

**DOE RELEASES GAME PLAN ON ENERGY EFFICIENCY, NATURAL GAS EXPORTS,
NATIONAL LABS, AND NEPA**

By Scott Blake Harris, Sam Walsh, and John A. Hodges

Secretary of Energy Rick Perry has released an important report setting forth plans to reduce regulatory burdens.¹ It reflects efforts of DOE's Regulatory Reform Task Force acting pursuant to President Trump's Executive Order 13783.²

DOE is seeking to target "those existing DOE rules that are obsolete, unnecessary, unjustified, or simply no longer make sense." The report highlights potential changes in DOE's: programs governing the energy efficiency of appliances and equipment; rules for natural gas exports; policies for National Laboratories; and compliance with the National Environmental Policy Act (NEPA).

Such potential changes at DOE warrant close attention by industry, which will surely be affected by the outcome of DOE's deliberations. As importantly, there will be numerous opportunities for industry to provide its views and thus help shape DOE's policies.

Review of DOE's Energy Efficiency Program

DOE's appliance and equipment efficiency program is a key element of the Energy Policy and Conservation Act of 1975 (EPCA). The pace of the program dramatically accelerated during the Obama Administration. The Trump Administration is now considering numerous changes to reduce perceived burdens on industry.

Review the Process Rule. Due to dissatisfaction with DOE's rulemaking process, the agency in 1996 issued procedures, interpretations, and policies for consideration of new or revised efficiency standards.³ These included such things as early input from stakeholders and highly detailed analyses. DOE will consider issuing a request for information (RFI) on how to amend or improve the Process Rule.

Reduce the Burden of Serial Rule-making. EPCA requires that no later than 6 years after the issuances of a standards rule, DOE must publish (i) a notice that standards for the product don't need to be amended; or (ii) a notice of proposed rulemaking for new proposed standards. Many in industry would like more time between rulemaking

¹ Department of Energy (DOE), Final Report on Regulatory Review under Executive Order 13783 (Oct. 24, 2017).

² Executive Order 13783 (Promoting Energy Independence and Economic Growth).

³ 10 C.F.R. Part 430, Subpt. C, App. A (Process Rule).

proceedings. DOE indicates that this would require a change to EPCA, which is outside the scope of Executive Order 13783. But the agency says it could consider regulatory changes since the 6-year period may not provide adequate time to determine whether standards “are working as intended and the underlying assumptions are sound.” These changes could include:

- o Issuing a “no amended standards” determination where the evidence supports that and there would be significant upfront costs to achieve a small energy savings.
- o Considering “voluntary, non-regulatory, and market-based alternatives to standards-setting.” DOE provides as an example using established industry test procedures as the DOE test procedures. There is strong precedent for this: DOE regulations often incorporate industry test procedures.
- o Considering establishing a baseline for energy savings from a standard that are not significant and thus not economically justified. DOE would need to be careful. Such an effort in the Reagan era was derailed when a court determined that DOE had established too-stringent criteria to measure whether energy savings would be significant.⁴
- o Refraining from enacting standards through a direct final rule. The ground for this is the purported economic burden such rules may impose on households and the lack of consumer voice in the rulemaking process. But EPCA specifically provides for adopting direct final rules in light of their usefulness in achieving consensus by interested persons fairly representative of relevant points of view, while also providing opportunity for public comment. Industry should be concerned about elimination of this useful tool.

Improve Cost-Benefit Analysis. DOE is considering setting clear definitions for costs and benefits to assure that standards both save energy and minimize economic burdens. This includes, *e.g.*, how to address a situation in which costs would exceed benefits for large portions of the public. It also includes review of previous DOE analysis before the analysis is used for new rules.

Reconsider standards and test procedures for particular products. DOE is considering suggestions for reconsideration of numerous standards and test procedures, based on excessive regulatory burdens. DOE will need to tread carefully in light of EPCA’s so-called “anti-rollback rule” applicable to prescribing amended standards.⁵

⁴ *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

⁵ 42 U.S.C. § 6295(o)(1).

Follow the requirements of EO 13783 when analyzing climate impacts. Climate change and the Social Cost of Carbon (SCC) are hot-button topics. The Trump Administration has pushed back against the Obama-era approach, withdrawing various SCC documents and requiring agencies to follow OMB Circular A-4 (Regulatory Analysis) in climate analyses. DOE says that it will follow these requirements in its regulations.

Other opportunities to relieve burdens. DOE says that it will continue to consider other areas where it may be possible to relieve burdens on domestic energy production. For example, DOE will consider possible flexibility for rules on fossil fuel consumption in Federal buildings, buildings codes, nuclear export licensing, and DOE's proposed nuclear damage contingent cost allocation rule. This provides a good opportunity for industry to raise concerns it may have.

Streamline Natural Gas Exports

On September 1, 2017, DOE requested comment on a proposal to expedite permitting of small-scale LNG export applications (defined as amounts less than 0.14 billion cubic feet per day). The proposal provides that DOE would grant any small-scale LNG export application filed with the agency that is eligible for a categorical exclusion under NEPA. The proposal rule is likely to apply to a limited universe of projects, because only applicants that intend to use existing liquefaction facilities will be eligible for categorical exclusion from NEPA.

Despite its narrow application, the proposal is likely to be open to legal challenge because it would remove the opportunity for public comment on each export application in favor of a single, blanket public interest finding that all small-scale exports are in the public interest. Legal challenges will focus on the language in Section 3 of the Natural Gas Act that requires that DOE issue export authorization orders “upon application” and “after opportunity for hearing.”

DOE's report also notes that it will examine whether future rulemaking can allow for expediting large-scale export applications, but no specific actions are described.

Review National Laboratory Policies

Secretary Perry has taken a strong interest in the National Laboratories that support DOE's missions, and the Task Force has reviewed the Labs' operations and procedures.

The Task Force has identified ways in which the Labs can focus more time and resources on early-stage research and development of innovative energy technologies. This is consistent with DOE's budget request, which provides for early-stage R&D for such things as building energy technologies affecting appliances and equipment and their integration into grid-connected building systems. DOE has also stressed such efforts in, *e.g.*, announcements on Energy Efficiency Day (October 5, 2017).

Review DOE's NEPA Regulations and Implementation

DOE is seeking to improve its NEPA document approval processes. The Task Force recommendations include:

- Reforming the NEPA process for permitting and export applications, including LNG and infrastructure.
- Assessing whether DOE should grant more categorical exclusions, adopt categorical exclusions already approved by other Federal agencies, and foster interagency collaboration on categorical exclusions.
- Removing language in DOE regulations that is not consistent with overarching Council on Environmental Quality (CEQ) regulations.

Conclusion

DOE's report indicates that the agency intends to carry out its statutory duties – but in a manner that reduces regulatory burden. How DOE ultimately does so is yet to be determined. Industry has the opportunity to weigh in and thus help shape policies that could be of significant benefit.

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