

Department of Energy Interim Administrative Appeal Procedure for Actions Related to 37 C.F.R. Part 401

§ 1 Purpose, Scope and Applicability.

- (a) This Interim Procedure establishes the administrative appeal process to be used by any contractor for an administrative review of a determination by the Department of Energy (DOE), including the National Nuclear Security Administration, to:
 - (i) use one of the exceptions at 37 C.F.R. § 401.3(a)(1)-(6);
 - (ii) take any of the actions listed in 37 C.F.R. § 401.11(b), including, for example, a refusal to grant a waiver under a U.S. Competitiveness provision.
- (b) Notwithstanding any of other provision herein, this Procedure does not apply to:
 - (i) any action appealable to the Patent Compensation Board pursuant to 10 C.F.R. Part 780 or the DOE Contract Appeal Board pursuant to 10 C.F.R. Part 1023
- (c) This Interim Procedure does not apply to any determination made by DOE on whether to waive all or any parts of its rights or to retain all of its rights pursuant to 10 C.F.R. Part 784. This Interim Procedure does apply to any action under a Patent Rights Clause regarding the terms and conditions of any patent waiver that was granted by DOE pursuant to 10 CFR Part 784, including, for example, a refusal to grant a waiver under a U.S. Competitiveness provision.
- (d) This Interim Procedure is implemented in accordance with 37 C.F.R. §§ 401.11(c) and (d).
- (e) The availability of the appeal process under this Interim Procedure is limited to the Contractor or the assignee of the Contractor impacted by the DOE action. This Interim Procedure does not impact the right of the Contractor, an inventor, assignee, or an exclusive licensee of the Contractor to file a petition in the U.S. Court of Federal Claims pursuant to the provisions of 35 U.S.C. § 203(b).
- (f) This Interim Procedure utilizes the delegation of authority by the Secretary of Energy to the Director of Office of Hearings and Appeals of DOE (HG) to “[c]onduct adjudicatory proceedings and issue orders in any instance in which a statute vesting authority in the Secretary requires an adjudication or appellate procedure and express Departmental procedures do not specify the manner in which the statutory authority is to be exercised.” Delegation Order No. 00-016.00, Dec. 6, 2001.

Definitions.¹

Contractor means any party to a DOE Funding Agreement, including any contractor, sub-contractor, recipient, sub-recipient, awardee, sub-awardee or other person, in which obligations are created between the party and DOE due to the existence of the DOE Funding agreement.

DOE means the Department of Energy, established by the Department of Energy Organization Act (Pub. L. 95-91; 42 U.S.C. § 7101).

DOE Funding Agreement means any funding agreement with DOE as defined by the Bayh-Dole Act (35 U.S.C. § 201), including any sub-agreements to any of the forgoing, when the contract, subcontract, arrangement, or sub-agreement includes a Patent Rights Clause. Such term includes

¹ These definitions are provided as a guide for purposes of this interim appeals procedure. To the extent that there is any conflict between the definition of a term in these procedures and the patent clause of the DOE agreement at issue, the definition of such term in the patent clause of the DOE agreement at issue shall control.

any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under the aforementioned agreements.

DOE Official means the Contracting Officer, DOE Patent Counsel or Field Patent Counsel, GC-62 or other DOE employee who approved the DOE action being appealed.

GC-62 means the DOE Office of the Assistant General Counsel for Technology Transfer and Intellectual Property.

HG means the Office of Hearings and Appeals of the Department of Energy, the entity responsible for hearing appeals under this interim procedure.

Patent Counsel means the DOE Patent Counsel assisting the contracting activity.

Patent Rights Clause means the Patent Rights Clause at 37 C.F.R. § 401.14 and/or any clause in a DOE Funding Agreement or required to be a part of a DOE Funding Agreement due to applicable federal statutes, regulations, or policies regarding the ownership, licensing or other rights to any invention related to or made under the DOE Agreement, including, but not limited to, the right to patent said invention.

Patent Waiver Regulations means the Department of Energy patent waiver regulations at 10 C.F.R. Part 784.

Secretary means the Secretary of Energy.

Subject Invention means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under a DOE Funding Agreement, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act (7 U.S.C. § 2401(d))) must also occur during the period of contract performance.

§ 2 Interim Process.

A Contractor may appeal an action listed in 37 C.F.R. § 401.3 (a)(1)-(6) or 37 C.F.R. § 401.11(b) by a DOE Official to HG. The interim appeal process for these actions shall be initiated, conducted, and decided pursuant to the existing HG general procedures set forth in 10 C.F.R. Part 1003, although any timelines set forth in 37 C.F.R. § 401.4 shall take precedence if the HG general procedures conflict. Any notice to DOE required by the provisions of 10 C.F.R. Part 1003 must be copied to the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Avenue SW, 6F-048, Washington, DC 20585, in addition to any requirements in 10 C.F.R. Part 1003 to submit notice directly to HG.