United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: January 20, 2021
Docket #: 21-107
Short Title: State of New York v. United States Department of En

Agency #: 85 Fed Reg. 79802
Agency: Department of Energy

DOCKETING NOTICE

A petition for review filed by State of New York, State of California, State of Connecticut, State of Illinois, State of Maine, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of Oregon, State of Vermont, State of Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, District of Columbia, City of New York in the above referenced case was docketed today as 21-107. This number must appear on all documents related to this case that are filed in this Court. For pro se parties the docket sheet with the caption page, and an Acknowledgment and Notice of Appearance Form are enclosed. In counseled cases the docket sheet is available on PACER. Counsel must access the Acknowledgment and Notice of Appearance Form from this Court's website http://www.ca2.uscourts.gov.

The form must be completed and returned within 14 days of the date of this notice. The form requires the following information:

YOUR CORRECT CONTACT INFORMATION: Review the party information on the docket sheet and note any incorrect information in writing on the Acknowledgment and Notice of Appearance Form.

The Court will contact one counsel per party or group of collectively represented parties when serving notice or issuing our order. Counsel must designate on the Acknowledgment and Notice of Appearance a lead attorney to accept all notices from this Court who, in turn will, be responsible for notifying any associated counsel.

CHANGE IN CONTACT INFORMATION: An attorney or pro se party who does not immediately notify the Court when contact information changes will not receive notices, documents and orders filed in the case.

An attorney and any pro se party who is permitted to file documents electronically in CM/ECF must notify the Court of a change to the user's mailing address, business address, telephone number, or e-mail. To update contact information, a Filing User must access PACER's Manage My Appellate Filer Account, https://www.pacer.gov/psco/cgi-bin/cmecf/ea-login.pl. The Court's records will be updated within 1 business day of a user entering the change in PACER.

A pro se party who is not permitted to file documents electronically must notify the Court of a change in mailing address or telephone number by filing a letter with the Clerk of Court.

CAPTION: In an appeal, the Court uses the district court caption pursuant to FRAP 12(a), 32(a). For a petition for review or original proceeding the Court uses a caption pursuant to FRAP 15(a) or 21(a), respectively. Please review the caption carefully and promptly advise this Court of any improper or inaccurate designations in writing on the Acknowledgment and Notice of Appearance form. If a party has been terminated from the case the caption may reflect that change only if the district court judge ordered that the caption be amended.

APPELLATE DESIGNATIONS: Please review whether petitioner is listed correctly on the party listing page of the docket sheet and in the caption. If there is an error, please note on the Acknowledgment and Notice of Appearance Form. Timely submission of the Acknowledgment and Notice of Appearance Form will constitute compliance with the requirement to file a Representation Statement required by FRAP 12(b).

For additional information consult the Court's instructions posted on the website.

Inquiries regarding this case may be directed to 212-857-8546.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MAINE, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, WASHINGTON, VERMONT, COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, DISTRICT OF COLUMBIA AND CITY OF NEW YORK

Docket No.

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY and
DAN BROUILLETTE, Secretary, U.S. Department of Energy,

Respondents.

PETITION FOR REVIEW

Pursuant to Section 336(b)(1) of the Energy Policy and Conservation Act, 42 U.S.C. § 6306(b)(1), Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, and Rule 15 of the Federal Rules of Appellate Procedure, the States of New York, California, Connecticut, Illinois, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Washington, Vermont, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia and the City of New York hereby petition this Court for review of a final action taken by respondents, published at 85 Fed. Reg. 79,802 *et seq*. (December 11, 2020), entitled "Test Procedure Interim Waiver Process." A copy of the final rule is attached hereto. Petitioners seek a determination by the Court that the rule is unlawful and must be vacated.

Dated: January 19, 2021

Respectfully submitted,

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requirements, Stockyards, Surety bonds, Trade practices.

For the reasons set forth in the preamble, USDA amends 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181—229c.

■ 2. Section 201.211 is added to read as follows:

§ 201.211 Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria, and may consider additional criteria, when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. The criteria include whether the preference or advantage under consideration:

(a) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;

(b) Cannot be justified on the basis of meeting a competitor's prices;

(c) Cannot be justified on the basis of meeting other terms offered by a competitor; and

(d) Cannot be justified as a reasonable business decision.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–27117 Filed 12–10–20; 8:45 am]

BILLING CODE 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, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (''DOE'') has adopted a streamlined approach to its test procedure 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. An interim waiver will remain in effect until a final waiver decision is published in the **Federal Register** or until DOE publishes a new or amended test procedure that addresses the issues presented in the application, whichever is earlier. DOE's regulations continue to specify that DOE will take either of these actions within 1 year of issuance of an interim waiver. This final rule addresses delays in DOE's current process for considering requests for interim waivers and waivers from the DOE test method, which in turn can result in significant delays for manufacturers in bringing new and innovative products to market. This final rule requires the Department to process interim waiver requests within the 45 business day window and clarifies the process by which interested stakeholders provide input into the development of an appropriate test procedure waiver.

DATES: The effective date of this rule is January 11, 2021.

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

A link to the docket web page can be found at: *http://www.regulations.gov/docket?D=EERE-2019-BT-NOA-0011.* The *http://www.regulations.gov* web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–7432. Email: *Francine.Pinto@hq.doe.gov.*

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I. Legal Authority and Background

A. Legal Authority

The Energy Policy and Conservation Act (''EPCA'' or ''the Act''),[1] Public Law 94–163 (42 U.S.C. 6291–6317) authorizes the United States Department of Energy (DOE or, in context, the Department) to regulate the energy efficiency of a number of consumer products and industrial equipment types. Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. Title III, Part C [3] of EPCA established the Energy Conservation Program for Certain Industrial Equipment. Under EPCA, DOE's energy conservation program 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 must use as the basis for: (1) Certifying to DOE that their products 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 those 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

[1] All references to EPCA in this document refer to the statute as amended through the America's Water Infrastructure Act of 2018, Public Law 115–270 (October 23, 2018).

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

[3] For editorial reasons, Part C was redesignated as Part A–1 upon codification in the U.S. Code.

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)). As a waiver is the issuance of a test procedure applicable to certain products, these same requirements are applicable to any alternate test procedure that DOE may specify in an interim waiver or waiver. Subsequent to issuance of an interim waiver or waiver, DOE conducts a rulemaking to amend the generally applicable test procedure to address the issue that gave rise to the creation of a new test procedure for the requesting party.

DOE's regulations provide that upon receipt of a petition, 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(f)(2). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. DOE regulations also provide that in addition to the full waiver (''decision and order'') described previously, the waiver process permits parties 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).

B. Background

In May of 2019, DOE proposed to streamline its existing interim waiver process by amending its regulations to require that the Department would make a determination on an interim waiver request within 30 business days of receipt. Under that proposal, should DOE fail to notify the applicant in writing of the determination within 30 business days, the request for interim waiver would be granted based on the criteria set forth in DOE regulations. 84 FR 18414 (May 1, 2019). The petitioner would be authorized to use the alternate test procedure specified in the request for interim waiver. *Id.*

DOE specified in the 2019 notice of proposed rulemaking (''NOPR'') that an interim waiver would remain in effect until a waiver decision is published or until DOE publishes a new or amended test procedure that addresses the issues presented in the application, whichever is earlier. If the alternate test procedure ultimately required by DOE differed from what was specified in the interim waiver, manufacturers would then have a 180-day grace period to begin using the alternate test procedure specified in the decision and order. If DOE denied the waiver request, the 180-day grace period would apply to the use of the test procedure specified in DOE's regulations. The proposal was intended to address delays in DOE's current process for considering requests for interim waivers from the DOE test method that ultimately imposed costs on manufacturers because they could not certify and distribute their products while awaiting a response to their petitions. 84 FR 18414 (May 1, 2019). The NOPR provided for the submissions of comments by July 1, 2019.

During the comment period, DOE received several requests to hold a public meeting and to extend the NOPR's comment period after the meeting so that the public could engage in the rulemaking process. 84 FR 30047, 30047 (June 26, 2019). To address these requests, the Department held a webinar on July 11, 2019, and extended the comment period until July 15, 2019.[4]

DOE held the webinar to discuss the proposal and answer questions regarding the changes proposed to the existing process. (July 2019 Webinar, No. 31 at p. 5) DOE explained that the proposal was intended to improve public participation and decrease uncertainty in a long standing process, which provided manufactures of new and innovative products an alternative means of testing those products while the Department made a final adjudication on the waiver petition. (*Id.* at pp. 5–8) DOE continued that the proposal would streamline this process by removing the language ''if administratively feasible'' from the Department's regulations and thereby require the Department to issue decisions on interim waiver applications within 30-business days that would remain in effect until the waiver decision and order was published, or until DOE published a new or amended test procedure. (*Id.* at pp. 9–10) If a petition was ultimately denied or granted with a different alternative test procedure than specified in the interim waiver, then the manufacturer would have 180-days to begin using that new test procedure. DOE stated that its intent in issuing the proposal was to improve the waiver process for regulated entities by making it more transparent and participatory as well as addressing the financial burden manufacturers have experienced in the past. The proposal was intended to shift the burden of any delays in the review process onto the Department, rather than the requester. (*Id.* at p. 11; 23) Following the webinar, DOE received additional requests to extend the comment period, which DOE granted and extended the comment period until August 6, 2019. 84 FR 35040 (July 22, 2019).

II. Discussion of Amendments

In this final rule, DOE is amending its regulations to address stakeholder concerns regarding lengthy waiting times following submission of interim waiver and waiver applications, and the burden that lengthy processing time imposes on manufacturers, who are unable sell their products or equipment absent an interim waiver or waiver from DOE.[5] Specifically, this rule amends Parts 430 and 431 of Chapter II, Subchapter D, of Title 10 of the Code of Federal Regulations as set forth at the end of this document in a way that is intended to provide the public and industry with greater clarity and transparency to the existing waiver process, and to address specific administrative delays that have prevented innovative and new products from reaching the market.

In this final rule, DOE has amended the current regulations to require that the Department make a determination on an interim waiver request within 45 business days of receiving a complete petition. DOE extended this time period from the 30 business days specified in the NOPR in response to comments suggesting that the Department may need additional time to review the interim waiver prior to issuing its decision. The Department believes that 45 business days provides the Department sufficient time to review an interim waiver request and make a determination on the interim waiver based on the regulatory criteria applicable at that step of the process, *i.e.,* that the petition for waiver is likely

[4] Transcript of the webinar is available on the docket, *https://www.regulations.gov/document?D=EERE-2019-BT-NOA-0011-0031.*

[5] *See, e.g., https://energy.gov/sites/prod/files/2018/01/f46/NAFEM%20Regulatory%20Reform%20Roundtable%20Meeting%20Notes%20-%2010.31.17.pdf.*

to be granted, or it is desirable for public policy to grant immediate relief pending a decision on the waiver petition. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2). Extending the Department's review time will still reduce manufacturers' burdens relative to the baseline and retains the certainty for manufacturers that DOE will reach a decision on the interim waiver within a specified time period. DOE emphasizes that the grant or denial of an interim waiver is an intermediate step in DOE's consideration of the waiver petition, and that DOE will continue to provide, as it does now under the current regulations, opportunity for public input and further consideration by the Department prior to issuance of a decision and order on the waiver petition.

10 CFR 430.27 and 10 CFR 431.401 are amended by revising paragraph (e), which now requires the Department to post online a petition for an interim waiver within five business days of receiving an application and, as discussed in the preceding paragraph, will provide a decision on that petition for an interim waiver within 45 business days of receipt. 10 CFR 430.27(e)(1) and 10 CFR 431.401(e)(1). DOE added the requirement for posting the interim waiver in response to comments expressing concern that interested parties will be unaware that the Department received a petition for interim waiver. While DOE currently posts waiver and interim waiver requests on its website at *https://www.energy.gov/eere/buildings/current-test-procedure-waivers,* posting upon receipt is now specified in DOE's regulations to enhance public awareness of when DOE receives a request for interim waiver for processing pursuant to these amended regulations.

The Department may reach a decision on the petition at any point during the 45 business day window. The regulations also specify that the Department will post on its website a notice of the determination regarding a petition for interim waiver within five business days and will publish a notice of the decision in the **Federal Register** as soon as possible thereafter. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii). The Department updated these notification provisions from the NOPR for the same reasons of increased transparency and notice that it added the posting requirement for receipt of an interim waiver.

For purposes of determining the start of the 45 business day window, DOE considers a waiver and interim test procedure waiver petition received when the application request is accepted in the email box for receipt of waiver petition or if delivered by mail, on the date the petition is stamped as received by the Department. 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii). DOE updated the NOPR to specify that failure to satisfy the criteria set forth in 10 CFR 430.27(b)(2) and 10 CFR 431.401(b)(2) would result in denial of the interim waiver. (*See* 10 CFR 430.27(e)(1)(ii) and 10 CFR 430.401(e)(1)(ii) of this final rule.) This change is consistent with the current regulatory requirements for submission of an interim waiver (identification of related petition and basic models, as well as information on the likely success of the petition and information on the economic hardship or competitive disadvantage that is likely to result absent a favorable determination and an authorized signature). This change is also consistent with the criteria for grant of an interim waiver, which require the applicant to show that the petition for waiver will likely be granted and/or that it is 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 430.401(e)(2). DOE also considers this change consistent with the provision in its regulations, which remains unchanged by these amendments, specifying that a petitioner must submit an alternative test procedure to the extent that one is known with the waiver petition. 10 CFR 430.27(b)(1)(iii) and 10 CFR 431.401(b)(1)(iii). While DOE will not grant an interim waiver absent an alternate test procedure specified by the petitioner, and the information required by 10 CFR 430.27(b)(2) and 10 CFR 431.401(b)(2), DOE will continue to process the waiver request and work with the petitioner to develop an appropriate alternate test procedure and provide additional information as necessary to process the waiver.

Revised paragraph (h) clarifies the duration of interim waivers by stating that an interim waiver remains in effect until the Department publishes a decision and order on the petition for waiver in the **Federal Register** or, publishes in the **Federal Register** a new or amended test procedure that addresses the issue(s) covered in the waiver, whichever is earlier. 10 CFR 430.27(h)(1) and 10 CFR 431.401(h)(1). In response to comments on the NOPR, DOE retains the requirement that DOE will complete either of these actions within one year of the issuance of an interim waiver. 10 CFR 430.27(h)(2) and 10 CFR 431.401(h)(2). DOE did not amend the current regulatory requirement that a waiver or interim waiver will automatically terminate on the date by which use of an amended test procedure that addresses the issue presented in the waiver is required to demonstrate compliance. 10 CFR 430.27(h)(3) and 10 CFR 431.401(h)(3).

The Department also revised 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) to provide manufacturers with a 180-day grace period for compliance with a specified test procedure in this final rule. In the event DOE ultimately denies the petition for waiver or the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition, the affected manufacturers will have 180-days to come into compliance. The duration of this grace period mirrors the amount of time the Department provides manufactures to come into compliance when a new test procedure is prescribed under 42 U.S.C. 6293(e). This provision was specified in the 2019 NOPR regulatory text as 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii), but has been relocated to 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) in response to comments that 10 CFR 430.27(i) and 10 CFR 431.401(i) already specified the outcome if DOE denies a waiver petition after granting an interim waiver, or specifies an alternate test procedure in the waiver decision than in the interim waiver, and so the addition of the originally included 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) in the NOPR was confusing.

III. Response to Comments Received

Commenters	Affiliation	Acronym, identifier
A.O. Smith Corporation	Manufacturer	A.O. Smith.
Acuity Brands	Manufacturer	Acuity.
Air-Conditioning, Heating, and Refrigeration Institute	Manufacturer Trade Group	AHRI.
Alliance to Save Energy	Advocacy Group	ASE.
American Council for an Energy Efficient Economy	Advocacy Group	ACEEE.

Commenters	Affiliation	Acronym, identifier
American Lighting Association	Manufacturer	ALA.
American Lighting Association (ALA), the Association of Home Appliance Manufacturers (AHAM), the National Automatic Merchandising Association (NAMA), and Plumbing Manufacturers International (PMI).	Manufacturer	Joint Industry Commenters.
Anonymous Anonymous	Member of the Public	Anonymous 1.
Anonymous Anonymous	Member of the Public	Anonymous 2.
Appliance Standards Awareness Project with American Council for an Energy-Efficient Economy, Consumer Federation of America, National Consumer Law Center on behalf of its low-income clients, Northeast Energy Efficiency Partnerships, and Northwest Energy Efficiency Alliance.	Advocacy Group	ASAP, et al.
Appliance Standards Awareness Project, Alliance to Save Energy, American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, National Consumer Law Center, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance, Pacific Gas and Electric.	Advocacy Group and Utilities	ASAP, et al. 2.
Association of Home Appliance Manufacturers	Manufacturer	AHAM.
Attorneys General of California, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, New York, North Carolina, Oregon, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York..	State, Local Governments	AG Joint Commenters.
Better Climate Research and Policy Analysis	Advocacy Group	Better Climate Research and Policy Analysis.
BSH Home Appliances Corporation	Manufacturer	BSH.
California Energy Commission	State	CEC.
Carrier Corporation	Industry	Carrier.
Connecticut Department of Energy and Environmental Protection	State	DEEP.
Consumer Federation of America	Advocacy Group	CFA.
Consumer Federation of America and National Consumer Law Center	Advocacy Group	Consumer Groups.
Earthjustice	Advocacy Group	Earthjustice.
Felix Storch, Inc.	Manufacturer	FSI.
Franke, Rebecca	Member of the Public	Franke.
Goodman Manufacturing Company	Manufacturer	Goodman.
Gould, Kyle	Member of the Public	Gould.
Hamdi, Ahmed	Member of the Public	Hamdi.
Hardin-Levine, Carolyn	Member of the Public	Hardin-Levine.
Information Technology Industry Council	Industry	ITI.
Ingersoll Rand	Manufacturer	Ingersoll Rand.
Lennox International Inc.	Manufacturer	Lennox.
Lutron	Manufacturer	Lutron.
National Association of State Energy Officials	State	NASEO.
National Automatic Merchandising Association	Manufacturer	NAMA.
National Consumer Law Center	Advocacy Group	NCLC.
National Electrical Manufacturers Association	Manufacturer	NEMA.
Natural Resources Defense Council	Advocacy Group	NRDC.
Nortek Global HVAC		Nortek.
North American Association of Food Equipment Manufacturers	Manufacturer Trade Group	NAFEM.
Northeast Energy Efficiency Partnerships	Advocacy Group	NEEP.
Northwest Energy Efficiency Alliance	Advocacy Group	NEEA.
Northwest Power and Conservation Council	Interstate Compact	NPCC.
Pacific Gas and Electric	Utility	PG&E.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison.	Utilities	CA IOUs.
Plumbing Manufacturers International	Manufacturer	PMI.
Regal Beloit Corporation	Advocacy Group	RBC.
Sachs, Harvey	Member of the Public	Sachs.
San Diego Gas and Electric	Utility	SDG&E.
Sierra Club	Advocacy Group	Sierra Club.
Sierra Club & Earthjustice	Advocacy Group	Earthjustice.
Small Business Association—Office of Advocacy	Industry	SBA.
Southern California Edison	Utility	SCE.
Stewart, Jim	Member of the Public	Stewart.
Traulsen, A Division of ITW Food Equipment Group, LLC	Industry	Traulsen.
State of Washington Department of Commerce, Washington State Energy Office.	State	WA State Energy Office.
Weikel, Wendy	Member of the Public	Weikel.
Whirlpool Corporation	Manufacturer	Whirlpool.

The 2019 NOPR proposed that ''an application for interim waiver would be deemed granted, thereby permitting use of the alternate test procedure suggested by the applicant in its application, if DOE fails to notify the applicant in writing of the disposition of an application within 30 business days of receipt of the application.'' 85 FR 18414, 18415 (May 1, 2019). During the comment period several stakeholders supported DOE's proposed approach. FSI believed that the current delays in the interim waiver process lead to substantial direct and indirect costs to both businesses and to consumers by not allowing innovative and energy saving appliances to come to market in a timely manner. (FSI, No. 16 at p. 1) This commenter further stated that it is an unfair economic penalty to all manufacturers, but especially burdensome to smaller manufacturers, where the investment of time and development is held in limbo. (*Id.* at p. 2) FSI asserted that the proposal creates a reasonable incentive for DOE to respond to petitions and that the requirement for a speedy waiver process is not the equivalent of self-regulation as some commenters claimed. In addition, FSI stated that the current regulations already contained language protecting against manufacturers abusing the process, with penalties provided for doing so. (*Id.* at p. 2) Also, one commenter stated general agreement with DOE's proposal. (Hamdi, No. 34, at p. 1)

ITI agreed that DOE's proposal met the goal of addressing delays in DOE's current process for considering requests for interim waivers, which can result in significant delays for manufacturers in bringing new and innovative products to market. (ITI, No. 20 at p. 1).

In DOE's request for comments concerning the Department's prioritization of rulemakings, 85 FR 20886 (April 15, 2020) rulemaking, AHAM commented in support of amending the existing test procedure interim waiver process and prioritizing this action. AHAM agreed that the Department's efforts to streamline the waiver process would mitigate the burden for manufacturers associated with waiting for DOE to respond to interim waiver requests and allow DOE to instead focus its attention on the merits of granting a final test waiver. Based on the Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions, AHAM anticipated that the finalization of the rule would not require the expenditure of significant resources and urged DOE to finalize the rule immediately. (AHAM, EERE–2020–BT–STD–0004, No. 10 at p. 3)

NAFEM fully supported the initial 30-day review deadline before petitions for interim waivers were deemed granted. This commenter stated that the proposal would greatly reduce the uncertainty and risk associated with the waiver process. (NAFEM, No. 26 at p. 3) The Joint Industry Commenters also agreed with DOE's determination that it is desirable for public policy reasons, including burden reduction on regulated parties and administrative efficiency, to grant immediate relief on each petition for interim waiver if DOE does not notify petitioner of its interim waiver decision within the 30 business days. (No. 52 at p. 2) This commenter stated that DOE's proposal will lead to the following benefits: (1) It will allow manufacturers to more swiftly provide innovative, energy saving products to consumers; (2) It will provide certainty to regulated entities; (3) It creates a compliance pathway for innovative products being introduced on the market for which the current test procedures do not apply; and (4) DOE's proposal provides a clear, transparent process so that regulated parties and other stakeholders know how DOE will operate. (*Id.* at pp. 2–5) While supporting the DOE proposal, the Joint Industry Commenters also recommended that DOE add to the final rule a provision indicating that, in cases where interim test procedures are deemed granted by the passage of time, DOE will publish the interim test procedure waiver (and the petition for test procedure waiver) in the **Federal Register** immediately. It stated that this would be consistent with DOE's current practice to publish its decisions on interim waivers together with the notice and request for comment on the test procedure waiver petition. (*Id.* at p. 4) This commenter expects that if DOE receives a petition that is incomplete, it will notify the petitioner and that such a petition could not be considered granted by the passage of time because it is not complete. (*Id.*)

Moreover, while NEMA stated its support for DOE's ''deemed granted'' approach, it would modify the proposal to provide for some action by DOE before an interim waiver is granted. NEMA suggested that the final rule provide that DOE will publish the interim test procedure application after the application is deemed complete by the Department. Then, it suggested a short comment period of 10 days to provide stakeholders the opportunity to raise red flags. If stakeholders and DOE do not identify any significant substantive problems with the petition for waiver, then 30 days after the interim test procedure application is published in the **Federal Register** the application should be deemed granted, unless DOE informs the manufacturer otherwise in writing. NEMA also believed that if significant and substantive concerns with the interim waiver are raised during the comment period or discovered by DOE in its preliminary review of the petition, DOE should be able to take another 30 days to review the petition before determining if the interim waiver is granted as-is, granted with modifications, or denied. (No. 55 at pp. 4–5) NEMA stated that these modifications will address the possibility of competitive gamesmanship and increase transparency.

The Office of Advocacy for the Small Business Association (SBA) fully supported DOE's proposal to streamline the test procedure interim waiver process so that small manufacturers have more regulatory certainty in the interim waiver process. According to the SBA, the delays have a significant impact on small businesses that sell product at much lower volumes and that are unable to sell their product for a significant amount of time, thus reducing their income flow. Therefore, these delays have the potential to put some small manufacturers out of business. (SBA, No. 23 at p. 1, 3, 4) It stated that abuse of the process is not a concern because the proposal only eliminates a bottleneck in the process by requiring DOE to meet the 30-day decision-making requirement. Even if the interim waiver is granted, the application is still required to go through a full review as the process remains unchanged. (SBA, No. 23 at p. 4)

On the other hand, many other commenters' objected to DOE's ''deemed granted'' approach. For example, Earthjustice argued that the proposal would weaken the energy conservation standards program by allowing manufacturers to abuse the process by placing noncompliant products in the market given the 30-day ''deemed granted'' requirement and the grace period after DOE revoked such waivers. This result could occur without any notice to either competitors or stakeholders and with no opportunity to object. (Earthjustice, No. 49 at p. 1 *See also* Hardin-Levine, No. 2 at p. 1; Stewart, No. 7, at p. 1; Lennox, No. 11 at p. 1; RBC, No. 12 at 1; Gould, No. 13 at p. 1; Anonymous 1, No. 17 at p. 1; NPCC, No. 21 at p. 1; WA State Energy Office, No. 22 at p. 1; Better Climate Research and Policy Analysis, No. 24 at p. 1; Traulsen, No. 25 at pp. 2–3; Sachs,

No. 29 at p. 2; Consumer Groups, No. 33 at p. 2; DEEP, No. 35 at p. 1; Carrier, No. 36 at p. 2; CA IOUs, No. 37 at p. 1; Nortek, No. 38 at p. 3; Ingersoll Rand, No. 39 at p. 1; CEC, No. 40 at p. 1; AHRI, No. 42 at p. 2; ASE. No. 43 at p. 3; A.O. Smith, No. 44 at p. 1–2; NASEO, No. 45 at p. 1; ASAP et al., No. 46, at pp. 1, 8; NRDC, No. 47, at p. 1–2, 5–6; Lennox, No. 48 at p. 1, 4; AG Joint Commenters, No. 51 at p. 2, 5; and Goodman, No. 54 at p. 1)

Many commenters, while ultimately objecting to the proposed automatic approval as noted in the preceding paragraph, commented that DOE should nonetheless be held to a timeline when processing interim waiver requests. Various commenters proposed alternative scenarios, such as maintaining the status quo, the 30-business day time limit proposed by DOE, and increasing the time limit to 120 days, with specific milestones along the way. (Franke, No. 8 at p. 1 for maintaining 30 days; BSH, No. 41 at 5, for maintaining 30 days, with notice and comment if application is deemed granted; Acuity, No. 14 at p. 2, for maintaining the 30 days but not more than 90; Lutron, No. 53 at p. 2, with providing stakeholders a brief opportunity for comment during the 30 business day window; FSI, No. 16 at p. 2, for maintaining 30 days; Anonymous 1, No. 17 at p. 1, if the proposal is finalized, use 60 to 90 days before granting; NAFEM, No. 26 at p. 2, supporting 30-day review process; Traulsen, No. 25 at p. 3, supporting a 60 business day review process; Carrier, No. 36 at p. 2, suggesting a review process that is not more than 120 days to conduct a review of the interim waiver application, public comment period, review of comments received, and additional communication with the petitioner; AHRI, No. 42 at pp. 2–3, supports a maximum of 120 days to review and process an interim waiver application; Sachs, No. 29 at p. 2, recommends creating time limits for each step of the process; CA IOUs, No. 37 at p. 2–3, suggesting a 6-month review process; Nortek, No. 38 at pp. 2–3, suggesting a maximum of 120 days; CEC, No. 40 at p. 9–10, suggesting an additional step for completion check and comment period and providing an automatic grant only if no adverse comments are received; ASE, No. 43, at p. 4, stating that a comment period is needed; A.O. Smith, No. 44 at p. 4–5, recommending an alternative process allowing 135 days, including stakeholder comment and a full technical review; ASAP et al., No. 46 at pp. 7–8, providing for a 90-day review period, including notice and comment but not replacing comment period after publication of interim waiver; Lennox, No. 48 at pp. 2–3, suggests setting a reasonable deadline with an expedited comment period of 30 days; and Goodman, No. 54 at pp. 1–2, 4, suggesting 90-day time period with opportunity for comment)

In response to these arguments, DOE's reiterates that these changes are being adopted in response to concerns that the current system for processing interim waiver petitions is not working as it should. In DOE's view, manufacturers should not be constrained from selling their products for significant periods of time while DOE undertakes a lengthy review of a temporary measure (the interim waiver) or applies its limited resources to other priorities, such as rulemakings subject to a statutory deadline. DOE also does not believe that manufacturers should be limited in their ability to sell their products while DOE works extensively, and without the benefit of public comment, to determine what the alternate test procedure should be in response to the interim waiver request.

As DOE explained in its modernized Process Rule, DOE should be held accountable for complying with its own procedures so that the public will have confidence in the transparency, predictability, clarity, and fairness of DOE's regulatory process. Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (''Process Rule''), 85 FR 8626, 8632, 8634 (February 14, 2020). Under the procedures adopted in this final rule, DOE places the burden of delay on DOE rather than the manufacturer. If DOE does not notify the applicant in writing of the disposition of the interim waiver within 45 business days, the manufacturer would be authorized to test subject products under an interim waiver using the alternate test procedure submitted by the manufacturer while DOE processes the waiver request, including obtaining the benefit of comment from other manufacturers and stakeholders.

In consideration of the comments received suggesting a longer review period, however, DOE has determined that a 45 business day period will provide the Department with a small amount of additional time to review the interim waiver request while still providing certainty to the manufacturer that if DOE does not act within the prescribed time period, the interim waiver will be granted pursuant to DOE's existing regulatory criteria for the grant of interim waiver requests at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2).

Accordingly, after taking all comments into account concerning the adequacy of the 30 business day time period for consideration of interim waiver petitions, DOE is modifying this requirement to provide the Department 45 business days to review completed interim waiver petitions based on the criteria in its current regulations, 10 CFR 430.27(e)(2) or 10 CFR 431.401(e)(2). These are the same criteria that have been applied to every interim waiver petition acted upon by DOE and are not changed by this final rule. Because an interim waiver is meant to be a temporary measure to hold a requester harmless while a final decision on a waiver is processed, the criteria for granting an interim waiver are straightforward and intended to facilitate a quick review process. For example, if DOE has seen a particular technological issue in prior waivers that have been granted, it should quickly become apparent that it is likely that the petitions for waiver based on the same technological issue would be granted. In addition, the criterion that it is desirable for public policy reasons to grant ''immediate relief pending a determination on the petition for waiver'' in particular indicates that DOE's decision for interim waiver is intended to be a quick process to grant ''immediate'' relief rather than serve as the culmination of DOE's decision-making process on the petition for waiver. As a result, it is not intended to encompass a detailed review to determine all of the complex particulars of the alternate test procedure that may ultimately be granted as part of the decision and order on the waiver petition. DOE emphasizes that, as in the current regulations, it remains required to affirmatively make a decision as to whether to grant or deny the interim waiver petition. If DOE denies the interim waiver petition, it is required to notify the petitioner within the 45 business day time period and post the notice on the website as well as publish its determination in the **Federal Register** as soon as possible after such notification. Moreover, in DOE's past experience, the majority of interim waiver petitions were granted.[6] As a

[6] Of the 21 concluded interim waiver petitions that DOE had granted as of issuance of DOE's NOPR, the Department had granted 18 in full and granted the remaining 3 with modifications such as one was granted in part, one with minor modifications, and one with a different test procedure than proposed. 84 FR 18414, 18419 (May 1, 2019).

result, this final rule also states that if petitioner has not received notification of the disposition of the petition for interim waiver within 45 business days, the interim waiver petition is granted based on the criteria in DOE's regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver or, such as in cases where DOE has granted waivers to other manufacturers for the same technology using the same or a similar alternate test procedure, that it is likely that the petition for waiver will be granted. The manufacturer may test and certify its products using the alternative test procedure included in the petition, and compliant products may be distributed in commerce. DOE will publish the grant or denial of the interim waiver in the **Federal Register** after its determination is made and posted online. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii).

In response to comments suggesting that DOE provide for a ''completeness check'' or ''full technical review'', it is DOE's intent to review the interim waiver request within the 45 business day time period. DOE notes the new provision in the final rule that for an interim waiver to be granted, the petitioner must submit an alternate test procedure. DOE reiterates that unless it acts to grant or deny the interim waiver within the 45 day period, the interim waiver will be granted at the end of the 45 days according to the criteria in DOE's regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2), and DOE will then publish the grant of interim waiver and alternate procedure for public comment. During this time, DOE will conduct any necessary technical review, working with the manufacturer as necessary—and with the benefit of input from the public, including other manufacturers—to ensure that the alternate test procedure ultimately adopted upon the grant of any petition for waiver is appropriate. The benefit to the new process is that when DOE publishes a decision on the interim waiver and request for comment, DOE does not expect to have made significant changes to the alternate test procedure submitted with the interim waiver. If there are significant ''red flags'', as indicated in NEMA's comment, DOE would deny the request for interim waiver and continue to process the petition for waiver. As a result, interested stakeholders will be able to provide input on the alternate test procedure as it was submitted by the petitioner, rather than an alternate test procedure to which DOE may have made substantial changes without the benefit of public input. DOE intends for the changes finalized in this rule to increase transparency and the use of stakeholder input in the waiver process. This approach is also intended to facilitate the introduction of innovative products to market and ensure that the burden to act promptly is on DOE.

NEMA recommended that the final rule should include a short comment period of 10 days to provide stakeholders the opportunity to raise red flags if necessary before DOE finalized a petition for interim waiver and DOE agrees the process needs greater transparency. (NEMA, No. 55 at p. 4) Current regulations lack the transparency to provide manufacturers and concerned stakeholders notice of DOE activities when making changes to waivers petitions submitted by a manufacturer and an opportunity to engage in the process. This final rule seeks to increase transparency and provide a means of including stakeholder input in the Department's review process. The final rule provides that members of the public will receive notice of interim waiver petitions through posting on the DOE website and publication of its decision in the **Federal Register**, 10 CFR 430.27(e)(1) and 10 CFR 431.401(e)(1). Stakeholders and other manufacturers will be made aware of the Department's ongoing review and decision through these amendments to the existing regulation and can raise concerns during the processing of the interim waiver.

DOE believes that this final rule directly addresses the concern expressed by commenters that the ''deemed granted'' language included in the proposal would result in situations where DOE did not exercise its statutory responsibility to apply the regulatory requirements to all interim waiver petitions in an affirmative manner. (CA IOUs, No. 37 at p. 7) Some commenters argued that DOE's proposed approach results in an abdication of the Department's decision-making authority and does not meet DOE's obligation to consumers nor does it promote a fair and level playing field among manufacturers. (A.O. Smith, No. 44 at p. 1–3, concerned that the automatic granting of an interim waiver is an abdication of responsibility; NRDC, No. 47 at p. 2–3, the Department must affirmatively review the request and decide that it is technically and procedurally appropriate to grant the interim waiver; Lennox, No. 48 at p. 4, pp. 5–6; and AG Joint Commenters, No. 51 at p. 5, EPCA requires that DOE must make an affirmative determination)

In response, DOE maintains that the language included in this final rule continues to require that DOE engage in a decision-making process for each interim waiver petition and provide notice of that decision to petitioners and the public. DOE will continue to fulfill its statutory obligations with respect to all waiver petitions it receives. Interim waivers to which DOE does not respond within the 45 business day period are granted pursuant to the criteria in DOE regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is within the public interest to grant immediate relief pending a determination on the petition for waiver. The grant of an interim waiver ensures that the manufacturer subject to the interim waiver (and to any subsequent waiver) is testing and certifying its products pursuant to a DOE test procedure, as required by EPCA. DOE will then continue to review the petition for waiver and issue a decision and order on that petition after any further technical review and consideration of public input. By finalizing this rulemaking, DOE does not cede its authority to review interim waiver petitions or otherwise abdicate its decision-making responsibilities with regard to requests for waiver from the test procedure set forth in DOE's regulations.

In addition, as a result of the ''deemed granted'' language, commenters proposed revised notice and comment scenarios for consideration as part of the interim waiver process. Those commenters asserted that the proposal fails to require notice of a waiver be given to consumers and competitors, that consumers will lack the information needed to make informed decisions about appliances, and that the Department should provide prompt notice of approved petitions. (Anonymous 1, No. 17 at p. 1; Consumer Groups, No. 33 at p. 3; and DEEP, No. 35 at p. 2) Supporting the proposal, BSH recommended adding in the final rule a provision regarding interim test procedure waivers deemed granted by the passage of time that the Department shall publish the waiver in the **Federal Register** immediately to ensure adequate notice to the public is provided. (No. 41 at p. 4) Additionally, Goodman notes that the existing process under 10 CFR 430.27(c)(1), which requires that notification of an interim test procedure waiver is only given to competitors in the same product class and after publication in the **Federal Register**, should be expanded. This commenter suggests that other manufacturers of the same product class

should also receive notification and an opportunity to comment. Such action would provide manufacturers of a given product class greater certainty of notice and opportunity to respond before a product is introduced into commerce. (Goodman, No. 54 at p. 2–4).

In response to these comments, DOE agrees that public input is critical to DOE's consideration of petitions for waiver of the DOE test procedure. DOE values input from stakeholders because such comments contribute to a better work product and help to resolve complicated technical issues. In this final rule, DOE has provided that all determinations made in response to interim waiver petitions will be published in the **Federal Register** after such decisions are made, taking into account the 45 business day deadline. In addition, to promote transparency, the regulations will require DOE to continue its current practice of posting waiver petitions online when they are received, so that the public and other manufacturers are aware that a petition for waiver and interim waiver has been submitted. The regulations also add a requirement for DOE to post decisions on interim waivers when those decisions are made. Posting of both receipt of a petition for interim waiver and DOE's decision on an interim waiver will be made within 5 business days. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii).

DOE emphasizes that under the current regulatory requirements, the stakeholder comment period is triggered by DOE's granting of an interim waiver. 10 CFR 430.27(c) and (d) and 10 CFR 431.401(c) and (d). This final rule does not change those requirements. Accordingly, DOE is not taking away any previous opportunity stakeholders had for comment prior to the grant of an interim waiver. To the contrary, DOE is facilitating additional transparency through issuance of this final rule. Previously, DOE in many cases conducted significant discussions with the manufacturer and made changes to the alternate test procedure submitted by the manufacturer without the benefit of input from the public, including other manufacturers and stakeholders in the process, as well as any other interested parties. Under this final rule, all of these interested groups will be afforded input at the very beginning of DOE's process of considering an alternate test procedure.

This rule is intended to expedite the review process and increase the transparency of the Department's review of interim test procedure waivers. Under the amended requirements of this final rule, stakeholders will have the opportunity for comment on the waiver process as under the current regulations, with the added benefit of earlier engagement with the Department as it considers an alternate test procedure. DOE will leave in place its current comment procedure, seeking comment upon the grant or denial of any interim waiver request. DOE will continue to invite a robust discussion of technical and other issues during that comment period.

Some commenters questioned whether the Department can meet the proposed ''deemed granted'' 30 business day deadline given that DOE's data indicate that it has only met the 30-day deadline on one occasion. (NPCC, No. 21 at p. 2) Comments submitted by NRDC note that such a timeframe is unwarranted given that the Department has failed to respond to interim waiver requests in that timeline in the past. Further, commenters contend that it is unlikely DOE will meet this deadline because the NOPR does not include a rational explanation for meeting the proposed 30 business day time period. (NRDC, No. 47 at p. 4–5).

Upon further review of the proposed timeframe, DOE has decided to extend the internal review period from the 30 business days referenced in the NOPR to 45 business days in this final rule. DOE notes that its dataset includes an additional three interim waivers were granted during this 45-business day timeframe as opposed to the 30-business day timeline, further supporting that DOE is able to consider interim waivers during the 45-business day time period adopted in this final rule. As with the modernized Process Rule referred to above, DOE views its examination of the interim test procedure waiver process as an opportunity to improve how the Department administers its programs. As was mentioned earlier in this document, much of DOE's delay in responding to a request for an interim waiver involved lengthy, private technical discussions with the requester attempting to re-design an alternate test procedure before seeking public input. Under this final rule, DOE will ensure that it acts expeditiously on requests for interim waiver and that any in-depth technical review will take place with the benefit of public comment, during DOE's decision-making process on the petition for waiver. This final rule will increase the transparency of the process and ensure that the manufacturer can distribute its products in commerce under an interim waiver while DOE processes the waiver request.

Many commenters expressed their concern that if DOE codified its original proposal, the system for interim waivers would institutionalize a process that would allow for abuse. Commenters who took this position believe that the ''deemed granted'' language would allow manufacturers with ill-intent to abuse the process by submitting waiver applications with faulty alternate test procedures or perhaps no alternate test procedures at all and nevertheless have their interim waivers granted within the proposed 30-business day period. These commenters stated that manufacturers who play by the rules and are producing compliant products or equipment would be harmed. In addition, they argued that foreign importers would receive a competitive advantage to the detriment of American manufacturers. (Hardin-Levine, No. 2 at p. 1; Stewart, No. 7 at p. 1; Franke, No. 8 at p. 1; Gould, No. 13 at p. 1; Anonymous 1, No. 17 at p. 1–2; NPCC, No. 21 at pp. 1–2; Traulsen No. 25, at p. 3; Sachs, No. 29 at p. 2; Consumer Groups, No. 33 at p. 2; Carrier, No. 36 at p. 2; CA IOUs, No. 37 at pp. 1–2; Nortek, No. 38 at p. 3; CEC, No. 40 at p. 4; AHRI, No. 42 at p. 2; ASE No. 43 at p. 3; A.O. Smith, No. 44 at pp. 1–3, 5; NASEO, No. 45 at p. 1; ASAP et al., No. 46 at pg. 3, 5; Lennox, No. 48 at pp. 3–4; Earthjustice, No. 49 at p. 1, 4; and AG Joint Commenters, No. 51 at p. 2, 8). Commenters voiced their concerns that the proposal ''[c]ould open the floodgates for a deluge of substandard foreign products to enter U.S. markets to the detriment of U.S. manufacturers,'' therefore DOE should not finalize a ''deemed granted'' interim waiver approach if the Department does not act in 30 days. (Lennox, No. 48 at p. 3–4)

Other commenters did not believe that the proposed process would allow for abuse. Acuity disagreed with these arguments and counted that through stakeholder engagement conducted throughout the test procedure rulemaking process that interim waivers are likely to be used infrequently and will not become a general opt out mechanism. (No. 14 at p. 3) Some commenters argued against these concerns by highlighting that there is language in the proposal that protects against an abuse of the process and that there are penalties if a manufacturer breaks the law also in place. (FSI, No. 16 at p. 2) The SBA also commented that the concern regarding possible abuse of the process was unfounded because the proposal only eliminated a bottleneck in the review process by requiring DOE to meet a time limit and even if an interim waiver is automatically granted that the application for the full waiver will still undergo a review by the Department.

(No. 23 at p. 4) Lastly, some commenters noted that even if abuse were to happen, DOE's regulation already includes a remedy and nothing in the proposal removes this authority. Commenters cited 10 CFR 430.27(k), which provides DOE the authority to rescind or modify a waiver or interim waiver at any time if DOE determines that the underlying factual basis is incorrect or determines that the results from an alternative test procedure are unrepresentative of the true energy consumption. (Joint Industry Commenters, No. 52, at p. 5)

DOE emphasizes that if DOE has not notified the petitioner of the disposition of an interim waiver within the 45 business day period, that interim waiver is granted according to the existing criteria in 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver or, such as in cases where DOE has granted waivers to other manufacturers for the same technology using the same or a similar alternate test procedure, that it is likely that the petition for waiver will be granted. DOE therefore no longer uses the term ''deemed granted'' in this rulemaking. DOE again notes a change to its regulatory text in response to these comments—specifically, if no alternate test procedure is submitted, DOE will not grant an interim waiver but will publish the denial of interim waiver and request for comment on the petition for public comment, so that it can process the waiver petition with the benefit of public comment on what the alternate test procedure should be.

DOE is not persuaded by commenters' concern regarding the likelihood of abuse of process by U.S. and foreign manufacturers. DOE finds the fear of speculative abuse unlikely as there is no evidence of such abuse and little reason to expect that the proposal would open the door to abuse by manufactures. (Joint Industry Commenters, No. 52 at p. 4) In DOE's experience over many years, the Department has not seen the waiver process abused as some commenters suggest. DOE believes that it is highly unlikely that a manufacturer would spend the time, effort, and funds to submit a faulty application on the hope that it might slip through and the risk that the requester might be alerting DOE to non-compliant products. As many commenters pointed out, manufacturers are incentivized to get their interim test procedure waivers right the first time. Commenters identified the following reasons as justification for why it is in the best interest of petitioners to ensure that the alternate test procedure is correct the first time around are as follows: Brand reputation, competitors will highlight any unfair procedures engaged in by others, the creation of significant marketing costs, and the fact that there are significant costs to conducting test procedures so manufacturers prefer not to retest if it can be avoided. (BSH, No. 41 at p. 4; and NEMA, No. 55 at p. 6) Commenters' concern overlooks the reality that DOE continues to review interim waiver petitions and waiver petitions and would find these abuses if they did exist.

Moreover, several commenters stated, and common sense suggests, that it is highly unlikely that stakeholders want to attract negative attention and incur the risk of DOE enforcement. While it is always possible that some stakeholder on some occasion will attempt to abuse any process, DOE believes this is a rare situation, if it were to happen at all. DOE agrees with the Joint Industry Commenters who reasonably point out that it would be ''odd that a manufacturer intent on abusing the system would notify DOE and the public by petitioning for a test procedure waiver'' using a faulty or fraudulent test procedure. (No. 52 at p. 4) Similarly, Lutron noted that the Department should not let the ''fear of a bad actor'' prevent this regulatory process from working for everyone else. (No. 53 at p. 3)

The Department does not base its decision-making process upon speculative behavior of alleged manufacturers who might act in bad faith. Further, DOE believes that if a manufacturer engaged in this behavior, it would likely be (as noted by commenters) detrimental to the reputation of the manufacturer. In addition, DOE's existing regulations already provide a remedy for abuse of the test procedure interim waiver and waiver process. 10 CFR 430.27(k) provides DOE with the authority to ''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 incorrect, or upon a determination that the results from an alternative test procedure are unrepresentative of the basic model(s) true energy consumption characteristics.'' Nothing in this final rule removes this authority from the Department.

In their challenge to the NOPR as allowing for the sale of non-compliant products to enter the market, ASAP et al. remarked that incomplete interim waivers petitions would be ''deemed granted'' after 30 days. A manufacturer could circumvent the energy conservation standard by submitting a petition lacking an alternative test procedure, they argued, and therefore be able to sell a product without conducting any testing. (ASAP. et al., No. 46 at p. 3) Other commenters also expressed their concern about what DOE would do when an alternative test procedure is not included in the submission. (Lennox, No. 48 at pp. 4–5) Commenters suggested that DOE should reject all incomplete interim waiver and waiver applications, including those without a valid test method included, so that applicants can then revise and resubmit the petition. (A.O. Smith, No. 44 at p. 3)

In response to these questions concerning an interim test procedure petition submitted without the required alternate test procedure, DOE wants to make very clear that, in reality, this scenario does not happen. That is, petitions for interim waiver and waiver submitted to the Department do include an alternative test procedure. However, in the exceedingly rare case that a requestor may not include an alternate test procedure, DOE has added language to the regulatory text stating that, if a petition is submitted without an alternative test procedure, DOE will deny the petition for an interim waiver and move to consideration of the waiver request. Commenters agree that manufacturers must have a viable way to test a covered product in the situation where the current DOE test procedure is inadequate to properly test specific basic models with specific design characteristics. Because the denial of interim waiver is published for public comment, the alternate test procedure ultimately developed as part of any grant of a waiver petition will benefit from input from other manufacturers, stakeholders, and interested parties.

DOE received comments arguing that DOE had not taken the impact on consumers from this proposal into consideration. Commenters asserted that the Department's ''deemed granted'' approach would allow noncompliant products into the marketplace for an indefinite period of time thereby harming consumers who would unknowingly purchase a product that does not meet DOE energy conservation standards, thereby resulting in higher energy costs to consumers. (Stewart, No. 7 at p. 1; Anonymous 1, No. 17 at p. 1–2; NPCC, No. 21 at p. 2; WA State Energy Office, No. 22 at p. 1; Better Research Climate and Policy Analysis, No. 24 at pp. 1–2; Consumer Groups, No. 33 at p. 2–3; CA IOUs, No. 37 at p. 1; Ingersoll Rand, No. 39 at p. 2; CEC, No. 40 at p. 4–6, 8; ASE, No. 43 at pp. 2–3; A.O. Smith, No. 44 at p. 1, pp. 2–

3; NASEO, No. 45 at p. 1; ASAP et al., No. 46 at pg. 3, 5; Lennox, No. 48 at pp. 3–4; Earthjustice, No. 49 at pp. 1–2; AG Joint Commenters, No. 51 at p. 2, 8; and Goodman, No. 54 at p. 2)

This final rule requires DOE to make decisions on all interim waiver requests within 45 business days. Because DOE publishes the decision on the interim waiver (and, at the same time seeks comment on the waiver petition), during or as soon as possible after the conclusion of this time period, consumers will be situated in a better position under this final rule than under DOE's previous procedures. The alternate test procedure will be published for comment as part of the grant or denial of any interim waiver, and consumers will benefit from being able to see comments provided on the alternate test procedure, including those from other manufacturers, which will be publicly available on *http://www.regulations.gov.* Moreover, as stated previously, DOE reaffirms that it is extremely doubtful that a manufacturer would go to the time and expense of submitting a fraudulent waiver petition in the hope of getting a small period of time to sell noncompliant products that would cause adverse impacts to consumers. Instead, DOE maintains that consumers will likely benefit from this rulemaking as innovative products will be made available more quickly and expand consumer choice when selecting a product to best meets consumers' needs.

In challenging the validity of the NOPR, several commenters argued that DOE lacks the statutory authority to create and amend the waiver process. Earthjustice argued specifically that EPCA does not explicitly authorize a waiver process pursuant to which manufacturers can avoid applying DOE's test procedures to their products, but provides only an authorization to DOE to amend a test procedure in response to petitions submitted by interested persons, under 42 U.S.C. 6293(b)(2). (No. 49 at p. 2) These commenters argue the NOPR has violated the APA's requirement to reference the legal authority under which a rule is proposed. (Earthjustice, No. 49, at p. 2 citing 5 U.S.C. 553(b)(2); *see also* AG Joint Commenters, No. 51 at p. 4–5; and Lennox, No. 48 at p. 5) Stakeholders also commented that it is DOE's responsibility to provide a path to compliance for all manufacturers that sell covered product because they are legally subject to DOE standards regulation. (Joint Industry Commenters, No. 52 at p. 1).

Section 393 of EPCA (42 U.S.C. 6293) provides the Department with the authority to adopt new test procedures and to amend existing test procedures for covered products when such test procedures would more accurately or fully comply with the requirement that the test procedure be reasonably designed to produce results that measure energy efficiency, energy use, water use, or estimated annual operating costs of a representative average use cycle or period of use. DOE first adopted regulations implementing waiver procedures in 1980, and has updated the regulations three times in 1986, 1995, and most recently in 2014 with no concerns raised. 45 FR 64109 (September 26, 1980); 51 FR 42823 (November 26, 1986); 60 FR 15004 (March 21, 1995); and 79 FR 26591 (May 9, 2014). DOE emphasizes that the alternate test procedure specified in a waiver or interim waiver is a DOE test procedure, adopted by the Department. Manufacturers are authorized to use this alternate DOE test procedure through the decision and order issued by DOE upon consideration of the waiver petition. DOE further notes that alternate test procedures authorized through DOE decision and orders are used by DOE in developing appropriate test procedure amendments pursuant to 42 U.S.C. 6293. As the Department has done for decades under the existing ''waiver'' rules, the Department is simply issuing a test procedure under EPCA applicable to certain technologies not considered in the existing codified test procedure.

The waiver process, both interim and final, is the process codified in DOE's regulations by which DOE addresses new and emerging technologies as they come on the market between test procedure rulemakings. Without it, affected manufacturers would be excluded from the market and would have no recourse until DOE engages in future rulemaking. DOE does not read EPCA to prohibit manufacturers with new and innovative products from being able to test and certify their products for consumer use until DOE were to engage in a future rulemaking. DOE also does not believe that stakeholders are advocating for the elimination of the waiver process. There was overwhelming support for having such a process in place for those instances when products fall outside the scope of the applicable, codified test procedure requirements. Manufacturers, interested stakeholders, and consumers rely on DOE's ability to consider amendments to the test procedure to more fully or accurately comply with EPCA's requirement to measure the energy use of a representative average use cycle or period of use that authorizes the waiver process so that potential amendments to the test procedure can be considered in fact-specific circumstances. To read EPCA otherwise would likely place a barrier on the availability of future innovative and potentially energy conserving products.

Several commenters argued that the economic analysis included in the NOPR is based on faulty assumptions and that many of those assumptions assessing the impact of the NOPR resulted in a significant overestimation of the costs of the interim waiver process on manufacturers. (Better Climate Research and Policy Analysis, No. 24 at pp. 1–2; CEC, No. 40 at pp. 7–9; ASE, No. 43 at pp 4–5; ASAP et al., No. 46 at p. 6–7; NRDC, No. 47 at p. 5; and Goodman, No. 54 at p. 5) Some commenters stated that DOE severely underestimated the costs of allowing non-compliant products onto the marketplace through the proposed ''deemed granted'' approach. The CA IOUs argued that many of these assumptions used to assess the impact of the NOPR resulted in a significant overestimation of the monetary impacts facing manufacturers, while understating impacts to customers, competitors and the environment, including the potential abuse from allowing the introduction of noncompliant and less efficient product into the market for a period of time. These and other commenters seek additional information from DOE on the economic and environmental costs and benefits of the proposed rule and a full assessment of negative impacts of the rulemaking. (CA IOU's, No. 37 at pp. 3–7; and AG Joint Commenters, No. 51 at p. 8).

On the other hand, NAFEM commented that the proposal correctly identifies many of the real costs and impacts to companies from the current process that unreasonably delays decisions on interim waiver requests. The current process prohibits companies from bringing valuable products to the marketplace while waiver requests are reviewed and interim waiver decisions are delayed. Commenters assert that such delays are unreasonable, given the specificity of the regulatory requirements for grant of an interim waiver, and supported the changes proposed in the NOPR. (NAFEM, No. 26 at p. 3).

As discussed in section III of the NOPR, DOE reviewed the time lags between the receipt of the waiver application and issuance of an interim waiver, and considered the anticipated cost savings that could result from waivers granted following the proposal's

deemed granted approach. DOE relied on the 40 waiver applications submitted between 2016 and 2018, 33 [7] of which included interim waiver requests, to note that only one interim waiver request was granted within 30 business days of receipt of the application and one-fifth of the requests were resolved in under 100 days. On average, the Department determined, 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. DOE's data illustrated that there was a need for issuance of a timely interim waiver while the full waiver was under review because the primary anticipated cost savings considered resulted by reducing the number of days by which a manufacturers revenues were delayed. 84 FR 18414, 18416–18417, 18418 (May 1, 2019). Setting mandatory timelines within the Department's review process will help prevent the financial impacts manufacturers currently experience as a result of delays in the processing of interim waiver requests.

In response to these concerns about the economic analysis conducted, DOE does not believe that the rule will allow noncompliant products onto the market for an indefinite period of time. To the contrary, the regulations allow manufacturers to test their product according to a DOE test procedure under an interim waiver while DOE considers public comment and other information in determining whether changes are warranted to the test procedure ultimately specified in the decision and order on the waiver petition. At all times, manufacturers will test and certify according to a DOE test procedure and will distribute in commerce only products that are compliant with the DOE standard.

Several commenters objected to DOE's proposal as unnecessary given that DOE already has an enforcement policy that addresses the underlying basis of the rule, that manufacturers with innovative products that cannot be tested under existing DOE test procedures will be harmed because delays in processing interim waivers prevent them from selling their product. These commenters point out that the current DOE enforcement policy addresses this issue. (ASAP et al., No. 46 at p. 5; Lennox, No. 48 at p. 10; and Earthjustice, No. 49 at p. 5–6) These commenters argue that under DOE's enforcement policy, as long as a petition for waiver has been filed, such products can be sold without fear of enforcement action. Accordingly, they state that because of the enforcement policy there is no reason that the existing interim waiver process should result in any delays concerning the introduction of innovative products. Hence, the NOPR cannot result in cost savings based on such delays and is therefore is unnecessary. (ASAP et al., No. 46 at p. 6; and A.O. Smith, No. 44 at p. 4) Some commenters noted that the Department's existing policy should remain the mechanism for dealing with the market introduction of truly innovative and ''first of its kind'' products while test procedure waiver applications are pending. (A.O. Smith, No. 44 at p. 4) Additionally, other commenters argued that DOE has failed to explain why its proposal is necessary given this non-enforcement policy. (AG Joint Commenters, No. 51 at p. 7) One commenter called the proposal a practical status quo that is consistent with the Department's 2010 enforcement policy.

NEMA supported the proposal because interim waivers provide a necessary pathway for manufactures to introduce innovative products into the market that would otherwise be barred as being noncompliant. NEMA continued that the Department's policy, in which DOE will not seek civil penalties for noncompliant products that have test procedure waiver application under review, reflects the realization that because waiver petitions require dedicated resources and significant time to evaluate that manufactures can be unfairly excluded from the market during delays. (No. 55 at pp. 3–4)

In response to commenters opposed to the proposed rule because they believe it would allow non-compliant products on the market, DOE views the non-enforcement policy as creating the same extremely low risk. 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. Manufacturers argued that their business is protected from the possibility of an adverse DOE action only if DOE has granted either an interim waiver or final waiver under which they can operate. As ASE pointed out, the interim waiver process is worthy of revision to provide manufacturers with greater predictability and improve transparency so that the public can have confidence in the energy efficiency of a given product. Further, due to the long delays in making a decision on an interim waiver and publishing for comment a petition for waiver, the current practice of non-enforcement pending a decision from the Department allows manufacturers an extended period to sell into the market without competitors, consumers, or other interested stakeholders being made aware of a pending waiver decision. (ASE, No. 43 at pp. 2–3) DOE stating a position that it will not take enforcement action while a waiver request is pending also does nothing to provide the manufacturer with a means to test a product to show compliance. A non-enforcement policy is of little value if the product cannot be sold due to a manufacturer's inability to demonstrate to its customer that the product is legally compliant with the applicable energy conservation standard. A more efficient interim waiver process, as set forth in this final rule, is the best means of providing a clear, transparent path for a manufacturer to achieve compliance while their final waiver is under review or while DOE completes a rulemaking for a new or amended test procedure to address the issues raised in the waiver.

The NOPR included a provision providing that if DOE ultimately denies a petition for waiver or grants the petition with a different alternate test procedure than specified in the interim waiver, DOE would provide a grace period of 180-days for the manufacturer to use the test procedure specified in the DOE Decision and Order to make representations of energy efficiency. 84 FR 18414, 18416 (May 1, 2019). Comments identified several viewpoints on the Department's proposed revision. Some commenters voiced their support for the addition of the 180 day grace period. (AHRI, No. 42 p. 4; and Joint Industry Commenters, No. 52 at p. 5) Some commenters noted that the grace period provides manufacturers certainty and permits time to retest and recertify equipment accordingly, and recommended that this timeline should be discretionary as well. (NEMA, No. 55 at pg. 6; and Nortek, No. 38 at p. 2) Commenters also noted that without the inclusion of a grace period manufacturers would be less likely to use the waiver process, which would ultimately result in less innovative products being introduced to the market. (Lutron, No. 53 at p. 3).

Other commenters argued that the NOPR's proposed grace period was too long and should be reduced, from 30–60 days or capped at 60 days. (Anonymous 1, No. 17 at p. 1; and Carrier, No. 36, at p. 3) Reducing the compliance period to 60 days would limit the time a noncompliant product would be on the market. Some

[7] Of these, two waivers were withdrawn and one waiver was delayed pending ongoing litigation. 84 FR 18414, 18416 (May 1, 2019).

commenters believed that manufacturers who are granted waivers with a modified test procedure should receive less than 180 days, based upon the magnitude of changes between the prescribed test procedure and the one originally proposed by the manufacturer, to comply with the order. Alternatively, one commenter suggested that the final rule should include a longer grace period because product design changes and supply chain re-certifications needed to meet regulatory approvals are a complicated and lengthy process, but did not specify a specific alternative duration. (ITI, No. 20 at p. 1–2).

Still other commenters objected to the 180-day grace period and want it removed from the final rule. Generally, such commenters believe that manufacturers who are denied a waiver should be compelled to start testing immediately so they cannot sell non-compliant products for an extended period of time. (Sachs, No. 29 at p. 2; CA IOUs, No. 37 at p. 3; CEC, No. 40. at pp. 4–5; and ASE, No. 43, at p. 4) Commenters suggested that in the event information submitted by an applicant was grossly or intentionally inaccurate, unrepresentative or misleading, the grace period should be eliminated. (Lennox, No. 48 at pp. 8–9) Others argued that if DOE grants a waiver based on an alternate test procedure that DOE modified from the one proposed by the manufacturer, the existing regulations at 10 CFR 430.27(i) already provide a sufficient grace period, relieving a manufacturer of the burden of re-testing and re-rating when an alternate test procedure is directed by DOE in the final waiver. (CEC, No. 40 at p. 5).

As DOE explained in the NOPR, the grace period offers manufacturers a safe harbor in the event that a waiver is denied or revisions to an interim waiver are required. The Department recognizes that manufacturers need time to comply with a new test procedure. The 180 day duration was proposed because that time frame is consistent with the EPCA provision that provides manufacturers 180 days from issuance of a new or amended test procedure to begin using that test procedure for representation of energy efficiency. 84 FR 18414, 18416 (May 1, 2019); *See* 42 U.S.C. 6293(c)(2). The Department understands that less than 180 days may be needed if any changes to the alternate test procedure specified in an interim waiver are minor and emphasizes that nothing in DOE's waiver regulations prohibits a manufacturer from commencing use of the new alternate test procedure in less than 180 days. In the event that information submitted by the applicant was inaccurate or unrepresentative, DOE retains the ability under its regulations to rescind or modify a waiver at any time. After considering all of the many viewpoints on the 180 day grace period provision, the Department has decided that it is necessary to provide manufacturers time to comply before enforcement measures can be initiated. Because the waiver process concerns the issuance or amendment of a test procedure in light of the specific circumstances that gave rise to the need for a waiver, the waiver process is no different than the rulemaking process for the issuance or amendment of a test procedure. As a result, DOE maintains the 180 day grace period consistent with the time period provided in 42 U.S.C. 6293(c) and 42 U.S.C. 6314(d) in this final rule.

Additionally, in response to the comment indicating that the existing regulation already includes a grace period in 10 CFR 430.27(i) and 10 CFR 431.401(i) that makes the 2019 NOPR's inclusion of an grace period in the initially proposed 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) duplicative, DOE has relocated the 180-day grace period to 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) in this final rule.

Some commenters stated that finalizing this proposal could indirectly allow for backsliding of energy conservation standards. These commenters argued that if changes to the test procedure would impact measured efficiency, the efficiency standard must then be amended so that products minimally compliant under the original procedure will remain compliant under the new procedure. (NRDC, No. 47 at p. 3–4 referencing 42 U.S.C. 323(e)) Commenters continued by stating that if DOE amends a test procedure and that test procedure changes the measured efficiency such that the efficiency standard must be amended, DOE cannot pick a new efficiency threshold that is lower than the old efficiency standard. This proposal enables DOE to indirectly do what EPCA clearly forbids under its anti-backsliding provision, 42 U.S.C. 6295(o)(1). (NRDC, No. 47 at p. 4) Similarly, other commenters argued that the proposal amounted to a ''more tailored approach'' to rolling back test procedures and efficiency standards, which lead to the same loss of efficiency EPCA's anti-backsliding provision was intended to prevent. (AG Joint Commenters, No. 51 at p. 9).

In response to these concerns, DOE notes that the commenters' concern appears equally applicable to a grant of interim waiver or waiver pursuant to DOE's waiver regulations generally, irrespective of this final rule. DOE maintains that the issuance of a waiver or interim waiver pursuant to DOE's waiver regulations, including the amendments in this final rule, will not violate EPCA's prohibition against backsliding at 42 U.S.C. 6295(o)(1). As explained above, a test procedure waiver (decision and order) and interim waiver are a test procedure prescribed by the Department. Under 42 U.S.C. 6293 and 42 U.S.C. 6314, EPCA sets forth the criteria and procedures that DOE is required to follow when prescribing or amending test procedures. This final rule does not roll back energy conservation standards. This final rule provides clear direction on how manufacturers can test their product to determine compliance with energy conservation standards when they have manufactured a new and innovative product that cannot adequately be tested for compliance with the existing standard using the existing test procedure.

DOE also received comments challenging the Department's position in the NOPR, at Footnote 5, stating that granting an interim waiver application is not a final agency action as contemplated by the APA, which defines an ''agency action'' as including ''the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'' 84 FR 18414, 18416 (May 1, 2019) referencing 5 U.S.C. 551(13). Commenters argued that the ''deemed granted'' interim waiver would constitute final agency action and that the Department's position overlooks the reality that an interim waiver application is a separate process that is distinct from the request for a decision and order granting a test procedure waiver. Commenters continued by stating that the finality of the interim waiver ensures that DOE cannot withhold judicial review indefinitely through prolonged inaction while an interim waiver is in effect; the separate process of issuing an interim waiver from the test procedure makes it a final decision. (Earthjustice, No. 49 at p. 7–8) Commenters continued that the finality of the interim waiver ensures that DOE cannot withhold judicial review indefinitely through prolonged inaction while an interim waiver is in effect and to find otherwise would lead to an absurd result. (AG Joint Commenters, No. 51 at p. 9).

While DOE recognizes that courts are responsible for determining whether judicial review is available under the APA for a particular agency action, DOE reiterates that interim waivers do not

represent the consummation of the Department's decision-making process. As noted in the NOPR, the Supreme Court has explained to be ''final,'' an agency action must ''mark the consummation of the agency's decision-making process, and must either determine rights or obligations or occasion legal consequences.'' *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 482 (2004) (quotation omitted); see *Bennett* v. *Spear,* 520 U.S. 154, 178 (1997). While manufacturers would be able to test and distribute their products or equipment in commerce if granted an interim waiver under the proposal, continued distribution is dependent upon DOE's decision on the petition for waiver. DOE regulations contemplate further process on the waiver request after issuance of an interim waiver decision, including publication of the interim waiver for comment, further indication that DOE's decision-making process on the waiver is not complete. DOE will consider any comments received, as well as any additional information provided by the petitioner or developed by the Department, in issuing a final decision on the associated petition for waiver, or a final rule amending the test procedure. Either of these actions could have rights or obligations, or consequences, that differ from those provided temporarily under an interim waiver. 84 FR 18414, 18416 (May 1, 2019), footnote 5.

Commenters argued that establishing a timeframe for final waiver determinations would encourage timely responses and communication during the process would ultimately provide certainty for the market. (Acuity, No. 14 at p. 2) Commenters also objected to the removal from the regulations in the proposal of the one year deadline for DOE to either grant or deny a waiver or, to complete a test procedure to address the issues raised by the waiver petition. (ITI, No. 20 at p. 1; Traulsen, No. 25 at 1; NAFEM, No. 26 at pp. 3–4; and Carrier, No. 36 at p. 2).

Lennox stated that interim waivers must not be allowed to continue indefinitely, but argued that if DOE fails to act within one year of issuing an interim waiver, the interim waiver should continue to remain in effect until DOE takes action. These commenters condition this extension by clarifying that petitioners or other stakeholders should not be able to bring judicial action to compel DOE to render a final determination. (Lennox, No. 48 at p. 8) Other commenters took a similar stance in that they supported the notice that interim waivers were to remain in effect until a decision was published in the **Federal Register** on the waiver petition or, an amended test procedure was published. (NEMA, No. 55 at p. 6).

In response, DOE understands the commenters' concerns about an interim waiver persisting indefinitely and retains the language at 10 CFR 430.27 and 10 CFR 431.401 in this final rule that DOE will issue a decision and order or amend the test procedure to address the issue(s) presented in the waiver petition within 1 year of issuance of an interim waiver.

DOE also received comments asserting that the Department's NOPR may not withstand the scrutiny of the APA because the Department has failed to provide satisfactory explanations for its proposed action and is proposing to forego independent judgment on this matter by deferring to private parties. The commenters suggest that if the Department will not withdraw the NOPR then it should consider issuing a Supplemental Notice of Proposed Rulemaking (SNOPR) to address the issues raised during the comment period. (CA IOUs, No. 37 at p. 8–9).

In response, DOE notes that the comment period was extended on multiple occasions to allow commenters to provide additional feedback on the NOPR. In both the NOPR and this final rule, DOE has provided detailed explanations regarding its decision-making process. DOE has explained its reasons for undertaking this action and considered the comments received by members of the public and industry when making the decision to move forward with this final rule. DOE has also determined that the minor changes DOE is making from the NOPR (*e.g.,* extending the time period from 30 to 45 business days) are the logical outgrowth of the issues raised in the proposed rule and the comments submitted by interested parties. As a result, DOE has determined that an SNOPR is unnecessary.

Some commenters argued that DOE has unlawfully changed its interpretation of its test procedure waiver regulations by failing to provide a reasoned explanation for allowing an interim waiver to be ''deemed granted'' if the Department fails to provide notice within 30-business days of receipt of the petition. (Earthjustice, No. 49 at p. 4 referencing *FCC* v. *Fox Television Stations,* 556 U.S. 502, 515–16 (2009); AG Joint Commenters, No. 51 at p. 6) Commenters look to the Department's 2014 amendments to the test procedure waiver regulations, noting that DOE did not in that rulemaking allow manufacturers to extend previously granted waivers to additional models with the same technology or characteristics because DOE would be unable to fulfill its responsibility to ensure that an alternative test procedure was appropriate for the new basic models. (Earthjustice, No. 49 at p. 4 referencing 79 FR 26591, 26593 (May 9, 2014)) These commenters argued that DOE failed to provide a reasoned explanation for why DOE proposed to allow manufacturers to ''write their own test procedures'' through the proposed ''deemed granted'' approach, thus removing the Department's oversight of the test procedure process.

Other commenters argued DOE failed to provide any justification for dispensing of public notice as to when an interim waiver is granted. Commenters note that under the proposal DOE need never make a formal determination before an interim waiver request is ''deemed granted,'' therefore the public notice requirement may never be triggered. These commenters asserted that the Department must also provide a reasoned explanation for this disparity otherwise the rulemaking is arbitrary and capricious. (AG Joint Commenters, No. 51 at p. 6).

Contrary to these commenters' assertions, this final rule does not change the Department's prior interpretation of its obligations under EPCA by offering manufacturers the possibility of writing their own test procedures absent DOE oversight. In the 2014 final rule, DOE responded to commenters suggesting that DOE allow manufacturers who had received a waiver for a particular basic model or group of basic models to extend that waiver to additional basic models without requesting a waiver extension from DOE. DOE determined in that case that DOE would need to make an independent waiver determination for those basic models. DOE is not changing this requirement in this final rule. This rule, as noted previously, affects DOE's process for a decision on an interim waiver, not a waiver petition. The rule specifies that if DOE does not notify a manufacturer within 45 business days of submitting an interim waiver, the interim waiver is granted and the manufacturer may test and certify its product while DOE processes the waiver petition. DOE also provides that DOE will not grant an interim waiver if the application does not include an alternative test procedure. Applicants will be made aware of the denial and can submit a petition including an alternate test procedure or work with DOE in a public process to develop an appropriate test procedure as DOE processes the petition for waiver.

DOE has also not eliminated its prior responsibility to provide public notice of granted interim waivers. Prior to the

issuance of this final rule, other manufacturers, stakeholders and interested parties were given an opportunity to comment on the interim waiver when DOE published the grant or denial of interim waiver in the **Federal Register**. That comment opportunity is unchanged by this final rule. The amended 10 CFR 430.27(e)(1)(i) and 10 CFR 431.401(e)(1)(i) provide members of the public with two specific opportunities to receive notice of a potential interim waiver. First, the Department specifies in its regulations that it will post a petition for an interim test procedure waiver on its website within five business days of receipt. While DOE currently posts waiver requests on its website, posting is now codified in DOE regulations as a requirement, and the posting is required to be done expeditiously. DOE will also provide notice of a decision regarding an interim waiver petition by posting the decision to the DOE website no later than 5 business days after the end of the 45 business day review period. Determinations regarding petitions for interim waivers will also be submitted for publication in the **Federal Register** as soon as possible after the determination is made. With this final rule, DOE continues to ensure the public remains notified and informed of waiver requests and has the ability to comment on them. The public also continues to receive timely notification of DOE's decision on any particular waiver request.

Commenters argued that by categorically excluding this proposed action from environmental review, the Department has violated the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.,* for applying an inapplicable categorical exclusion. Commenters assert that the Department has failed to meet the burden of proof for this claim by failing to determine, as required by DOE regulations, whether extraordinary circumstances exist that could ''affect the significance of the environmental effects of the proposal''. Commenters continued that DOE cannot simply conclude that the rulemaking will have no impact on environmental factors without providing an analysis into such factors. (CA IOUs, No. 37 at p. 8).

As stated in the NOPR, this rule amends existing regulations without changing the environmental effect of the regulations being amended. The Department reasonably asserted that the proposal was covered under the A5 Categorical Exclusion, 10 CFR part 1021, subpart D., and that neither an environmental assessment nor an environmental impact statement was required. 84 FR 18414, 18420 (May 1, 2019). DOE maintains that this final rule provides greater clarity and transparency throughout the interim test procedure waiver process. The rulemaking does not extend to setting energy conservation standards, but relates to the test procedures manufacturers may use to demonstrate compliance. DOE concludes in this final rule that the A5 categorical exclusion still applies. For these same reasons, because the rule only provides for manufacturers to use, on an interim basis, the test procedure specified in the interim waiver if DOE fails to act within a reasonable time period, no extraordinary circumstances exist that could affect the significance of the environmental effects of the proposal.

Commenters have also asserted that DOE should devote more resources towards reviewing test procedure waivers using the existing regulatory framework. (Earthjustice, No. 49 at p. 1, 6; and ASAP et al., No. 46 at p. 7) Commenters noted that the current delays in the test procedure waiver process are problems of efficiency and could be improved through the additional allocation of resources. (CEC, No. 40 at p. 7).

It is the Department's intent that by finalizing its test procedure waiver decision-making process in this rulemaking that it will increase response time and reduce manufacturers' burdens associated with the interim waiver application process, provide greater certainty and transparency it its administrative process, and reduce delays in manufacturers' availability to bring innovative product options to consumers. 84 FR 18414, 18415 (May 1, 2019).

Some commenters disagreed with DOE's use of public policy reasons as a basis for granting interim waivers. (CEC, No. 40 at p. 10) These commenters call DOE's action contrary to the intent of EPCA because the statute establishes clear criteria for any test procedure authorized by the Department under 42 U.S.C. 6293(b)(3). DOE, therefore, cannot permit a manufacturer to use an alternative test procedure without first finding that the alternative satisfies these statutory criteria. (Earthjustice, No. 49 at pp. 4–5).

In response, the Department is not changing the longstanding regulatory criteria for the grant of waiver that have existed since 1980, 45 FR 64109 (September 26, 1980), and were retained and extended to include interim waivers in amendments to the procedures in 1986, 51 FR 42823 (November 26, 1986). The Department's procedures were revised in 1995, 60 FR 15004 (March 21, 1995), and again in 2014, 79 FR 26591 (May 9, 2014). Under this final rule, for an interim waiver and waiver application to be granted, applicants are required to provide an application that includes an alternative test procedure. The Department's review of the application includes a review of the proposed alternative test procedure, and as noted previously, DOE is well aware of the EPCA requirements for the issuance or amendment of a test procedure at 42 U.S.C. 6293 and 42 U.S.C. 6314. If DOE does not otherwise act to affirmatively grant or deny the interim waiver within 45 business days, the waiver is granted based on the regulatory criterion that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2). DOE continues to believe that it is desirable for public policy reasons to allow manufacturers to test and certify their products using to the test procedure specified in the waiver petition, pursuant to an interim waiver, while DOE receives comment on the petition for waiver and works with the petitioner, and with the benefit of public input, to determine whether any changes to that test procedure are warranted.

Some commenters expressed confusion regarding what triggers the 30-day clock for granting an interim waiver. (ASE, No. 43 at p. 4; and Acuity, No. 14 at p. 2) Other commenters argued that the clock for review should only start once DOE has received all of the necessary information. (Earthjustice, No. 49 at p. 7).

DOE notes that the 30-day deadline of the proposed rule has been amended to 45 business days, which equates to approximately two months. To clarify when DOE considers a petition received and starts the clock, DOE notes that the 45 business day clock does not begin until an applicant submits a petition for an interim waiver that includes the information specified in 10 CFR 430.27(b)(2) or 10 CFR 431.401(b)(2) under 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) of this final rule. Inclusion of an alternate test procedure is necessary to allow DOE to consider the likelihood of success of the petition for waiver and is required for DOE to grant an interim waiver.

As a means of further streamlining the interim waiver process, DOE received comments suggesting the use of group waiver applications from trade associations or similar industry groups if they produce like or similar products.

Commenters asserted that this grouped approach would conserve manufacturers' compliance resources and save the Department resources from having to review repetitive applications. (Acuity, No. 14 at pp. 2–3)

Because each waiver submission is dependent on the specifics of each product that is the subject of any particular waiver request, DOE does not plan to implement such a practice through this final rule. To conserve resources, the Department suggests that manufacturers look to existing test procedure waivers for similar products as a means of identifying relevant alternative test procedures that can be included in their own, individual petitions for a waiver, *see https://www.energy.gov/eere/buildings/current-test-procedure-waivers.*

IV. Procedural Requirements

A. Review Under Executive Order 12866 and 13563

This regulatory action has been determined to be ''significant'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

DOE has also reviewed this final regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281, Jan. 21, 2011). E.O. 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE concludes that this final rule is consistent with these principles. The amendments to DOE's regulations are intended to expedite DOE's processing of test procedure interim waiver applications, thereby reducing financial and administrative burdens for all manufacturers; as such, the final rule satisfies the criteria in Executive Order 13563.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. DOE considers this final rule to be an E.O. 13771 deregulatory action, resulting in expected cost savings to manufacturers.

Additionally, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force will make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force shall attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

As noted, this final rule is deregulatory, and is expected to reduce both financial and administrative burdens on regulated parties. Specifically, the amendments to DOE's regulations discussed in this final rule should improve upon current waiver regulations, which potentially are inhibiting job creation; are ineffective in creating certainty for manufacturers with respect to business decisions; and impose costs that exceed benefits. Specifically, the length of time manufacturers have previously waited for DOE to provide notification of the disposition of applications for interim waiver (or final decisions on waiver petitions), made possible by the open-ended nature of the current regulations, will be significantly shortened. The cost savings and other benefits manufacturers should realize by waiting no more than 45 business days for an interim waiver determination should create cost savings, as manufacturers have a decision whether they could introduce their products and equipment into commerce in a timely fashion. These cost savings may lead to increased job creation, and create other potentially significant economic benefits.

i. National Cost Savings and Forgone Benefits

The primary anticipated cost saving is from reducing the number of days by which manufacturer revenues are delayed for affected products. DOE monetized this value for the NOPR using the interest that a manufacturer might have earned on product revenue if an interim waiver were approved within 45 business days. Between the proposed rule and the final rule, DOE has adjusted this time period from 30 business days to 45 business days. There are three interim waivers in this dataset that were granted after more than 30 business days but in fewer than 45 business days; however, those interim waivers did not cause any change in manufacturer revenues.[8] On average, between 2016 and 2018, DOE concluded interim waivers after 185

[8] All three interim waivers were granted for more efficient models of external power supplies, which could already test and certify compliance in the absence of the grant of interim waiver. As a result, speeding the grant of these interim waivers would not increase manufacturer revenues in either the NOPR analysis or final rule analysis.

days, or 118 days beyond the 45 business days specified in this final rule. Using a threshold of 45 business days rather than 30 business days changes the magnitude, though not the direction, of DOE's anticipated cost savings from this final rule. DOE uses 7% interest per the Office of Management and Budget's Circular A–4,[9] and calculates the forgone interest that could have accrued for each affected product during the 118 day delay period.

DOE monetized the scope of delay using average prices for products in interim waiver petitions and the proportion of affected shipments, based on the proportion of basic models listed in interim waiver petitions relative to the total number of basic models within each product category. A full list of petitions for interim waiver can be accessed at *https://www.energy.gov/eere/buildings/current-test-procedure-waivers.* This list indicates how many interim waiver petitions were received for each product category. Each petition for interim waiver also lists the number of affected basic models, which DOE used to assess the proportion of shipments affected by each petition. Total numbers of basic models per product category are accessible via the DOE's Compliance Certification Database.[10]

Between 2016 and 2018, 5,322 basic models of 12 residential and commercial products were affected by interim waiver delays, totaling 1.31 million in estimated annual shipments and $1.76 billion in annual sales. The affected products are outlined in Table IV.B.1 below.[11] While all affected shipments are represented in Table IV.B.1 below, DOE monetized the cost of delay only for those basic models for which manufacturers would be unable to test or certify absent an interim waiver. For one petition, the manufacturer was unable to test or certify half of the basic models requested absent a waiver; the estimated cost of delay is proportionate to those models. DOE calculated the interest that could have been earned on this revenue over the 118-day average delay period and multiplied the average cost of delay per petition by 11, the average number of interim waiver requests received per year, to reach an annual cost of delay. In undiscounted terms, DOE expects that this proposal will result in $14 million in annual cost savings. DOE assumes that these sales are delayed rather than forgone.

TABLE IV.B.1—SHIPMENTS AND AVERAGE PRICES OF PRODUCTS/EQUIPMENT AFFECTED BY INTERIM WAIVER DELAYS

[2016–2018]

Product/equipment	Affected shipments	Average price (2016$) [12]	Estimated product sales	Cost of delay
Residential:				
Battery Chargers	74,694	$7.92	$591,738	$13,391
Ceiling Fans	48,397	110.43	5,344,688	120,951
Central Air Conditioners & Heat Pumps	481,200	3,086.07	1,371,615,829	31,039,854
Clothes Washers	31,780	700.24	22,253,510	503,600
Dishwashers	24,912	301.92	7,521,486	170,212
Refrigerators	40,968	655.30	26,846,375	607,537
Commercial:				
Commercial Refrigeration Equipment	22,036	3,902.71	85,998,189	1,946,151
Walk-in Coolers & Freezers—Doors	190,950	585.60	111,821,271	2,503,440
Walk-in Coolers & Freezers—Systems	700	2,681.82	1,876,011	42,454
Total				36,947,591
Average Cost of Delay per Petition (29 petitions total)				1,274,055
Average Cost of Delay per Year (11 petitions/year)				14,014,604

Note that totals may not add due to rounding.

Forgone Benefits

To the extent that this policy would cause DOE to grant interim waiver requests that it would not have granted in the status quo, this proposal may result in forgone benefits to consumers or the environment. Based on historical data, these effects are anticipated to be relatively small. Of 21 concluded interim waiver petitions, DOE granted 18 in full and granted the remaining 3 with modifications. Of the modified interim waivers, one was granted in part, one was granted with minor modifications, and one was granted with a different alternative test measure than proposed. DOE estimated the forgone environmental benefits and energy savings of granting the petitions as received, rather than as modified by the Department.

All forgone benefits and savings are annual, rather than one-time, and are projected in the table below using a perpetual time horizon and discounted to 2016. DOE expects these changes to result in $359 million or $163 million in total cost savings, discounted at 3% and 7%, respectively. In annualized terms, DOE expects $10.8 million in net cost savings, discounted at 3%, or $11.4 million in net cost savings discounted at 7%.

[9] "The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital." *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[10] *https://www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A*.*

[11] Walk-in Coolers and Freezers (WICF) are counted as a single affected product. However, Table IV.B.1. breaks out which petitions concerned which WICF components, as their annual shipments and prices vary accordingly.

[12] Average price is generally the base case average MSP of equipment from the life-cycle cost year in the most recently published technical support document. This represents a shipment-weighted average across efficiency distribution and across all product classes.

TABLE IV.B.2—COST IMPACT OF PROPOSED INTERIM WAIVER RULE

[2016$]

	Costs or (savings)	Costs or (savings) *millions*
Annual Cost Savings of Reduced Delay	($14,014,604)	($14.01)
Annual Forgone Energy Savings	164,000	0.16
Annualized Carbon Emissions (SCC), 3% †	1,764,000	1.76
Annualized Carbon Emissions (SCC), 7% †	827,000	0.83
Net Present Value at 3%	(358,927,345)	(358.93)
Net Present Value at 7%	(163,068,216)	(163.07)
Annualized Costs or (Savings) at 3%	(10,767,820)	(10.77)
Annualized Costs or (Savings) at 7%	(11,414,775)	(11.41)

† Undiscounted annual SCC values are not available for comparison.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that a Federal agency prepare a final regulatory flexibility analysis (FRFA) for any final rule for which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

This final rule would impose a requirement on the Department that it must make a decision on interim waiver applications within 45 business days after receipt of a petition. An interim waiver would remain in effect until a waiver decision is published or until DOE publishes a new or amended test procedure that addresses the issues presented in the waiver, whichever is earlier.

The final rule does not impose any new requirements on any manufacturers, including small businesses. DOE's economic analysis, presented in section IV.B. of this final rule, analyzed interim waiver requests submitted by 21 different manufacturers. Assuming that all of these manufacturers were small entities, because the final rule does not impose any new requirements on any small entity, the economic impact on small entities will be zero. Therefore, there will be no significant economic impact to affected small entities. The final rule provides greater certainty to manufacturers applying for interim waivers that their petitions would be considered and adjudicated promptly, allowing them, upon DOE grant of an interim waiver, to distribute their products or equipment in commerce while the Department considered its final decision on the petition for waiver. This may be especially true of any small manufacturers who may only sell one or two specialty products and rely on this as their sole stream of revenue. This rulemaking would allow such manufacturers to continue selling their product while the Department considers a final decision on the petition for waiver. The potential benefits of the rule to manufacturers, including small manufacturers, are as discussed in Section IV. B. of this final rule. No additional requirements with respect to the waiver application process would be imposed. DOE did not receive comments on this certification, and no commenters provided information that the rule would impose any economic impacts on small entities.

For these reasons, DOE certifies that this final rule will 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 factual basis has been provided to the Chief Counsel of Advocacy of the SBA pursuant to 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act

Manufacturers of covered products and equipment must certify to DOE that their products or equipment comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products and equipment according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (Mar. 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved 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.

E. Review Under the National Environmental Policy Act

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this proposed action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, Appendix A5 because it is an interruptive rulemaking that does not change the environmental effect of the rule and meets the requires for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that the promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 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; and (3) provide a clear legal standard for

affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b)(2) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, to be given to the regulation; (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, to be given to the regulation; (5) 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 section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of the standards. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. 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 final 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.

H. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' DOE may not issue a discretionary rule that has ''tribal'' implications and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that the final rule would not have such effects and concluded that Executive Order 13175 does not apply to this final rule.

I. 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. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For regulatory actions 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 ''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 *http://energy.gov/gc/office-general-counsel*.) DOE examined this final rule according to UMRA and its statement of policy and has tentatively determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal government, 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.

J. 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.

K. 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 proposed rule that may affect family well-being. This rule will 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.

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

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 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 rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Test procedures, Incorporation by reference, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on November 6, 2020, by Daniel R. Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, 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 November 24, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, the Department of Energy is amending parts 430 and 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

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 (e)(1), (h), and (i)(1) to read as follows:

§ 430.27 Petitions for waiver and interim waiver.

* * * * *

(e) *Provisions specific to interim waiver*—(1) *Disposition of petition.* (i) Within 5 business days of receipt of a petition for an interim waiver, DOE will post that petition for an interim waiver on its website.

(ii) In those cases where DOE receives a petition for an interim waiver in conjunction with a petition for waiver, DOE will review the petition for interim waiver within 45 business days of receipt of the petition. Where the manufacturer does not specify any alternate test procedure, or otherwise fails to satisfy the other required criteria specified under paragraph (b)(2) of this section, DOE will deny the petition for interim waiver. In such case, DOE will notify the applicant of the denial within the 45-day review period and process the request for waiver in accordance with this section. If DOE does not notify the applicant of the disposition of the petition for interim waiver, in writing, within 45 business days of receipt of the petition, the interim waiver is granted utilizing the alternate test procedure requested in the petition. Notice of DOE's determination on the petition for interim waiver will be posted on the Department's website not later than 5 business days after the end of the review period. Such determination will also be submitted for publication in the **Federal Register**.

(iii) A petition submitted under this paragraph (whether for an interim waiver or waiver) is considered ''received'' on the date it is received by the Department through the Department's established email box for receipt of waiver petitions or, if delivered by mail, on the date the waiver petition is stamped as received by the Department.

* * * * *

(h) *Duration.* (1) Interim waivers remain in effect until the earlier of the following:

(i) DOE publishes a decision and order on a petition for waiver in the **Federal Register** pursuant to paragraph (f) of this section; or

(ii) DOE publishes in the **Federal Register** a new or amended test procedure that addresses the issue(s) presented in the waiver.

(2) Within one year of a determination to grant an interim waiver, DOE will complete either paragraph (h)(1)(i) or (ii) of this section as specified in this section.

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

(i) *Compliance certification.* (1) If the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: The manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if DOE ultimately denies the petition of waiver or the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, DOE will provide a period of 180 days 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 of energy efficiency.

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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 (e)(1), (h), and (i)(1) to read as follows:

§ 431.401 Petitions for waiver and interim waiver.

* * * * *

(e) *Provisions specific to interim waivers*—(1) *Disposition of petition.* (i) Within 5 business days of receipt of a petition for an interim waiver, DOE will post that petition for an interim waiver on its website.

(ii) In those cases where DOE receives a petition for an interim waiver in conjunction with a petition for waiver, DOE will review the petition for interim waiver within 45 business days of receipt of the petition. Where the manufacturer does not specify any alternate test procedure, or otherwise fails to satisfy any of the other required criteria specified under paragraph (b)(2) of this section, DOE will deny the petition for interim waiver. In such case, DOE will notify the applicant of the denial within the 45-day review period and process the request for waiver in

accordance with this section. If DOE does not notify the applicant of the disposition of the petition for interim waiver, in writing, within 45 business days of receipt of the petition, the interim waiver is granted utilizing the alternate test procedure requested in the petition. Notice of DOE's determination on the petition for interim waiver will be posted on the Department's website not later than 5 business days after the end of the review period. Such determination will also be submitted for publication in the **Federal Register**.

(iii) A petition submitted under this paragraph (whether for an interim waiver or waiver) is considered ''received'' on the date it is received by the Department through the Department's established email box for receipt of waiver petitions or, if delivered by mail, on the date the waiver petition is stamped as received by the Department.

* * * * *

(h) *Duration.* (1) Interim waivers remain in effect until the earlier of the following:

(i) DOE publishes a decision and order on a petition for waiver pursuant to paragraph (f) of this section in the **Federal Register**; or

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

(2) Within one year of a determination to grant an interim waiver, DOE will complete either paragraph (h)(1)(i) or (ii) of this section as specified in this section.

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

(i) *Compliance certification.* (1) If the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: The manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if DOE ultimately denies the petition for waiver, or if the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order, DOE will provide a period of 180 days 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 of energy efficiency.

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[FR Doc. 2020–26321 Filed 12–10–20; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1733]

RIN 7100–AG 03

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2021. The annual indexation of these amounts is required notwithstanding the Board's action in March 2020 setting all reserve requirement ratios to zero. The Regulation D amendments set the reserve requirement exemption amount for 2021 at $21.1 million of reservable liabilities (up from 16.9 million in 2020). The Regulation D amendments also set the amount of net transaction accounts at each depository institution (over the reserve requirement exemption amount) that could be subject to a reserve requirement ratio of not more than 3 percent (and which may be zero) in 2021 at $182.9 million (up from $127.5 million in 2020). This amount is known as the low reserve tranche. The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act (the ''Act''). The annual indexation of the reserve requirement exemption amount and low reserve tranche, though required by statute, will not affect depository institutions' reserve requirements, which will remain zero. The Board is also announcing changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency at which depository institutions must submit deposit reports.

DATES: *Effective date:* January 11, 2021.

Compliance dates: The new low reserve tranche and reserve requirement exemption amount will apply to the fourteen-day reserve maintenance period that begins January 14, 2021. For depository institutions that report deposit data weekly, this maintenance period corresponds to the fourteen-day computation period that begins December 15, 2020. For depository institutions that report deposit data quarterly, this maintenance period corresponds to the seven-day computation period that begins December 15, 2020. The new values of the nonexempt deposit cutoff level, the reserve requirement exemption amount, and the reduced reporting limit will be used to determine the frequency at which a depository institution submits deposit reports effective in either June or September 2021.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Special Counsel (202–452–3565), or Justyna Bolter, Senior Attorney (202/452–2686), Legal Division, or Kristen Payne, Senior Financial Institution and Policy Analyst (202–452–2872), or Francis A. Martinez, Lead Financial Institution and Policy Analyst (202–245–4217), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202–263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the purpose of implementing monetary policy. Section 11(a)(2) of the Act (12 U.S.C. 248(a)(2)) authorizes the Board to require reports of liabilities and assets from depository institutions to enable the Board to conduct monetary policy. The Board's actions with respect to each of these provisions are discussed in turn below.

I. Reserve Requirements

Section 19(b) of the Act authorizes different ranges of reserve requirement ratios depending on the amount of transaction account balances at a depository institution. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement ratio shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the