



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-319134

December 22, 2009

The Honorable Jeff Bingaman
Chairman
The Honorable Lisa Murkowski
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe L. Barton
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Energy: Loan Guarantees for Projects That Employ Innovative Technologies*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Energy (DOE), entitled “Loan Guarantees for Projects That Employ Innovative Technologies” (RIN: 1901-AB27). We received the rule on December 7, 2009. It was published in the *Federal Register* as a final rule on December 4, 2009, with a stated effective date of December 4, 2009. 74 Fed. Reg. 63,544.

The final rule amends the regulations implementing the loan guarantee program for projects that (1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued. This rule is intended to provide flexibility in the determination of an appropriate collateral package to secure guaranteed loan obligations, facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions regarding DOE’s treatment of collateral.

The Congressional Review Act requires major rules to have a 60-day delay in their effective date following their publication in the *Federal Register* or receipt by

Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This rule was published on December 4 and received on December 7, 2009, but has a stated effective date of December 4, 2009. Therefore, the stated effective date of this rule does not reflect the required 60-day delay.

Enclosed is our assessment of DOE's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken, except for the delay in the effective date, indicates that DOE complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Daniel Cohen
Assistant General Counsel for Legislation,
Regulation, and Energy Efficiency
Department of Energy

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF ENERGY
ENTITLED
"LOAN GUARANTEES FOR PROJECTS THAT
EMPLOY INNOVATIVE TECHNOLOGIES"
(RIN: 1901-AB27)

(i) Cost-benefit analysis

According to the Department of Energy (DOE), DOE did not prepare an analysis of the costs and benefits of this final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603–605, 607, and 609

DOE stated that it is not obliged to prepare a regulatory flexibility analysis for this rulemaking because there is no requirement to publish a general notice of proposed rulemaking for rules related to loans under the Administrative Procedure Act (5 U.S.C. 553(a)(2)).

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

DOE determined that the Act does not apply to this rule because the rule concerns a voluntary program and therefore its requirements fall under exceptions to the definitions of “federal intergovernmental mandate” and “federal private sector mandate.”

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On August 7, 2009, DOE published a notice of proposed rulemaking and opportunity to comment. 74 Fed. Reg. 39,569. DOE received timely comments from 2,123 interested parties (excluding requests to extend the comment period) and responded to the comments it determined were within the scope of the rulemaking in the final rule. 74 Fed. Reg. 63,546–548.

Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520

DOE determined that this final rule includes an information collection requirement and that the information collection requirement has been previously approved by the Office of Management and Budget (OMB) under OMB Control Number 1910-5134.

Statutory authorization for the rule

DOE promulgated this final rule under the authority of sections 7254 and 16511 to 16514 of title 42, United States Code.

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370f

DOE determined that, because it is making no decision relative to the approval of a loan guarantee for a particular proposed project, this final rule is covered under the Categorical Exclusion found at paragraph A.6 of Appendix A to subpart D, part 1021 of title 10, Code of Federal Regulations. DOE therefore determined that preparing an environmental assessment or an environmental impact statement was not currently required.

Treasury and General Government Appropriations Act, 1999, 5 U.S.C. § 601 note

DOE determined that this final rule will not have any impact on the autonomy or integrity of the family as an institution and concluded that it was not necessary to prepare a Family Policymaking Assessment.

Treasury and General Government Appropriations Act, 2001, 44 U.S.C. § 3516 note

DOE reviewed this final rule under the OMB and DOE guidelines governing the dissemination of information to the public and concluded that the rule is consistent with applicable policies in those guidelines.

Executive Order No. 12,866 (Regulatory Planning and Review)

DOE determined this final rule to be significant under the Order and therefore the rule was subject to review by OMB.

Executive Order No. 12,988 (Civil Justice Reform)

The Order imposes on agencies the general duty to eliminate drafting errors and ambiguity, write regulations to minimize litigation, and provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. DOE stated that it completed the required review of this final rule and determined that it meets the relevant standards of the Order.

Executive Order No. 13,132 (Federalism)

DOE determined that this rule will not preempt state law and will not have a substantial direct effect on the state, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order No. 13,211 (Energy Supply)

DOE determined that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy and therefore it is not a significant energy action. DOE did not prepare a Statement of Energy Effects.

Executive Order No. 13,272 (Consideration of Small Entities)

To address the requirements of the Order, DOE published procedures and policies regarding how the potential impacts of its rules on small entities are considered in its rulemaking process. 68 Fed. Reg. 7990 (Feb. 19, 2003).