



NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1204

[Document Number NASA-20-035; Docket Number-NASA-2020-0003]

RIN 2700-AE55

NASA Guidance Procedures

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: This final rule incorporates the National Aeronautics and Space Administration's (NASA) existing internal policy and procedures relating to the issuance of guidance documents into the Code of Federal Regulations.

DATES: Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, requires agencies to finalize regulations to set forth processes and procedures for issuing guidance documents to include:

- Requirements for each guidance document to clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract.
- Procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which the petition should be directed.
- Provisions requiring significant guidance documents, unless exempted for reasons of exigency, safety, health, or other compelling cause as determined by NASA and the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) Administrator, to undergo a 30-day public notice and comment period; be approved on a non-delegable basis by the NASA Administrator; be reviewed by OIRA; and comply with the applicable requirements for guidance documents including significant regulatory actions.

This final rule also incorporates NASA's existing internal policy and procedures, NASA Policy Directive (NPD) 1400.2, Publishing NASA Documents in the Federal Register and Responding to Regulatory Actions, into the Code of Federal Regulation (CFR) in response to the order. NPD 1400.2 establishes the Agency's policy, procedures, and responsibilities for issuing guidance documents to ensure that the required review and clearance is obtained before issuance and all stages of the rulemaking process are followed.

II. Regulatory Analysis

Executive Order 12866 - Regulatory Planning and Review and Executive Order 13563 – Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and

safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is not a significant regulatory action under Executive Order 12866.

Executive Order 13132 – Federalism

Executive Order 13132 requires agencies to ensure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in the order, and NASA has determined that this action will not have a substantial direct effect or federalism implications on the states and would not preempt any state law or regulation or affect the states' ability to discharge traditional state governmental functions. Therefore, consultation with the states is not necessary.

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. NASA has determined that because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 does not apply.

Executive Order 13771 – Reducing Regulations and Controlling Regulatory Costs

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Regulatory Flexibility Act

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Administrative Procedure Act

This final rule merely incorporates requirements of the order and NASA's existing internal policy and procedures for issuing guidance documents into the CFR. Therefore, in accordance with 5 U.S.C. 553, the Administrator of NASA has concluded that there is good cause to publish this rule without prior opportunity for public comment because the action is of Agency organization, procedure, or practice. See 5 U.S.C 553(b)(3)(A).

Statutory Authority

Part 1204 is established under the National Aeronautics and Space Act (Space Act). In accordance with 51 U.S.C. 20113(a), "In the performance of its functions, the Administration is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law."

Paperwork Reduction Act

This rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

List of Subjects in 14 CFR Part 1204

Administrative practice and procedure.

For reasons set forth in the preamble, and under the authority of 51 U.S.C. 20113, NASA is amending 14 CFR part 1204 as follows:

PART 1204—ADMINISTRATIVE AUTHORITY AND POLICY

1. Add subpart 3 to read as follows:

Subpart 3—NASA Guidance Documents

Sec.

1204.300 General.

1204.301 Review and clearance.

1204.302 Requirements for clearance.

1204.303 Public access to effective guidance documents.

1204.304 Good faith cost estimates.

1204.305 Approved procedures for guidance documents identified as “significant” or “otherwise of importance to the NASA’s interests.”

1204.306 Definitions of “significant guidance document” and guidance documents that are “otherwise of importance to NASA’s interests.”

1204.307 Designation procedures.

1204.308 Notice-and-comment procedures.

1204.309 Petitions for guidance.

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1204.311 Exigent circumstances.

1204.312 Reports to Congress and the Government Accountability Office (GAO).

204.313 No judicial review or enforceable rights.

Authority: 51 U.S.C. 20113.

§ 1204.300 General.

(a) This subpart governs all National Aeronautics and Space Administration (NASA or Agency) employees and contractors involved with all phases of issuing NASA guidance documents.

(b) Subject to the qualifications and exemptions contained in this subpart, the procedures in this subpart apply to all guidance documents issued by NASA after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(c) For purposes of this subpart, the term guidance document includes any statement of Agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the Agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, advisories, and may

include video, audio, and web-based formats. See Office of Management and Budget (OMB) Bulletin 07-02, “Agency Good Guidance Practices,” (“OMB Good Guidance Bulletin”).

(d) This subpart does not apply to:

(1) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(2) Rules of Agency organization, procedure, or practice;

(3) Decisions of Agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

(4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

(5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;

(8) Guidance pertaining to military or foreign affairs functions;

(9) Grant solicitations and awards;

(10) Contract solicitations and awards; or

(11) Purely internal Agency policies or guidance directed solely to NASA employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§ 1204.301 Review and clearance.

All NASA guidance documents, as defined in § 1204.300(c), require review and clearance in accordance with this subpart.

(a) Guidance proposed by a NASA responsible office must be reviewed by the head of the relevant legal practice group within NASA's Office of General Counsel (OGC) and cleared by the General Counsel.

(b) Additional reviews by other NASA offices are also conducted and are described in NPD 1400.2, Publishing NASA Documents in the Federal Register and Responding to Regulatory Actions, <https://nodis3.gsfc.nasa.gov/displayDir.cfm?t=NPD&c=1400&s=2E>.

§ 1204.302 Requirements for clearance.

NASA's review and clearance of guidance shall ensure that each guidance document proposed by a NASA responsible office satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for Agency action);

(b) The guidance document identifies or includes:

- (1) The term “guidance” or its functional equivalent;
 - (2) The issuing NASA responsible office name;
 - (3) A unique identifier, including, at a minimum, the date of issuance and title of the document and its regulatory identification number (RIN), if applicable;
 - (4) The activity or entities to which the guidance applies;
 - (5) Citations to applicable statutes and regulations;
 - (6) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and
 - (7) A short summary of the subject matter covered in the guidance document at the top of the document;
- (c) The guidance document avoids using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement or is addressed to NASA employees and will not foreclose NASA’s consideration of positions advanced by affected private parties;
 - (d) The guidance document is written in plain and understandable English; and
 - (e) All guidance documents include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law, are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or NASA’s policies.

§ 1204.303 Public access to effective guidance documents.

The NASA responsible office issuing guidance documents shall:

- (a) Ensure all effective guidance documents, identified by a unique identifier which includes, at a minimum, the document's title and date of issuance or revision and its RIN, if applicable, are on its website in a single, searchable, indexed database, and available to the public in accordance with § 1204.309;
- (b) Note on its website that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;
- (c) Advertise on its website where the public can comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in § 1204.308 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents. Guidance documents subject to the notice-and-comment procedures, but not published on the Agency's website, will be rescinded; and
- (d) Designate an office to receive and address complaints from the public that NASA is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.

§ 1204.304 Good faith cost estimates.

Even though not legally binding, some Agency guidance may result in a substantial economic impact. For example, the issuance of Agency guidance may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, the proposing NASA responsible office shall, to the extent practicable, make a good faith effort to estimate the likely economic

cost impact of the guidance document to determine whether the document might be significant. When a NASA responsible office is assessing or explaining whether it believes a guidance document is significant, it should, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act. When NASA determines that a guidance document will be economically significant, the NASA responsible office should conduct and publish a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

§ 1204.305 Approved procedures for guidance documents identified as “significant” or “otherwise of importance to the NASA’s interests.”

(a) For guidance proposed by a NASA responsible office, if there is a reasonable possibility the guidance may be considered “significant” or “otherwise of importance to NASA’s interests” within the meaning of § 1204.306 or if the NASA responsible office is uncertain whether the guidance may qualify as such, the NASA responsible office should e-mail a copy of the proposed guidance document (or a summary of it) to OGC for review and further direction before issuance. Unless exempt, each proposed NASA guidance document determined to be significant or otherwise of importance to NASA’s interests must be approved by the NASA Administrator before issuance. In such instances, the NASA Mission Support Directorate (MSD) will:

- (1) Request that the proposing NASA responsible office obtain a RIN to report what NASA is planning to issue;
- (2) Coordinate the guidance document with OMB’s Office of Information and Regulatory Affairs (OIRA) for the interagency review, final significance determination, and clearance; and

(3) Advise the NASA responsible office on coordinating the guidance document for an internal NASA review before submitting it to the NASA Administrator for approval.

(b) If the guidance document is determined not to be either significant or otherwise of importance to NASA's interests within the meaning of § 1204.306, OGC will advise the NASA responsible office to proceed with issuance of the guidance through the NASA MSD for publication in the Federal Register. For each guidance document coordinated through the NASA MSD, the issuing NASA responsible office should include a statement in the action memorandum indicating that the guidance document has been reviewed and cleared in accordance with this process.

§ 1204.306 Definitions of “significant guidance document” and guidance documents that are “otherwise of importance to NASA’s interests.”

(a) The term “significant guidance document” means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Historically, NASA has not issued any significant guidance documents with these implications;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term "significant guidance document" does not include the categories of documents excluded by §1204.306 or any other category of guidance documents exempted in writing by NASA in consultation with OIRA.

(c) Significant and economically significant guidance documents must be reviewed by OIRA under E.O. 12866 before issuance and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(d) Even if not "significant," a guidance document will be considered "otherwise of importance to NASA's interests" within the meaning of this paragraph (d) if it may reasonably be anticipated:

(1) To relate to a major program, policy, or activity of NASA or a high-profile issue pending for decision before NASA;

(2) To involve one of the NASA Administrator's top policy priorities;

(3) To garner significant press or congressional attention; or

(4) To raise significant questions or concerns from constituencies of importance to NASA, such as Committees of Congress, states, Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, or leading representatives of industry.

§ 1204.307 Designation procedures.

(a) OGC may request a NASA responsible office to prepare a designation request for their respective guidance document. Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The NASA responsible office's recommended designation of "not significant," "significant," or "economically significant," as well as a justification for that designation.

(b) Except as otherwise provided in paragraph (c) of this section, the NASA MSD will seek significance determinations from OIRA. Prior to publishing these guidance documents, and with sufficient time to allow OIRA to review the document in the event that a significance determination is made, the NASA MSD should provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of "significant" or "economically significant" under Executive Order 13891.

(c) Unless they present novel issues, significant risks, interagency considerations, unusual circumstances, or other unique issues, the categories of guidance documents exempted pursuant to an agreement between NASA and OIRA do not require designation by OIRA.

§ 1204.308 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, all proposed NASA guidance documents determined to be a "significant guidance document" within the meaning of § 1204.306 are subject to notice-and-comment procedures. The issuing NASA responsible office shall publish an advance notice in the Federal Register of the proposed guidance document and invite public comments for a minimum of 30 days, then publish a response to major concerns raised in the comments when the final guidance document is published.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OGC finds, in consultation with OIRA, the proposing NASA responsible office, and the NASA Administrator, good cause that notice-and-comment procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons in the guidance issued). Unless the NASA responsible office, in consultation with OGC, advises otherwise in writing, the categories of guidance exempted pursuant to an agreement between NASA and OIRA will be exempt from the requirements of paragraph (a) of this section.

(c) Where appropriate, the NASA responsible office, in consultation with OGC, may recommend to the NASA Administrator that a particular guidance document that is otherwise of importance to NASA's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 1204.309 Petitions for guidance.

(a) Interested parties may submit petitions to NASA requesting withdrawal or modification of any effective guidance document by selecting the "petition" link for the respective guidance document located on the NASA Regulations website at:
https://nodis3.gsfc.nasa.gov/CFR_rep/CFR_list.cfm.

(b) Interested parties should include the guidance document's title and a summarized justification describing why the document should be withdrawn, how it should be modified, or the nature of the complaint in the petition in order to receive an expedited response.

(c) The responsible office, in consultation with OGC, will review the petition, determine if withdrawal or modification is necessary or the best way to resolve the complaint, and respond to the petitioner with a decision no later than 90 days after receipt of the request.

§ 1204.310 Rescinded guidance.

No NASA office or NASA Center may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 1204.311 Exigent circumstances.

In emergency situations or when NASA is required by statutory deadline or court order to act more quickly than normal review procedures allow, the issuing NASA responsible office shall coordinate with NASA's MSD to notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this subpart at the earliest opportunity. Wherever practicable, the issuing NASA responsible office should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this subpart.

§ 1204.312 Reports to Congress and the Government Accountability Office (GAO).

Unless otherwise determined in writing by NASA, it is the policy of the Agency that upon issuing a guidance document determined to be "significant" within the meaning of § 1204.306, the issuing NASA responsible office will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the "Congressional Review Act").

§ 1204.313 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of NASA. As such, it is for the use of NASA personnel only and is not intended to, and does not create any right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

Nanette Smith,
Team Lead for NASA Directives and Regulations.
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