



July 15, 2019

VIA ELECTRONIC SUBMISSION

The Honorable James Richard Perry
Secretary
United States Department of Energy
1000 Independence Avenue Southwest
GC-33
Washington, D.C. 20585

Re: Test Procedure Interim Waiver Process (Docket No. EERE 2019-BT-NOA-011)

Dear Secretary Perry:

On Wednesday, May 1, 2019, the U.S. Department of Energy (DOE) published a proposed rule titled: “*Test Procedure Interim Waiver Process.*”¹ This proposed rule would require that DOE notify interim waiver applicants of a disposition of a request within 30 business days of receipt of the application. If the agency fails to render a decision within this timeframe, the waiver would be deemed granted based on applicable criteria.

The Office of Advocacy (Advocacy) believes that streamlining the test procedure interim waiver process, thereby eliminating delays for considering requests for interim waivers, will reduce a serious regulatory burden on small business. Advocacy urges the agency to act quickly to finalize this rule to ensure that small businesses receive a decision on their applications in a timely manner.

¹ Test Procedure Interim Waiver Process, 84 Fed. Reg. 18,414 (proposed May 1, 2019).



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The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Background and Procedural History

The Energy Policy and Conservation Act of 1975 (EPCA) authorizes DOE to regulate energy efficiency of consumer and commercial products through regulation.⁶ This is accomplished through a four-step process consisting of the application of “(1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.”⁷

Test procedures are used as the basis for certifying to DOE that products comply with applicable energy efficiency standards, and the agency uses the test procedures themselves to ensure this compliance.⁸ Test procedures must be reasonably designed, and not overly burdensome to conduct.⁹ Manufacturers of products covered under EPCA can apply for a waiver from the test procedure requirements. The agency will grant full waivers from the test procedure requirements if it determines that there is a design characteristic that prevents testing on the basic model of the product in question, or that the test procedure evaluates the basic model in a manner that does not represent the product's energy consumption characteristics.¹⁰

The interim waiver process allows those petitioning for a full waiver to receive a decision from the agency within 30 days of receipt of the application if it appears likely that the full waiver will

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (Pub. L. 111-240) §1601.

⁵ *Id.*

⁶ Pub. L. 94-163 (codified in 42 U.S.C. § 6291-6317). The version mentioned here is as amended through the Energy Efficiency Improvement Act of 2015, Pub. L. 114-11.

⁷ See 84 Fed. Reg. 18,414, 18,415.

⁸ See *Id.* (citing 42 U.S.C. § 6295 (s); 42 U.S.C. § 6316 (a)).

⁹ *Id.*

¹⁰ *Id.*

be granted, or if at the discretion of the Assistant Secretary the agency determines that it is desirable to grant immediate relief pending a determination of the full waiver application.¹¹

Main Features of the Proposed Rule

While DOE is already required to render a decision on a petition for an interim waiver within 30 business days of receipt of the application, the agency itself acknowledges that it rarely meets this deadline, and that the average response time in rendering a decision is 185 days.¹² This proposed rule would streamline the decision-making process by requiring the agency to render a decision within 30 days, and if it does not do so, automatically grant the request for an interim waiver.

Advocacy Supports This Proposed Rule

Advocacy, as well as the agency itself, heard from small businesses through its regulatory reform efforts about the burden lengthy decision times cause to small manufacturers.¹³ Many small manufacturers of products covered under EPCA only produce one or two models and some only work on niche or custom made-to-order products.¹⁴ These businesses rely on timely decisions from the agency to ensure that they can sell enough units to generate revenue and remain sustainable.¹⁵

While it is already required that the agency render a decision within 30 days on a petition for interim waiver, these same small businesses in some cases have had to wait for nearly a year. This means that for small companies that sell at much lower volumes, they are unable to sell these products for a significant amount of time, thus reducing their income flow. This has the potential to put some small manufacturers out of business, as they must weigh regulatory costs against their potential profits and overhead.

Advocacy notes that this proposed rule would merely correct a flaw in an existing regulation, whereby the existing 30-day requirement is met either through the agency rendering its decision, or if the agency does not do so, automatically granting the petition for interim waiver until the agency renders a decision on the full waiver application.

¹¹ *See Id.*

¹² *See* “Frequently Asked Questions Notice of Proposed Rulemaking pertaining to the Test Procedure Interim Waiver Process”, <https://www.energy.gov/sites/prod/files/2019/06/f63/interim-waiver-faq.pdf>.

¹³ *See* Comment of the North American Association of Food Equipment Manufacturers filed at 82 Fed. Reg. 24,582 on July 14, 2017. In response to DOE’s request for comment on regulatory reform priorities, the North American Food Equipment Manufacturers (NAFEM) filed a comment letter outlining several priorities, one being the lengthy wait time for decisions on applications for interim waivers.

¹⁴ *See* “Regulatory Reform Roundtable Discussion Notes of the North American Association of Food Equipment Manufacturers”, <https://energy.gov/sites/prod/files/2018/01/f46/NAFEM%20Regulatory%20Reform%20Roundtable%20Meeting%20Notes%20-%202010.31.17.pdf>. Also in response to DOE’s request for comment on regulatory reform priorities, and as a result of efforts by Advocacy to organize roundtables to discuss topics for reform, NAFEM members, Advocacy, and DOE held a roundtable on October 31, 2017 at which one of the points of the discussion was again the lengthy wait time for decisions on applications for interim waivers.

¹⁵ Advocacy held a teleconference with DOE and entity stakeholders on June 26, 2019 to discuss the proposed rule. One attendee stated that the proposal will improve the process significantly.

There are several commenters on this proposed rule who have stated concerns about abuse of the waiver process, and that this will make it too easy for industry to apply for and receive waivers through mischaracterization.¹⁶ Advocacy disagrees. The proposed rule does not extend beyond what is already allowable by law under EPCA. It merely attempts to eliminate a bottleneck that currently exists in the process by ensuring that the agency is meeting the 30-day decision-making requirement. For those instances in which the interim waiver is automatically deemed granted due to the agency not meeting its 30-day requirement, there will still be a review of the full waiver application as this process remains unchanged.

Conclusions and Recommendations

Advocacy believes that addressing delays in decisions for interim waiver applications will eliminate the burden to small manufacturers who in some instances must wait several months to a year before receiving a decision. Advocacy urges DOE to finalize this rule in a timely manner so that small manufacturers have more regulatory certainty in the interim waiver process. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

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Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Prianka P. Sharma
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/s/

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Copy to: Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹⁶ DOE hosted a webinar on July 11, 2019 to discuss the proposed rule. Entity stakeholders and other members of the public were given an opportunity to ask questions and express concerns with the proposed rule.