

EPA Extends Public Comment Period on Draft Vapor Intrusion Guidance

MAY 10, 2013

On May 8, 2013, EPA announced that it is extending the public comment period on its draft vapor intrusion guidance and its draft petroleum vapor intrusion guidance documents. The public comment period was previously scheduled to close on May 24, 2013, but EPA has extended the public comment period through June 24, 2013. EPA released the draft guidance documents on its website on April 16, 2013, but did not publish a Federal Register notice announcing the public comment period. Industry groups, including the Utility Solid Waste Activities Group (USWAG) have criticized EPA's decision to announce its vapor intrusion policy in two lengthy guidance documents, rather than through rulemaking, and with limited notice of public participation opportunities. USWAG and other commentators have also expressed concerns that EPA will implement its vapor intrusion guidance as if it were a rule in violation of the Administrative Procedure Act.

In a public comment dated April 30, 2013, USWAG stated that “the informal nature of the public notice provided, compounded by the extremely short window of time provided for public review of these lengthy and complex documents, will limit the efficacy of the public participation process.” USWAG urged EPA to publish formal notice of the guidance documents in the Federal Register in order to “reach a broader audience than simply those individuals who have signed up for EPA’s vapor intrusion listserv or who happen to visit EPA’s vapor intrusion website – and to provide for a 60-day comment period beginning with the date of publication in the Federal Register.” USWAG emphasized the importance of public participation in light of the fact that the guidance documents “appear[] more like a rule, likely to be applied in a prescriptive manner by EPA (and, potentially, state agencies)[,]” potentially in violation of the Administrative Procedure Act, which forbids agencies from substituting guidance documents for regulations in order to avoid the formal rulemaking process. USWAG further noted that OMB had warned that “absent adequate public participation, guidance documents may suffer from ill-conceived design and/or lead to improper implementation.” Despite these comments, EPA has not announced any intention to publish notice of the public comment period in the Federal Register or to promulgate vapor intrusion regulations.

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