency guidance and policy documents cannot be used to mandate any specific action, outcome, or requirement in litigation or other contexts.

The memorandum states that it does not expect that the policy it is announcing of rescinding old draft documents will affect any documents that are critical to national program implementation.

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In terms of implementation and “to ensure transparency and promote regulatory certainty,” the memorandum states that the Office of Water will establish a website with the complete collection of guidance and policy documents that are currently effective.

Finally, although the memorandum only applies to the Office of Water and was only circulated to the Office of Water Program Directors, the issue of the impact and force of draft policy and guidance documents has long been debated within the agency. This memorandum may signal that a larger, similar policy may be implemented agency-wide.

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