



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 1061

RIN 1990-AA50

Procedures for the Issuance of Guidance Documents

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of proposed rulemaking (NPR) and request for comment.

SUMMARY: The U.S. Department of Energy (DOE) proposes to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891.

The proposed rule would establish internal agency requirements for the contents of guidance documents, and procedures for providing notice of, and soliciting public comment on, certain guidance documents. The proposed rule would also establish procedures for the public to petition DOE to modify or withdraw guidance documents.

This NPR also resolves a petition for rulemaking submitted by the New Civil Liberties Alliance (NCLA) and responds to comments submitted on that petition.

DATES: DOE will accept comments regarding this NPR on or before [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN *THE FEDERAL REGISTER***]. See the section entitled “Public Participation” for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting

comments. Alternatively, interested persons may submit comments, identified by RIN 1990-AA50, by any of the following methods:

1. *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. *Email*: Guidance@hq.doe.gov. Include the RIN 1990-AA50 in the subject line of the message.

3. *Postal Mail*: U.S. Department of Energy, Office of the General Counsel (GC-33), 6A-179, 1000 Independence Avenue, SW., Washington, DC 20585. If possible, please submit all items on a compact disc (“CD”), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier*: U.S. Department of Energy, 6A-179, 1000 Independence Avenue, SW., Washington, DC 20585. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see the section on Public Participation for details.

Docket: The docket, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the <http://www.regulations.gov> index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at the <http://www.regulations.gov/> webpage associated with RIN 1990-AA50. The docket web page contains simple instructions on how to access all documents, including public comments, in the docket. See the section on Public Participation for information on how to submit comments through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-33, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-2555, Email: Guidance@hq.doe.gov.

SUPPLEMENTARY INFORMATION: DOE issues this proposed rule to incorporate into the Code of Federal Regulations a new 10 CFR part 1061, which would implement the requirements of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” 84 FR 55235 (October 9, 2019). Executive Order 13891 requires agencies to provide more transparency in the issuance and use of guidance documents, including by promulgating procedures to allow the public to comment on significant guidance documents before their issuance. As noted in the Executive Order, the Administrative Procedure Act (APA) generally requires agencies to provide public notice of proposed regulations, allow interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in

the *Federal Register*.¹ (See 5 U.S.C. 553) Such regulations, also known as legislative rules, have the force and effect of law and are legally binding upon the public.

In addition to legislative rules, agencies may clarify existing obligations of regulated entities through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. (5 U.S.C. 553(b)(A))² Executive Order 13891 defines “guidance document” as “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation”, with a few noted exceptions listed in the Executive Order.³ Such guidance documents do not have the force and effect of law, and are intended only to provide clarity to the public of existing statutory and regulatory obligations. However, as noted in the Executive Order, some guidance documents may impose obligations beyond those required by statute or regulation, or carry a threat of enforcement if the guidance is not followed by regulated parties. Additionally, the public may not have sufficient notice of guidance documents, which are not always published in the *Federal Register* or distributed to all regulated parties. See 84 FR 55235.

¹ The APA defines a “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” (5 U.S.C. 551(4))

² The APA refers to these types of documents as “interpretative rules or general statements of policy”. 5 U.S.C. 553(b)(A).

³ The types of documents excepted from the definition of “guidance document” in Executive Order 13891 are: (i) legislative rules promulgated under the APA, or similar statutory provisions; (ii) rules exempt from the rulemaking requirements of the APA; (iii) rules of agency organization, procedure, or practice; (iv) decisions of agency adjudications under the APA, or similar statutory provisions; (v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or (vi) internal executive branch legal advice or legal opinions addressed to executive branch officials. 84 FR 55235-55236.

Accordingly, Executive Order 13891 requires agencies to provide more transparency for their guidance documents by creating a searchable online database for current guidance documents,⁴ and by establishing procedures to allow the public to comment on significant guidance documents and to petition the agency to withdraw or modify guidance documents.⁵ Moreover, the Executive Order requires agencies to clearly state in their guidance documents that such guidance does not have the force and effect of law and is not legally binding, except as authorized by law or as incorporated into a contract. 84 FR 55236-55237.

This proposed rule would implement the requirements of Executive Order 13891. This proposed rule would apply to all DOE guidance documents, which DOE proposes to define in the same manner as that term is defined in Executive Order 13891, including the exceptions to that definition listed in section 2 of the Executive Order. DOE proposes to also list specific types of documents and communications that fall within the broader exceptions listed in the Executive Order (e.g., speeches and presentations given by DOE officials, legal positions taken in litigation or enforcement actions, etc.). (See also OMB, M-20-02, Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 31, 2019) available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>).

⁴ DOE’s online database may be found at energy.gov/guidance.

⁵ Executive Order 13891 defines “significant guidance document” as “a guidance document that may reasonably be anticipated to: (i) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.” 84 FR 55236.

The proposed rule would also adopt the same definition of “significant guidance document” as that term is defined in section 2 of Executive Order 13891.

In accordance with Executive Order 13891, DOE proposes to require that all DOE guidance documents clearly state that they do not have the force and effect of law and are not legally binding on the public, and that they are only intended to provide clarity to the public regarding existing statutory and regulatory requirements. Moreover, DOE proposes to require DOE guidance documents to be written clearly and to refrain from using mandatory language, such as the terms “shall” or “must.” If a guidance document purports to describe, approve, or recommend specific conduct that is beyond what is required by existing statute or legislative rule, the proposed rule would require that the document include a clear and prominent statement that the guidance document will not be used as an independent basis for enforcement and that conformity with the guidance document is strictly voluntary and nonconformity will not affect the rights and obligations of regulated parties.

DOE also proposes to require that all DOE guidance documents be reviewed and cleared by the Office of the General Counsel. Additionally, the proposed rule would require that significant guidance documents be approved by the Secretary or a component agency head appointed by the President. This will ensure that the requirements and intent of Executive Order 13891 are met, and that guidance documents are issued in accordance with relevant laws and regulations.

The proposed rule would also codify procedures for providing notice in the *Federal Register* concerning significant guidance documents, soliciting public comments on such guidance documents, and responding to such comments. DOE notes that the

agency generally provides notice and solicits comments on significant guidance documents. Therefore, the proposed rule would codify agency procedures that are already in use for significant guidance documents. The proposed rule also provides procedures for the public to petition the agency to modify or withdraw guidance documents. DOE notes that the procedures in the proposed rule for petitions to modify or withdraw guidance documents are similar to the procedures that DOE uses for petitions for rulemaking.

With this proposed rule, DOE would effectuate the requirements of Executive Order 13891 and ensure that the agency's process for the issuance of guidance documents is transparent and accessible to the public. The proposed rule also assures regulated parties that such guidance is not legally binding and does not affect the rights and obligations of regulated parties.

NCLA Petition for Rulemaking

On August 2, 2019, prior to the issuance of Executive Order 13891, DOE received a petition from the New Civil Liberties Alliance (NCLA) asking DOE to initiate a rulemaking to prohibit any DOE component from issuing, relying on, or defending improper agency guidance.⁶ In its petition, NCLA argued that federal agencies often issue informal interpretations, advice, statements of policy, and other forms of guidance that make law by declaring views about what the public should do even though the U.S. Constitution and the APA prohibit doing so. NCLA asserted that such practices evade legal requirements and are used for the purpose of coercing persons or entities outside the Federal Government into taking or not taking action beyond what is required by an

⁶ NCLA's petition, the notice soliciting comment, and comments received on the petition may be found on <http://www.regulations.gov> under docket number DOE-HQ-2020-0002, document number 2019-20540.

applicable statute or regulation. NCLA further stated that despite being prohibited by law, improper guidance is typically outside of judicial review because of procedural limits. (Petition at 6-8) More specifically, NCLA stated that binding legislative rules will be invalidated for failure to conform to the notice-and-comment process under the APA only after they are determined to be legislative in the first place, which, NCLA argues, is neither a simple nor quick task. NCLA also stated that an initial or interim rule, even one that binds regulated parties, may not be reviewable by courts because the rule may not constitute final agency action under the APA, which is required for judicial review. As a result, NCLA stated, courts rarely consider the genuinely coercive effects of guidance documents as sufficiently binding to permit review. (Petition at 8-9)

NCLA concluded that to solve these underlying problems, DOE should issue a binding and final rule prohibiting any DOE component from issuing, relying on, or defending improper agency guidance, and stating that only a new rule binding DOE can assure regulated parties that DOE will refrain from future improper use of guidance. (Petition at 20) NCLA discussed a number of authorities in favor of its petition, including the U.S. Constitution, the APA, an OMB Bulletin (Final Bulletin for Agency Good Guidance Practices, issued in 2007 and available at <https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/E7-1066.pdf>), and an OMB Memorandum (OMB Memorandum M-19-14, issued in 2019 and available at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>). (Petition at 4-17) NCLA also provided proposed regulatory text that would require internal DOE procedures for the issuance and use of legislative rules and guidance documents, procedures for compliance with the Congressional Review Act (CRA), and procedures

for the public to petition DOE to determine whether a rule is legislative or non-binding guidance and for such determinations to be reviewable by the courts. (Petition at 23-28) DOE published the notice of the petition in the *Federal Register* and sought comment on whether to grant the petition and proceed with a rulemaking. See 84 FR 50791. DOE received three relevant comments on the petition, which are summarized below along with DOE's responses.⁷

Due to the intervening issuance of Executive Orders 13891 after the submission of NCLA's petition, DOE grants in part, and denies in part, NCLA's requests in its petition. This proposed rule addresses NCLA's concerns by proposing regulations that would ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public. The proposed rule also assures regulated parties that such guidance documents are not legally binding and do not affect the rights and obligations of regulated parties. The proposed rule would implement, and be consistent with, the requirements of Executive Orders 13891, and would ensure that DOE guidance is not used to coerce regulated parties into compliance with non-binding guidance, or used as the sole basis for an enforcement action against such parties. The proposed rule also provides procedures for regulated parties to petition DOE to rescind or modify DOE guidance documents. After receiving comments from the public on this proposed rule, and making any necessary amendments to the proposed rule to reflect meaningful comments, DOE intends to publish a final rule implementing the requirements of Executive Order 13891 and establishing procedures for the issuance and

⁷ DOE received nine additional comments on the petition. However, DOE believes that these 9 comments were submitted to the incorrect docket, as these comments concerned the regulation of hemp. Accordingly, DOE will not publish or respond to these comments as they are irrelevant to the NCLA petition and this rulemaking.

use of DOE guidance documents. However, DOE declines to include provisions in this proposed rule that would establish procedures for compliance with the CRA and for the issuance and use of legislative rules. Such procedures were not addressed by Executive Orders 13891, and the provisions of the CRA and APA, as well as current DOE internal procedures, adequately govern CRA compliance and the issuance and use of legislative rules. Moreover, DOE notes that the greater concerns highlighted in NCLA's petition and proposed regulatory text pertain to DOE's issuance and use of guidance documents, which, as described above, are directly addressed by this proposed rule. Additionally, DOE declines to include procedures for determining legislative versus non-legislative rules, the finality of such determinations, or judicial review of such determinations in the proposed rule. The courts have the authority, and are best positioned, to determine what agency actions are reviewable by a court under the APA or other relevant laws and regulations.

Comments of NCLA

NCLA supported its petition and reiterated its request for DOE to propose and finalize regulations regarding DOE's issuance and use of guidance. NCLA commented that the regulatory text proposed in its petition is compatible with Executive Order 13891 and its counterpart, Executive Order 13892 ("Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," 84 FR 55239 (October 9, 2019)). (NCLA at 2-3) NCLA also referred to the Department of Transportation's (DOT) final rule regarding DOT procedures for issuing regulations and guidance, and DOT enforcement actions. (See 84 FR 71714) NCLA commented that the DOT rule addressed several of NCLA's concerns regarding agency issuance and use of

guidance documents and that NCLA's proposed regulatory text for DOE was similar to the DOT rule. NCLA commented that the DOT rule addressed other considerations that NCLA did not raise in its petition to DOE, but that NCLA nonetheless believes DOE should consider. (NCLA at 4-7) NCLA commented that the judicial review provisions in NCLA's proposed regulatory text would allow an interested party to seek redress from the courts when an agency's improper guidance review process falls short. NCLA stated that its proposed regulatory text also resolves the finality question by identifying agency action or inaction that would constitute final agency action reviewable under the APA. (NCLA at 7-8)

DOE Response

Consistent with NCLA's comments, this proposed rule would establish procedures to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public. The proposed rule also assures regulated parties that such guidance is not legally binding, and does not affect the rights and obligations of regulated parties. The proposed rule would implement, and be consistent with, the requirements of Executive Order 13891. DOE is not addressing the specific requirements of Executive Order 13892 in this proposed rule. This proposed rule is consistent with the goals of Executive Order 13892 in requiring that guidance documents contain clear language that they are not legally binding and will not be used by DOE as an independent basis for an enforcement action or other administrative penalty. DOE will implement the requirements of Executive Order 13892 in separate administrative actions, as appropriate.

Further, the proposed rule is very similar to the DOT final rule. However, as noted previously, DOE declines to include specific provisions regarding judicial review or finality of DOE actions in the proposed rule. The courts have the authority, and are best positioned, to determine what agency actions are reviewable by a court under the APA or other relevant laws and regulations. In addition, DOE is not persuaded that provisions concerning finality or judicial review would be as useful to regulated parties as the provisions proposed in the proposed rule. These provisions should eliminate, or lessen, the perceived need for judicial review in a significant range of circumstances by further confirming that guidance documents do not bind regulated parties.

Comments of the Antonin Scalia Law School Administrative Law Clinic

The Antonin Scalia School of Law Administrative Law Clinic (the Clinic) expressed support for NCLA's petition for DOE to undertake a rulemaking relating to DOE's practice of using guidance documents. The Clinic noted the importance of guidance documents, but stated that agencies too often use guidance as a means of setting agency policy without providing the public notice and opportunity to comment, thereby limiting meaningful and intelligent public participation. The Clinic noted the lack of transparency surrounding agencies' issuance and use of many guidance documents. (Clinic at 2-6) The Clinic stated that DOE should propose and finalize regulations through the notice-and-comment process to ensure that formalized procedures are in place for the development, approval, and issuance of guidance documents. (Clinic at 10-12)

DOE Response

Consistent with the Clinic’s comments, this proposed rule would establish procedures to ensure that the agency’s process for the issuance and modification of guidance documents is transparent and accessible to the public. Moreover, the proposed rule assures regulated parties that such guidance is not legally binding, and that regulated parties’ statutory and regulatory rights and obligations are not affected by such guidance.

Comments of the Administrative Conference of the United States

The Administrative Conference of the United States (ACUS) did not take a position with respect to the NCLA petition; rather, ACUS called DOE’s attention to two past ACUS recommendations regarding agency guidance. ACUS referred to ACUS Recommendation 2017-5, “Agency Guidance Through Policy Statements,” which provides best practices to agencies on the formulation and use of policy statements, and lists steps that agencies can take to remain flexible in their use of policy statements and to encourage public participation in the adoption or modification of policy statements. ACUS also referred to ACUS Recommendation 2019-1, “Agency Guidance Through Interpretive Rules,” which identifies ways in which agencies can offer the public the opportunity to propose alternatives to approaches provided in an agency’s interpretive rule that advises the public on how to comply with the underlying statute or regulation. Recommendation 2019-1 also identifies ways agencies can encourage public participation in the adoption or modification of interpretive rules. (ACUS at 1) ACUS also cited to and submitted reports by ACUS in support of both Recommendations. ACUS took no position on the merits of NCLA’s petition. (ACUS at 1-2)

DOE Response

Consistent with the ACUS recommendations, this proposed rule would formally establish procedures to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public. Moreover, the proposed rule assures regulated parties that such guidance is not legally binding, and that regulated parties' statutory and regulatory rights and obligations are not affected by such guidance. Additionally, this proposed rule provides procedures for DOE to allow for public participation in the issuance of significant guidance documents, and for petitioning DOE to rescind or modify any DOE guidance document.

Comments of the National Association of Manufacturers

The National Association of Manufacturers (NAM) expressed support for NCLA's petition and urged DOE to develop a rule to create procedural safeguards and to provide regulated entities with clarity as to when an agency proclamation is final and binding and when it is not. (NAM at 2). In its comments, NAM noted the usefulness of guidance in providing clarity for regulated entities; however, NAM stated that the improper use of guidance can impose burdens on society when regulated entities struggle to differentiate between binding rules and non-binding guidance. (NAM at 1) NAM described the difficulties in differentiating between binding rules and non-binding guidance, and the costs imposed on manufacturers as a result of this confusion. (NAM at 1-2). NAM also stated that agency guidance documents are seldom subject to public scrutiny and, therefore, that such guidance documents often lack notice or explanation, are difficult to locate, and fail to provide regulated entities with recourse in court. (NAM at 2) NAM urged DOE to establish, by rule, guidelines for the development of policies that may not technically bind the public but that may be coercive in practical effect,

which should include a reasonable form of notice, opportunity for public participation, an easily accessible online repository of guidance documents, and procedures for regulated industries to challenge guidance that may exceed statutory or regulatory authority. (NAM at 2-3).

DOE Response

Consistent with NAM's comments, this proposed rule would establish procedures to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public. The agency has already established an online repository where its guidance documents may be easily accessed (*energy.gov/guidance*). Moreover, the proposed rule assures regulated parties that such guidance is not legally binding, and that regulated parties' statutory and regulatory rights and obligations are not affected by such guidance. Additionally, this proposed rule would establish a procedure for regulated entities to petition DOE to modify or withdraw DOE guidance documents.

Public Participation

DOE will accept comments, data, and information regarding this proposed rule on or before the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE General Counsel staff only. Your contact information will not be publicly viewable except for your first and last

names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information the disclosure of which is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking

number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” that deletes the information believed to be confidential. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and will treat it according to its determination.

It is DOE's policy that all comments, including any personal information provided in the comments, may be included in the public docket, without change and as received, except for information deemed to be exempt from public disclosure.

Regulatory Analysis

A. Review Under Executive Order 12866, “Regulatory Planning and Review”

This proposed rule is a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review.” 58 FR 51735 (October 4, 1993). As a result, this action was reviewed by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). DOE does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a proposed rule of agency procedure and practice. The proposed rule describes DOE’s internal procedures for the promulgation and processing of guidance documents, to ensure that guidance documents only clarify existing statutory and regulatory obligations and do not impose any new obligations. DOE proposes to adopt these internal procedures as part of its implementation of Executive Order 13891, and does not anticipate incurring significant additional resource costs in doing so. Moreover, it is anticipated that the public will

benefit from the resulting increase in efficiency and transparency in the issuance of guidance documents, and more opportunities to comment on guidance documents.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” See 82 FR 9339 (January 30, 2017). E.O. 13771 states that the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 states that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. More specifically, section 2 of E.O. 13771 requires, amongst other things, that the costs of any new regulation be offset by the elimination of existing costs associated with at least 2 prior regulations.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis (IRFA) 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. The Department has made its procedures and policies available on the Office of General Counsel's Web site: <http://energy.gov/gc/office-general-counsel>.

The proposed rule would codify internal agency procedures regarding DOE's issuance of guidance documents. Additionally, as noted previously, guidance documents do not have the force and effect of law and are not legally binding on regulated entities. This rule would establish procedures to ensure that DOE guidance only clarifies existing statutory and regulatory obligations, rather than imposing any new obligations. DOE therefore does not anticipate any significant economic impacts from this proposed rule. For these reasons, DOE certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE did not prepare an IRFA for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act of 1995

The proposed rule would impose no new information or record keeping requirements. Accordingly, Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq*).

E. Review Under the National Environmental Policy Act of 1969

DOE has determined that the proposed rule would be covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6 of appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to actions that are strictly procedural, such as rulemaking establishing the administration of grants. The proposed rule would codify internal agency procedures for issuing guidance documents. The action would not have direct environmental impacts. Accordingly, DOE does not intend to prepare an environmental assessment or an environmental impact statement.

F. Review under Executive Order 13132, “Federalism”

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (See 65 FR 13735) DOE examined this proposed rule and 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.

G. Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The proposed rule has been analyzed in accordance with the principles

and criteria contained in Executive Order 13175. Because this proposed rule would not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

H. Review Under Executive Order 12988, “Civil Justice Reform”

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 (February 7, 1996), imposes on Federal 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. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies its 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 its 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 it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule would meet the relevant standards of Executive Order 12988.

I. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at <http://energy.gov/gc/office-general-counsel>). This proposed rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector, so these requirements under the Unfunded Mandates Reform Act do not apply.

J. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment

for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review Under Executive Order 12630, “Governmental Actions and Interference With Constitutionally Protected Property Rights”

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this proposed rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

L. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of 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 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed the proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

M. Review Under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final

rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. The proposed rule would codify internal agency procedures and does not meet any of the three criteria listed above. Accordingly, the requirements of Executive Order 13211 do not apply.

Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 1061

Administrative practice and procedure.

Signing Authority

This document of the Department of Energy was signed on June 17, 2020, by William S. Cooper, III, General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on June 18, 2020.

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons stated in the preamble, DOE is proposing to add part 1061 to Chapter X of Title 10 of the Code of Federal Regulations as set forth below:

PART 1061—PROCEDURES FOR THE ISSUANCE OF GUIDANCE DOCUMENTS

Sec.

1061.1 Purpose.

1061.2 Definitions.

1061.3 Procedures for issuing guidance documents.

1061.4 Petitions for withdrawal or modification of guidance documents.

Authority:

42 U.S.C. 7254; 42 U.S.C. 7101 *et seq.*; E.O. 13891, 84 FR 55235.

§ 1061.1 Purpose.

This part establishes DOE procedures for the issuance and review of new or revised guidance documents, and procedures for the public to petition for the withdrawal or removal of DOE guidance documents.

§ 1061.2 Definitions.

For purposes of this part, the following terms, phrases and words are defined as follows:

Administrator means the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget.

DOE means the U.S. Department of Energy.

Guidance document means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, which sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include:

- (1) Rules promulgated pursuant to notice and comment under the Administrative Procedure Act, 5 U.S.C. 553, or similar statutory provisions;
- (2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (3) Rules of agency organization, procedure, or practice;
- (4) Decisions of agency adjudications under 5 U.S.C. 554, 42 U.S.C. 6303(d)(3)(A), or similar statutory provisions;
- (5) Internal executive branch legal advice or legal opinions addressed to executive branch officials;
- (6) Agency statements of specific, rather than general, applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions, notices regarding particular locations or facilities, and correspondence with individual persons or entities, including notices of violation and warning letters;
- (7) Briefs and other positions taken in litigation, enforcement actions, and financial assistance or contract bid protests, appeals or any other contract or financial assistance litigation;
- (8) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including, but not limited to, speeches, presentations, editorials, media interviews, press materials, congressional testimony, and congressional correspondence;
- (9) Guidance pertaining to military or foreign affairs functions;

(10) Guidance or policies pertaining to financial assistance formation, funding opportunity announcements, awards and administration of financial assistance;

(11) Guidance or policies pertaining to contract formation, solicitations, awards and administration of contracts;

(12) Guidance or policies pertaining to the administration or oversight of capital asset projects or projects treated as capital asset projects by the Department;

(13) Guidance pertaining to execution of the Department's small business programs and achievement, including compliance with the Small Business Regulatory Enforcement Fairness Act;

(14) Grant solicitations and awards;

(15) Contract solicitations and awards;

(16) Internal agency policies or guidance directed solely at DOE personnel or to other Federal agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(17) Guidance pertaining to the use, operation, or control of a government facility or property; or

(18) Policies or guidance when the release or disclosure of the document is legally prohibited.

Significant guidance document means a guidance document that may reasonably be anticipated to:

(1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

§ 1061.3 Procedures for issuing guidance documents.

(a) *Contents of Guidance Documents.* All new or revised DOE guidance documents:

(1) Must comply with all relevant statutes and regulations;

(2) Must include a clear and prominent statement declaring that:

(i) The contents of the document do not have the force and effect of law and are not meant to bind the public in any way;

(ii) The document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies, except as authorized by law or as incorporated into a contract; and

(iii) DOE will not rely upon the document as an independent basis for an enforcement action or other administrative penalty.

(3) Must avoid using mandatory language such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement, or is directed solely to DOE personnel and is not intended to have a substantial future effect on the behavior of regulated parties;

(4) Must be written in plain and understandable language; and

(5) Must include the following attributes: the term “guidance”; a title; identify the issuing agency or office; identify activities to which and the persons to whom the document applies; the date of issuance; the relation to previous guidance (if applicable); a citation to the statutory provision or regulation to which applies; and a short summary of the subject matter.

(b) *Review and Clearance by Counsel.* All new or revised DOE guidance documents must be reviewed by the Office of the Assistant General Counsel for Legislation, Regulation and Energy Efficiency prior to issuance to:

(1) Ensure compliance with this part and Executive Order 13891;

(2) Obtain a determination from the Administrator as to whether the guidance document is significant, as defined in this part; and

(3) If the guidance document is determined to be significant, coordinate efforts with the Office of Information and Regulatory Affairs within the Office of Management and Budget as prescribed in paragraph (c) of this section.

(c) *Procedures for Significant Guidance Documents.* For any guidance document deemed to be a significant guidance document by the Administrator, DOE shall:

(1) Publish notice of the guidance document in the *Federal Register* and on DOE's guidance website, and provide a public notice and comment period of not less than 30 days prior to the issuance of the final significant guidance document;

(2) Provide publicly available responses to major and relevant concerns raised in comments;

(3) Obtain approval of the significant guidance document by the Secretary of Energy or DOE component head appointed by the President prior to issuance of the final significant guidance document;

(4) In accordance with the procedures of Executive Order 12866, obtain review of the significant guidance document by the Administrator prior to issuance of the final significant guidance document;

(5) Comply with applicable requirements of Executive Orders 12866, 13563, 13609, 13771, and 13777.

(d) *Exception to notice and comment procedures.* DOE may dispense with the requirements of paragraphs (c)(1) and (2) of this section where DOE finds for good cause that notice and public comment for a significant guidance document are impracticable, unnecessary, or contrary to the public interest. DOE shall incorporate such finding and a brief statement of the reasons for such finding into the significant guidance document.

(e) *Other Exceptions.* The procedural requirements of paragraph (c) of this section shall not apply, in whole or in part, when:

(1) DOE and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from the relevant requirement or requirements; or

(2) The significant guidance document is of a kind for which DOE and the Administrator have developed a categorical exception from the relevant requirement or requirements, as approved by the Administrator.

(f) *Electronic Availability of Guidance*. DOE will:

(1) Ensure that all guidance documents, as defined in this part, are available to the public on the DOE website through a single webpage portal; and

(2) State clearly and prominently on its webpage portal that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(g) *Rescinded Guidance Documents*. All guidance documents, as defined in this part, that are not posted on DOE's website portal as described in paragraph (a) of this section shall be deemed rescinded, unless and until DOE subjects such guidance documents to the procedures of this section. Except for the purposes of establishing historical facts, DOE will not cite, use, or rely upon rescinded guidance documents unless and until DOE subjects such guidance documents to the procedures of this section.

§ 1061.4 Petitions for withdrawal or modification of guidance documents.

(a) *Filing a petition*. Any person may petition DOE to withdraw or modify a guidance document. The petition must be addressed to the Assistant General Counsel for

Legislation, Regulation, and Energy Efficiency, Attention: Petition for Modification or Withdrawal of Guidance Document, and either:

(1) Sent by mail addressed to: Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585;

(2) Sent by email to *Guidance@hq.doe.gov*; or

(3) Hand delivered to DOE at 1000 Independence Avenue, SW., Washington, DC, 20585.

(b) *Content of petition.* For each petition filed under this section, the petitioner must:

(1) Specify the petitioner's:

(i) Name, or if the petitioner is an organization, the name of the organization and the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner;

(ii) Telephone number;

(iii) Mailing address; and

(iv) Email address (if available).

(2) Identify the guidance document to be withdrawn or modified; and

(3) Be signed by the petitioner or authorized representative.

(c) *Additional information.* To assist DOE in responding appropriately to the petition, a petitioner should also:

(1) Present any specific problems or issues that the petitioner believes are associated with the guidance document, including any specific circumstances in which the guidance document is incorrect, incomplete, obsolete, or inadequate;

(2) Present any proposed solution to either modify or withdraw the guidance document, including a discussion of how the petitioner's proposed solution resolves the issues identified under paragraph (c)(1) of this section;

(3) In the case of a petition for modification of a guidance document, specify any modifications to the text of the document that petitioner seeks;

(4) Cite, enclose, or reference technical, scientific, or other data or information supporting the petitioner's assertions under paragraphs (c)(1) and (2) of this section.

(d) *Public comment.* DOE will publish a petition for modification or withdrawal of a guidance document and supporting documentation in the *Federal Register*, and provide opportunity for public comment. DOE may dispense with the notice and comment procedures in this paragraph where DOE finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest, or where exigency, safety, health, or other compelling cause warrants an exemption from the notice and comment procedures in this paragraph. DOE shall incorporate such finding and a brief statement of the reasons for such finding into its decision on the petition.

(e) *Confidential business information.* In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition for modifying or withdrawing a guidance document, or in supporting documentation, must be accompanied by a copy of the petition or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the *Federal Register* the petition and supporting documents

from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11.

(f) *Disposition of petition.* DOE shall determine the appropriate disposition of a petition after consideration of the petition and any supporting documents received, as well as any public comment received on the petition, within 90 days of DOE's publication in the *Federal Register* of such petition, to the maximum extent practicable.

(g) *Exhaustion of administrative remedies.* Before any DOE action under this part is final, a person must exhaust his or her administrative remedies. To exhaust administrative remedies under this part, a person must:

- (1) Avail himself or herself of the procedures in this section; and
- (2) Receive a final disposition from DOE in accordance with paragraph (f)

of this section.

[FR Doc. 2020-13458 Filed: 6/30/2020 8:45 am; Publication Date: 7/1/2020]