

## Energy Efficiency Advisory

July 30, 2021

### DOE Proposes Changes to the Energy Efficiency Interim Waiver Process

*Scott Blake Harris, John A. Hodges, and Stephanie S. Weiner*

The saga of the Department of Energy’s (DOE) treatment of interim waiver requests for innovative products has entered a new phase.

DOE has issued a pre-publication Federal Register notice proposing significant changes to its process for interim waivers of energy efficiency test procedures.<sup>1</sup> Most importantly, it would repeal the Trump Administration provision that automatically granted an interim waiver request unless the Department ruled on it within 45 business days. The new proposed rule would require the agency to “make best efforts” to review an interim waiver request within 90 business days. If adopted, the proposal could affect the timing of bringing to market innovative products that need an interim waiver. The proposal contains other significant changes affecting the waiver process.

*Comments from the public on the new proposal are due within 30 days after publication in the Federal Register. Publication will likely be in early August 2021.*

**The Need for Timely Interim Waivers.** Interim waivers perform an important function in the energy efficiency program pursuant to the Energy Policy and Conservation Act (EPCA).<sup>2</sup> Waivers allow for use of an alternate test procedure tailored to an innovative product where the existing DOE test procedure is inappropriate.<sup>3</sup> While a waiver request is being processed, DOE provides for interim waivers to ensure that it does not unreasonably impede introduction of these products. DOE will grant an interim waiver “if it appears likely that the 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.”<sup>4</sup>

---

<sup>1</sup> DOE, Office of Energy Efficiency and Renewable Energy, Test Procedure Interim Waiver Process, Notice of Proposed Rulemaking (Pre-publication), <https://www.energy.gov/sites/default/files/2021-07/waiver-process-nopr.pdf>. DOE’s regulations for waivers are at 10 C.F.R. §§ 430.27 (consumer products), 431.401 (commercial and industrial equipment).

<sup>2</sup> 42 U.S.C. § 6291 *et seq.*

<sup>3</sup> DOE “will grant a waiver from the test procedure requirements if DOE determines either that the basic model(s) for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedures evaluate the basic model in a manner so unrepresentative of its true energy or water consumption characteristics as to provide materially inaccurate comparative data.” 10 C.F.R. §§ 430.27(f)(2), 431.401(f)(2).

<sup>4</sup> *Id.* §§ 430.27(e)(2), 431.401(e)(2).

**Prior Rules on Timing of Interim Waivers.** DOE has grappled over the years with how much time to allow for processing an interim waiver request.

In 2014, DOE issued a rule that, “if administratively feasible,” DOE would reach a determination on an application for interim waiver within 30 business days—concluding that “30 business days is a reasonable time” for review.<sup>5</sup> This replaced a rule providing for disposition within 15 business days if administratively feasible.<sup>6</sup>

In December 2020, as the Trump Administration was preparing to leave office, DOE issued a new rule (December 2020 Final Rule) that DOE “will” review an interim waiver request within 45 business days. Further, if DOE did not notify the applicant of the disposition of the request within 45 business days, “the interim waiver is granted.”<sup>7</sup> DOE said it believed that 45 business days provided the agency sufficient time to review the request and make a determination for an interim waiver based on the regulatory criteria applicable at that step of the process, *i.e.*, that the petition for waiver is likely to be granted, or it is desirable for public policy to grant immediate relief pending a decision on the waiver petition.<sup>8</sup>

**New Proposal to Extend Time for Processing Interim Waivers.** On Inauguration Day, President Biden issued an Executive Order 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. An accompanying Fact Sheet specifically targeted the December 2020 Final Rule.<sup>9</sup>

In its new proposal, DOE notes that the December 2020 Final Rule had placed significant weight on reducing manufacturers’ burdens, providing greater certainty and transparency to manufacturers, and reducing delays in manufacturers’ ability to bring innovative product options to consumers. In the new proposal, DOE says that it is weighing these policy considerations differently.

DOE has tentatively determined that the changes under the December 2020 Final Rule may not allow DOE sufficient time to review an alternate test procedure,

---

<sup>5</sup> 79 Fed. Reg. 26591, 26593 (May 9, 2014).

<sup>6</sup> *See id.* In addition, during the Obama Administration, DOE issued an Enforcement Policy Statement that “to encourage waivers and prevent the Department’s administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, the Department, 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.” DOE, Enforcement Policy Statement – Pending Test Procedure Waiver Applications, issued Dec. 23, 2010. The policy was reissued on April 5, 2017. In the rulemaking on the December 2020 Final Rule, DOE said, “As a practical matter, based on its experience, DOE believes that the enforcement policy alone is insufficient to address manufacturer concerns with the ability to sell products that they cannot test and certify pursuant to a DOE test procedure.” 85 Fed. Reg. 79802, 79812 (Dec. 11, 2020).

<sup>7</sup> 10 C.F.R. §§ 430.27(e)(1)(ii), 431.401(e)(1)(ii), *as added*, 85 Fed. Reg. 79802, 79820 (Dec. 11, 2020).

<sup>8</sup> 85 Fed. Reg. *supra*, at 79803-04.

<sup>9</sup> Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021). In addition, DOE limited the effect of the December 2020 Final Rule by not applying it to petitions filed before January 11, 2021, the rule’s effective date.

leading to increased risks to consumers of purchasing noncompliant products and decreased energy savings. Given EPCA’s goal of energy conservation and DOE’s statutory obligations under EPCA, DOE is placing greater weight on ensuring compliant test procedures, decreasing risks to consumers, and ensuring that DOE meets its statutory obligations.<sup>10</sup>

DOE is therefore proposing to remove the provision that interim waivers will be automatically granted if it fails to notify the petitioner of the disposition of the request within 45 business days of receipt. It is also proposing that DOE will “make best efforts” to respond to interim waiver requests within 90 business days.

**Other Proposed Amendments.** DOE’s new proposal also includes:

- Changes on information needed to support a complete interim waiver request and on handling of incomplete requests.
- Changes on information to be provided in a request to extend a waiver to additional basic models.
- Specifying that final waivers and interim waivers both automatically terminate on the compliance date of the test procedure final rule.
- Clearly stating the transition period for compliance with a decision and order or test procedure final rule.
- Aligning with requirements of 10 C.F.R. Part 429 (certification, compliance, and enforcement), including that a model must be certified prior to distribution in commerce, and that certification must be based on testing conducted in conformance with the applicable test requirements in Parts 429, 430 (consumer products) and 431 (commercial and industrial equipment), or in accordance with an applicable test procedure waiver. This eliminates a 60-day grace period applicable in certain circumstances.
- Broadening the reasons why DOE may rescind or modify a waiver or interim waiver.

**Conclusion.** Manufacturers often need interim waiver relief to help assure timely introduction of innovative products into the marketplace. DOE’s new proposal, if adopted, would extend the timeline for issuance of interim waivers—and thus could have an impact on the introduction of these products. The proposal contains other significant changes as well. *Stakeholders should take advantage of the public comment period to make their views known on this proposal.*

---

<sup>10</sup> Notice of Proposed Rulemaking (Pre-publication), *supra*, at 9.

\* \* \* \*

For more information on this subject or Harris, Wiltshire & Grannis LLP's energy practice, please contact **Scott Blake Harris** at +1 (202) 730-1330 or by e-mail at [sbharris@hwglaw.com](mailto:sbharris@hwglaw.com), **Stephanie Weiner** at +1 (202) 730-1344, or by email at [sweiner@hwglaw.com](mailto:sweiner@hwglaw.com), or **John A. Hodges** at +1 (202) 730-1326 or by e-mail at [jhodges@hwglaw.com](mailto:jhodges@hwglaw.com).

*This advisory is not intended to convey legal advice. It is circulated to our clients and others as a convenience and is not intended to reflect or create an attorney-client relationship as to its subject matter.*