

 New Civil Liberties Alliance

July 30, 2020

**VIA REGULATIONS.GOV**

Mr. Matthew Ring  
U.S. Department of Energy  
Office of the General Counsel  
Forrestal Building, GC-33  
1000 Independence Avenue,  
SW Washington, DC 20585

*Re: Procedures for the Issuance of Guidance Documents,  
Docket Number DOE-HQ-2020-0033*

Dear Mr. Ring,

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the Department of Energy’s (DOE) request for comment on its July 1, 2020 notice of proposed rulemaking. *See* Procedures for the Issuance of Guidance Documents, 85 Fed. Reg. 39495 (July 1, 2020) (to be codified at 10 C.F.R. pt. 1061) (*DOE Proposed Guidance Procedures Rule*). The DOE Proposed Guidance Procedures Rule “grants in part, and denies in part, NCLA’s requests in its petition.”<sup>1</sup> *Id.* at 39497.

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<sup>1</sup> On August 2, 2019, NCLA submitted a petition for rulemaking and proposed rule to DOE that the agency responded to by issuing a notice of petition for rulemaking and request for comment. *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*); *id.* at 50793-800 (*DOE Petition for Rulemaking*); *id.* at 50798-99 (*DOE Proposed Rule*). On December 20, NCLA submitted comments in support of the DOE Petition for Rulemaking and Proposed Rule encouraging the agency to pursue adoption of the proposed rule. *See* NCLA, Comment to Proposed Agency Guidance Rulemaking, Docket Number DOE\_FRDOC\_0001-3856 (Dec. 20, 2019), *available at* <https://nclalegal.org/wp-content/uploads/2019/12/2019.12.20-FINAL-Comment-to-DOE-re-Petition-for-Rulemaking.pdf> (*NCLA December 20 Comment*). Three

NCLA again appreciates the agency’s willingness to consider NCLA’s DOE Petition for Rulemaking and Proposed Rule. DOE’s continued action on NCLA’s proposed provisions 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, and its December 20 Comment. This comment responds specifically to a portion of NCLA’s DOE Petition for Rulemaking and Proposed Rule that DOE did not include in the DOE Proposed Guidance Procedures Rule—procedures addressing finality and judicial review of agency guidance.

### **I. Statement of Interest**

As the petitioner of the DOE Proposed Rule, NCLA has a continuing interest in the adoption of aspects of the Proposed Rule. NCLA is a nonpartisan, 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.<sup>2</sup> 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

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organizations filed comments in response to the DOE Notice of Petition and Request for Comment. *See* Procedures for the Issuance of Guidance Documents, 85 Fed. Reg. at 39497-98.

<sup>2</sup> *See generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

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 Agency Should Further Clarify the Proposed Rule to Express the Availability of Judicial Review After the Final Disposition of Petition for Withdrawal or Modification of Guidance Documents**

Finality and meaningful judicial review are recurring problems with respect to agency guidance documents.<sup>3</sup> In conformity with the requirements of Executive Order 13891, § 4, the DOE Proposed Guidance Procedures Rule addresses some of these problems by making it clear that guidance documents are non-binding and providing procedures for petition for withdrawal or modification of guidance documents. However, as noted in NCLA’s December 2019 Comment, even with additional procedures in place, regulated entities may still fall victim to improper guidance absent the availability of judicial review of such guidance.<sup>4</sup>

NCLA disagrees with DOE’s view that the courts “are best positioned, to determine what agency actions are reviewable by a court under the [Administrative Procedure Act (APA)] or other relevant laws and regulations” and “that provisions concerning finality or judicial review would be as useful to regulated parties as the provisions proposed in the proposed rule.”<sup>5</sup> As discussed in NCLA’s DOE Petition for Rulemaking and Proposed Rule, the judiciary has historically lacked the ability to review improper agency guidance.<sup>6</sup> This occurs in part because the APA typically only permits review of “final agency action.”<sup>7</sup> The failure to achieve finality under the APA has resulted in courts’ being unable to consider the coercive effects of guidance documents.<sup>8</sup> 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.

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<sup>3</sup> See DOE Petition for Rulemaking, 84 Fed. Reg. at 50795.

<sup>4</sup> See NCLA December 20 Comment at 7-8.

<sup>5</sup> DOE Proposed Guidance Procedures Rule, 85 Fed. Reg. at 39497.

<sup>6</sup> See DOE Petition for Rulemaking, 84 Fed. Reg. at 50795.

<sup>7</sup> See *id.* (quoting 5 U.S.C. § 704); see also *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (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.” (internal citations and quotation marks omitted)).

<sup>8</sup> DOE Petition for Rulemaking, 84 Fed. Reg. at 50795.

The DOE Proposed Guidance Procedures Rule does not specify whether or how a person may challenge its disposition of a petition.<sup>9</sup> As proposed, Section 1061.4 contemplates the finality of the agency’s action on a petition but signals no recourse for a petitioner who disagrees with the agency’s disposition of a petition. Moreover, invocation of the phrase “exhaustion of administrative remedies” suggests that, under the APA, judicial review of DOE’s disposition of a petition to withdraw or modify guidance documents may be available. If review were not available, then exhaustion of administrative procedures would not be necessary. Thus, if it is the view of the agency that a court may review DOE’s disposition of a petition, then why not make the availability of judicial review explicit? Such a clear statement is useful to both the public and the courts and furthers the spirit and requirements of Executive Order 13891 and its companion order, Executive Order 13892.<sup>10</sup>

NCLA recommends that DOE include an explicit judicial review provision in its final rule by adding the following language to section 1061.4 of the proposed rule:

(h) *Judicial Review.* If a person exhausts his or her administrative remedies in accordance with paragraph (g) of this section, then the DOE disposition of petition set out in part (f) shall constitute final agency action under 5 U.S.C. § 704 and shall be subject to review pursuant to 5 U.S.C. § 702.

### III. 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](mailto:kara.rollins@ncla.legal).

Kind regards,



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<sup>9</sup> See DOE Proposed Guidance Procedures Rule, 85 Fed. Reg. at 39502-03 (to be codified at 10 C.F.R. § 1061.4).

<sup>10</sup> Promoting the Rule of Law Through Improved Agency Guidance Documents, Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 9, 2019); Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 9, 2019).