DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Parts 420 and 450

[Docket No. EE–RM–96–402]

RIN 1904–AA81

State Energy Program

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

ACTION: Final rule.

SUMMARY: Today the Department of Energy is publishing a final rule revising the regulations for its State Energy Program in response to comments received after the publication of the program's interim final rule on July 8, 1996. With the exception of the revisions to the interim final rule discussed herein, the interim final rule is being adopted as it was printed on July 8, 1996.

EFFECTIVE DATE: June 13, 1997.

FOR FURTHER INFORMATION CONTACT: Thomas P. Stapp, Office of Building Technology, State and Community Programs, Department of Energy, Mail Stop 5G–063, EE–44, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC 20585, (202) 586–2096.

SUPPLEMENTARY INFORMATION:

I. Introduction and Description of the Program

On July 8, 1996, the Department of Energy (Department or DOE) published in the **Federal Register** an interim final rule consolidating the State Energy Conservation Program (SECP) and the Institutional Conservation Program (ICP) under the name ''State Energy Program'' (SEP or program). 61 FR 35890 The program provides formula grants to States for a wide variety of energy efficiency and renewable energy initiatives, and, in years when funding is available, may also offer financial assistance for a number of State-oriented competitively awarded special project activities.

The Department also included in its July 8, 1996 rulemaking the removal of 10 CFR part 450, which constituted prescriptive energy audit procedures that are no longer needed.

Six comment letters were received regarding the changes made under 10 CFR part 420, which are discussed herein. No comments were received regarding the removal of 10 CFR part 450, and its removal is herein made final.

II. The Revisions to the Rule

With the exception of the revisions made and discussed below, this rule is adopted as it was published in the program's interim rule on July 8, 1996 (61 FR 35890). The major issues raised in the comments are discussed below.

Section 420.2 Definitions

Several commenters argued that the revised definition for ''building'' was too restrictive, with some suggesting that the definition be reduced to ''any structure.'' DOE is not making that change because it would disregard the statutory definition of ''building'' requiring provision for a ''heating or cooling system, or both, or for a hot water system''. 42 U.S.C. 6326. However, DOE has revised the definition by limiting it to the wording in the statutory definition.

Four exceptions included in the interim definition of ''building'' have been removed from the new definition and, as appropriate, moved to the specific sections of the rule where they apply, as follows:

(1) The exception regarding buildings for which the peak design rate of energy usage for all purposes is less than one watt (3.4 Btu's per hour) per square foot of floor area has been moved to § 420.15(d)(1), which covers mandatory thermal efficiency standards for new and renovated buildings. States are not required to implement thermal efficiency standards for buildings that are covered by this exception.

(2) The exception regarding buildings with neither a heating nor a cooling system or a hot water sytem is incorporated into the definition of ''building'' and does not need to be repeated, as a commenter pointed out. Such buildings are not eligible for any type of assistance under SEP.

(3) The exception regarding mobile homes has been revised to cover ''manufactured homes,'' which is the current term of art, and has been moved to § 420.15(d)(1), which covers mandatory thermal efficiency standards for new and renovated buildings. States are not required to implement thermal efficiency standards for ''manufactured homes'' because that is already done by the U. S. Department of Housing and Urban Development. (A definition for ''manufactured home'' has also been added, as discussed under that term.) Buildings meeting the definition of ''manufactured home'' are eligible for appropriate assistance under SEP other than their exclusion from the SEP mandatory thermal efficiency standards.

(4) The exception regarding buildings owned or leased by the United States has been moved to § 420.15(a)(2), which covers mandatory lighting efficiency standards, and § 420.15(d)(1), which covers mandatory thermal efficiency standards. States are not required to implement either of those types of standards for buildings owned or leased by the United States. The exception for such buildings has also been added as a new § 420.18(e)(3) under expenditure prohibitions and limitations. Buildings owned or leased by the United States are not eligible under SEP for funding the purchase and installation of equipment and materials for energy efficiency and renewable energy measures.

A number of commenters stated that the definition of ''energy audit'' was limiting due to its being confined to buildings and being overly specific. DOE has therefore replaced that definition with a new one suggested by two of the commenters (based on the definition in the Act), which has broader application to all capital investments that are eligible for funding under SEP. DOE will be providing energy audit guidance for consideration by the States.

Several commenters expressed concern that the definition for ''energy conservation measure'' was too restrictive. DOE has changed the term defined to ''energy efficiency measure'' to reflect the broader current concerns of SEP, removing the restriction to buildings, and providing for a wide range of cost-effective improvements.

DOE has added a definition for ''manufactured home'' in conjunction with moving some of the exceptions to eligible buildings to § 420.15, as previously discussed. The term formerly used was ''mobile homes'' which was not defined.

A few commenters complained that the definition of ''renewable energy measure'' was too restrictive, and DOE has revised this definition to provide for a wider range of activities.

One commenter claimed that the definition of ''variable working schedule'' should include, as an example, telecommuting. DOE has

revised that definition to provide for examples of allowable activities including the activities formerly part of the definition plus telecommuting.

Section 420.5 Reports.

Some commenters advocated that DOE require semiannual rather than quarterly reports, and that the reports be simplified. DOE has determined that quarterly reports are needed to adequately track the progress of the program, but will work with the States to streamline the reports and to expedite the quantification of results.

Section 420.11 Allocation of funds among the States.

A few commenters argued that two of the data elements in the base allocation (population and SECP savings data) should be updated annually. DOE has not made this change because it believes the base allocation needs to remain constant to reflect and incorporate the historical distribution of funding for SEP's component programs, SECP and ICP, that formerly used different funding formulas.

One commenter recommended that DOE use only one approach for the entire allocation, either the base allocation approach or the new formula. For the reason stated in the previous paragraph, DOE believes the base allocation should remain constant, with the new formula applying only to available funding above $25.5 million, so DOE is not making this change.

One commenter wanted DOE to use the most recent population and energy consumption data for the new formula. DOE intends to do this, as stated under § 420.11(b)(4)(iii).

Section 420.12 State matching contribution.

One commenter asked if petroleum violation escrow (PVE) funds could be used to meet the requirement for a State matching contribution. Under SEP, PVE funds that are considered as ''Federally appropriated'' funds (such as Warner Amendment and Exxon funds) may not be used to meet a State's matching contribution. However, PVE funds that are considered as ''non-Federally appropriated'' (such as Stripper Well and Diamond Shamrock funds) may be used to meet a State's matching contribution.

Section 420.13 Annual State applications and amendments to State plans.

A number of commenters requested that DOE simplify the information required in SEP grant applications, including the requirement that goals be specified and quantified each year under § 420.13(b) (2) and (3). DOE believes a State's goals need to be articulated each year as part of making the program accountable, and therefore DOE is not making this change. However, as mentioned under § 420.5, Reports, DOE will be working with the States to simplify and expedite the quantification of program goals and results.

One commenter expressed the opinion that annual applications should be required, but not State plans. While DOE does not require complete State plans to be resubmitted each year, amendments to plans need to be submitted whenever the activities a State intends to undertake under SEP change. If an activity for which funds are sought is not in the State plan, then an amendment to that plan is necessary because the Act only authorizes DOE to provide financial assistance to execute State plans. The heading of this section and the wording of § 420.13(a) have been revised to clarify this.

One commenter suggested that States be allowed to submit an assurance that the required activities under § 420.15 have been implemented. DOE was not persuaded by this comment, because these activities need to be accounted for annually, as specified under § 420.13(b)(4)(v), which has been revised to make the requirement clearer.

One commenter argued that States should only have to address the issues specified under § 420.13 (b)(5) and (b)(6) in cases where a State is actually undertaking activities that apply to those situations. That is DOE's intent, and those paragraphs have been revised to clarfy that.

Section 420.14 Review and approval of annual State applications and amendments to State plans.

One commenter suggested that ''plans'' be dropped from the heading and that only applications be required. As already discussed under § 420.13, DOE is continuing to require amendments to plans to reflect changes, and DOE has revised this heading to provide for amendments to State plans. Unless the State elects to submit a complete plan each year with its application, DOE only requires appropriate plan amendments.

Section 420.15 Minimum criteria for required program activities for plans.

One commenter wanted the references to ''plans'' in the heading and the text of the section deleted and replaced with ''applications.'' As with the discussions under §§ 420.13 and 420.14, this commenter argued that only applications should be required each year, not plans. Since the statute requires that the State plan include the relevant activities a State is undertaking, DOE is not deleting the requirement for State plan amendments where warranted.

Section 420.17 Optional elements of State Energy Program plans.

One commenter thought only applications should be required and wanted the reference to ''plans'' in the heading replaced with ''applications.'' As already discussed under §§ 420.13, 420.14, and 420.15, DOE has not made this change because State plan amendments must continue to be submitted with applications when a State changes the SEP activities for which it is seeking financial assistance. Paragraphs (a)(3) and (a)(7) have been revised to replace the term ''energy conservation measure'' with ''energy efficiency measure'' to coincide with the change in terms defined, as discussed under § 420.2, Definitions.

Section 420.18 Expenditure prohibitions and limitations.

One commenter asked that design costs be allowable as part of energy efficiency and renewable energy measure costs, and DOE has revised § 420.18(e) to provide for reasonable design costs to be allowable.

Some commenters advocated that DOE drop the 50 percent limit on energy efficiency and renewable energy measure expenditures because it was unnecessary. DOE believes that it is reasonable to have this 50 percent limitation in order to, in general, keep a balance between State activities relating to energy efficiency and renewable energy measures and the wide variety of other types of SEP activities that States may undertake. On the other hand, DOE also believes it is worthwhile to include the possibility of a waiver, provided for under § 420.18(e)(2), for States that plan to use more than 50 percent of their SEP funds for energy efficiency and renewable energy measures. DOE will treat any waiver requests expeditiously; States simply need to explain how much funding they plan to devote to energy efficiency and renewable energy measures, and why they need to exceed the 50 percent limit. Therefore, DOE has not dropped the 50 percent limit.

One commenter claimed the restriction on loan repayments and the prohibition on loan forgiveness specified under § 420.18(e)(2) should not apply to non-Federal funds used under SEP. DOE is of the view that any funds used under SEP must be used in

compliance with the SEP rule, and is not changing those restrictions.

One commenter wanted the wording under § 420.18(e)(3) revised to provide for public buildings, not just State and local government buildings. DOE believes this entire paragraph should be deleted; the section applies to all eligible buildings and the range of eligible buildings has already been specified under § 420.17(a)(3). DOE is replacing that paragraph with one excluding from eligibility for energy efficiency and renewable energy measures buildings owned or leased by the United States as was discussed earlier under the definition of ''building.''

Former § 420.18 (e)(6), (e)(6)(i), and (e)(6)(ii) have been redesignated § 420.18 (f), (f)(1), and (f)(2), respectively, because they are more logically separate paragraphs rather than continuations of the limitations specified under paragraph (e).

One commenter wondered if the 50 percent limit on rebates specified under new § 420.18(f)(1) (former § 420.18(e)(6)(i)) applied to grants. This limit does not apply to grants, which may be for up to 100 percent of the cost of measures under SEP.

III. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987) requires that regulations, legislation and any other policy action be reviewed for any substantial direct effects on States, on the relationship between the National Government and the States, or on the distribution of power among various levels of government. If there are sufficient substantial direct effects, the Executive Order requires preparation of a federalism assessment to be used in decisions by senior policy-makers in promulgating or implementing the regulation.

Today's regulatory amendments will not have a substantial direct effect on the traditional rights and prerogatives of States in relationship to the Federal Government. Preparation of a federalism assessment is therefore unnecessary.

IV. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, October 4, 1993. Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA).

V. Review Under Executive Order 12988

Section 3 of Executive Order 12988, 61 FR 4729 (February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in Section 3 (a) and (b), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that today's regulatory action meets the requirements of Section 3 (a) and (b) of Executive Order 12988.

VI. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed on the public by today's rules.

VII. Review Under the National Environmental Policy Act

A programmatic environmental assessment has been prepared covering the grant program under the final regulations published today which was sent to the States for comment on March 27, 1996. No comments were received by the end of the 14-day comment period. This programmatic environmental assessment resulted in a finding of no significant impact (FONSI). A FONSI was issued on June 7, 1996. The documents relating to this programmatic environmental assessment are available in the DOE Freedom of Information Reading Room, United States Department of Energy, Room 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6020.

VIII. Congressional Notification

The final regulations published today are subject to the Congressional notification requirements of the Small Business Regulatory Enforcement Fairness Act of 1996 (Act), 5 U.S.C. 801. OMB has determined that the final regulations do not constitute a ''major rule'' under the Act, 5 U.S.C. 804. DOE will report to Congress on the promulgation of the final regulations prior to the effective date set forth at the beginning of this notice.

IX. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 imposes a variety of procedural requirements on agencies proposing or finalizing a ''Federal mandate'' on State, local, and tribal governments. 2 U.S.C. 1531–1535. None of these requirements apply to this rulemaking because, by definition, enforceable duties that are a condition of Federal financial asistance do not constitute a ''Federal mandate.'' 2 U.S.C. 658 (5)(A)(i)(I), (6).

X. The Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the State Energy Program is 81.041.

List of Subjects in 10 CFR Part 420

Energy conservation, Grant programs—energy, Reporting and recordkeeping requirements, Technical Assistance, Incorporation by reference.

Issued in Washington, DC, on April 11, 1997.

Christine A. Ervin,

Assistant Secretary, Energy Efficiency and Renewable Energy.

Accordingly, the interim rule revising 10 CFR part 420 and removing 10 CFR part 450 which was published at 61 FR 35890 on July 8, 1996, is adopted as a final rule with the following changes to part 420:

PART 420—STATE ENERGY PROGRAM

1. The authority citation for part 420 continues to read as follows:

Authority: Title III, part D, as amended, of the Energy Policy and Conservation Act (42 U.S.C. 6321 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*)

§ 420.2 [Amended]

2. Section 420.2 is amended by (a) Revising the definitions for ''Building,'' ''Energy audit,'' ''Renewable energy measure,'' and ''Variable working schedule;'' by (b) adding, in alphabetical order, the definitions of ''Energy efficiency measure,'' and ''Manufactured home;'' and by (c) removing the definition of ''Energy conservation measure,'' to read as follows:

§ 420.2 Definitions.

* * * * *

Building means any structure which includes provision for a heating or cooling system, or both, or for a hot water system.

* * * * *

Energy audit means any process which identifies and specifies the energy and cost savings which are likely to be realized through the purchase and installation of particular energy efficiency measures or renewable energy measures.

Energy efficiency measure means any capital investment that reduces energy costs in an amount sufficient to recover the total cost of purchasing and installing such measure over an appropriate period of time and maintains or reduces non-renewable energy consumption.

* * * * *

Manufactured home means any dwelling covered by the Federal Manufactured Home Construction and Safety Standards, 24 CFR part 3280.

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Renewable energy measure means any capital investment that reduces energy costs in an amount sufficient to recover the total cost of purchasing and installing such measure over an appropriate period of time and that results in the use of renewable energy to replace the use of non-renewable energy.

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Variable working schedule means a flexible working schedule to facilitate activities such as carpools, vanpools, public transportation usage, and/or telecommuting.

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§ 420.13 [Amended]

3. Section 420.13 is amended by revising the heading, paragraph (a), paragraph (b)(4)(iii), paragraph (b)(4)(v), paragraph (b)(5), and paragraph (b)(6) to read as follows:

§ 420.13 Annual State applications and amendments to State plans.

(a) To be eligible for financial assistance under subpart B of this part, a State shall submit to the cognizant Regional Support Office Director an original and two copies of the annual application executed by the Governor, including an amended State plan or any amendments to the State plan needed to reflect changes in the activities the State is planning to undertake for the fiscal year concerned. The date for submission of the annual State application shall be set by DOE.

(b) * * *

(4) * * *

(iii) A narrative statement detailing the nature of State plan amendments and of new program activities.

* * * * *

(v) An explanation of how the minimum criteria for required program activities prescribed in § 420.15 have been implemented and are being maintained.

(5) If any of the activities being undertaken by the State in its plan have environmental impacts, a detailed description of the increase or decrease in environmental residuals expected from implementation of a plan defined insofar as possible through the use of information to be provided by DOE and an indication of how these environmental factors were considered in the selection of program activities.

(6) If a State is undertaking program activities involving purchase or installation of materials or equipment for weatherization of low-income housing, an explanation of how these activities would supplement and not supplant the existing DOE program under 10 CFR part 440.

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§ 420.14 [Amended]

4. Section 420.14 is amended by revising the heading and paragraph (a) to read as follows:

§ 420.14 Review and approval of annual State applications and amendments to State plans.

(a) After receipt of an application for financial assistance under subpart B of this part and for approval of an amendment, if any, to a State plan, the cognizant Regional Support Office Director may request the State to submit within a reasonable period of time any revisions necessary to make the application complete and to bring the application into compliance with the requirements of this part. The cognizant Regional Support Office Director shall attempt to resolve any dispute over the application informally and to seek voluntary compliance. If a State fails to submit timely appropriate revisions to complete an application or to bring it into compliance, the cognizant Regional Support Office Director may reject the application in a written decision, including a statement of reasons, which shall be subject to administrative review under § 420.19 of this part.

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§ 420.15 [Amended]

5. Section 420.15 is amended by revising paragraphs (a)(2) and (d)(1) to read as follows:

§ 420.15 Minimum criteria for required program activities for plans.

* * * * *

(a) * * *

(2) Apply to all public buildings (except for public buildings owned or leased by the United States), above a certain size, as determined by the State;

* * * * *

(d) * * *

(1) Be implemented throughout the State, with respect to all buildings (other than buildings owned or leased by the United States, buildings whose peak design rate of energy usage for all purposes is less than one watt (3.4 Btu's per hour) per square foot of floor space for all purposes, or manufactured homes), except that the standards shall be adopted by the State as a model code for those local governments of the State for which the State's law reserves the exclusive authority to adopt and implement building standards within their jurisdictions;

* * * * *

§ 420.17 [Amended]

6. Section 420.17 is amended by revising paragraph (a)(3) introductory text, paragraph (a)(3)(i), and paragraph (a)(7) to read as follows:

§ 420.17 Optional elements of State Energy Program plans.

(a) * * *

(3) Program activities for financing energy efficiency measures and renewable energy measures—

(i) Which may include loan programs and performance contracting programs for leveraging of additional public and private sector funds and program activities which allow rebates, grants, or other incentives for the purchase of energy efficiency measures and renewable energy measures; or

* * * * *

(7) Program activities to identify unfair or deceptive acts or practices which relate to the implementation of energy efficiency measures and renewable energy measures and to educate consumers concerning such acts or practices;

* * * * *

§ 420.18 [Amended]

7. Section 420.18 is amended by revising the introductory text to paragraph (e), by revising paragraphs (e)(3) and (e)(5), and by redesignating paragraphs (e)(6) introductory text, (e)(6)(i), and (e)(6)(ii) as new paragraphs (f) introductory text, (f)(1), and (f)(2), respectively, to read as follows:

§ 420.18 Expenditure prohibitions and limitations.

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(e) A State may use funds under this part for the purchase and installation of equipment and materials for energy efficiency measures and renewable energy measures, including reasonable

design costs, subject to the following terms and conditions:

* * * * *

(3) Buildings owned or leased by the United States are not eligible for energy efficiency measures or renewable energy measures under this paragraph;

* * * * *

(5) Subject to paragraph (f) of this section, a State may use a variety of financial incentives to fund purchases and installation of materials and equipment under this paragraph including, but not limited to, regular loans, revolving loans, loan buy-downs, performance contracting, rebates and grants.

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[FR Doc. 97–12641 Filed 5–13–97; 8:45 am]

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