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DOE PROPOSES ELIMINATING BOTTLENECK IN ENERGY EFFICIENCY WAIVER PROCESS*By Scott Blake Harris, John A. Hodges, Sam Walsh, and Stephanie Weiner*

The Department of Energy (DOE) is continuing its effort to streamline its energy efficiency program.¹ To that end, it has proposed a significant change to its test procedure waiver rules: allowing an interim waiver to go into effect if DOE has not acted on the application for interim waiver within 30 days.² This could help get new and innovative products to market without undue delay. Comments on the proposal are due by July 1, 2019.

DOE's current waiver rules contribute to significant delays

Under the Energy Policy and Conservation Act (EPCA), test procedures necessarily play a central role in DOE's efficiency program.³ A manufacturer can only certify that its products meet the applicable energy efficiency standard if they are tested using the DOE approved test procedure. But when a manufacturer develops new technology or product, the applicable test procedure may not fairly reflect energy usage. In these circumstances, the Department may grant a waiver of the test procedure and allow the manufacturer to use an alternative procedure that more fairly measures energy usage.⁴ In practice, however, DOE's rules have allowed for extensive delays in providing waiver relief, thereby stranding innovative products.

The problem arises when an applicant seeks an interim waiver. An interim waiver should be granted if it appears likely that the underlying petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver.⁵ Thus, the interim waiver is intended to allow a manufacturer to market a new product while the underlying petition for waiver goes through the administrative process, including public comment.

¹ 10 C.F.R. pts. 429-31.

² DOE, Office of Energy Efficiency and Renewable Energy, Test Procedure Interim Waiver Process, Notice of proposed rulemaking, request for comment, 84 Fed. Reg. 18414 (May 1, 2019).

³ 42 U.S.C. § 6291 *et seq.* This includes test procedures' roles in making efficiency representations, labeling, certifying compliance with efficiency standards, and enforcement.

⁴ 10 C.F.R. §§ 430.27 (consumer products), 431.401 (commercial and industrial equipment). A petition for waiver would be appropriate where a product has a characteristic that either prevents testing pursuant to the DOE test procedure, or the test procedure may evaluate the product in a way so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. In such circumstances, DOE may provide a waiver of the DOE test procedure and impose an alternative test procedure for the product until the agency changes its rules to address the product.

⁵ *Id.* §§ 430.27(e)(2), 431.401(e)(2).

When an interim waiver is requested under current law, DOE is to notify the applicant of the disposition of the petition within 30 business days, but only “[i]f administratively feasible.”⁶ While the phrase “[i]f administratively feasible” encourages action within 30 days, it also means that 30 days is not a hard deadline. In practice, this flexibility has created room for significant delays. DOE acknowledges that it has failed to act for months on requests for interim waivers and, in four cases in 2017 alone, took more than 350 days to act.

DOE also states that this delay has imposed negative consequences for manufacturers who cannot bring their products to market absent a waiver that allows them to test their products and certify them as compliant with DOE energy conservation standards.

DOE previously dealt with the delay problem by issuing an enforcement policy, but this has proved to be incomplete relief. In 2010 (and again in 2017), DOE said that to prevent the agency’s administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, the agency, as a matter of policy, “will refrain from an enforcement action related to a specific basic model while a waiver request is pending with the Department.”⁷ This well-intended policy has proved to be cold comfort for at least some applicants. Despite the policy, administrators of DOE’s product certification system have declined to allow certification of products in the DOE certification database until an interim waiver has been officially granted, thus impeding efforts to get the products into the marketplace.

DOE proposes 30-day deadline for action on interim waivers

To address the inordinate delays in acting on interim waivers, and the lack of adequate relief under the enforcement policy, DOE now proposes to drop the “[i]f administratively feasible” language and mandate disposition of an interim waiver request within 30 business days. Should DOE fail to satisfy this requirement, the request for interim waiver would be deemed granted.

DOE believes that this would reduce manufacturers’ burden associated with the interim waiver application process, provide them with greater certainty, and speed the availability of innovative product options to consumers.

DOE also proposes that if it ultimately denies the petition for waiver or grants the petition with a different alternate test procedure than specified in the interim waiver, it will provide a grace period of 180 days for the manufacturer to begin to use the alternate test procedure specified in the decision and order on the petition.

DOE requests comment on its proposal

The entire proposal is open to public comment. DOE has flagged two specific issues for comment.

⁶ *Id.* §§ 430.27(e)(1), 431.401(e)(1).

⁷ DOE, Enforcement Policy Statement – Pending Test Procedure Waiver Applications (issued: Dec. 23, 2010; re-issued: April 5, 2017).

DOE requests comment on its proposal to specify that an interim waiver would remain in effect until the earlier of the following: a waiver decision is published, or DOE publishes a new or amended test procedure that addresses the issues presented in the waiver.

DOE also requests comment on (i) the length of time manufacturers have previously waited for DOE to provide notification of the disposition of applications for interim waiver (or final decisions on waiver petitions), and (ii) the correlated extent of cost savings and any other benefits they expect to realize as a result of the proposal to specify in the regulations that if the Department fails to issue an interim waiver decision within 30 business days following receipt of an application, the application is deemed granted. DOE seeks, in particular, comment on whether interim waiver delays have affected the availability of seasonal products during peak season and the effects of these delays on manufacturers and consumers.

Conclusion

DOE's proposal, if adopted, would be a significant benefit to manufacturers that could have innovative products that don't fit neatly into DOE test procedures and therefore need waiver relief. Interested parties should take advantage of this opportunity to weigh in.

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