

ENERGY EFFICIENCY ADVISORY

February 5, 2021

Biden Administration Focuses on Energy Efficiency

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Energy efficiency is central to the Biden Administration's ambitious environmental agenda. As a result, we can expect the Department of Energy (DOE) to set new energy efficiency standards for numerous products. President Biden has also charged DOE with reviewing the Trump Administration's procedural rules on how standards are set. That process has already begun, and stakeholders should take advantage of opportunities to participate in these proceedings.

Addressing Efficiency Standards. The Energy Policy and Conservation Act (EPCA)¹ requires DOE to establish energy efficiency standards for covered consumer products and commercial equipment, and to periodically review those standards and then update them if warranted.² There are dozens of standards rules in DOE's pipeline.³ Indeed, during the Trump Administration, states and environmental groups filed still-pending lawsuits⁴ against DOE for missing standards rules deadlines for over 20 products.⁵ The Biden Administration DOE is likely to address this backlog and take up other efficiency matters, such as test procedures used for updated standards.⁶ DOE is also likely to enforce these standards rigorously—and, with the ability to

¹ 42 U.S.C. § 6291, *et seq.*

² DOE must publish a notice of determination that the standards for the product do not need to be amended or publish a notice of proposed rulemaking for new proposed standards. *Id.* § 6295(m)(1).

³ See Office of Management and Budget, Office of Information and Regulatory Affairs, *Agency Rule List – Fall 2020, Dep't of Energy* (last accessed: Feb. 2, 2021), https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1900&csrf_token=1C66B36911F60D88661B0A3567C24492A614BAF3C8847C286386EDB04E8FEB4A6B165EDFCC748F959B6094A3017D5C9D4803B.

⁴ See *New York v. Brouillette*, Case No. 20-cv-9362 (S.D.N.Y., filed Nov. 9, 2020); *Natural Resources Def. Council v. Brouillette*, Case No. 20-cv-9127 (S.D.N.Y., filed Oct. 30, 2020).

⁵ These include water heaters; pool heaters; non-weatherized furnaces and mobile home gas furnaces; clothes dryers; room air conditioners; conventional cooking products; oil furnaces and weatherized gas furnaces; refrigerators and freezers; clothes washers; microwave ovens; direct heating equipment; dishwashers; metal halide lamp fixtures; furnace fans; small electric motors; water and evaporatively cooled commercial air conditioners; commercial water heating equipment; distribution transformers; walk-in coolers and walk-in freezers; commercial refrigerators, freezers, and refrigerator-freezers; electric motors; dedicated outdoor air systems; computer room air conditioners; and variable refrigerant flow air conditioners and heat pumps. The lawsuits had included fluorescent lamp ballasts; DOE subsequently finalized action on those products.

⁶ See *Agency Rule List*, *supra*, fn 3.

impose a civil penalty of \$474 for every unit sold in violation of the rule, it has the clout to do so.

As DOE standards become more stringent, we expect parallel adjustments in DOE's and the Environmental Protection Agency's voluntary Energy Star program—a carrot to induce efficiency gains above DOE mandatory levels. More stringent DOE standards could also encourage more stringent standards abroad.

Reviewing Prior Actions. On Inauguration Day, President Biden issued an Executive Order⁷ requiring DOE and other agencies to “immediately” review numerous actions taken in the last four years and to “consider suspending, revising, or rescinding” actions that are inconsistent with his Administration's environmental and other goals. The Executive Order specifically directs DOE to consider initiating notice-and-comment rulemakings to suspend, revise, or rescind the following DOE actions within set timeframes:

- **Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (Process Rule),**⁸ with major revisions proposed by March 2021 and any remaining revisions proposed by June 2021.

During the Trump Administration, DOE amended the Process Rule, which had been in place since 1996 and sets out DOE's procedures for establishing minimum efficiency standards. The Trump DOE made numerous changes to that rule,⁹ which will be reviewed pursuant to the new Executive Order. For example:

The amended Process Rule provides opportunities for earlier stakeholder input to determine the need for standards rulemaking. Expect DOE to consider whether this and other procedural changes are reasonable or make it unnecessarily difficult to issue standards rules.

A major focus of DOE's review will undoubtedly be whether to retain or reject the amended Process Rule's approach to determining if projected energy savings of a standard would be “significant” within the meaning of EPCA.¹⁰ For many years, DOE

⁷ Executive Order 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).

⁸ Energy Conservation Program for Appliance Standards: 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).

⁹ For a detailed analysis of the 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) at <https://www.hwglaw.com/energy-efficiency-advisory-doe-amends-efficiency-rulemaking-procedures-proposes-amended-standards-selection/>.

¹⁰ See 42 U.S.C. § 6295(o)(3)(B).

considered energy savings to be “significant” as long as they were not “genuinely trivial”—relying on language in *Natural Resources Defense Council v. Herrington*.¹¹ The amended Process Rule adopts a new approach to the term “significant” that sets numeric thresholds for determining “significant” energy savings. On that basis, DOE now determines the significance of energy savings using either 0.3 quad of aggregate site energy savings or a 10-percent decrease in energy use (measured in quads)—both over a 30-year period.

Also expect scrutiny of the amended Process Rule requirement that DOE adopt industry test standards without modification unless they would be unduly burdensome to conduct or would not produce test results that reflect energy efficiency, energy use, or estimated operating costs of equipment during a representative average use cycle. While industry standards have long been recognized by DOE, some commenters have argued that the requirement in the amended Process Rule goes too far.

- **Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards),¹²** with major revisions proposed by March 2021, and remaining revisions proposed by June 2021.

Historically, DOE selected efficiency standards using a so-called “walk-down” approach: DOE would create a range of trial standard levels (TSLs)—beginning with the most stringent TSL that is technologically feasible (the “max-tech” standard). It would then conduct a cost-benefit analysis of the max-tech TSL. If that assessment demonstrated that the benefits of the max-tech TSL exceed its costs, DOE would adopt the max-tech TSL as the standard. Otherwise, DOE would “walk down” to consider the next most-stringent TSL. This “walk-down” process would continue until DOE determined that the benefits of a TSL exceed its costs, and, thus, the TSL is economically justified, or that none of the TSLs are economically justified.

The Trump DOE changed this process. The Process Rule now requires DOE’s comparative analysis to assess the incremental changes in costs and benefits for each TSL’s benefits and burdens relative to other TSL’s and as part of a holistic analysis across all TSLs.

- **Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC)¹³** by May 2021.

¹¹ 768 F.2d 1355, 1373 (D.C. Cir. 1985).

¹² Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, Supplemental Notice of Proposed Rulemaking, 85 Fed. Reg. 50937 (Aug. 19, 2020).

¹³ Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC), 84 Fed. Reg. 67435 (Dec. 10, 2019).

EPCA establishes requirements for building energy conservation standards, which are administered by DOE.¹⁴ It requires that whenever the 1992 CABO Model Energy Efficiency Code, or any successor to the code, is revised, DOE must determine whether the revised code would improve energy efficiency in residential buildings.¹⁵ The IECC is the contemporary successor to the CABO Model Code.

DOE issued a determination that the 2018 edition of IECC would improve energy efficiency in buildings subject to the code compared to the 2015 edition. As a result, each State is required to certify that it has reviewed the provisions of its residential building code regarding energy efficiency and has made a determination as to whether it is appropriate to update its code to meet or exceed the 2018 IECC.

- **Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1-2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings,**¹⁶ by May 2021.

EPCA requires that whenever the ANSI/ASHRAE/IEASNA Standard 90.1-1989, or any successor to that code, is revised, DOE must determine whether the revised code would improve energy efficiency in commercial buildings required to meet the standard.¹⁷

DOE issued a determination that the 2016 edition of the ANSI/ASHRAE/IES Standard 90.1 improves overall energy efficiency in buildings subject to the code compared to the 2013 edition of Standard 90.1. As a result, each State is required to certify that it has reviewed and updated the provisions of its commercial building code regarding energy efficiency with respect to the revised or successor code and demonstrate that those provisions in the code meet or exceed the revised Standard.

Monetizing the Value of Changes in Greenhouse Gas Emissions. A major issue in DOE standards rulemaking (and other contexts) has been how to account accurately for the cost of greenhouse gas emissions when determining whether a standard is “economically justified.” Namely, how should policymakers measure and account for the “social cost of carbon” (SCC), “social cost of nitrous oxide” (SCN), and “social cost of methane” (SCM)? To address this, the Executive Order establishes an Interagency Working Group on the Social Cost of Greenhouse Gases, which includes DOE and other agencies.

The Executive Order directs the Working Group to, among other things, publish an interim SCC, SCN, and SCM within 30 days of the Executive Order. It requires agencies to use this when monetizing the value of changes in greenhouse gas emissions resulting from agency actions. The

¹⁴ 42 U.S.C. § 6831 *et seq.*

¹⁵ *Id.* § 6833(a)(5)(A).

¹⁶ Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1-2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings, 83 Fed. Reg. 8463 (Feb. 27, 2018).

¹⁷ 42 U.S.C. § 6833(b)(2)(A).

Working Group must solicit public comment and engage with stakeholders and publish a final SCC, SCN, and SCM by no later than January 2022.

Task Force to Combat the Climate Crisis. On January 27, 2021, President Biden issued a far-reaching Executive Order on the climate crisis.¹⁸ Among other things, it established a National Climate Task Force, which includes DOE. The President directed the Task Force to facilitate the organization and deployment of “a Government-wide approach to combat the climate crisis.” This includes planning and implementation of “key Federal actions to reduce climate pollution.” Because efficiency standards have long been considered important elements to control greenhouse gas emissions, they are likely to be a meaningful part of the Task Force’s efforts.

Conclusion. The Biden Administration has moved quickly to establish historic environmental goals. And DOE energy efficiency efforts will play an important role in achieving those goals, with significant ramifications for stakeholders. The Administration will be careful to seek public comment, and interested parties should take advantage of those opportunities.

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¹⁸ Executive Order 14008 of January 27, 2021, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021).