Department of Energy
Washington, DC 20585

March 11, 2009

EXEC-2008-002400

MEMORANDUM FOR THE SECRETARY

FROM: STEVEN G. CHALK S. Chalk
PRINCIPAL DEPUTY ASSISTANT SECRETARY
ENERGY EFFICIENCY AND RENEWABLE ENERGY

SUBJECT: ACTION: Issuance and Publication in the Federal Register of a Final Rule for the Weatherization Assistance Program (WAP), RIN: 1904-AB84 – ESECS EE-4290

ISSUE: DOE is amending the regulatory definition of "State" under WAP and the WAP funding allocation formula so as to include American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands. DOE is also amending the WAP regulations to reflect amendments made by the American Recovery and Reinvestment Act of 2009.

BACKGROUND: Section 411(c) of the Energy Independence and Security Act of 2007 (EISA) adds Puerto Rico and the U.S. Territories to the definition of "State" for the purpose of the Weatherization Assistance Program (10 CFR Part 440). The attached final rule amends the WAP regulations consistent with the EISA 2007 change.

In addition to appropriating $5 billion dollars to WAP, the American Recovery and Reinvestment Act of 2009:

- increased the referenced percentage of the poverty level in the definition of "low income" from 150 percent to 200 percent;
- increased the limit on the minimum average expenditure per dwelling unit from $2,500 to $6,500; and
- increased the amount of appropriated funds that the Department may apply towards training and technical assistance from 10 percent of the appropriated sums up to 20 percent.

The final rule also amends the regulations consistent with these changes.

SENSITIVITIES: The attached rule must be finalized in order for the U.S. territories to be eligible for weatherization assistance funds under WAP. The U.S. territories combined would receive approximately $43 million dollars under the American Recovery and Reinvestment Act of 2009 funding level.

POLICY IMPACT: None. DOE received one comment to the proposed regulation that generally was supportive.

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URGENCY: Immediate issuance of the final rule would permit a timely announcement of the allocation of WAP funds to the States, including the U.S. territories.

RECOMMENDATION: Recommend that you approve issuance of the final rule and its publication in the Federal Register.

Attachment

Approve: _____

Disapprove: _____

Date: March 12, 2009

CONCURRENCE: PI (PI/Jonathan Shrier, Acting PI-1, 3/6/09)
CF-1/Steven J. Isakowitz, 03/11/09
GC/Eric Fygi, Acting GC1, 3/4/09
OMB/Nathan J. Frey, 3/10/09

[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 440

[Docket No. EEWAP1201]

RIN 1904-AB84

Weatherization Assistance Program for Low-Income Persons

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

ACTION: Final Rule.

SUMMARY: The U.S. Department of Energy (DOE) is expanding the definition of "State" under the Weatherization Assistance Program for Low-Income Persons and amending the financial assistance allocation procedure to reflect the expanded definition. The Energy Independence and Security Act of 2007 amended the Weatherization Assistance Program definition of "State" to include the Commonwealth of Puerto Rico and the other territories and possessions of the United States. Consistent with the statutory amendment, DOE is amending the regulatory definition of "State," and amending the allocation procedure relied on to calculate the amount of financial assistance received by each State so as to include American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands. Further, DOE is amending the Weatherization Assistance Program regulations consistent with recent statutory amendments in the American Recovery and Reinvestment Act of 2009.

DATES: This final rule is effective March 12, 2009.

FOR FURTHER INFORMATION CONTACT: Jean Diggs, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Weatherization Assistance Program, EE-2K, Room 6070, 1000 Independence Avenue, SW, Washington, DC 20585-0121, (202) 586- 8506, e-mail: jean.diggs@ee.doe.gov, or Chris Calamita, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-72, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-9507, e-mail: Christopher.Calamita@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

II. Definition of "State"

III. Allocation of Funds

IV. American Recovery and Reinvestment Act of 2009

V. Effective Date

VI. Regulatory Analysis

VII. Congressional Notification

VIII. Approval of the Office of the Secretary

I. Introduction

Sections 411-418 of the Energy Conservation and Production Act established the Weatherization Assistance Program for Low-Income Persons (Weatherization Assistance Program). (42 U.S.C. 6861 et seq.) The Weatherization Assistance Program reduces energy costs for low-income households by increasing the energy efficiency of their homes, while promoting their health and safety. DOE works in partnership with State- and local-level agencies to implement the Weatherization Assistance Program. DOE's Project Management Center awards grants to State-level agencies, which then contract with local agencies.

DOE issued a notice of proposed rulemaking (NOPR) to amend the Weatherization Assistance Program regulations consistent with amendments to the Energy Conservation and Production Act under the Energy Independence and Security Act of 2007 (Pub. L. No. 110-140; December 19, 2007). (73 FR 79414; December 29, 2008) The Energy Independence and Security Act of 2007 amended the Weatherization Assistance Program definition of "State" to include the Commonwealth of Puerto Rico and the other territories and possessions of the United States. Consistent with the statutory amendment, DOE proposed to amend the regulatory definition of "State," and to amend the allocation procedure relied on to calculate the amount of financial assistance received by each State so as to include American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands.

DOE received one comment in response to the NOPR, from the Governor of the Virgin Islands. The comment was generally supportive of the rule as proposed. As explained in the remainder of this notice, DOE is adopting the NOPR as proposed. Further, DOE is making

additional amendments to the Weatherization Assistance Program regulations consistent with the recent statutory changes in the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5).

II. Definition of "State"

DOE allocates financial assistance for weatherization to States and Indian tribes. 10 CFR §§ 440.10 and 440.11. Section 411(c) of the Energy Independence and Security Act of 2007 amended section 412 of the Energy Conservation and Production Act to include under the definition of "State," the Commonwealth of Puerto Rico, and any other territory or possession of the United States. (42 U.S.C. 6862(8)) In the NOPR, DOE proposed to amend the regulatory definition of "State" under the Weatherization Program consistent with the statutory definition. As proposed the definition of "State" would include American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands (hereafter collectively referred to as the U.S. territories).

The amended statutory definition of "State" includes territories or possessions of the United States generally, which would indicate that the territories of Palmyra Atoll and Wake Atoll would also be included. However, as explained in the NOPR, the territories of Palmyra Atoll and Wake Atoll do not have significant permanent populations to warrant inclusion in the Weatherization Program. Palmyra Atoll is a national Wildlife Refuge and access to Wake Atoll is restricted. (See, http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm, last visited September 30, 2008.) The purpose of the Weatherization Assistance Program is to provide grants "for the purpose of providing financial assistance with regard to projects designed to provide for the weatherization of

dwelling units, particularly those where elderly or handicapped low-income persons reside, occupied by low-income families." (42 U.S.C. 6863(a)) Further DOE must "allocate financial assistance to each State on the basis of the relative need for weatherization assistance among low-income persons throughout the States[.]" (42 U.S.C. 6864) The absence of permanent populations on Palmyra Atoll and Wake Atoll would make the inclusion of these Atolls superfluous. As such DOE did not propose to include the territories of Palmyra Atoll and Wake Atoll in the regulatory definition of State for the purpose of the Weatherization Assistance Program.

The comment from the Governor of the Virgin Islands supported inclusion of the U.S. territories in the definition of "State," and urged DOE to finalize the revised definition in advance of distributing funds made available under the American Recovery and Reinvestment Act of 2009.

DOE has concluded that the rationale for the proposed definition remains valid. Therefore, DOE is amending the definition of "State," as proposed, to mean each of the States, the District of Columbia, American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands.

III. Allocation of Funds

Each year Congress appropriates funds to implement the Weatherization Assistance Program. A portion of the appropriated funds is used for training and technical assistance. The remaining funds, comprising the majority of the appropriated funds, are distributed to the States as program funds based on a two-part allocation.

From the total appropriation, DOE reserves funds for national training and technical

assistance (T&TA) activities that benefit all States. In addition, DOE specifically allocates funding to States for T&TA activities at both the State and local levels. Prior to the American Recovery and Reinvestment Act of 2009, the total funds for national, State, and local T&TA could not exceed 10 percent of the Congressional appropriation. Section 407 of the American Recovery and Reinvestment Act of 2009 increased the percent of funds eligible for T&TA to up to 20 percent. (42 U.S.C. 6866) The remaining funds comprise the State program allocations.

If the State program allocations in a fiscal year (FY) are at or above the amount allocated to States in FY 1994 under Public Law No. 103-332 (September 30, 1994), (i.e., the funds made available to the Weatherization Assistance Program minus funds for T&TA, which equaled $209,724,761) the State program allocations are distributed according to a two-part allocation procedure. Should total funds for State program allocation fall below $209,724,761, the allocations to States are reduced proportionally. See 10 CFR 440.10(c).

The two-part allocation is comprised of a base allocation plus a formula allocation. See 10 CFR 440.10(b). The base allocation for each State is fixed, but differs for each State and was derived from each State's allocation under the appropriations for FY 1993.[1] The base allocation was developed to minimize fluctuations in funds received by States between fiscal years resulting from changes in the total amount of appropriated funds received for the Weatherization Assistance Program. The base allocation was established in response to concern that substantial fluctuation between annual funds could disrupt a State's program.

Under the two-part allocation, funds in excess of the total base allocation are allocated

[1] Calculation of each State's share of the funds was based on a formula different from that in the current regulations. See, 60 FR 4480, 4482; January 23, 1995.

among States according to the formula allocation set forth in 10 CFR 440.10(b)(3). A State's formula allocation is based on three factors for each State. Factor 1, Low-Income Population, represents the share of the nation's low-income households in each State expressed as a percentage of all U.S. low-income households. Factor 2, Climatic Conditions, is obtained from the heating and cooling degrees for each State, treating the energy needed for heating and cooling proportionately. Factor 3, Residential Energy Expenditures by Low-Income Households in each State, is an approximation of the financial burden that energy use places on low-income households. The approximation is necessary because State-specific data on residential energy expenditures by low-income households is generally lacking.

In the NOPR, DOE proposed to revise how funds are allocated under the Weatherization Assistance Program so as to include the U.S. territories. The proposed revisions were based on a method for determining the base and formula allocation for the U.S. territories that was consistent with how the current allocation method for States was developed.

Essentially, the Department followed the development process used in 1995 to establish the existing allocation method (i.e., basing the allocation formula on FY 1994 allocation) under the assumption that at that time the U.S. territories were included in the Weatherization Assistance Program. DOE recognized that the data used to calculate a State's share of the funds under the 1995 rulemaking are not available for the U.S. territories. Therefore, DOE proposed to use Hawaii's information for the U.S. territories. Similar to Hawaii, the U.S. territories are in hot climates with virtually no heating load, are all islands, and share a common main fuel type used in low-income households, electricity.

A. Allocation Threshold

As discussed in the previous paragraphs, the allocation of funding under the Weatherization Assistance Program is dependent first upon whether the total funds available for allocation to the States (excluding funds for T&TA) are at or above the level made available under Pub. L. No. 103-322, i.e., $209,724,761. In order to make the regulations clearer, the Department is replacing the references in 10 CFR part 440 to the "total program allocations under Pub. L. No. 103-322" with the actual dollar value. This amendment does not impact the allocation process, and is solely for the purpose of making the current regulation easier to read and understand.

B. Base Allocation

To reflect the addition of the U.S. territories to the Weatherization Assistance Program, DOE is revising the base allocation to include the newly added jurisdictions, as proposed. As discussed previously, DOE relied on Hawaii's base allocation ($120,000) as the base allocation for the U.S. territories. This revision does not reduce the base allocation amount for any State, but instead increases the total base allocation value so as to include the U.S. territories.

The comment from the Governor of the Virgin Islands supported the use of data from Hawaii, although indicated that such data could be made available for the Virgin Islands. However, such data was not provided as part of the comment.

For the reasons expressed in the NOPR and in today's Final Rule, DOE is adopting the Base Allocation as proposed. Under the adopted approach, the revised base allocation in 10 CFR

440.10(b) now reads as follows:

State	Base Allocation
Alabama	$1,636,000
Alaska	$1,425,000
Arizona	$760,000
Arkansas	$1,417,000
California	$4,404,000
Colorado	$4,574,000
Connecticut	$1,887,000
Delaware	$409,000
District of Columbia	$487,000
Florida	$761,000
Georgia	$1,844,000
Hawaii	$120,000
Idaho	$1,618,000
Illinois	$10,717,000
Indiana	$5,156,000
Iowa	$4,032,000
Kansas	$1,925,000
Kentucky	$3,615,000
Louisiana	$912,000
Maine	$2,493,000
Maryland	$1,963,000
Massachusetts	$5,111,000
Michigan	$12,346,000
Minnesota	$8,342,000
Mississippi	$1,094,000
Missouri	$4,615,000
Montana	$2,123,000
Nebraska	$2,013,000
Nevada	$586,000
New Hampshire	$1,193,000
New Jersey	$3,775,000
New Mexico	$1,519,000
New York	$15,302,000
North Carolina	$2,853,000
North Dakota	$2,105,000

Ohio	$10,665,000
Oklahoma	$1,846,000
Oregon	$2,320,000
Pennsylvania	$11,457,000
Rhode Island	$878,000
South Carolina	$1,130,000
South Dakota	$1,561,000
Tennessee	$3,218,000
Texas	$2,999,000
Utah	$1,692,000
Vermont	$1,014,000
Virginia	$2,970,000
Washington	$3,775,000
West Virginia	$2,573,000
Wisconsin	$7,061,000
Wyoming	$967,000
American Samoa	$120,000
Guam	$120,000
Puerto Rico	$120,000
Northern Mariana Islands	$120,000
Virgin Islands	$120,000
Total	$171,858,000

C. Formula Allocation

In addition to a base allocation, DOE will now allocate weatherization funds to the U.S. territories through the formula allocation. Essentially, the weatherization funds will be based on the U.S. territories' (1) number of low-income households (10 CFR 440.10(b)(3)(i)), (2) number of "heating degree" and "cooling degree" days (10 CFR 440.10(b)(3)(ii) and (iii)), and (3) average residential household energy expenditures (10 CFR 440.10(b)(3)(v)). DOE recognizes that data for the third factor of the formula allocation, i.e., average residential household energy expenditures, may not be available for all the U.S. territories. In the instances in which DOE does not have such data, DOE will again rely on comparable data from a comparable State, i.e., Hawaii, as proposed. This approach does not require revisions to the regulatory text for the formula allocation.

IV. American Recovery and Reinvestment Act of 2009

Section 407 of the American Recovery and Reinvestment Act of 2009 amended several of the Weatherization Assistance Program provisions in the Energy Conservation and Production Act. The amendments under section 407 –

- increased the referenced percentage of the poverty level in the definition of "low income" from 150 percent to 200 percent (42 U.S.C. 6862(7));
- increased the limit on the minimum average expenditure per dwelling unit from $2,500 to $6,500 (42 U.S.C. 6865(c)(1));
- increased the maximum amount of appropriated funds that the Department may apply towards T&TA from 10 percent of the appropriated sums to 20 percent (42 U.S.C. 6866);

and

- extended eligibility for further financial assistance to dwelling units that had been partially weatherized under a Federal program from September 30, 1975, through September 30, 1994.

The first three of these amendments under section 407 of the American Recovery and Reinvestment Act of 2009 require updates to the Weatherization Assistance Program regulations. Today's final rule amends the regulations consistent with these changes. The time period for previously received financial assistance as it relates to dwelling eligibility is governed by the statute and is not reflected in regulation, and as such there is no existing regulation to update.

DOE finds that there is good cause to amend the Weatherization Assistance Program regulations consistent with the American Recovery and Reinvestment Act of 2009 without providing an opportunity for notice and comment as such procedures are unnecessary. DOE is establishing the maximum percent of poverty level referenced in the definition of "low income," the maximum permitted expenditure per dwelling, or the maximum percent of funds permitted to be used for T&TA in accordance with the specific provisions of the statute. DOE is exercising no discretion in codifying these provisions and does not have the authority to amend the specific aspects of these provisions. Thus, no useful purpose would be served by offering an opportunity for public comment.

V. Effective Date

Today's final rule is effective on March 12, 2009. Pursuant to 5 U.S.C. 553(d)(3), the Department finds good cause that the effective date of this final rule need not be delayed. In the

delayed. In the American Recovery and Reinvestment Act of 2009 Congress appropriated $ 5 billion for the Weatherization Assistance Program. The stated purposes of the American Recovery and Reinvestment Act of 2009 are –

(1) To preserve and create jobs and promote economic recovery.

(2) To assist those most impacted by the recession.

(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.

(5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

(Section 3(a), Pub. L. No. 11-5) Moreover, Congress directed the agencies to manage and expend the funds made available so as to achieve the specified purposes, including commencing expenditures and activities as quickly as possible consistent with prudent management. (Section 3(b), Pub. L. No. 11-5) A delay in the effective date of today's final rule would delay the allocation of weatherization assistance funds to the States including the U.S. territories.[2] DOE believes it would be contrary to the public interest to delay the allocation of weatherization funds made available under the American Recovery and Reinvestment Act of 2009. Thus, a delay to the final rule would be inconsistent with the Congressional direction to commence expenditures as quickly as

[2] The comment from the Governor of the Virgin Islands encouraged DOE to apply the amended definition and allocation formula to funds made available under the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. No. 110-329; September 30, 2008). Today's final rule will apply to fund allocation determinations made following the issuance date of today's final rule.

possible, and thereby unnecessary, impracticable, and contrary to public interest. For the reasons stated above, DOE finds good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date required by the rulemaking provisions of the Administrative Procedures Act.

VI. Regulatory Analysis

A. Review under Executive Order 12866

Today's final rule is not a significant regulatory action under section 3(f)(1) of Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735; October 4, 1993). Accordingly, today's action was not subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," (67 FR 53461; August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's website: http://www.gc.doe.gov.

DOE has reviewed today's final rule for the Weatherization Assistance Program under the

provisions of the Regulatory Flexibility Act. Today's final rule incorporates statutory changes made to the Weatherization Assistance Program. The amendments include the U.S. territories in the Weatherization Assistance Program to the same extent as States are currently included. This rule will directly affect States and individual recipients of assistance. It will not have an economic impact on small entities. On this basis, DOE certifies that today's final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking.

C. Review under the National Environmental Policy Act of 1969

DOE has determined that today's final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6. of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to rulemakings that are strictly procedural, such as rulemaking establishing the administration of grants. Today's final rule establishes the procedure for allocating funds under the Weatherization Assistance Program so as to cover, in addition to the States and the District of Columbia, the U.S. territories. The regulations will not have any independent environmental impact. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

D. Review under Executive Order 13132, "Federalism"

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have

federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's final rule and has determined that it will not pre-empt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

E. Review under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. The review required by sections 3(a) and 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the pre-emptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in

sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them.

DOE has completed the required review and determined that, to the extent permitted by law, today's final rule meets the relevant standards of Executive Order 12988.

F. Review under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

Today's final rule will not impose a Federal mandate on State, local or tribal governments, and it will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

G. Review under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

I. Review under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use, should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review under Executive Order 13175

Executive Order 13175. "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249; November 9, 2000), requires DOE to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" refers to regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal

Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." Today's regulatory action is not a policy that has "tribal implications" under Executive Order 13175.

Under the Weatherization Assistance Program, a tribal organization may qualify as a unit of general purpose local government and, therefore, be eligible to apply for funds. See 10 CFR 440.11. Today's regulatory action will not change the eligibility of Indian tribes to apply for or receive funds under the Weatherization Assistance Program. Today's regulatory action will include the U.S. territories in the allocation of available funds. DOE has reviewed today's final rule under Executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

VII. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 440

Administrative practice and procedure, Energy conservation, Grant programs – energy, Grant programs – housing and community development, Housing standards, Indians, Individuals with disabilities, Reporting and record keeping requirements, Weatherization.

Issued in Washington, DC, on March 12, 2009.

S. Chalk

Steven G. Chalk
Principal Deputy Assistant Secretary
Energy Efficiency and Renewable Energy

For the reasons set forth in the preamble, DOE amends part 440 of chapter II of title 10, Code of Federal regulations to read as follows:

PART 440 – WEATHERIZATION ASSISTANCE PROGRAM FOR LOW-INCOME PERSONS

1. The authority citation for Part 440 continues to read as follows:

Authority: 42 U.S.C. 6861 et seq.; 42 U.S.C. 7101 et seq.

2. Section 440.3 is amended by revising the definitions of "low income" and "State" to read as follows:

§ 440.3 Definitions.

* * * * *

Low Income means that income in relation to family size which:

(1) at or below 200 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget, except that the Secretary may establish a higher level if the Secretary, after consulting with the Secretary of Agriculture and the Secretary of Health and Human Services, determines that such a higher level is necessary to carry out the purposes of this part and is consistent with the eligibility criteria established for the weatherization program under Section 222(a)(12) of the Economic Opportunity Act of 1964;

(2) Is the basis on which cash assistance payments have been paid during the preceding twelve month-period under Titles IV and XVI of the Social Security Act or applicable State or local law; or

(3) If a State elects, is the basis for eligibility for assistance under the Low Income Home Energy Assistance Act of 1981, provided that such basis is at least 200 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget.

* * * * *

State means each of the States, the District of Columbia, American Samoa, Guam, Commonwealth of the Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands.

* * * *

(3) Section 440.10 is amended by:

a. Removing the phrase "total program allocations under Pub. L. 103-332" in paragraph (b) and adding in its place "$209,724,761";

b. Revising paragraphs(b)(1) Table, and (c) to read as follows:

§ 440.10 Allocation of funds.

* * * * *

(b) * * *

(1) * * *

BASE ALLOCATION TABLE

State	Base Allocation
Alabama	$1,636,000
Alaska	$1,425,000
Arizona	$760,000
Arkansas	$1,417,000
California	$4,404,000
Colorado	$4,574,000
Connecticut	$1,887,000
Delaware	$409,000
District of Columbia	$487,000
Florida	$761,000
Georgia	$1,844,000
Hawaii	$120,000
Idaho	$1,618,000
Illinois	$10,717,000
Indiana	$5,156,000
Iowa	$4,032,000
Kansas	$1,925,000
Kentucky	$3,615,000
Louisiana	$912,000
Maine	$2,493,000
Maryland	$1,963,000
Massachusetts	$5,111,000
Michigan	$12,346,000
Minnesota	$8,342,000
Mississippi	$1,094,000
Missouri	$4,615,000
Montana	$2,123,000
Nebraska	$2,013,000
Nevada	$586,000
New Hampshire	$1,193,000
New Jersey	$3,775,000
New Mexico	$1,519,000
New York	$15,302,000
North Carolina	$2,853,000
North Dakota	$2,105,000

Ohio	$10,665,000
Oklahoma	$1,846,000
Oregon	$2,320,000
Pennsylvania	$11,457,000
Rhode Island	$878,000
South Carolina	$1,130,000
South Dakota	$1,561,000
Tennessee	$3,218,000
Texas	$2,999,000
Utah	$1,692,000
Vermont	$1,014,000
Virginia	$2,970,000
Washington	$3,775,000
West Virginia	$2,573,000
Wisconsin	$7,061,000
Wyoming	$967,000
American Samoa	$120,000
Guam	$120,000
Puerto Rico	$120,000
Northern Mariana Islands	$120,000
Virgin Islands	$120,000
Total	$171,858,000

* * * * *

(c) Should total program allocations for any fiscal year fall below $209,724,761, then each State's program allocation shall be reduced from its allocated amount under a total program allocation of $209,724,761 by the same percentage as total program allocations for the fiscal year fall below $209,724,761.

* * * * *

4. Section 440.18 is amended by revising paragraphs (a) and (c) to read as follows:

§ 440.18 Allowable expenditures.

(a) Except as adjusted, the expenditure of financial assistance provided under this part for labor, weatherization materials, and related matters included in paragraphs (c)(1) through (9) of this section shall not exceed an average of $6,500 per dwelling unit weatherized in the State, except as adjusted in paragraph (c) of this section.

* * * * *

(c) The $6,500 average will be adjusted annually by DOE beginning in calendar year 2010 and the $3,000 average for renewable energy systems will be adjusted annually by DOE beginning in calendar year 2007, by increasing the limitations by an amount equal to:

* * * * *

5. Section 440.22 is amended by revising paragraph (a) to read as follows:

§ 440.22 Eligible dwelling units.

(a) A dwelling unit shall be eligible for weatherization assistance under this part if it is occupied by a family unit:

(1) Whose income is at or below 200 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget,

(2) Which contains a member who has received cash assistance payments under Title IV or XVI of the Social Security Act or applicable State or local law at any time during the 12-month period preceding the determination of eligibility for weatherization assistance; or

(3) If the State elects, is eligible for assistance under the Low-Income Home Energy Assistance Act of 1981, provided that such basis is at least 200 percent of the poverty level determined in accordance with criteria established by the Director of the Office of Management and Budget.

* * * * *

6. Section 440.23 is amended by revising paragraph (e) to read as follows:

§ 440.23 Oversight, training, and technical assistance.

* * * * *

(e) The Secretary may reserve from the funds appropriated for any fiscal year an amount not to exceed 20 percent to provide, directly or indirectly, training and technical assistance to any grantee or subgrantee. Such training and technical assistance may include providing information concerning conservation practices to occupants of eligible dwelling units.

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