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Northwest Power and Conservation Council

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Jim Yost
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Idaho

April 2, 2019

DECISION MEMORANDUM

TO: Council members

FROM: Kevin Smit, Senior Analyst; John Shurts, General Counsel

SUBJECT: Discussion and approval of Council response to the Department of Energy's (DOE) Notice of Proposed Rulemaking (NOPR) regarding proposed revisions to the federal efficiency standards processes, or "Process Rule."

PROPOSED ACTION: Approve Council comments to DOE regarding the federal efficiency standards processes.

SIGNIFICANCE: The Northwest has effectively utilized federal standards as a key delivery mechanism for cost-effective energy savings, which have been important in meeting efficiency goals. The DOE requested comments on revisions to the standards-setting process, and the Council is uniquely positioned to provide quality input. The Council has been actively engaged in the standards process for over a decade.

BUDGETARY/ECONOMIC IMPACTS

None.

BACKGROUND

In December 2017 the Department of Energy (DOE) issued a Request for Information (RFI) regarding proposed changes to the "Process Rule,"¹ which outlines DOE's

¹ The formal title is "Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products"

approach to establishing new or revised energy efficiency standards for consumer appliances. The Council submitted [comments](#) in response to the RFI in February 2018.

DOE has now issued a Notice of Proposed Rulemaking ([NOPR](#)) and request for comment on its proposed changes to the Process Rule. Comments on the NOPR are due May 6, 2019.

The NOPR outlines 12 proposed changes. In general, the NOPR aims to “reduce regulatory burden,” modernize procedures, clarify undocumented processes, better align DOE’s processes with the Energy Policy and Conservation Act (EPCA), expand early opportunities for public input, and establish a threshold for screening proposed standards. Of the 12 proposed changes, Council staff agree with or have minimal concerns with nine, and strong reservations about three of the proposed changes. Staff reviewed the NOPR and our proposed responses with the Power Committee at the March committee meeting. Staff subsequently attended a public meeting at DOE and provided oral comments. Staff will also attend the continuation of this meeting on April 11.

Staff circulated draft comments to the Council members by email. At the April Council meeting staff will provide a high-level overview of DOE’s proposed changes and summarize the draft comments. We will be prepared to discuss any parts of the NOPR.

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April 2, 2019

DECISION MEMORANDUM

TO: Council Members

FROM: Tina Jayaweera, Senior Analyst; John Shurts, General Counsel, Andrea Goodwin, Senior Counsel; Kevin Smit, Senior Analyst

SUBJECT: Discussion and approval of Council response to the Department of Energy's (DOE) Notice of Proposed Rulemaking (NOPR) regarding General Service Lamps (GSLs).

PROPOSED ACTION: Approve Council comments to DOE regarding the general service lamps NOPR.

SIGNIFICANCE: Federal standards has been a key delivery mechanism for cost-effective energy savings in the Northwest, which have been an important component in meeting efficiency goals. DOE's proposed rule would have a significant impact on energy savings toward meeting our long-term energy efficiency goals.

BUDGETARY/ECONOMIC IMPACTS

None.

BACKGROUND

In January 2017, DOE adopted a final rule expanding the definition of GSLs to include a wider range of lightbulbs, effective January 1, 2020. In February 2019, DOE issued a Notice of Proposed Rulemaking (NOPR) proposing to withdraw the January 2017 definitions asserting that the legal basis underlying those revised definitions misconstrued existing law. Power and legal staff together prepared draft comments on the NOPR, and staff circulated those comments to Council members via email on March 29, 2019. As detailed in the comments, staff does not support DOE's proposal to withdraw the 2017 definitions. Public comment on the NOPR closes May 3, 2019.

Council comments on DOE's "Process Rule" and General Service Lamps NOPRs (DOE Energy Efficiency Appliance Standards)

Council Meeting
April 9, 2019

John Shurts, General Counsel
Kevin Smit, Senior Analyst



Agenda

- Summary of key point – DOE's proposed rulemakings and Council comments in response
- Relevant statutes
- Why we care about appliance standards
- Process Rule Notice of Proposed Rulemaking (NOPR)
- General Service Lighting NOPR



DOE's NOPRs and Council's comments

- DOE is proposing to revise the “Process Rule” - the collection of rules about how DOE sets energy efficiency standards for appliances and equipment
- DOE is proposing in a separate NOPR to revise its definition of General Service Lamps, rescinding an expanded definition of GSLs that DOE approved in 2017
- The two NOPRs are not related, but the timing requires that the Council develop comments at the same time – now up for Council decisions
- Proposed comments by Council reviewed by the Power Committee at the March Committee meeting and then circulated to the full Council well ahead of this meeting
- Process Rule NOPR: Council supports many provisions of the revised “Process Rule”; expresses significant concerns with three aspects of the proposal
- GSL definition NOPR: Council does not support the proposal to revise the definition of GSLs

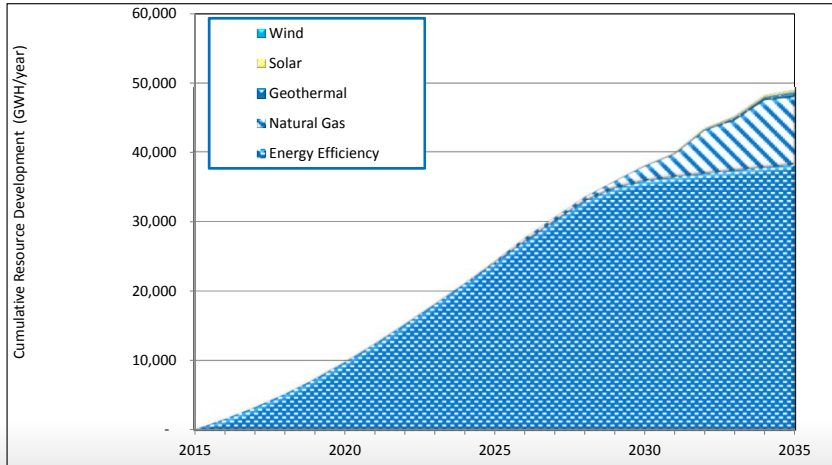
Statutes Related to Appliance Standards

- Energy Policy and Conservation Act of 1975 (EPCA)
- National Appliance Energy Conservation Act of 1987 (NAECA)
- Energy Policy Action of 1992 (EPACT 1992)
 - Expanded the standards program to include certain commercial and industrial equipment
 - Process rule developed 1994-96 during Congressionally imposed moratorium on spending for standards
- Energy Policy Act of 2005
- Energy Independence and Security Act of 2007 (EISA)
 - Amended EPCA to allow DOE to issue “direct final rules (DFR)”



Why Does the Council Participate?

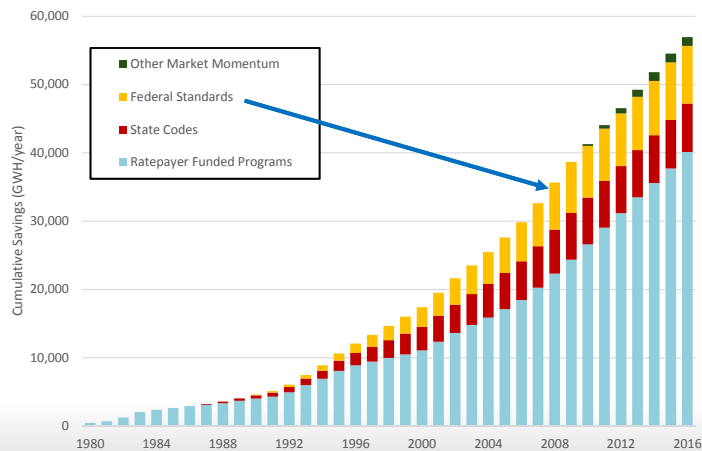
1. Energy Efficiency is a huge part of our Seventh Plan resource strategy



Why Does the Council Participate?

2. Energy codes and appliance standards are a key part of our success

- Codes and standards have accounted for over one-sixth of region's energy savings since 1980
- Other benefits of codes and standards:
 - Low cost savings
 - Affect the entire market
 - More equitable



Why Does the Council Participate?

3. We have been actively engaged in the process since 1987

- **Council testified in support of NAECA (1987)**
- **Council staff have represented the Council in DOE's regulatory proceedings since 1990**
- **Staff (i.e., Tom Eckman) have also served as a member of the Secretary of Energy's Appliance Standards Rulemaking Federal Advisory Committee (ASRAC)**
- **Council staff and the region benefit from the Technical Support Documents (TSDs) produced in support of the standards development**

"Process Rule" NOPR

- **The "Process Rule" is the collection of rules about how DOE goes about setting energy efficiency standards for appliances and equipment**
- **The rule was developed in 1996 and DOE is proposing to update these rules**
 - **"Reduce regulatory burden" - Executive Order 13771**
 - **Update and modernize the rule**

“Process Rule” NOPR-Timeline

- December 2017 – DOE releases RFI for changes to the Process Rule
- February 2018 - Council submitted detailed comments in response to the RFI (dated February 16, 2018)
- January 2019 - DOE developed the Notice of Proposed Rulemaking (NOPR) and released for public comment
- March 21, 2019 - A public meeting was held and staff presented primary Council comments
- April 11, 2019 – A second public meeting is being held at DOE to finish the agenda from the first meeting
- May 6, 2019 - Written comments are due
 - Staff presenting and discussing draft comments at April Council meeting (April 9-10)

List of Proposed Changes to Process Rule

- A. The Process Rule Will Be Binding on the Department of Energy*
- B. The Process Rule Will Apply to Both Consumer Products and Commercial Equipment*
- C. The Application of the Process Rule to ASHRAE Equipment*
- D. Priority Setting*
- E. Coverage Determinations*
- F. Early Stakeholder Input to Determine the Need for Rulemaking*
- G. Significant Energy Savings Threshold*
- H. Finalization of Test Procedure Prior to Issuance of a Standards NOPR*
- I. Adoption of Industry Standards*
- J. Direct Final Rules*
- K. Negotiated Rulemaking*
- L. Other Revisions and Issues*

The following slides include our comments for the three underlined items (taken directly from the set of draft comments)

Primary Comment 1

G. Significant Energy Savings Threshold

Proposal Summary: DOE has proposed to apply a threshold-based analysis that includes a 0.5 quad threshold (over a 30-year period) and a percentage threshold of 10%.

Comment: The Council does not support the proposal to set a threshold for determining significant energy savings that any proposed standard must satisfy before it may even be considered for adoption. We do not believe this is consistent with the requirements or purposes of EPCA. Under EPCA, whether to adopt a standard depends on consideration of a number of factors, not just the energy savings. Applying a threshold to determine “significant” energy savings before the proposed standard may be evaluated against all of EPCA’s criteria risks losing substantial savings from standards that simply do not pass the threshold but that EPCA would otherwise allow. For example, based on an estimate provided by the Appliance Standards Awareness Project (ASAP), a third of the standards adopted between 2009 to 2017 would not have met the proposed threshold. Therefore, evaluation of these proposed standards under the criteria prescribed by EPCA would have been inappropriately foreclosed and the significant combined savings from these standards not realized. To set a threshold that prejudices a proposal based just on the proposed savings, and not on a balanced consideration of the overall benefits and costs, is not in line with the provisions or goals of EPCA.

Primary Comment 2

I. Adoption of Industry Standards

Proposal Summary: DOE proposes to amend the Process Rule to require the use, without modification, of industry standards as test procedures for covered products and equipment unless the industry standards would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use and estimated operating costs of that equipment during a representative average use cycle.

Comment: DOE’s current practice is to use industry standards as test procedures as often as it can. However, DOE modifies or adjusts the industry standard when necessary to satisfy requirements of EPCA. Thus, the Council disagrees with the DOE’s proposal to require adoption, without modification, of industry standards as test procedures for covered products and equipment. Industry standards may be appropriate without modification in many cases, but this should not be the default or required approach in all cases. DOE must retain the ability to modify industry testing standards to allow for the testing of equipment and proposed standards in a way that avoids conflicts with the requirements of EPCA. DOE’s proposal seems to recognize this point, by including the caveat that industry standards will not be used “unless such standards...would not produce test results that reflect the energy efficiency, energy use, and estimated operating costs of that equipment during a representative average use cycle.” But the caveat simply makes the case that requiring, rather than allowing, the use of industry standards without assessing what is needed in any particular case under EPCA is a mistake. Experience has shown that DOE’s current approach works well and there is no need or benefit from changing it, and potentially some risk. DOE should retain its current approach.

Primary Comment 3

K. Negotiated Rulemaking

Proposal Summary: DOE proposes to add a section to the process rule continuing and institutionalizing the use of negotiated rulemaking. The proposal has a number of parts to it, including one troublesome element: DOE proposes that in all cases the results of a negotiated rulemaking will be embedded in a NOPR (notice of proposed rulemaking) and still go through all the steps of notice and comment rulemaking. This would be a change in current practice, as DOE has been using its authority to issue DFRs (direct final rules) following the conclusion of negotiated rulemakings.

Comment: The Council strongly supports the continued use of negotiated rulemaking in appropriate circumstances. We specifically support the continued use of DOE's Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) to that end. However, DOE should not abandon the option to issue direct final rules at the end of negotiated rulemakings. Following a negotiated rulemaking with a direct final rule often makes immense sense. To abandon the use of direct final rules in all cases- rather than retaining the flexibility to use DFRs when appropriate following a negotiated rulemaking- will simply result in prolonging the agency process, increasing the agency's own costs often to no useful end, and increasing the regulatory process burden on manufacturers and other stakeholders rather than reducing it.

GSL NOPR - Background

- In January 2017, DOE adopted a final rule expanding the definition of GSLs to include a wider range of lightbulbs, effective January 1, 2020.
 - Primarily reflector bulbs, decorative lamps, and three-way bulbs
- In February 2019, DOE issued a NOPR proposing to rescind the definitions adopted in the January 2017 rule
 - Asserting that the legal basis underlying those revised definitions misconstrued existing law.
 - This will, in effect, reduce the number of lightbulbs subject to the stricter efficiency standards applicable to GSLs.

Impact on the PNW

- **Withdrawing the January 2017 definitions will significantly reduce the number of lightbulbs subject to stricter efficiency standards, specifically the statutory backstop for GSLs of 45 lumens per watt, effective January 1, 2020.**
- **The withdrawal represents energy savings of approximately 150-260 average megawatts (aMW)**
 - **Savings would either be lost or the utilities would need to pursue through their energy efficiency programs, which will increase costs and ultimately result in fewer average megawatts of savings**
 - **Would also cause serious disruption and uncertainty among utilities, manufactures and retailers already planning for implementation**

GSL NOPR – Proposed Comments

- **Most comments to DOE will focus on the legality of the 2017 definitions and the legality of the proposed withdrawal**
 - **Specifically whether the 2017 re-definitions were allowed by the law, and also whether the proposed rescission violates the anti-backsliding provision of EPCA**
- **Council prepared draft comments on the NOPR**
 - **We are *not* developing detailed legal arguments, leaving that to others**
 - **2017 definition that expanded the definition of GSLs seems consistent with the underlying law and was unchallenged, and so see no need for DOE to go out of its way to rescind those definitions as a matter of law**
 - **Focus our comments on the substantial amount of energy efficiency potential that will be lost due to this rule change**
- **Public comment on the NOPR closes on May 3, 2019 (extended from April 12, 2019).**

Optional Slides

Energy Policy and Conservation Act: Criteria for Prescribing New or Amended Standards

1. the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;
2. the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;
3. the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;
4. any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
5. the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
6. the need for national energy and water conservation; and
7. other factors the Secretary considers relevant.

DOE Standard-Setting 101

DOE been basically the following steps since the process rule went into effect in 1996:

1. Issue a Proposed Notice of Determination to update (or cover) for public comment, take comment
2. Issue a final determination to cover (update)
3. Issue RFI or conduct Framework workshop to discuss scope, issues and data needs
4. DOE and consultants do the technical analysis, write up the TSD and determine a proposed standard level
5. DOE publishes NOPR w/TSD for public comment (including holding at one public meeting to take comments on and discuss the NOPR/TSD)
6. DOE reviews public comment, develops final proposed rule and sends proposed rule to OMB for review
7. If and when OMB approves proposed final rule DOE publishes final rule on DOE's website, then wait 45 days for "technical corrections"
8. DOE makes any technical corrections and sends final rule to Fed Register for publication which starts the clock on filing lawsuits
9. DOE waits (either 45 or 90 days, can't remember which) for lawsuits. If no lawsuits, standard is final
10. EXCEPT that Congress has some time (I think 180 legislative days – i.e., days the House or Senate are actually in session) to take action under the Congressional Review Act to repeal the standard

Note: DOE can decide at any point in this process, and has, to attempt a Negotiated Rulemaking, even after they have issue a proposed final rule (they did that for Commercial AC, but that's a real exception. Usually the "RegNeg" process starts before DOE issues a NOPR and even before they've done any real significant technical work.