

Energy Efficiency Advisory

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DOE Amends Energy Efficiency Process Rule

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As expected, the Department of Energy (DOE) has adopted amendments to the agency's Process Rule¹—the key rule for adopting energy conservation standards and test procedures. In doing so, the Department rejected Trump-era revisions that the Biden Administration believes impeded achieving its ambitious policies on greenhouse gases and climate change.

In 2020, the Trump-era DOE revised the Process Rule,² 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. DOE quickly responded with a proposal and has now issued a final rule, which goes into effect on January 12, 2022. DOE says its new revisions are 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).⁵

The 2021 rule provides the following:

- **Restoring DOE's Discretion to Depart from the Process Rule's General Guidance.** In contrast with the 1996 Process Rule, the 2020 version was binding on DOE. The 2021 rule reverts to the Process Rule's original, non-binding status. DOE believes that the procedures, interpretations, and policies generally applicable to DOE's rulemaking program should be evaluated on a case-by-case basis based on the circumstances of each rulemaking.
- **Significant Energy Savings Threshold.** Under EPCA, DOE is prohibited from prescribing a standard if it determines that the standard will not result in “significant” conservation of energy.⁶ For many years, DOE considered energy savings to be “significant” on a case-by-case basis. In one of the most contentious provisions, the 2020 revisions to the Process Rule set numerical thresholds for determining “significant” energy savings. In the 2021 rule, DOE has returned to its prior case-by-case approach. While acknowledging that it has the authority to establish a numerical threshold, DOE says it does not believe that is the best course of action—since it would not allow DOE to consider specific circumstances surrounding a given rulemaking when considering the significance of savings.
- **Determinations of Economic Justification.** Under EPCA, a standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified.⁷ DOE uses a “walk-down” process to select standard levels. Before the 2020 revisions to the Process Rule, this meant that, as a first step, DOE conducted a cost-benefit analysis of the most stringent selected trial standard level (TSL) that was

technologically feasible (the max-tech standard). Then, if the benefits of the max-tech TSL exceeded its costs, DOE adopted the max-tech TSL as the standard. If not, DOE would “walk down” to consider the next most-stringent TSL (and, if needed, continue this process), until it determined—if it could—that the benefits of a TSL exceed its costs. This process allowed it to find the TSL that was economically justified, or that none was economically justified. But under the 2020 revision, DOE had to compare the benefits and burdens of the TSLs against the benefits and burdens of the baseline case and all other TSLs. Under the 2021 rule, DOE has eliminated the comparative approach—saying that the comparative analysis generated confusion and that the prior approach was sufficiently robust.

- **Adoption of Industry Test Standards.** In 2020, DOE revised the Process Rule to require adoption, *without modification*, of industry consensus standards as test procedures, unless the standards do not meet EPCA criteria. DOE now believes this created the false impression that it had adopted a new presumption of an “as-is” adoption of industry standards without meaningful review. The 2021 rule clarifies that industry standards must undergo a thorough agency review to ensure compliance with EPCA.
- **Finalization of Test Procedures Prior to Issuance of a Standards Proposal.** In the 2020 Process Rule revisions, DOE adopted a requirement that its test procedures must be finalized at least 180 days before proposal of an efficiency standard. DOE has now determined that such a “one-size-fits-all” requirement does not account for the particular circumstances of rulemaking and may result in unnecessary delays. The 2021 rule now generally provides that new test procedures be finalized prior to DOE issuing a standards proposal. However, in response to comments, it also requires (with certain exceptions) that new test procedures and amended test procedures that impact measured energy use or efficiency be finalized at least 180 days prior to the close of the comment period for (i) a notice of proposed rulemaking proposing new or amended standards; or (ii) a notice of proposed determination that standards do not need to be amended.
- **Direct Final Rules.** DOE has authority to issue a “direct final rule” (DFR) to establish a standard.⁸ In 2020, DOE re-interpreted the EPCA provision for DFRs⁹ as just procedural and not an independent grant of rulemaking authority. DOE also provided additional guidance on the term “fairly representative” and adverse comments. In the 2021 rule, DOE has returned to its historic practice for DFRs and rejected the 2020 rule’s re-interpretation of the DFR provision. This allows stakeholders to negotiate over more aspects of a standard, such as compliance periods, so long as the requirements of EPCA are met. The 2021 rule also allows for DOE to assess representativeness and any adverse comments on a case-by-case basis.
- **Negotiated Rulemaking.** In 2020, DOE adopted a procedure that it would follow when using negotiated rulemaking to develop a consensus proposal in consultation with interested parties, thereby addressing comments from stakeholders before issuing a proposed rule. In the 2021 rule, DOE has returned to its prior approach—saying that in attempting to codify its existing practice, the 2020 rule imposed unnecessary restrictions and limited DOE’s flexibility and the usefulness of negotiated rulemaking.

Conclusion. The 2021 amendments to the Process Rule are highly significant. DOE 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. Further potential amendments will be addressed in a separate final rule; interested parties should be on the alert for these as well.

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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, 86 Fed. Reg. 70892 (Dec. 13, 2021).

² 10 C.F.R. Part 430, Subpt. C, App. A, Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment (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, 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://www.hwglaw.com/wp-content/uploads/2020/02/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 EPCA, 42 U.S.C.A. § 6291 *et seq.*

⁶ *Id.* §§ 6295(o)(3)(B), 6316(a).

⁷ *Id.* §§ 6295(o)(2)(A), 6316(a).

⁸ DOE may issue a DFR upon receipt of a joint proposal from a group of “interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates),” provided DOE determines the standards recommended in the joint proposal conform with the requirements of 42 U.S.C. § 6295(o) or § 6313(a)(6)(B), as applicable. *Id.* § 6295(p)(4)(A).

⁹ *Id.* § 6295(p)(4).