

The EPA Administrator Michael S. Regan signed the following final rule on May 11, 2021, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<https://www.regulations.gov>) in Docket EPA-HQ-OA-2020-0128. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 2**

**[EPA-HQ-OA-2020-0128, FRL-10024-07-OP]**

**RIN 2010-AA15**

### **EPA Guidance; Administrative Procedures for Issuance and Public Petitions; Rescission**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; rescission of regulations.

**SUMMARY:** On October 19, 2020, the Environmental Protection Agency (EPA) published a final rule implementing Executive order (E.O.) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” In accordance with E.O. 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation,” which revoked E.O. 13891, this final rule rescinds the EPA’s prior final rule.

**DATES:** This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-HQ-OA-2020-0128. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as

copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <https://www.regulations.gov>. For information on the EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>.

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**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. What action is the Agency taking?*

In accordance with E.O. 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation,” issued by President Biden on January 20, 2021 (86 FR 7049, January 25, 2021), the EPA is rescinding the final rule (85 FR 66230, October 19, 2020) that established the procedures and requirements regarding the issuance, revision, and withdrawal of guidance documents. The prior final rule was promulgated to implement E.O. 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (84 FR 55235, October 15, 2019).

*B. What is the Agency's authority for taking this action?*

The revisions to the EPA’s policies and requirements surrounding guidance are matters of agency organization, procedure, or practice that lack the force and effect of law. Accordingly, the EPA is not required to engage in a notice and comment process to issue or revise internal procedures under the Administrative Procedure Act (APA). See 5 U.S.C. 553(b)(3)(A), which

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provides that an agency may issue interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice without providing notice and an opportunity for public comment. The EPA is providing an immediate effective date for this rulemaking because it is procedural rather than substantive. The APA's requirement, 5 U.S.C. 553(d), that substantive rules not be effective until at least 30 days after publication in the **Federal Register** is inapplicable because this rulemaking is procedural.

## **II. Background**

On October 9, 2019, President Trump issued E.O. 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents." The now revoked E.O. 13891 provided a specific definition of guidance documents and required Federal agencies to finalize regulations or amend existing regulations to establish processes and procedures for issuing guidance documents, among other actions. On October 19, 2020, the EPA published a final rule consistent with E.O. 13891. The final rule, codified at 40 CFR Part 2, subpart D, established the EPA's policy and internal procedures for issuing, modifying, withdrawing, and using guidance documents; making guidance documents available to the public; and receiving and responding to petitions about guidance documents (85 FR 66230).

On January 20, 2021, President Biden issued E.O. 13992, "Revocation of Certain Executive Orders Concerning Federal Regulation," which revoked E.O. 13891. E.O. 13992 states that it is the policy of the Administration "to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and

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directives that threaten to frustrate the Federal Government's ability to confront these problems, and empowers agencies to use appropriate regulatory tools to achieve these goals.” Section 3 of E.O. 13992 directs agencies to take steps to rescind any orders, rules, regulations, guidelines or policies, or portions thereof, implementing or enforcing the revoked Executive orders.

### **III. Discussion**

After consideration and review, the EPA has concluded that the internal rule on guidance deprives the EPA of necessary flexibility in determining when and how best to issue public guidance based on particular facts and circumstances, and unduly restricts the EPA's ability to provide timely guidance on which the public can confidently rely. Therefore, in accordance with E.O. 13992, the EPA is issuing this final rule to rescind the subpart D regulations.

The EPA's stated purpose in issuing subpart D was to promote transparency and public involvement in the development and amendment of EPA guidance documents. The EPA notes, however, that the Agency has historically employed procedures for public transparency and involvement in the development of all Agency actions, including guidance, and will continue these practices. The EPA will continue to make Agency guidance available to the public on the Agency's website at <https://www.epa.gov>. In addition, the EPA will comply with all statutory obligations pertaining to posting documents for public accessibility. The EPA will also continue its practice, as appropriate, of soliciting stakeholder input on guidance of significant stakeholder and public interest. Consistent with the APA, stakeholders may still petition the EPA at any time regarding our regulatory programs, including requests to issue, amend, or repeal EPA guidance, by contacting the EPA program office or regional office that is responsible for administering the area of stakeholder interest. Finally, the EPA notes that guidance is non-binding and does not have the force and effect of law. Accordingly, the EPA will continue to include in all guidance a

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disclaimer that the guidance is non-binding. Considering these practices regarding guidance, the EPA believes that rescinding the subpart D regulations will restore the flexibilities needed effectively to address the challenges listed in E.O. 13992 and to otherwise meet the Agency's statutory duties.

Therefore, in accordance with E.O. 13992 and for the reasons stated above, the EPA is rescinding its internal agency procedures for issuing guidance documents codified at 40 CFR part 2, subpart D.

#### **IV. Statutory and Executive Orders Reviews**

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:*

###### *Improving Regulation and Regulatory Review*

This action is exempt from review by the Office of Management and Budget (OMB) because it is a rule of agency procedure and practice and is limited to agency management.

##### *B. Paperwork Reduction Act (PRA)*

This action does not contain any information collection activities and therefore does not impose an information collection burden under the PRA.

##### *C. Regulatory Flexibility Act (RFA)*

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to agency management or personnel, which the APA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2).

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*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children. Per the definition of “covered regulatory action” in section 2-202 of Executive Order 13891 and because this action does not concern an environmental health risk or safety risk, it is not subject to Executive Order 13045.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This regulatory action is a procedural rule and does not have any impact on human health or the environment.

*K. Congressional Review Act*

This rule is exempt from the CRA because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

**List of Subjects in 40 CFR Part 2**

Environmental protection, Administrative practice and procedure, Organization and functions (Government agencies).

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the Environmental Protection Agency amends 40 CFR part 2 as follows:

## **PART 2 – PUBLIC INFORMATION**

1. The authority citation for part 2 is revised to read as follows:

**Authority:** 5 U.S.C. 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

## **SUBPART D [REMOVED]**

Remove subpart D.