

Document description	ADAMS accession No.	Regulations.gov docket ID No.
Interim Staff Guidance DANU-ISG-2022-02, "Advanced Reactor Content of Application Project Chapter 2, 'Site Information.'"	ML23277A140	NRC-2022-0075
Interim Staff Guidance DANU-ISG-2022-03, "Advanced Reactor Content of Application Project Chapter 9, 'Control of Routine Plant Radioactive Effluents, Plant Contamination and Solid Waste.'"	ML23277A141	NRC-2022-0076
Interim Staff Guidance DANU-ISG-2022-04, "Advanced Reactor Content of Application Project Chapter 10, 'Control of Occupational Dose.'"	ML23277A142	NRC-2022-0077
Interim Staff Guidance DANU-ISG-2022-05, "Advanced Reactor Content of Application Project Chapter 11, 'Organization and Human-System Considerations.'"	ML23277A143	NRC-2022-0078
Interim Staff Guidance DANU-ISG-2022-06, "Advanced Reactor Content of Application Project Chapter 12, 'Post-manufacturing and construction Inspection, Testing, and Analysis Program.'"	ML23277A144	NRC-2022-0079
Interim Staff Guidance DANU-ISG-2022-07, "Advanced Reactor Content of Application Project, 'Risk-Informed Inservice Inspection/Inservice Testing Programs for Non-LWRs.'"	ML23277A145	NRC-2022-0080
Interim Staff Guidance DANU-ISG-2022-08, "Advanced Reactor Content of Application Project, 'Risk-Informed Technical Specifications.'"	ML23277A146	NRC-2022-0081
Interim Staff Guidance DANU-ISG-2022-09, "Advanced Reactor Content of Application Project, 'Risk-Informed Performance-Based Fire Protection Program (for Operations).'"	ML23277A147	NRC-2022-0082
Review of Advanced Reactor Content of Application Project/Technology-Inclusive Content of Application Project Guidance.	ML23348A182	NRC-2022-0074
Response to the Advisory Committee on Reactor Safeguards Letter, "Review of Advanced Reactor Content of Application Project/Technology-Inclusive Content of Application Project Guidance".	ML24024A025	NRC-2022-0074

**III. Congressional Review Act**

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

**IV. Backfitting, Forward Fitting, and Issue Finality**

RG 1.253, Revision 0, does not constitute backfitting as defined in 10 CFR 50.109, "Backfitting," and as described in Management Directive (MD) 8.4, "Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests"; does not constitute forward fitting as that term is defined and described in MD 8.4; and does not affect the issue finality of any approval issued under 10 CFR part 52. The guidance would not apply to any current licensees or applicants or existing or requested approvals under 10 CFR part 52, and therefore its issuance cannot be a backfit or forward fit or affect issue finality. Further, as explained in RG 1.253, applicants and licensees would not be required to comply with the positions set forth in RG 1.253.

**V. Submitting Suggestions for Improvement of Regulatory Guides**

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at <https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html>. Suggestions will be considered in future updates and enhancements to the "Regulatory Guide" series.

Dated: March 28, 2024.

For the Nuclear Regulatory Commission.

**Meraj Rahimi,**

*Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.*

[FR Doc. 2024-07022 Filed 4-2-24; 8:45 am]

**BILLING CODE 7590-01-P**

**DEPARTMENT OF ENERGY**

**10 CFR Part 430**

**[EERE-2020-BT-STD-0015]**

**RIN 1904-AE87**

**Energy Conservation Program: Clarifying Amendments to the Error Correction Rule**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy ("DOE" or "the Department") is amending its procedures for providing public input on possible corrections of errors contained in the regulatory text of energy conservation standard final rules. In this final rule, DOE modifies certain aspects of these procedures to clarify and reflect the Department's intent regarding the error correction process that it previously created. The procedures as amended in this final rule do not in any way restrict, limit, diminish, or eliminate the Secretary's discretion to determine whether to establish or amend an energy conservation standard, or to determine the appropriate level at which to amend or establish any energy conservation standard.

**DATES:** The effective date of this rule is April 3, 2024.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available. The docket web page can be found at [www.regulations.gov/docket?D=EERE-2020-BT-STD-0015](http://www.regulations.gov/docket?D=EERE-2020-BT-STD-0015). The docket web page explains how to access all documents, including public comments, in the docket.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE-5B, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (202) 287-5904 or [Lucas.Adin@ee.doe.gov](mailto:Lucas.Adin@ee.doe.gov).

Ms. Melanie Lampton, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585-0121. Telephone: (240) 751-5157. Email: [Melanie.Lampton@hq.doe.gov](mailto:Melanie.Lampton@hq.doe.gov).

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**I. Summary of Final Rule**

This procedural rule amends DOE’s procedures for providing the public with an opportunity to request the correction of a possible error identified in the regulatory text of a final rule that

would establish new or amended energy conservation standards prior to the rule’s publication in the **Federal Register**.<sup>1</sup> See 10 CFR 430.5. On October 9, 2020, DOE issued a notice of proposed rulemaking (“NOPR”), proposing various amendments to 10 CFR 430.5.<sup>2</sup> 85 FR 64071. This final rule adopts some of the NOPR proposals. Specifically, the amendments contained within this final rule clarify that the Secretary was not, and is not, under a mandatory duty to post final energy conservation standard rules online for error-correction purposes, but to do so was, and is, a discretionary and voluntary act.

When DOE elects to post online an energy conservation standard final rule prior to its submission and publication in the **Federal Register**—or what is referred to as the pre-publication final rule for the purposes of this final rule discussion—DOE shall follow the procedures set forth in the error correction process found in 10 CFR 430.5. Additionally, this final rule amends language in 10 CFR 430.5 to

clarify that, if DOE posts a rule for error-correction purposes, DOE will continue to strive to provide a 45-day review period for error correction, but it is within DOE’s discretion to provide a shorter or longer period.

As for other amendments proposed in the NOPR, DOE is retaining certain of the current regulatory requirements in 10 CFR 430.5. Specifically, DOE is retaining the current definitions, as well as the requirement for DOE to submit for publication in the **Federal Register** a pre-publication final rule that has been posted in accordance with the error correction process. See 10 CFR 430.5(b) and (f). DOE is also retaining the language in 10 CFR 430.5(a), except to clarify that the error correction process is an optional and voluntary process. Furthermore, DOE is retaining the current requirements in 10 CFR 430.5(g) and (h).

The adopted amendments are summarized in Table I.1 and compared to the proposed amendments, as well as the requirements prior to the amendments.

TABLE I.1—LIST OF REVISIONS IN THIS DOCUMENT

Section	Current DOE requirement	Proposed revisions from the October 2020 NOPR	Amended requirements
§ 430.5(a) <i>Scope and purpose.</i>	Describes the procedures through which DOE will consider submissions regarding potential Errors for those rulemakings establishing or amending energy conservation standards under EPCA.	Rename section and separate into two subsections; and clarify there is no affirmative obligation on the Secretary to provide the public with an opportunity for error correction review.	Retain current regulatory language found in § 430.5(a), except for adding “optional” before “procedure” and “may” before “accept and consider” to clarify the error correction process is a procedure that may be voluntarily implemented by the Secretary.
§ 430.5(b) <i>Definitions</i> .....	Defines “Act,” “Error,” “Rule,” and “Secretary”.	Revise definition of “Error” and replace the term “Rule” with the term “Pre-publication draft”.	Retain current definitions found in § 430.5(b).
§ 430.5(c) <i>Posting of rules</i>	Describes the beginning of the error correction process.	Revise section title; clarify that the posting of a pre-publication final rule for error correction review is within the Secretary’s discretion and if posted, it would be available for a period of 45 days, but the review period may be shortened or lengthened at the Secretary’s discretion; remove any implication that the Secretary will publish a rule that has undergone error correction review; and revise the disclaimer notice language to be consistent with other proposed amendments.	Adopt the proposal to clarify that the posting of a pre-publication final rule for error correction review is within the Secretary’s discretion in § 430.5(c)(1) and if posted, it would be available for a period of 45 days, but the review period may be shortened or lengthened at the Secretary’s discretion in § 430.5(c)(2). Retain current disclaimer notice text in § 430.5(c)(3).
§ 430.5(d) <i>Request for Correction.</i>	Explains how to submit a request to DOE to correct an Error and describes what a request must contain.	Update to include the term “Pre-publication draft;” clarify that the Secretary is not obligated to take action on an error correction request; and clarify that the ECR would be limited to identifying Errors in the regulatory text of a pre-publication final rule.	Adopt proposed amendments to § 430.5(d), with the exception of replacing “pre-publication draft” with “rule.”
§ 430.5(e) <i>Correction of rules.</i>	Describes the courses of action DOE may undertake if it believes an identified error needs to be corrected.	Revise to impose no requirement for publication in the <b>Federal Register</b> upon completion of the error correction process and to clarify DOE’s authority to determine the appropriate remedy for an identified error.	Retain current regulatory language in § 430.5(e).
§ 430.5(f) <i>Publication in the Federal Register.</i>	Describes how DOE will eventually publish a final rule in the <b>Federal Register</b> .	Revise to prevent the inference that publication in the <b>Federal Register</b> is the only outcome available at the conclusion of the error correction process.	Retain current regulatory language in § 430.5(f), with the exception of two clarifying amendments and two minor non-substantive edits.
§ 430.5(g) <i>Alteration of standards.</i>	Explains that DOE may change a standard that has been posted but not yet published in the <b>Federal Register</b> .	Remove as unnecessary in light of amendments proposed for the remaining sections of 10 CFR 430.5.	Retain current regulatory language in § 430.5(g).

<sup>1</sup> DOE typically posts pre-publication versions energy conservation test procedures and standards rulemaking documents on a publicly accessible website. However, the posting of those rulemaking

documents is separate from the error correction process outlined in 10 CFR 430.5.

<sup>2</sup> Although DOE took notice and comment on the NOPR, agency rules of procedure and practice, such as the one described in this document, are not

subject to the requirement to provide prior notice and an opportunity for public comment pursuant to authority at 5 U.S.C. 553(b)(A). See section III of this document for additional discussion.

TABLE I.1—LIST OF REVISIONS IN THIS DOCUMENT—Continued

Section	Current DOE requirement	Proposed revisions from the October 2020 NOPR	Amended requirements
§ 430.5(h) <i>Judicial review</i>	Explains the timing related to a potential petition for review that may be filed pursuant to 42 U.S.C. 6306.	Renumbered to § 430.5(g) and included new text to reaffirm that pre-publication final rules are not final rules or prescribed rules within the meaning of EPCA.	Retain current regulatory language in § 430.5(h).

While this final rule contains amendments to the error correction process—the process will be applied to identify errors in pre-publication final rules that might be difficult to remedy due to EPCA’s anti-backsliding provision (42 U.S.C. 6295(o)(1))—these modifications do not impair DOE’s ability to meet its statutorily prescribed deadlines for either establishing or amending energy conservation standards. Instead, these modifications

focus solely on DOE’s intent to allow the public to identify possible technical and objective errors in certain pre-publication final rules. DOE will use the error correction process only to seek input on the narrow question of whether an error has occurred in the regulatory text of a pre-publication final rule document.

The remainder of this final rule discusses comments received in response to the NOPR, as well as DOE’s

responses and the amendments adopted in this final rule.

**II. General Discussion**

The NOPR included a summary detailing how DOE intended to amend specific sections of the ECR to better align with the rule’s intended purpose. DOE received seven comments in response to the NOPR (see Table II.1) voicing various levels of support and opposition.

TABLE II.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS IN RESPONSE TO THE NOPR, 85 FR 64071

Commenter(s)	Abbreviation	Comment No. in the docket	Commenter type
A. O. Smith Corporation	A.O. Smith	8	Manufacturer.
Air-Conditioning, Heating, and Refrigeration Institute, the Association of Home Appliance Manufacturers, and the National Electrical Manufacturers Association.	Joint Industry Commenters	3	Manufacturers.
American Public Gas Association and Spire Inc	APGA/Spire	5	Utility Associations.
GE Appliances	GEA	7	Manufacturer.
Joseph Richardson	Richardson	2	Individual.
Lennox International Inc	Lennox	4	Manufacturer.
Natural Resources Defense Council and Appliance Standards Awareness Project.	NRDC/ASAP	6	Energy Efficiency Advocates.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.<sup>3</sup>

*A. General Comments*

Commenters generally expressed support of DOE’s proposal to clarify the application of the error correction process, but they also harbored reservations regarding certain aspects of DOE’s proposals. For example, APGA/Spire supported the Department’s proposed amendments to clarify that the rule does not establish a non-discretionary duty to publish pre-publication final rules in the **Federal Register** after undergoing error correction review. (APGA/Spire, No. 05, at p. 2) However, those commenters disagreed with the proposal’s attempt to clarify the extent of DOE’s discretion

with respect to the posting of documents for review. (APGA/Spire, No. 05, at p. 2) Similarly, the Joint Industry Commenters, while supportive of DOE’s efforts to better reflect the Department’s intent behind the rule, noted their collective concerns that the proposal would curtail DOE’s ability to cure errors and limit public certainty regarding the error correction process. (Joint Industry Commenters, No. 03, at p. 1) These commenters stated that the ECR does not impose non-discretionary mandates superseding DOE’s inherent discretion to make policy determinations but, in their view, the ECR is separate from DOE’s policy discretion and the proposal’s attempt at clarifying its discretion instead created uncertainty. (Joint Industry Commenters, No. 03, at pp. 1–2)

Lennox agreed with the NOPR’s proposed amendment to clarify that the ECR does not create a nondiscretionary duty to publish pre-publication final rules at the end of the review process. (Lennox, No. 4 at p. 5 (referencing 85 FR 64072)) But Lennox asserted that the entire error correction process should not be made voluntary. (Lennox, No. 4 at p. 5) GEA supported the comments

submitted by the Joint Industry Commenters and added that a rule containing an error making a material difference to that rule should be corrected and that having a consistent, transparent, and predictable error correction process would benefit all parties. (GEA, No. 7 at p. 2)

A.O. Smith supported the idea of narrowly tailoring the error correction process to correct clerical errors without reopening portions of the rulemaking process, but it expressed its opposition to the proposed amendments contained within the NOPR and questioned the legality of the rulemaking in light of the Ninth Circuit’s opinion.<sup>4</sup> (A.O. Smith, No. 08 at p. 1)

Separately, one individual commenter supported the rule in its entirety and explained that the proposal offered a good way for the Department to “remain as transparent as possible with the public” and maintain a relationship that allowed for public involvement in the rulemaking process. This commenter supported the existence of a method to correct and amend documents to more

<sup>3</sup> The parenthetical reference provides a reference for information located in the docket of DOE’s rulemaking for amending the error correction process. (Docket No. EERE–2017–BT–STD–0015, which is maintained at [www.regulations.gov/#/docketDetail;D=EERE-2017-BT-STD-0015](http://www.regulations.gov/#/docketDetail;D=EERE-2017-BT-STD-0015)). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

<sup>4</sup> See *Natural Resources Defense Council v. Perry*, 940 F.3d 1072 (9th Cir. 2019).

accurately report data relevant to DOE activities and projects. (Richardson, No. 02 at p. 1)

In the NOPR, DOE clarified that the Secretary was not, and is not, under a mandatory duty to post pre-publication final rules online, but to do so was, and is, a discretionary and voluntary act. DOE is not compelled by statute to offer such a procedural step. Therefore, DOE proposed amending 10 CFR 430.5(c) to account for the Secretary's discretion to post energy conservation standard final rules for error correction review. 85 FR 64071, 64073. As discussed further in the Section-by-Section Analysis, DOE is adopting this proposal to amend 10 CFR 430.5(c) in this final rule.

Furthermore, DOE initially proposed to clarify that the ECR does not create a non-discretionary duty to publish in the **Federal Register** a pre-publication final rule that has been posted in accordance with the error correction process. 85 FR 64071, 64074. However, DOE has determined it will retain the language currently found in 10 CFR 430.5(f). DOE notes that while the ECR provides a means by which interested parties may notify DOE of potential errors found in the regulatory text of a pre-publication final rule document that has been posted for public viewing, it is not a means for raising issues relating to the determinations and conclusions made by the Secretary in an energy conservation standard rulemaking. The posting of an energy conservation standards final rule signals the end of DOE's substantive analysis and decision-making regarding the applicable standards. Therefore, upon conclusion of the error correction process, DOE will submit a final rule, correcting any identified errors, to the **Federal Register** for publication in accordance with the requirements in 10 CFR 430.5(f). DOE's decision not to amend 10 CFR 430.5(f) at this time also recognizes the narrow scope and purpose of the error correction process, which DOE notes is separate from the Department's policy-making discretion.

#### *B. Comments Concerning EPCA's Anti-Backsliding Provision*

Some commenters asserted that the NOPR mistakenly relied on EPCA's anti-backsliding provision, 42 U.S.C. 6295(o)(1), to justify the amendments proposed. The Joint Industry Commenters argued that DOE fundamentally misunderstands the anti-backsliding rule, which causes the premise behind the error correction process to be faulty. If there is an error in the analysis provided for an energy conservation standard, these commenters argue that the standard is

not justified under EPCA's required economic and technical justifications. In their view, this would mean that the anti-backsliding provision cannot legally be used to maintain the standard. (Joint Industry Commenters, No. 03 at p. 6) They urged DOE to determine that it is authorized to correct errors in its analysis at any point if the errors lead to an energy conservation standard that is not justified under EPCA. While this would ultimately make the error correction process unnecessary, it would result, according to the commenters, in a better reading of EPCA—*i.e.*, that the anti-backsliding provision does not limit DOE from correcting standards that were not actually justified in the first place. (Joint Industry Commenters, No. 03 at pp. 6–7) GEA also noted that EPCA's anti-backsliding provision does not prevent error correction and that any concern regarding a reduction in efficiency requirements through error correction is outweighed by the importance of maintaining the overall integrity of the energy conservation program. (GEA, No. 07 at p. 2)

Under EPCA, DOE may not prescribe any amended standard that either (1) increases the maximum allowable energy use (or water use in the case of certain types of water products and equipment) or (2) decreases the minimum require energy efficiency of a covered product or covered equipment. (42 U.S.C. 6295(o)(1)) Although DOE agrees with commenters that retaining flexibility to correct any errors is important for integrity of the energy conservation program, industry commenters' reading of EPCA's anti-backsliding provision is inconsistent with *Abraham's* reading of that provision. *See NRDC v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004) (noting that “publication [of an energy conservation standard] must be read as the triggering event for the operation of section 325(o)(1).”). In light of *Abraham*, proceeding in the manner suggested by these commenters presents the risk that a reviewing court would invalidate an attempt by DOE to correct an error after publication of a final rule if the result of that correction was a standard with a greater maximum allowable energy use or decreased required energy efficiency as compared to the final rule that contained the error. Regardless of the reading that should be ascribed to the anti-backsliding provision, DOE concludes that the adoption of the ECR process (as revised by this rule) will be helpful in minimizing the risk that DOE may inadvertently adopt a final rule containing an objective error.

Further, DOE's efforts to address errors as part of the ECR's process are necessarily limited to addressing errors that affect the amended standards' regulatory text prior to the publication of a final rule amending the energy conservation standards for a covered product or covered equipment. To the extent that an error appears outside of the posted regulatory text of a draft pre-publication document, such as in a supporting rulemaking document it authored (*e.g.*, technical support document), DOE may, under its own discretion, make corrections to those documents, but these types of issues will be handled on an individual basis as appropriate outside of the ECR process.

#### *C. Other Comments*

DOE also received comments on other topics. NRDC/ASAP noted that nothing in the proposal conferred to DOE the authority to delay a rule or impact a standard the Department must select other than by providing an opportunity for DOE to correct any inadvertent mistakes. They suggested DOE add language to the ECR to explicitly state that the rule does not disturb or modify any of DOE's statutory obligations. (NRDC/ASAP, No. 06 at p. 1) They further suggested that DOE clarify in the final rule regarding the timeline and general procedures for error correction, including specifying when a rule would be made available for review, the duration of the review period, and whether the Department envisioned initiating a second error correction process for a pre-publication draft document. (NRDC/ASAP, No. 06 at p. 2)

A.O. Smith claimed that the proposal would have significant impacts on manufacturers because it would allow for the rulemaking process to be “reopened in perpetuity” by not limiting the Secretary's authority, would allow for the introduction of new data, additional analyses, and would create the potential for a revised final decision to result if an error is identified. (A.O. Smith, No. 08 at p. 2) Alternatively, A.O. Smith supported the original 2016 ECR, which ensured any request “must identify the claimed error, explain how the record demonstrates the regulatory text to be erroneous, and state what the corrected version should be.” (A.O. Smith, No. 08 at p. 2)

The ECR does not permit DOE to ignore EPCA's statutory deadlines or other applicable deadlines when finalizing a rulemaking action, and it is within DOE's authority to re-evaluate the document within the applicable deadline for that rulemaking. Nothing in the ECR authorizes DOE to circumvent

statutory or other applicable deadlines. Additionally, when an energy conservation standards final rule is posted for error correction review, its posting signals the end of DOE's substantive analysis and decision-making regarding the applicable standards, thus eliminating any concern that the rulemaking would be reopened in perpetuity. Accordingly, the ECR remains limited to identifying errors relating to the standards regulatory text in a pre-publication draft.

#### *D. Section-by-Section Analysis of Comments*

##### Section 430.5(a)

In the NOPR, DOE proposed to amend 10 CFR 430.5(a) by renaming the section and separating the section into two separate subsections that address the purpose and scope of the regulations in this section. The proposed subsections described (1) the procedures through which the Department may accept and consider public input for review of a pre-publication final rule document's regulatory text, and (2) the scope of the procedure that would be available. 85 FR 64071, 64072–64073.

DOE received comments opposing its proposal to clarify that the error correction process was strictly a voluntary activity on the part of the Department and did not create a legal obligation to offer the public an additional review period for energy conservation standards beyond that which is already provided under EPCA and other applicable provisions of the Administrative Procedure Act.

The Joint Industry Commenters disagreed with this aspect of the proposal. They argued that the ECR's review process should not be a discretionary activity and must provide stakeholders with a process to ensure no errors in the analysis exist before publishing a rule that would create an unjustified standard. (Joint Industry Commenters, No. 03 at p. 2) APGA/Spire similarly suggested that DOE strike the word "voluntary" from § 430.5(a)(1) as proposed because there are no mandatory submissions for the public at large, making it redundant to characterize such submissions as "voluntary." (APGA/Spire, No. 05 at p. 2) GEA asserted that the proposal lacked justification for leaving the implementation of the ECR review process solely to DOE's discretion. (GEA, No. 07 at p. 2) Lennox opposed characterizing the ECR review as voluntary because it would limit the rule and undermine the critical protections provided to industry and stakeholders from inaccurate rules being

made final. (Lennox, No. 04 at p. 4, 1) In its view, the ECR should be mandatory for all energy conservation standards as it would help avoid litigation costs resulting from efforts to correct erroneous rules. Lennox added that requiring all energy conservation standard rulemakings to undergo the error correction process would enable DOE to avoid errors that would disrupt the supply chain and avoid the risk of consumers being harmed through mislabeled equipment. (Lennox, No. 04 at p. 2) In addition to there being a clear need for error correction review to ensure that all energy conservation standards are technologically feasible and economically justified under 42 U.S.C. 6295(o)(2), Lennox argued that making the error correction process voluntary would destroy public confidence in that process. (Lennox, No. 04 at pp. 3–4)

GEA challenged DOE's decision to limit the scope of the error correction process to final rules and argued DOE should determine that it is authorized to correct errors in its analysis at any time if the error would result in a standard not justified under EPCA. GEA suggested that DOE make the error correction process mandatory for all energy conservation standard rulemakings. In its view, doing so would provide consistency, transparency, and predictability to the rulemaking process, which decreases uncertainty and the regulatory burden. (GEA, No. 07 at p. 2)

NRDC/ASAP supported DOE's proposal to make the review process discretionary and asserted that some circumstances may require waiving the normal process, making a shorter review period or no review period justified. They encouraged DOE to include in the final rule a clarification that some products may warrant shorter review periods. (NRDC/ASAP, No. 06 at 2)

DOE's proposal also noted that it would continue to exclude energy conservation standards set through the issuance of a direct final rule pursuant to section 325(p)(4) of EPCA (42 U.S.C. 6295(p)(4)). 85 FR 64071, 64073. The Joint Industry Commenters and Lennox supported this approach because, in their view, EPCA (through section 325(p)(4)) already provided the necessary opportunity for review and comment prior to the finalization of such rules. (Joint Industry Commenters, No. 03 at p. 2; and Lennox, No. 04 at p. 4)

EPCA mandates certain procedures that DOE must follow in its rulemakings. *See* 42 U.S.C. 6295(p). Beyond the procedures mandated in EPCA, the Secretary is under no

statutory obligation to provide the public with an additional opportunity to submit error correction requests on any document. DOE has considered the approach of turning this process into a mandatory one for all energy conservation standard rulemakings, as suggested by these commenters, but notes that doing so would be both impractical and unnecessary. DOE notes that the public has many opportunities to review and provide input on EPCA rulemakings already during the robust rulemaking process as provided by EPCA and other applicable provisions of the Administrative Procedure Act. Additionally, DOE recognizes that situations may arise, such as complying with a judicial decree, that would necessitate shortening or waiving of the error correction process. DOE reminds commenters that opening an energy conservation standard rulemaking to error correction review is only to confirm that no errors exist in the regulatory text prior to anticipated publication; it is not intended for parties to argue the findings and conclusions of the rulemaking. The voluntary nature of the ECR provides the Secretary the flexibility to subject specific rulemakings to one last review and not unnecessarily elongate the rulemaking process for energy conservation standard rulemakings.

DOE's proposal to amend 10 CFR 430.5(a) was intended to describe an error correction process that is an optional and voluntary, specifically on the part of DOE. However, given DOE's decision in this final rule to retain the current regulatory requirements found in 10 CFR 430.5(f), which prescribe the steps DOE will take to publish a final rule upon conclusion of the error correction process, DOE no longer believes it is necessary at this time to extensively revise the text in 10 CFR 430.5(a), except to clarify DOE is under no legal obligation to offer the public this additional error correction process from the outset. Accordingly, DOE is retaining the current regulatory provisions contained in 10 CFR 430.5(a), with the exception of adding the term "optional" before "procedure" and "may" before "accept and consider" to clarify it is within the Secretary's discretion to allow for an error correction review of a final energy conservation standard rule.

##### Section 430.5(b)

DOE proposed amending the definition of "Error" found in 10 CFR 430.5(b) to more narrowly define it as meaning an objective mistake in the regulatory text of a pre-publication final rule document that may result in the

establishment or amendment of an energy conservation standard. DOE also proposed replacing the term “Rule” with the term “Pre-publication draft.” 85 FR 64071, 64077.

The Joint Industry Commenters opposed narrowing the definition of “Error” and argued that substantial errors can occur outside of the regulatory text and its erroneous results will not be explicit or disclosed in the regulatory text. They argued that the review should be extended to include errors that may exist in the Technical Support Document as well as the preamble to a final rule as these errors could also result in arbitrary and capricious standards. (Joint Industry Commenters, No. 03 at pp. 2–3)

It is DOE’s current practice to post a pre-publication copy of a rulemaking document online, prior to the rule’s publication in the **Federal Register**, for the public to access. This action is separate and distinct from the error correction process. Given that DOE uses the term “pre-publication” when posting and disseminating these documents, DOE believes it may create potential confusion for DOE to adopt the proposed definition for “pre-publication draft” in this final rule. Additionally, the use of the term “draft” may also suggest that the final rule document is open to further deliberations and policy considerations. Accordingly, DOE is not adopting its proposal to amend 10 CFR 430.5(b), and is retaining the current definitions found in 10 CFR 430.5(b) in this final rule.

However, DOE’s decision to not amend 10 CFR 430.5(b) does not diminish the intent of the ECR, which is to minimize the potential risk of finalizing and publishing the regulatory text of an energy conservation standard with an apparent error that establishes a level that was not intended by DOE. With the utilization of the ECR, DOE is seeking to avoid the need for any subsequent rulemaking, correcting that error, that might violate the anti-backsliding provision of 42 U.S.C. 6295(o)(1). Therefore, by addressing concerns with the draft regulatory text of an energy conservation standard before that text is finalized, DOE can significantly reduce the risk of litigation over an unintended error. This same difficulty does not exist for an error identified in the preamble text or Technical Support Document published in support of an energy conservation standard. For that, DOE can issue a correction to remedy such a mistake. And in the event an error appears in a Technical Support Document for a given rule, if DOE agrees that error impacts the resulting standard that DOE

intended to adopt (as reflected in a posted draft document), then DOE retains the authority to make the appropriate correction in that posted draft document.

#### Section 430.5(c)

The NOPR proposed revising 10 CFR 430.5(c) to clarify that the Secretary was not, and is not, under a mandatory duty to post pre-publication final rules online for error correction review, but to do so was, and is, a discretionary and voluntary act. If the Secretary chooses to post a final rule online for error correction review, the document would be available for 45 days, but the Secretary in his or her discretion may shorten or lengthen that time period. DOE also proposed revising 10 CFR 430.5(c) to clarify that the ECR does not impose a deadline by which the Secretary must determine whether to establish or amend an energy conservation standard, or when the Secretary must submit a final rule for publication in the **Federal Register**. DOE further proposed revising the text in the disclaimer notice, which is posted along with a final rule made available for error correction review, to explain that the Department may conduct additional review of the regulatory text prior to finalizing a potential energy conservation standard to ensure that the text is consistent with the Secretary’s intent and with data and analysis available at the time of posting. 85 FR 64071, 64073.

APGA/Spire objected to this aspect of the proposal, arguing that every final rule should be posted routinely since DOE would have complete discretion on what to do with any comment received under paragraph (e). (APGA/Spire, No. 05 at p. 2) The Joint Industry Commenters objected to the proposal’s failure to obligate DOE to post pre-publication draft final energy conservation standard rules. In their view, it is critical that the public be given the opportunity to review these types of documents for errors that could result in a standard that is not, in fact, technically or economically justified. (Joint Industry Commenters, No. 03 at p. 3) They added that the Secretary should not retain the discretion to determine whether to post pre-publication drafts because any rulemaking that may impact an energy conservation standard should be subject to error correction review. (Joint Industry Commenters, No. 03 at p. 4) These commenters also supported posting a pre-publication draft for the proposed continuation of the 45-day review period, but disagreed with the proposal’s inclusion to provide the Secretary the discretion to adjust the

length of the review period. They suggested there should be a set period of time that the rule is posted and the Secretary may extend that time period if needed, but that this time period cannot be limited to less than the 45-day window on a whim. (Joint Industry Commenters, No. 03 at p. 3)

Lennox also objected to a shortening of the 45-day review period because energy conservation standard rulemakings are complex and that modifying the ECR to permit a shorter review period would “gut” the ECR process by allowing the Secretary to unilaterally provide inadequate time for a meaningful review. (Lennox, No. 04 at p. 4) Other commenters suggested that DOE include a firm minimum time limit for error correction requests to be considered, such as 30 days. (NRDC, et al., No. 06 at p. 1)

Furthermore, Joint Industry Commenters and Lennox were supportive of DOE’s proposal to retain discretion on whether a pre-publication draft that has undergone error correction review is submitted for publication as a final rule. (Joint Industry Commenters, No. 03 at p. 4; Lennox, No. 04, at p. 1) The Joint Industry Commenters agreed with DOE’s clarification to remove any inference of an implied timeline for the Secretary’s decision to publish a potential rule that was subject to the error correction process and that the Secretary should retain discretion to determine the degree to which the document may or may not be amended. (Joint Industry Commenters, No. 03 at p. 4) These commenters agreed with DOE that the error correction process should not obligate the Secretary to publish a document simply because that document has completed the error correction process. They asserted that DOE has broad authority to execute its statutory obligations and that the ECR’s scope is limited only to the opportunity for stakeholders to comment on errors and DOE’s obligation to consider those comments. (Joint Industry Commenters, No. 03 at p. 4)

The Joint Industry Commenters also supported DOE’s proposed revision to the disclaimer in § 430.5(c)(3) that DOE may conduct additional review of the regulatory text prior to finalizing a standard to ensure that the text itself is consistent with the Secretary’s intent and relevant data and analysis available at the time of posting. They also supported DOE’s proposed revision emphasizing that it is “within the Secretary’s discretion to determine the appropriate remedy” for an error identified during the error correction process. (Joint Industry Commenters, No. 03 at p. 4)

As previously noted, EPCA already specifies the procedures DOE is mandated to follow in an energy conservation standard rulemaking. The error correction process is an extra step that DOE is choosing to adopt as a tool to help DOE avoid promulgating a final energy conservation standard rule with an apparent error. It is DOE's judgment that not all energy conservation standard rulemakings will need to undergo a 45-day review period. For example, there may be instances where an unanticipated legal obligation may arise, or a statutory deadline may be approaching, that may necessitate a modification to a 45-day review period. While DOE will continue to strive to provide a 45-day review period, retaining flexibility to account for case-by-case circumstances would enable DOE to continue offering the public this additional review opportunity while accounting for those circumstances where a 45-day review period is not warranted or feasible. Upon posting of a pre-publication draft, the public will be notified of the length of the review period for that specific energy conservation standard final rule.

Moreover, posting a pre-publication final rule for review under this process is an additional step in the already comprehensive review process the Department follows when developing a standard in accordance with EPCA's requirements. Providing this step—which itself is a discretionary act by DOE—offers the public with a final opportunity, not required under EPCA, to help DOE in verifying that no errors in the regulatory text went unnoticed and unaddressed. Although DOE anticipates that this step would be routinely provided, it may not be necessary to do so for every energy conservation standard rulemaking and requiring it in those instances where it would be unnecessary or impractical to do so would unnecessarily restrict DOE's flexibility to carry out its statutory obligations under EPCA or other legal obligations in an efficient manner. Rigidly applying a mandatory minimum review period requirement not only ignores the potential for conflicts with preexisting statutory deadlines but also assumes that all energy conservation standard rulemakings are the same. Not every energy conservation standard rulemaking will require this additional review period and to mandate one may unnecessarily lengthen the rulemaking process.

With these considerations in mind, DOE is adopting its proposal to amend 10 CFR 430.5(c) to clarify that the Secretary was not, and is not, under a

mandatory duty to post pre-publication final rules online for error correction review, but to do so was, and is, a discretionary and voluntary act. DOE is also adopting its proposal to amend 10 CFR 430.5(c) to note that it will ordinarily post the pre-publication final rule online for a period of 45 calendar days, but noting that the period for review may be shortened or lengthened to best serve the needs of that rulemaking in accordance with DOE's statutory or other legal obligations.

While DOE is adopting the aforementioned proposals in this final rule, DOE is not adopting the remaining revisions proposed in the NOPR for 10 CFR 430.5(c)(2). Those revisions concerned the submittal of rules for publication and DOE's authority to amend standards prior to publication. DOE's decision to not adopt those proposed revisions is due to repetitive nature of some of the language, as well as the decision to retain the current requirements in 10 CFR 430.5(f) and (g). Section 430.5(c) as adopted in this final rule already expresses that the Secretary is not obligated to post pre-publication final rules on a publicly accessible website for public review. Adopting the proposed revision that it would be in the Secretary's discretion both before and after posting of a pre-publication final rule to determine whether to establish or amend an energy conservation standard would conflict with DOE's decision to retain the current requirements in 10 CFR 430.5(f) and (g). Therefore, to maintain the current numbering in 10 CFR 430.5(c), DOE has made slight clarifying amendments to revise and renumber the proposed regulatory text that DOE is adopting in this final rule.

Furthermore, due to DOE's decision to retain the current definitions in 10 CFR 430.5(b), DOE is retaining the current disclaimer notice text found in 10 CFR 430.5(c)(3).

#### Section 430.5(d)

In the NOPR, DOE explained how the public could submit a request for error correction, what errors will be reviewed, and identified the evidence the Department would accept in considering such a request under 10 CFR 430.5(d). Specifically, DOE proposed to clarify that the Secretary would not be obligated to take an action, and would have the discretion to choose whether to correct an error properly identified and determined to be consequential. The proposal also explained that the review would be limited to identifying Errors in the regulatory text and not be expanded to include issues related to the policy

decision itself; policy decisions would continue to remain strictly within the discretion of the Secretary. 85 FR 64071, 64073.

The Joint Industry Commenters opposed DOE's proposal for 10 CFR 430.5(d) and argued that the Secretary lacks the discretion to not amend a consequential or inconsequential error properly identified. While the commenters agreed that it is within the Secretary's discretion in deciding not to act when an inconsequential error is identified, they asserted that in those instances where an error is uncorrected, DOE should explain its reasons for doing so. (Joint Industry Commenters, No. 03 at p. 4) When deciding not to act on a consequential error, the Joint Industry Commenters argued that the Secretary should explain why no action is being taken. (Joint Industry Commenters, No. 03 at pp. 4–5) The Joint Industry Commenters reiterated that DOE should not limit error review to the regulatory text and should consider addressing errors in the technical support document and the preamble if the error substantially affects the resulting standard in the regulatory text. (Joint Industry Commenters, No. 03 at p. 5) The Joint Industry Commenters also argue that the evidence used to substantiate the error should not be limited to the existing rulemaking record—any evidence that may substantiate an error should be permitted, including evidence that is not part of the existing record. (Joint Industry Commenters, No. 03 at p. 5)

Determining whether a purported error in a pre-publication final rule is, actually, an error, and, if so, whether such error is consequential or inconsequential—along with the decision on how to handle that error—resides solely within the Secretary's discretion under 10 CFR 430.5(d)(1). The Secretary is also under no obligation to consider a request that does not comply with 10 CFR 430.5(d). As a practical matter, DOE likely would consider an inconsequential error as one not meriting a response, while a consequential error likely would be addressed in the form of a correction to the relevant regulatory text.

While some commenters suggested that DOE accept evidence not previously included in the record, DOE again emphasizes that the error correction process is the final step immediately prior to when DOE submits a document to the **Federal Register** for publication. At this stage, all of the information pertaining to the substance of the rulemaking should have already been submitted to DOE for its consideration. If DOE were to permit the

submission of additional information at this late juncture for consideration, the risk of parties withholding valuable and useful information for DOE to consider until the error correction process would be considerably higher, resulting in a process that would adversely impact the rulemaking process by delaying finality to the rulemaking. Moreover, DOE wishes to ensure that parties provide as much information as possible during the relevant and appropriate stages of a given rulemaking—that is, during any pre-NOPR stages, which DOE typically offers, as well as in response to a designated comment period for a NOPR or supplemental NOPR. Commenters have these multiple opportunities to bring data or information to the Department's attention during the rulemaking process. Accordingly, DOE is declining to adopt the approach suggested by the commenters and will continue to restrict consideration of available data and evidence to information that is already part of the relevant rulemaking record.

#### Section 430.5(e)

In the NOPR, DOE explained that this section would continue to describe the course of action that the Department may take in the event that a request for correction has appropriately identified an error. DOE proposed new text explaining the Secretary's authority to determine the appropriate remedy for an error identified and the Secretary's discretion to initiate additional review of the regulatory text so that it mirrors the Secretary's intent. 85 FR 64071, 64074

In response to the NOPR, Joint Industry Commenters recommended that DOE respond to every error correction request submitted even if the Secretary decides not to act under 10 CFR 430.5(e). In their view, the requester should be notified that its request for review was received, considered, and provided a rationale for why the Department decided not to act upon the request. (Joint Industry Commenters, No. 03 at pp. 5–6)

The Joint Industry Commenters further concurred with DOE's proposal to clarify that the ECR does not establish any obligation on the Secretary to publish a pre-publication draft document upon completion of the error correction process. Joint Industry Commenters acknowledged timing for publication remains within the Department's discretion, which are separate and apart from the error correction process. (Joint Industry Commenters, No. 03 at p. 5)

In light of DOE's decision to not amend the regulatory requirements

currently found in 10 CFR 430.5(f), as discussed in more detail below, DOE will be retaining the regulatory text currently found in § 430.5(e). In DOE's view, the ECR process is designed solely as an additional review period to address errors that may be contained in the regulatory text of a draft pre-publication document. In those cases where DOE agrees that a properly submitted error correction request identified an error in the posted text and that error requires correcting, DOE's response will come in the form of DOE's correction of that error. If DOE concludes that any request for error-correction is not valid, and if it has identified no errors on its own, DOE will proceed to submit the rule for publication in the **Federal Register** in the same form it was previously posted. By doing so, the Department will effectively be rejecting any error-correction requests it has received, and will ordinarily not respond directly to a requester or provide additional notice regarding the request.

Compelling DOE to individually address each error correction request submitted in instances where no change is merited is not an appropriate use of DOE's limited resources. Moreover, in DOE's experience, many of the error correction requests that DOE receives are transmitted at the end of the error correction process and often do not identify what this rule defines as "Errors." Therefore, at this time, DOE declines to implement any requirements that it affirmatively address every error correction request received. DOE will, however, docket all properly submitted error correction requests in the appropriate docket to ensure that the public is aware of any properly submitted requests that were received.

DOE notes that commenters continue to remain free to submit input to the relevant docket throughout the duration of the rulemaking to help inform DOE regarding any aspects of that rulemaking.

#### Section 430.5(f)

In the NOPR, DOE proposed revising 10 CFR 430.5(f) to prevent the inference that publication in **Federal Register** is the only outcome available at the conclusion of the error correction process. 85 FR 64071, 64074. While some commenters asserted that the Secretary is not obligated to submit a pre-publication final rule for publication in the **Federal Register** at the end of the review process and that it remains within the Secretary's discretion to determine what happens once the review period concludes (*see* Joint Industry Commenters, No. 03 at p.

5–6; Lennox, No. 04 at 5; NRDC/ASAP, No. 06 at p. 1), one commenter opposed DOE's proposal and questioned the legality of the rulemaking considering a decision from the United States Court of Appeals for the Ninth Circuit. *Natural Resources Defense Council v. Perry*, 940 F.3d 1072 (9th Cir. 2019) (A.O. Smith, No. 8 at p. 1) Additionally, others argued that DOE is obligated to provide a publicly available statement detailing how any properly received requests were handled. (Lennox, No. 04 at p. 4) Commenters stated that if DOE is unable to fix an error identified, then DOE must provide a consistent process to help ensure energy conservation standards are supported by error-free analysis that is justified under EPCA. (Joint Industry Commenters, No. 03 at p. 6)

At this time, DOE is retaining the current regulatory text found in 10 CFR 430.5(f), notwithstanding two clarifications and two minor non-substantive changes to reflect updated cross-references to amended 10 CFR 430.5(c). As explained in the NOPR, the Ninth Circuit held that 10 CFR 430.5(f) created a non-discretionary duty to submit draft rules (*i.e.*, a pre-publication draft) for publication in the **Federal Register** within 30 days of the close of the error correction submission period. Although DOE declines to adopt its proposal to amended 10 CFR 430.5(f) as discussed in the NOPR, DOE continues to maintain that the error correction process is intended to correct errors, as defined in 10 CFR 430.5(b), and is separate from DOE's policy-making discretion.

In this final rule, DOE provides two clarifying amendments to the current regulatory text found in 10 CFR 430.5(f). Specifically, DOE amends 10 CFR 430.5(f)(2) to remove the term "in due course." The use of the term "in due course" in 10 CFR 430.5(f)(2) could imply that a final rule for which DOE does not receive any properly filed error correction requests and determines that no corrections are necessary, is subject to a different or longer time frame for submission for publication in the **Federal Register** than a final rule for which DOE has received one or more properly filed requests and determines that no corrections are necessary (*see* 10 CFR 430.5(f)(1)). This is not the case. In either scenario, DOE expects that the rule will be submitted for publication in the **Federal Register** within the 30 days allotted for rules that actually require correction prior to submittal in 10 CFR 430.5(f)(3). DOE also amends 10 CFR 430.5(f)(3) to add "or discovers an Error on the Secretary's own initiative." This amendment addresses the scenario of when the Secretary discovers an Error



on his or her own initiative and determines a correction is necessary—a scenario that had only been addressed in 10 CFR 430.5(e), but has not been explicitly included as a scenario in 10 CFR 430.5(f).

DOE will continue to consider the impact of the Ninth Circuit decision on 10 CFR 430.5(f), as well as any impact a proposed change to § 430.5(f) would have on stakeholders in providing certainty and transparency during the error correction process. Should DOE desire to amend the language in paragraph (f) of this section, DOE will consider and follow the appropriate rulemaking procedures for making such amendments. The decision to maintain the current language in § 430.5(f) does not in any way restrict, limit, diminish, or eliminate the Secretary's discretion to determine whether to establish or amend an energy conservation standard, or to determine the appropriate level at which to amend or establish any energy conservation standard.

Section 430.5(g) and (h)

DOE proposed renumbering 10 CFR 430.5(g) and (h) and including new text to reaffirm that a pre-publication document is not a final rule within the meaning of EPCA. 85 FR 64071, 64073. DOE received comments supporting its proposed modification to 10 CFR 430.5(g). The Joint Industry Commenters supported the reaffirmation that the publication of such drafts did not finalize the substance of the rule or signal an end to the rulemaking process. (Joint Industry Commenters, No. 03 at p. 6)

While DOE acknowledges the comments it received in support of this proposal, DOE has decided to retain the current regulations at 10 CFR 430.5(g) and (h). Since DOE's proposal for 10 CFR 430.5(g) was simply intended to reorganize and reaffirm the language currently found in 10 CFR 430.5(g) and (h), DOE believes retaining the current requirements would not be inconsistent with the intent and purpose of its proposal. Therefore, DOE is retaining the current regulations at 10 CFR 430.5(g) and (h) in this final rule.

### III. Procedural Issues and Regulatory Review

#### A. Administrative Procedure Act

Agency rules of procedure and practice, such as the one described in this document, are not subject to the requirement to provide prior notice and an opportunity for public comment pursuant to authority at 5 U.S.C. 553(b)(A). DOE notes that a rule of this nature is also not a substantive rule

subject to a 30-day delay in effective date pursuant to 5 U.S.C. 553(d). Nonetheless, DOE voluntarily offered an opportunity to the public to make comments on the changes set forth in this final rule.

#### B. Review Under Executive Orders 12866, 13563, and 14094<sup>5</sup>

This regulatory action is not a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, this action was not subject to review under that Executive order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The revisions contained in this regulatory action are designed to clarify DOE's process with respect to its error correction process for addressing errors identified in the regulatory text of a draft pre-publication document of a potential rule that would establish or amend the energy conservation standards of a regulated product or equipment. These revisions clarify the manner in which DOE will implement this error correction process and affirms the agency's retention of its discretion with respect to the handling of these pre-publication documents and any comments received regarding potential errors contained in the relevant regulatory text. These revisions would not impose any regulatory costs or burdens on stakeholders, nor would they in any way limit public participation in DOE's rulemaking process.

#### C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires preparation of an initial regulatory flexibility analysis (“IRFA”) and a final regulatory flexibility analysis (“FRFA”) 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. The proposed rule was not subject to the requirement to provide prior notice and an opportunity for public comment, therefore, this final rule is not subject to the analytical requirements of the Regulatory Flexibility Act.

<sup>5</sup> Executive Order (“E.O.”) 12866, “Regulatory Planning and Review,” as supplemented and reaffirmed by E.O. 13563, “Improving Regulation and Regulatory Review,” 76 FR 3821 (Jan. 21, 2011) and E.O. 14094, “Modernizing Regulatory Review,” 88 FR 21879 (April 11, 2023).

#### D. Review Under the Paperwork Reduction Act

This final rule does not contain a collection of information for purposes of the Paperwork Reduction Act.

#### E. Review Under the National Environmental Policy Act of 1969

DOE has determined that this final rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule is strictly procedural and is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### F. Review Under Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal 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 that it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products and equipment that would be subject to this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

#### G. 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,” 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. 61 FR 4729 (Feb. 7, 1996). 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 final 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) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting 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), (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 [www.energy.gov/gc/office-general-counsel](http://www.energy.gov/gc/office-general-counsel). DOE examined this final rule according to UMRA and its statement of policy and determined that the final rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

#### *I. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 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 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.

#### *J. Review Under Executive Order 12630*

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (Mar. 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. 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 Federal 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 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this 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*

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 OIRA at OMB, a Statement of Energy Effects for any 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 significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This final rule is not a significant energy action because the ability to correct regulations will not, in itself, have a significant adverse effect on the supply, distribution, or use of energy. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *M. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before 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).

## **IV. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this final rule.

### **List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

### **Signing Authority**

This document of the Department of Energy was signed on March 25, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been

authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 26, 2024.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

For the reasons stated in the preamble, DOE amends part 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

### **PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Revise and republish § 430.5 to read as follows:

#### **§ 430.5 Error correction procedures for energy conservation standards rules.**

(a) *Scope and purpose.* The regulations in this section describe an optional procedure through which the Department of Energy may accept and consider submissions regarding possible Errors in its rules under the Energy Policy and Conservation Act, as amended (42 U.S.C. 6291–6317). This section applies to rules establishing or amending energy conservation standards under the Act, except that this section does not apply to direct final rules issued pursuant to section 325(p)(4) of the Act (42 U.S.C. 6295(p)(4)).

(b) *Definitions.*

*Act* means the Energy Policy and Conservation Act of 1975, as amended (42 U.S.C. 6291–6317).

*Error* means an aspect of the regulatory text of a rule that is inconsistent with what the Secretary intended regarding the rule at the time of posting. Examples of possible mistakes that might give rise to Errors include:

(i) A typographical mistake that causes the regulatory text to differ from how the preamble to the rule describes the rule;

(ii) A calculation mistake that causes the numerical value of an energy conservation standard to differ from what technical support documents would justify; or

(iii) A numbering mistake that causes a cross-reference to lead to the wrong text.

*Rule* means a rule establishing or amending an energy conservation standard under the Act.

*Secretary* means the Secretary of Energy or an official with delegated authority to perform a function of the Secretary of Energy under this section.

(c) *Posting of rules.* (1) It is within in the sole discretion of the Secretary to make a rule available to the public to review for Errors in the document's regulatory text.

(2) If a rule is made available for review, the Secretary ordinarily will keep the document posted for a period of 45 calendar days, but the Secretary in his or her discretion (while remaining consistent with his or her statutory obligations under EPCA and other legal obligations when promulgating an energy conservation standard) may shorten or lengthen the time period during which the rule document is posted.

(3) Any rule document posted pursuant to paragraph (c)(1) of this section shall bear the following disclaimer: *Notice:* The text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5 before publication in the **Federal Register**. Readers are requested to notify the United States Department of Energy, by email at [EMAIL ADDRESS PROVIDED IN POSTED NOTICE], of any typographical or other errors, as described in such regulations, by no later than midnight on [DATE SPECIFIED IN THE POSTING OF THE DOCUMENT ON THE DEPARTMENT'S WEBSITE], in order that DOE may make any necessary corrections in the regulatory text submitted to the Office of the Federal Register for publication.

(d) *Request for error-correction review.* (1) A person identifying an Error subject to this section may request that the Secretary review a potential Error. Such a request must ordinarily be submitted within 45 calendar days of the posting of the rule pursuant to paragraph (c)(1) of this section. The Secretary in his or her discretion may shorten or lengthen the time period during which such requests may be submitted.

(2)(i) A request under this section must identify a potential Error with particularity. The request must specify the regulatory text claimed to be erroneous. The request must also provide text that the requester contends would be a correct substitute. If a requester is unable to identify a correct substitute, the requester may submit a request that states that the requester is unable to determine what text would be correct and explains why the requester is unable to do so. The request must also

substantiate the claimed Error by citing evidence from the existing record of the rulemaking, demonstrating that the regulatory text of the rule is inconsistent with what the Secretary intended the text to be.

(ii) A person's disagreement with any policy choices or discretionary decisions that are contained in the rule will not constitute a valid basis for a request under this section. All policy and discretionary decisions with regard to whether to establish or amend any conservation standard and, if so, the appropriate level at which to amend or establish that standard, remain within the sole discretion of the Secretary without regard to the procedures established in this section.

(3) The evidence to substantiate a request (or evidence of the Error itself) must be in the record of the rulemaking at the time of posting the rule, which may include an accompanying preamble. The Secretary will not consider new evidence submitted in connection with an error-correction request.

(4) A request under this section must be filed in electronic format by email to the address that the disclaimer to the rule designates for error-correction requests. Should filing by email not be feasible, the requester should contact the program point of contact designated in the rule order to ascertain an appropriate alternative means of filing an error-correction request.

(5) A request that does not comply with the requirements of this section will not be considered.

(e) *Correction of rules.* The Secretary may respond to a request for correction under paragraph (d) of this section or address an Error discovered on the Secretary's own initiative by submitting to the Office of the Federal Register either a corrected rule or the rule as previously posted.

(f) *Publication in the Federal Register.* (1) If, after receiving one or more properly filed requests for correction, the Secretary decides not to undertake any corrections, the Secretary will submit the rule for publication to the Office of the Federal Register as it was posted pursuant to paragraph (c)(1) of this section.

(2) If the Secretary receives no properly filed requests after posting a rule and identifies no Errors on the Secretary's own initiative, the Secretary will submit the rule, as it was posted pursuant to paragraph (c)(1) of this section, to the Office of the Federal Register for publication. This will occur after the period prescribed pursuant to paragraph (c)(2) of this section has elapsed.

(3) If the Secretary receives a properly filed request after posting a rule pursuant to paragraph (c)(1) of this section and determines that a correction is necessary, or discovers an Error on the Secretary's own initiative, the Secretary will, absent extenuating circumstances, submit a corrected rule for publication in the **Federal Register** within 30 days after the period prescribed by paragraph (c)(2) of this section has elapsed.

(4) Consistent with the Act, compliance with an energy conservation standard will be required upon the specified compliance date as published in the relevant rule in the **Federal Register**.

(5) Consistent with the Administrative Procedure Act, and other applicable law, the Secretary will ordinarily designate an effective date for a rule under this section that is no less than 30 days after the publication of the rule in the **Federal Register**.

(6) When the Secretary submits a rule for publication, the Secretary will make publicly available a written statement indicating how any properly filed requests for correction were handled.

(g) *Alteration of standards.* Until an energy conservation standard has been published in the **Federal Register**, the Secretary may correct such standard, consistent with the Administrative Procedure Act.

(h) *Judicial review.* For determining the prematurity, timeliness, or lateness of a petition for judicial review pursuant to section 336(b) of the Act (42 U.S.C. 6306), a rule is considered "prescribed" on the date when the rule is published in the **Federal Register**.

[FR Doc. 2024-06690 Filed 4-2-24; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2023-1046; Project Identifier AD-2023-00253-T; Amendment 39-22700; AD 2024-05-09]

RIN 2120-AA64

### Airworthiness Directives; The Boeing Company Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 757-200, -200CB, and -300 series airplanes. This

AD was prompted by a report of a crack at fuselage station (STA) 1640 frame web common to the lower hinge intercostal tee clip center hole of the upper fastener row. This AD requires a maintenance records check for existing repairs at STA 1640, repetitive ultrasonic (UT) inspections for cracking of the frame web, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective May 8, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 8, 2024.

#### ADDRESSES:

*AD Docket:* You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1046; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

#### *Material Incorporated by Reference:*

- For material identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Boulevard, MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website: [myboeingfleet.com](https://myboeingfleet.com).

- You may view this material that is incorporated by reference at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1046.

#### FOR FURTHER INFORMATION CONTACT:

Wayne Ha, Aviation Safety Engineer, Continued Operational Safety Branch, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562-627-5238; email: [wayne.ha@faa.gov](mailto:wayne.ha@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 757-200, -200CB, and -300 series airplanes. The NPRM published in the **Federal Register** on June 1, 2023 (88 FR 35783). The NPRM was prompted by a report of a crack at fuselage STA 1640 frame web common

to the lower hinge intercostal tee clip center hole of the upper fastener row. In the NPRM, the FAA proposed to require a maintenance records check for existing repairs at STA 1640, repetitive UT inspections for cracking of the frame web, and applicable on-condition actions. The FAA is issuing this AD to address possible undetected cracking in the STA 1640 frame web common to the lower hinge intercostal tee clip center hole of the upper fastener row. Such cracking, if not addressed, could result in the inability of a principal structural element to sustain limit loads which could adversely affect the structural integrity of the airplane.

### Discussion of Final Airworthiness Directive

#### Comments

The FAA received comments from Air Line Pilots Association, International, who supported the NPRM without change.

The FAA received additional comments from seven commenters, including Aviation Partners Boeing (APB), Boeing, Delta Air Lines (DAL), European Air Transport GmbH (DHL), FedEx Express, United Airlines (UAL), and VT Mobile Aerospace Engineering, Inc. (VT MAE). The following presents the comments received on the NPRM and the FAA's response to each comment.

#### Request To Correct the Location of the Unsafe Condition

Boeing requested that the location of the cracking be corrected from "inboard and center holes" to "center hole" of the upper fastener row in the Summary and Background of the NPRM, and paragraph (e) of the proposed AD. Boeing said that cracking was found only in the center hole.

The FAA agrees. The correction has been made in the specified sections of this AD.

#### Request To Change Inspection Requirement for Certain Converted Airplanes

VT MAE proposed that no additional inspection be required other than the inspection specified in VT MAE 15-Pallet Maintenance Planning Data (MPD) Supplement 757SF-MPD-01 for airplanes converted per VT MAE Supplemental Type Certificate (STC) ST04242AT. VT MAE asserted that Boeing has performed analysis of the modified airplanes, including the new STA 1640 frame, which is inspected as part of the VT MAE MPD Supplement 757SF-MPD-01.

The FAA disagrees with the commenter's request because sufficient