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and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any petition provided that the petitioner is afforded an opportunity to respond to all third person submissions. In evaluating a petition, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference, if, in its discretion, it considers that such will advance its evaluation of the petition.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the petition without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the petition with prejudice. If the petitioner fails to provide the notice required by §1003.74, the OHA may dismiss the petition without prejudice.

(b)(1) The OHA will dismiss without prejudice a "Petition for Special Redress or Other Relief" if it determines that another more appropriate proceeding is provided by this part.

(2) The OHA will dismiss with prejudice a "Petition for Special Redress or Other Relief" filed by a person who has exhausted his administrative remedies with respect to any proceeding provided by this part, and received a final order therefrom that addresses the same issue or transaction.

§ 1003.77 Decision and Order.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition.

(b) The Decision and Order denying or granting the petition shall include a written statement setting forth the relevant facts and legal basis for the Decision and Order. Such Decision and Order shall state that it is a final order of the DOE of which the petitioner may seek judicial review.

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PART 1004—FREEDOM OF INFORMATION ACT (FOIA)

Sec.

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AUTHORITY: 5 U.S.C. 552.

SOURCE: 53 FR 15661, May 3, 1988, unless otherwise noted.

§ 1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) that implement Freedom of Information (FOIA) 5 U.S.C. 552, Pub. L. 89-487, as amended by Pub. L. 93-502, 88 Stat. 1561, by Pub. L. 94-409, 90 Stat. 1241, and by Pub. L. 99-570, 100 Stat. 3207-49, by Pub. L. 104-231, 110 Stat. 3048, by Pub. L. 110-175, 121 Stat. 2524, and by Pub. L. 111-83 564, 123 Stat. 2142, 2184. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of the DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of the DOE may find it helpful to consult with a DOE FOIA Officer before invoking the formal procedures set out below. To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22857, Apr. 25, 2014]

§ 1004.2 Definitions.

As used in this part:

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(a) *Appeal Authority* means the Office of Hearings and Appeals.

(b) *Authorizing or Denying Official* means that DOE officer as identified by the Directorate of Administration by separate directive, having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Officer as defined below and officials who report directly to either the Office of the Secretary or a Secretarial Officer as also defined below. In the Field Offices, the term refers to the head of a field location identified in §1004.2(h) and the heads of field offices to which they provide administrative support and have delegated this authority.

(c) *'Commercial use' request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.

(d) *Department or Department of Energy (DOE)* means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub L. 95-91. This specifically excludes the FERC.

(e) *Direct costs* means those expenditures which the DOE actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(f) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of, but are not limited to, paper copy, microform, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk). The copy provided must be in a form that can be reasonably used by requesters.

(g) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) *Freedom of Information Act (FOIA) Officer* means the person designated to administer the Freedom of Information Act at the following DOE offices:

(1) Bonneville Power Administration, P.O. Box 3621, Portland, OR 97232.

(2) Carlsbad Field Office, P.O. Box 3090, Carlsbad, NM 88221.

(3) Chicago Office, 9800 S. Cass Avenue, Argonne, IL 60439.

(4) Environmental Management Consolidated Business Center, 250 East 5th Street, Suite 500, Cincinnati, OH 45202.

(5) Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401.

(6) Headquarters, Department of Energy, Washington, DC 20585.

(7) Idaho Operations Office, 1955 Fremont Avenue, MS 1203, Idaho Falls, ID 83401.

(8) National Nuclear Security Administration Albuquerque Complex, P.O. Box 5400, Albuquerque, NM 87185-5400.

(9) National Energy Technology Laboratory, 3610 Collins Ferry Road, Morgantown, WV 26507-0800.

(10) Naval Reactors Laboratory Field Office, P.O. Box 109, West Mifflin, PA 15122-0109.

(11) Oak Ridge Office, P.O. Box 2001, Oak Ridge, TN 37831.

(12) Office of Naval Reactors, Headquarters, 1240 Isaac Hull Avenue SE., Washington Navy Yard, DC 20376-0822.

(13) Office of Scientific and Technical Information, P.O. Box 2001, Oak Ridge, TN 37831.

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(14) Richland Operations Office, P.O. Box 550, Mail Stop A7–75, Richland, WA 99352.

(15) Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

(16) Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635–6711.

(17) Southwestern Power Administration, One West Third, S1200, Tulsa, OK 74103.

(18) Strategic Petroleum Reserve Project Management Office, 900 Commerce Road East–MS FE–455, New Orleans, LA 70123.

(19) Western Area Power Administration, 12155 W. Alameda Parkway, P.O. Box 281213, Lakewood, CO 80228–8213.

(i) *General Counsel* means the General Counsel provided for in section 202(b) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters.

(j) *Headquarters* means all DOE facilities functioning within the Washington metropolitan area except the Office of Naval Reactors.

(k) *Non-commercial scientific institution* refers to an institution that is not operated on a “commercial” basis as that term is referenced in §1004.2(c), and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(l) *Office* means any administrative or operating unit of the DOE, including those in field offices.

(m) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive.

Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of “freelance” journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

(n) *Review* refers to the process of examining documents located in response to a commercial use request (see §1004.2(c)) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(o) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The DOE will search for material in the most efficient and least expensive manner in order to minimize cost for both DOE and the requester. For example, DOE will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. “Search” will be distinguished, moreover, from “review” of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(p) *Secretarial Officer* means the Under Secretary; Under Secretary for Science; Administrator, Energy Information Administration; Administrator, National Nuclear Security Administration; Assistant Secretary for Congressional and Intergovernmental Affairs;

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Assistant Secretary for Energy Efficiency and Renewable Energy; Assistant Secretary for Environmental Management; Assistant Secretary for Fossil Energy; Assistant Secretary for Policy and International Affairs; Assistant Secretary for Nuclear Energy; Chief Financial Officer; Chief Health, Safety and Security Officer; Chief Human Capital Officer; Chief Information Officer; “Director, Advanced Research Projects Agency—Energy”, “Director, Office of Indian Energy Policy and Programs”, and “Director, Loan Programs Office, Director, Office of Economic Impact and Diversity; Director, Office of Electricity Delivery and Energy Reliability; Director, Office of Hearings and Appeals; Director, Office of Legacy Management; Director, Office of Management; Director, Office of Public Affairs; Director, Office of Science; General Counsel; Inspector General; and Senior Intelligence Officer.

(q) *Statute specifically providing for setting the level of fees for particular types of records*, at 5 U.S.C. 552(a)(4)(A)(vi), means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

[53 FR 15661, May 3, 1988, as amended at 71 FR 68734, Nov. 28, 2006; 79 FR 22857, Apr. 25, 2014]

§ 1004.3 Public reading facilities and policy on contractor records.

(a) The DOE Headquarters will maintain, in the public reading facilities, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. The principal public reading facility will be located at the Office of Information Resources Office, 1000 Independence Avenue, SW, Washington, DC. The DOE Headquarters will maintain an electronic public reading room that can be accessed at <http://energy.gov/management/office-management/operational-management/freedom-information-act/reading-room>. A complete listing of other facilities is available from the Office of Information Resources Officer at DOE Headquarters.

(b) Each of the designated field offices will maintain in public reading facilities certain materials maintained in the Headquarters facility and other materials associated with the particular field offices.

(c) Each of these public reading facilities will maintain and make available for public inspection and copying current indices of the materials at that facility which are required to be indexed by 5 U.S.C. 552(a)(2) or other applicable statutes.

(d) [Reserved]

(e) Contractor Records. (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b)(2).

(2) Notwithstanding paragraph (e)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in § 1004.3(e)(4) or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

(3) The policies stated in this paragraph:

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(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

(4) For purposes of §1004.3(e)(2), "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.

[53 FR 15661, May 3, 1988, as amended at 59 FR 63884, Dec. 12, 1994; 79 FR 22858, Apr. 25, 2014]

§ 1004.4 Elements of a request.

(a) *Addressed to the FOIA Officer.* A request for a record of the DOE which is not available in a public reading facility, as described in §1004.3, shall be: Addressed to the Headquarters or appropriate field FOIA Officer at the DOE at a location listed in §1004.2(h) of this part, and both the envelope and the letter shall be clearly marked "Freedom of Information Act Request;" or submitted electronically on the Headquarters or appropriate field FOIA Web sites. Except as provided in §1004.4(e), a request will be considered to be received by the DOE for purposes of 5 U.S.C. 552(a)(6) and the 20-day response period will start upon actual receipt by the appropriate FOIA Officer, or not later than 10 days after receipt by a designated FOIA Officer at any location in §1004.2(h). Requests delivered after regular business hours of the FOIA Officer are considered received on the next regular business day.

(b) *Request must be in writing and for reasonably described records.* A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where

possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to the submission of a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should identify that office.

(c) *Categorical requests.* (1) Must meet reasonably described records requirement. A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The FOIA Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) *Assistance in reformulating a non-conforming request.* If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

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(d) *Nonexistent records.* (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(3) If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified.

(e) *Assurance of willingness to pay fees.* A request shall include (1) an assurance to pay whatever fees will be assessed in accordance with §1004.9, (2) an assurance to pay those fees not exceeding some specified dollar amount, or (3) a request for a waiver or reduction of fees. No request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees anticipated to be associated with the processing of the request or a specific request of a waiver or reduction of fees.

(f) *Requests for records or information of other agencies.* Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(1) Where a document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester, unless the originator agrees to direct release by DOE.

(2) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official will coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, will cite the other agency Denying Official as well as the appropriate DOE Denying Official if a denial by DOE is also involved.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22853, Apr. 25, 2014]

§ 1004.5 Processing requests for records.

(a) FOIA Officers will be responsible for processing requests for records submitted pursuant to this part. Upon receiving such a request, the FOIA Officer will, except as provided in paragraph (c) of this section, ascertain which Authorizing Official has responsibility for, custody of, or concern with the records requested. The FOIA Officer will review the request, consulting with the Authorizing Official where appropriate, to determine its compliance with §1004.4. Where a request complies with §1004.4, the FOIA Officer will acknowledge receipt of the request to the requester and forward the request to the Authorizing Official for action.

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official or FOIA Officer will prepare a written response (1) granting the request, (2) denying the request, (3) granting/denying it in part, (4) replying with a response stating that the request has been referred to another agency under §1004.4(f) or §1004.6(e), (5) informing the requester that responsive records cannot be located or do not exist.

(c) Where a request involves records which are in the custody of or are the concern of more than one Authorizing Official or FOIA Officer, the FOIA Officer will identify all concerned all Authorizing Officials, send copies of the request to them and forward the request for action to the Authorizing Official or FOIA Officer that can reasonably be expected to have custody of most of the requested records. This Authorizing Official or FOIA Officer will prepare a DOE response to the requester consistent with paragraph (b) of this section, which will identify any other Authorizing Official or FOIA Officer, having responsibility for the denial of records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section will be taken within 20 working days of receipt of a request for DOE records ("receipt" is defined in §1004.4(a)), except that,

(i) One request can be made to the requester for information and the DOE can toll the 20-day response period

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while it waits for the requester's response;

(ii) If necessary to clarify with the requester issues regarding fee assessment and the DOE can toll the 20-day response period; or

(iii) If unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official or FOIA Officer of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official or FOIA Officer may take an extension not to exceed 10 working days.

(2) For purposes of this section and §1004.8(d), the term "unusual circumstances" may include but is not limited to the following:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;

(ii) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are responsive to a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Department having substantial subject matter interest therein.

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.

(4) If no determination has been made at the end of the 20-day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the responsible Authorizing Official or FOIA Officer will nevertheless continue to process the request. If the DOE is unable to provide a response within the statutory period, the Authorizing Official or FOIA Officer will

inform the requester of the reason for the delay; the date on which a determination may be expected to be made; that the requester can seek remedy through the courts, but ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official or FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and will clearly specify the total time agreed upon.

(6) Expedited processing. Generally, the DOE will respond to requests in the order of receipt. Requests will be processed out of order and processed as soon as practicable when it is determined, based upon information supplied by the requester or otherwise known to the DOE, that a compelling need exists to provide the records in an expeditious manner. The FOIA states that a compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, when a request is submitted by a person primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged Federal Government activity.

(7) A determination to grant or deny a request for expedited processing will be made by the appropriate FOIA Officer within 10 days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 30 calendar days to the Office of Hearings and Appeals."

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.6 Requests for classified records.

(a) All requests for classified records will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 13526 and §1045 or any

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successor thereto, may be automatically considered a FOIA Act request.

(c) Concurrence of the Director of Classification is required on all responses involving the denial of classified information. The Director of Classification will be informed of the request by either the FOIA Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification who will be the Denying Official for the classified portion of such records in accordance with §§1004.5(c) and 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions will be listed in the notice of denial in accordance with §§1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of §1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.7 Responses by authorizing officials: Form and content.

(a) *Form of grant.* Records requested pursuant to §1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the FOIA, and where the applicable fees are \$15 or less or where it has been determined that the payment of applicable fees should be

waived. Where the applicable fees exceed \$15, the records may be made available before all charges are paid.

(b) *Form of denial.* A reply denying a request for a record will be in writing. It will be signed by a FOIA Officer the Denying Official pursuant to §1004.5 (b) or (c) and will include:

(1) *Reason for denial.* A statement of the reason for denial, containing a reference to the specific exemption under the FOIA authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate. The amount of information deleted and the applicable exemption will be indicated on the released portion of the record, unless the indication would harm an interest protected by the exemption.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period, may be appealed within 30 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing or Denying Official or FOIA Officer Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with §1004.4(d),

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or when the Freedom of Information Officer has denied a request for expedited processing consistent with §1004.5(d) for waiver of fees consistent with §1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585 -1615 and both the envelope and letter must be clearly marked “Freedom of Information Act Appeal.” The appeal may be delivered by U.S Mail or commercial delivery service, by electronic mail to *OHA.Filings@hq.doe.gov*, or by facsimile to (202) 287-1415. The appeal must contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, must be submitted with the appeal. The appeal also should provide a telephone number, electronic mail address, or other means for communicating with the requester during business hours.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the Appeal Authority. Documents delivered after regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day.

(d) *Action within 20 working days.* (1) The Appeal Authority will act upon the appeal within 20 working days of its receipt, except that if unusual circumstances (as defined in §1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the Appeal Authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the Appeal Authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the Appeal Authority and will clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The Appeal Authority’s action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business, the district in which the records are situated, or in the District of Columbia. Documents determined by the Appeal Authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records and records covered by section 148 of the Atomic Energy Act.* The Secretary of Energy or his or her designee will make the final determination concerning appeals involving the denial of requests for classified information or the denial of requests for

information falling within the scope of section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

(g) *Appeal of the denial of expedited processing.* Any appeal of the determination to deny a request for expedited processing will be acted on expeditiously."

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

§ 1004.9 Fees for providing records.

(a) *Fees to be charged.* The DOE will charge fees that recoup the full allowable direct costs incurred. The DOE will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The DOE may contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, the DOE will ensure that the ultimate cost to the requester is no greater than it would be if the DOE itself had performed these tasks. In no case will the DOE contract out responsibilities which the FOIA provides that only the agency may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees, which are determinations by Authorizing Officials or FOIA Officers. Where the DOE can identify documents that are responsive to a request and are maintained for public distribution by other agencies such as the National Technical Information Service and the Government Printing Office, the FOIA Officer will inform requesters of the procedures to obtain records from those sources.

(1) *Manual searches for records.* Whenever feasible, the DOE will charge for manual searches for records at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search.

(2) *Computer searches for records.* The DOE will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary.

(3) *Review of records.* The DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges will be assessed only for the initial review (i.e., the review undertaken the first time the DOE analyzes the applicability of a specific exemption to a particular record or portion of a record. The DOE will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(4) *Duplication of records.* The DOE will make a per-page charge for paper copy reproduction of documents. At present, the charge for paper to paper copies will be ten cents per page and the charge for microform to paper copies will be ten cents per page. For computer generated copies, such as tapes or printouts, the DOE will charge the actual cost, including operator time, for production of the tape or printout. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s).

(5) *Other charges.* It shall be noted that complying with requests for special services such as those listed below is entirely at the discretion of this agency. Neither the FOIA nor its fee structure cover these kinds of services. The DOE will recover the full direct costs of providing services such as those enumerated below to the extent that we elect to provide them:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(6) *Restrictions on assessing fees.* (i) With the exception of requesters seeking documents for a commercial use, section (a)(4)(A)(iv) of the FOIA, as amended, DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to

any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only 10 minutes of search time and only five pages of reproduction. If this cost is equal to or less than \$15.00, the amount DOE incurs to process a fee collection, no charges would be assessed. For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will be normally be "8-1/2 x 11" or "11 x 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term "search time" is based on a *manual search*. To apply this term to searches made by computer, the DOE will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the computer operator conducting the search, DOE will begin assessing charges for computer search.

(ii) When unusual or exceptional circumstances do not apply and time limits specified in the FOIA are not met, the DOE will not charge any search fees, or duplication fees for educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.

(7) *Notification of charges.* If the DOE determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency. In cases where a re-

quester has been notified that actual or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to a requester pursuant to this paragraph will offer the opportunity to confer with DOE personnel in order to reformulate the request to meet his or her needs at a lower cost.

(8) *Waiving or reducing fees.* The DOE will furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to the DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the appropriate FOIA Officer should address the following two criteria:

(i) That disclosure of the Information "is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government." Factors to be considered in applying this criteria include but are not limited to:

(A) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

(B) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

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(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

(ii) If Disclosure of the Information "is Not Primarily in the Commercial Interest of the Requester." Factors to be considered in applying this criteria include but are not limited to:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(b) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The FOIA Officers will make determinations regarding categories of requesters as defined at §1004.2. The Headquarters FOIA Officers will assist field FOIA Officers in categorizing requesters, and will resolve conflicting categorizations. The FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When the DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. The DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(2) *Educational and non-commercial scientific institution requesters.* The DOE

will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) *Requesters who are representatives of the news media.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in §1004.2(m), and his or her request must not be made for a commercial use. With respect to this class of requesters, a request for records supporting the news dissemination function of the requester will not be considered to be a request for a commercial use.

(4) *All other requesters.* The DOE will charge requesters who do not fall into any of the above categories fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests from individuals for records about themselves filed in DOE systems of records will continue to be processed under the fee provisions of the Privacy Act of 1974.

(5) *Charging interest—notice and rate.* Interest will be charged those requesters who fail to pay fees. The DOE will begin to assess interest charges on the amount billed on the 31st day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) *Charges for unsuccessful search.* The DOE will assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be

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exempt from disclosure. If the DOE estimates that search charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

(7) *Aggregating requests.* A requester may not file multiple requests each seeking portions of a document or documents, solely to avoid payment of fees. When the DOE reasonably believes that a requester or, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the DOE will aggregate any such requests and charge the appropriate fees. The DOE may consider the time period in which the requests have been made in its determination to aggregate the related requests. In no case will DOE aggregate multiple requests on unrelated subjects from one requester.

(8) *Advance payments.* Requesters are not required to make an advance payment (i.e., payment before action is commenced or continued on a request) unless:

(i) The DOE estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00. In such cases, the DOE will notify the requester of the likely cost and obtain a satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(ii) A requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days of the date of the billing). The DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he or she has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a

new request or a pending request from that requester.

When the DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after the DOE has received fee payments described above.

(c) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* The DOE will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and the use of collection agencies, where appropriate, to encourage payment of fees.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014]

§ 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with §1004.1 of these regulations to matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue;

(ii) Establishes particular criteria for withholding or refers to particular

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types of matters to be withheld; for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) are covered by this exemption; or

(iii) If enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (i) could reasonably be expected to interfere with enforcement proceedings, (ii) would deprive a person of a right to a fair trial or an impartial adjudication, (iii) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (iv) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (vi) could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use

of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) Any reasonably segregated non-exempt portion of a record will be provided to a requester. The DOE will delete portions which are withholdable under the exemptions listed above.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22859, Apr. 25, 2014]

§ 1004.11 Handling information of a private business, foreign government, or an international organization.

(a) Whenever a document submitted to the DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, the DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, or at any other time.

(b) When the DOE may determine, in the course of responding to a FOIA request, not to release information submitted to the DOE (as described in paragraph (a) of this section, and contained in a requested document) without seeking any or further submitter's views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter's views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the FOIA Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE

will make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by the DOE that a claim of exemption made pursuant to this paragraph is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(d) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, the DOE will consider such submitter's views and will not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE will make its own determination with regard to any claim that information be exempted from disclosure. Notice of the DOE's determination to deny a claim of exemption made pursuant to this paragraph will be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by the DOE that a claim of exemption is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) *Criteria for determining the applicability of 5 U.S.C. 552(b)(4).* Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt

from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When the DOE, in the course of responding to a Freedom of Information request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with §1004.1, the DOE will notify the submitter of the intended discretionary release no less than seven (7) days prior to intended public disclosure of the information in question.

(h) As used in this section, the term *submitter's views* means, with regard to a document submitted to the DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation shall specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C.

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552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section excluding paragraph (f)(5). In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014]

§ 1004.12 Computation of time.

Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays, and legal holidays are excepted.

PART 1005—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF ENERGY PROGRAMS AND ACTIVITIES

Sec.

- 1005.1 What is the purpose of these regulations?
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- 1005.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
- 1005.11 What are the Secretary's obligations in interstate situations?

1005.12 How may a state simplify, consolidate, or substitute federally required state plans?

1005.13 May the Secretary waive any provision of these regulations?

AUTHORITY: E. O. 12372, July 14, 1982, 47 FR 30959, as amended April 8, 1983, 48 FR 15887; sec. 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506).

SOURCE: 48 FR 29182, June 24, 1983, unless otherwise noted.

§ 1005.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§ 1005.2 What definitions apply to these regulations?

Department means the U.S. Department of Energy.

Order means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled "Intergovernmental Review of Federal Programs."

Secretary means the Secretary of the U.S. Department of Energy or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.