Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635
RIN 3209-AA50

Announcement of public meeting:
Legal Expense Fund Regulation

AGENCY: Office of Government Ethics (OGE).

ACTION: Announcement of public meeting.

SUMMARY: The U.S. Office of Government Ethics (OGE) is hosting public meetings to engage in dialogue with interested members of the public regarding the development of a legal expense fund regulation. OGE will also accept additional written comments related to legal expense funds.

DATES: Written Comment Period Dates: Written comments must be received by November 5, 2019. Information on how to submit a written comment may be found in the SUPPLEMENTARY INFORMATION section of this notice.

Public Meeting Dates: The public meetings will be held on the following dates:
• October 17, 2019, from 10:00 a.m. to 12:00 p.m., Eastern time.
• October 22, 2019, from 10:00 a.m. to 12:00 p.m., Eastern time.

Information on how to register for the public meetings and registration deadlines may be found in the SUPPLEMENTARY INFORMATION section of this notice.

ADDRESSES: The two public meetings will be held at the Office of Government Ethics, 1201 New York Avenue NW, Washington, DC 20005–3917. A call-in number will be provided upon request.

FOR FURTHER INFORMATION CONTACT: Rachel Mclae, Associate Counsel, General Counsel and Legal Policy Division, Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005–3917; Telephone: (202) 482–9300; TTY: (800) 877–8339; FAX: (202) 482–9237.

SUPPLEMENTARY INFORMATION: The U.S. Office of Government Ethics (OGE) is hosting public meetings to obtain the views of experts and interested parties regarding the development of a legal expense fund regulation. On April 15, 2019, OGE sought stakeholder input on issues specifically related to legal expense funds through an advance notice of proposed rulemaking (ANPRM). See Notice and Request for Comments: Legal Expense Fund Regulation, 84 FR 14146 (Apr. 15, 2019). In response to this ANPRM, OGE received written comments and heard testimony at a virtual public hearing on May 22, 2019. See https://www.oge.gov/Web/oge.nsf/Resources/Rulemaking.

OGE is now inviting all interested members of the public to share ideas, provide information, and express concerns at public meetings about specific topics related to legal expense funds. These meetings will allow interested groups to hear and respond to the concerns of other affected persons and allow OGE to further develop our understanding of the views of various constituencies. The goal of these meetings is to exchange ideas rather than come to a consensus.

To facilitate discussion at the public meetings, OGE welcomes input on issues related to legal expense funds, including, but not limited to, the following topics:
• Scope of a legal expense fund regulation, including:
  ○ The types of legal matters to be covered by a legal expense fund regulation if the employee seeks to raise funds for legal expenses arising from those legal matters;
  ○ Other possible sources of legal expense payments or legal support (e.g., pro bono assistance, established legal aid providers) outside of a legal expense fund; and
  ○ The possibility of different rules for different types of employees.
• Structure of a legal expense fund, including:
  ○ Number of eligible beneficiaries for a legal expense fund; and
  ○ Legal structure used to establish a legal expense fund (e.g., trust, limited liability company, etc.).

An agenda, a list of attendees, and a list of topics discussed will be posted to the following website at the conclusion of the public meetings: https://www.oge.gov/Web/oge.nsf/Resources/Rulemaking. There will be no transcription at the meetings. OGE is accepting additional written comments until November 5, 2019, during which time interested parties will have an opportunity to present further comment on issues related to legal expense funds.

Registration: To ensure adequate room accommodations and to facilitate entry to the meeting space, individuals wishing to attend the public meetings must register by close of business on the following dates:
• October 10, 2019, for the meeting on October 17th.
• October 15, 2019, for the meeting on October 22nd.

Individuals must register by sending an email to usoge@oge.gov. The email should include “Legal Expense Fund Public Meeting” in the subject line and include the name of the attendee(s) and the preferred date of attendance.

Written Comments: To submit a written comment to OGE, please email usoge@oge.gov, send a fax to: (202) 482–9237, or submit a paper copy to: Office of Government Ethics, Suite 500, 1201 New York Avenue NW, Washington, DC 20005–3917 by close of business on the date listed in the DATES section of this notice. Individuals must include OGE’s agency name and the words “Legal Expense Fund Regulation” in all written comments. All written comments, including attachments and other supporting materials, will become part of the public record and be subject to public disclosure. Written comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Written comments generally will not be edited to remove any identifying or contact information.

Approved: September 18, 2019.

Emory Rounds,
Director, U.S. Office of Government Ethics.

[FR Doc. 2019–20489 Filed 9–25–19; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF ENERGY

10 CFR Chapters I, II, III, X, XIII, XVII and XVIII

Regulations Prohibiting Issuance, Reliance, or Defense of Improper Agency Guidance, Notice of Petition for Rulemaking

AGENCY: Office of the General Counsel, Department of Energy.
ACTION: Notice of petition for rulemaking; request for comment.

SUMMARY: On August 2, 2019, the Department of Energy (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. Through this document, DOE seeks comment on the petition, as well as any data or information that could be used in DOE’s determination whether to proceed with the petition.

DATES: Written comments and information are requested on or before December 26, 2019.

ADDRESSES: Interested persons are encouraged to submit comments, identified by “Proposed Agency Guidance Rulemaking,” by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Email: Guidance@hq.doe.gov. 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. 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. Docket: To access the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at: http://www.regulations.gov.


SUPPLEMENTAL INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., provides among other things, that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” (5 U.S.C. 553(e)). DOE received a petition from NCLA, as described in this document and set forth verbatim below, requesting that DOE initiate a rulemaking to prohibit any DOE component from issuing, relying on, or defending improper agency guidance. In publishing this petition for public comment, DOE is seeking views on whether it should grant the petition and undertake a rulemaking. By seeking comment on whether to grant this petition, DOE takes no position at this time regarding the merits of the suggested rulemaking or the assertions made by NCLA.

In its petition, NCLA argues 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 Constitution and APA prohibit doing so. NCLA asserts that such practice evades legal requirements and is 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 applicable statute or regulation. NCLA further states that despite being prohibited by law, improper guidance is typically outside of judicial review because of procedural limits. NCLA discusses 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 an OMB Memorandum (OMB Memorandum M–19–14, issued in 2019). It concludes that to solve underlying problems completely, DOE should issue a binding and final rule prohibiting any DOE component from issuing, relying on, or defending improper agency guidance, and that only a new rule binding DOE can assure regulated parties that DOE will refrain from future improper use of guidance. The NCLA petition also presents text for a proposed rule.

DOE invites all interested parties to submit comments and views of interested parties on any aspect of the petition for rulemaking.

Submission of Comments

DOE invites all interested parties to submit in writing by December 26, 2019 comments and information regarding this petition.

Submitting comments via email, hand delivery, or postal mail. Comments and documents via email, hand delivery, or postal mail will also 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 on 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 in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery, 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.

However, your contact information will be publicly viewable if you include it in the comment 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.

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 for which disclosure 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.

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, or postal mail. Comments and documents via email, hand delivery, or postal mail will also 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 on 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 in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery, 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 electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not include any 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 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” with the information believed to be confidential deleted. 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 treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time, and (7) why disclosure of the information would be contrary to the public interest.

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

DOE considers public participation to be a very important part of its process for considering rulemaking petitions. DOE actively encourages the participation and interaction of the public during the comment period. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in determining how to proceed with a petition.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of petition for rulemaking.

Signed in Washington, DC, on September 16, 2019.

William S. Cooper, III,
General Counsel.

PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS PROHIBITING THE ISSUANCE, RELIANCE ON OR DEFENSE OF IMPROPER AGENCY GUIDANCE SUBMITTED TO THE UNITED STATES DEPARTMENT OF ENERGY

August 2, 2019

Rick Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585
(202) 586–5000

Bill Cooper
General Counsel
U.S. Department of Energy
1000 Independence Ave. SW
Washington, DC 20585
(202) 586–5000

Dan Brouillette
Deputy Secretary of Energy
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
(202) 586–5000

Eric J. Fygi
Deputy General Counsel
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
(202) 586–5000

Submitted by:

New Civil Liberties Alliance

1225 19th Street NW, Suite 450
Washington, DC 20036
tel.: (202) 869–5210
www.nclallegal.org

I. Statement of the Petitioner

Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(e), the New Civil Liberties Alliance (hereinafter “NCLA”) hereby petitions the United States Department of Energy (hereinafter “DOE” or the “Department”) to initiate a rulemaking proceeding to promulgate regulations prohibiting any DOE component from issuing, relying on, or defending improper agency guidance. The proposed rule will formalize and make more permanent policies and best practices from other agencies concerning agency guidance that improperly attempts to create rights or obligations... hindering on persons or entities outside DOE. The proposed rule will also provide affected parties with a means of redress for improper agency action.

II. Summary of the Petition

Even though both the Constitution and the Administrative Procedure Act prohibit the practice, federal agencies often engage in the “commonplace and dangerous” acts of issuing informal interpretations, advice, statements of policy, and other forms of “guidance” that “make law simply by declaring their views about what the public should do.” Philip Hamburger, Is Administrative Law Unlawful? 260, 114 (2014). This practice evades legal requirements and often is “used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.” Office of the At’y Gen., Prohibition on Improper Guidance Documents at 2 (Nov. 16, 2017), available at https://www.justice.gov/opa/press-release/file/1012271/download. Despite being prohibited by law, improper guidance is typically “immuniz[ed]” from judicial review by procedural limits. Appalachian Power Co. v. Envtl. Prot.
IV. Legal Authority To Promulgate the Rule

This petition for rulemaking is submitted pursuant to 5 U.S.C. 553(e), which provides any “interested person the right to petition (an agency) for the issuance . . . of a rule.” Section 301 of the APA provides that the “head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, and the custody, use, and preservation of its records, papers and property.” Id. § 501. The Department of Energy is one such Executive department. Id. § 101. Accordingly, the Secretary of Energy may “formulate and publish” regulations binding DOE in the exercise of its lawful authority. See Georgia v. United States, 411 U.S. 526, 536 (1973), abrogated on other grounds, Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013). In addition, 42 U.S.C. 7254 authorizes the Secretary of Energy to “prescribe such procedural and administrative rules and regulations as he may deem necessary or appropriate to administer and manage the functions now or hereafter vested in him.”

When an agency engages in rulemaking procedures it must abide by the requirements set out in 5 U.S.C. 553.

V. Reasons for Creating the Rule

A. Legal Background

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests “[a]ll legislative powers” in Congress, and “the lawmaking function belongs to Congress . . . and not to public officers convoluted to another branch or entity.” Loving v. United States, 517 U.S. 748, 758 (1996). This is a constitutional barrier to an exercise of legislative power by an agency. Further, “an agency literally has no power to act . . . unless and until Congress confers power upon it.” Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986). Thus, even if an agency could constitutionally exercise legislative power, it lacks the authority to bind anyone without congressional authorization.

Significantly, Congress has categorically prohibited the issuance of binding guidance. The Administrative Procedure Act was passed in 1946 in order “to introduce greater uniformity of procedure and standardization of administrative action among the various agencies whose customs had departed wildly from each other.” Wong Yang Sung v. McGrath, 339 U.S. 33, 41, modified on other grounds by 339 U.S. 908 (1950). As a result, it sets out a comprehensive set of rules governing administrative action. Id.

Consistent with this design, the APA established a process by which agencies could engage in “rule making.” 5 U.S.C. 553. The APA explains that a “rule” “means 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.” Id. § 551(4).

Rules generally may be promulgated by agencies only following notice-and-comment procedures. First, an agency must post a “general notice” of the proposed rulemaking in a prominent place and seek commentary from private parties. Id. § 553(b). This notice must set out “the time, place and nature” of the proposed “public rule making proceedings,” “the legal authority under which the rule is proposed,” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” Id. §§ 553(b)(1)–(3).

After the notice has been posted, the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” Id. § 553(c). “An agency must consider and respond to significant comments received during the period for public comment.” Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1190, 1203 (2015).

In response to submitted comments, a “general statement” of the purpose of the rules must also be “incorporate[d] in the rules adopted.” 5 U.S.C. 553(c).

The APA’s notice-and-comment period “does not apply . . . to interpretive rules, general statements of policy, or rules of agency organization procedure, or practice.” Id. § 553(b). Instead, this requirement applies only to “substantive rules,” which are sometimes referred to as “legislative rules.” Mendoza v. Perez, 754 F.3d 1002, 1021 (D.C. Cir. 2014); see also 5 U.S.C. § 553(d) (distinguishing between “substantive” and “interpretive” rules for publication and service).

A “substantive” or “legislative” rule is any “agency action that purports to impose legally binding obligations or prohibitions on regulated parties.” Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014). Stated differently: “A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy.” Mendoza, 754 F.3d at 1021. Such “legislative rules” have the “force and effect of law.” Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979).

Legislative rules are also accorded deference from courts. United States v. Mead Corp., 533 U.S. 218, 230 (2001). In contrast, “interpretive rules” are not subject to notice-and-comment requirements. Mendoza, 754 F.3d at 1021. Interpretive rules “do not have the force and effect of law and are not accorded any deference in the adjudicatory process.” Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 99 (1995). An interpretive rule is any “agency action that merely interprets a prior statute or regulation and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties.” Nat’l Mining Ass’n, 758 F.3d at 252. “[I]nterpretive rules . . . are issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Perez, 135 S. Ct. at 1204 (internal citation and quotation marks omitted). Such a rule simply “describes the agency’s view of the meaning of an existing statute or regulation.” Batterson v. Marshall, 648 F.2d 694, 702 n. 34 (D.C. Cir. 1980).

The notice-and-comment process is not merely a technical requirement imposed upon the APA. The process serves important purposes. As the Supreme Court has explained, “Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a
pronouncement of such force." Mead Corp., 533 U.S. at 230. "APA notice and comment" is one such formal procedure, "designed to assure due deliberation." Id. (quoting Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735, 741 (1996)).

By contrast, informal interpretations, such as policy statements, agency manuals, enforcement guidelines and opinion letters, "lack the force of law" and warrant, at best, only limited "respect" from courts concerning matters of interpretation. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Further, to the extent that a court grants any respect to these interpretations, the strength of such respect varies widely depending on the degree of formality employed by the agency. See Mead Corp., 533 U.S. at 228 (discussing the deference owed to agency decisions). It depends in many instances on an agency's use of "notice-and-comment rulemaking or formal adjudication." Id. at 226–30 (internal citation and quotation marks omitted). A court "gives the least amount of respect to an "agency practice [that lacks] any indication [the agency] set out with a lawmaking pretense in mind" when it acted. Id. at 233.

Despite the relative straightforward legal distinction, it is not always easy for courts or regulators to draw practical distinctions between "legislative" and "interpretive" rules. Because each agency action is unique, determining whether a given agency action is a legislative rule or interpretive rule "is an extraordinarily case-specific endeavor." Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

Perhaps because of this difficulty, or perhaps for more invidious reasons, agencies often promulgate legislative rules under the guise of mere guidance, without following the notice-and-comment requirements of the APA. And courts, in turn, have often struck down such rules. See, e.g., Mendoza, 754 F.3d at 1025 (vacating guidance documents as legislative rule or interpretive rule "is an extraordinarily case-specific endeavor"); Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 8 (D.C. Cir. 2011) (same); Hemp Indus. Ass'n v. Drug Enforcement Admin., 333 F.3d 1092, 1091 (9th Cir. 2003) (same); Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 231 (D.C. Cir. 1992) (same); Texas v. United States, 201 F. Supp. 3d 810, 825 (N.D. Tex. 2016) (same), appeal dismissed, 2017 WL 7000562 (5th Cir. Mar. 3, 2017).

But the prevalence of court invalidation of improper guidance vastly understates the problem, because "extralegal" agency action "usually occurs out of view." Hamburger, supra, at 260. "To escape even the notice-and-comment requirement for lawmaking interpretation, agencies increasingly make law simply by declaring their views about what the public should do." Id. at 114. Such improper guidance statements are often deliberate "evasions" of legal requirements, and "[a] means of "extralegal lawmaking." Id. at 115.

Agencies have strong incentives to resort to this kind of extralegal lawmaking. The "absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." Perez, 135 S. Ct. at 1204. An agency operating in this fashion can issue rules "quickly and inexpensively without following any statutorily prescribed procedures." Appalachian Power Co., 208 F.3d at 1020. When this happens, "[[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations." Id.

More troubling, "[w]hen agencies want to impose restrictions they cannot openly adopt as administrative rules, and that they cannot plausibly call 'interpretation,'" they typically place the restrictions in guidance, advice, or other informal directives. Hamburger, supra, at 260. This is "a sort of extortion," because an agency can secure compliance by "threatening" enforcement or other regulatory action, even if the agency has no genuine authority to act in the first place. Id. at 260–61. An agency's informal "views about what the public should do," almost always comes "with the unmistakable hint that it is advisable to comply." Id. at 114–15.

This extortion is primarily enabled by the judiciary's inability to review improper guidance. Indeed, an agency often realizes that "another advantage" to issuing guidance documents, is "immunizing its lawmaking from judicial review." Appalachian Power Co., 208 F.3d at 1020. As discussed above, legislative rules will only be invalidated for failure to conform to the notice-and-comment process after the fact, while an informal "view" is determinate in the first place. This is neither a simple nor quick task.

Simultaneously, even invalid, binding, regulatory rules may escape judicial review. The APA typically allows review only of "final agency action." 5 U.S.C. 704. "[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the consummation of the agency's decision-making process. And second, the action must be one by which rights or obligations have been determined and legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal citations and quotation marks omitted).

But "an agency's action is not necessarily final merely because it is binding." Appalachian Power Co., 208 F.3d at 1022. An 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." Soundboard Ass'n v. Fed. Trade Comm'n, 888 F.3d 1261, 1271 (D.C. Cir. 2018); see also Ctr. for Food Safety v. Burwell, 126 F. Supp. 3d 114, 118 (D.D.C. 2015) (Contreras, J.) (discussing binding "Interim Policy" of agency that was in effect for 17 years but evaded judicial review as non-final action).

As a result, courts rarely consider the genuineness of an "agency's" other modes of lawmaking. Id. (internal citation and quotation marks omitted). In many instances, an agency's "guidance" is actually a means of "extralegal lawmaking." Id. at 115.

Holistic Candlers & Consumers Ass'n v. Food & Drug Admin., 664 F.3d 940, 944 (D.C. Cir. 2012). Indeed, "practical consequences, such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement, are insufficient to bring an agency's conduct under [a court's] purview." Indep. Equip. Dealers Ass'n v. Envtl. Prot. Agency, 372 F.3d 420, 428 (D.C. Cir. 2004) (internal citation and quotation marks omitted). Even to the extent that such action coerces compliance from a regulated entity, and even to the extent this might result in "a dramatic impact on the [affected] industry," it still may not be considered final action subject to review. Soundboard Ass'n, 888 F.3d at 1272; see also Nat'l Mining Ass'n, 756 F.3d at 253 (agency action is not final even if a regulated entity "really has no choice when faced with 'recommendations' except to fold," and might "feel pressure to voluntarily conform their behavior because the writing is on the wall").

The use of guidance results in "commonplace and dangerous" abuses of administrative power and "often leaves Americans at the mercy of administrative agencies." Hamburger, supra, at 260, 335. "It allows agencies to exercise a profound under-the-table power, far greater than the above-board administrative powers, and agencies thuggishly use it to secure what they euphemistically call 'cooperation.'" Id. at 335. This results in an "evasion" of the Constitution and any premise that laws can only be made by the Congress. Id. at 113–14; see also Ln. Pub. Serv. Comm'n, 476 U.S. at 374. It is also statutorily forbidden. Mendoza, 754 F.3d at 1021. And it often results in violations of the due process of law. Hamburger, supra, at 241, 353. But, perhaps by design, such improper agency conduct routinely occurs with little hope of judicial intervention. See Appalachian Power Co., 208 F.3d at 1020.

B. Prior Responses to These Problems


On January 18, 2007, the Office of Management and Budget for the Executive Office of the President, addressed the ongoing problem caused by the issuance of "poorly designed or imprudently promulgated formal documents" from administrative entities. Office of Mgmt. & Budget, Executive Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 FR 34322, 34322 (Jan. 18, 2007) (OMB Bulletin). OMB explained that many stakeholders had ongoing "[c]oncern about whether agencies" had been improperly issuing guidance documents that actually "establish new policy positions that the agency treats as binding," without following the notice-and-comment requirements of the APA. Id. at 3433. In addition to promulgating formal rules with the effect of law, many "agencies increasingly have relied on guidance documents to inform the public and to provide direction to their staffs." Id. at 3432.

While the bulletin characterized this practice as generally positive, it noted that
many guidance documents do “not receive the benefit of careful consideration accorded under the procedures for regulatory development and review.” Id. Even worse, “[b]ecause it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations.” Id. Some of these guidance documents also improperly “establish new policy positions that the agency treats as binding,” despite failing to comply with the APA’s notice-and-comment and judicial review provisions. Id. at 3433. To combat this problem, OMB issued its Final Bulletin to help ensure that guidance documents issued by Executive Branch departments and agencies under the OMB’s management would not improperly issue “legally binding requirements.” Id.

First, the OMB Bulletin directed each agency to “develop or have written procedures for the approval of significant guidance documents,” in order to “ensure that the issuance of significant guidance documents is approved by appropriate senior agency officials.” Id. at 3436, 3440. The OMB Bulletin also suggested that each significant guidance document adhere to the following:

a. Include the term “guidance” or its functional equivalent;

b. Identify the agency(ies) or office(s) issuing the document;

c. Identify the activity to which and the persons to whom the significant guidance document applies;

d. Include the date of issuance;

e. Note if it is a revision to a previously issued guidance document and, if so, identify the document that it replaces;

f. Provide the title of the document, and any document identification number, if one exists;

g. Include the citation to the statutory provision or regulation (in Code of Federal Regulations format) which it applies to or interprets; and

h. Not include mandatory language such as “shall,” “must,” “required,” or “required” to direct parties outside the federal government to take or refrain from taking action, except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.

5 To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not, in itself, result in any enforcement action.

Id. at 2.

The memo also defined “guidance documents” to include “any Department statements of general applicability and future effect, whether styled as guidance or otherwise that are designed to advise parties outside the federal Executive Branch about legal rights and obligations falling within the Department’s regulatory or enforcement authority.” Id. Notably, this definition excluded “internal directives [and] memoranda.” Id. at 2–3. In accordance with this new policy, the Attorney General also directed the Justice Department’s Regulatory Reform Task Force “to work with components to identify existing guidance documents that should be repealed, replaced, or modified in light of these principles.” Id. at 2.

Finally, the memo made clear that it “is an internal Department of Justice policy directed at Department components and employees. As such, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” Id. at 3.

Just over a month later, the Attorney General announced that he was applying his

On January 25, 2018, then Associate Attorney General Rachel Brand, who was the chair of the Department’s Regulatory Reform Task Force, issued a memorandum entitled Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Brand Memo), for all Justice Department litigators. The Brand Memo echoed the Sessions Memo’s concerns that Justice Department agencies had previously issued “guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch.” Id. at 1. The Brand Memo went farther than the Sessions Memo in asserting that the CRA applies to all Federal agencies under the CRA are not submitted to OIRA through the centralized review process of Executive Order 12866. Id. at 4.

The OMB Memo reaffirmed “the broad applicability of the CRA to all Federal agencies and a wide range of rules[,]” Id. at 2. It also noted that the CRA adopts the APA’s “expansive definition of ‘rule.’” Id. Thus, the OMB Memo concluded that “[t]he CRA applies to more than just notice-and-comment rules; it also encompasses a wide range of other regulatory actions, including, inter alia, guidance documents, general statements of policy, and interpretive rules. Id. at 3 (citing 5 U.S.C. 551(4)). Effective May 11, 2019, all proposed rules—whether the agency believes a rule to be major or minor or legislative or interpretive—must be submitted to OIRA for review. See id. at 5. This mandatory reporting requirement encompasses all guidance—including DOE guidance—relating to the legal duties of private parties.

4. The 2019 Kisor v. Wilkie, Secretary of Veterans Affairs Decision

On June 26, 2019, the Supreme Court decided Kisor v. Wilkie, Secretary of Veterans Affairs. Announcing the judgment of the Court, Justice Kagan’s plurality opinion reiterated the Court’s long-standing view that rulemaking under APA Section 553 “mandates that an agency use notice-and-comment procedures before issuing legislative rules.” Kisor v. Wilkie, No. 18–15, 588 U.S. ____ , slip op. at 22 (2019). An agency may avoid notice-and-comment procedures only where a proposed rule is interpretive and “not supposed to ‘have the force and effect of law’—or, otherwise said, to bind private parties.” Id. “[I]nterpretive rules are meant only to ‘advise the public of how the agency understands, and is likely to apply, its binding statutes and legislative rules.’” Id. at 24. If those substantive rules “neither form the basis of enforcement actions, courts cannot—and will not—attribute the force of law to interpretive rules. See id. at 23. Thus, when reviewing agency action, courts “must heed the same procedural values as [APA] Section 553 reflects[,]” when considering whether the agency has issued “authoritative and considered judgments.” See id. These principles are part of the foundation of administrative law. See, e.g., Perez, 135 S.Ct. at 12003–04.

5. Current Status of Guidance and the Department of Energy

The Sessions and Brand Memoranda are unequivocal—Executive Branch departments and agencies must cease the unconstitutional practice of issuing guidance as a means of avoiding notice-and-comment procedures when promulgating substantive rules. Indeed, as the Kisor plurality stated, “[n]o binding of anyone occurs merely by [an] agency’s say-so.” Kisor, 139 S. Ct. at 2420. Despite this admonishment and current Justice Department directives, DOE’s pending notices of rulemaking do not include a proposed rule that would unequivocally and permanently bind the Department in a manner consistent with the Justice Department Memoranda.

The DOE’s dilatory approach to cementing the Justice Department’s directive is puzzling given DOE’s commitment to regulatory reform, as evidenced by the Department’s request for public comment on implementing Executive Order 13771, its final report on Executive Order 13783, and Secretary Perry’s December 7, 2017 directive to each Departmental element to identify areas for regulatory reform. While regulatory redesign is laudable, these actions do not address the Department’s past, present, or future use of guidance. Indeed, the Department’s regulatory reform and deregulatory initiatives, while important, are only one component of the Administration’s larger strategy to reform the regulatory landscape and the relationship between the regulators and the regulated. The other co-equal regulatory reform component is transparent, open, and accountable notice-and-comment rulemaking where agencies seek to create, define, and regulate the rights, duties, and powers of private parties. In fact, to call this regulatory “reform” may be a bit of a misnomer, as the Supreme Court has long held that agencies cannot avoid notice-and-comment procedures when promulgating substantive rules because such procedures “were designed to assure that the Administrations and courts, and the regulated, consider carefully the legal, economic, and environmental effects of the rulemaking.” See NRDB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969).

C. The Rule Is Necessary Because Meta-Guidance Is Insufficient

Given the legal background just discussed, the various reform efforts outlined above are extremely important measures to rein in the improper use of guidance documents. The 2007 OMB Bulletin and 2019 Memo, in conjunction with the Sessions and Brand Memos, clearly identify some of the worst features of the guidance problem and provide a good start for the broader regulatory reform effort. Unfortunately, even these documents do not go far enough to fully address the pernicious harms caused by binding guidance, primarily because they constitute, at most, mere “guidance on guidance.” While these meta-guidance documents advance essential points, and identify regulatory pathologies, they ultimately constitute nothing more than temporary
policy announcements within their supervised agencies. Hence, they should not be the sole model for DOE’s reform efforts. To solve the underlying problems completely, DOE should issue binding and final rules prohibiting any Department component from issuing, relying on, or defending improper agency guidance.2

The first and most significant problem with the previously-issued meta-guidance documents is that they lack any permanent or binding effect. Even though the 2007 OMB Bulletin was formally binding, relying on, or defending improper agency guidance.2

The Sessions Memo at 2–3; Brand Memo at 1.

Thus, to the extent offices or individuals within the Department of Justice ignore these guidelines, they could “not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” Sessions Memo at 3; Brand Memo at 2.

2 The proposed internal rule would be controlling only within DOE and is not strictly a “substantive” or “legislative” rule as that term is otherwise used in this document. NCLA invokes the Secretary’s authority “to prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” 5 U.S.C. 301. Such rules should be considered “housekeeping” rules that have a controlling effect within DOE but cannot bind parties outside DOE without an added grant of authority. See Chrysler Corp. v. Brown, 441 U.S. 281, 283, 309 (1979) (describing section 301 as a “housekeeping statute” and “simply a grant of authority to the agency to regulate its own affairs.”).

Although these memos constitute noble policy goals, they could also be immediately rescinded at any time—without seeking any input from affected entities. While the OMB Bulletin followed notice-and-comment procedures, it was not required to do so because it is an informal legislative rule. See 5 U.S.C. 553(b). If a new administration wants to rescind it, it can do so without any formal procedures. See Perez, 135 S. Ct. at 1203 (agency action not subject to mandatory notice-and-comment procedures may be altered or rescinded). The Sessions and Brand Memos could also be rescinded with little notice or fanfare.

Moreover, none of these efforts solved the underlying problem. Even when improperly issued, defective guidance documents evaded judicial review—and continue to do so. Even where “regulated entities could assert a dramatic impact on their industry,” and even when such agency guidance is improper legislative rulemaking, it may nevertheless escape judicial review as non-final action. See Soundboard Ass’n, 888 F.3d at 1272. If an agency action challenges the OMB Bulletin, the result remains the same. The inability to subject such actions to judicial review can have momentous, and even disastrous, consequences for regulated industries that might “feel pressure to voluntarily conform their behavior because the writing is on the wall.” Nat’l Mining Ass’n, 758 F.3d at 253.

Finally, even to the extent that the documents genuinely confine improper rulemaking, each contains significant limitations to its scope. The OMB Bulletin only applies to “significant guidance” documents issued by the limited number of “Executive Branch departments and agencies,” not to independent agencies. OMB Bulletin, 72 FR at 3433, 3436. Similarly, the Sessions Memo only applies to a subset of Department of Justice actions. Sessions Memo at 1. And while the Brand Memo has some effect when external agency guidance documents are relevant to DOJ action, it is still confined to an extremely narrow class of future “affirmative civil enforcement” cases.

The 2019 OMB Memo, however, is much broader in scope—it seeks to stop unlawful agency rulemaking Executive Department-wide. As such, it could rectify the shortcomings of the Sessions and Brand Memos, but it is not clear what enforcement mechanisms will be in place, if any, to ensure that departments and agencies comply. Moreover, DOE does not have a policy or rule in place that contemplates OIRA’s review of all proposed departmental action, as mandated by the 2019 OMB Memo. Only a new rule binding DOE and its various components can assure regulated parties that the Department will refrain from the improper use of guidance in the future. For that reason, Petitioner has provided the text for an adequate and effective rule below.

D. Text of the Proposed Rule

While the most effective, efficient, and logical way to promote the following rule would be to do so at the departmental level, the following text could readily be adapted by individual Department offices and administrations wishing to pursue reform on their own, if necessary.

Section 1: Congressional Review Act Compliance

a. The Department of Energy and its offices and administrations (“DOE” or “Department”) will comply with all Congressional Review Act, 5 U.S.C. 801–808, requirements for review of all proposed regulatory actions, including, but not limited to, legislative rules, regulations, guidance documents, general statements of policy, and interpretive rules.

b. All proposed regulatory actions that DOE submits to the Office of Information and Regulatory Affairs (“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 a “major rule” under 5 U.S.C. 804(2).

c. Where proposed regulatory actions would not meet Executive Order 12866’s OIRA review requirement, and where the category of regulatory action had not been previously designated as presumptively not-major by OIRA, the Department will notify OIRA of the proposed regulatory action in writing. The written notification to OIRA will include:

i. DOE’s summary of the proposed regulatory action;

ii. DOE’s assessment as to the nature of the proposed regulatory action, including, but not limited to, whether the action is legislative or interpretive and whether it is applicable to the Department or to private parties outside the Department; and

iii. DOE’s recommended designation of the regulatory action as a major rule or not, as defined by 5 U.S.C. 804(2).

d. If OIRA designates DOE’s proposed regulatory action as a possible major rule, the Department will:

i. Submit the proposed regulatory action to OIRA for CRA review at least 30 days before the Department publishes the proposed rule in the Federal Register or otherwise publicly releases the rule;

ii. submit an analysis sufficient to allow OIRA to make its major rule determination. This analysis should include, but not be limited to, information regarding the degree of uncertainty concerning the regulatory action’s impacts; and

iii. provide all required information, analysis, and documentation to OIRA in a manner consistent with the principles and metrics enunciated in OMB Circular A–4 (Sept. 17, 2003) and Part IV of OMB Memorandum M–19–14 (Apr. 11, 2019).

e. If OIRA designates the proposed regulatory action not-major, the Department may proceed with its rulemaking procedures without submitting a CRA report to Congress.

f. If OIRA designates the proposed regulatory action a major rule, the Department will:

i. Submit a CRA report to Congress and the Comptroller in accordance with the provisions of 5 U.S.C. 801(a);

ii. publish the major rule in the Federal Register; and
Section 2: Requirements for Issuance of Legislative Rules

a. Neither the Department of Energy nor any office operating within the Department may issue any "legislative rule" without complying with all requirements set out in 5 U.S.C. 553.

b. Any pronouncement from the Department or any office operating within DOE that is not a "legislative rule" must:
   i. Identify itself as "guidance" or its functional non-legislative equivalent, or as an internal DOE regulation as authorized by applicable enabling legislation;
   ii. Disclaim any force or effect of law;
   iii. Prominently state that it has no legally binding effect on persons or entities outside DOE;
   iv. Not be used for purposes of coercing persons or entities outside the Department or office itself into taking any action or refraining from taking any action beyond what is already required by the terms of the applicable statute; and
   v. Not use mandatory language such as "shall," "must," "required," or "requirements" to direct parties outside the federal government to take or refrain from taking action, except when restating—with citations to statutes or binding judicial precedent—clear mandates contained in a statute.

c. A regulated entity's noncompliance with any agency pronouncement other than a "legislative rule," issued from any agency (whether or not the agency or office is operating within the Department), may not be considered by any entity within DOE in determining whether to institute an enforcement action or as a basis for proving or adjudicating any violation of applicable law.

d. No office operating within the Department may apply any "legislative rule," as defined by this rule, issued by DOE or any other agency, no matter how styled, which has not complied with all requirements set out in 5 U.S.C. 553.

e. No office operating within the Department may defend the validity of any "legislative rule," as defined by this rule, issued by DOE or any other agency, no matter how styled, which has not complied with all requirements set out in 5 U.S.C. 553, in any court or administrative proceeding.

Section 3: Judicial Review

a. 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.

b. Such a petition for review shall be filed in writing with the agency or office, pursuant to the procedures set out in compliance with 5 U.S.C. 553(e).

c. Any office operating within the Department must respond to such a petition for review within 60 calendar days of receipt of the petition.

d. The office operating within the Department must respond by either:
   i. Rescinding the prior Department pronouncement;
   ii. Denying the petition for review on the basis that the Department pronouncement under review did not constitute a "legislative rule," or on the basis that the Department pronouncement was adopted in compliance with the requirements set out in 5 U.S.C. 553.

   e. Any agency determination under section (d) must be made in writing and must be promptly made publicly available and must include a formal statement of reasons for determining that the pronouncement under review does or does not constitute a "legislative rule," or does or does not comply with 5 U.S.C. 553.

   f. If the office fails to respond to a petition for review within the 60-day period, such an action shall constitute a denial of the petition on the basis that the Department pronouncement under review did not constitute a "legislative rule.

g. If any Department or office pronouncement has been determined to not be a "legislative rule" under parts (d), (e) or (f), DOE shall promptly announce that the pronouncement has no binding force.

h. Any DOE pronouncement, action or inaction set out in parts (d), (e), (f) or (g), shall constitute final agency action under 5 U.S.C. 704, and shall be subject to review pursuant to 5 U.S.C. 702.

   i. For purposes of this rule, no matter how styled or when issued and irrespective of any other Department determination, the issuance of any "legislative rule" by any office operating within the Department shall be deemed final agency action under 5 U.S.C. 704.

Section 4: Definitions

a. For purposes of this rule, the term "legislative rule" means any pronouncement or action from any DOE office that purports to:

   i. Impose legally binding duties on entities outside the DOE;
   ii. Impose new requirements on entities outside DOE;
   iii. Create binding standards by which DOE will determine compliance with existing statutory or regulatory requirements; or
   iv. Adopt a position on the binding duties of entities outside DOE that is new, that is inconsistent with existing regulations, or that otherwise affects a substantive change in existing law;

b. For purposes of this rule, the term "interested person" has the same meaning used in 5 U.S.C. 553, 553; provided that a person may be "interested" regardless of whether they would otherwise have standing under Article III of the United States Constitution to challenge an agency action.3

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3 See Animal Legal Def. Fund, Inc. v. Vilsack, 237 F. Supp. 3d 15, 21 (D.D.C. 2017) (Cooper, J) (a party may be an "interested person" under the APA even without Article III standing).
decision on a petition for review as final, thus establishing a concrete cause of action. Section 3(h), meanwhile, resolves the problem that may exist when agency action is improperly binding, but nevertheless evades review because it is not yet final, by deeming any binding action necessarily one that is also final.*

VI. Conclusion

Americans should never be “at the mercy” of the whims of administrative agencies, set out in extralegal and extortionate “guidance”, for approved behavior. Hamburger, supra, at 260. Purportedly binding rules masquerading as guidance are unlawful and unconstitutional and are among the very worst threats to liberty perpetrated by the administrative state. The Department of Energy should enact clear rules that respect administrative state. The Department of Energy should enact clear rules that respect the limits set by the Constitution, the APA, and all other statutes applicable to DOE regarding procedures for promulgating substantive, legislative rules. The Department should therefore prohibit the issuance, reliance on, or defense of improper agency guidance, and promulgate the proposed rule set out in this Petition.

Sincerely,

Steven M. Simpson,
Senior Litigation Counsel.

Mark Chenoweth,
General Counsel.

New Civil Liberties Alliance, 1225 19th Street NW, Suite 450, Washington, DC 20036, mark.chenoweth@ncla.legal,
(202) 869–5210.

* NCLA gratefully acknowledges the contribution of former Senior Litigation Counsel Rick Faulk to this petition.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71


RIN 2120–AA66

Proposed Amendment and Establishment of Multiple Air Traffic Service (ATS) Routes; Western United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend two high altitude United States Area Navigation (RNAV) Air Traffic Service (ATS) routes (Q–13 and Q–15), establish one high altitude RNAV ATS route (Q–174), and establish five low altitude RNAV ATS routes (T–338, T–357, T–359, T–361, and T–363) in the western United States. The proposed Q and T routes will facilitate the movement of aircraft to, from, and through the Las Vegas terminal area. Additionally, the routes will promote operational efficiencies for users and provide connectivity to current and proposed RNAV enroute procedures while enhancing capacity for adjacent airports.

DATES: Comments must be received on or before November 12, 2019.


FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at http://www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email: fedreg.legal@nara.gov or go to https://www.archives.gov/federal-register/cfr/ibr-locations.html.

FOR FURTHER INFORMATION CONTACT:

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to support the flow of air traffic within the National Airspace System.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers (FAA Docket No. FAA–2019–0660; Airspace Docket No. 18–AWP–13) and be submitted in triplicate to the Docket Management Facility (see ADDRESSES section for address and phone number). You may also submit comments through the internet at http://www.regulations.gov.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: “Comments to FAA Docket No. FAA–2019–0660; Airspace Docket No. 18–AWP–13.” The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at http://www.regulations.gov. Recently published rulemaking documents can also be accessed through the FAA’s web page at http://www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see ADDRESSES section for address and