



Billing Code: 50-01-1*

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: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) publishes this final rule to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891. In this final rule, DOE establishes internal agency requirements for the contents of guidance documents, and procedures for providing notice of, and soliciting public comment on, certain guidance documents. This final rule also establishes procedures for the public to petition DOE to modify or withdraw guidance documents.

DATES: The effective date of this rule is [**INSERT DATE 30 DAYS AFTER PUBLICATION IN *THE FEDERAL REGISTER***].

ADDRESSES: The docket for this rulemaking, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index, such as those containing information that is exempt from public disclosure by law, may be publicly available. A link to the docket web page can be found at <https://www.regulations.gov/document?D=DOE-HQ-2020-0033-0001>. The docket web page explains how to access all documents, including public comments, in the docket.

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:

I. Summary of Final Rule

In this final rule, DOE incorporates into the Code of Federal Regulations a new 10 CFR part 1061, which implements the requirements of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” (84 FR 55235 (Oct. 15, 2019)) Among other things, Executive Order 13891 requires agencies to provide more transparency for their guidance documents by creating a searchable online database for current guidance documents,¹ 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.² 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 55235, 55237)

This final rule applies to all DOE guidance documents, as defined by Executive Order 13891, including the exceptions listed in section 2 of the Executive Order. This final rule also lists specific types of documents and communications that fall within the

¹ DOE’s online database may be found at *energy.gov/guidance*.

² 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 55235, 55236)

broader exceptions listed in the Executive Order (e.g., speeches and presentations given by DOE officials, legal positions taken in litigation or enforcement actions). (See also OMB M-20-02, Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 31, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>) This final rule also adopts the same definition of “significant guidance document” as section 2 of Executive Order 13891.

In accordance with Executive Order 13891, this final rule requires 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, this final rule requires that DOE guidance documents be written clearly and 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, this final rule requires that the document include a clear and prominent statement that the guidance document will not be used as an independent basis for enforcement, that conformity with the guidance document is strictly voluntary, and that nonconformity will not affect the rights and obligations of regulated parties.

This final rule also requires that all DOE guidance documents be reviewed and cleared by the Department’s Office of the General Counsel. Additionally, this final rule requires that significant guidance documents be signed 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.

This final rule also codifies 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, this final rule codifies agency procedures that are already in use for significant guidance documents. This final rule also provides procedures for the public to petition the agency to modify or withdraw guidance documents. DOE notes that the procedures in this final rule for petitions to modify or withdraw guidance documents are similar to the procedures that DOE uses for petitions for rulemaking.

II. Summary of Comments and DOE Responses

On July 1, 2020, DOE published a notice of proposed rulemaking (NPR) in which DOE proposed new part 1061 to implement the requirements of Executive Order 13891. (85 FR 39495) In the NPR, DOE also granted in part, and denied in part, a petition for rulemaking submitted by 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.³ DOE received four comments on the NPR, which are summarized below along with DOE's responses. Based on comments, DOE is making changes between the proposed rule and this final rule, as described in DOE's responses below.

Comments of NCLA

NCLA's comments⁴ responded specifically to a portion of NCLA's petition for rulemaking that DOE declined to include in the NPR: procedures addressing finality and judicial review of agency guidance. NCLA stated that DOE should further clarify

³ See 84 FR 50791 (Sept. 26, 2019). 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.

⁴ NCLA's comments may be found on <http://www.regulations.gov> under docket number DOE-HQ-2020-0002 with the Comment ID DOE-HQ-2020-0033-0004.

part 1061 to express the availability of judicial review after final disposition of a petition for the withdrawal or modification of guidance documents under the procedures of §1061.4. (NCLA at 3) NCLA disagreed with DOE's statement in the NOPR that "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" and that the provisions concerning finality or judicial review sought by NCLA would not be as useful to regulated parties as the provisions DOE proposed in the NOPR, because the provisions in the proposed rule "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." (NCLA at 3; see also 85 FR 39497) NCLA stated that the judiciary has historically lacked the ability to review improper agency guidance because, in part, the APA typically permits review only of final agency action, and the failure to achieve finality under the APA has resulted in courts being unable to consider the coercive effects of guidance documents. NCLA further stated that when an agency's guidance review process falls short, clear procedures identifying when an agency action is final and what review is available allow an interested party to seek meaningful redress from the courts. (NCLA at 3)

NCLA further stated that, as proposed, §1061.4 contemplates the finality of DOE's action on a petition and suggests that judicial review under the APA may be available, but it does not provide a specific recourse for a petitioner who disagrees with the agency's disposition of a petition. NCLA concluded that §1061.4 should include an explicit provision stating that if a person exhausts his or her administrative remedies in accordance with paragraph (g) of §1061.4, then the disposition of the petition submitted in accordance with §1061.4 shall constitute final agency action under the APA and shall be subject to review under the judicial review provisions of the APA. (NCLA at 4)

In response, DOE emphasizes that the final rule requires DOE guidance documents to explicitly state that they are non-binding and do not have the force and effect of law, and prohibits DOE from relying on guidance documents as an independent basis for enforcement. Enforcement actions must be based on the underlying statutory or regulatory requirements. The requirements of this final rule make clear that no binding legal obligations or consequences flow from DOE guidance documents, and that compliance with a guidance document is voluntary. With respect to petitions for modification or withdrawal of DOE guidance documents, DOE declines to make the changes sought by NCLA. This final rule makes clear that a petitioner must avail himself or herself of the procedures in §1061.4. After those procedures have been exhausted and the petitioner receives a final disposition of the petition, DOE's consideration of the petition is complete, and DOE will take no further action on the petition. As in the proposed rule, DOE notes that courts are responsible for determining whether judicial review is available under the APA for a particular agency action, including DOE's disposition of a petition under §1061.4. Courts are in the best position to determine if an agency action is final and ripe for review, and whether legal consequences actually flow from said action, and therefore, DOE declines to include a provision stating when judicial review of a guidance document or a petition to modify or withdraw guidance document would be available. In addition, DOE notes that this final rule 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. Accordingly, DOE declines to incorporate NCLA's suggested changes into this final rule.

Comments of MHARR

The Manufactured Housing Association for Regulatory Reform (MHARR) provided comments⁵ in support of NCLA's petition for rulemaking and DOE's proposed rule, except to the extent that the proposed rule omitted procedural and substantive protections set forth in NCLA's petition for rulemaking, particularly procedures to ensure that DOE comply with the Congressional Review Act (CRA). (5 U.S.C. 801–808) MHARR stated that it supports the adoption of all elements of NCLA's petition, including specific CRA compliance procedures. (MHARR at 2) MHARR stated that it has observed agencies, including DOE, abuse the guidance document process to impose *de facto* regulatory mandates and associated burdens. MHARR continued that such guidance documents impose significant cost burdens on regulated parties, including MHARR members, without affording interested parties opportunity to comment or to challenge such guidance in court. (MHARR at 3) MHARR further stated that, as set forth in Executive Order 13891, the imposition of new obligations through guidance documents is against statutory law, as well as the Constitution, and therefore, the proposed regulatory language offered in NCLA's petition for rulemaking should be included in this final rule. Additionally, MHARR stated that, in particular, the CRA compliance provisions offered in NCLA's petition should be included in the final rule because the CRA encompasses guidance documents, and MHARR disagreed with DOE's assertion in the NOPR that DOE's internal procedure adequately govern DOE's compliance with the CRA because DOE and other agencies have undertaken covered actions on an ongoing basis without full compliance with the CRA and its substantive requirements. (MHARR at 3)

DOE Response

⁵ MHARR's comments may be found on <http://www.regulations.gov> under docket number DOE-HQ-2020-0002 with the Comment ID DOE-HQ-2020-0033-0002.

Consistent with MHARR’s comments, the final rule establishes procedures to ensure that the agency’s process for the issuance and modification of guidance documents is transparent and accessible to the public, including by allowing public comment on significant guidance documents. The final rule also assures regulated parties that such guidance is not legally binding, and does not affect the rights and obligations of regulated parties. The final rule implements, and is consistent with, the requirements of Executive Order 13891. With respect to MHARR’s comments on the proposed CRA compliance provisions in NCLA’s petition, DOE declines to include such provisions in the final rule. As DOE stated in the NOPR, current DOE and Executive Branch procedures ensure compliance with the CRA. MHARR stated that DOE has issued actions covered by the CRA without fully complying with the CRA; however, MHARR did not provide any specific examples of such non-compliant actions. Moreover, the CRA compliance procedures in NCLA’s petition mirror those that are already required of Executive Branch agencies by OMB M-19-14, Guidance on Compliance with the Congressional Review Act (Apr. 11, 2019), which NCLA cited in its petition. (See 84 FR 5079, 50797 (Sept. 26, 2019)) Accordingly, the CRA compliance procedures proffered by NCLA, and supported by MHARR, are already in place in Executive Branch policy. Additionally, this final rule requires DOE to consult with, and receive a determination from, OIRA on the significance of DOE guidance documents. Therefore, OIRA will have the opportunity to determine independently whether a guidance document is a “major” rule for purposes of the CRA, consistent with 5 U.S.C. 804(2), or otherwise must be submitted under the CRA’s procedures.

Comments of AHRI

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI)⁶ submitted comments in support of DOE's plan to issue procedures on the issuance of guidance documents in accordance with Executive Order 13891. AHRI stated that its experience working with DOE's Office of Energy Efficiency and Renewable Energy (EERE) has consistently demonstrated alignment with the spirit of Executive Order 13891, that AHRI has found DOE's guidance documents to be useful and helpful, and that DOE guidance has, on occasion, been particularly useful in quickly resolving questions that arise in the implementation of regulations. (AHRI at 1) AHRI encouraged DOE to establish procedures that enable efficient solutions to short-term challenges. AHRI further stated that it appreciates EERE's efforts to make all guidance documents readily accessible on its website, and that the establishment of a single web portal on DOE's website makes it even easier now for the public to locate DOE's guidance documents. (AHRI at 1)

DOE Response

Consistent with the AHRI's comments, the final rule establishes procedures consistent with Executive Order 13891 to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public, including through DOE's guidance web portal. The procedures in the final rule ensure that DOE guidance documents are readily accessible to the public online. With respect to AHRI's comments encouraging DOE to establish procedures that enable efficient solutions to short-term challenges, DOE believes that the procedures in the final rule are sufficient to meet such challenges. DOE (acting in conjunction with the Administrator of OMB's Office of Information and Regulatory Affairs pursuant to section 4(a)(iii) of Executive Order 13891) may dispense with the notice and comment procedures of the final rule in exigent circumstances or emergencies. DOE may likewise

⁶ AHRI's comments may be found on <http://www.regulations.gov> under docket number DOE-HQ-2020-0002 with the Comment ID DOE-HQ-2020-0033-0005.

do so when DOE finds for good cause (consistent with section 4(a)(iii)(A) of Executive Order 13891) that notice and public comment for a significant guidance document are impracticable, unnecessary, or contrary to the public interest. Moreover, non-significant guidance documents need not be subject to public notice and comment. Accordingly, DOE made no changes to the final rule based on AHRI's comments, because the procedures in the final rule allow DOE sufficient flexibility to efficiently address short-term or urgent challenges.

Comments of Goodman

Goodman Manufacturing Company, L.P. (Goodman)⁷ submitted comments in support of DOE's proposal to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891. In its comments, Goodman proposed some revisions to the provisions in the NOPR, so that the prescribed provisions in the proposed new 10 CFR part 1061 do not unduly impact well-established existing guidance documents that the HVAC industry has relied upon for several years. Goodman stated that it was concerned that the rescission of such existing guidance documents would cause uncertainty among regulated HVAC manufacturers. (Goodman at 2)

Goodman stated that, as currently proposed, §1061.3(g) may rescind existing guidance documents that do not comply with the procedures in §1061.3(a), and that such rescission would last unless and until DOE subjects such guidance documents to these procedures. Goodman stated that it is concerned that such immediate action could lead to a gap in the availability of guidance to stakeholders for an unknown period of time, and that it is not clear to stakeholders which of the existing guidance documents are "posted on DOE's website portal as described in paragraph (a) [of §1061.3]," and that this lack of clarity would cause greater uncertainty, specifically for the HVAC industry. (Goodman at 2)

⁷ AHRI's comments may be found on <http://www.regulations.gov> under docket number DOE-HQ-2020-0002 with the Comment ID DOE-HQ-2020-0033-0006.

As an alternative, Goodman proposed revising paragraph (g) in §1061.3 to state that guidance documents not posted to DOE's webpage portal are rescinded effective one year after final rule publication or whenever DOE subjects such guidance documents to the procedures of this section, whichever comes first. Goodman stated that this alternative is particularly essential to the HVAC industry regarding the uniform test methods for measuring the energy consumption of central air conditioners and heat pumps because of the difference in the applicable effective dates for Appendices M and M1 to Subpart B of 10 CFR part 430. (Goodman at 2) Goodman stated that, due to the difference in these effective dates, it is imperative that DOE maintain the existing guidance document for the usage of an amended test procedure for testing, rating, and certifying products prior to the compliance date for new standards ("2014 Early Compliance Guidance"), and that otherwise Appendix M1 will compel manufacturers to make representations in accordance with Appendix M1 on or after the effective date of Appendix M1, rather than prior to that date, as allowed under the 2014 Early Compliance Guidance. (Goodman at 2) Goodman stated that the 2014 Early Compliance Guidance is particularly essential for products subject to regional standards because it allows manufacturers to introduce products into commerce well in advance of the 2023 effective date as long as those products are tested, rated, and certified in accordance with Appendix M1 and the 2023 energy conservation standards, thereby providing remaining market actors in the traditional distribution chain an option to procure such products in time for the 2023 installation effective date. (Goodman at 2-3) Goodman requested that, at a minimum, DOE indicate on its website portal which guidance documents are in compliance and which guidance are not in compliance with §1061.3(a). Goodman also stated that its concerns about existing guidance documents apply to guidance other than 2014 Early Compliance Guidance, along with a list of examples of such guidance documents. (Goodman at 3)

Goodman also proposed minor editorial revisions for the final rule. Specifically, Goodman stated that because the proposed definition of “Guidance document” in paragraph (16) of §1061.2 already eliminates documents “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,” the inclusion of this language in §1061.3(a)(3) is duplicative and can be removed. Goodman also proposed replacing the word “will” in §§1061.3(f), 1061.3(g), 1061.4(d) and 1061.4(e) with the word “shall.” (Goodman at 3)

DOE Response

In response to Goodman, DOE makes clear that the specific guidance referenced in the comment has not been rescinded. DOE declines to make the changes to §1061.3(g) proposed by Goodman; however, DOE has made a change to §1061.3(g) to clarify that documents not made available through DOE’s website portal as described in paragraph (f) of §1061.3 are deemed rescinded under §1061.3(g). This change replaces the text of §1061.3(g) from the proposed rule that stated guidance documents “not posted to DOE’s website portal as described in paragraph (a) of [§1061.3]” would be deemed rescinded. DOE believes that the final rule makes clear that existing documents currently available through the guidance web portal, such as the 2014 Early Compliance Guidance, are in effect. Executive Order 13891 required that agencies make all effective guidance documents available through each agency’s guidance web portal, and that otherwise the guidance document would be deemed rescinded. However, agencies could have reinstated rescinded guidance documents without being subject to the procedures of Executive Order 13891 by making them available through their guidance web portal by June 27, 2020. Accordingly, any DOE guidance document, as defined in part 1061, that was not available through the DOE guidance web portal as of June 27, 2020, is deemed rescinded. DOE will not cite, use, or rely on any guidance document that has been rescinded, except to establish historical facts. However, all guidance documents made

available through DOE's website portal prior to June 27, 2020, and that are currently available through DOE's website portal, have not been rescinded and are currently effective and may be relied upon. Under the final rule, only new or revised guidance documents, or rescinded guidance documents that DOE seeks to reinstate, must go through the procedures in §1061.3. Guidance documents made available through DOE's website portal prior to June 27, 2020, and that are currently available through DOE's website portal, are currently in effect and are not required to go through the procedures in §1061.3.

DOE agrees with Goodman's remaining editorial comments and has removed the reference to documents directed at DOE personnel in §1061.3(a)(3), and has replaced the term "will" with "shall" in §§1061.3(f), 1061.3(g), 1061.4(d) and 1061.4(e).

Regulatory Analysis

A. Review Under Executive Order 12866, "Regulatory Planning and Review"

This final rule is a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review." (58 FR 51735 (Oct. 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 final rule of agency procedure and practice. The final 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 adopts 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

On January 30, 2017, the President issued Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” (See 82 FR 9339 (Feb. 3, 2017)) This final rule is not an Executive Order 13771 regulatory action because it results in costs that are de minimis.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of a 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, (Aug. 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 the General Counsel's Web site:

<http://energy.gov/gc/office-general-counsel>.

The final rule codifies 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 final rule establishes 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 today’s final 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 a regulatory flexibility act analysis 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 final rule imposes 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 final rule is 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 final rule codifies internal agency procedures for issuing guidance documents. The action does not have direct environmental impacts. No extraordinary circumstances are present that would warrant further review. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

F. Review under Executive Order 13132, "Federalism"

Executive Order 13132, "Federalism," 64 FR 43255, (Aug. 10, 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. (65 FR 13735) DOE examined this final rule and determined that it will not preempt State law and will 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 (Nov. 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 final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. Because this final rule does 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 (Feb. 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 final rule meets 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), (b)) 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 final 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 UMRA 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 final rule does 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 (Mar. 18, 1988), that this final rule does not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

L. Review Under the Information Quality Act

The Information Quality Act (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). 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.

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)(i) is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) 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 final rule codifies internal agency procedures; it is not likely to have a significant adverse effect on the supply, distribution, or use of energy; and the Administrator of OIRA has not designated it as a significant energy action. 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 final 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 December 11, 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 December 15, 2020.

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

For the reasons stated in the preamble, DOE adds part 1061 to Chapter X of Title 10 of the Code of Federal Regulations as follows:

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, that 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; identification of the issuing agency or office; identification of 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(s), regulation(s), or both to which the document 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 General Counsel 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 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 signature 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. and any revisions thereto or superseding Executive Orders

(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 shall:

(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 made available through DOE's website portal as described in paragraph (f) 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 shall 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 Office of the General Counsel, 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 shall 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 shall 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.

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