

DOE Again Amends Energy Efficiency Process Rule

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The evolution of the Department of Energy (DOE) energy efficiency procedures continues. DOE has just adopted, for the fourth time in four years, amendments to the agency's Process Rule.¹ This is the key rule governing DOE's practices in adopting energy conservation standards and test procedures.² The changes generally require less process and time for DOE to regulate. They involve DOE coverage determinations; the processes for developing standards and test procedures; and special procedures for equipment subject to ASHRAE Standard 90.1. More amendments are in the offing: DOE says that it intends to have separate rulemakings on ASHRAE equipment and on DOE's analytical methodology for developing standards. The regulated community needs to keep abreast of these rulemakings as they can have important substantive and timing consequences.

In 2020, the Trump-era DOE twice revised the Process Rule, which had been in place since 1996.³ But on Inauguration Day, President Biden issued an Executive Order⁴ requiring DOE to consider undoing these revisions. In 2021, DOE issued a final rule rejecting many of the Trump-era changes to the Process Rule.⁵ DOE said that its 2021 revisions were consistent with longstanding agency practice and would remove "unnecessary obstacles" to the agency's ability to meet its obligations under the Energy Policy and Conservation Act (EPCA).⁶

DOE has just issued a new set of amendments. This final rule includes additional changes to undo what DOE perceives as a "one-size-fits-all" approach in the Trump-era Process Rule that impedes its ability to act on a timely basis. And DOE says that further revisions are planned.

The just-issued amendments include the following:

Shortening the Time Periods for Coverage Determinations (Final Rule at 24344-47, 24359-60).

EPCA specifies certain types of consumer products and commercial/industrial equipment as "covered." It also contains provisions allowing DOE to designate other types as covered.⁷ DOE makes such designations through coverage determination rulemakings, as provided in Section 5 of the Process Rule.

In 2020, DOE made changes (i) requiring that it initiate a standards rulemaking with an early assessment request for information (RFI); (ii) mandating that the preliminary stages of a standards rulemaking include either a framework document/preliminary analysis or an advance notice of proposed rulemaking (ANOPR); and (iii) setting minimum comment periods for Notice of Proposed Rulemaking (NOPR) and pre-NOPR documents.

DOE has now revised Section 5 to expedite coverage determination proceedings. It has eliminated the requirement that a coverage determination rulemaking begin with a notice of proposed determination (NOPD). It has also eliminated the requirement that final coverage determinations be published prior to the initiation of any test procedure or standards rulemaking and at least 180 days prior to publication of a test procedure NOPR; rather, coverage determinations are simply to be finalized prior to publication of a test procedure NOPR. The revision also allows DOE to propose, if necessary, an amended coverage determination before proceeding with a test procedure or standards rulemaking.

Shortening the Process for Developing Energy Conservation Standards (Final Rule at 24347-49, 24360-61). In 2020, DOE made a number of changes to its process for developing standards. This included changes in Section 6 (i) to require that DOE initiate a standards rulemaking with an early assessment RFI; (ii) to mandate that the preliminary stages of a standards rulemaking include either a framework document/preliminary analysis or ANOPR; and (iii) to set minimum comment periods for NOPR and pre-NOPR documents (*i.e.*, not less than 75 calendar days for NOPR documents and not less than 75 calendar days for pre-NOPR documents).

DOE has now adopted amendments to Section 6 to allow for a more expedited rulemaking process in appropriate cases. DOE has eliminated the requirement for a separate early assessment RFI. In determining whether to consider establishing or amending any energy conservation standard, DOE will publish one or more preliminary, pre-NOPR documents. Such document(s) could take several forms depending upon the specific proceeding, including a framework document, RFI, NODA, preliminary analysis, or ANOPR. Comment periods for standards rulemaking documents will be determined on a case-by-case basis with a minimum 60-day comment period for NOPRs.

Shortening the Process for Developing Test Procedures (Final Rule at 24349-51, 24361-62). In 2020, DOE changed its process for developing test procedures. In particular, it amended Section 8 to require that DOE (i) initiate a test procedure rulemaking with an early assessment RFI; and (ii) identify any necessary modifications to established test procedures prior to initiating the standards development process.

DOE has now adopted revisions to Section 8 to eliminate the requirement for a separate early assessment RFI. Comment periods for test procedure rulemaking documents will be determined on a case-by-case basis with a minimum 60-day comment period for NOPRs. And DOE is eliminating the requirement that it identify necessary modifications to a test procedure prior to initiating an associated standards rulemaking.

Revising Process Requirements for ASHRAE Equipment (Final Rule at 24351-54, 24362-63). Congress in EPCA established “a separate and unique regulatory scheme”⁸ for DOE rulemakings of certain covered equipment addressed by ASHRAE Standard 90.1, Energy Standard for Buildings Except Low-Rise Residential Buildings, including specific requirements for both standards and test procedures.⁹ In 2020, DOE added Section 9 to the Process Rule specifically addressing so-called “ASHRAE equipment” for the first time.

DOE now says that, while it sees value in setting forth the statutory requirements and DOE's regulatory process for covered ASHRAE equipment, a subsequent review suggested that DOE's initial efforts to explain the applicable ASHRAE requirements could be improved—both in terms of better delineating the rulemaking process for covered ASHRAE equipment and removing constraints that are neither compelled by the statute nor consistent with DOE's past practice.

To that end, DOE has revised Section 9 to create separate, detailed provisions for standards and test procedure rulemaking requirements. In this regard, DOE has concluded that the 2020 amendments erroneously applied EPCA's timelines for standards to test procedures as well and reverses the 2020 judgment. Other changes include that the ASHRAE provisions in the Process Rule are triggered when an updating version of 90.1 is published. DOE has also clarified that the ASHRAE provisions in the Process Rule would be triggered only when an updated industry test procedure contains modifications of relevance to DOE metrics. And it has removed language from Section 9 that suggested that ASHRAE not acting to amend a standard is a decision affirming the current standard.

DOE has declined to finalize some of the proposed revisions from the 2021 NOPR relating to ASHRAE equipment, however. In particular, DOE is not adopting in the current final rule proposed revisions dealing with regulated metrics, the baseline for energy conservation standards analysis, adoption of industry test procedure sections not relevant to the DOE test procedure, or consistency with the industry test procedure. DOE will further consider these proposals and other ASHRAE-related issues in a separate process.

Considering Changes to DOE's Analytical Methodology in a Separate Rulemaking (Final Rule at 24354-55). DOE's 2021 NOPR included proposed changes to its analytical methodology for developing standards. These included proposed revisions on impacts on manufacturers, private impacts on consumers, impacts on utilities, and impacts on the environment. In the new final rule, DOE has decided that it will consider changes to its methodologies in a separate notice-and-comment process. That proceeding is to be informed by a 2022 report on a peer review conducted by the National Academy of Sciences on DOE's methods for setting standards.

Conclusion. DOE currently has standards and test procedures for more than sixty categories of products and equipment and is typically working simultaneously on fifty to one hundred rulemakings. The Process Rule applies to all these proceedings—and hence has a broad effect on stakeholders. They should keep informed about the Process Rule—including participation in the further amendments proceedings that DOE is contemplating.

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For more information on HWG LLP's energy practice, please contact [Sean A. Lev](#), [John A. Hodges](#), or [Jason E. Neal](#).

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- ¹ DOE, Office of Energy Efficiency and Renewable Energy, Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final Rule, 89 Fed. Reg. 24340 (April 8, 2024).
- ² 10 C.F.R. § 430, Subpt. C, App. A (Process Rule).
- ³ DOE, Office of Energy Efficiency and Renewable Energy, Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final Rule, 85 Fed. Reg. 8626 (Feb. 14, 2020); DOE, Office of Energy Efficiency and Renewable Energy, Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, Final Rule, 85 Fed. Reg. 50937 (Aug. 19, 2020). For a detailed analysis of the 2020 amended Process Rule, see Scott Blake Harris, John A. Hodges, Sam Walsh, and Stephanie Weiner, *DOE Amends Efficiency Rulemaking Procedures; Proposes Amended Standards Selection* (Feb. 24, 2020), <https://hwglaw.com/wp-content/uploads/2022/01/DOE-Issues-Amendments-to-Process-Rule-2-24-20-1.pdf>.
- ⁴ Exec. Order No. 13990 of January 20, 2021, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).
- ⁵ DOE, Office of Energy Efficiency and Renewable Energy, Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, Final Rule, 86 Fed. Reg. 70892 (Dec. 13, 2021). The 2021 amendments were discussed in a prior advisory. Scott Blake Harris, John A. Hodges, and Stephanie S. Weiner, *DOE Amends Energy Efficiency Process Rule* (Dec. 13, 2021) <https://hwglaw.com/wp-content/uploads/2021/12/DOE-Amends-Energy-Efficiency-Process-Rule-12-13-2021.pdf>.
- ⁶ 42 U.S.C.A. § 6291 *et seq.*
- ⁷ *Id.* §§ 6292(b), 6312(b).
- ⁸ 89 Fed Reg. at 24351.
- ⁹ 42 U.S.C. §§ 6313(a)(6), 6314(a)(4). ASHRAE is The American Society of Heating, Refrigerating and Air-Conditioning Engineers.