

Memo

<i>to:</i>	Department of Energy	<i>via email:</i>	expartecommunications@hq.doe.gov
<i>from:</i>	Jennifer Cleary		
<i>date:</i>	August 9, 2021		
<i>subject:</i>	Ex parte Communication; Process Rule; Docket No. EERE-2021-BT-STD-0003		

This memo memorializes the meeting between the American Council for an Energy Efficient Economy (ACEEE), Association of Home Appliance Manufacturers (AHAM), Appliance Standards Awareness Project (ASAP), National Electrical Manufacturers Association (NEMA), and the Department of Energy on August 6, 2021, for inclusion in the public docket. In summary, we discussed a joint proposal regarding DOE's proposal to amend the Process Rule, Docket No. EERE-2021-BT-STD-0003; 86 Fed. Reg. 18901 (April 12, 2021) and 86 Fed Reg. 35668 (July 7, 2021).

Specifically, ACEEE, AHAM, ASAP, and NEMA presented a joint proposal agreed upon by AHAM, the American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), NEMA, Plumbing Manufacturers International (PMI), ASAP, and ACEEE. The joint proposal is included below the attendee list.

The attendees were as follows:

Ashley Armstrong, DOE
Peter Cochran, DOE
John Cymbalsky, DOE

Chris Perry, ACEEE
Jennifer Cleary, AHAM
Andrew deLaski, ASAP
Joanna Mauer, ASAP
Alex Boesenberg, NEMA

DOE Process Rule Consensus Proposal

The parties propose to DOE the following concepts related to the Part 1 proposed rule:

1. **Propose that DOE revert fully to the 1996 language on when deviations from the Process Rule are appropriate.** The parties intend that the deviation language would apply both to test procedures and standards.

DOE's proposed language states, in Section 3(a):

This appendix contains procedures, interpretations, and policies that are generally applicable to the development of energy conservation standards and test procedures. The Department may, as necessary, deviate from this appendix to account for the specific circumstances of a particular rulemaking.

The 1996 Process Rule, in Section 14(a) stated:

This appendix specifies procedures, interpretations and policies for the development of new or revised energy efficiency standards in considerable detail. As the approach described in this appendix is applied to the development of particular standards, the Department may find it necessary or appropriate to deviate from these procedures, interpretations or policies. If the Department concludes that such deviations are necessary or appropriate in a particular situation, DOE will provide interested parties with notice of the deviation and an explanation.

2. **Propose that the Process Rule require formal notice and comment (i.e., in the Federal Register) to deviate from the following processes (parts *i* and *ii* below).** We anticipate that the necessary notice and comment will almost always be able to take place as part of a regular rulemaking step (e.g., an RFI, NOPR, or NODA), that already requires publication in the Federal Register, and will not likely require its own, unique publication or comment period. *As an example:* If the required dishware for the dishwasher test procedure were to become obsolete and manufacturers would not be able to test without DOE quickly revising the test procedure to indicate replacement dishware, DOE could propose a rule to change the dishware and in the NOPR could indicate in the NOPR that it believes it needs to deviate from the requirement to seek public comment before issuance of a proposed test procedure because the change is necessary and urgent and unlikely to impact measured energy. DOE would seek comment on the deviation in the NOPR and, based on those comments, could decide whether to continue with the deviation by finalizing the rule without seeking additional comment or could decide that it requires additional feedback and issue an SNOPR.

- i. Test procedures finalized before new or amended energy conservation standards are proposed.*

Any proposed rule to establish new or amended energy conservation standards will be based on and developed using the final test procedure that will be used to demonstrate compliance with that product's standard.

DOE will provide a 180-day time period between the finalization of a new or amended test procedure and the end of the comment period on the proposed standard. Note that this timing is shorter than the current rule, which requires 180 days between the finalization of a new or amended test procedure and the publication of a proposed new or amended energy conservation standard.

Exceptions: DOE need not engage in notice and comment in order to deviate from the 180-day requirement when:

- a. test procedures/standards are agreed upon in negotiation (either ASRAC/Negotiated Rulemaking Act or “private” negotiation—i.e., a statement is submitted jointly by interested persons that are fairly representative of relevant points of view), including negotiation that results in a direct final rule.
 - b. the test procedure change is limited to a calculation change (e.g., use factor or adder)
- ii. *An opportunity for formal public comment prior to the issuance of a proposed rule on new or amended energy conservation standards, notices of proposed determination, and test procedures.*

Except in cases where DOE is acting under its direct final rule authority or if a statement is submitted jointly by interested person that are fairly representative of relevant points of view seeking a proposed rule, any proposed energy conservation standards, notice of proposed determination, or test procedure rule will be preceded by some form of outreach to the public that includes formal notice and public comment. DOE can determine the appropriate regulatory tool for this outreach—i.e., RFI, Framework Document, NODA, ANOPR, Preliminary Technical Support Document, etc.