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July 19, 1985

Part V

Department of Energy

Office of Conservation and Renewable
Energy

10 CFR Part 440

Weatherization Assistance for Low-
Income Persons; Notice of Proposed
Rulemaking and Public Hearings

DEPARTMENT OF ENERGY

Office of Conservation and Renewable Energy

10 CFR Part 440

[Docket No. CAS-RM-80-508]

Weatherization Assistance for Low-Income Persons

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

ACTION: Notice of proposed rulemaking and public hearings.

SUMMARY: The Department of Energy (DOE) is issuing a notice of proposed rulemaking for the Program for Weatherization Assistance for Low-Income Persons in order to implement a recent statutory change requiring that a Performance Fund be established to provide additional financial assistance to those States demonstrating best performance under the Program. The proposed regulation sets forth the following criteria for determining annually which States have demonstrated the best performance: Percentage of eligible dwelling units within the State which have been weatherized during the evaluation period; energy savings data supplied by the States; States' actual performance in achieving goals as projected in the State Application; States' ability to use available funds during the relevant period.

Beginning in fiscal year 1986, not less than 5 and not more than 15 percent of the amount appropriated for the Program for each fiscal year will be set aside by DOE to establish the Performance Fund. The twenty States to have demonstrated best performance will share the Performance Fund each year. The first funds awarded under the Performance Fund will be made available for expenditure during program year 1987.

DOE is aware that the equitable implementation of this statutory requirement is important to States. DOE is proposing a methodology it believes will give each State an equal opportunity to compete for the funds without regard to climate or amount of funding allocation. Each State will be evaluated individually on how effectively and efficiently it operates the DOE weatherization program.

DATES: Written comments must be received on or before September 17, 1985.

Public hearings will be held in:
Atlanta, Georgia—August 7, 1985—9:30 AM

(Request to speak by August 2)
San Francisco, California—August 9, 1985—9:30 AM

(Request to speak by August 6)
Boston, Massachusetts—August 12, 1985—9:30 AM

(Request to speak by August 7)
Chicago, Illinois—August 14, 1985—9:30 AM

(Request to speak by August 9)
Dallas, Texas—August 16, 1985—9:30 AM

(Request to speak by August 13)
Washington, DC—August 20, 1985—9:30 AM

(Request to speak by August 15)

ADDRESSES: Public hearing locations—

Atlanta, Georgia:

Richard Russell Federal Building, 75 Spring Street, Lower Plaza Conference Room (LP-7), 30303

San Francisco, California:

Federal Office Building, 450 Golden Gate Avenue, (between Polk & Larkin Streets), Room 13029 (13th Floor) 94102

Boston, Massachusetts:

John F. Kennedy Federal Building, Government Center, Room 2003-A (20th Floor) 02203

Chicago, Illinois:

U.S. District Court, 219 South Dearborn, Room 1669 (16th Floor) 60604

Dallas, Texas:

Main Tower Building, 1200 Main Street, Room 635 (6th Floor) 75202

Washington, DC:

U.S. Department of Energy, 1000 Independence Avenue, SW., Room 1E-245 (1st Floor) 20585

All written comments and requests to speak at the hearings should be addressed to: Conservation and Renewable Energy, Department of Energy, Office of Hearings and Dockets, Forrestal Building, Room 6B-025, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 252-9319. Though five (5) copies are requested to be submitted, this is not a mandatory requirement in order to submit comments. In the event any person wishing to submit a written comment cannot provide five copies, alternative arrangements can be made in advance with the Office of Hearings and Dockets.

FOR FURTHER INFORMATION CONTACT: Greg Reamy, Office of Weatherization Assistance Program, Conservation and Renewable Energy Department of Energy, Mail Shop 5G-023, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 252-2207.

Dan Ruge, Office of General Counsel, Department of Energy, Mail Stop 6B-144, Forrestal Building, 1000 Independence

Avenue, SW., Washington, DC 20585, (202) 252-9527.

SUPPLEMENTARY INFORMATION:

- I. Introduction and Background of the Program
- II. Amendments to the Weatherization Assistance Program
- III. Opportunity for Public Comment
- IV. Environmental, Regulatory Impact, Regulatory Flexibility, Paperwork Reduction Act, and Coordinating Agency Reviews

I. Introduction and Background of the Program*Introduction*

The Department of Energy (DOE) is proposing an amendment to the regulations for the Weatherization Assistance for Low-Income Persons Program (Program or WAP), 10 CFR Part 440, issued under Title IV of the Energy Conservation and Production Act, as amended, 42 U.S.C. 6861 *et seq.* (Act or Program Statute). Today's action proposes implementation of a new provision of the Program required by the recent passage of section 404, 42 U.S.C. 6865, of the Human Services Reauthorization Act of 1984, Pub. L. 98-558, 98 Stat. 2888 (Amending Act). When final, this amendment will provide States an opportunity to compete annually for additional funding based on their performance in operating the Weatherization Assistance Program.

Background of the Program

The Act authorized DOE to establish a program to weatherize the homes of low-income persons, particularly those who are elderly or handicapped. The program is intended to reduce national energy consumption, particularly of imported oil, and to reduce the impact of higher fuel costs on low-income families. Funds are provided to install weatherization materials such as insulation, storm windows, caulking and weatherstripping, and to make furnace efficiency modifications and other improvements to conserve energy.

DOE currently makes grants to States, the District of Columbia, and under certain circumstances, Indian tribal organizations. The Governor of each State, or designee, applies for, receives and administers the grant funds. The funds are distributed by the States and the District of Columbia to local governments and nonprofit organizations to weatherize homes. Certain Indian tribal organizations also administer Federal funds and perform weatherization activities under this Program.

Funds are allocated by DOE through a formula which reflects the relative need

for weatherization assistance among the States. The formula takes into account the number of low-income households, the percentage of total residential energy used for space heating and cooling, and the number of heating and cooling degree days in each State.

II. Amendment to the Weatherization Program

DOE is proposing in this rulemaking to establish the criteria and procedures by which States will be evaluated to determine which have demonstrated the best program performance. This evaluation will serve as the basis for DOE awarding supplemental funding to States from the Performance Fund.

The percentage of appropriated funds to be set aside for each year's Performance Fund will be determined by DOE and issued as part of the Annual Grant Guidance. This amount will be between 5 and 15 percent of the appropriated funds.

Section 440.26 Establishment of the Performance Fund.

Beginning in fiscal year 1986, not less than 5 and not more than 15 percent of the amount appropriated for each fiscal year will be set aside by DOE to establish the Performance Fund as required by the Amending Act. The Amending Act requires that the determinations of best performance be on a fiscal year basis (October 1 through September 30 of the following calendar year). The program, however, is operated on a program year basis (April 1 through March 31 of the following calendar year). In order to accommodate these two different "years," DOE is proposing to use relevant evaluative information from an 18-month period beginning with a given fiscal year (October 1) and running through the related program year (March 31 of the second following calendar year). This 18-month period is called the "relevant reporting period." The first relevant reporting period is proposed to run from October 1, 1985, through March 31, 1987. Funds for the first year will be made available in program year 1987.

On January 4, 1985, DOE published at 50 FR 708 an interim final rule implementing seven other amendments to the Weatherization Program mandated by the Amending Act. In that rulemaking DOE indicated that a separate rulemaking would be issued concerning the Performance Fund amendment. While the interim final rule did not solicit comments on the Performance Fund idea, several comments were received. One comment suggested that the establishment and implementation of a fair and equitable

Performance Fund would be very difficult and expressed fears the fund would turn into a "numbers game." Several comments suggested that States and local agencies would sacrifice quality at the expense of production. Three comments expressed concern that States in the Western part of the country might be unfairly evaluated because population-related criteria could adversely affect the sparsely-populated States. These States might lose funding in spite of a good performance record. DOE's proposed criteria would attempt to avoid these potential problems by evaluating the States on their individual performance in operating the Weatherization Program.

Only the 50 States and the District of Columbia will be eligible to receive money from the Performance Fund. Certain Indian tribes which are grantees of the program would not be eligible because, at the discretion of DOE, the tribes at present usually receive funding at more than 100 percent of their tentative allocation. Because the amount of funds involved with these grantees, moreover, is so small, it would be impractical to include them in a Performance Fund. The following paragraphs discuss the performance criteria DOE is proposing for evaluating States' performance and distributing funds placed in the Performance Fund. DOE invites comments regarding these criteria, as well as all other aspects of today's proposal.

Section 440.27 Evaluating State Performance.

A. Information

This section lists the information DOE will use in its annual evaluation of the States. This information is already provided to DOE by the States as part of the application and reporting aspects of the program. DOE will not require new or additional information in evaluating States' performance.

DOE will evaluate a State's performance based on information provided in the State Plan, the monitoring plan, and the training and technical assistance plan, pursuant to § 440.12; the monthly and quarterly reports required under § 440.25; and any relevant additional information available to DOE. The annual grant guidance from DOE to the States will detail explicitly all information required by the criteria in the Performance Fund.

It will be the responsibility of each State to insure the information provided in each of the areas above reflects an accurate account, as relevant, of operations to date and of how the State intends to operate its Weatherization

Program. This information provided by the State will be the basis for DOE's evaluation.

B. Percentage of Eligible Units Weatherized

The first performance factor, which is mandated by the Amending Act, is the percentage of eligible dwelling units within the State which have been weatherized using low-income weatherization assistance program funds during the relevant reporting period. This percentage will consist of the actual completions reported to DOE on the monthly and quarterly reports divided by the planned completions submitted by the State under § 440.14(b)(8)(ii), multiplied by the maximum score for this criterion of 20. To minimize any incentive for a State to project a low completion figure but achieve a higher figure in order to receive a higher score, the maximum point value for this factor is 20. This proposed criterion will provide equity to all States regardless of funding level, climate, or eligible population. For example, a State which plans 1,200 completed units during the relevant reporting period and completes 1,000 actual units will be evaluated in the formula as follows:
 $1,000 \div 1,200 = .83 \times 20 = 17$ Therefore, 17 would be the score that State would receive out of a possible 20.

C. Comparable Energy Savings

The second performance factor, also mandated by the Amending Act, requires DOE to consider comparable energy savings data in assessing the quality of weatherization assistance provided. Section 440.14(b)(5) of the program regulation already requires States in their Annual Plans to provide to DOE the estimated amount of energy to be conserved. DOE has completed an energy savings study entitled *Weatherization Program Evaluation* by Gerald E. Peabody, under contract SR-EEUD-84-1, published on August 20, 1984, by the Energy Information Administration of the Department of Energy. The study concludes that energy savings for this program average nationally between 13 to 14 percent. Copies of this report are available from DOE upon request. DOE proposes to award points for energy savings on the basis of data which States supply as required in the Annual State Plan. No score will be awarded for program energy savings of 10 percent or less. For energy savings between 11 and 12 percent the value awarded is 5. For savings between 13 and 14 percent the value awarded is 10; between 15 and 16

the value awarded is 12; between 17 and 18 the value awarded is 14; between 19 and 20 the value awarded is 16; between 21 and 22 the value awarded is 18; and for 23 percent or higher the value awarded is 20. Any claim of more than 14 percent energy savings must be accompanied by supporting documentation for purposes of the Performance Fund. At a minimum, the State must provide the methodology it used in determining the energy savings.

DOE is particularly interested in comments on whether the Department should require a particular methodology for justifying some or all of the savings to be considered under the Performance Fund. If a particular methodology is favored, commenters are also invited to make detailed recommendations in this regard. For example, commenters might think that the formula in § 440.21(b), which details energy audit procedures, might be adaptable without too great a burden. Prior to issuing a final rule, DOE will also examine further whether methodologies can be adopted nationally for calculating energy savings for Performance Fund use.

D. Achievement of Goals

The third factor in the Performance Fund criteria is the State's actual achievement of its goals as projected in the State Plan submitted under § 440.14. The State Plan, submitted annually, is an important link between DOE and the State which tells how the Weatherization Program will be managed for the year. DOE will evaluate a State's achievement of goals by comparing the projected goals with actual production and expenditures as reported in data supplied monthly on DOE Standard Form 459E and the Quarterly Financial Status Report, Standard Form 269. The areas of the State Application which DOE will use in its evaluation are as follows: (1) The production schedule for expenditures and number of dwellings expected to be weatherized each month (§ 440.14(b)(1)); (2) the estimated number of dwelling units expected to be weatherized during the relevant reporting period by category (§ 440.14(b)(2)); (3) the average amount of the DOE funds to be applied to any dwelling unit not to exceed \$1,600 (§ 440.14(b)(9)(viii)); (4) the requirement that States spend at least 40 percent of their program costs for weatherization materials (§ 440.14(b)(9)(ix)); (5) the compliance with the State's Training and Technical Assistance Plan (T&TA) (§ 440.12(b)(7)); and (6) the compliance with the Monitoring Plan (§ 440.12(b)(6)). DOE will use the information from DOE Form 459E for evaluating T&TA and monitoring goals. Each of the six areas

evaluated has a maximum point value of 5. Accordingly, the maximum value score for this factor is 30. The proposal for areas (1), (2), (5), and (6) is to divide the actual goals achieved by the planned goals and multiply each by 5. The maximum score for each area would be 5, even if actual performance were to exceed planning. Because areas (3) and (4) involve either meeting or failing to meet limits in the Act and WAP regulations, DOE proposes to award the maximum score of 5 to any State which complies and a score of 0 to a State not in compliance.

E. Actual Expenditures

The fourth criterion of the Performance Fund is the State's actual expenditure of DOE funds during the relevant reporting period. States that expend all DOE funds during the relevant reporting period will receive the maximum score of 30 points. Any State which does not expend all DOE funds, excluding funds used for administrative expenses, during the relevant reporting period will have a reduced score. States with one month's carryover, that is, an amount equal to 1/2 of the tentative allocation for that State, will receive a maximum score of 20. States with two months' carryover will receive a score of 10. States with carryover funds in excess of two months will receive a score of 0. DOE proposes to weight this criterion heavily because States which cannot expend funds during the relevant reporting period should be given less consideration for additional funding under the Performance Fund.

Section 440.28 Awarding the Performance Fund.

DOE proposes that the money allocated in this Performance Fund will be awarded to the twenty States annually determined to have demonstrated the "best performance." A State's ranking will be based on the total score achieved as a result of DOE's evaluation of each performance criterion. The criterion for distributing remaining funds is similar to that currently used to reallocate funds from States which were incrementally funded due to inability to expend DOE funds during a program year. DOE will evaluate production and expenditures as reported by the States on DOE Form 459E and Form 269 for the relevant reporting period and determine the demonstrated capacity of each State to expend additional funds to weatherize homes. DOE may find it necessary to review other data in addition in order to evaluate trends in making its determination. DOE proposes that a

State which qualifies for performance funding will receive at least the percentage of its tentative allocation that is the same as the percentage (5 percent through 15 percent) used in determining the amount of the Performance Fund for the relevant year. For example, if DOE selects 10 percent of an appropriation as the figure to be used for the Performance Fund for that year, then a State which qualifies will receive an additional 10 percent of its tentative allocation from that year's Performance Fund. Any remaining funds will be distributed to all twenty States qualifying, based on their demonstrated capacity to expend. For example, a State with a relatively low tentative allocation that scores very high in the Performance Fund would not receive any more funds than that State's demonstrated capacity to expend them. To reward a State with more money than it can expend in a timely fashion would jeopardize that State's performance for the relevant reporting period in which the funds were not expended. In no event would this amount exceed 50 percent of a State's tentative allocation.

Section 440.29 Appeal.

DOE is proposing that States will be notified of their performance score, ranking, and the amount, if any, of funds to be received from the Performance Fund. A State may appeal the results only as to any technical or clerical error. Any appeal must be submitted in writing to DOE within 10 days of the receipt of the notification.

III. Opportunity for Public Comment

Interested persons are invited to participate in this rulemaking by submitting data, views or arguments with respect to the matters set forth in this notice to: Conservation and Renewable Energy, Department of Energy, Office of Hearings and Dockets, Forrestal Building, Room 6B-025, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-9319.

Comments should be identified on the outside of the envelope, and on the document themselves, with the designation: "Weatherization Assistance for Low-Income Persons, Notice of Proposed Rulemaking, Docket Number CAS-RM-80-508." Five copies should be submitted. Though five (5) copies are requested to be submitted, this is not a requirement in order to submit comments. In the event any person wishing to submit a written comment cannot provide five copies, alternative arrangements can be made in advance with the Office of Hearings and Dockets.

All comments received will be available for public inspection in the DOE Reading Room, Room 1E-090, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours, 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Any person submitting information which that person believes to be confidential, and which may be exempt by law from public disclosure, should submit one complete copy, as well as two copies from which the information claimed to be confidential has been deleted. DOE shall make a determination of any such claim. This procedure is set forth in 10 CFR 1004.11 (44 FR 1980, January 8, 1979).

DOE will hold several public hearings on this proposed rule. The hearings will be held on the dates and at the locations indicated at the beginning of this notice.

Any person who has an interest in the proposed regulation or who is a representative of a group or class of persons which has an interest in it may make a request for an opportunity to make an oral presentation. Such a request to speak at a hearing should be addressed to the Office of Hearings and Dockets, at the address indicated at the beginning of this notice.

The person making the request should describe briefly his or her interest in the proceedings and, if appropriate, state why that person is a proper representative of a group. The person should also give a concise summary of the proposed oral presentation, and should provide a phone number where the person may be reached. Each person selected to be heard at a public hearing will be notified. Those persons selected to be heard should bring five copies of their statement to the hearing, however, this is not a requirement. In the event any person wishing to testify cannot meet this requirement, alternative arrangements can be made in advance with the Office of Hearings and Dockets by so indicating in the letter or phone call requesting an opportunity to make an oral presentation.

DOE reserves the right to select persons to speak at the hearings, to schedule their presentations, and to establish the procedures governing the conduct of the hearing. The length of each presentation will be limited to twenty minutes, based on the number of persons requesting to speak.

A DOE official will preside at the hearing. This will not be a judicial or evidentiary-type hearing. Questions may be asked of speakers only by those conducting the hearing, and there will be no cross-examination of persons presenting statements. Any decision

made by DOE with respect to the subject matter of the hearings will be based on all of the information available to DOE.

Any participant who wishes to ask a question at the hearing may submit the question in writing to the presiding officer. The presiding officer will determine whether the question is relevant and material, and whether the time limitations permit it to be presented for an answer.

Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer.

A transcript of the hearing will be made, and the entire record of the hearing, including the transcript, will be retained by DOE and made available for inspection at the DOE Freedom of Information Office, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Any person may purchase a copy of the transcript from the reporter.

If DOE must cancel a hearing, DOE will make every effort to publish an advance notice of such cancellation in the *Federal Register*. Notice of cancellation will also be given to all persons scheduled to speak at the hearing. Hearing dates may be cancelled in the event no public testimony has been scheduled in advance.

IV. Environmental, Regulatory Impact, Regulatory Flexibility, Paperwork Reduction Act, and Coordinating Agency Reviews

A. Environmental Review

Pursuant to the requirements of the National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, DOE published a Notice of Availability of an Environmental Assessment (EA) (DOE/EA-0085) of the Program for Weatherization Assistance for Low-Income Persons in the *Federal Register* on April 10, 1979 (44 FR 21323). At the same time, DOE published notice of its determination, based on the EA, that the proposed action would not constitute a major Federal action significantly affecting the quality of the human environment, and that therefore no Environmental Impact Statement (EIS) was required.

DOE has reviewed the environmental impacts of the program amendment proposed today. It is DOE's judgment that the program amendments will result in no environmental impacts not previously analyzed in the EA. Accordingly, DOE has determined that

the environmental impacts of the program amendments, if modified as proposed, have been adequately analyzed in the April 1979 EA, and that these impacts are not significant. Hence, no additional EA or EIS is required.

B. Review Under Executive Order 12291

Today's issuance was reviewed under Executive Order 12291, 46 FR 13193 (February 27, 1981). DOE has concluded that the rule is not a "major rule" under the Executive Order because it will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in cost or prices for consumers, individual industries, State, Federal or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Pursuant to section 3(c)(3) of Executive Order 12291, this rule was submitted to the Director of OMB for a ten-day review. The Director has concluded his review of this proposed regulation under the Executive Order.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, requires, in part, that an agency prepare a final regulatory flexibility analysis for any final rule, unless it determines that the rule will not have a "significant economic impact on a substantial number of small entities." In the event that such an analysis is not required for a particular rule, the agency must publish a certification and an explanation of that determination in the *Federal Register*. The changes proposed in this action, the addition of the Performance Fund, are largely procedural and have direct effect on only States and other grantees. Any impact on small entities would not be direct and would have, at most, only a minimal effect on only a few small entities. Accordingly, pursuant to section 605(b) of the Regulatory Flexibility Act, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The information collection requirements contained in this proposed rule are included in the Program Management package of information collections, and were approved by the Office of Management and Budget (OMB) under Control Number 1910-1400.

