New Civil Liberties Alliance

December 20, 2019

VIA REGULATIONS.GOV

Ms. Jennifer Tiedeman
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue SW
Washington, DC 20585

Re: *Proposed Agency Guidance Rulemaking*,
Docket Number DOE_FRDOC_0001-3856

Dear Ms. Tiedeman,

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Department of Energy's (DOE) request for comment on NCLA's August 2, 2019 petition for rulemaking. *See* Regulations Prohibiting Issuance, Reliance, or Defense of Improper Agency Guidance, Notice of Petition for Rulemaking, 84 Fed. Reg. 50791 (Sept. 26, 2019) (*DOE Notice of Petition and Request for Comment*); *see also id.* at 50793-800 (*DOE Petition for Rulemaking*); *Id.* at 50798-99 (*DOE Proposed Rule*).

NCLA sincerely appreciates the agency's willingness to consider NCLA's DOE Petition for Rulemaking and Proposed Rule. DOE's action on this petition signals that it is invested in meaningful regulatory reform that curbs abuses of administrative power—an issue central to NCLA's mission.

NCLA incorporates and readopts the facts and reasoning set forth in its DOE Petition for Rulemaking and Proposed Rule. This comment is intended to provide additional support for our Petition for Rulemaking and bring intervening actions to the attention of DOE that we believe reflect favorably on adoption of the DOE Proposed Rule.

I. Statement of Interest

As the petitioner of the DOE Proposed Rule, NCLA has a continuing interest in the adoption of the Proposed Rule. NCLA is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law (which includes fair notice of legal obligations), the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, federal administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent.[1] This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's attention.

Even where NCLA has not yet brought a suit to challenge an agency's unconstitutional exercise of administrative power, it encourages agencies themselves to curb the unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance. NCLA therefore advises that all agencies and agency heads must examine whether their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act (APA) and with the Constitution.

II. The DOE Proposed Rule Is Compatible with Executive Orders 13891 and 13892

On October 9, 2019, President Trump signed two executive orders aimed at reining in unlawful administrative state action.[2] The DOE Proposed Rule is compatible with both executive orders and provides regulated parties with additional protections. NCLA believes that both facts weigh in favor of DOE adopting the Proposed Rule.

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[1] *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

[2] *See* Exec. Order No 13891, 84 Fed. Reg. 55235 (2019) (*Guidance EO*); Exec. Order 13892, 84 Fed. Reg. 55239 (2019) (*Civil Administrative Enforcement EO*).

The Guidance EO declares that, consistent with existing law, it is the policy of the executive branch to: (1) "require that agencies treat guidance documents as non-binding both in law and in practice; except as incorporated into a contract" (2) "take public input into account when appropriate in formulating guidance documents;" and, (3) "make guidance documents readily available to the public."[3] To achieve these policy objectives the Guidance EO requires agencies to finalize new or amend existing regulations "to set forth processes and procedures for issuing guidance documents" consistent with the order.[4]

At least three of the Guidance EO's requirements are achieved by the DOE Proposed Rule. First, the order requires that guidance documents clearly state that they have no binding effect on the public.[5] Second, the order requires agencies to implement "procedures for the public to petition for withdrawal or modification of a particular guidance document."[6] Finally, the Guidance EO requires additional review of so-called "significant guidance document[s]" by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).[7]

The Civil Administrative Enforcement EO declares that, "[t]he rule of law requires transparency" and that "[r]egulated parties must know in advance the rules by which the Federal Government will judge their actions."[8] The order requires agencies to "act transparently and fairly with respect to all affected parties … when engaged in civil administrative enforcement or adjudication."[9] Like the DOE Proposed Rule, the Civil Administrative Enforcement EO prohibits agencies from using guidance documents as the basis for enforcement actions and from treating noncompliance with a guidance document as a violation of law. [10]

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[3] Guidance EO §1, 84 Fed. Reg. 55235.

[4] *Id.* at §4, 84 Fed. Reg. 55235, 55237.

[5] *Compare* Guidance EO § 4(i), 84 Fed. Reg. 55235, 55237 *with* DOE Proposed Rule at § 2(b), 84 Fed. Reg. 50791, 50799.

[6] *Compare* Guidance EO § 4(ii), 84 Fed. Reg. 55235, 55237 *with* DOE Proposed Rule at § 3, 84 Fed. Reg. 50791, 50799.

[7] *Compare* Guidance EO § 4(iii), 84 Fed. Reg. 55235, 55237 *with* DOE Proposed Rule at § 1, 84 Fed. Reg. 50791, 50798-99

[8] Civil Administrative Enforcement EO § 1, 84 Fed. Reg. 55239.

[9] *Id.*

[10] *Compare* Civil Administrative Enforcement EO § 3, 84 Fed. Reg. 55239, 55240-41 *with* DOE Proposed Rule at § 2(c), 84 Fed. Reg. 50791, 50799.

III. The Department of Transportation's *Administrative Rulemaking, Guidance, and Enforcement Procedures* Final Rule Responded to NCLA's Petition for Rulemaking and Adopted Several of Its Provisions

On December 20, 2018, NCLA submitted a petition for rulemaking and proposed rule to the Department of Transportation (DOT).[11] That petition for rulemaking and proposed rule was substantially similar to the DOE Petition for Rulemaking and Proposed Rule. On December 3, 2019, DOT issued its *Administrative Rulemaking, Guidance, and Enforcement Procedures* final rule (*DOT Final Rule*).[12] In part, the DOT Final Rule responds to NCLA's petition for rulemaking and proposed rule.[13] DOT's willingness to adopt certain concepts and language, and address concerns included in NCLA's petition weighs in favor of DOE's adopting the Proposed Rule.

Regarding guidance document procedures, both the DOT Final Rule and DOE Proposed Rule require that the agency provide some analysis under and compliance with the Congressional Review Act, 5 U.S.C. § 801-08 (CRA).[14] Both require that any guidance document, or non-legislative rule, identify itself as "'guidance' or its functional equivalent."[15] Additionally, they require that guidance documents not use "mandatory language such as 'shall,' 'must,' 'required,' or 'requirement.'"[16] Both also require that guidance documents disclaim that they have legal force or effect.[17] The DOT Final Rule and DOE Proposed Rule also mandate that guidance documents include a prominent statement

[11] Petition to DOT for Rulemaking to Promulgate Regulations Prohibiting the Issuance, Reliance on, or Defense of Improper Agency Guidance, New Civil Liberties Alliance (Dec. 20, 2018) *available at* https://nclalegal.org/wp-content/uploads/2019/01/2018-12-20-Complete-Petition-Package-to-Chao-DOT-1.pdf.

[12] As of the filing of this comment, an official version of the DOT Final Rule had not been published in the Federal Register. A copy of the draft DOT Final Rule is available on DOT's website. *See* DOT Final Rule *available at* https://www.transportation.gov/sites/dot.gov/files/docs/regulations/359656/administrative-rule.pdf (last visited Dec. 20, 2019) (to be codified at 49 C.F.R. § 5.1-5.111).

[13] *See* DOT Final Rule at 3. The DOT Final Rule also responds to Executive Orders 13891 and 13892 adopting requirements that DOT procedures did not previously provide for. *Id.* at 9, 10.

[14] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.33 (requiring DOT components considering whether a guidance document is "significant" to "at a minimum, provide the same level of analysis that would be required for a major determination under the [CRA]") *with* DOE Proposed Rule at § 1(b), 84 Fed. Reg. 50791, 50798 (requiring "[a]ll proposed regulatory actions that DOE submits to [OIRA] pursuant to Executive Order 12866, will include: i. A DOE-proposed significance determination; and ii. a DOE-proposed determination as to whether the regulatory action meets the definition of 'major rule' under [the CRA]."); *see also* Guidance EO § 4(iii), 84 Fed. Reg. 55235, 55237.

[15] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.29(b)(i) *with* DOE Proposed Rule at § 2(b)(i), 84 Fed. Reg. 50791, 50799; *see also* Guidance EO § 4(i), 84 Fed. Reg. 55235, 55237.

[16] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.29(c) *with* DOE Proposed Rule at § 2(b)(v), 84 Fed. Reg. 50791, 50799.

[17] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.29(e) *with* DOE Proposed Rule at § 2(b)(ii), 84 Fed. Reg. 50791, 50799.

that the guidance document is not legally binding on the public.[18] Finally, both provide a mechanism for a party to petition the agency for retrospective review of agency pronouncements.[19]

Regarding enforcement procedures, both the DOT Final Rule and DOE Proposed Rule adopt provisions that noncompliance with guidance documents cannot be used as a basis to institute an enforcement action or for "proving" "violations of applicable law."[20]

IV. The DOT Final Rule Includes Several Provisions Not Contemplated by the DOE Proposed Rule that NCLA Nonetheless Believes DOE Should Now Consider

The DOT Final Rule requires that all guidance documents are subject to a review and clearance process. That process requires review by a Chief Counsel, if applicable, or the Office of General Counsel.[21] While not contemplated by the DOE Proposed Rule, consideration and inclusion of a similar provision by DOE would be welcome. Such a provision provides minimal guarantees that a purported guidance document has gone through legal review prior to its publication.

The DOT Final Rule also codifies several DOT enforcement procedures that bring much-needed due process protections to regulated entities.[22] While these provisions were not contemplated in NCLA's Petition for Rulemaking and Proposed Rule, NCLA highlights two here for DOE's consideration in this or future rulemakings.

First, the DOT Final Rule mandates affirmative disclosure of exculpatory evidence in all civil enforcement actions akin to the "Brady Rule" available in criminal cases.[23] As DOT's Final Rule states, "affirmative disclosures of exculpatory evidence" help to maintain "open and fair investigations and administrative enforcement proceedings."[24] While DOE has adopted some provisions allowing for disclosure of exculpatory evidence, the provisions do not mandate affirmative disclosure. Rather,

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[18] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.29(e) *with* DOE Proposed Rule at § 2(b)(iii), 84 Fed. Reg. 50791, 50799; *see also* Guidance EO § 4(i), 84 Fed. Reg. 55235, 55237.

[19] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.13(c), 5.43 ("any person may petition … to withdraw or modify a particular guidance document") *with* DOE Proposed Rule at § 3, 84 Fed. Reg. 50791, 50799 ("Any 'interested party' may petition any office operating within the Department to determine whether a prior agency pronouncement, no matter how styled, is a 'legislative rule' as defined by this rule."); *see also* Guidance EO § 4(ii), 84 Fed. Reg. 55235, 55237.

[20] *Compare* DOT Final Rule, to be codified at 49 C.F.R. § 5.85 *with* DOE Proposed Rule at § 2(c), 84 Fed. Reg. 50791, 50799; *see also* Civil Administrative Enforcement EO § 3, 84 Fed. Reg. at 55239, 55240-41.

[21] *See* DOT Final Rule, to be codified at 49 C.F.R. § 5.27.

[22] *See generally* DOT Final Rule at Subpart D, to be codified at 49 C.F.R. §5.53-5.111. The DOT Final Rule "substantially incorporates" procedural requirements in "an internal administrative procedure directive" by DOT's General Counsel. *See* DOT Final Rule at 2-3; *see also* Memorandum from DOT General Counsel on Procedural Requirements for DOT Enforcement Actions (Feb. 15, 2019) *available at* https://www.transportation.gov/administrations/office-general-counsel/general-counsel%E2%80%99s-enforcement-memorandum.

[23] DOT Final Rule, to be codified at 49 C.F.R. § 5.83; *see also Brady v. Maryland*, 373 U.S. 83 (1963).

[24] DOT Final Rule, to be codified at 49 C.F.R. § 5.83.

defendants must make a written request for exculpatory information.[25] Further, these disclosure provisions only apply to one of many types of enforcement actions DOE can conduct.

In contrast, the Federal Energy Regulatory Commission (FERC), an independent agency within DOE, issued a 2009 policy statement adopting the affirmative disclosure rule in *Brady* for all FERC administrative enforcement actions.[26] In the Brady Policy Statement, FERC noted that the policy "serves the Commission's goal of providing fairness to regulated entities appearing before it."[27] FERC's adoption of its Brady Policy Statement is commendable, but it represents the type of "temporary policy announcements" NCLA cautioned about in its Petition for Rulemaking and Proposed Rule.[28] To ensure permanent and binding effect, DOE should instead adopt a rule requiring affirmative disclosures of exculpatory evidence in all DOE enforcement actions akin to the DOT Final Rule, to be codified at 49 C.F.R.§ 5.83.

Second, the DOT Final Rule codifies that settlement agreements cannot bind parties outside those agreements.[29] DOE prominently displays its consent orders and settlement agreements on its website.[30] While a positive measure for government transparency, the publication of these documents without a disclaimer runs the risk that prior alleged acts of and agreed-to settlement terms by a regulated entity may serve as a type of pseudo-guidance, akin to an interpretive rule, in future enforcement actions. As noted in NCLA's Petition for Rulemaking and Proposed Rule, "[s]ince interpretive rules 'never' form the basis of enforcement actions, courts cannot—and will not—attribute the force of law to interpretative rules."[31] To avoid potential misapplication of consent orders and settlement agreements in DOE enforcement actions, NCLA urges DOE to adopt a rule stating that "No DOE settlement agreement or consent order should be used to adopt or impose new

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[25] *See* 10 C.F.R. § 13.20(b) (addressing disclosure of documents by the Nuclear Regulatory Commission in Program Fraud enforcement actions); 10 C.F.R. § 1013.20(b) (addressing disclosure of documents by DOE in Program Fraud enforcement actions).

[26] *See* Policy Statement on Disclosure of Exculpatory Materials, 129 ¶ 61,248 (2009) *available at* https://ferc.gov/whats-new/comm-meet/2009/121709/M-2.pdf (*FERC Brady Policy Statement*).

[27] *Id.*

[28] *Cf.* 84 Fed. Reg. 50791, 50797-98 (noting that various memos issued to address agency use of guidance documents are temporary at best).

[29] DOT Final Rule, to be codified at 49 C.F.R. § 5.93; *see also* Civil Administrative Enforcement EO § 5, 84 Fed. Reg. at 55239, 55241 (requiring publication of documents arising out of litigation—including consent decrees and settlement agreements—that an agency "intends to rely on").

[30] Consent Orders and Settlement Agreements, DOE, https://www.energy.gov/ea/listings/consent-orders-and-settlement-agreements (last accessed Dec. 20, 2019); *see also* DOE, Safety and Security Enforcement Process Overview, 43-44 (Sept. 2017) *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/Enforcement%20Process%20Overview%20-%20September%202017.pdf (outlining "Communications Protocols" in safety and security enforcement actions) (last accessed Dec. 20, 2019).

[31] 84 Fed. Reg. 50791, 50797 (citing *Kisor v. Wilkie*, No. 18-15, 588 U.S. ___, slip op. at 23 (2019)).

regulatory obligations on entities that are not parties to the settlement." Furthermore, this statement should be prominently displayed on the page(s) of the website displaying consent orders and settlement agreements.

V. The DOE Proposed Rule's Judicial Review Provisions Provide a Complete Means to Achieve Some of the Goals Set Forth in Executive Orders 13891 and 13892

Although Executive Orders 13891 and 13892, and the DOT Final Rule, include many positive developments for regulated parties, they could do a better job of expressing the right to judicial review of guidance documents. In particular, as NCLA's Proposed Rule reflects, finality is a recurring problem with agency guidance documents that needs to be expressly addressed and cured in the final version of the DOE Proposed Rule.

As discussed in the DOE Petition for Rulemaking and Proposed Rule, the judiciary has historically lacked the ability to review improper agency guidance.[32] This occurs even when the improper guidance is binding because the APA typically only permits review of "final agency action."[33] An agency action is final when the action "mark[s] the consummation of the agency's decision-making process" and the action is "one by which rights or obligations have been determined, or from which legal consequences will flow."[34] The binding nature of an agency action does not necessarily make the action final.[35] Consequently, "[a]n initial or interim ruling, even one that binds, 'does not mark the consummation of agency decision-making' and thus might not constitute final agency action."[36] The failure to achieve finality under the APA has resulted in courts' inability to consider the coercive effects of binding guidance documents.[37]

The Guidance EO requires agencies to implement "procedures for the public to petition for withdrawal or modification of a particular guidance document" and the Civil Administrative Enforcement EO prohibits agencies from using guidance documents as the basis for enforcement actions and from treating noncompliance with a guidance document as a violation of law.[38] Still,

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[32] DOE Petition for Rulemaking, 84 Fed. Reg. 50791, 50795.

[33] *Id.* (quoting 5 U.S.C. § 704).

[34] *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted).

[35] *Appalachian Power Co. v. Envtl. Prot. Agency*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

[36] DOE Petition for Rulemaking, 84 Fed. Reg. 50791, 50795 (quoting *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1271 (D.C. Cir. 2018)).

[37] *Id.* (discussing cases).

[38] Guidance EO § 4(ii), 84 Fed. Reg. 55235, 55237; Civil Administrative Enforcement EO § 3, 84 Fed. Reg. 55239, 55240-41.

regulated entities may fall victim to improper binding guidance absent additional procedural safeguards. One such safeguard is provided for in DOE Proposed Rule § 3.[39]

The DOE Proposed Rule's judicial review provisions allow an interested party to seek redress from the courts when an agency's improper guidance review process falls short.[40] The proposed rule also resolves the common finality question by identifying agency action or inaction that would "constitute final agency action" that is reviewable under the APA.[41] The act of putting all guidance up on DOE's website in one place, which the Guidance EO requires, arguably constitutes final agency action in adopting a guidance.[42] If not, then surely DOE's refusal to take down any particular piece of guidance, upon being petitioned to do so, would count as final agency action. In any case, the judicial review provisions in the DOE Proposed Rule satisfy the requirements of Executive Orders 13891 and 13892 in this regard—and possibly do a bit better. They certainly provide an elegant and effective mechanism to achieve the goals of the orders, and DOE should adopt these provisions.

VI. Conclusion

Thank you again for this opportunity to provide NCLA's view on this important rulemaking proposal. Should you have any questions, please contact Kara Rollins, Litigation Counsel, at kara.rollins@ncla.legal.

Kind regards,

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[39] DOE Proposed Rule § 3, 84 Fed. Reg. 50791, 50799.
[40] DOE Petition for Rulemaking, 84 Fed. Reg. 50791, 50799-800.
[41] DOE Proposed Rule § 3(h), 84 Fed. Reg. 50791, 50799.
[42] Guidance EO § 3, 84 Fed. Reg. 55235, 55236 (requiring agencies to "establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component").