

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 440

RIN 1904-AB05

Weatherization Assistance Program for Low-Income Persons

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

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The Department of Energy (DOE) proposes to amend the regulations for the Weatherization Assistance Program for Low-Income Persons. DOE is proposing changes based on a series of open forum discussions with numerous State and local stakeholders as well as through program experience gained since issuance of the final rule on June 5, 1995. These proposed changes add clarifying language, delete obsolete language, and propose certain regulatory changes to improve the overall operation of the Program to assist State and local agencies in administering the Program. Further, these proposed changes will give States and local agencies additional flexibility in addressing the particular weatherization needs of their low-income citizens while achieving better program results with less paperwork.

DATES: To ensure your comments are considered, we must receive three copies of your comments on or before March 27, 2000. You may present oral views, data, and arguments at the public hearing which will be held in Washington, DC, on March 3, 2000. If you would like to speak at this hearing, contact Mr. Greg Reamy at (202) 586-4074. Each oral presentation is limited to 10 minutes. The hearing will last as long as there are persons requesting an opportunity to speak.

ADDRESSES: Send written comments to Greg Reamy, Weatherization Assistance Program Division, US Department of Energy, Mail Stop EE-42, 5E-066, 1000 Independence Avenue, SW., Washington, DC 20585. We will hold a public hearing at the following address: U.S. Department of Energy, Room 1E-245, 1000 Independence Avenue, SW, Washington, DC. Please bring three copies of the prepared oral statement to the hearing. You may read and copy written comments received, a copy of the public hearing transcript, and any other docket material received as a

result of this notice at the DOE Freedom of Information Reading Room, 1000 Independence Avenue, SW., Washington, DC 20585 between the hours of 9:00 a.m.-4:00 p.m., Monday through Friday except Federal holidays. For more information concerning public participation in this rulemaking proceeding, see section IV of this notice of proposed rulemaking (Opportunities for Public Comment).

FOR FURTHER INFORMATION CONTACT: Greg Reamy, Weatherization Assistance Program Division, U.S. Department of Energy, Mail Stop EE-42, 5E-066, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-4074.

SUPPLEMENTARY INFORMATION:

- I. Introduction
- II. Amendments to the Weatherization Assistance Program
- III. Other
- IV. Opportunities for Public Comment
- V. Procedural Requirements
- VI. Other Federal Agencies
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I. Introduction

The Department of Energy (DOE or Department) proposes amendments to revise the program regulations for the Weatherization Assistance Program for Low-Income Persons (WAP). This Program is authorized by title III of the Energy Conservation and Production Act, as amended (Act), 42 U.S.C. 6561 *et seq.* The proposed changes are necessitated by the evolution of the program since the last publication of the rule on June 5, 1995 (60 FR 29470). These changes would help States by clarifying sections to the rule, thereby enhancing the interpretation and application of the program requirements. Some of the definitions in § 440.3 would be clarified and, where needed, new definitions would be added to provide a clearer and more concise meaning to States and local agencies who must interpret these regulations. Other sections applying to energy audits and allowable expenditures would be clarified to enhance their meanings; and certain obsolete items would be deleted. Other regulatory changes proposed in today's rulemaking would: add new and eliminate obsolete terms in the Program definitions; add "household with a high energy burden" and "high residential energy user" as new categories for those receiving priority service; create a separate cost category for health and safety expenditures and the purchase of vehicles by local agencies; reduce the eligibility criteria for certain large multi-family buildings to 50 percent; establish new minimum energy audit criteria for

the Program; and revise the date for reweatherization from 1985 to 1993.

Prior to developing and issuing this proposed rulemaking, DOE consulted with its primary stakeholders, representatives of both State and local agencies, to listen to their concerns about what issues they wanted DOE to consider. The Program has evolved from a relatively simplified approach of providing service to low-income homes with unskilled labor, installing low-cost/no cost retrofits, to a program that conducts advanced diagnostics and installs cost-effective energy conservation materials. The increased demand to maintain highly-trained crews has placed added strain on State and local agencies efforts to sustain a quality level of service to its low-income clients. Many of the changes proposed today would help lessen the administrative burden and provide flexibility for State and local agencies to incorporate the ever-changing technical enhancements as they become available. These proposed rule changes would also make State and local agencies better-suited to attract non-Federal leveraged resources into their programs. This proposed rule attempts to address as many of those concerns as possible. Many of the concerns that the stakeholders raised to DOE were not of a regulatory nature and were addressed administratively through program guidance documents. Other concerns were statutory in nature and formed the basis of the legislative initiative proposed to the Congress.

In addition to the proposed regulatory changes, the Department proposed on September 20, 1999 several statutory changes developed during discussions with State and local stakeholders. These suggested changes are part of the Department's legislative initiative and are currently under consideration by the Congress. These proposed statutory changes are: eliminate the requirement that 40 percent of the funds used to weatherize a home be spent for materials; restructure the method by which States compute their average cost per home and eliminate the separate per dwelling unit average for capital intensive improvements; and increase the average cost per home to \$2500 beginning in 2000 to include the cost of making capital intensive improvements.

II. Amendments to the Weatherization Assistance Program

Section 440.1 Purpose and Scope

DOE proposes to delete the first sentence in the Scope and Purpose since this information is duplicative of what is stated elsewhere in the proposed rule.

DOE proposes to amend the Purpose and Scope to add to the priority categories the terms "high residential energy user" and "household with a high energy burden." By adding these two categories, States would be better able to prioritize their low-income clients by targeting those experiencing high energy costs and burden, thereby addressing those units with the greatest potential for energy savings. Additionally, by including these two categories, State and local agencies would be better able to coordinate services with other Federal programs and leveraging opportunities. The current priority categories of elderly, persons with disabilities, and families with children would continue and remain unchanged. Definitions for these two terms are discussed in § 440.3.

Section 440.3 Definitions

DOE proposes to add the term "balance point temperature" to describe the outdoor temperature below which the furnace of a dwelling must operate to maintain comfort during the winter, and above which the air conditioner must operate during the summer. The balance point temperature is used to calculate heating and cooling degree day weather data as described in more detail in § 440.21.

DOE proposes a definition for "electric base-load measures" to describe energy use outside of the traditional weatherization approach to heating and cooling and building envelope measures. As the Program evolves over the next several years into a whole house approach, DOE believes that electric base-load measures, which account for more than half the energy used in a typical household, are important when considering total residential energy use. Limited lighting measures are currently permitted in the Program and in the near future DOE may consider including other electric base-load measures such as the replacement of certain appliances.

DOE proposes to add the term "high residential energy user" which means a low-income household whose residential energy expenditures exceed the median level of residential expenditures for all low-income households in the State. The proposed definition for this category would permit State and local agencies to better coordinate their activities and resources with many utility programs.

DOE also proposes to add the term "household with a high energy burden" which means a low-income household whose residential energy burden (residential expenditures divided by the annual income of that household)

exceeds the median level of energy burden for all low-income households in the State. The proposed definition for this category would give States and local agencies greater flexibility in determining priority service for those households that may not have traditional priority individuals such as the elderly, persons with disabilities, or families with children, but are experiencing a particular hardship due to their high energy costs.

DOE proposes to substitute the term "persons with disabilities" for the term "handicapped" to reflect the current accepted reference. The definition remains unchanged.

DOE considered both State and local agency concerns over the definition of "low-income" and the difficulties in effectively administering, coordinating, and leveraging between various Federal low-income programs using different definitions. However, in a review of the statute and the legislative history of the Program, DOE chose not to amend the existing definition. The DOE Weatherization Assistance Program was established to serve the neediest Americans. To expand the eligibility requirements to facilitate coordination with other Federal programs either through increasing the poverty level to 80 percent, permitting census tracking of neighborhoods, or allowing area average median income levels would change the scope and purpose of the Program. More importantly, expanding the eligibility criteria would substantially increase the number of households eligible for assistance which already stands at over 29 million. DOE addresses this issue in detail in program guidance.

Section 440.14 State Plans

DOE proposes to reorganize and revise § 440.14 to eliminate unnecessary and duplicative information. DOE agrees with the States that these requirements are no longer needed and will reduce paperwork and time in the production of the annual State plan. In reorganizing this section, DOE proposes grouping items together relating to the public hearing. Items specific to the development of the State plan would also be placed together. The information for the production schedule is proposed to be projected annually instead of quarterly and include the number of previously weatherized homes expected to be weatherized.

DOE proposes to eliminate § 440.14(b)(2), (6), (7), and (b)(8)(iii). This information requirement resulted in the States providing little more than meaningless estimates to DOE. States will continue to report to DOE the

number of persons served in each of these groups.

DOE proposes to retain the requirement for information on the number of dwelling units expected to be weatherized for each area, but eliminate the expected number of previously weatherized units for each area. States have no idea how many previously weatherized homes can be expected to be weatherized for each area of the State.

In § 440.14(b)(6)(xi) DOE proposes to retain the requirement that States identify and describe the type of audit that meets the criteria outlined in § 440.21 and that DOE has approved. However, the reference to Project Retro-Tech or another DOE-approved audit is proposed to be eliminated in this section as well as in § 440.21.

Section 440.15 Subgrantees

DOE proposes to amend § 440.15(a)(3)(iv) to eliminate the reference to "JTPA" and replace it with "other Federal or State training programs." The JTPA Federal program is repealed effective July 1, 2000 pursuant to Pub. L. 105-220.

Section 440.16 Minimum Program Requirements

DOE proposes to amend § 440.16(d) to eliminate the reference to "JTPA" and replace it with "other Federal or State training programs." The JTPA Federal program is repealed effective July 1, 2000 pursuant to Pub. L. 105-220. States should describe any "other Federal or State training program" they will be using in their annual State plans as sources of labor.

DOE proposes to add clarifying language to § 440.16(b) to allow States to include "high residential energy user" and "household with a high energy burden" as priority groups among those receiving weatherization services. The use of the two new priority categories is not mandatory. By adding these two categories, DOE is providing State and local agencies with expanded flexibility to choose the categories for priority which best serve their respective programs.

Section 440.17 Policy Advisory Council

DOE proposes to amend § 440.17(a) to include the language "or a State commission or council" which meets the criteria in § 440.17(a)(1), (2) and (3). Many State agencies which operate the DOE Weatherization Assistance Program have existing commissions or councils which review and approve policies and plans for many other Federal programs. By utilizing these existing bodies, States

would eliminate the need to establish a separate Weatherization Policy Advisory Council which would essentially perform the same function. States which opt to utilize an existing commission or council would have to certify to DOE, as a part of the annual application, the council or commission as an independent reviewer of activities for the Program. Therefore, any person(s) employed in any State Weatherization Program can also be a member of an existing commission or council but would have to abstain in reviewing and approving the activities associated with the DOE Weatherization Assistance Program.

Section 440.18 Allowable Expenditures

DOE proposes to delete from § 440.18(b) and (b)(2)(i) references to (c)(15), the cost of eliminating health and safety hazards from the amount of funds used to determine the average cost per home. State and local agencies have indicated to DOE that including the cost of health and safety into the amount of funds that can be spent on a home severely restricts their flexibility to operate effectively their programs. In providing for this flexibility, DOE agrees that excluding these costs from the average cost per home would afford States and local agencies the opportunity to fund advanced technology practices into their weatherization programs while reducing their administrative burden.

DOE proposes to revise § 440.18(c)(6) to read "Purchase or annual lease of tools, equipment, and the annual lease of vehicles." DOE proposes to add a new (c)(16) as a separate line item for the cost of purchasing vehicles. In doing so, DOE would remove the cost of purchasing vehicles from the amount of funds used to determine the average cost per home. State and local agencies argue that having the cost of these vehicles included in the average cost per home calculation placed an undue burden on them. For some local agencies, purchasing vehicles force them to seek low cost weatherization candidate homes in order to maintain operation while ignoring potentially higher energy savings homes.

The proposed rule would require States to include in their calculations of average per unit costs the costs of leased vehicles, but would now permit States to exclude the cost of purchased vehicles from such calculations. This proposal is being made at the urging of States and local agencies that expressed concerns about the distortionary effects that the purchase price of new vehicles had on average per unit costs. For small

agencies, the purchase of a new vehicle could represent a substantial fraction of the average cost of weatherizing units in the year the vehicle is purchased, which sometimes means that the amount of weatherization performed on any unit would have to be arbitrarily limited in order to stay under the Federally-specified cap on the average cost per unit. DOE is concerned, however, that provisions permitting the exclusion of certain vehicle costs, but not others, would unnecessarily distort the decisionmaking of States and local agencies.

One possible alternative to this approach would be to permit States to exclude from their average per unit cost calculations that portion of the value of any large capital assets that remained at the end of the funding year. This would permit States to include in their average cost calculations only that fraction of the cost of a new vehicle which was actually "used" during the current year. This approach might also permit states to exclude part or most of the purchase price of other large capital investments that have many years of useful life. Such an approach would not affect the ability of States or local agencies to use current funds to pay for the full purchase cost of such investments. DOE solicits comments on its proposal to exclude the cost of purchased vehicles, as well as on this alternative.

DOE proposes to amend § 440.18(e)(2)(iii) by extending the date by which homes can be reweatherized from 1985 to 1993. Previously, DOE extended this date from 1975 to 1985 based on the evolution of the Program. Between 1975 and 1979, the Program addressed primarily building envelope measures. In 1985, the Program expanded to place more emphasis on mechanical measures, including furnace efficiency modifications. Since the last rulemaking which introduced new criteria for advanced energy audits, virtually all States have improved their energy auditing techniques. DOE acknowledges this overall program improvement by the States and is confident that by extending the date to 1993, those homes weatherized between 1985 and 1993 would provide an even greater opportunity to achieve increased energy efficiency. DOE also reminds States that homes which become candidates for reweatherization would have a new energy audit performed and that audit would take into consideration any previous weatherization improvements done on the home.

Section 440.19 Labor

DOE revises § 440.19 by deleting references to JTPA and replacing it with

"other Federal or State training programs." The JTPA Federal program is repealed effective July 1, 2000 pursuant to Pub. L. 105-220.

Section 440.21 Standards and Techniques for Weatherization

DOE is proposing to rename, reorganize, and revise this entire section. The proposed name change more accurately reflects the subject matter of § 440.21. The other major changes eliminate the base audit criteria and make the waiver audit criteria the minimum criteria for an energy audit used in the Program. In its final rule published on March 4, 1993 (58 FR 12525), DOE provided for a waiver of the 40-percent material cost requirement described in § 440.18(a) for those States that adopted advanced energy audit procedures. Today, virtually all of the States have incorporated an approved waiver audit and received a waiver of this requirement from DOE. Within the next year, all States will be using an approved waiver audit. DOE is proposing to make the existing waiver energy audit requirements the new minimum standard for all energy audit procedures. The 40 percent material cost requirement and the waiver provisions have become unnecessary and their suggested elimination from the statute is discussed later in this proposed rule. States and local agencies have made great strides in improving the energy auditing techniques used in their programs during this decade. Investments in time and resources have paid dividends in the form of greater energy efficiency and savings on the types of materials and the installation techniques used in the Program.

To implement this change, DOE proposes to delete all references to Project Retro-Tech audit procedures and the simplified cost-effectiveness tests used with Project Retro-Tech. DOE is proposing that all energy audits require calculation of a savings-to-investment ratio for weatherization measures, and assignment of priorities based on the resulting figures consistent with the life-cycle cost methodology developed by DOE's Federal Energy Management Program and the National Institute of Standards and Technology (NIST). DOE is also proposing that all energy audit procedures require a similar calculation to determine the overall cost effectiveness of the "total conservation investment" including incidental repairs. As in the current rule, the effect of explicitly including incidental repairs is that the extent of such repair costs would be limited by the extent of offsetting cost savings.

The procedures and required assumptions for the life-cycle cost methodology are described in the "Life-Cycle Costing Manual for the Federal Energy Management Program," which is published by NIST. "The Annual Supplement of NIST Handbook 135 and SP 709, Energy Price Indices and Discount Factors for Life-Cycle Cost Analysis" is updated annually to provide an adjusted discount rate based on an average of recent U.S. Treasury bonds of various maturities (less inflation as estimated by the President's Council of Economic Advisers), as well as adjusted, regional, energy cost escalation rates.

The NIST handbook was revised in 1995 to incorporate several changes reflecting the eight years of experience since the 1987 revision. DOE proposes to replace the existing references in § 440.21 to U.S. Treasury bonds, the Economic Report of the President's Council of Economic Advisers, and the DOE Energy Information Administration with citation of the NIST life-cycle costing manual and its annual supplement as a convenient source of discount and fuel cost escalation rates for States. DOE proposes to maintain the States' discretion to choose a reasonable discount rate higher than the one provided in the annual supplement.

In its 1993 Notice of Proposed Rulemaking, DOE allowed States to disregard the energy cost escalation rates if they thought that local energy costs would not rise faster than the rate of general price inflation over the long term. At the time, fuel costs were projected to increase, and giving this discretion allowed States to require of their subgrantees cost-effectiveness standards that were more stringent than the Federal standards. With the cost of some major fuel types now projected to decrease over time, disregarding fuel cost adjustment rates could overestimate the cost-effectiveness of energy conservation measures. For this reason, DOE is proposing to require States to use the fuel cost escalation rates/indices in the NIST annual supplement.

DOE is proposing to include in paragraph (d), the sentence, "The lifetime of materials must not exceed the remaining useful life of the dwelling," to acknowledge that the low-income housing stock served by some programs is in poor condition. A weatherization measure may have a savings-to-investment ratio exceeding one assuming an economic life of twenty years for that material, but a savings-to-investment ratio of less than one in light of a remaining useful dwelling life of, for example, ten years.

DOE is proposing to include in § 440.21(f)(1) the phrase "using generally accepted engineering methods" to remind States to use reasonable energy-estimating methods and assumptions to account for the interaction among weatherization measures.

Paragraph (h) describes the proposed requirements for energy audit procedures that do not pertain to life-cycle costing methods. In paragraph (h)(1), DOE is proposing to substitute the phrase "climatic data" for the existing "number of heating or cooling degree days" to acknowledge that other types of weather data besides heating and cooling degree days can be used in the estimation of fuel cost savings.

DOE is also proposing to include language in paragraph (h)(1) to encourage States to set the balance point temperature(s) used in conjunction with heating and cooling degree data to more reasonably reflect the outside temperatures which require operation of heating or cooling equipment to maintain comfort. Heating degree days are computed by subtracting the average daily temperature from a balance point temperature, which has traditionally been 65° F. The traditional heating degree day balance point temperature assumes that the furnace needs to run at outside temperatures less than 65° F. In reality, the furnace is typically not needed until the outside temperature drops below around 60° F due to the heat generated by lights and people. Similarly, air conditioning is not usually required until outside temperatures exceed traditional cooling degree day balance points by about 5 to 10° F. Encouraging States to set balance points to more reasonably reflect their housing stock and climate would reduce the overestimation of energy savings for most measures, which would more accurately model their true cost-effectiveness.

The State Energy Efficiency Programs Improvement Act of 1990, which amended 42 U.S.C. 6861 *et seq.*, stated that energy audit procedures should "establish priorities for selection of weatherization measures based on their cost and contribution to energy efficiency." DOE interprets this language, in part, to mean that advanced energy audit procedures should consider energy efficiency as well as total energy savings. For example, replacing an existing space heater being used to heat a single room, with a more energy efficient central furnace, capable of heating the whole house, would probably increase energy use even as it improved energy efficiency. The occupants would also be better able to

use the entire dwelling unit. Unless undertaken for health and safety reasons, this measure is to be cost justified by the audit. Addressing energy efficiency in this case would require a cost justification that compares the energy usage of the central unit to the energy usage of heating the entire home with space heaters.

The existing rule language addressing this issue states that energy audit procedures must "consider the rate of energy use," which does not clearly describe the need to look at both energy efficiency and total energy savings. To more directly address situations similar to the space heater example, DOE is proposing instead to include in paragraph (h)(2) the phrase "and energy requirements." This proposed change combines the requirement to determine the existing energy use with the need to determine existing energy requirements from actual energy bills or by generally accepted engineering calculations. As in the space heater example, the energy requirements of a dwelling unit may exceed its existing energy use.

Proposed paragraph (h)(7) reminds States that DOE would have to approve an energy audit for each major dwelling type covered by the State's weatherization program in light of the different energy audit requirements of single-family dwellings, multi-family buildings, and mobile homes.

In paragraph (i), DOE is proposing language that clarifies the type of information DOE requires to approve State priority lists for similar dwelling units. When States submit to DOE their request for priority list approval, they often do not provide sufficient details. For example, inadequate information is provided to explain how dwellings covered by the priority list were established. They also do not tell how the subset of similar dwellings used to develop the priority list was determined, or adequately describe the circumstances that will require a site-specific audit in lieu of the priority list. The increased energy savings resulting from advanced energy audit procedures could be compromised by priority lists that are not based on truly typical housing stock or used without comprehensive guidelines that tell an auditor when atypical circumstances require a site-specific audit.

In § 440.21(k), to make the revalidation of priority lists more straightforward, DOE is proposing to require States to submit to DOE for approval every five years their complete energy audit procedures including priority lists and lists of general heat waste reduction materials. To revalidate their priority lists, States would have to

re-run their energy audit on a subset of the similar dwellings that the priority list covers. States have made the logical argument that their housing stock and typical housing types have not changed in five years. However, technologies, relative costs, and auditing tools do change. Revalidating priority lists every five years is meaningless if States merely resubmit their original list and indicate that nothing has changed. DOE encourages the continual improvement of audit tools as evidenced by new versions of the National Energy Audit (NEAT) over the years. The best and most current audit software should be used in developing priority lists. Since the latest version of a State's audit software may not have specific DOE approval, it makes sense for the DOE approval process to update the energy audit, priority lists, and lists of general heat waste reduction measures every five years.

Furthermore, DOE is proposing that new versions of energy audit software or manual methods released after a State-specific DOE approval, other than the NEAT and the Mobile Home Energy Audit (MHEA) developed by DOE, be re-approved by DOE before a State adopts a new version. Since DOE controls the content of NEAT and MHEA, new versions of these two software packages are designed to comply with the requirements of § 440.21; thus no pre-approval would be needed. However, DOE has no such control over the content of new versions of other energy audit software. To ensure that States' energy audit procedures continue to comply with § 440.21, language is proposed that would require States to get DOE approval for any and all specific versions of energy audit software and manual methods before a State adopts the energy audit.

While not a part of this proposed rule, DOE may propose in the future to require States to include overhead charges (such as costs for supervisory personnel, tools, vehicles, etc.) in the savings to investment ratio calculations for individual weatherization measures. Such costs are a significant fraction of the total costs of weatherizing individual homes and should, therefore, be considered in the assessment of the relative costs and benefits of measures. States are now permitted, but not required, to include such overhead costs in their saving to investment ratio calculations. These costs might be incorporated in these calculations through the use of a standard percentage to adjust the material and labor costs currently used or States and local agencies might develop more sophisticated approaches to including

overhead costs. DOE urges States to consider such overhead costs now. In developing any future proposal to require the inclusion of overhead costs, DOE intends to solicit the views of States or local agencies that have already attempted to incorporate such costs, as well as the views of other stakeholders. DOE is particularly interested in receiving information that indicates how the consideration of such overhead costs affects the overall cost-effectiveness of State and local weatherization efforts. DOE would welcome comments on this issue as a part of this proposed rule.

Section 440.22 Eligible Dwelling Units

DOE proposes to amend § 440.22(b)(2) to add certain eligible types of large multi-family buildings to the list of dwellings that are exempt from the requirement that at least 66 percent of the units are to be occupied by income-eligible households. In these large multi-family buildings, as few as 50 percent of the units would have to be certified as eligible before weatherization. This exception would apply only to those large multi-family buildings where an investment of DOE funds would result in significant energy-efficiency improvement because of the upgrades to equipment, energy systems, common space, or the building shell. By providing this flexibility, local agencies would be better-suited to select the most cost-effective investments and enhance their partnership efforts in attracting leveraged funds and/or landlord contributions.

III. Other

A. Legislative Initiative

On September 20, 1999, the Department proposed a legislative initiative for consideration by the Congress to make certain statutory changes to the Program based on discussions held with State and local stakeholders. The suggested statutory changes are: (1) Eliminate the requirement in § 440.18 that 40 percent of the funds used to weatherize a home be spent for materials; (2) restructure the method in § 440.18 by which States compute their average cost per home by increasing the average cost per home to \$2500 beginning in 2000; and (3) eliminate the separate per dwelling unit average in § 440.18 for capital intensive improvements and include capital intensive costs as a part of the average costs. If this legislative proposal is enacted, DOE will publish implementing regulatory amendments for public comment.

B. Inclusion of Preamble Language From Previous Rulemakings

DOE plans to include in the preamble of the final rule clarifying language on several areas of the program regulations where no actual changes were made. This action will provide States and local agencies the benefit of explanatory language used in the preambles of previous rulemakings which are still applicable today. This is necessary since many State and local staffs have changed several times over the years and much institutional knowledge has been lost. A comprehensive final rule will provide Federal, State, and local agency staff a central document for program regulatory information. This will also help in providing uniform interpretation of the regulations at all levels of the Program.

IV. Opportunities for Public Comment

A. Participation in Rulemaking

The Department encourages public participation in this rulemaking. The Department has established a period of 60 days following publication of this notice for persons to comment on this notice of proposed rulemaking. You may review all public comments and other docket material in the DOE Freedom of Information Reading Room at the address shown at the beginning of this notice of proposed rulemaking.

B. Written Comment Procedures

Interested persons and organizations are invited to participate in this rulemaking by submitting data, views, or comments with respect to the proposed rulemaking. Please provide three copies of your comments to the address indicated in the **ADDRESSES** section of this notice of proposed rulemaking. DOE will consider all timely-submitted comments and other relevant information before issuing a final rule.

C. Public Hearing

1. Request To Speak Procedures

The time and place of the public hearing are indicated in the **DATES** and **ADDRESSES** sections of this notice. The Department invites any person or organization having an interest in the proposed rulemaking to request to make an oral presentation. Your request should be directed to DOE at the address indicated in the **ADDRESSES** section of this notice of proposed rulemaking. You should bring three copies of your statement to the hearing.

2. Conduct of the Hearing

DOE will designate an official to preside at the hearing. This will not be

an evidentiary or judicial-type hearing but will be conducted in accordance with 5 U.S.C. 553 and section 501 of the Department of Energy Organization Act, 42 U.S.C. 7191. Only those conducting the hearing may ask questions. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal or clarifying statement. The statements will be given in the order in which the initial statements were made and will be subject to time limitations.

DOE will prepare a transcript of the hearing. DOE will retain the transcript and other records of this rulemaking and make them available for public inspection at the DOE Freedom of Information Reading Room as provided at the beginning of this notice of proposed rulemaking. Any person may purchase a copy of the transcript from the transcribing reporter.

The presiding officer will announce any further procedural rules needed for the proper conduct of the hearing.

V. Procedural Requirements

A. Review Under Executive Order 12866

Today's proposed regulatory action has been determined not to be "a significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires 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. This rulemaking would amend 10 CFR part 440 to give State and local agencies additional flexibility in addressing the weatherization needs of low-income citizens and to make other changes designed to streamline and update DOE's weatherization assistance program. The proposed rule was developed following extensive consultation with State and local stakeholders, and DOE does not think the proposed rule would have any adverse economic impact on any small governments, organizations or businesses. Accordingly, DOE certifies

that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

C. Review Under the Paperwork Reduction Act

No new collection of information is imposed by this proposed rule. Accordingly, no clearance by the Office of Management and Budget is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act

This proposed rulemaking has been reviewed according to the requirements of the Department's regulations (10 CFR Part 1021) implementing the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* This rulemaking would amend 10 CFR Part 440 to give State and local agencies additional flexibility in addressing the weatherization needs of their low-income citizens and to make other changes designed to streamline and update DOE's weatherization assistance program. The Department has determined that this proposed rulemaking is covered by the Categorical Exclusion in paragraph A5 to subpart D, 10 CFR Part 1021 (rulemaking interpreting or amending an existing regulation, no change in environmental effect.) Accordingly, neither an Environmental Assessment nor an Environmental Impact Statement is required.

E. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's proposed rule and has 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.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice

Reform," 61 FR 4729 (February 7, 1996), imposes on 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 proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year. The Act 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 it requires an agency to develop a plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirement that might significantly or uniquely affect small governments. The proposed rule published today does not contain any Federal mandate, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act

Section 654 of the Treasury and General Government Appropriations

Act, 1999 (Pub. L. No. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's proposal 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.

VI. Other Federal Agencies

DOE provided draft copies of the proposed rule to the Department of Health and Human Services' Low-Income Home Energy Assistance Program and the Department of Agriculture's Farmers Home Administration. We have received no comments. DOE also provided a draft copy to the Administrator of the Environmental Protection Agency, pursuant to § 7 of the Federal Energy Administration Act, as amended, 15 U.S.C. 766. The Administrator has made no comments.

VII. The Catalog of Federal Domestic Assistance

The *Catalog of Federal Domestic Assistance* number for the Weatherization Assistance Program for Low-Income Persons is 81.042.

List of Subjects in 10 CFR Part 440

Administrative practice and procedure, Aged, Energy conservation, Grant programs—Energy, Grant programs—Housing and community development, Persons with disabilities, Housing standards, Indians, Reporting and recordkeeping requirements, weatherization.

Issued in Washington, DC, on January 18, 2000.

Dan W. Reicher,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend Part 440 of Title 10, Code of Federal Regulations, as set forth below.

PART 440—WEATHERIZATION ASSISTANCE PROGRAM FOR LOW-INCOME PERSONS

1. The authority citation for part 440 is revised to read as follows:

Authority: Title IV, Energy Conservation and Production Act, (42 U.S.C. 6861 *et seq.*), as amended; Department of Energy Organization Act, (42 U.S.C. 7101 *et seq.*).

2. Section 440.1 is revised to read as follows:

§ 440.1 Purpose and scope.

This part implements a weatherization assistance program to increase the energy efficiency of dwellings owned or occupied by low-income persons, reducing their total residential expenditures, and improve their health and safety, especially low-income persons who are particularly vulnerable such as the elderly, persons with disabilities, families with children, high residential energy users, and households with high energy burden.

3. In § 440.3, remove the definition for “JTPA” and “Handicapped Person” and add the following definitions in alphabetical order to read as follows:

§ 440.3 Definitions.

* * * * *

Balance point temperature means the outdoor temperature below which the furnace of a dwelling must operate to maintain comfort during the winter, or above which the air conditioner must operate during the summer.

* * * * *

Electric base-load measures means measures which address the energy efficiency and energy usage of lighting and appliances.

* * * * *

High residential energy user means a low-income household whose residential energy expenditures exceed the median level of residential expenditures for all low-income households in the State.

Household with a high energy burden means a low-income household whose residential energy burden (residential expenditures divided by the annual income of that household) exceeds the median level of energy burden for all low-income households in the State.

* * * * *

Persons With Disabilities means any individual—

(1) Who is a handicapped individual as defined in section 7(6) of the Rehabilitation Act of 1973,

(2) Who is under a disability as defined in section 1614(a)(3)(A) or 223(d)(1) of the Social Security Act or in section 102(7) of the Developmental Disabilities Services and Facilities Construction Act, or

(3) Who is receiving benefits under chapter 11 or 15 of title 38, U.S.C.

* * * * *

4. Section 440.14 is revised to read as follows:

§ 440.14 State plans.

(a) Before submitting to DOE an application, a State must provide at least 10 days notice of a hearing to inform prospective subgrantees, and

must conduct one or more public hearings to receive comments on a proposed State plan. The notice for the hearing must specify that copies of the plan are available and state how the public may obtain them. The State must prepare a transcript of the hearings and accept written submission of views and data for the record.

(b) The proposed State plan must:

(1) Identify and describe proposed weatherization projects, including a statement of proposed subgrantees and the amount each will receive;

(2) Address the other items contained in paragraph (c) of this section; and

(3) Be made available throughout the State prior to the hearing.

(c) After the hearing, the State must prepare a final State plan that identifies and describes:

(1) The production schedule for the State indicating projected expenditures and the number of dwelling units, including previously weatherized units which are expected to be weatherized annually during the program year;

(2) The climatic conditions within the State;

(3) The type of weatherization work to be done;

(4) An estimate of the amount of energy to be conserved;

(5) Each area to be served by a weatherization project within the State, and must include for each area:

(i) The tentative allocation;

(ii) The number of dwelling units expected to be weatherized during the program year; and

(iii) Sources of labor.

(6) How the State plan is to be implemented, including:

(i) An analysis of the existence and effectiveness of any weatherization project being carried out by a subgrantee;

(ii) An explanation of the method used to select each area served by a weatherization project;

(iii) The extent to which priority will be given to the weatherization of single-family or other high energy-consuming dwelling units;

(iv) The amount of non-Federal resources to be applied to the program;

(v) The amount of Federal resources, other than DOE weatherization grant funds, to be applied to the program;

(vi) The amount of weatherization grant funds allocated to the State under this part;

(vii) The expected average cost per dwelling to be weatherized, taking into account the total number of dwellings to be weatherized and the total amount of funds, Federal and non-Federal, expected to be applied to the program;

(viii) The average amount of the DOE funds specified in § 440.18(c)(1) through (9) to be applied to any dwelling unit;

(ix) The average amount of DOE funds applied to any dwelling unit for weatherization materials as specified in § 440.18(c)(1);

(x) The procedures used by the State for providing additional administrative funds to qualified subgrantees as specified in § 440.18(d);

(xi) Procedures for determining the most cost-effective measures in a dwelling unit;

(xii) The definition of "low-income" which the State has chosen for determining eligibility for use statewide in accordance with § 440.22(a);

(xiii) The definition of "children" which the State has chosen consistent with § 440.3; and

(xiv) The amount of Federal funds and how they will be used to increase the amount of weatherization assistance that the State obtains from non-Federal sources, including private sources, and the expected leveraging effect to be accomplished.

5. Section 440.15 is amended by revising paragraph (a)(3)(iv) as follows:

§ 440.15 Subgrantees.

(a) * * *

(3) * * *

(iv) The ability of the subgrantee to secure volunteers, training participants, public service employment workers, and other Federal or State training programs.

* * * * *

6. Section 440.16 is amended by revising paragraphs (b) and (d) to read as follows:

§ 440.16 Minimum program requirements.

* * * * *

(b) Priority is given to identifying and providing weatherization assistance to:

(1) Elderly persons;

(2) Persons with disabilities;

(3) Families with children;

(4) High residential energy users; and

(5) Households with a high energy burden.

* * * * *

(d) To the maximum extent practicable, the grantee will secure the services of volunteers when such personnel are generally available, training participants and public service employment workers, other Federal or State training program workers, to work under the supervision of qualified supervisors and foremen;

* * * * *

7. In § 440.17 paragraph (a) introductory text is revised and paragraphs (b) and (c) are added to read as follows:

§ 440.17 Policy Advisory Council.

(a) Prior to the expenditure of any grant funds, a State policy advisory council, or a State commission or council which serves the same functions as a State policy advisory council, must be established by a State or by the Support Office Director if a State does not participate in the Program which:

* * * * *

(b) Any person employed in any State Weatherization Program may also be a member of an existing commission or council, but must abstain from reviewing and approving activities associated with the DOE Weatherization Assistance Program.

(c) States which opt to utilize an existing commission or council must certify to DOE, as a part of the annual application, of the council's or commission's independence in reviewing and approving activities associated with the DOE Weatherization Assistance Program.

8. Section 440.18 is amended by revising paragraph (a), removing the phrase "and (c)(15)" in the introductory text to paragraph (b) and in paragraph (b)(2)(i); revising paragraph (c)(6); adding paragraph (c)(16); and revising "September 30, 1985" to read "September 30, 1993" in paragraph (e)(2)(iii) to read as follows:

§ 440.18 Allowable expenditures.

(a) States must spend an average of at least 40 percent of the funds provided them for weatherization materials, labor and related matters listed in paragraphs (c)(1) through (9) of this section. DOE may approve a State's application to waive the 40 percent requirement under § 440.21.

* * * * *

(c) * * *

(6) Purchase or annual lease of tools and equipment and the annual lease of vehicles;

* * * * *

(16) The cost of purchasing vehicles, except that any purchase of vehicles must be referred to DOE for prior approval in every instance.

* * * * *

9. Section 440.19 is revised to read as follows:

§ 440.19 Labor.

Payments for labor costs under § 440.18(c)(2) must consist of:

(a) Payments permitted by the Department of Labor to supplement wages paid to training participants, public service employment workers, or other Federal or State training programs; and

(b) Payments to employ labor or to engage a contractor (particularly a

nonprofit organization or a business owned by disadvantaged individuals which perform weatherization services), provided a grantee has determined an adequate number of volunteers, training participants, public service employment workers, or other Federal or State training programs are not available to weatherize dwelling units for a subgrantee under the supervision of qualified supervisors.

10. Section 440.21 is revised to read as follows:

§ 440.21 Weatherization materials standards and energy audit procedures.

(a) Paragraph (b) of this section describes the required standards for weatherization materials. Paragraphs (c) through (g) of this section describe the cost-effectiveness tests that weatherization materials must pass before they may be installed in an eligible dwelling unit. Paragraph (h) of this section lists the other energy audit requirements that do not pertain to cost-effectiveness tests of weatherization materials. Paragraphs (i) and (j) of this section describe the use of priority lists and lists of presumptively cost-effective general heat waste reduction materials as part of a State's energy audit procedures. Paragraphs (k) and (l) of this section explain that a State's energy audit procedures, priority lists, and lists of general heat waste reduction materials must be re-approved by DOE every 5 years.

(b) State and local agencies may only purchase weatherization materials which meet or exceed standards prescribed and listed in Appendix A to this part with funds provided under this part. However, States may submit to DOE an unlisted material for review and approval.

(c) Except for materials to eliminate health and safety hazards allowable under § 440.18(c)(15), each individual weatherization material and package of weatherization materials installed in an eligible dwelling unit must be cost-effective by meeting a savings-to-investment ratio that is greater than or equal to one. The savings-to-investment ratio of an individual weatherization material or package of weatherization materials is the net fuel cost savings over the lifetime of the material(s), discounted to present value, divided by the material, installation, and related costs as defined in paragraphs (e) and (g) of this section.

(d) The net fuel cost savings over the lifetime of an individual weatherization material or package of weatherization materials must be discounted using the DOE discount rate from the Annual Supplement to NIST Handbook 135,

Energy Price Indices and Discount Factors for Life-Cycle Cost Analysis (NISTIR 85-3273-14). The discount rate and regional fuel cost adjustment rates/indices provided in the annual supplement must be used in accordance with the procedures in NIST Handbook 135, Life-Cycle Costing Manual for the Federal Energy Management Program. The lifetime of materials must not exceed the remaining useful life of the dwelling. In their computation of savings-to-investment ratios, States:

- (1) May keep the discount rate constant up to 5 years and may use a reasonably higher real discount rate subject to a ceiling of 10 percent and a floor of 3 percent;
- (2) May keep the fuel cost adjustment rates/indices constant up to 5 years; and
- (3) Must use figures for the lifetime of the materials and for the cost of materials and cost of the installation of the materials that are generally accepted in the relevant trade.

(e) In calculating the savings-to-investment ratio of an individual weatherization material, the denominator must include the costs for materials, labor, and on-site supervisory personnel to be claimed as allowable under § 440.18(c)(1), (2), and (7), and any other significant, related cost that a State requires to be included.

(f) The energy audit procedures must assign priorities among individual weatherization materials in descending order of their savings-to-investment ratios according to paragraphs (c) through (e) of this section after:

(1) Adjusting those savings-to-investment ratios for interaction between architectural and mechanical weatherization materials by using generally accepted engineering methods to decrease the estimated fuel cost savings for a lower priority weatherization material in light of fuel cost savings for a related higher priority weatherization material; and

(2) Eliminating any weatherization material if its savings-to-investment ratio, as adjusted under paragraph (f)(1) of this section, is less than one.

(g) In calculating the savings-to-investment ratio of a package of weatherization materials to be installed in an eligible dwelling unit, the denominator must include the costs for materials, labor, on-site supervisory personnel, and incidental repairs to be claimed as allowable under § 440.18(c)(1), (2), (7), and (9), and any other significant, related cost that a State requires to be included. To ensure that the total conservation investment in a dwelling unit has a positive rate of return, the numerator of the overall savings-to-investment ratio must

include the cumulative net fuel cost savings of all weatherization materials installed in the dwelling unit, discounted to present value according to paragraphs (c) and (d) of this section and adjusted for interaction among energy efficiency measures, if any, according to paragraph (f) of this section.

(h) The energy audit procedures also must—

(1) Compute the cost of fuel saved per year by taking into account the climatic data of the area of where the dwelling unit is located, where the balance point temperature(s) of the dwelling unit represents conditions when operation of heating or cooling equipment is required to maintain comfort, and must otherwise use reasonable energy estimating methods and assumptions;

(2) Determine existing energy use and energy requirements of the dwelling unit from actual energy bills or by generally accepted engineering calculations;

(3) Address significant heating and cooling needs;

(4) Make provision for the use of advanced diagnostic and assessment techniques which DOE has determined are consistent with sound engineering practices;

(5) Identify health and safety hazards to be abated with DOE funds in compliance with the State's DOE-approved health and safety procedures under § 440.16(h);

(6) Treat the dwelling unit as a whole system by examining its heating and cooling system, its air exchange system, and its occupants' living habits and needs, and making necessary adjustments to the priority of weatherization materials with adequate documentation of the reasons for such an adjustment; and

(7) Be specifically approved by DOE for use on each major dwelling type covered by the State's weatherization program in light of the varying energy audit requirements of different dwelling types including single-family dwellings, multi-family buildings, and mobile homes.

(i) For similar dwelling units without unusual energy-consuming characteristics, energy audits may be accomplished by using a priority list developed by conducting, in compliance with paragraphs (b) through (h) of this section, site-specific energy audits of a representative subset of these dwelling units. For DOE approval, States must describe how the priority list was developed, how the subset of similar homes was determined, and circumstances that will require site-specific audits rather than the use of the

priority lists. States also must provide the input data and list of weatherization measures recommended by the energy audit software or manual methods for several dwelling units from the subset of similar units.

(j) Subject to DOE approval, a State may use as a part of an energy audit a list of presumptively cost-effective general heat waste reduction weatherization materials. States must show these materials are cost-effective in typical dwelling units for major dwelling unit types in the State based on documentation of analytic reports, published articles, sample energy calculations, or a representative number of site-specific energy audits. States must also describe the circumstances under which such materials may be presumed cost-effective without need for further site-specific audit justification.

(k) States must resubmit their energy audit procedures to DOE for approval every 5 years including the current version of the energy audit software or manual methods used by the State. New versions of energy audit software or manual methods released after State-specific DOE approval, other than the National Energy Audit (NEAT) and the Mobile Home Energy Audit (MHEA) developed by DOE, must be re-approved by DOE before adoption by a State.

(l) Priority lists and lists of general heat waste reduction materials developed in accordance with paragraphs (i) and (j) of this section, if applicable, must also be resubmitted to DOE for approval every 5 years. Priority lists and lists of general heat waste reduction materials must be revalidated by conducting a representative sample of site-specific energy audits with the version of energy audit software or manual methods that the State submits for DOE approval in accordance with paragraph (k) of this section.

11. Section 440.22 is amended by revising paragraph (b)(2) introductory text to read as follows:

§ 440.22 Eligible dwelling units.

* * * * *

(b) * * *

(2) Not less than 66 percent (50 percent for duplexes and four-unit buildings, and certain eligible types of large multi-family buildings) of the dwelling units in the building:

* * * * *

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