



July 15, 2019

By E-mail

Mr. Daniel Simmons,
Assistant Secretary, Energy Efficiency and Renewable Energy
Appliance and Equipment Standards Program
Department of Energy
Mailstop EE-5B
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TPWaiverProcess2019NOA0011@ee.doe.gov

Re: Joint Comments on DOE's Notice of Proposed Rulemaking on the Test Procedure Interim Waiver Process; Docket No. EERE-2019-BT-NOA-0011; RIN 1904-AE24

Dear Mr. Simmons:

American Lighting Association (ALA), the Association of Home Appliance Manufacturers (AHAM), the National Automatic Merchandising Association (NAMA), and Plumbing Manufacturers International (PMI) (collectively, the Joint Commenters) respectfully submit the following comments to the Department of Energy (DOE) on its Notice of Proposed Rulemaking on the Test Procedure Interim Waiver Process; Docket No. EERE-2019-BT-NOA-0011, RIN 1904-AE24, 84 Fed. Reg., 18414 (May 1, 2019).

The Joint Commenters support DOE in its efforts to ensure a national marketplace through the Appliance Standards Program, which prevents a patchwork of state standards and reduces manufacturing costs. We recognize that test procedures are a critical part of the Appliance Standards Program and offer an important opportunity to ensure energy use and costs are accurately and consistently measured and represented without overly burdening manufacturers.

Test procedures also are critical in that they provide manufacturers with a pathway to demonstrate compliance with energy conservation standards. When a test procedure does not accurately or adequately measure energy for a particular basic model or models, it is important that manufacturers are able to avail themselves of an interim test procedure waiver, and ultimately a final test procedure waiver, and deliver innovative and, often more efficient products to consumers quickly.

I. Streamlining the Interim Waiver Approval Process Is Good Policy.

The Joint Commenters appreciate and support the Department's concerted effort to address an evident problem: test procedure waiver petitions, including petitions for interim waivers, take too long to process.

We recognize that there are myriad reasons for the time-lag between when the need for a test procedure waiver arises and when it is finally granted. Those reasons include the necessary work required to develop a bespoke test procedure for a product that falls outside of the mainstream or for a product that was not in Congress' regulatory line of sight when the covered product was first defined and energy conservation standards set. Writing new test procedures, or editing and verifying procedures identified in a test procedure waiver petition, is a time and resource intensive effort. The test method, like all regulated test procedures, must be enforceable, repeatable, reproducible, not unduly burdensome, and render representative performance ratings. Laboratory testing may be required. Other reasons for the delay may be administrative—the Department has many other priorities, including regulation driven by statutory deadlines. If the Department has determined that it cannot process its test procedure waiver petitions more quickly—as demonstrated by the data in the proposed rule—the Joint Commenters support the Department's endeavor to solve the problem as it relates to interim test procedure waivers.

DOE proposes that, “[b]ecause manufacturers may not distribute covered products or equipment in commerce without demonstrating compliance with an applicable energy conservation standard pursuant to testing under the DOE test procedure or a waiver or interim waiver approved by DOE, DOE determines 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 where DOE has not notified the petitioner of its interim waiver decision within the 30-day business day period.” The Joint Commenters strongly agree with DOE's determination.

DOE's proposal arises at the intersection of two important policy considerations: (1) government restriction of markets; and (2) level playing field for competition. By addressing these, DOE's proposal has numerous benefits:

First, DOE's proposal will allow manufacturers to more swiftly provide innovative, energy saving products to consumers. It is important for interim test procedure waivers to be decided quickly. Without prompt DOE action, the result is delay, uncertainty, and unnecessary cost as manufacturers cannot sell their product during the time DOE takes to decide an interim waiver petition. As DOE noted in its proposal, that time is generally quite lengthy—usually over 100 days. This is even more significant because the time for DOE to issue final decisions and orders on waiver petitions is even greater—DOE data show that, on average, it took DOE nearly one year to issue decisions on waiver petitions submitted in 2016 and 2017 and DOE has yet to reach a decision on 90 percent of the petitions submitted in 2018. Yet, as DOE's analysis

demonstrates, interim waivers are almost always granted.¹ Thus, DOE's proposed determination that it is desirable for public policy reasons to grant immediate relief on interim test procedure waivers pending a determination of the waiver makes a great deal of sense.

Second, providing a time limit on interim waiver decisions provides certainty to regulated entities. Currently, manufacturers know only one thing about when an interim waiver petition will be acted upon: it will be a long wait. Thus, it is nearly impossible to plan for when a new product can be introduced. That uncertainty drives unnecessary cost and makes it difficult to provide product line plans to retailers, make projections, budget, and develop manufacturing plans, among other things. Typically, many retailers only allow resets to their model line up one or two times a year, so if a product is not ready in one of those windows, the product cannot be introduced for another six months to a year. Under DOE's proposal, however, regulated entities needing interim test procedure waivers will know that they will have the necessary approval in a relatively short period of time and can make product plans. This certainty is welcome and needed.

Third, the proposal provides a necessary pathway to compliance for manufacturers of innovative products. A test procedure waiver is necessary and appropriate in circumstances where DOE has exercised its authority over a product or range of products but has not provided a pathway to compliance. A manufacturer of a regulated covered product cannot bring its product or equipment into compliance with an energy conservation standard unless it tests that product or equipment to the codified test procedure and certifies compliant results to DOE. If the codified test procedure does not apply or does not produce accurate results, then that product is, in essence, locked out of the market.

In such cases, fundamental fairness dictates that DOE provide a pathway to compliance as expeditiously as possible. DOE's proposal adequately and appropriately addresses this concern. If the Department were to deem an interim waiver granted thirty days after submission as it has proposed to do, then the regulated party's market lock-out will not last longer than a month, which is reasonable. Moreover, DOE's proposal is consistent with the practical status quo. In 2010, DOE issued an enforcement policy stating that it would not seek civil penalties for products for which a test procedure waiver petition had been filed. This policy reflects the realization that test procedure waiver and interim waiver petitions require dedicated resources and significant time to evaluate. Without such a policy, DOE would unfairly exclude manufacturers from the market.

Fourth, DOE's proposal provides a clear, transparent process so that regulated parties and other stakeholders know how DOE will operate. Timing is a key factor in ensuring that interim test procedure waivers are processed fairly. But the substance of the test may have competitive impacts. If two products compete in the same market, their energy performance ratings may impact consumer choice. Test results that look similar may not be comparative if

¹ DOE noted that of 21 interim waiver petitions, DOE granted 18 in full and granted the remaining three 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 procedure than proposed.

the tests used to achieve those results are significantly different or if the test does not accurately reflect the energy use or efficiency of a product. The cost and burden of testing also has competitive impacts. Even if products are different enough to warrant different methods of test, the playing field must be as level as possible to avoid competitive gamesmanship.

To ensure the proposal is truly in keeping with the status quo other than streamlining the process, the Joint Commenters recommend that DOE add to the final rule a provision indicating that, in cases where an interim test procedure waiver is 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. This is consistent with DOE's current practice to publish its decisions on interim waivers together with notice and request for comment on the test procedure waiver petition. In addition, we would strongly encourage DOE to use the 30 business day period to review the petition for interim waiver, ensure petitions are complete, and address any need for clarity on the substance of the petition. That review period would also be a good time for DOE to evaluate whether a petition raises any substantive concerns and should not be deemed granted by the passage of time. DOE should have adequate resources to conduct such review while also keeping up with its test procedure and energy conservation standards rulemaking priorities.

Some stakeholders have critiqued and will continue to critique DOE's proposed rule on the basis that they believe it opens the door for manufacturers to abuse the system and provides manufacturers with a "free pass" to develop their own test procedures. Those with this view believe that manufacturers have nefarious intentions and will use the streamlined process to their advantage at the detriment of consumers and the environment. Critics also seem concerned that DOE will allow incomplete petitions to be granted by the passage of time, thus allowing petitioners to sell products without an alternate test procedure. But those concerns are unsubstantiated.

DOE's test procedure waiver regulations have been in effect for nearly 15 years. *See* 69 Fed. Reg. 61916 (Oct. 21, 2004). There is no evidence of abuse and there is no reason to expect that will change under the current proposal which, in essence, codifies and makes more transparent the status quo. The one documented instance of which we are aware in which a petitioner did not propose an alternate test procedure was effectively cured by DOE intervention. *See* 82 Fed. Reg. 30099 (July 19, 2017). This is exactly what DOE's regulations contemplate—the regulations require the petitioner to include an alternative test procedure *if it is known to the petitioner*. *See* 10 C.F.R. 430.27(b)(iii). Moreover, we expect that if DOE receives a petition that is not complete, it will notify the petitioner. And, in any case, such a "petition" could not be considered granted by the passage of time because it is not complete. Our proposal that interim test procedure waivers that are granted—either proactively by DOE or by the passage of time—be published in the Federal Register would cure this concern as well. Companies and all parties would know when an interim waiver was granted. Any company moving forward on the basis of an incomplete petition would do so at the risk of DOE enforcement action.

The Joint Commenters also note that DOE's regulations already include a remedy for potential abuse of the test procedure waiver process. Specifically, 10 C.F.R. 430.27(k) gives DOE 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 is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model(s)' true energy consumption characteristics. Waivers and interim waivers are conditioned upon the validity of statements, representations, and documents provided by the requestor; any evidence that the original grant of a waiver or interim waiver was based upon inaccurate information will weigh against continuation of the waiver." Nothing in DOE's current proposal would remove this authority.

Aside from DOE's ability to cure abuse of the test procedure waiver, it would seem odd that a manufacturer with the intent of abusing the system and developing its own test procedure to skirt standards would notify DOE and the public of that intent via petitioning for a test procedure waiver. That would be akin to a criminal asking the police for permission to commit a crime—it simply doesn't make sense.

Moreover, manufacturers have a vested interest in ensuring their interim waiver does not differ from their final waiver and, accordingly, are unlikely to propose alternative tests that do not produce accurate results. The appliance and equipment industries are extremely competitive and brand reputation is important—manufacturers know that consumer trust is critical to customers purchasing their products. Also, competitors will be quick to point out any unfair test procedure that will either produce inaccurate results or give a competitor an unfair advantage. Furthermore, test procedures require significant resources to conduct—technicians must be trained and labs set up to perform the tests. Manufacturers are loath to make these investments under the prospect that the test may change in short order. Thus, they are incentivized to get it right the first time in the interim test procedure waiver petition.

II. The Joint Commenters Also Support Other Elements of DOE's Proposal.

DOE also proposes that interim test procedure waivers would remain in effect until the earlier of the following: 1) DOE publishes in the Federal Register a determination on the petition for waiver; or 2) DOE publishes in the Federal Register a new or amended test procedure that addresses the issues presented in the waiver petition. The Joint Commenters support this proposal because it provides certainty for manufacturers and recognizes the realities of the time it takes DOE to address final petitions for test procedure waiver.

DOE also proposes that if DOE ultimately denies the petition for waiver or grants the petition with a different alternate test procedure than specified in the interim waiver, DOE will provide a grace period of 180 days for the manufacturer to begin to use the alternate test procedure specified in the decision and order on the petition. The Joint Commenters strongly support this proposal. As DOE pointed out in its notice, this is consistent with EPCA's provision providing 180 days from the issuance of a new or amended test procedure for manufacturers to begin using the test procedure for representations of energy efficiency. Moreover, the 180-days gives manufacturers certainty and permits time to retest and recertify equipment accordingly. The

current rule is arbitrary because it requires retesting and recertification to occur before the next annual certification deadline. That framework allows for anything from twelve months to twelve hours' notice, depending on what date DOE issues the final determination on the petition.

We note, as discussed above, that 10 CFR 430.27(k) permits the Department to rescind a waiver if the determination was based on false or inaccurate information. The Joint Commenters recommend that if DOE makes such a determination, then the 180-day transition timeline should be discretionary.

III. The Joint Commenters

ALA is a trade association representing over 3,000 members in the residential lighting, ceiling fan and controls industries in the United States, Canada and the Caribbean. Our member companies are manufacturers, manufacturers' representatives, retail showrooms and lighting designers who have the expertise to educate and serve their customers.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

Founded in 1936, NAMA is the association representing the \$25 billion U.S. convenience services industry. With nearly 1,000-member companies—including many of the world's most recognized brands—NAMA provides advocacy, education and research for its membership.

PMI is the nation's leading trade association for plumbing product manufacturers. Its members produce 90 percent of the plumbing products sold in the United States and employ thousands of workers in over 70 locations in 25 states. Our member companies' plumbing products are found in the majority of homes, commercial buildings, schools, restaurants, manufacturing facilities, hospitals, and hotels across the nation. Examples of these products include, but are not limited to kitchen and bathroom faucets, toilets, showerheads, urinals, fixture fittings, sinks, whirlpools/tubs, water fountains, and waste disposal systems. PMI member companies continue to raise the bar in developing the most advanced water-efficient plumbing products.

The Joint Commenters appreciate the opportunity to submit these comments on DOE'S Notice of Proposed Rulemaking on the Test Procedure Interim Waiver Process and would be glad to discuss these matters in more detail should you so request.

Respectfully Submitted,

A handwritten signature in black ink that reads "Eric Jacobson". The signature is written in a cursive style and is positioned to the left of a vertical line.

Eric Jacobson, CAE
President/CEO
American Lighting Association

A handwritten signature in black ink that reads "Jennifer Cleary". The signature is written in a cursive style.

Jennifer Cleary
Vice President, Regulatory Affairs
Association of Home Appliance Manufacturers

A handwritten signature in black ink that reads "Mike Goscinski". The signature is written in a cursive style.

Mike Goscinski
Director, Federal and State Affairs
National Automatic Merchandising Association

A handwritten signature in black ink that reads "Matt Sigler". The signature is written in a cursive style.

Matt Sigler
Technical Director
Plumbing Manufacturers International