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DEPARTMENT OF ENERGY

10 CFR Part 429

[Docket No. EERE-2011-BT-CE-0077]

Appliance Standards and Rulemaking Federal Advisory Committee: Notice of Intent to Establish the Regional Standards Enforcement Working Group to Negotiate a Notice of Proposed Rulemaking (NOPR) for Regional Standards Enforcement

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

ACTION: Notice of intent.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is giving notice that it intends to establish a negotiated rulemaking working group under the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act (NRA) to negotiate proposed Federal standards for the energy efficiency requirements of enforcement of regional standards. The purpose of the working group will be to discuss and, if possible, reach consensus on a proposed rule for the energy efficiency of requirements of enforcement of regional standards, as authorized by the Energy Policy

and Conservation Act (EPCA) of 1975, as amended. The working group will consist of representatives of parties having a defined stake in the outcome of the proposed standards, and will consult as appropriate with a range of experts on technical issues.

DATES: Written comments and request to be appointed as members of the working group are welcome and should be submitted by **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The deadline for negotiating a proposed rule and submitting it to ASRAC is October 30, 2014.

ADDRESS: Interested person may submit comments, identified by docket number **EERE-2011-BT-CE-0077** by any of the following methods:

1. Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.
2. E-mail: ASRAC@ee.doe.gov. Include docket number EERE-2011-BT-CE-0077 in the subject line of the message.
3. Mail: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC 20585-0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
4. Hand Delivery/Courier: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586-2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted.

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

FOR FURTHER INFORMATION CONTACT: John Cymbalsky, U.S. Department of Energy, Office of Building Technologies (EE-5B), 950 L'Enfant Plaza, S.W., Washington, DC 20024. Phone: 202-287-1692. Email: asrac@ee.doe.gov.

SUPPLEMENTARY INFORMATION:

Preamble

- I. Authority
- II. Background
- III. Proposed Negotiating Procedures
- IV. Comments Requested

I. Authority

This notice of intent, announcing DOE's intent to negotiate a proposed rule for the enforcement of regional energy conservation standards, was developed under the authority of sections 563 and 564 of the NRA (5 U.S.C. §§ 561–570, Pub. L. 104–320). The regulation for regional standards enforcement of energy conservation standards that DOE is proposing to develop under a negotiated rulemaking will be developed under the authority of EPCA, as amended, 42 U.S.C. 6311(1)(A) and 42 U.S.C. 6291 *et seq.*

II. Background

As required by the NRA, DOE is giving notice that it is establishing a working group under ASRAC to develop proposed energy efficiency requirements for regional standards enforcement. EPCA, as amended, directs DOE to adopt energy conservation standards for regional standards enforcement for which standards would be technologically feasible and economically justified, and would result in significant energy savings. There currently are no energy conservation standards for regional standards enforcement.

A. Negotiated Rulemaking

DOE has decided to use the negotiated rulemaking process to develop proposed energy efficiency standards for regional standards enforcement. Under EPCA, Congress mandated that DOE develop regulations establishing energy efficiency standards for covered residential and commercial appliances that are designed to achieve the maximum improvement in energy efficiency that are technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A). The primary reason for using the negotiated rulemaking process for developing a proposed Federal standard is that stakeholders strongly support a consensual rulemaking effort. DOE believes such a regulatory negotiation process will be less adversarial and better suited to resolving complex technical issues. An important virtue of negotiated rulemaking is that it allows expert dialog that is much better than traditional techniques at getting the facts and issues right and will result in a proposed rule that will effectively reflect Congressional intent.

A regulatory negotiation will enable DOE to engage in direct and sustained dialog with informed, interested, and affected parties when drafting the regulation, rather than obtaining input during a public comment period after developing and publishing a proposed rule. Gaining this early understanding of all parties' perspectives allows DOE to address key issues at an earlier stage of the process, thereby allowing more time for an iterative process to resolve issues. A rule drafted by negotiation with informed and affected parties is expected to be potentially more pragmatic and more easily implemented than a rule arising from the traditional process. Such rulemaking improvement is likely to provide the public with the full benefits of the rule while minimizing the potential negative impact of a proposed regulation conceived or drafted without the full prior input of outside knowledgeable parties. Because a negotiating working group includes representatives from the major stakeholder groups affected by or interested in the rule, the number of public comments on the proposed rule may be decreased. DOE anticipates that there will be a need for fewer substantive changes to a proposed rule developed under a regulatory negotiation process prior to the publication of a final rule.

B. The Concept of Negotiated Rulemaking

Usually, DOE develops a proposed rulemaking using Department staff and consultant resources. Typically, a preliminary analysis is vetted for stakeholder comments after a Framework Document is published and comments taken thereon. After the notice of proposed rulemaking is published for comment, affected parties may submit arguments and data defining and supporting their positions with regard to the issues raised in the proposed rule. Congress noted in the NRA, however, that regulatory

development may “discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions * * *.” 5 U.S.C. 561(2)(2). Congress also stated that “adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.” 5 U.S.C. 561(2)(3).

Using negotiated rulemaking to develop a proposed rule differs fundamentally from the Department centered process. In negotiated rulemaking, a proposed rule is developed by an advisory committee or working group, chartered under FACA, 5 U.S.C. App. 2, composed of members chosen to represent the various interests that will be significantly affected by the rule. The goal of the advisory committee or working group is to reach consensus on the treatment of the major issues involved with the rule. The process starts with the Department’s careful identification of all interests potentially affected by the rulemaking under consideration. To help with this identification, the Department publishes a notice of intent such as this one in the Federal Register, identifying a preliminary list of interested parties and requesting public comment on that list. Following receipt of comments, the Department establishes an advisory committee or working group representing the full range of stakeholders to negotiate a consensus on the terms of a proposed rule. Representation on the advisory committee or working group may be direct; that is, each member may represent a specific interest, or may be indirect, such as through trade associations and/or similarly-situated parties with common interests. The Department is a member of the advisory committee or working group and

represents the Federal government's interests. The advisory committee or working group chair is assisted by a neutral mediator who facilitates the negotiation process. The role of the mediator, also called a facilitator, is to apply proven consensus-building techniques to the advisory committee or working group process.

After an advisory committee or working group reaches consensus on the provisions of a proposed rule, the Department, consistent with its legal obligations, uses such consensus as the basis of its proposed rule, which then is published in the Federal Register. This publication provides the required public notice and provides for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested), and request judicial review. DOE anticipates, however, that the pre-proposal consensus agreed upon by the advisory committee or working group will narrow any issues in the subsequent rulemaking.

C. Proposed Rulemaking for Enforcement of Regional Energy Conservation Standards

The NRA enables DOE to establish an advisory committee or working group if it is determined that the use of the negotiated rulemaking process is in the public interest. DOE intends to develop Federal regulations that build on the depth of experience accrued in both the public and private sectors in implementing standards and programs.

DOE has determined that the regulatory negotiation process will provide for obtaining a diverse array of in-depth input, as well as an opportunity for increased collaborative discussion from both private-sector stakeholders and government officials who are familiar with energy efficiency of regional standards enforcement.

D. Department Commitment

In initiating this regulatory negotiation process to develop a regulation to enforce regional energy conservation standards, DOE is making a commitment to provide adequate resources to facilitate timely and successful completion of the process. This commitment includes making the process a priority activity for all representatives, components, officials, and personnel of the Department who need to be involved in the rulemaking, from the time of initiation until such time as a final rule is issued or the process is expressly terminated. DOE will provide administrative support for the process and will take steps to ensure that the advisory committee or working group has the dedicated resources it requires to complete its work in a timely fashion. Specifically, DOE will make available the following support services: properly equipped space adequate for public meetings and caucuses; logistical support; word processing and distribution of background information; the service of a facilitator; and such additional research and other technical assistance as may be necessary.

To the maximum extent possible consistent with the legal obligations of the Department, DOE will use the consensus of the advisory committee or working group as the basis for the rule the Department proposes for public notice and comment.

E. Negotiating Consensus

As discussed above, the negotiated rulemaking process differs fundamentally from the usual process for developing a proposed rule. Negotiation enables interested and affected parties to discuss various approaches to issues rather than asking them only to

respond to a proposal developed by the Department. The negotiation process involves a mutual education of the various parties on the practical concerns about the impact of standards. Each advisory committee or working group member participates in resolving the interests and concerns of other members, rather than leaving it up to DOE to evaluate and incorporate different points of view.

A key principle of negotiated rulemaking is that agreement is by consensus of all the interests. Thus, no one interest or group of interests is able to control the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee or working group, unless the committee or working group itself unanimously agrees to use a different definition. 5 U.S.C. § 562. In addition, experience has demonstrated that using a trained mediator to facilitate this process will assist all parties, including DOE, in identifying their real interests in the rule, and thus will enable parties to focus on and resolve the important issues.

III. Proposed Negotiating Procedures

A. Key Issues for Negotiation

The following issues and concerns will underlie the work of the Negotiated Rulemaking Committee on Enforcement of Regional Energy Conservation Standards for regional standards enforcement:

- DOE's key issues include assuring full compliance with statutory mandates.
- The committee must develop an effective enforcement framework for regional energy conservation standards.

To examine the underlying issues outlined above, and others not yet articulated, all parties in the negotiation will need DOE to provide data and an analytic framework complete and accurate enough to support their deliberations. DOE's analyses must be adequate to inform a prospective negotiation—for example, a preliminary Technical Support Document or equivalent must be available and timely.

B. Formation of Working Group

A working group will be formed and operated in full compliance with the requirements of FACA and in a manner consistent with the requirements of the NRA. DOE has determined that the working group not exceeds 25 members. The Department believes that more than 25 members would make it difficult to conduct effective negotiations. DOE is aware that there are many more potential participants than there are membership slots on the working group. The Department does not believe, nor does the NRA contemplate, that each potentially affected group must participate directly in the negotiations; nevertheless, each affected interest can be adequately represented. To have a successful negotiation, it is important for interested parties to identify and form coalitions that adequately represent significantly affected interests. To provide adequate representation, those coalitions must agree to support, both financially and technically, a member of the working group whom they choose to represent their interests.

DOE recognizes that when it establishes energy efficiency standards for residential products and commercial equipment, various segments of society may be affected in different ways, in some cases producing unique “interests” in a proposed rule based on income, gender, or other factors. The Department will pay attention to providing

that any unique interests that have been identified, and that may be significantly affected by the proposed rule, are represented.

FACA also requires that members of the public have the opportunity to attend meetings of the full committee and speak or otherwise address the committee during the public comment period. In addition, any member of the public is permitted to file a written statement with the advisory committee. DOE plans to follow these same procedures in conducting meetings of the working group.

C. Interests Involved/Working Group Membership

DOE anticipates that the working group will comprise no more than 25 members who represent affected and interested stakeholder groups, at least one of whom must be a member of the ASRAC. As required by FACA, the Department will conduct the negotiated rulemaking with particular attention to ensuring full and balanced representation of those interests that may be significantly affected by the proposed rule governing rules for the enforcement of regional energy conservation standards. Section 562 of the NRA defines the term interest as “with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.” Listed below are parties the Department to date has identified as being “significantly affected” by a proposed rule regarding the energy efficiency of regional standards enforcement.

- The Department of Energy
- Trade Associations representing installers and distributors of HVAC equipment
- Component manufacturers and related suppliers

- Utilities
- Energy efficiency/environmental advocacy groups
- Consumers

One purpose of this notice of intent is to determine whether Federal regulations regarding the enforcement of regional energy conservation standards will significantly affect interests that are not listed above. DOE invites comment and suggestions on its initial list of significantly affected interests.

Members may be individuals or organizations. If the effort is to be fruitful, participants on the working group should be able to fully and adequately represent the viewpoints of their respective interests. This document gives notice of DOE's process to other potential participants and affords them the opportunity to request representation in the negotiations. Those who wish to be appointed as members of the working group, should submit a request to DOE, in accordance with the public participation procedures outlined in the DATES and ADDRESSES sections of this notice of intent. Membership of the working group is likely to involve:

- Attendance at approximately five (5), one (1) to two (2) day meetings;
- Travel costs to those meetings; and
- Preparation time for those meetings.

Members serving on the working group will not receive compensation for their services. Interested parties who are not selected for membership on the working group may make valuable contributions to this negotiated rulemaking effort in any of the following ways:

- The person may request to be placed on the working group mailing list and submit written comments as appropriate.
- The person may attend working group meetings, which are open to the public; caucus with his or her interest's member on the working group; or even address the working group during the public comment portion of the working group meeting.
- The person could assist the efforts of a workgroup that the working group might establish.

A working group may establish informal workgroups, which usually are asked to facilitate committee deliberations by assisting with various technical matters (e.g., researching or preparing summaries of the technical literature or comments on specific matters such as economic issues). Workgroups also might assist in estimating costs or drafting regulatory text on issues associated with the analysis of the costs and benefits addressed, or formulating drafts of the various provisions and their justifications as previously developed by the working group. Given their support function, workgroups usually consist of participants who have expertise or particular interest in the technical matter(s) being studied. Because it recognizes the importance of this support work for the working group, DOE will provide appropriate technical expertise for such workgroups.

D. Good Faith Negotiation

Every working group member must be willing to negotiate in good faith and have the authority, granted by his or her constituency, to do so. The first step is to ensure that each member has good communications with his or her constituencies. An intra-interest

network of communication should be established to bring information from the support organization to the member at the table, and to take information from the table back to the support organization. Second, each organization or coalition therefore should designate as its representative a person having the credibility and authority to ensure that needed information is provided and decisions are made in a timely fashion. Negotiated rulemaking can require the appointed members to give a significant sustained for as long as the duration of the negotiated rulemaking. Other qualities of members that can be helpful are negotiating experience and skills, and sufficient technical knowledge to participate in substantive negotiations.

Certain concepts are central to negotiating in good faith. One is the willingness to bring all issues to the bargaining table in an attempt to reach a consensus, as opposed to keeping key issues in reserve. The second is a willingness to keep the issues at the table and not take them to other forums. Finally, good faith includes a willingness to move away from some of the positions often taken in a more traditional rulemaking process, and instead explore openly with other parties all ideas that may emerge from the working group's discussions.

E. Facilitator

The facilitator will act as a neutral in the substantive development of the proposed standard. Rather, the facilitator's role generally includes:

- Impartially assisting the members of the working group in conducting discussions and negotiations; and

- Impartially assisting in performing the duties of the Designated Federal Official under FACA.

F. Department Representative

The DOE representative will be a full and active participant in the consensus building negotiations. The Department's representative will meet regularly with senior Department officials, briefing them on the negotiations and receiving their suggestions and advice so that he or she can effectively represent the Department's views regarding the issues before the working group. DOE's representative also will ensure that the entire spectrum of governmental interests affected by the standards rulemaking, including the Office of Management and Budget, the Attorney General, and other Departmental offices, are kept informed of the negotiations and encouraged to make their concerns known in a timely fashion.

G. Working Group and Schedule

After evaluating the comments submitted in response to this notice of intent and the requests for nominations, DOE will either inform the members of the working group that they have been selected or determine that conducting a negotiated rulemaking is inappropriate.

DOE will advise working group members of administrative matters related to the functions of the working group before beginning. DOE will establish a meeting schedule based on the settlement agreement and produce the necessary documents so as to adhere to that schedule. While the negotiated rulemaking process is underway, DOE is

committed to performing much of the same analysis as it would during a normal standards rulemaking process and to providing information and technical support to the working group.

IV. Comments Requested

DOE requests comments on which parties should be included in a negotiated rulemaking to develop draft language pertaining to the energy efficiency of regional standards enforcement and suggestions of additional interests and/ or stakeholders that should be represented on the working group. All who wish to participate as members of the working group should submit a request for nomination to DOE.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's notice of proposed rulemaking.

Issued in Washington, DC, on June 9, 2014.



Kathleen B. Hogan
Deputy Assistant Secretary for Energy
Efficiency and Renewable Energy