

DEPARTMENT OF ENERGY

Guidance on Ex Parte Communications

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Notice of guidance on ex parte communications.

SUMMARY: The Department of Energy sets forth guidance on ex parte communications during informal rulemaking proceedings. The guidance is intended to encourage the public to provide DOE with all information necessary to develop rules that advance the public interest, while ensuring that rulemaking proceedings are not subject to improper influence from off-the-record communications. As President Obama stated in a January 21, 2009 memorandum, “Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.” (74 Fed. Reg. 4685) DOE intends this guidance to provide both increased public participation in the rulemaking process and additional transparency during that process.

DATES: This guidance on ex parte communications is effective on October 13, 2009.

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SUPPLEMENTARY INFORMATION: The following guidance, provided in the form of answers to “Frequently Asked Questions”, is intended to encourage stakeholders to meet with, and provide information and advice to, DOE officials during the rulemaking process by setting forth simple and clear procedures governing meetings, or telephone or electronic contact, with DOE officials to discuss a pending rulemaking action. Informal stakeholder communications other than written comments on the proposed rule or presentations at a public hearing that occur during the public comment period are generally lawful under section 501 of the Department of Energy Organization Act and the Administrative Procedure Act (5 U.S.C. 553). Informal communications, however, must be disclosed properly to ensure fairness for all stakeholders, the integrity of the rulemaking process, and the adequacy of the record in support of the final rule.

Frequently Asked Questions on Ex Parte Communications with DOE Employees:

(1) What is the purpose of DOE’s Ex Parte Guidance?

The ex parte guidance governs the manner in which interested parties may communicate with DOE during its informal rulemaking proceedings, termed “permit-but disclose” proceedings for purposes of this guidance. It is designed to encourage additional public participation in the rulemaking process, while ensuring that all such participation is open and transparent.

(2) What types of proceedings are considered “permit-but-disclose” proceedings?

Permit-but-disclose proceedings are comprised of: (i) proceedings in response to petitions for rulemaking; (ii) informal rulemaking proceedings upon release of an advanced notice of

proposed rulemaking, a notice of public meeting or, if neither of those documents are utilized, the notice of proposed rulemaking; (iii) proceedings involving an interim final rule.

(3) Does the ex parte guidance apply to me?

The ex parte guidance applies to anyone who engages in the kind of communications covered by the guidance.

(4) What types of communications are covered by the ex parte guidance?

The guidance governs ex parte presentations to DOE decision makers during its “permit-but-disclose” proceedings.

(5) What is an ex parte presentation?

An ex parte presentation is a communication directed to the merits or outcome of a proceeding that, if written (including e-mail), is not provided to all interested parties or, if oral, is made without advance notice to all interested parties and without opportunity for such parties to be present.

(6) Who are DOE decision making personnel?

Decision-making personnel are those DOE employees who are or may reasonably be expected to be involved in formulating a rulemaking.

(7) What are the disclosure requirements applicable in “permit-but-disclose” proceedings?

For the proceedings listed above, in-person meetings or telephone calls between DOE and an interested party or parties will require a memorandum memorializing the meeting to be placed in the public docket. The memorandum should include a summary of the issues discussed as well as a list of attendees and date of the meeting. The interested party or

parties must complete the memorandum and submit it to DOE for inclusion in the public docket within one week of the meeting. The DOE reserves the right to supplement these public filings with additional information as necessary or to demand that the party making the filing do so (i.e., if DOE believes that important information was omitted or characterized incorrectly).

If outside parties bring documents to give DOE employees, the employees should inform the outside parties that those documents will be put in the record. If the outside parties do not want DOE employees to put their documents in the record, they should not, except as specified in this response, provide the documents to or leave the documents with DOE.

Interested parties may submit documents under a request for confidential treatment; however, a public version of these documents must be provided for the record for DOE to rely on the information as part of a rulemaking. In addition, DOE will make its own determination on whether documents should be released in response to a request for the documents under the Freedom of Information Act.

(8) What communications are not covered by the ex parte guidance?

Phone calls that DOE employees or contractors initiate to gather information as part of the rulemaking process need not be memorialized. If new data is obtained as a result of such contacts after issuance of the notice of proposed rulemaking, it may be necessary to seek public comment on the data for DOE to rely on the data in the final rule.

(9) What is DOE's role in ex parte communications?

To safeguard the integrity of DOE's rulemaking process, the primary goal of DOE employees in ex parte communications is to listen and ask clarifying questions. The DOE will not engage in negotiation or reveal substantive aspects of the forthcoming rulemakings.

The DOE is the receiver of information. If meetings are held with an outside party while the rulemaking is pending, every reasonable effort will be made to meet with any other outside party who requests a similar opportunity.

(10) Where should memoranda memorializing ex parte communications be sent?

Memorandums memorializing ex parte communications should be provided to the e-mail address listed above, *expartecommunications@hq.doe.gov*.

(11) How does DOE give notice of ex parte communications?

DOE is currently developing a link on the homepage of the Office of the General Counsel where ex parte communications will be posted. Further information on the website will be provided in a future **Federal Register** notice.

Issued in Washington, DC, on October 7, 2009

Scott Blake Harris
General Counsel