

Environmental Law

Guidance Is no Substitute for Proper Procedure

By John F. Spinello and
Gail Howie Conenello

The New Jersey Department of Environmental Protection (DEP) has developed numerous guidance documents to help those subject to regulation, as well as its own staff, to better understand and apply regulatory requirements ranging from how to apply for a permit to how to clean up a contaminated site. Guidance documents have served and should continue to serve a valuable and legitimate purpose. However, guidance documents have at times been misused to establish new substantive requirements that may lawfully be established only through the rulemaking procedures prescribed by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq.

In response, the Legislature passed and the governor signed into law in January legislation prohibiting the improper use of guidance documents by regulatory agencies, including DEP, in the place of properly adopted regulations. P.L. 2012, c. 215. The APA already prescribes rulemaking requirements for all executive branch agencies, but the new law supplements the APA, providing direction to agencies

regarding the use of guidance documents.

Specifically, the new law prohibits the use of guidance documents to: (1) impose any new or additional requirements that are not included in the state or federal law or rule that the regulatory guidance document is intended to clarify or explain; or (2) be used by the state agency as a substitute for the state or federal law or rule for enforcement purposes.

The APA establishes specific procedures governing the adoption of regulations, including requirements that agencies publish proposed rules, that those potentially affected have an opportunity to comment on the proposal and that agencies respond to those comments. These and other rulemaking requirements are intended to ensure compliance with constitutionally based principles of due process, and foster more informed decision making.

The APA defines the term *administrative rule* as “each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice of an agency.” N.J.S.A. 52:14B-2(c). Thus, any agency statement falling within the scope of the definition must be adopted through the rulemaking

procedures prescribed by the APA.

The New Jersey Supreme Court has held that an agency determination or statement may be an administrative rule, subject to the rulemaking requirements of the APA, if it:

- (1) is intended to have wide coverage encompassing a large segment of the regulated or general public;
- (2) is intended to be applied generally and uniformly to all similarly situated persons;
- (3) is designed to operate only in future cases, that is, prospectively;
- (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
- (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Spinello and Conenello are partners of K&L Gates LLP in Newark. Spinello's practice focuses on regulatory counseling, advocacy and litigation for clients in the life sciences, energy and heavy construction industries. Conenello's practice is focused in the areas of CERCLA and Spill Act liability actions and various environmental permitting, compliance, regulatory and enforcement matters.

Metromedia v. Dir., Div. of Taxation, 97 N.J. 313, 331-332 (1984). Any one of these factors, alone or in combination, is sufficient to classify an agency statement

as an administrative rule triggering the rulemaking requirement. Thus, guidance documents that embody these characteristics may not be used in the place of properly adopted rules.

Some guidance documents on their face or in their application have crossed this line and been improperly used by DEP, whether or not intentionally, in circumvention of the rulemaking requirement of the APA. This practice has been especially pronounced in the site remediation program, where guidance documents have been used routinely to establish and enforce detailed requirements for virtually every aspect of remediation. Circumvention has also been prevalent in the air quality permitting program to establish specific emission monitoring requirements, expand the regulation of hazardous air pollutants and re-interpret the applicability of state-of-the-art technology requirements.

Regardless of the potential merits of these and other policy decisions expressed through guidance documents, the circumvention of the APA is not only unlawful, but precludes the participation of stakeholders in the formulation of policy decisions, and DEP's consideration of their valuable experience and expertise, as contemplated by the APA. The misapplication of guidance documents undermines the legitimacy of regulatory decisions by fostering an impression that they are not grounded in law.

As an example, the DEP air quality program developed and applies a guidance document it calls "presumptive norms," establishing specific emission monitoring requirements to be included in permits. Under N.J.A.C. 7:27-22.16(o), DEP is required to establish, in each operating permit, periodic monitoring requirements that are sufficient to "yield reliable data from the relevant time period that are representative of the facility's compliance with the permit." The regulations do not specify particular monitoring requirements for types or categories of equipment or operations, and monitoring requirements must therefore be determined on a case-by-case basis, based upon the general criteria established by the regulation. The touchstone of the rule is the need for data that are representative of operations so that compliance with emission limits may be demonstrated.

However, DEP often does not conduct the case-by-case analysis required by the regulation, but instead relies upon presumptive norms to establish these requirements pursuant to N.J.A.C. 7:27-22.16(o). The guidance document sets forth specific monitoring requirements for specific types and sizes of equipment, stating the specified monitoring requirements "must be" included in all air operating permits when they are issued, renewed or modified. The guidance was developed without any public or stakeholder input. It does not explain how it relates to N.J.A.C. 7:27-22.16(o), or explain why the specified monitoring is necessary to yield "reliable data" that is "representative of compliance" to the exclusion of all other potential monitoring methods. Similarly, it does not discuss the circumstances under which DEP will consider exceptions or variances from the monitoring requirements mandated by the guidance, nor does it establish the criteria or standards it would apply in the evaluation of alternatives.

DEP and the U.S. Environmental Protection Agency (EPA), Region 2, view the guidance document as a "safe harbor" or "norm," expressing the monitoring requirements that EPA and DEP have privately agreed satisfy N.J.A.C. 7:27-22.16(o) and the parallel EPA rule upon which it is based, 40 CFR 70. However, in *General Electric v. E.P.A.*, 290 F.3d 377 (D.C. Cir. 2002), the U.S. Circuit Court of Appeals for the District of Columbia held the use of guidance documents — such as the presumptive norms establishing safe harbors or norms — was improper, even though it was intended to be applied "flexibly." The court explained that safe harbors and norms that establish accepted outcomes are legislative rules that may not be relied upon unless adopted through notice and comment rulemaking, even if the guidance document permits exceptions to the norm. The court held:

Our cases ... make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, *Appalachian Power*, 208 F.3d at 1023 ("[T]he entire Guidance, from beginning to end ... reads like a ukase. It commands, it

requires, it orders, it dictates."), or is applied by the agency in a way that indicates it is binding. As Professor Robert A. Anthony cogently comments, the mandatory language of a document alone can be sufficient to render it binding:

A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application. If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced. In some circumstances, if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions, it can be binding as a practical matter. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1355 (1992). (Internal citations omitted.)

DEP recently engaged stakeholders in a review of its use of presumptive norms, apparently recognizing its current practice may conflict with the new proscription on this application of guidance documents, but decided, at least for now, to leave the guidance in place in its current form.

Similar practices can be observed in DEP's use of guidance documents in its Site Remediation Program. For example, under recently enacted revisions to the Technical Requirements for Site Remediation (Tech Regs), N.J.A.C. 7:26E, an "immediate environmental concern" (IEC) is defined, in part, as "contamination in indoor air at a level greater than the Department's vapor intrusion rapid action level as found [in DEP's Vapor Intrusion Guidance document]." N.J.A.C. 7:26E-1.8. Moreover, if an IEC is identified, responsible parties

are required to comply with extensive notification, investigation and remediation requirements.

However, the rapid action levels (RALs) DEP uses as the standards that trigger these requirements have not been established through the rulemaking process prescribed by the APA. Accordingly, the recently enacted prohibition on the

enforcement of regulatory requirements that are expressed solely in guidance documents would appear to circumscribe DEP's authority to enforce any requirement in the Tech Regs that is based on the RALs. It should also be noted that, while DEP has engaged in an extensive stakeholder process to obtain input on this and other SRP guidance documents, this process

does not satisfy or substitute for the procedures specified in the APA and that DEP is required to follow to properly establish RALs as enforceable standards. These are just a couple of examples of how the new law is likely to affect DEP's application and enforcement of regulatory requirements that are expressed exclusively in guidance documents. ■