

[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Parts 433 and 435

[Docket No.: EERE-2011-BT-STD-0005]

RIN 1904-AC41

Energy Efficiency Design Standards for New Federal Commercial and Multi-Family High-Rise Residential Buildings and New Federal Low-Rise Residential Buildings

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) is publishing this final rule to implement provisions in the Energy Conservation and Production Act (ECPA) that require DOE to update the baseline Federal energy efficiency performance standards for the construction of new Federal buildings, including commercial and multi-family high-rise residential buildings and low-rise residential buildings. This rule updates the baseline Federal commercial standard to the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 90.1-2007. This rule updates the baseline Federal residential standard to the 2009 International Energy Conservation Code (IECC).

DATES: This rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The incorporation by reference of certain publications in the rule is approved by the Director of the Federal Register as of **[INSERT DATE 60 DAYS AFTER**

DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

Docket: For access to the docket to read background documents or comments received by DOE, go to the U.S. Department of Energy, (Office of Building Technologies Resource Room), 950 L'Enfant Plaza SW, Washington DC 20024 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Brenda Edwards at (202) 586-2945 for additional information regarding visiting the Building Technologies Resource Room. Resource Room hours are between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Margo Appel, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE-2J, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-9495, e-mail: Margo.Appel@ee.doe.gov, or Ms. Ami Grace-Tardy, Esq., U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-71, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-5709, e-mail: Ami.Grace-Tardy@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

This rulemaking incorporates by reference the following standards into Part 433:

(1) ANSI/ASHRAE/IESNA Standard 90.1-2004, Energy Standard for Buildings Except Low-Rise Residential Buildings, January 2004, American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc., ISSN 1041-2336.

(2) ANSI/ASHRAE/IESNA Standard 90.1-2007, Energy Standard for Buildings Except Low-Rise Residential Buildings, December 2007, American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc., ISSN 1041-2336.

Copies of these standards are available from American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc., 1791 Tullie Circle, N.E. Atlanta, GA 30329, (404) 636-8400, <http://www.ashrae.org/>

This rulemaking also incorporates by reference the following standards into Part 435:

(1) ICC International Energy Conservation Code (IECC), 2004 Supplement Edition, January 2005, International Code Council, ISBN 7801S04;

(2) ICC International Energy Conservation Code (IECC), 2009 Edition, January 2009, International Code Council, ISBN 978-1-58001-742-8.

Copies of these standards are available from International Code Council, 500 New Jersey Avenue, NW, 6th Floor, Washington, DC 20001, 1-888-ICC-SAFE (422-7233) or (202) 370-1800, <http://www.iccsafe.org/Pages/default.aspx>

I. Introduction

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I. Introduction

Section 305 of the Energy Conservation and Production Act (ECPA), as amended, requires DOE to establish building energy efficiency standards for all new Federal buildings. (42 U.S.C. 6834(a)(1)) The standards established under section 305(a)(1) of ECPA must contain energy efficiency measures that are technologically feasible, economically justified, and meet the energy efficiency levels in the applicable voluntary consensus energy codes specified in section 305. (42 U.S.C. 6834(a)(1)-(3))

Under section 305 of ECPA, the referenced voluntary consensus code for commercial buildings (including multi-family high rise residential buildings) is the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 90.1 and the referenced code for low-rise residential buildings is the International Energy Conservation Code (IECC). (42 U.S.C. 6834(a)(2)(A)) DOE codified these referenced codes into energy efficiency standards in 10 CFR Parts 433, 434, and 435. Also under section 305 of ECPA, DOE must establish, by rule, revised Federal building energy efficiency performance standards for new Federal buildings that require such buildings be designed to achieve energy consumption levels that are at least 30 percent below the levels established in the referenced codes, if life-cycle cost-effective. (42 U.S.C. 6834(a)(3)(A)(i)(I))

Under section 305 of ECPA, not later than one year after the date of approval of each subsequent revision of the ASHRAE Standard or the IECC, DOE must determine whether to amend the Federal building standards with the revised voluntary standard based on the cost-effectiveness of the revised voluntary standard. (42 U.S.C. 6834(a)(3)(B)) It is this requirement that today's rulemaking addresses. ASHRAE Standard 90.1 and the IECC have been updated from the versions currently referenced in DOE's regulations at 10 CFR Parts 433-435. DOE is now revising the baseline Federal building standards for 10 CFR Parts 433 and 435.

Section 306(a) of ECPA provides that each Federal agency and the Architect of the Capitol must adopt procedures to ensure that new Federal buildings will meet or exceed the Federal building energy efficiency standards established under section 305. (42 U.S.C. 6835(a)) Section 306(b) bars the head of a Federal agency from expending Federal funds for the construction of a new Federal building unless the building meets or exceeds the applicable Federal building energy standards established under section 305. (42 U.S.C. 6835(b)) This includes both the requirement that all new Federal buildings comply with the baseline standards in ASHRAE Standard 90.1 and the IECC and the requirement that new Federal buildings achieve energy consumption levels at least 30 percent below these minimum baseline standards where life-cycle cost-effective. (42 U.S.C. 6834 (a)(3)(A))

II. Discussion of Today's Action

DOE is issuing today's action as a final rule. As indicated above, DOE must determine whether the energy efficiency standards for new Federal buildings should be updated to reflect

revisions to ASHRAE Standard 90.1 or the IECC based on the cost-effectiveness of the revisions. (42 U.S.C. 6834(a)(3)(B)) In today's final rule, DOE determines that the energy efficiency standards for new Federal buildings should be updated to reflect the 2007 revisions to ASHRAE Standard 90.1 and the 2009 revisions to the IECC based on the cost-effectiveness of the revisions.

DOE reviewed ASHRAE Standard 90.1 and the IECC standard for DOE's state building codes program and determined that the 2007 version of ASHRAE Standard 90.1 and the 2009 version of the IECC, would achieve greater energy efficiency than their respective prior versions. These determinations were subject to notice and comment. See 75 FR 54117 (September 3, 2010) and 75 FR 54131 (September 3, 2010). In those prior determinations, and again in today's rule, DOE states that the cost-effectiveness of revisions to the voluntary codes is considered through DOE's statutorily directed involvement in the codes process. See 75 FR at 54121. Section 307 of ECPA requires DOE to participate in the ASHRAE and IECC codes development process and to assist in determining the cost-effectiveness of the voluntary standards. (42 U.S.C. 6836) DOE is required to periodically review the economic basis of the voluntary building energy codes and participate in the industry process for review and modification, including seeking adoption of all technologically feasible and economically justified energy efficiency measures. (42 U.S.C. 6836(b))

ASHRAE Standard 90.1 is developed through an American National Standards Institute (ANSI) consensus process. The ANSI consensus process involves representatives of producers (industry), users (owners and designers), and general (advocates and government) segments of the building industry. Part of that process involves development of cost-effectiveness criteria to use in the development of Standard 90.1. Another part of the process is extensive public review and

comment of each change to Standard 90.1. During the course of the public review and comment process, cost-effectiveness is often a topic. One of the objectives considered by the committee developing Standard 90.1 is for the requirements of Standard 90.1 to be cost-effective for use in the private sector. The 90.1 committee uses a scalar ratio for cost-effectiveness based on ASTM Standard E917- Standard Practice for Measuring Life-Cycle Costs of Buildings and Building Systems.

Similarly, the IECC is developed by the International Code Council (ICC) in a government-consensus process. In the ICC process, only voting members of the ICC who are representative of state and local governments and who are responsible for code enforcement vote on any changes to the IECC. The public may participate in hearings and the hearings are widely attended by the building community. The process in the IECC is somewhat different than in Standard 90.1 in that explicit use of life-cycle costing is not required for each change proposed to the ICC. However, proponents of changes are required to state if a proposed change will increase the first cost of construction and the cost-effectiveness of proposals is widely debated during the hearings. Given the level of debate by the entire building community, DOE believes that the end result of the ICC code development process is an energy code that is cost-effective.

In today's rule, DOE is amending the energy efficiency standards applicable to new Federal buildings based on the determinations made by DOE as to the energy efficiency improvements of ASHRAE Standard 90.1-2007 and the 2009 IECC, as compared to their respective predecessor versions, and based on the considerations of cost-effectiveness incorporated into the codes processes, as well as DOE's involvement in those processes. This final rule amends

10 CFR Parts 433 and 435 to update the referenced baseline Federal energy efficiency performance standards. No other changes are proposed to 10 CFR Parts 433 and 435 by this rule.

DOE notes that it is currently working on a preliminary determination for ASHRAE Standard 90.1-2010. After this determination is finalized, DOE intends to update 10 CFR Part 433 with ASHRAE Standard 90.1-2010.^[AGT1]

III. Compliance Date

Today's final rule applies to new Federal buildings for which design for construction begins on or after one year from the date of this notice. Such buildings must be designed to exceed the energy efficiency level of the appropriate updated voluntary standard by 30 percent if life-cycle cost-effective. However, at a minimum, such buildings must achieve the energy efficiency equal to that of the appropriate updated voluntary standard. One year lead time is consistent with DOE's previous updates to the energy efficiency baselines and the original statutory mandate for Federal building standards. One year lead time helps minimize compliance costs to agencies, which may have planned buildings in various stages of design, and allows for design changes to more fully consider life-cycle cost-effective measures (as opposed to having to revise designs in development, which may make incorporation of energy efficiency measure more difficult or expensive.)^[AGT2]

IV. Reference Resources

The Department originally prepared this list of resources to help Federal agencies achieve building energy efficiency levels of at least 30 percent below ASHRAE Standard 90.1-2004 or the 2004 IECC. The Department has reviewed these resources and believes that they are still

applicable to helping agencies achieve building energy efficiency levels of at least 30% better than ASHRAE Standard 90.1-2007 or the 2009 IECC. The Department has updated this resource list as necessary. These resources come in many forms and in a variety of media. Resources are provided for three categories: for all buildings, specifically for commercial and multi-family high-rise residential buildings, and specifically for low-rise residential buildings.

Resources for All Buildings

Energy Efficient Products – U.S. DOE Federal Energy Management Program and U.S.

Environmental Protection Agency (EPA) ENERGY STAR Program

<http://www.eere.energy.gov/femp/procurement/> and <http://www.energystar.gov/products>

Federal agencies are required by the Energy Policy Act of 2005 to specify Federal Energy Management Program (FEMP) designated or ENERGY STAR equipment, including building mechanical and lighting equipment and builder-supplied appliances, for purchase and installation in all new construction. This equipment is generally more efficient than the corresponding requirements of ASHRAE Standard 90.1-2004 and the 2004 IECC, and may be used to achieve part of the savings required of Federal building designs. (Today's rule does not specifically address the use of this equipment, but this website is listed for convenience because it is a very useful resource for achieving part of the energy savings required by the rule.)

Life-Cycle Cost Analysis – U.S. DOE Federal Energy Management Program

http://www.access.gpo.gov/nara/cfr/waisidx_04/10cfr436_04.html

The life-cycle cost analysis rules promulgated in 10 CFR Part 436 Subpart A *Life-Cycle*

Cost Methodology and Procedures conform to requirements in the Federal Energy Management Improvement Act of 1988 (Pub. L. 100-615) and subsequent energy conservation legislation, as well as Executive Order 13123, *Greening the Government through Efficient Energy Management*.

The life-cycle cost guidance and required discount rates and energy price projections are determined annually by FEMP and the Energy Information Administration, and are published in the Annual Supplement to The National Institute of Science and Technology Handbook 135: “Energy Price Indices and Discount Factors for Life-Cycle Cost Analysis”

<http://www1.eere.energy.gov/femp/pdfs/ashb10.pdf>. FEMP also provides guidance on the life-cycle cost requirements of Executive Order 13123 at

http://www1.eere.energy.gov/femp/information/download_blcc.html

ENERGY STAR Buildings –U.S. Environmental Protection Agency and U.S. Department of Energy

http://www.energystar.gov/index.cfm?c=new_homes.nh_features (homes) and

http://www.energystar.gov/index.cfm?c=new_bldg_design.bus_target_finder (non-residential buildings)

ENERGY STAR is a Government-backed program helping businesses and individuals protect the environment through superior energy efficiency. The EPA specifications for ENERGY STAR-labeled homes, effective as of the date of this rule, provide a useful prescriptive guide for meeting the Federal energy efficiency standard for low-rise residential buildings. [EPA plans to launch ENERGY STAR specifications for new construction and substantially rehabilitated multifamily high rise buildings in July, 2011.](#) ^[AGT3] The benchmarking tool and other information at the ENERGY STAR Target Finder website can be useful in determining an annual energy target

for building design and computer simulations, evaluating cost-effectiveness of efficiency measures, and tracking a building's actual energy performance after construction

Commercial Building Initiative – U.S. DOE Building Technologies Program

http://www1.eere.energy.gov/buildings/commercial_initiative/

A collection of design approaches, tools, technologies and case studies focused on high performance buildings that achieve savings of 30 percent to 50 percent better than generally accepted good practice.

Building Energy Software Tools – U.S. DOE Building Technologies Program

http://www.eere.energy.gov/buildings/tools_directory/

This directory provides information on building software tools for evaluation energy efficiency, renewable energy, and sustainability in buildings.

Resources for Commercial and Multi-Family High-Rise Residential Buildings

ASHRAE Standard 90.1-2007 – ASHRAE

<http://www.ashrae.org> (search for Standard 90.1-2007) or

http://www.techstreet.com/standards/ASHRAE/90_1_2007_I_P ?product_id=1536065

The baseline energy efficiency standard for commercial and multi-family high-rise buildings is ANSI/ASHRAE/IESNA Standard 90.1-2007. This link also contains a link to a read-only version of Standard 90.1-2007.

Whole Building Design Guide – National Institute of Building Sciences

<http://www.wbdg.org>

A portal providing one-stop access to up-to-date information on a wide range of building-related guidance, criteria and technology from a “whole buildings” perspective.

Advanced Energy Design Guides – ASHRAE

<http://www.ashrae.org/aedg>

A set of design guides for users who wish to go beyond Standard 90.1. The design guides are targeted at 30 percent better than ASHRAE Standard 90.1-2004 (which translates to approximately 25 percent better than Standard 90.1-2007). (DOE’s final determination of energy savings for Standard 90.1-2007 (available at http://www.energycodes.gov/status/determinations_com.stm) indicates that Standard 90.1-2007 is approximately 4.6 percent better than Standard 90.1-2004 on a site energy basis.) The design guides are available for free download.

Advanced BuildingsTM Core Performance GuideTM – New Buildings Institute

<http://www.newbuildings.org/advanced-design/advanced-buildings>

A set of guidelines for the design, construction, and operation of new and renovated nonresidential buildings targeted at 30 percent better than ASHRAE Standard 90.1-2004 (which translates to approximately 25 percent better than ASHRAE Standard 90.1-2007).

Labs for the 21st Century – U.S. EPA and U.S. DOE

<http://www.labs21century.gov/>

A website focused on improving the energy efficiency and environmental performance of laboratory space. This site includes training and educational resources and design tools focused on laboratories.

Resources for Low-Rise Residential Buildings

2009 IECC – ICC

<http://www.iccsafe.org> (search for 2009 IECC) or

<http://www.iccsafe.org/Store/Pages/Product.aspx?category=0&cat=ICCSafe&id=3800X09>

The baseline energy efficiency standard for low-rise residential buildings is the International Code Council (ICC) 2009 IECC.

Building America - U.S. Department of Energy

http://www.eere.energy.gov/buildings/building_america/

Building America is a private/public partnership that develops energy solutions for new and existing homes. The Building America project combines the knowledge and resources of industry leaders with DOE's technical capabilities.

Energy & Environmental Building Association (EEBA)

<http://www.eeba.org/>

EEBA's mission is to provide education and resources to transform the residential design, development and construction industries to profitably deliver energy efficient and environmentally

responsible buildings and communities

The Partnership for Advancing Technology in Housing (PATH) – U.S. Department of Housing and Urban Development

http://www.pathnet.org/sp.asp?mc=about_path

PATH is dedicated to accelerating the development and use of technologies that radically improve the quality, durability, energy efficiency, environmental performance, and affordability of America's housing. PATH is a voluntary partnership between leaders of the homebuilding, product manufacturing, insurance, and financial industries and representatives of Federal agencies concerned with housing.

V. Regulatory Analysis

A. Review under Executive Order 12866, "Regulatory Planning and Review"

Today's final rule is a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review." 58 FR 51735 (October 4, 1993). Accordingly, today's action was subject to review by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). OMB has completed its review.

DOE believes that although cost increases vary from project to project, the construction cost of Federal buildings will increase only slightly as a result of this rule. DOE estimates a construction

cost increase of less than 1% for both commercial and multi-family high-rise residential buildings and low-rise residential buildings. The cost estimate for commercial and multi-family high-rise residential buildings is based on an interpolation of a cost study conducted on several building types that are 30% or 50% more efficient than ASHRAE Standard 90.1-2004. The cost estimate for low-rise residential buildings is based on the national average cost increase of homes under the 2009 IECC compared to the 2006 IECC. The 2004 and 2006 IECC are approximately equivalent on a national average in terms of baseline cost and efficiency, therefore it is reasonable to estimate the cost increase for the 2009 IECC by comparing it to the 2006 IECC.

B. Administrative Procedure Act

~~Pursuant to the authority at 5 U.S.C. 553(b)(B), DOE finds good cause to waive the requirement to provide prior notice and an opportunity for public comment as such procedures would be unnecessary. The subjects of today's final rule are the voluntary consensus codes referenced in the energy efficiency standards for Federal buildings. As discussed earlier in this notice, DOE's review of and subsequent determinations for the voluntary consensus codes that are adopted in today's final rule were previously subject to notice and comment. See 75 FR 54117 (September 3, 2010) and 75 FR 54131 (September 3, 2010).~~

~~DOE notes that the determinations regarding the updated voluntary consensus codes were subject to notice and comment in evaluating the voluntary consensus codes in the context of State building codes. See 75 FR 54117 (September 3, 2010) and 75 FR 54131 (September 3, 2010). The determinations made in the context of the State codes are equally applicable in the context of Federal buildings. DOE finds that providing notice and comment on the determinations again in~~

the context of Federal buildings would be unnecessary. The fact that the voluntary consensus codes apply to Federal buildings as opposed to the general building stock does not require a different evaluation of energy efficiency and cost-effectiveness. Additionally, DOE notes that today's rule, amending standards on energy efficiency performance standards for the design and construction of new Federal buildings, is a rule relating to public property, and therefore, is not subject to the rulemaking requirements of the Administrative Procedure Act, including the requirement to publish a notice of proposed rulemaking. (See, 5 U.S.C. 553(a)(2))

C. 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. The Department has made its procedures and policies available on the Office of General Counsel's website: <http://www.gc.doe.gov>.

DOE has determined that a notice of proposed rulemaking is not required by 5 U.S.C. 553 or any other law for issuance of this rule. As such the analytical requirements of the Regulatory Flexibility Act do not apply.

D. Review under the Paperwork Reduction Act of 1995

This rulemaking will impose no new information or record keeping requirements. Accordingly, Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

E. Review under the National Environmental Policy Act of 1969

The Department prepared an Environmental Assessment (EA) (DOE/EA-1871) entitled, “Environmental Assessment for Final Rule, 10 CFR part 433, ‘Energy Efficiency Standards for New Federal Commercial and Multi-Family High-Rise Residential Buildings,’ and 10 CFR part 435, ‘Energy Efficiency Standards for New Federal Low-Rise Residential Buildings’ Baseline Standards Update,” pursuant to the Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Parts 1500-1508), the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and DOE’s NEPA Implementing Procedures (10 CFR Part 1021).

The EA addresses the possible incremental environmental effects attributable to the application of the final rule. The only anticipated impact would be a decrease in outdoor air pollutants resulting from decreased fossil fuel burning for energy use in Federal buildings. Therefore, DOE has issued a Finding of No Significant Impact (FONSI), pursuant to NEPA, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and DOE’s regulations for compliance with NEPA (10 CFR part 1021).

To identify the potential environmental impacts that may result from implementing the final rule on new Federal commercial buildings, DOE compared the final rule with the “no-action alternative” of using the current Federal standards. This comparison essentially compares the baseline standards – ANSI/ASHRAE/IESNA Standards 90.1-2004 and 90.1-2007 for Federal commercial and multi-family high-rise residential buildings, and the 2004 Supplement to the 2003 IECC to the 2009 IECC for Federal low-rise residential buildings. This comparison is identical to that undertaken by DOE in its determinations of energy savings of those standards and codes. For the purposes of this environmental assessment, DOE also investigated the impact of buildings achieving energy consumption below Standard 90.1-2007 or the 2009 IECC in increments of 10 percent, up to 50 percent. The Federal government is estimated to construct about 2000 covered, low-rise housing units annually, which, if built to realize a 30 percent savings over the 2009 IECC, will avoid 3,600 metric tons of carbon dioxide emissions, 22 metric tons of methane emissions, 1 metric ton of nitrogen oxide, and 2 metric tons of sulfur dioxide each in the first year the final rule is in effect. These savings would compound in future years as more and more Federal construction occurs.

For commercial and multi-family high-rise residential buildings, the Federal government is projected to construct 40 million square feet of Federal commercial buildings annually. Federal multi-family high-rise residential buildings are rare. Looking just at Federal commercial buildings, and assuming a 30 percent savings over Standard 90.1-2007, 6,200 metric tons of carbon dioxide will be avoided (relative to the existing 10 CFR Part 433) in the first year the final rule is in effect. These savings would compound in future years as more and more Federal

construction occurs. Again assuming a 30 percent savings over Standard 90.1-2007, 24 metric tons of methane emissions will be avoided, 6 metric tons of nitrogen oxide emissions will be avoided, and 14 metric tons of sulfur dioxide emissions will be avoided, all in the first year the rule is in effect.

F. Review under Executive Order 13132, "Federalism"

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations, 65 FR 13735. DOE examined this rule and determined that it does not preempt State law and does 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.

G. Review under Executive Order 12988, "Civil Justice Reform"

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 Federal 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. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive 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 section 3(a) and section 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, this rule meets the relevant standards of Executive Order 12988.

H. Review under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202

of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at <http://www.gc.doe.gov>). This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year by State, local, and tribal governments, so these requirements under the Unfunded Mandates Reform Act do not apply.

I. 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. This final rule would 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.

J. Review under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights"

The Department has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” 53 FR 8859 (March 18, 1988), that this rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

K. Review under the Treasury and General Government Appropriations Act, 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.

L. Review under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

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 Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, 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 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. This final rule would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

VI. 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).

List of Subjects in 10 CFR Parts 433 and 435

Buildings and facilities, Energy conservation, Engineers, Federal buildings and facilities, Housing, Incorporation by reference.

Issued in Washington, DC, on

Henry Kelly
Acting Assistant Secretary
Energy Efficiency and Renewable Energy

For the reasons set forth in the preamble, the Department of Energy amends chapter II of title 10 of the Code of Federal Regulations as set forth below:

PART 433 - ENERGY EFFICIENCY STANDARDS FOR NEW FEDERAL COMMERCIAL AND MULTI-FAMILY HIGH-RISE RESIDENTIAL BUILDINGS

1. The authority citation for part 433 continues to read as follows:

Authority: 42 U.S.C. 6831-6832; 6834-6835; 42 U.S.C. 7101 *et seq.*

2. The heading for part 433 is revised to read as set forth above.

3. Amend § 433.2 to remove the definition of “Baseline building” and add in alphabetical order the definitions of “ASHRAE 2004 Baseline Building” and “ASHRAE 2007 Baseline Building” to read as follows:

§ 433.2 Definitions.

* * * * *

ASHRAE 2004 Baseline Building means a building that is otherwise identical to the proposed building but is designed to meet₂ but not exceed₂ the energy efficiency specifications in ANSI/ASHRAE/IESNA Standard 90.1-2004, Energy Standard for Buildings Except Low-Rise Residential Buildings, January 2004 (incorporated by reference, see § 433.3).

ASHRAE 2007 Baseline Building means a building that is otherwise identical to the proposed building but is designed to meet₂ but not exceed₂ the energy efficiency specifications in ANSI/ASHRAE/IESNA Standard 90.1-2007, [Energy Standard for Buildings Except Low-Rise Residential Buildings](#), December 2007 (incorporated by reference, see § 433.3).

* * * * *

4. Revise § 433.3 to read as follows:

§ 433.3 Materials incorporated by reference.

(a) *General.* The Department of Energy incorporates by reference the energy performance standards listed in paragraph (b) of this section into 10 CFR part 433. The Director of the Federal Register has approved the material listed in paragraph (b) of this section for incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to a standard by the standard-setting organization will not affect DOE regulations unless and until DOE amends its energy performance standards. Material is incorporated as it exists on the date of the approval, and a notice of any change in the material will be published in the Federal Register. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. Also, this material is available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945.

(b) American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE), 1791 Tullie Circle, N.E. Atlanta, GA 30329, (404) 636-8400; or go to, <http://www.ashrae.org/>

(1) ANSI/ASHRAE/IESNA 90.1-2004, Energy Standard for Buildings Except Low-Rise Residential Buildings (“ASHRAE 90.1-2004”), January 2004, American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc., ISSN 1041-2336, IBR approved for §§ 433.2, 433.4;

(2) ANSI/ASHRAE/IESNA Standard 90.1-2007, Energy Standard for Buildings Except Low-Rise Residential Buildings (“ASHRAE 90.1-2007”), December 2007, American Society of Heating Refrigerating and Air-Conditioning Engineers, Inc., ISSN 1041-2336, IBR approved for §§ 433.2, 433.4.

5. Revise § 433.4, paragraph (a) to read as follows:

§ 433.4 Energy efficiency performance standard.

(a) (1) All Federal agencies shall design new Federal buildings that are commercial and multi-family high-rise residential buildings, for which design for construction began on or after January 3, 2007, but before **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, to:

(i) Meet ASHRAE 90.1-2004, (incorporated by reference, see § 433.3); and

(ii) If life-cycle cost-effective, achieve energy consumption levels, calculated consistent with paragraph (b) of this section, that are at least 30 percent below the levels of the ASHRAE 2004 baseline building.

(2) All Federal agencies shall design new Federal buildings that are commercial and multi-family high-rise residential buildings, for which design for construction began on or after **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, to:

(i) Meet ASHRAE 90.1-2007, (incorporated by reference, see § 433.3); and

(ii) If life-cycle cost-effective, achieve energy consumption levels, calculated consistent with paragraph (b) of this section, that are at least 30 percent below the levels of the ASHRAE 2007 baseline building.

* * * * *

6. Revise § 433.5 paragraph (a) to read as follows:

§ 433.5 Performance level determination.

(a) (1) For Federal buildings for which design for construction began on or after January 3, 2007, but before **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE**

FEDERAL REGISTER], each Federal agency shall determine energy consumption levels for both the ASHRAE 2004 baseline building and proposed building by using the Performance Rating Method found in Appendix G of ASHRAE 90.1-2004 (incorporated by reference, see § 433.3), except the formula for calculating the Performance Rating in paragraph G1.2 shall read as follows:

Percentage improvement = $100 \times ((\text{Baseline building consumption} - \text{Receptacle and process loads}) - (\text{Proposed building consumption} - \text{Receptacle and process loads})) / (\text{Baseline building consumption} - \text{Receptacle and process loads})$ (which simplifies as follows):

Percentage improvement = $100 \times (\text{Baseline building consumption} - \text{Proposed building consumption}) / (\text{Baseline building consumption} - \text{Receptacle and process loads})$.

(2) For Federal buildings for which design for construction began on or after **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, each Federal agency shall determine energy consumption levels for both the ASHRAE 2007 baseline building and proposed building by using the Performance Rating Method found in Appendix G of ASHRAE 90.1-2007 (incorporated by reference, see § 433.3), except the formula for calculating the Performance Rating in paragraph G1.2 shall read as follows:

Percentage improvement = $100 \times ((\text{Baseline building consumption} - \text{Receptacle and process loads}) - (\text{Proposed building consumption} - \text{Receptacle and process loads})) / (\text{Baseline building consumption} - \text{Receptacle and process loads})$ (which simplifies as follows):

Percentage improvement = 100 x (Baseline building consumption--Proposed building consumption)/ (Baseline building consumption--Receptacle and process loads).

PART 435 - ENERGY EFFICIENCY STANDARDS FOR NEW FEDERAL LOW-RISE RESIDENTIAL BUILDINGS

7. The authority citation for part 435 continues to read as follows:

Authority: 42 U.S.C. 6831-6832, 6834-6836; 42 U.S.C. 8253-54, 42 U.S.C. 7101 *et seq.*

8. Amend § 435.2 to remove the definition of “Baseline building” and add in alphabetical order the definitions of “IECC 2004 Baseline Building” and “IECC 2009 Baseline Building” to read as follows:

§ 435.2 Definitions.

* * * * *

IECC 2004 Baseline Building means a building that is otherwise identical to the proposed building but is designed to meet, but not exceed, the energy efficiency specifications in the ICC International Energy Conservation Code, 2004 Supplement Edition, January 2005 (incorporated by reference, see § 435.3).

IECC 2009 Baseline Building means a building that is otherwise identical to the proposed building but is designed to meet, but not exceed, the energy efficiency specifications in the ICC

International Energy Conservation Code, 2009 Edition, January 2009 (incorporated by reference, see § 435.3).

9. Revise § 435.3 to read as follows:

§ 435.3 Materials incorporated by reference.

(a) *General.* The Department of Energy incorporates by reference the energy performance standards listed in paragraph (b) of this section into 10 CFR part 435. The Director of the Federal Register has approved the material listed in paragraph (b) of this section for incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to a standard by the standard-setting organization will not affect DOE regulations unless and until DOE amends its energy performance standards. Material is incorporated as it exists on the date of the approval, and a notice of any change in the material will be published in the Federal Register. All approved material is available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. Also, this material is available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945.

(b) International Code Council, 500 New Jersey Avenue, NW, 6th Floor, Washington, DC 20001, 1-888-ICC-SAFE or (202) 370-1800, or go to <http://www.iccsafe.org/Pages/default.aspx>

(1) ICC International Energy Conservation Code (IECC), 2004 Supplement Edition (“IECC 2004”), January 2005, International Code Council, ISBN 7801S04, IBR approved for §§ 435.2, 435.4;

(2) ICC International Energy Conservation Code (IECC), 2009 Edition (“IECC 2009”), January 2009, International Code Council, ISBN 978-1-58001-742-8, IBR approved for §§ 435.2, 435.4.

* * * * *

10. Revise § 435.4 paragraph (a) to read as follows:

§ 435.4 Energy efficiency performance standard.

(a) (1) All Federal agencies shall design new Federal buildings that are low-rise residential buildings, for which design for construction began on or after January 3, 2007, but before **[INSERT DATE ONE YEAR FOLLOWING DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, to:

(i) Meet the IECC 2004 (incorporated by reference, see § 435.3), and

(ii) If life-cycle cost-effective, achieve energy consumption levels, calculated consistent with paragraph (b) of this section, that are at least 30 percent below the levels of the IECC 2004 baseline building.

(2) All Federal agencies shall design new Federal buildings that are low-rise residential buildings, for which design for construction began on or after **[INSERT DATE ONE YEAR FOLLOWING DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to:

(i) Meet the IECC 2009 (incorporated by reference, see § 435.3), and

(ii) If life-cycle cost-effective, achieve energy consumption levels, calculated consistent with paragraph (b) of this section, that are at least 30 percent below the levels of the IECC 2009 baseline building.

* * * * *

11. Revise § 435.5 to read as follows:

§ 435.5 Performance level determination

(a) For Federal buildings for which design for construction began on or after January 3, 2007, but before **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, each Federal agency shall determine energy consumption levels for both the IECC 2004 baseline building and proposed building by using the Simulated Performance Alternative found in section 404 of the IECC 2004 (incorporated by reference, see § 435.3).

(b) For Federal buildings for which design for construction began on or after **[INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION]**, each Federal agency shall determine energy

consumption levels for both the IECC 2009 baseline building and proposed building by using the Simulated Performance Alternative found in section 405 of the IECC 2009 (incorporated by reference, see § 435.3).