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[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE-2019-BT-NOA-0011]

RIN 1904-AE24

Test Procedure Interim Waiver Process

AGENCY: Office of Energy Efficiency and Renewable Energy (EERE), U.S. Department of Energy.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The U.S. Department of Energy (“DOE” or the “Department”) proposes to revise the Department’s test procedure interim waiver process. The proposed revisions address areas of the test procedure interim waiver process regulations that may result in alternate test procedures that are inconsistent with the purpose and requirements of the Energy Policy and Conservation Act (“EPCA”), and that otherwise appear not to effectuate the statute properly.

DATES: DOE will accept comments, data, and information regarding this notice of proposed rulemaking on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by “2021 Test Procedure Interim Waiver Process NOPR” and docket number EERE-2019-BT-NOA-0011 and/or the regulatory information number (RIN) 1904-AE24, by any of the following methods:

(1) *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

(2) *E-mail:* TPWaiverProcess2019NOA0011@ee.doe.gov. Include “2021 Test Procedure Interim Waiver Process NOPR” and docket number EERE-2019-BT-NOA-0011 and/or RIN number 1904-AE24 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Appliance Standards Program staff at (202) 586-1445 to discuss the need for alternative arrangements. Once the Covid-19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V (Public Participation) of this document.

Docket: The docket for this rulemaking, which includes *Federal Register* notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket webpage can be found at:

<https://www.regulations.gov/docket?D=EERE-2019-BT-NOA-0011>. The

<https://www.regulations.gov> web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Sarah Butler, U.S. Department of Energy, Office of General Counsel, GC-33, 1000 Independence Avenue, S.W., Washington, DC, 20585-0121. E-mail: Sarah.Butler@hq.doe.gov.

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SUPPLEMENTARY INFORMATION:

I. Summary of Proposal

On December 11, 2020, DOE published a final rule (“December 2020 Final Rule”) in the *Federal Register* that made significant revisions to its procedures for processing petitions for interim waivers from test procedures mandated pursuant to EPCA, found in 10 CFR 430.27 and 10 CFR 431.401. 85 FR 79802.

Subsequently, on January 20, 2021, the White House issued Executive Order 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” 86 FR 7037 (Jan. 25, 2021). Section 1 of that Order listed several policies related to the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation’s resilience to climate change. *Id.* at 86 FR 7037, 7041. Section 2 of the Order instructs all agencies to review “existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies].” *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.* In addition, the White House explicitly enumerated certain agency actions, including the December 2020 Final Rule, as

actions that would be reviewed to determine consistency with Section 1 of the Order.¹ Executive Order 13990, Fact Sheet.

While E.O. 13990 triggered the Department's re-evaluation, DOE is relying on the analysis presented below, based upon EPCA, to revise its prior rule. In conducting its review of the December 2020 Final Rule, DOE has identified areas that do not meet DOE's responsibilities under EPCA. The December 2020 Final Rule mandates a process that may result in alternate test procedures that are inconsistent with EPCA's purpose and requirements. In addition, as discussed in greater detail in section III. of this document, upon reconsideration DOE believes provisions implemented by the December 2020 Final Rule could weaken energy conservation standards by allowing manufacturers to place noncompliant products in the market. In furtherance of its duties under EPCA and in accordance with Executive Order 13990, DOE is proposing revisions to its procedures for processing interim waiver requests.

In this document, DOE proposes to amend 10 CFR 430.27 and 10 CFR 431.401 by: (1) removing the provisions, adopted in the December 2020 Final Rule, that interim waivers will be automatically granted if DOE fails to notify the petitioner of the disposition of the petition within 45 business days of receipt of the petition, and instead specifying that DOE will make best efforts to process any interim waiver request within 90 days of receipt; (2) providing the requirements for a complete petition for interim waiver, and specifying that DOE would notify petitioners of incomplete petitions via email, and that DOE will post a petition for interim waiver on its website within five business days of receipt of a complete petition; (3) stating the

¹ Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>

information that must be provided in a request to extend a waiver to additional basic models; (4) revising the compliance certification and representations requirements; (5) specifying that interim waivers will automatically terminate on the compliance date of a new or amended test procedure; (6) harmonizing 10 CFR 430.27(j) and 10 CFR 431.401(j) with enforcement requirements; and (7) allowing DOE to rescind or modify a waiver for appropriate reasons.

II. Authority and Background

A. Authority

EPCA,² Public Law 94-163 (42 U.S.C. 6291–6317) authorizes DOE to regulate the energy efficiency of a number of consumer products and industrial equipment types. Title III, Part B³ of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. Title III, Part C⁴ of EPCA established the Energy Conservation Program for Certain Industrial Equipment. The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

The Federal testing requirements consist of test procedures that manufacturers of covered products and equipment generally must use as the basis for: (1) certifying to DOE that the

² All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116-260 (Dec. 27, 2020).

³ For editorial reasons, Part B was redesignated as Part A upon codification in the U.S. Code.

⁴ For editorial reasons, Part C was redesignated as Part A-1 upon codification in the U.S. Code.

product or equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s); 42 U.S.C. 6316(a)), and (2) making representations about the efficiency of the products or equipment (42 U.S.C. 6293(c); 42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the product or equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316(a))

Under 42 U.S.C. 6293 and 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products and equipment. Specifically, test procedures must be reasonably designed to produce test results that reflect energy efficiency, energy use or estimated annual operating cost of a covered product or covered equipment during a representative average use cycle or period of use, and must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3); 42 U.S.C. 6314(a)(2))

B. Background

This Notice of Proposed Rulemaking (“NOPR”) involves the regulatory provisions governing the submission and processing of test procedure waivers for both consumer products under Part A of EPCA and industrial equipment under Part A-1. DOE’s regulations in Title 10 of the Code of Federal Regulations (CFR), §430.27 (consumer products) and §431.401 (commercial equipment) contain provisions allowing a person to seek a waiver from the test procedure requirements if certain conditions are met. DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model 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 procedure evaluates the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1) and 10 CFR 431.401(a)(1). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. In addition, the waiver process permits parties submitting a petition for waiver to also file an application for interim waiver from the applicable test procedure requirements. 10 CFR 430.27(a) and 10 CFR 431.401(a). DOE will grant an interim waiver if it appears likely that the petition for waiver will be granted or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a decision on the petition for waiver. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2).

On May 1, 2019, DOE published a NOPR to amend the existing test procedure interim waiver process (the “May 2019 NOPR”). 84 FR 18414. After considering the comments received, DOE published the December 2020 Final Rule, which significantly revised its procedures for test procedure interim waivers. 85 FR 79802.

The December 2020 Final Rule adopted an approach to DOE’s test procedure interim waiver decision-making process that requires the Department to notify, in writing, an applicant for an interim waiver of the disposition of the request within 45 business days of receipt of the application. 10 CFR 430.27(e)(ii) and 10 CFR 431.401(e)(ii). Importantly, under the recent amendments, if DOE does not notify the applicant in writing of the disposition of the interim waiver within 45 business days, the interim waiver is granted and the manufacturer is authorized to test subject products or equipment using the alternate test procedure proposed by the

manufacturer in the petition. *Id.* If DOE denies the interim waiver petition, DOE is required to notify the petitioner within 45 business days and post the notice on the website as well as publish its determination in the *Federal Register* as soon as possible after such notification. *Id.* If DOE ultimately denies an associated petition for waiver or grants the petition with a test procedure that differs from the alternate test procedure specified in the interim waiver, manufacturers are allowed a 180-day grace period before the manufacturer is required to use the DOE test procedure or the alternate test procedure specified in the decision and order to make representations regarding energy efficiency. 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1).

In the December 2020 Final Rule, DOE made a policy decision to place 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. 85 FR 79816. To justify these changes to DOE's interim waiver process, DOE noted that it intended to shift the burden of any delays in the review process onto the Department and allow for innovative products to be made available more quickly to consumers. 85 FR 79802, 79803 and 79811. However, as discussed further in section III. of this document, in reconsideration of the December 2020 Final Rule, DOE 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, 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.

III. Discussion of Proposed Revisions

DOE is reconsidering whether certain provisions implemented by the December 2020 Final Rule are appropriate or necessary. DOE acknowledges that its interim waiver process often involves a lengthy period following submission of interim waiver and waiver applications and imposes burdens on manufacturers who are unable to certify their products or equipment absent an interim waiver or waiver from DOE. The December 2020 Final Rule, however, mandates a process that, by prioritizing the speeding up of the petition process, may result in alternate test procedures that are inconsistent with EPCA's purpose and requirements and have adverse environmental impacts.

As noted previously, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product and covered equipment during a representative average use cycle or period of use. (42 U.S.C. 6293; 42 U.S.C. 6314) Manufacturers of covered products and covered equipment must use the prescribed DOE test procedure to certify that their products and equipment meet the applicable energy conservation standards adopted under EPCA, and also when making any other representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c), 6295(s), 42 U.S.C. 6314(d) and 42 U.S.C. 6316(a)) In accordance with EPCA, manufacturers are prohibited from distributing a covered product without first demonstrating compliance with applicable standards through the use of DOE test procedures. (42 U.S.C. 6302(a)(5), 42 U.S.C. 6295(s)) Under the interim waiver process established in the December

2020 Final Rule, an interim waiver granted by default after the 45-day period would lack DOE review and would not benefit from a determination that the alternate test procedure meets EPCA requirements. As demonstrated in the examples discussed, DOE often requires longer than 45 business days to adequately evaluate an alternate test procedure to make a determination that will accurately reflect the product's energy consumption during an average use cycle. The default waiver process may result in test procedures later found to be inconsistent with EPCA which would allow manufacturers to distribute noncompliant products in commerce, resulting in additional costs (i.e., cost of energy use) to consumers.

DOE noted in the December 2020 Final Rule that some commenters stated that the amendments to the interim waiver process would weaken the energy conservation standards program because the automatic granting of interim waivers without review could place noncompliant products in the market and allow them to remain for an additional 180 days after DOE acts on the associated petition. 85 FR 79802, 79806. In addition, some commenters noted that the amendments could indirectly allow for backsliding of energy conservation standards, noting that 42 U.S.C. 6295(o)(1) forbids DOE from prescribing an energy conservation standard that decreases the required energy efficiency of a product. 85 FR 79802, 79813. These commenters argued that the amendments proposed in the May 2019 NOPR (and that were ultimately adopted in the December 2020 Final Rule) would lead to the same loss of efficiency that EPCA's anti-backsliding provision was intended to prevent. *Id.* DOE's decision under the December 2020 Final Rule reflected a policy choice to reject these comments raising concerns about the risks of non-compliant products in favor of greater certainty and transparency, and a less burdensome process for manufacturers. In support of the December 2020 Final Rule, DOE

explained that the changes were in response to concerns that the current system for processing interim waiver petitions was not working as it should, and in DOE's view, manufacturers should not be constrained from selling their products for significant periods while DOE reviews the interim waiver petition. 85 FR 79802, 79807.

Upon further consideration, DOE is weighing these factors differently in light of recent analysis of petitions suggesting that the number of non-compliant test procedures granted without sufficient time to review is higher than DOE estimated and considering DOE's statutory obligations under EPCA. For example, on June 30, 2021, DOE issued a notice denying the interim waiver application from General Electric Appliance (GEA) for certain miscellaneous refrigeration product (MREF) basic models. 86 FR 35766. The original petition for waiver and interim waiver from the test procedure for MREFs set forth at appendix A to subpart B of 10 CFR part 430 was received on April 9, 2021. (GEA, No. 1 at p. 1) The original GEA petition did not contain sufficient information about the MREF basic models including necessary information about the use of these products, which is needed to determine an appropriate alternative method for testing. In response to the lack of information in the original petition, DOE sent GEA a number of technical questions, and GEA revised and supplemented its original petition twice. The revised alternate test procedure⁵ included in the April 26, 2021 petition lead DOE to ask further technical questions to understand how the basic models subject to the petition worked in the field, to which GEA provided additional correspondence on June 2, 2021.⁶ Based on these final clarifications, DOE was able to successfully evaluate the proposed interim waiver test procedure, which led DOE to deny the interim waiver because the alternative method proposed

⁵ This document can be found in the docket for this test procedure waiver under Document No. 002.

⁶ This document can be found in the docket for this test procedure waiver under Document No. 003.

by GEA was not representative of an average use cycle for the basic models in question. 86 FR 35766.

From the time that DOE received GEA's original petition, to the time that the petition was denied, 55 business days passed. DOE was provided more than the 45-business day period in this case because GEA revised and supplemented its original petition in response to DOE's technical questions. However, if DOE did not have sufficient time to gather the additional information about GEA's MREF basic models and how such models are applied in the field, an alternate test procedure could have erroneously been applied that did not meet the requirements in EPCA. DOE needed time to understand more about the product and the proposed alternate test procedure, and after several exchanges, came to understand that the GEA proposed alternate test procedure did not include all the energy consumption to represent an average use cycle and thus, the test procedure proposed by GEA was not representative. *See* 42 U.S.C. 6293. If the alternate test procedure proposed by GEA was automatically granted, the basic models subject to the interim waiver would be using a test procedure that underestimates the energy consumption of the product.

In another example on October 25, 2016, AHT filed a petition for waiver and interim waiver from the DOE test procedure for commercial refrigeration equipment set forth in 10 CFR part 431, subpart C, appendix B. (EERE-2017-BT-WAV-0027-0009, AHT, No. 0001 at pp. 1-10 (3)) AHT petitioned for waiver for six model lines that are capable of multi-mode operation (i.e., as ice cream freezer and commercial refrigerator). In the petition, AHT stated that the DOE test procedure is not clear regarding how to test multi-mode equipment. 82 FR 15345, 15349. To

address multi-mode operation, AHT requested that their equipment be tested and rated only as ice cream freezers (with integrated average temperature of $-15\text{ }^{\circ}\text{F} \pm 2.0\text{ }^{\circ}\text{F}$ and use of total display area (TDA) to determine associated energy conservation standards). 82 FR 15345, 15349-15350.

In evaluating and adopting energy conservation standards, DOE generally divides covered equipment into classes by the type of energy used, or by capacity or other performance-related feature that justifies a different standard for equipment having such a feature. (42 U.S.C. 6295(q) and 42 U.S.C. 6316(e)(1)) Commercial refrigeration equipment is divided into various equipment classes categorized by specific physical and design characteristics, such as operating temperatures. These equipment classes have characteristics that impact efficiency and have different corresponding energy conservation standards for refrigerators, freezers, and ice-cream freezers under the current DOE regulations. AHT's proposed alternate test procedure would have rated its multi-mode basic models in a manner that was unrepresentative because it would have only accounted for ice-cream freezer mode operation and would not have accounted for freezer mode operation. As DOE explained in the notice of a petition for waiver, partial grant of an interim waiver, and request for public comment, DOE did not agree with AHT's assertion that the multi-mode regulations for commercial refrigeration equipment were unclear. 82 FR 15345, 15347. DOE reiterated that in the most recent commercial refrigeration equipment test procedure final rule, self-contained equipment or remote condensing equipment with thermostats capable of operating at temperatures that span multiple equipment categories must be certified and comply with DOE's regulations for each applicable equipment category. (Id.)

After evaluating AHT's petition and alternate test procedure, DOE partially granted AHT's interim waiver. 82 FR 15345. DOE required 102 business days for this review. If DOE did not have sufficient time to evaluate this test procedure waiver and AHT moved forward with its request without modification, AHT would not have been evaluating the multi-mode operation in a manner representative of field use in freezer mode and it may have resulted in equipment being distributed in commerce that may have otherwise been non-compliant with the energy conservation standards.

DOE has tentatively determined that the December 2020 Final Rule did not place sufficient weight on the potential for alternate test procedures granted without sufficient DOE review to allow manufacturers to place products in the market that do not meet applicable energy conservation standards. To the extent that test procedure results are unrepresentative and do not provide comparative data, energy savings may not be realized, and consumers may not be able to make informed choices. As discussed previously, DOE has an obligation under EPCA to ensure that all test procedures authorized by the Department yield measurements of energy consumption that are representative of actual product or equipment performance. (42 U.S.C. 6293) As commenters noted in the December 2020 Final Rule, a DOE test procedure that inaccurately measures energy use of a covered product or equipment could inadvertently allow for the backsliding of energy conservation measures in violation of 42 U.S.C. 9265(o). As seen with the GEA and AHT petitions, DOE cannot appropriately determine whether an alternate test procedure will accurately measure energy use if there is insufficient time to understand a product and validate an alternate test procedure. Accordingly, DOE is proposing to remove the provision that interim waivers will be automatically granted if DOE fails to notify the petitioner of the

disposition of the petition within 45 business days of receipt. DOE also proposes to remove the language at 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) specifying when a petition is considered “received” by DOE. These provisions were added for purposes of determining the start of the 45 business day window and would serve no purpose if interim waivers are not automatically granted within a specified time period.

DOE requests comments, information, and data on its proposal to remove the provision that interim waivers will be automatically granted if DOE fails to respond to the request within 45 business days of receipt of the petition.

In addition, after further reflection of the approach adopted in the December 2020 Final Rule and considering DOE’s available resources, DOE is reconsidering whether the 45 business day review timeframe provides sufficient time for DOE to properly evaluate a proposed alternate test procedure. As discussed in the December 2020 Final Rule, DOE’s analysis of the processing time of 33 interim waivers between 2016 and 2018 showed long review periods between the receipt of the waiver application and issuance of an interim waiver. 85 FR 79802, 79812-79813. Of those 33 interim waiver requests, only four were granted within 45 business days of receipt. *Id.* On average, interim waiver requests received in 2016 took 162 days to resolve, those received in 2017 took 202 days, and those received in 2018 took 208 days. *Id.* DOE noted in the December 2020 Final Rule that this data illustrated that there was a need for issuance of a timely interim waiver. 85 FR 79802, 79813.

After further consideration, DOE acknowledges that there is a need for improvement in its process to more timely address interim waivers but DOE believes the 45 business day timeframe implemented by the December 2020 Final Rule is too brief and rigid. An inflexible rule can fail to take relevant circumstances into account. As seen with the GEA and AHT petitions, a longer time frame is often needed for DOE to understand the product, the proposed alternate test procedure, and whether that alternate test procedure will accurately reflect the product's energy consumption during an average use cycle. As noted in DOE's 2014 rulemaking on the petitions for waiver and interim waiver regulations, many delays in processing waiver applications arise from iterative efforts by DOE to obtain sufficient information upon which to base a decision to grant an interim waiver. Making a determination that an alternate test procedure complies with EPCA also requires careful analysis and sometimes requires testing by DOE. 79 FR 26591, 29593 (May 9, 2014). DOE stated in the December 2020 Final Rule that a downside of this iterative process is the inability of interested stakeholders to participate in the development of an interim test procedure (85 FR 79802, 79809); however, DOE believes the risk of non-compliant alternate test procedures outweighs early stakeholder input. Further, interested stakeholders will not lose the ability to provide comment on the alternate test procedures as the regulations require notification of a proposed alternated test procedure to affected manufacturers and opportunity for comment. 10 CFR 430.24(b)(iv) and 10 CFR 431.401(b)(iv). DOE has a statutory obligation under EPCA to ensure that alternative test methods authorized by the Department yield measurements of energy consumption that are representative of actual performance. Providing a longer, flexible timeframe that better reflects DOE's experience will allow DOE to complete the analysis required, while providing a realistic timeframe on which manufacturers can more reasonably rely.

Accordingly, DOE proposes that DOE will make best efforts to respond to interim waiver requests within 90 business days. Based on DOE's experience, a period of 90 business days would still represent an improvement in response time, and in most cases would allow DOE sufficient time for proper analysis, review, and testing. Importantly, this proposal would ensure that DOE can fulfill its obligation under EPCA to ensure that alternative test methods yield results that are representative of the product's true energy (or water) consumption characteristics so as to provide materially accurate comparative data, while still accounting for how circumstances may dictate a lengthier period for consideration of a particular request.

DOE requests comments, information, and data on its proposal that DOE will make best efforts to respond to an interim waiver request within 90 business days.

To clarify the necessary contents of a petition for interim waiver, DOE is also proposing amendments to 10 CFR 430.27(b) and 10 CFR 431.401(b). As noted previously, many of the delays in interim waiver processing arise from the back-and-forth between DOE and manufacturers to ensure that the manufacturer has submitted the necessary information to support its request. Before DOE can act on a request for interim waiver, DOE may correspond with a manufacturer several times to obtain all necessary information and ensure that the manufacturer has submitted a complete petition. In addition, to formalize the process by which DOE will respond to incomplete petitions, DOE is proposing to specify at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2) that a petition for interim waiver will be considered incomplete if it does not meet the content requirements of 10 CFR 430.27(b) or 10 CFR 431.401(b), as

applicable. In such a case, DOE will notify the petitioner of an incomplete petition via email. DOE will continue the iterative process by which DOE assists manufacturers in completing their petitions. DOE believes these amendments will provide clarity regarding the initial requirements for petition submissions. Consistent with these proposals, DOE also proposes to state at 10 CFR 430.27(e)(1) and 10 CFR 431.401(e)(1) that DOE will post a petition for interim waiver on its website within five business days of receipt of a *complete* petition.

DOE is similarly proposing amendments to 10 CFR 430.27(g) and 10 CFR 431.401(g) to specify the information that must be provided in a request to extend a waiver to additional basic models. Specifically, DOE proposes that the petition for extension must identify the particular basic model(s) for which a waiver extension is requested, each brand name under which the identified basic model(s) will be distributed in commerce, and documentation supporting the claim that the additional basic models employ the same technology as the basic model(s) set forth in the original petition. DOE believes that including these requirements in the regulations will make clear to manufacturers the information required for an extension request and allow DOE to process such requests more expeditiously.

DOE requests comments on its proposals to specify the contents of a complete petition for interim waiver, to formalize the process by which DOE will respond to incomplete petitions, and to specify the information that must be provided in a request to extend a waiver to additional basic models.

DOE is also proposing amendments to 10 CFR 430.27(h) and 10 CFR 431.401(h). The current regulations provide that upon publication in the *Federal Register* of a new or amended test procedure that addresses the issue(s) presented in a waiver, an interim waiver will cease to be in effect. 10 CFR 430.27(h)(1)(ii) and 10 CFR 431.401(h)(1)(ii). Under this provision, a manufacturer can no longer rely on an interim waiver upon the publication date of a new or amended test procedure. In contrast, final waivers automatically terminate on the date on which use of such test procedure is required to demonstrate compliance. To ensure equitable treatment of final waivers and interim waivers that are in place at the time a test procedure final rule publishes, DOE is proposing to specify that final waivers and interim waivers both automatically terminate on the compliance date of the test procedure final rule.

DOE requests comments on its proposal to specify that interim waivers in place at the time a test procedure final rule is published will automatically terminate on the compliance date of the test procedure final rule.

DOE is also proposing amendments to 10 CFR 430.27(i) and 10 CFR 431.401(i) to clearly state the transition period for compliance with a decision and order or test procedure final rule. DOE believes these amendments are necessary to make clear the transition periods for scenarios not previously addressed by these provisions. These provisions would apply to required certifications and any representations. DOE proposes to specify at 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) that manufacturers have 180 days (or up to 360 days, as applicable) to comply with a decision and order or test procedure methodology, unless otherwise specified by DOE in the decision and order. The existing language in these sections specifies that when basic

models have already been certified using the test procedure permitted in DOE's grant of an interim test procedure waiver, a manufacturer is not required to re-test and re-rate those basic models under certain circumstances. DOE intends to retain this flexibility, but simplify this provision by stating that DOE may specify in the decision and order when certification reports and any representations need not be based on the decision and order test procedure methodology. DOE also proposes to specify at 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) that once a manufacturer uses the decision and order test procedure methodology in a certification report or any representation, all subsequent certification reports and any representations would be required to be made using the decision and order test procedure methodology while the waiver is valid. In addition, DOE is proposing similar amendments to clarify when certification reports and any representations are required to be based on a new or amended test procedure. Specifically, 10 CFR 430.27(i)(2) and 10 CFR 431.401(i)(2) would provide that certification reports and any representations may be based on the testing methodology of an applicable final waiver or interim waiver, or the new or amended test procedure until the compliance date of the amended test procedure. Thereafter, certification reports and any representations must be based on the test procedure final rule methodology unless specified by DOE in the test procedure final rule. Consistent with this provision, as necessary, DOE would be able to specify in a test procedure final rule that a manufacturer need not recertify basic models where testing under the interim waiver or final waiver test procedure methodology, as compared to the amended test procedure methodology, does not result in a change in measured energy use. This section would also specify that once a manufacturer uses the test procedure final rule methodology in a certification report or any representation, all subsequent certification reports and any representations must be made using the test procedure final rule methodology.

DOE requests comments on the proposed amendment to 10 CFR 430.27(i) and 10 CFR 431.401(i).

In addition, DOE is proposing amendments to 10 CFR 430.27(j) and 10 CFR 431.401(j) for simplification and consistency with the enforcement requirements at 10 CFR part 429. Under 10 CFR 430.27(j) and 10 CFR 431.401(j) manufacturers of products or equipment employing a technology or characteristic for which a waiver was granted for another basic model must also seek a waiver for basic models of their product or equipment. Under these provisions, manufacturers currently distributing such products in commerce have 60 days to submit a waiver application and manufacturers of such products that are not currently distributing such products in commerce must petition for and be granted a waiver prior to distribution in commerce. When originally implemented, the intent of these provisions was to ensure that similar products are rated in a comparable manner. 77 FR 74616, 74618. DOE wishes to preserve this intent, but believes this language to be confusing when read in context with 10 CFR part 429. Pursuant to 10 CFR 429.12, a basic 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 prescribed in 10 CFR parts 429, 430 and 431, or in accordance with the terms of an applicable test procedure waiver. Manufacturers must comply with 10 CFR part 429 prior to distributing their product in commerce (i.e., there is no grace period) and 10 CFR part 429 draws no distinction between models currently being distributed and models that will be distributed in the future. To align with 10 CFR part 429, DOE proposes to remove the 60 day period and to make no distinction between models currently being distributed and models that will be

distributed in the future. DOE believes the proposed amendments continue to achieve the original intent of paragraph (j) while better aligning with 10 CFR part 429.

DOE requests comments on the proposed amendment to 10 CFR 430.27(j) and 10 CFR 431.401(j).

Finally, DOE is proposing an amendment to 10 CFR 430.27(k)(1) and 10 CFR 431.401(k)(1). Currently those provisions provide that DOE may rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver or interim waiver is incorrect or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model(s)' true energy consumption characteristics. DOE envisions that there could be other circumstances, such as new methodology, that might necessitate modification of a waiver. As such, DOE proposes to add to this provision that DOE may rescind or modify a waiver for other appropriate reasons.

DOE requests comments on the proposed amendment to 10 CFR 430.27(k)(1) and 10 CFR 431.401(k)(1).

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) waived Executive Order (“E.O.”) 12866, “Regulatory Planning and Review” review of this rule.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website at: <https://energy.gov/gc/office-general-counsel>.

This proposed rule would not impose any new requirements on any manufacturers, including small businesses. This proposed rule removes the provision automatically granting interim waivers within 45 business days of receipt and proposes to add a new provision that DOE will make best efforts to process an interim waiver request within 90 days of receipt. While this proposal allows DOE a longer period to review interim waiver petitions, consistent with DOE’s current enforcement policy, manufacturers can sell products tested in accordance with a filed

petition without fear of enforcement action.⁷ As such, DOE anticipates any additional review period will minimally impact manufacturers, including small businesses. Under this proposed rule, DOE is also specifying a number of requirements for complete petitions for interim waiver and petitions for an extension of a waiver. These proposals are not new requirements (i.e., petitions must currently include this information), but are proposed to be included in DOE's regulations to make clear to manufacturers the information required for a petition or an extension request and allow DOE to process such requests more expeditiously. DOE is also proposing to eliminate the 60-day period from 10 CFR 430.27(j) and 10 CFR 431.401(j) to align with enforcement requirements at 10 CFR part 429. DOE believes this amendment will minimally impact manufacturers, including small businesses, as they are already subject to the requirements at 10 CFR part 429 which provides no grace period. Finally, DOE believes its proposals to revise the compliance certification and representation requirements and to clarify the duration of interim waivers will provide clarity to manufacturers and do not increase the burden on manufacturers, including small businesses. DOE does not anticipate any impact on small businesses as a result of the proposed amendments to 10 CFR 430.27(k)(1) and 10 CFR 431.401(k)(1).

For these reasons, DOE certifies that this proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. DOE's certification and supporting statement of

⁷ Department of Energy, Enforcement Policy Statement – Pending Test Procedure Waiver Applications (Apr. 5, 2017), available at <https://www.energy.gov/sites/default/files/2017/04/f34/Enforcement%20Policy%20-%20waivers.pdf>.

factual basis will be provided to the Chief Counsel of Advocacy of the SBA pursuant to 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Specifically, this proposed rule, addressing revisions to DOE's test procedure waiver process, does not contain any collection of information requirement that would trigger the PRA.

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it amends an existing rule and does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, the relationship between the national government and the

States, or the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at <https://www.energy.gov/gc/office-general-counsel> under “Guidance & Opinions” (Rulemaking)) DOE examined the proposed rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that

may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001) requires Federal agencies to

prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy, and it has not been designated by the Administrator of OIRA as a significant energy action; it therefore is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Consistent with OMB’s Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government’s scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are “influential scientific information,” which the Bulletin defines as “scientific information the agency

reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” *Id.* at 70 FR 2667.

In response to OMB’s Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The “Energy Conservation Standards Rulemaking Peer Review Report,” dated February 2007, has been disseminated and is available at the following website: https://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE’s analytical methodologies to ascertain whether modifications are needed to improve the Department’s analyses. The results from that review are expected later in 2021.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via <https://www.regulations.gov>. The <https://www.regulations.gov> webpage will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <https://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <https://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <https://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <https://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email will be posted to <https://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not contain special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

Signing Authority

This document of the Department of Energy was signed on July 26, 2021, by Dr. Kathleen B. Hogan, Acting Under Secretary for Energy and Science, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on July 26, 2021.

7/26/2021

X Kathleen B. Hogan

Kathleen B. Hogan
Acting Under Secretary for Science and Ener...
Signed by: Kathleen B. Hogan

Dr. Kathleen B. Hogan
Acting Under Secretary for Science and Energy

PART 430 – ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291-6309; 28 U.S.C. 2461 note.

2. Section 430.27 is amended by revising paragraphs (b), (e), (g), (h), (i), (j), and (k)(1) to read as follows:

§430.27 Petitions for waiver and interim waiver of the test procedure.

* * * * *

(b) *Petition content and publication.* (1) Each petition for interim waiver and waiver must:

(i) Identify the particular basic model(s) for which a waiver is requested, each brand name under which the identified basic model(s) will be distributed in commerce, the design characteristic(s) constituting the grounds for the petition, and the specific requirements sought to be waived, and must discuss in detail the need for the requested waiver;

(ii) Identify manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition;

(iii) Include any alternate test procedures known to the petitioner to evaluate the performance of the product type in a manner representative of the energy and/or water consumption characteristics of the basic model; and

(iv) Be signed by the petitioner or an authorized representative. In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition or in supporting documentation must be accompanied by a copy of the petition, application or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the Federal Register the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11 and will solicit comments, data and information with respect to the determination of the petition.

(2) In addition to the requirements in paragraph (b)(1) of this section, each petition for interim waiver must reference the related petition for waiver, demonstrate likely success of the petition for waiver, and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the petition for interim waiver.

* * * * *

(e) *Provisions specific to interim waivers--(1) Disposition of petition.* DOE will post a petition for interim waiver on its website within 5 business days of receipt of a complete petition. DOE will make best efforts to review a petition for interim waiver within 90 business days of receipt of a complete petition.

(2) *Incomplete petitions.* A petition for interim waiver that does not meet the content requirements of paragraph (b) of this section will be considered incomplete. DOE will notify the petitioner of an incomplete petition via email.

(3) *Criteria for granting.* DOE will grant an interim waiver from the test procedure requirements 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. Notice of DOE's determination on the petition for interim waiver will be published in the *Federal Register*.

* * * * *

(g) *Extension to additional basic models.* A petitioner may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition. The petition for extension must identify the particular basic model(s) for which a waiver extension is requested, each brand name under which the identified basic model(s) will be distributed in commerce, and documentation supporting the claim that the additional basic models employ the same technology as the basic model(s) set forth in the original petition. DOE will publish any such extension in the Federal Register.

(h) *Duration.* (1) Within one year of issuance of an interim waiver, DOE will either:

(i) Publish in the *Federal Register* a determination on the petition for waiver; or

(ii) Publish in the *Federal Register* a new or amended test procedure that addresses the issues presented in the waiver.

(2) When DOE publishes a decision and order on a petition for waiver in the *Federal Register* pursuant to paragraph (f) of this section, the interim waiver will terminate 180 days after the publication date of the decision and order.

(3) When DOE amends the test procedure to address the issues presented in a waiver, the waiver or interim waiver will automatically terminate on the compliance date of the amended test procedure.

(i) *Compliance certification and representations.* (1) If the interim waiver test procedure methodology is different than the decision and order test procedure methodology, certification reports to DOE required under 10 CFR 429.12 and any representations may be based on either of the two methodologies until 180 days after the publication date of the decision and order.

(j) *Petition for waiver required of other manufactures.* Any manufacturer of a basic model employing a technology or characteristic for which a waiver was granted for another basic model and that results in the need for a waiver (as specified by DOE in a published decision and order in the Federal Register) must petition for and be granted a waiver for that basic model. Manufacturers may also submit a request for interim waiver pursuant to the requirements of this section.

(k) *Rescission or modification.* (1) DOE may rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for

waiver or interim waiver is incorrect, upon a determination that the results from the alternate test procedure are unrepresentative of the basic model(s)' true energy consumption characteristics, or for other appropriate reason. Waivers and interim waivers are conditioned upon the validity of statements, representations, and documents provided by the requestor; any evidence that the original grant of a waiver or interim waiver was based upon inaccurate information will weigh against continuation of the waiver. DOE's decision will specify the basis for its determination and, in the case of a modification, will also specify the change to the authorized test procedure.

* * * * *

PART 431 – ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

4. Section 431.401 is amended by revising paragraphs (b), (e), (g), (h), (i), (j), and (k)(1) to read as follows:

§431.401 Petitions for waiver and interim waiver of the test procedure.

* * * * *

(b) *Petition content and publication.* (1) Each petition for interim waiver and waiver must:

(i) Identify the particular basic model(s) for which a waiver is requested, each brand name under which the identified basic model(s) will be distributed in commerce, the design characteristic(s) constituting the grounds for the petition, and the specific requirements sought to be waived, and must discuss in detail the need for the requested waiver;

(ii) Identify manufacturers of all other basic models distributed in commerce in the United States and known to the petitioner to incorporate design characteristic(s) similar to those found in the basic model that is the subject of the petition;

(iii) Include any alternate test procedures known to the petitioner to evaluate the performance of the product type in a manner representative of the energy and/or water consumption characteristics of the basic model; and

(iv) Be signed by the petitioner or an authorized representative. In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition or in supporting documentation must be accompanied by a copy of the petition, application or supporting documentation from which the information claimed to be confidential has been deleted. DOE will publish in the *Federal Register* the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11 and will solicit comments, data and information with respect to the determination of the petition.

(2) Each petition for interim waiver must reference the related petition for waiver, demonstrate likely success of the petition for waiver, and address what economic hardship and/or

competitive disadvantage is likely to result absent a favorable determination on the petition for interim waiver.

* * * * *

(e) *Provisions specific to interim waivers--(1) Disposition of petition.* DOE will post a petition for interim waiver on its website within 5 business days of receipt of a complete petition. DOE will make best efforts to review a petition for interim waiver within 90 business days of receipt of a complete petition.

(2) *Incomplete petitions.* A petition for interim waiver that does not meet the content requirements of paragraph (b) of this section will be considered incomplete. DOE will notify the petitioner of an incomplete petition via email.

(3) *Criteria for granting.* DOE will grant an interim waiver from the test procedure requirements 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. Notice of DOE's determination on the petition for interim waiver will be published in the *Federal Register*.

* * * * *

(g) *Extension to additional basic models.* A petitioner may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition. The petition for extension must

identify the particular basic model(s) for which a waiver extension is requested, each brand name under which the identified basic model(s) will be distributed in commerce, and documentation supporting the claim that the additional basic models employ the same technology as the basic model(s) set forth in the original petition. DOE will publish any such extension in the *Federal Register*.

(h) *Duration.* (1) Within one year of issuance of an interim waiver, DOE will either:

(i) Publish in the *Federal Register* a final determination on the petition for waiver; or

(ii) Publish in the *Federal Register* a new or amended test procedure that addresses the issues presented in the waiver.

(2) When DOE publishes a decision and order on a petition for waiver in the *Federal Register* pursuant to paragraph (f) of this section, the interim waiver will 180 days after the publication date of the decision and order

(3) When DOE amends the test procedure to address the issues presented in a waiver, the waiver or interim waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance.

(i) *Compliance certification and representations.* (1) If the interim waiver test procedure methodology is different than the decision and order test procedure methodology, certification reports to DOE required under 10 CFR 429.12 and any representations may be based on either of the two methodologies until 180 – 360 days after the publication date of the decision and order, as specified by DOE in the decision and order. Thereafter, certification reports and any representations must be based on the decision and order test procedure methodology unless

otherwise specified by DOE. Once a manufacturer uses the decision and order test procedure methodology in a certification report or any representation, all subsequent certification reports and any representations must be made using the decision and order test procedure methodology while the waiver is valid.

(2) When DOE publishes a new or amended test procedure, certification reports to DOE required under 10 CFR 429.12 and any representations may be based on the testing methodology of an applicable waiver or interim waiver, or the new or amended test procedure until the date on which use of such test procedure is required to demonstrate compliance unless otherwise specified by DOE in the test procedure final rule. Thereafter, certification reports and any representations must be based on the test procedure final rule methodology. Once a manufacturer uses the test procedure final rule methodology in a certification report or any representation, all subsequent certification reports and any representations must be made using the test procedure final rule methodology.

(j) *Petition for waiver required of other manufactures.* Any manufacturer of a basic model employing a technology or characteristic for which a waiver was granted for another basic model and that results in the need for a waiver (as specified by DOE in a published decision and order in the Federal Register) must petition for and be granted a waiver for that basic model. Manufacturers may also submit a request for interim waiver pursuant to the requirements of this section.

(k) *Rescission or modification.* (1) DOE may rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, upon a determination that the results from the alternate test

procedure are unrepresentative of the basic model(s)' true energy consumption characteristics, or for other appropriate reason. Waivers and interim waivers are conditioned upon the validity of statements, representations, and documents provided by the requestor; any evidence that the original grant of a waiver or interim waiver was based upon inaccurate information will weigh against continuation of the waiver. DOE's decision will specify the basis for its determination and, in the case of a modification, will also specify the change to the authorized test procedure.

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