

Appliance Standards Awareness Project
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
Northwest Energy Efficiency Alliance

August 6, 2019

Ms. Jennifer Tiedeman
U.S. Department of Energy
Office of the General Counsel, GC-33
1000 Independence Avenue SW
Washington, DC 20585

RE: Docket Number EERE–2019–BT–NOA–0011: Notice of Proposed Rulemaking on the Test Procedure Interim Waiver Process

Dear Ms. Tiedeman:

This letter constitutes the comments of the Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy (ACEEE), Consumer Federation of America (CFA), National Consumer Law Center, on behalf of its low-income clients (NCLC), Northeast Energy Efficiency Partnerships (NEEP), and Northwest Energy Efficiency Alliance (NEEA) on the notice of proposed rulemaking (NOPR) on the test procedure interim waiver process. 84 Fed. Reg. 18414 (May 1, 2019). We appreciate the opportunity to provide input to the Department.

In the NOPR, DOE proposes significant changes to the process for granting interim test procedure waivers. Specifically, the NOPR proposes that if DOE does not notify the applicant of an interim waiver about the Department’s decision within 30 business days, the interim waiver would be “deemed granted.” If DOE ultimately denies the petition or grants the petition with a different alternate test procedure than that specified in the interim waiver, DOE would provide a 180-day grace period before the manufacturer would be required to use the DOE test procedure or the alternate test procedure.¹

This proposal strikes at the heart of the national standards program by threatening its fundamental reliability and fairness. It would effectively allow manufacturers and importers to self-assign test procedure waivers, opting out of the rules that apply to their competitors for an indefinite period. Making matters worse, these self-assigned waivers would remain a secret, also for an indefinite period. Products sold under a self-assigned waiver from the testing rules could fail to meet federal standards and nobody would know. Consumers purchasing these products would end up with higher energy bills and competing manufacturers would be undercut in the market.

DOE justifies the proposal based on a false premise and a mischaracterization. DOE falsely asserts that existing policy prevents manufacturers from selling products while an interim waiver application is pending. But a longstanding DOE enforcement policy allows such sales. DOE mischaracterizes the

¹ 84 Fed. Reg. 18422.

historic treatment of interim waivers by saying “they are not typically rejected,”² which appears intended to imply that the proposal would only speed approvals that would eventually happen anyway. But this statement ignores the many interim waiver applications that have been approved, but only with modification or only in part as well as the considerable risk of abuse resulting from the creation of a new pathway for applications to be “deemed granted.” A policy that simply deems interim waivers granted by the passage of time invites unjustified applications.

Below we describe in detail why the proposal alarms us. We also describe why the Department’s estimates of cost savings from the proposal are flawed. In addition, we understand that some manufacturers are concerned that the time required to review interim waiver applications in recent years has sometimes been too long, and we believe that the existing process should be more transparent. Therefore, we close these comments by outlining our suggestions for how the existing process could be improved without undermining the reliability of national standards.

DOE’s proposal would result in self-assigned interim waivers. Based on our review of the regulatory record for a range of waiver applications, it does not seem feasible for DOE to be able to fairly and adequately review interim waiver requests within 30 days. Many waiver applications involve complex products and test procedure issues, and DOE often needs to review additional materials beyond the manufacturer’s waiver application in order to determine both the need for an interim waiver and the adequacy of any alternate test procedure. For example, in a recent notice granting an interim waiver to Store It Cold for walk-in cooler refrigeration systems, in addition to reviewing the petition and the manufacturer’s proposed alternate test procedure, DOE also reviewed “the company’s testing and performance data, product characteristics, and product specification sheets published online.”³ The docket contains 12 of these documents that DOE reviewed.⁴

In addition, waiver applications are sometimes incomplete or do not provide sufficient technical detail for DOE to be able to adequately evaluate the application. For example, in several instances manufacturers have submitted waiver applications without a complete list of the basic models for which they are requesting a waiver.⁵ In the case of Store It Cold’s application, the company submitted a revised petition “in response to DOE requests for technical clarification.” The original petition did not include enough detail about the alternate test procedure that Store It Cold was proposing. In the case of an application from AHT Cooling for commercial refrigeration equipment, the company provided additional information after submitting their petition in response to technical questions from DOE about the functionality of a specific product feature and how the proposed alternate test procedure would work.⁶ DOE noted in a 2014 final rule that “many of the delays in processing arise from iterative efforts by the Department to obtain sufficient information upon which to base a decision to grant an interim waiver.”⁷

² <https://www.energy.gov/sites/prod/files/2019/06/f63/interim-waiver-faq.pdf>.

³ 84 Fed. Reg. 11947 (March 29, 2019).

⁴ <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=SR&D=EERE-2018-BT-WAV-0002>.

⁵ For example, waiver applications submitted by AGA Marvel for refrigerators, Acuity Brands for illuminated exit signs, ITW for commercial refrigeration equipment, and Jamison Door Company and Heatcraft for walk-in coolers and walk-in freezers.

⁶ <https://www.regulations.gov/document?D=EERE-2017-BT-WAV-0027-0008>.

⁷ 79 Fed. Reg. 26593 (May 9, 2014).

DOE notes in the NOPR that of the waiver applications received between 2016 and 2018, only one interim waiver request was granted within 30 business days.⁸ We note that as shown in comments from Earthjustice, prior to 2016, interim waivers were granted much more quickly on average than they were during the 2016-2018 period. Nevertheless, it appears that it is very difficult for DOE to be able to respond to an interim waiver application within 30 days. DOE's proposal in the NOPR would therefore seem to result in interim test procedure waivers being automatically granted. Manufacturers and importers will thus be empowered to self-assign interim waivers.

DOE's proposal would allow the sale of non-compliant products into the U.S. market. The proposal creates a pathway for unscrupulous manufacturers and importers to circumvent energy conservation standards. For example, if any manufacturer wanted to sell noncompliant products into the U.S. market, they could submit a test procedure waiver application that would allow their products to appear to be compliant, and, if DOE did not respond within 30 days, immediately start to sell the noncompliant products. The manufacturer could potentially continue to sell the noncompliant products indefinitely since there would be no deadline for DOE to make a final decision on a waiver application.⁹ Even if DOE ultimately denied the waiver petition, the manufacturer would continue to be able to sell the noncompliant products for another 180 days. After that, the company could apply again, perhaps simply changing model numbers, triggering another period for selling non-compliant products if DOE failed to deny the petition promptly.

For example, if an importer of refrigerators wanted to sell noncompliant products, they could submit a test procedure waiver application requesting to test their products at a lower ambient temperature than that specified in the DOE test procedure such that their products would appear to be much more efficient than they actually were. If the importer's interim waiver application was "deemed granted," they could immediately begin to legally sell the noncompliant products. DOE would not be able to take any enforcement action since under the interim waiver the importer's products could be certified as compliant. And yet consumers would unknowingly be purchasing wasteful products that do not meet the standards as measured by the DOE test procedure and competitors would be put at a disadvantage.

The risk of manufacturers and importers circumventing efficiency standards would be magnified by DOE's proposal that an interim waiver application would be "deemed granted" after 30 days even if the application was not complete or did not include an alternate test procedure. The current regulations state that a petition for waiver must include "any alternate test procedures known to the petitioner," but allow for a petition to be submitted without an alternate test procedure.¹⁰ And the proposed regulatory language simply states that "if DOE does not notify the applicant in writing of the disposition of the petition for interim waiver within 30 business days of receipt of the application, the interim waiver, as requested in the application, is deemed granted."¹¹ A manufacturer looking to circumvent the standards could thus submit a waiver application without proposing an alternate test procedure and, once their interim waiver was "deemed granted," sell products without conducting *any* testing.

⁸ 84 Fed. Reg. 18416.

⁹ The proposed regulatory language states that interim waivers would remain in effect until DOE publishes either a final decision on a waiver petition or an amended test procedure, without any time period specified. Even if DOE maintained the existing requirement regarding the duration of interim waivers, the Department could take up to a year before publishing a final decision on a waiver petition.

¹⁰ 10 CFR 430.27(b)(1); 10 CFR 431.401(b)(1).

¹¹ 84 Fed. Reg. 18422.

In short, DOE's proposed approach creates a moral hazard: it offers a pathway for evading federal test procedures and standards while eliminating any risk or consequence for submitting a shoddy, incomplete, or unjustified application. Some manufacturers and importers will attempt to exploit such a system to sell products that fail to meet standards. If DOE fails to identify attempts to abuse the system within 30 days, both consumers and reputable manufacturers will be harmed. Consumers would unknowingly end up with products that do not meet the minimum efficiency standards, which would increase their energy bills. And manufacturers who continue to utilize the waiver process only in legitimate instances would be undercut in the market by competitors taking advantage of a process that would allow them to legally sell noncompliant products.

“Deemed granted” interim waivers would be a secret. All stakeholders benefit from a transparent waiver process, and DOE's proposal in the NOPR would only reduce transparency. Under the current waiver process, DOE publishes a manufacturer's waiver application in the Federal Register along with the Department's decision on the granting of an interim waiver. However, DOE's proposed changes do not include any provision for notification that a waiver application has been received or that an interim waiver has been “deemed granted” by the passage of time. A manufacturer could thus have an interim waiver in force for an indefinite period without their competitors or other stakeholders even knowing that a petition had been submitted.

DOE's proposal would lead to the granting of unjustified, incomplete, and unfair interim waivers that have been disallowed or deterred under the existing system. DOE's “Frequently Asked Questions” document on the NOPR states that “DOE does not typically reject petitions for interim waivers, and as a result there is no real reason to keep manufacturers waiting for so long . . . to distribute their compliant products.”¹² DOE appears to be arguing that automatically granting interim waivers would lead to little to no difference with respect to the approval of interim waivers, just do it more quickly. This conclusion is incorrect for three reasons.

First, while rare, some interim waivers are outright rejected. DOE rejected an interim waiver application from a refrigerator importer that sought to test its products at a lower ambient temperature than its competitors.¹³ It took DOE three months to investigate the petition and publish a rejection in the Federal Register. This unjustified waiver request would have been automatically granted had the proposed policy been in place.

Second, DOE has often approved interim waivers *with modification*. For example, in granting an interim waiver to Whirlpool for clothes washers, DOE corrected two errors in the table of load sizes proposed by Whirlpool.¹⁴ In an interim waiver granted to AGA Marvel for refrigerators, rather than permitting the company to use the alternate test procedure proposed in its petition, DOE instead aligned the test procedure in the interim waiver with that previously granted for similar products.¹⁵ In the case of an application from AHT Cooling for commercial refrigeration equipment, DOE only partially granted an interim waiver (and with modifications to AHT's proposed approach).¹⁶ DOE's approvals of the modified interim waivers for AGA Marvel and AHT cooling each took five months. An automatic granting of AGA Marvel's interim waiver application would have resulted in inconsistent ratings as compared to similar

¹² <https://www.energy.gov/sites/prod/files/2019/06/f63/interim-waiver-faq.pdf>.

¹³ <https://www.regulations.gov/document?D=EERE-2014-BT-WAV-0011-0001>.

¹⁴ <https://www.regulations.gov/document?D=EERE-2015-BT-WAV-0020-0001>.

¹⁵ <https://www.regulations.gov/document?D=EERE-2016-BT-WAV-0028-0001>.

¹⁶ <https://www.regulations.gov/document?D=EERE-2017-BT-WAV-0027-0009>.

products from other manufacturers. And an automatic granting of AHT Cooling's interim waiver application would have given the company an unfair advantage by not having to meet the standard for commercial refrigerators even though the equipment is capable of operating as a refrigerator.¹⁷ The automatic granting of AHT Cooling's interim waiver could also have resulted in underestimating energy use by not fully capturing defrost cycles.

Third, as described above, DOE cannot use the incidence of shoddy, unjustified interim waiver applications under the existing system as a predictor of the rate of unjustified applications under the proposed changes. By providing for automatic approval, DOE's proposal increases the incentives for applications designed solely to circumvent existing standards.

DOE's justification for the proposal is based on a false premise. DOE states in the NOPR that the proposed changes will reduce regulatory burden and achieve cost savings by manufacturers.¹⁸ The NOPR specifically states that "to the extent that DOE previously has issued interim waiver decisions in excess of 30 business days after receipt of petitions, the time saved under this proposal is expected to significantly reduce the costs imposed on these manufacturers who cannot sell their products during the time it takes DOE to process an application for interim waiver or waiver request."¹⁹ However, there is no evidence that the current interim waiver process is in fact delaying the introduction of new products, nor is there any reason that the current process *would* delay the introduction of new products.

In December 2010, DOE issued an enforcement policy regarding test procedure waivers, which the Department reissued in April 2017. While the NOPR makes no mention of this enforcement policy, the policy states that "to encourage waivers and prevent the Department's administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, the Department, as a matter of policy, will refrain from an enforcement action related to a specific basic model while a waiver request is pending with the Department."²⁰ The existing process thus allows a manufacturer to begin to sell a new product for which they have requested a test procedure waiver immediately after submitting their waiver application with no threat of enforcement action. For example, First Co. submitted a petition for waiver and application for interim waiver on June 8, 2018 for certain basic models of through-the-wall space-constrained central air conditioners.²¹ While DOE has not yet granted (or denied) an interim waiver, all 36 of the basic models listed in First Co.'s petition appear to be listed in DOE's Certification Compliance Database and advertised for sale on First Co.'s website.²²

¹⁷ AHT Cooling requested to test and rate the basic models in their application only as ice cream freezers even though the equipment can operate in more than one mode (i.e. as either a refrigerator or an ice cream freezer).

¹⁸ 84 Fed. Reg. 18416.

¹⁹ Ibid.

²⁰ <https://www.energy.gov/sites/prod/files/2017/04/f34/Enforcement%20Policy%20-%20waivers.pdf>.

²¹ <https://www.regulations.gov/document?D=EERE-2018-BT-WAV-0012-0002>.

²² https://www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A*;
<https://firstco.com/#/productCatalogIndividual?ProductId=915>;
<https://firstco.com/#/productCatalogIndividual?ProductId=708>;
<https://firstco.com/#/productCatalogIndividual?ProductId=709>.

Since the existing enforcement policy allows manufacturers to immediately begin to sell a new product after submitting a test procedure waiver application, DOE's premise for the proposal in the NOPR—namely that the current system delays product introductions—is false.²³

Interim waiver applications “deemed granted” would provide an inadequate opportunity for public comment. Competitors and other stakeholders should have the opportunity to comment on interim waivers that have been reviewed and approved (in some cases with changes) by DOE rather than commenting on just a manufacturer's petition. Under the existing process, DOE publishes and seeks comment on an interim waiver that DOE has granted that includes an alternate test procedure. As described above, the alternate test procedure contained in an interim waiver may contain corrections or other changes compared to the procedure proposed by the manufacturer in their petition. The interim waiver is, in effect, DOE's proposed action on the more permanent waiver. If an interim waiver was instead “deemed granted” and DOE's review of the waiver application was conducted only as part of making a final decision, the process would appear to provide no opportunity for comment on DOE's proposed alternate test procedure, which may vary from that submitted in the petition. Comment solely on the original petition submitted by the manufacturer would be insufficient since it would not reflect the government's considered evaluation of the application and a government-proposed alternate test procedure. This problem would be exacerbated by the fact that, under DOE's proposal, a manufacturer could have an interim waiver “deemed granted” without even proposing an alternate test procedure.

DOE appears to be significantly overestimating the net cost savings that would result from the proposed changes. In the NOPR, DOE attempts to quantify the national cost savings “from reducing the number of days by which manufacturer revenues are delayed for affected products.”²⁴ DOE first estimated the revenue from product sales of basic models that the Department claims were affected by interim waiver delays. DOE then calculated the cost of delay as the interest that could have been earned on this revenue over the period of delay. DOE also calculated the foregone environmental benefits and energy savings from the impact of the Department automatically granting interim waiver requests that it otherwise would not have granted.

As described above, the enforcement policy regarding waivers means that there is no reason that the existing interim waiver process should be resulting in any delays in the introduction of new products, and thus the proposal in the NOPR cannot result in cost savings. Yet even if there *were* delays due to the current process, DOE appears to be significantly overestimating the savings that would result from the proposal in the NOPR.

First, even if the existing process *was* delaying the introduction of new products, it is unreasonable to assume that consumers are foregoing purchasing products altogether. Rather, a more realistic scenario is that a consumer would simply purchase a different model than that for which the manufacturer is requesting a waiver. In such a scenario, there would be little, if any, loss in revenue to manufacturers and therefore minimal loss, if any, of any interest earned on revenues.

²³ While the NOPR must be evaluated based on existing policy including the enforcement policy, our comments in this letter should not be read as endorsement of the enforcement policy. The current enforcement policy suffers from some of the same flaws as the NOPR with respect to lack of transparency and the ease with which a manufacturer or importer can take advantage of enforcement discretion. We would welcome the opportunity to provide feedback on how the enforcement policy might be improved.

²⁴ 84 Fed. Reg. 18418.

Second, DOE does not explain why it is reasonable to assume that manufacturers earn interest on all the revenue they receive from product sales. It appears that DOE is effectively assuming that manufacturers place all their revenue in the bank to earn interest. But much of the revenue resulting from the sale of a product is attributable to the manufacturer production cost, which includes the cost of materials, labor, overhead, etc. Therefore, it seems entirely unrealistic to assume that manufacturers are earning interest on all the revenue they receive.

DOE also appears to be significantly underestimating the foregone benefits as a result of the Department's proposal. The NOPR states that of 21 concluded interim waiver petitions evaluated for this notice, DOE granted 18 in full and 3 with modifications.²⁵ For the 3 petitions granted with modifications, DOE estimated the foregone benefits of granting the petitions as received rather than with modifications. However, this calculation fails to account for the significant risk of the waiver process being abused under DOE's proposal in the NOPR, which could result in very large foregone benefits.

In sum, because the existing enforcement policy was designed to prevent delays in the introduction of new products, DOE's claim that the proposal in the NOPR would achieve cost savings due to reducing delays is not supported. Furthermore, even if there were delays in the introduction of new products, consumers would most likely purchase other models instead, which would mean that there would be little, if any, delay in revenues received by manufacturers. Even if revenues were delayed, it is not reasonable to assume that manufacturers are earning interest on all the revenue they receive. Finally, by failing to account for the significant risk of DOE's proposal being abused, the Department is underestimating the foregone benefits. Therefore, DOE appears to be significantly overestimating the net cost savings due to the proposal in the NOPR.

We urge DOE to consider potential changes to the interim waiver process that could reduce delays and improve transparency without inviting abuse. We understand manufacturers' concerns about the time it has taken in some cases in recent years for interim waiver applications to be granted, and we believe that all stakeholders would benefit from a more transparent process. However, any changes made to the interim waiver process must protect consumers and competing manufacturers. To protect against abuse, any changes made to the interim waiver process must not include a provision for the automatic granting of interim waivers. We suggest three changes that could be made to the existing process that would help reduce delays and make the process more transparent without inviting abuse.

First, DOE should ensure that adequate resources are dedicated to reviewing waiver applications. As shown in comments from Earthjustice, prior to 2016, DOE reviewed waiver applications relatively quickly, which suggests that with adequate resources, delays in granting interim waivers may be able to be significantly reduced.

Second, in order to further reduce delays, DOE should modify the regulations regarding the disposition of petitions for interim waivers. Currently, the regulations state that "if administratively feasible, DOE will notify the applicant in writing of the disposition of the petition for interim waiver within 30 business days of receipt of the application."²⁶ We suggest deleting the phrase "if administratively feasible" to provide manufacturers more certainty regarding the timeframe for receiving notification of the disposition of an interim waiver. However, as described above, 30 days is not sufficient to allow DOE to

²⁵ 84 Fed. Reg. 18419.

²⁶ 10 CFR 430.27(e)(1); 10 CFR 431.401(e)(1).

fairly and adequately review interim waiver requests. We believe that 90 days would provide enough time without unnecessarily delaying the process for manufacturers. We recommend that the regulations therefore state that “DOE will notify the applicant in writing of the disposition of the petition for interim waiver within 90 business days of receipt of the application.”

Finally, in order to improve transparency, DOE should provide an early opportunity for competitors and other stakeholders to comment on interim waiver applications. Under the existing process, manufacturers may not even know that one of their competitors has submitted a waiver application before an interim waiver is granted. We suggest that the regulations should state that DOE will publish waiver petitions when they are received, provided that they are complete. To be considered complete, the application would need to meet the existing criteria specified in the CFR.²⁷ DOE should also provide an opportunity for comment at this stage. This change would allow competitors and other stakeholders to be able to raise any initial concerns about an interim waiver application at an early stage without significantly lengthening the process. We note that this comment period would not replace, but rather complement, the comment period that DOE provides when publishing interim waivers.

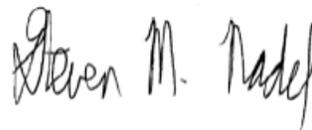
In conclusion, we strongly oppose DOE’s proposal in the NOPR, which could result in significant harm to both consumers and manufacturers by inviting abuse and circumvention of energy conservation standards. We urge DOE to instead consider our alternative suggested changes to the interim waiver process which would reduce delays and improve transparency while ensuring the continued reliability of national appliance standards.

Thank you for considering these comments.

Sincerely,



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Executive Director
Appliance Standards Awareness Project



Steve Nadel
Executive Director
American Council for an Energy-Efficient
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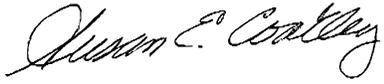


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²⁷ 10 CFR 430.27(b)(1); 10 CFR 431.401(b)(1).



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