



DEQ POLICY STATEMENT PS15-04

RULES VERSUS GUIDANCE

PURPOSE

A properly developed guidance document can be used to assist DEQ and the regulated public. A guidance document, however, does not have the force and effect of law. The distinction between rules and guidance is important. If an agency policy statement should be adopted as a rule but is not, it is void and the agency cannot enforce the agency position against others solely on the basis of the written agency statement. Therefore, if DEQ takes an action relying on a guidance document that should have been adopted as a rule and that agency action is challenged, the action may be invalidated because the guidance document is void and cannot be used by the agency.

This policy sets forth procedures that the agency should use in determining whether development of guidance is appropriate, and if determined to be appropriate, the procedures for developing guidance. In summary, the agency should follow the 6-step process below in developing guidance:

1. Consult with the Office of the Attorney General on whether the agency's statement should be developed as a guidance document or a rule.
2. Obtain the director's approval for development of a guidance document.
3. Determine the appropriate amount of public input and comment opportunity respective to the content, complexity, and impact of the proposed guidance document.
4. Based on step 3, issue public notice to allow for participation by interested parties in the development of the guidance document.
5. Based on step 3, issue the proposed guidance for public comment.
6. Incorporate public comments, as appropriate, and finalize the guidance document.

Appendix 1 provides (1) an overview of the Administrative Procedures Act (APA) definition of a rule and the factors the Idaho Supreme Court has determined should be considered when determining whether an agency action meets this definition and therefore requires rulemaking and (2) the definition of agency guidance document set forth in the APA and the APA provisions that allow agencies to use guidance documents.

The statement of policy below outlines the following:

- Factors for DEQ to consider when it determines whether it must follow rulemaking requirements of the APA or instead may develop or rely upon an agency guidance document
- Process for public involvement
- Instructions for the proper use of guidance documents by agency employees

STATEMENT OF POLICY

1. Factors to Consider When Determining Whether Agency Action Requires Rulemaking

Comparing the APA definition of a rule as interpreted by the Idaho Supreme Court with the definition and treatment of guidance documents in the APA, there appears to be several similarities between rules and guidance documents. Both may be generally applicable, have wide coverage, and interpret law. Only rules, however, prescribe a legal standard or directive that the agency can enforce without further explanation or effort. In addition, while rules interpret law, the definition of rule excludes an interpretation of a rule or the documentation of compliance with a rule. Therefore, when determining whether a guidance document may be developed or whether rulemaking is required, DEQ should pay close attention to the following:

1. Is DEQ interpreting an existing standard set out in a rule?

If a DEQ rule already sets out a regulatory standard or required process, and the agency intends only to provide further explanation regarding how it interprets the standard or process, DEQ may be able to use a guidance document. On the other hand, if DEQ is interpreting or implementing directives found in a statute rather than a rule, then rulemaking is most likely required. In addition, if there is no existing standard or requirement in a rule and DEQ is creating such a standard or requirement as an extension of the rule or as a means of implementing a rule, then rulemaking is likely required. So, DEQ must first carefully review the underlying basis and authority for creating the agency statement.

2. Is DEQ prescribing a legal standard?

As noted above, even if a DEQ agency statement is addressing a particular DEQ rule, if the statement creates a legal standard that does not already exist in the rule, rulemaking is likely required. The rule addressed by the agency statement must be carefully reviewed to ensure DEQ is interpreting an existing regulatory standard or requirement. Second, the agency statement should be reviewed to determine whether it employs mandatory or prescriptive language. If the agency statement is clear that it is not mandatory but instead is meant to provide guidance regarding how DEQ interprets a rule, it is less likely that rulemaking will be required. For example, if the agency statement describes factors the agency considers when determining compliance with a rule, but also makes it clear that the factors are not exclusive and other methods can be used, then rulemaking is less likely to be required.

3. Whether rulemaking is required is a case-specific determination.

Before a guidance document is developed, DEQ should consult with the Office of the Attorney General.

2. Development of Guidance Documents and Public Involvement

After consultation with the Office of the Attorney General, agency personnel should seek director approval for development of a guidance document. Additionally, thought should be given as to parties potentially impacted by the proposed guidance and offer an opportunity for stakeholders and interested parties to participate in the development of such guidance document. Finally, draft guidance documents should be published for public comment.

3. Use of Guidance Documents

A properly developed guidance document can be used to assist DEQ and the regulated public. A guidance document, however, does not have the force and effect of law. Therefore, DEQ should avoid using statements in a guidance document as mandatory requirements. For example, an application for a permit should not be denied because the application does not meet requirements set forth in a guidance document. Instead, the agency action on the permit should focus on whether the application meets the standard in the rule, taking into consideration the factors and interpretations provided in the guidance document. Likewise, DEQ should consider the guidance document but should also consider other interpretations or factors presented by the regulated entity to determine compliance with or an interpretation of a rule.

RESPONSIBILITY

DEQ's Director's Office policy analyst is responsible for maintaining this policy.

IMPLEMENTATION

This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration.

Dated this 21st day of May, 2015



Curt Fransen
Director

Appendix A. Definitions

1. The Definition of a Rule

A. Rule is defined in Idaho Code §67-5201(19) (emphasis added):

67-5201. Definitions. — As used in this Act:

(19) “Rule” means the whole or a part of an agency *statement of general applicability* that has been promulgated in compliance with the provisions of this chapter and that *implements, interprets or prescribes*:

(a) *law or policy* or

(b) the *procedure or practice* requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but *does not include*:

(i) statements concerning only the *internal management or internal personnel policies* of an agency and *not affecting private rights of the public* or procedures available to the public; or

(ii) declaratory rulings issued pursuant to section 67-5232, Idaho Code; or

(iii) intra-agency memoranda; or

(iv) any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

B. The Idaho Supreme Court has determined that the Idaho APA’s definition of a rule is so broad that it is unworkable. As a result, the Court has put sideboards on the definition to help determine what is a rule:

The Idaho Supreme Court in *Asarco v. State*, 138 Idaho 719, 69 P.3d 139 (2000), stated the following with respect to the APA definition of a rule (emphasis added):

Thus, under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. . . . Nonetheless, this definition of a rule is too broad to be workable. Under such a definition, virtually every agency action would constitute a rule requiring rulemaking procedures. Therefore, in order to provide further guidance in determining when agency action requires rulemaking, this Court ... considers the following characteristics of agency action indicative of a rule:

(1) wide coverage,

(2) applied generally and uniformly,

(3) operates only in future cases,

(4) prescribes a legal standard or directive not otherwise provided by the enabling statute,

(5) expresses agency policy not previously expressed, and

(6) is an interpretation of law or general policy.

2. Definition of Guidance Document and Documents Excluded from the Definition of a Rule

A. The definition of a rule in the APA excludes certain documents.

According to Idaho Code §67-5201(19), the term rule does not include: intra-agency memoranda or any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

B. The APA recognizes the use of guidance documents and defines guidance document in Idaho Code §67-5250.

Idaho Code §67-5250 recognizes the use of guidance documents and requires that agencies index by subject all guidance documents. This section also defines what is meant by guidance document. Section 67-5250 reads as follows (emphasis added):

(2) Unless otherwise prohibited by any provision of law, each agency shall index by subject all agency guidance documents. The index and the guidance documents shall be available for public inspection and copying at cost in the main office and each regional or district office of the agency. As used in this section, *“agency guidance” means all written documents, other than rules, orders, and pre-decisional material, that are intended to guide agency actions affecting the rights or interests of persons outside the agency. “Agency guidance” shall include memoranda, manuals, policy statements, interpretations of law or rules, and other material that are of general applicability, whether prepared by the agency alone or jointly with other persons.* The indexing of a guidance document does not give that document the force and effect of law or other precedential authority.