

DOE Proposes to Amend Efficiency Rulemaking Procedures

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The Department of Energy (DOE) has published a major proposal to update and modernize its current procedures for energy efficiency rulemaking (Process Rule).¹ DOE will hold a public meeting on the proposal on March 21, 2019; comments are due by April 15, 2019.

Opportunity for input into Process Rule amendments

This proposal presents an important opportunity for industry to help shape the administrative process for standards and test procedures that will affect their products. The stakes are high, and the amended Process Rule will have the potential to significantly impact multiple parties and stakeholders. DOE will take all views into account – pro and con.

DOE's current Process Rule

Due to dissatisfaction with DOE's appliance rulemaking procedures under the Energy Policy and Conservation Act (EPCA),² the agency in the mid-90s developed extensive new procedures. The resulting Process Rule was published in 1996.³ It includes such things as early input from stakeholders and highly detailed analysis by DOE. It states that the agency can deviate from or revise its criteria if necessary or appropriate and notice is provided.

DOE's proposal to amend the Process Rule

DOE's proposal indicates that, while there have been many positive results from the 1996 Process Rule, the agency is considering further improvements. Key features of the proposal include the following:

The Process Rule would be binding on DOE. DOE says that the current Process Rule is not binding on the agency. The agency believes that requiring mandatory compliance on its part would clearly promote a rulemaking environment that is predictable and consistent.

The Process Rule would apply to both consumer products and commercial equipment. The current Process Rule by its terms applies only to consumer products, but DOE in practice has also applied it to commercial equipment. The proposal makes clear that this practice will continue. An exception is equipment subject to ASHRAE 90.1, which is subject to special requirements under EPCA.

The Process Rule would have a revised process for rulemaking priority setting. This would include stakeholder input on setting priorities.

¹ DOE, Energy Conservation Program Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedure for Consumer Products and Commercial/Industrial Equipment, 84 Fed. Reg. 3910 (Feb. 13, 2019).

² 42 U.S.C. § 6291 et seq.

³ 61 Fed. Reg. 36974 (July 15, 1996). These procedures appear at 10 C.F.R. Pt. 430, Subpart C, App. A.

The Process Rule would tighten procedures for designating additional products as “covered products.” Such designation could make the products candidates for potential efficiency standards. DOE’s proposal suggests that the Department should exercise its authority to identify new “covered products” in a limited fashion.

The Process Rule would provide enhanced opportunities for early stakeholder input to determine the need for rulemaking. This would include adding a process for an early assessment review of a potential rule, and for continuing to seek early stakeholder input after the early assessment review. It would also include procedures for more expeditious determinations on whether to amend a rule.

The Process Rule would apply a revised threshold approach on whether the projected energy savings for a standard would be “significant” within the meaning of EPCA. DOE is considering using a revised, multipart threshold methodology: a quad threshold of energy savings (over a 30-year period) of 0.5 quad and a relative percentage threshold value of 10 percent increase in efficiency/decrease in energy usage that would be obtained from setting or amending standards for a given product/equipment. This may be particularly contentious and turn partly on how much flexibility is allowed by the seminal 1985 decision *Natural Resources Defense Council v. Herrington*.⁴ There, the court determined that DOE had established too-stringent criteria to measure whether energy savings of a standard would be “significant.”

Test procedures would be finalized before issuance of a proposal for a standard. The current Process Rule provides for developing test procedures developed before issuance of a notice of proposed rulemaking for a standard. But DOE has deviated on occasion. Such deviation can affect the ability to comment on proposed standards and has been problematic for would-be commenters. DOE proposes that the Process Rule require that test procedures be finalized at least 180 days before publication of a Notice of Proposed Rulemaking for new or amended standards.

The Process Rule would generally require adoption of industry test standards. Under the proposal, industry test standards would be adopted without modification unless they would be unduly burdensome to conduct or would not produce test results that reflect energy efficiency, energy use, and estimated operating costs of equipment during a representative average use cycle.

The Process Rule would include provisions relating to the use of direct final rules (DFRs) and negotiated rulemaking (NR). DFRs and NR are mechanisms already used by DOE. The Process Rule would clarify DOE’s DFR authority; the conditions a submitted

⁴ 768 F.2d 1355 (D.C. Cir. 1985).

joint proposal must meet for the agency to consider publication; and DOE's obligations upon receipt of an adverse comment. The Process Rule would also contain provisions consistent with the Negotiated Rulemaking Act, including an Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) transmitting to DOE a report containing a proposed rule or term sheet.

DOE will consider improvements in its analytical methodologies. DOE believes that it needs additional time to determine whether changes to the Process Rule are necessary to address issues raised about its analytical methodologies. It is seeking peer review of its methodologies and what changes would be needed to improve on its current approach. Any potential changes to the Process Rule that might be appropriate based on the results of its peer review and any methodological update would be addressed in a subsequent proceeding to amend the Process Rule.

DOE will improve its assessment of cumulative regulatory burden. Many in industry have thought that DOE should account more comprehensively for cumulative regulatory burden in standards rulemakings in light of substantial burdens from multiple regulatory requirements. DOE says that it commits to improving its assessment of burdens through its modeling approaches and that it remains open to constructive feedback. This proceeding provides an opportunity to provide such feedback.

DOE will consider conducting retrospective review of energy savings and costs of standards. Such a review would be part of the agency's pre-rulemaking process. DOE believes that a comprehensive review could be beneficial, but it also recognizes the limits on its resources to do it. The agency has not reached a conclusion as to how to proceed. It notes that the early assessment processes proposed in the Process Rule proceeding incorporates an element of retrospective review.

DOE will consider certification, compliance, and enforcement (CCE) separately. DOE has received comments on CCE-related issues. It says that these relate to regulations other than the Process Rule. Therefore, it plans to deal with them in separate rulemakings.

Conclusion

The Process Rule proposal would make changes broadly affecting industry. Interested parties should take advantage of this opportunity to weigh in.

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