



**[6450-01-P]**

**DEPARTMENT OF ENERGY**

**10 CFR Part 1003**

**[DOE-OHA-2019-0024]**

**RIN 1903-AA10**

**Revisions to the Office of Hearings and Appeals Procedural Regulations**

**AGENCY:** Office of Hearings and Appeals, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Office of Hearings and Appeals Procedural Regulations set forth the default procedures for appearance and practice before the Office of Hearings and Appeals (OHA), the quasi-judicial branch of the Department of Energy (DOE). The procedures set forth in this regulation apply to all proceedings before the OHA where a comprehensive procedural scheme is not found in another DOE regulation. Through this rulemaking, the OHA simplified and modernized its procedures.

**DATES:** This final rule is effective as of *[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**FOR FURTHER INFORMATION CONTACT:** Kristin L. Martin, Attorney-Advisor, Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585-0107, (202) 287-1550, Email: *kristin.martin@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:**

**I. Regulatory History**

Part 1003 was promulgated in 1995 to replace 10 CFR part 205, a procedural regulation designed to apply to matters involving the former oil price and allocation control regulations effective

during the 1970s. As the oil price and allocation control program wound down, the OHA's jurisdiction expanded to include other programs. Part 1003 was intended to apply to most proceedings before the OHA that did not involve the former federal petroleum price and allocation control regulations. Namely, part 1003 contained a number of subparts that set forth procedures specific to the following types of proceedings: requests for exceptions or exemptions from DOE rules, appeals of DOE orders, applications for stays, applications for modification or revision of DOE orders, requests for OHA conferences and hearings, and requests for special redress relief or other extraordinary assistance.

Since 1995, the OHA's jurisdictional portfolio has changed significantly, shifting away from petroleum product refund proceedings to include primarily personnel security hearings, Freedom of Information Act appeals, and proceedings under the DOE's Contractor Employee Whistleblower Protection Program. Most of the proceedings that the OHA oversees currently are governed by their own procedural regulations and are not subject to the procedures found in part 1003. As the nature of the OHA's work has evolved and technology has improved, the procedures set forth in part 1003 have become more cumbersome and less effective. Part 1003 proceedings involve fewer parties, few to no hearings, and fewer stakeholders than other types of OHA proceedings. In addition, Part 1003 mandates outdated methods of communication that are far less efficient than modern methods. Accordingly, the OHA has decided to make revisions to part 1003 as described in Section II.

## **II. Summary of Revisions**

The OHA is making a number of updates to part 1003. Specifically, the OHA is eliminating the subparts specific to individual types of proceedings and consolidating those procedures in a single part with general applicability. The new consolidated procedures will govern all proceedings before the OHA where a comprehensive procedural scheme is not found in another DOE regulation, including appeals of DOE orders, requests for exceptions or exemptions from DOE rules, and requests for modification or rescission of DOE orders. This is intended to simplify and streamline the procedures for appearing before the OHA, and to reduce cost and administrative burdens for parties.

*A. Methods of Communication and Disclosure*

In executing its duties under the revised part 1003, the OHA intends to make use of the regulations.gov federal portal. Currently, except in unusual circumstances, all documents submitted in exception relief proceedings are posted to an e-docket on that website and are available for public comment through the website as well. The OHA is expanding this practice to all proceedings conducted under part 1003. In addition, the OHA is eliminating requirements that communications and disclosures under part 1003 be transmitted by any one particular method, allowing for greater flexibility as technology changes. For instance, the revisions do not mandate a particular method by which service must be carried out, and the OHA may allow service by a method other than those specified in the regulation.

*B. §1003.1 Purpose and Scope*

*1. Applicability to Other Regulations.* Part 1003's procedures are not applicable to proceedings that are subject to specific and comprehensive procedural schemes found in other parts of DOE's

regulations. Examples of regulations with comprehensive adjudicative procedures include 10 CFR parts 708, 710, 712, and 1004.

2. *Elimination of Subparts.* The OHA is consolidating subparts B through G of the current part 1003 into a single part.

Multiple parts of DOE’s regulations make reference to subparts B through G as they appear in the previous iteration of part 1003. With the consolidation of the subparts, rather than attempt to identify and amend each and every reference throughout all of DOE’s regulations, the OHA is adding §1003.1(b), which clarifies that all such references shall be considered to refer to part 1003 generally, rather than to a specific subpart. For example, DOE’s Energy Conservation Program for Consumer Products, at 10 CFR part 430, states, “To exhaust administrative remedies, any person aggrieved by an action under this section must file an appeal with the DOE's Office of Hearings and Appeals as provided in 10 CFR part 1003, subpart C.” 10 CFR 430.27(m). In the revised part 1003, subpart C no longer exists, but in accordance with §1003.1(b), the general procedures contained in part 1003 will still apply to the appeals process required by §430.27(m).

*C. §1003.2 Definitions*

1. The OHA is adding a definition of “Alternative Dispute Resolution” (ADR). The OHA is also adding a provision to the regulation encouraging ADR.

2. As part of its effort to consolidate the multiple iterations of procedures contained in the current part 1003 into a single procedure, the OHA is using the term “petition” to refer to all initial filings in all proceedings governed by part 1003. Similarly, any person who files an initial submission with the OHA is called a “petitioner” for purposes of the regulation. However, in

practice, the person could still be referred to as an appellant, applicant, or other appropriate designation.

3. The OHA is defining “verified email address,” a new term created to assist with electronic notice and filing.

4. The OHA is defining the terms “action,” “Decision and Order,” “final disposition of DOE,” “party,” and “participant.”

#### *D. §1003.6 Service*

The OHA is allowing for methods of service other than the U.S. Mail. Specifically, the OHA now allows service via email. The OHA is also allowing for service via unspecified alternative methods, allowing for flexibility as communications technology evolves. For example, a petitioner can request that the OHA allow him to send a link to the e-docket on the *regulations.gov* federal portal in lieu of sending copies of documents.

#### *E. §1003.9 Method of submission of petitions, documents, and other materials*

The OHA is mandating that all documents filed with the OHA be filed electronically, except when permission is granted to file in another manner. Not everyone can file electronically, and some materials are better mailed or faxed for logistical reasons. Accordingly, any person wishing to file via non-electronic means may contact the OHA and request permission to do so. The OHA will consider granting such requests in circumstances where good cause has been shown why the document cannot or should not be filed electronically.

#### *F. §1003.11 Filing a petition*

The consolidated procedures by the OHA will be initiated by the filing of a petition by a person who believes he has been adversely affected by a DOE decision or action, or who is otherwise authorized by law.

1. *Form and Elements of a Petition.* The revised part 1003 contains requirements for the form and elements of a petition. While the form is substantially similar to the form of like filings under the previous iteration of the regulation, the proposed elements are more specific and comprehensive and are intended to reduce the need for information requests from the OHA.

2. *Motions for Stay.* The OHA is requiring that motions for a stay be filed at the same time as petitions. However, if a petitioner can show good cause as to why it should be able to file a motion for stay later, part 1003 allows the OHA the flexibility to fairly address the situation.

A stay is a type of order that has the effect of pausing a legal process, such as a proceeding or order. Unlike under the previous iteration of part 1003, where the procedure for requesting a stay was set forth in its own subpart, subpart D, the consolidated procedures the OHA is adopting in this rulemaking do not apply to requests for stays. The OHA now will issue stays as interlocutory orders, rather than as Decisions and Orders. The legal standard for consideration of stay requests is outlined in previous OHA decisions, which have precedential authority. Motions and interlocutory orders will be posted to the e-docket, allowing the public an opportunity to comment.

#### *G. §1003.12 Notice*

The OHA is allowing notice via electronic or other means. Additionally, the OHA may require additional or alternative notice if the standard provisions prove ineffective or overly burdensome.

#### *H. §1003.13 Alternative Dispute Resolution*

The OHA is adding a section encouraging the use of Alternative Dispute Resolution.

#### *I. §1003.14 Evaluation of Petitions*

1. *Timing.* The OHA is imposing time limits, mandatory communication with litigants, and procedural guidelines on its evaluation of petitions.

2. *Conduct of the Proceedings.* The OHA is specifying that the OHA Director has the judicial powers necessary to conduct proceedings, including, but not limited to, granting or denying motions and entering interlocutory orders. This provision allows the OHA Director to exercise the full range of judicial powers—even those not specified in the regulation—that are necessary to ensure a fair and full evaluation of the petition. For example, while discovery is not typically a part of part 1003 proceedings, it may be ordered by the OHA Director in certain cases where appropriate.

3. *Hearings.* The OHA is eliminating the subpart on hearings and inserting a new section outlining the criteria used to determine whether a hearing should be conducted. Nothing in this regulation prohibits a party from requesting a hearing.

#### *J. §1003.15 Subpoenas, information requests, oaths, witnesses*

1. The OHA is changing the term “Special Report Order” to “information request,” which the OHA considers a more accurate description of the tool used by the OHA to elicit information related to a proceeding.

2. The OHA is adding standards for oaths or affirmations. The oath or affirmation must now refer the witness to federal statutes describing penalties for perjury and falsification.

The OHA understands 18 U.S.C. 1001 and 18 U.S.C. 1621 to apply to all statements and submissions to the OHA, whether oral or written. Therefore, the OHA is removing duplicative references to these statutes from the regulation.

*K. §1003.16 Dismissal of petitions*

The OHA is expanding upon and codifying the circumstances under which it may dismiss petitions. Dismissals are separated into two categories: dismissal with prejudice and dismissal without prejudice. A dismissal is considered a Decision and Order.

*L. §1003.17 Standard of Review*

The OHA is creating a default standard of review for petitions not otherwise governed by an authority that prescribes a standard of review. Under the new standard, the OHA will pay deference to the subject matter expertise of the DOE component whose action is under review, while at the same time ensuring that such component acted legally and with appropriate consideration.

The OHA's standard of review for petitions filed under the authority of 42 U.S.C. 7194 continues to include a consideration of whether the petitioner has made a showing of serious hardship, gross inequity or unfair distribution of burdens.

*M. §1003.18 Decision and Order*

The OHA is requiring that a decision granting or denying the relief sought by a petitioner be presented in a particular format, referred to as a Decision and Order. The Decision and Order

will include the legal and factual basis for the decision, state whether it is the DOE's final agency action on the matter, and state what review is available to the parties.

The OHA is eliminating the administrative appeal of a Decision and Order, except as provided by federal statute. This stems from logistical necessity. Decisions under part 1003 are issued by the OHA Director. There is no higher authority in the OHA to which a person can appeal. Furthermore, as the OHA's jurisdiction under part 1003 is almost entirely delegated from the Secretary of Energy, there is no other entity within the DOE with authority to make decisions or hear appeals on such matters.

*N. §1003.19 Reconsideration.*

The OHA is allowing for reconsideration of a Decision and Order if the motion to do so is filed by the 20th day after the Decision and Order is made available to the public. The Director may grant a motion for reconsideration only if he determines that the Decision and Order contains an error that materially influenced the proceeding's outcome.

### **III. Public Comment**

Interested persons were invited to participate in the proposed rulemaking (84 FR 41654, August 15, 2019) proceeding by submitting data, views, or arguments. The comment period ended on September 16, 2019. No comments were received during that time.

### **IV. Regulatory Review**

*A. Executive Order 12866*

It was determined that this action is not a significant regulatory action subject to review under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993) by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

*B. Executive Orders 13771, and 13777*

On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” The Order required that the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;

- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Pursuant to OMB's *Guidance Implementing Executive Order 13771, titled "Reducing Regulation and Controlling Regulatory Costs"* (April 5, 2017), this action does not constitute an "EO 13771 regulatory action" because it does not meet the EO 12866 definition of a significant regulatory action. DOE determined, however, that this action furthers the policy goals outlined in Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which encourages the repeal, replacement, or modification of existing regulations that, among other things, are outdated, unnecessary, or ineffective. Prior to this action, Part 1003 was outdated, repetitive, and, in some sections, inefficient. Certain provisions, particularly the requirement that notice be served via U.S. Mail, had become onerous for regulated parties. This action clarifies the regulation's language, streamlines the proceedings, and removes burdensome requirements. This should result in increased time and resource savings for litigants and DOE.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that, by law, must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s Web site: <http://www.gc.doe.gov>.

DOE has reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This final rule will simplify procedural rules primarily for litigants and reduce the financial and administrative burdens involved in bringing cases before the OHA. DOE has determined that the final rule will not result in a significant economic impact on a substantial number of small entities because the revisions are specifically designed to ease and reduce the obligations of litigants. For example, allowing service via email and other electronic methods significantly reduces the time and expense of bringing a part 1003 proceeding for petitioners, most of whom are corporations and small businesses. Moving the public reference room from a physical location in Washington, D.C., to an online location makes research far easier for litigants outside the Capital region. In making changes such as the ones mentioned here and described elsewhere in the preamble, the OHA has not added new burdens on participants in part 1003 proceedings, resulting in a net decrease in burdens.

DOE will provide its certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

*D. The Paperwork Reduction Act of 1995*

The changes to part 1003 do not contain information collection requirements subject to review and approval by OMB under the Paperwork Reduction Act.

*E. The Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

This final rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

*F. The Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This final rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, the DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*G. Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The DOE has examined this final rule and has determined that it would not preempt State law and would not have a substantial direct effect 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. No further action is required by Executive Order 13132.

*H. Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. The DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

*I. Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR

62446 (Oct. 7, 2002). The DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Congressional Notification*

As required by 5 U.S.C. 801(2), DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this document. The report will state it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 801(2).

**V. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this final rule.

**List of Subjects in 10 CFR Part 1003**

Administrative practice and procedure, Appeal procedures, Hearing and appeal procedures.

Signed in Washington, DC on: October 22, 2019

Poli A. Marmolejos  
Director,  
Office of Hearings and Appeals.

For the reasons set out in the preamble, the DOE amends title 10, Code of Federal Regulations, chapter X, by revising part 1003 to read as follows:

**PART 1003—OFFICE OF HEARINGS AND APPEALS PROCEDURAL  
REGULATIONS**

Sec.

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**Authority:** 15 U.S.C. 761 et seq.; 42 U.S.C. 7101 et seq.

**§1003.1 Purpose and scope.**

(a) This part establishes the procedures to be utilized in certain proceedings before the Office of Hearings and Appeals of the Department of Energy, where comprehensive procedures are not to be found in another part of DOE's regulations. These procedures provide standard rules of practice in a variety of informal adjudications when jurisdiction is vested in the Office of Hearings and Appeals, including requests for adjustments from DOE rules, regulations, and orders under the authority of 42 U.S.C. 7194 as well as other requests for relief with respect to final dispositions of DOE. Any or all of the procedures contained in this part may be adopted by

reference in another DOE program, statute, rule, regulation, guidance, or DOE delegation of authority that invokes the adjudicatory authority of the Office of Hearings and Appeals. These rules do not apply to proceedings governed by a federal statute or DOE regulation that contains comprehensive procedures specifically applicable to proceedings conducted under the authority of that regulation. (E.g., 10 CFR part 708-DOE Contractor Employee Protection Program; 10 CFR part 710-Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material; 10 CFR part 1004-Freedom of Information Act (FOIA); 10 CFR part 712-Human Reliability Program.)

(b) Wherever another DOE program, statute, rule, regulation, guidance, or DOE delegation of authority references or adopts by reference the procedures set forth in a subpart contained in a previous iteration of this part, regardless of the subpart referenced, the procedures set forth in this part shall be deemed to apply.

### **§1003.2 Definitions.**

(a) As used in this part:

*Action* means an affirmative act by DOE that carries the force of law.

*Aggrieved*, with respect to a person, means adversely affected by an action of the DOE.

*Alternative Dispute Resolution* means any technique for resolving disputes and managing conflict without resorting to litigation in either an administrative or judicial forum. Alternative Dispute Resolution techniques include, but are not limited to, mediation, facilitation, and shuttle diplomacy.

*Decision and Order* means the OHA's final decision on a petition brought under this part.

*Director* means the Director of the Office of Hearings and Appeals or duly authorized delegate.

*DOE* means the Department of Energy, created by the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*), and the National Nuclear Security Administration (NNSA).

*Duly authorized representative* means a person who has been designated to appear before the Office of Hearings and Appeals in connection with a proceeding on behalf of a person interested in or aggrieved by an action of the DOE. Such appearance may consist of the submission of a written document, a personal appearance, verbal communication, or any other participation in the proceeding.

*Federal legal holiday* means any calendar day designated as a federal holiday by federal statute or Executive order.

*Final disposition of DOE* means a DOE rule, order, or other action in any matter other than:

- (i) A rulemaking;
- (ii) An internal DOE order or directive issued by the Secretary of Energy or his delegate in the management and administration of departmental elements and functions; or
- (iii) Any decision or order issued under 41 U.S.C. 4712 or under part 708, part 710, part 712, or part 1004 of this title.

*OHA* means the Office of Hearings and Appeals of the Department of Energy.

*Participant* means a non-party entity that submits a comment, briefing, or other filing in a proceeding.

*Party* means the petitioner and any adverse entity, which may include the DOE, which assumes the role of defendant or respondent in the proceeding.

*Person* means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a

charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

*Petition* means a written submission to the OHA requesting that the OHA grant the petitioner relief.

*Petitioner* means any person filing a petition with the OHA.

*Proceeding* means the process and activity, and any part thereof, instituted by the OHA—either on its own initiative or in response to a petition submitted by a person—that may lead to an action by the OHA.

*Verified email address* means an email address that is publicly published or available upon request, or, if no such address exists, an email address through which the sender has communicated with the recipient in the previous 12 months.

(b) Throughout this part the use of a word or term in the singular includes the plural, and the use of the male pronoun is gender neutral.

### **§1003.3 Appearance before the OHA.**

(a) An interested person may make an appearance, including a personal appearance at the discretion of the OHA, and participate in any proceeding described in this part on his own behalf or by a duly authorized representative. Any document filed by a duly authorized representative must contain a statement by such person certifying that he is a duly authorized representative.

(b) The OHA may deny, temporarily or permanently, in whole or in part, the privilege of participating in proceedings, including oral presentation, to any individual who is found by the OHA—

- (1) To have made false or misleading statements, either orally or in writing;
- (2) To have filed false or materially altered documents, affidavits or other writings;

- (3) To lack the specific authority to represent the party or participant; or
- (4) To have engaged in or to be engaged in conduct that substantially disrupts a proceeding.

**§1003.4 Computation of time.**

(a) *Days.* Except as provided in paragraph (b) of this section, in computing any period of time prescribed or allowed by these regulations or by an order of the OHA, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the following day that is not a Saturday, Sunday, or a federal legal holiday. Documents received after 5 p.m., Eastern Time, are deemed filed on the following regular business day.

(b) *Hours.* If the period of time prescribed in an order issued by the OHA is stated in hours rather than days, the period of time begins to run upon actual notice of such order, whether by oral or written communication, to the person directly affected, and will run without interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended, or rescinded. When a written order is transmitted by oral communication, the written order must be served as soon thereafter as is feasible.

(c) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice or other document and the order, notice, or other document is served solely by mail, 3 days will be added to the prescribed period.

**§1003.5 Extension of time.**

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the OHA upon good cause shown.

**§1003.6 Service.**

(a) All documents required to be served under this part must be served personally, by first class United States mail, or by verified email address, except as otherwise provided.

(b) Service upon a person's duly authorized representative constitutes service upon that person.

(c) Official United States Postal Service receipts from certified mailing and email delivery receipts constitute evidence of service.

(d) The OHA may, at its discretion, allow for alternate forms of service when it determines that such would be advisable.

**§1003.7 General filing requirements.**

(a) *Purpose and scope.* The provisions of this section apply to all documents required or permitted to be filed with the OHA.

(b) *Signing.* Any document that is required to be signed, must be signed by the person filing the document. Any document filed by a duly authorized representative must contain a statement by such person certifying that he is a duly authorized representative. The signature by the filer constitutes a certificate by the signer that the signer has read the document and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact, warranted under existing law, and submitted in good faith and not for any improper purpose such as to harass or to cause unnecessary delay. If a document is signed in violation of this section, the OHA may impose the sanctions specified in §1003.3 and other sanctions determined to be appropriate.

(c) *Labeling.* A petition must be clearly labeled according to the nature of the action involved both on the petition itself and, where applicable, in the subject line of the email in which the petition is transmitted.

(d) *Obligation to supply information.* A person who files a petition is under a continuing obligation during the proceeding to provide the OHA with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other submission that is subsequently filed by that person with any DOE office.

(e) *The same or related matters.* A person who files a petition with the OHA must state whether, to the best knowledge of that person, the same or related action as that which is the subject of the petition has been or presently is being considered or investigated by any other DOE office, other federal agency, department, or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with any proceeding described in this part. In addition, the person must state whether contact has been made by the person or one acting on his behalf with any person who is employed by the DOE with regard to the same or a related issue, act, or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was oral or in writing; the nature and substance of the contact; and the date or dates of the contact.

(f) *Request for confidential treatment.* (1) If any person filing a document with the OHA claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if such person requests the OHA not to disclose such information, such person must file together with

the document a copy of the document from which the information for which confidential treatment is being sought has been deleted. The person must indicate in the original document that it is confidential or contains confidential information and must file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. For example, if the person states that the information comes within the exception codified at 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If the person filing a document does not submit a copy of the document with the confidential information deleted, the OHA may assume that there is no objection to public disclosure of the document in its entirety.

(2) The OHA will make a determination regarding any claim of confidentiality under criteria specified in 10 CFR 1004.11. Notice of the decision by the OHA to deny such claim, in whole or in part, and an opportunity to respond will be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

(g) *Submitting multiple petitions.* Each petition to the OHA must be submitted as a separate document, even if the petitions deal with the same or a related action or are submitted in connection with the same proceeding.

#### **§1003.8 Effective date of orders.**

Any order issued under this part is effective as against all persons having actual or constructive notice thereof upon issuance, in accordance with its terms, unless and until it is stayed or suspended. An order is deemed to be issued on the date, as specified in the order, on which it is signed by the Director, unless the order provides otherwise.

#### **§1003.9 Method of submission of petitions, documents, and other materials.**

Absent exceptional circumstances, all submissions to the OHA, as provided in this part or otherwise, must be filed electronically in accordance with the instructions set forth on the OHA website, found at <https://www.energy.gov/oha/filing-information>. The OHA may grant permission to file via mail or facsimile. Any submissions made in hard copy will not be returned.

**§1003.10 Public reference room.**

The OHA maintains an electronic public reference room at

<https://www.energy.gov/oha/decision-summaries>. The following information is included:

- (a) A list of all persons who have filed a petition and a digest of each petition;
- (b) Each Decision and Order, with confidential information deleted, issued in response to a petition; and
- (c) Any other information in the possession of the OHA which is required by statute to be made available for public inspection and copying, and any other information that the OHA determines should be made available to the public.

**§1003.11 Filing a petition.**

- (a) *Who may file.* Any person may file a petition under this part who is aggrieved by a final disposition of DOE or who is so authorized by a program, statute, rule, regulation, guidance, or DOE delegation of authority.
- (b) *Form of petition.* The person seeking relief under this part must file a petition. The general filing requirements in §1003.7 apply in addition to the requirements stated in this part.
- (c) *Elements of a petition.* Petitions to the OHA must include, as applicable:
  - (1) A full and complete statement of all relief requested from the OHA;
  - (2) A citation to the statute, regulation, delegation, or other authority pursuant to which the OHA has jurisdiction to consider the petition;

(3) A full and complete statement of all relevant facts pertaining to the action that is the subject of the petition and to the OHA relief sought;

(4) A statement of the factual and legal justification for the relief requested in the petition;

(5) A copy of all documents, including, but not limited to, contracts, financial records, communications, plans, analyses, and diagrams related to the petitioner's eligibility for the relief requested in the petition; and,

(6) A motion for stay, if a stay is sought by the petitioner. The OHA may grant a motion for stay filed after the petition only upon a showing of good cause.

(d) *Service certification.* The petitioner must submit to the OHA a certification that the petitioner has served the notice required pursuant to §1003.12 of this part. The OHA must receive the certification within 15 days of the date on which the OHA received the petition. The OHA may grant an extension of time only upon a showing of good cause. The certification must include the names, addresses, telephone numbers, and email addresses of all potentially aggrieved persons or a statement that such information, in whole or in part, is not reasonably ascertainable.

(e) *Where to file.* A petition must be filed with the OHA in the manner specified in §1003.9.

**§1003.12 Notice.**

(a) The petitioner must serve a copy of the petition and any subsequent amendments or other documents relating to the petition, or a copy from which confidential information has been deleted in accordance with §1003.7(f), to each person who is reasonably ascertainable by the petitioner as a person who would be aggrieved by the OHA relief sought. The copy of the petition must be accompanied by a statement that the person may submit comments regarding the petition to the OHA within 10 days. The OHA may, in its discretion, extend the comment period.

The petitioner must file a service certification with the OHA, in accordance with §1003.11(d), stating that the requirements of this paragraph have been complied with and must include the names, addresses, and verified email addresses of each person to whom a copy of the petition was sent. The OHA may require the petitioner to provide additional or alternative notice, may identify additional persons on whom an applicant must serve notice, or may determine that notice should be published in the *Federal Register*.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the petitioner determines that compliance with paragraph (a) of this section would be impracticable, the petitioner must:

- (1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and
- (2) Include with the certification a description of the persons or class or classes of persons to whom notice was not sent, as well as a brief explanation of why notice to each person or class of person was impracticable.

(c) Any person submitting written comments to the OHA regarding a petition filed under this part must serve a copy of the comments, or a copy from which confidential information has been deleted in accordance with §1003.7(f), to the petitioner. The person must certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

### **§1003.13      Alternative Dispute Resolution.**

The DOE encourages the use of Alternative Dispute Resolution (ADR) to resolve disputes and controversies at any stage of the proceedings. Accordingly, parties appearing before the OHA are encouraged to use ADR when practical. The DOE Alternative Dispute Resolution Office, which

employs multiple neutrals trained in mediation and other ADR services, provides ADR services for disputes involving the DOE and its affiliated organizations (*e.g.*, DOE contractors). ADR is voluntary and the OHA will never require parties to engage in settlement negotiations or mediation.

**§1003.14 Evaluation of petitions.**

(a) The OHA will acknowledge receipt of all petitions filed pursuant to this part.

(b) The OHA may request information of a petitioner, including, but not limited to, financial documents, responses to interrogatories, copies of communications, and such other information the OHA determines may inform its evaluation of the petition.

(1) The OHA will provide a petitioner with a period of time within which to provide any information requested by the OHA pursuant to this paragraph and instructions on how to deliver the information to the OHA.

(2) The OHA may extend the period of time for a petitioner to provide information requested by the OHA upon a showing of good cause by the petitioner. Such extensions will generally be for a period of no more than 30 days, and in no case will the OHA grant an extension that would result in the undue delay of its evaluation of a petition.

(c) In evaluating a petition, the OHA may consider relevant information from any source, including information received from a third party, provided that the petitioner is afforded an opportunity to respond to all third-party submissions.

(d) The OHA will complete its evaluation of a petition within 180 days of receipt of the petition.

However, the Director may extend the period for the OHA's review for good cause, the reasoning for which must be set forth in the order extending the review period.

(e) In its evaluations, the OHA will use as a guide, but will not be bound by, the Federal Rules of Civil Procedure and Federal Rules of Evidence.

(f) The Director has all of the judicial powers necessary to conduct the proceeding, including, but not limited to, grants or denials of motions and entry of interlocutory orders.

(g) The OHA may conduct a hearing with regard to the petition if, in its discretion, it considers that such hearing will materially advance the proceeding. In deciding whether to conduct a hearing, the OHA may consider various factors, including, but not limited to, the number of persons potentially aggrieved by a petition, the extent to which witness testimony will assist the OHA in developing a complete factual record, and the estimated costs of conducting a hearing at a venue reasonably convenient to all parties.

**§1003.15 Subpoenas, information requests, oaths, witnesses.**

(a) In accordance with the provisions of this section and as otherwise authorized by law, the Director may sign, issue, and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; and subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in the possession of the subpoenaed person.

(b) The OHA may issue an information request requiring any person subject to the jurisdiction of the OHA to file a report providing information relating to the OHA proceeding, including, but not limited to, written answers to specific questions. The information request may be in addition to any other reports required.

(c) The Director, for good cause shown, may extend the time prescribed for compliance with the subpoena or information request and determine the terms of satisfactory compliance.

(d) Prior to the time specified for compliance, but within 10 days after the date of service of the subpoena or information request, the person upon whom the document was served may file a request for review of the subpoena or information request with the Director. The Director then will provide notice of receipt to the person requesting review, may extend the time prescribed for compliance with the subpoena or information request, and may determine the terms of satisfactory compliance.

(e) If the subpoena or information request is not modified or rescinded within 10 days of the date of the Director's notice of receipt:

(1) The subpoena or information request will be effective as issued; and

(2) The person upon whom the document was served must comply with the subpoena or information request within 20 days of the date of the Director's notice of receipt, unless otherwise notified in writing by the Director.

(f) A subpoena or information request must be served upon a person named in the document.

(g) If any person upon whom a subpoena or information request is served pursuant to this section refuses or fails to comply with any provision of the subpoena or information request, a proceeding may be commenced in the appropriate United States District Court to enforce the subpoena or information request.

(h) Documents produced in response to a subpoena must be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that:

(1) A diligent search has been made for each document responsive to the subpoena; and

(2) To the best of his knowledge, information, and belief each document responsive to the subpoena is being produced.

(i) Any information furnished in response to an information request must be accompanied by the sworn certification, under penalty of perjury, of the person to whom it was directed or his authorized agent who actually provides the information that:

(1) A diligent effort has been made to provide all information required by the information request; and

(2) All information furnished is true, complete, and correct.

(j) If any document responsive to a subpoena is not produced or any information required by an information request is not furnished, the certification must include a statement setting forth every reason for failing to comply with the subpoena or information request. If a person to whom a subpoena or information request is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (h) or (i) of this section must also submit a written list of the documents or the information withheld indicating a description of each document or piece of information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of the person whose privilege is being asserted.

(k) If testimony is taken pursuant to a subpoena, the Director will determine whether the testimony will be recorded and the means by which the testimony is recorded.

(l) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees.

(m) The Director may sequester any person subpoenaed to furnish documents or give testimony.

Unless permitted by the Director, neither a witness nor his attorney is permitted to be present during the examination of any other witnesses.

(n) The Director may require testimony to be given under oath, regardless of the form of the testimony. The oath or affirmation will direct the witness's attention to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(o) The Director may require submissions to the OHA to be accompanied by an oath or affirmation attesting to the truth and accuracy of the submission. The oath or affirmation will direct the submitter's attention to 18 U.S.C. 1001 and 18 U.S.C. 1621.

(p) A witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(1) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(2) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(q) The Director will take all necessary steps to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or language. The OHA may take steps as the circumstances warrant in regard to any instances where any person or attorney refuses to comply with directions or provisions of this section.

**§1003.16 Dismissal of petitions.**

The Director may issue a Decision and Order dismissing a petition at any time during the course of a proceeding. The Decision and Order shall state whether the dismissal is with prejudice or without prejudice. A Decision and order Dismissing a petition may be the subject of a motion for reconsideration in accordance with §1003.19 of this part.

(a) *Dismissal with prejudice.* The dismissal of a petition with prejudice by the OHA terminates the OHA's review of the petition and bars the petitioner from submitting any future petition concerning the same, or substantially the same, issues as those in the petition. The OHA may dismiss a petition with prejudice if:

- (1) The OHA lacks jurisdiction to consider the petition;
- (2) The petitioner has already received a Decision and Order from the Director in response to a previously filed petition that addresses the same issue;
- (3) The petitioner provides a false statement under oath or files a false instrument with the OHA, as determined by the OHA;
- (4) The petitioner refuses to comply with an order issued by the OHA;
- (5) The petition is untimely;
- (6) The issues raised in the petition are moot;
- (7) The petitioner repeatedly fails to comply with procedural requirements; or,
- (8) The same or a substantially similar petition was previously dismissed by the OHA without prejudice, and the same basis for dismissal without prejudice exists upon refiling by the same petitioner.

(b) *Dismissal without prejudice.* The dismissal of a petition without prejudice by the OHA terminates the OHA's review of the petition but does not bar the petitioner from resubmitting the petition provided that the facts or circumstances leading to the dismissal have been resolved. In

dismissing a petition without prejudice, the OHA may order that the petitioner may not resubmit the petition, or a substantially similar petition, for a period of time not to exceed 180 days. The OHA may dismiss a petition without prejudice if:

- (1) The petitioner fails to include any of the required elements of a petition set forth in §1003.11 of this part;
- (2) The petitioner fails to provide notice as required by §1003.12 of this part;
- (3) The petitioner fails to timely provide documents or information at the request of the OHA pursuant to §1003.14 or §1003.15 of this part;
- (4) The petition fails to state a claim upon which the OHA can grant relief; or
- (5) The OHA determines that there is insufficient information upon which to base a decision.

**§1003.17 Standard of review.**

- (a) The OHA will grant a petition that seeks an adjustment from a DOE rule, regulation or order under the authority of 42 U.S.C. 7194 only if it determines that doing so will alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens.
- (b) Except as provided by program, statute, rule, regulation, or DOE delegation of authority, the OHA will grant any other petition filed under this part upon a showing that the DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation with respect to the final disposition of DOE that is the subject of the petition.
- (c) Petitions shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous petitions of the same kind.

**§1003.18 Decision and Order.**

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition and ordering relief as appropriate. The OHA will serve the Decision and Order on the parties to the proceeding and make it available to the public.

(b) The Decision and Order will set forth its legal basis and the relevant facts, state whether it is a final agency action of the DOE, and state what further review, if any, is available.

(c) There is no administrative appeal of a Decision and Order, except as provided by federal statute.

**§1003.19 Reconsideration.**

A participant in the proceeding may submit to the OHA a motion for reconsideration of a Decision and Order. The motion for reconsideration must be filed by the 20th day after the OHA makes the Decision and Order available to the public. The motion must include a statement of the grounds on which the movant believes reconsideration is warranted. Such grounds may include, but are not limited to, procedural, legal, or factual errors in the Decision and Order. A motion for reconsideration may be granted if the Director determines the Decision and Order contains an error that materially impacted the outcome of the proceeding.

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