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United States Government Accountability Office
Washington, DC 20548

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July 1, 2011

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

The Honorable Fred Upton
Chairman
The Honorable Henry A. Waxman
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Energy: Energy Priorities and Allocations System
Regulations*

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 "Energy Priorities and Allocations System Regulations" (RIN: 1901-AB28). We received the rule on June 16, 2011. It was published in the *Federal Register* as a final rule on June 9, 2011. 76 Fed. Reg. 33,615.

The final rule establishes standards and procedures by which the DOE may require that certain contracts or orders that promote the national defense be given priority over other contracts or orders. This rule also sets new standards and procedures by which DOE may allocate materials, services, and facilities to promote the national defense. DOE is publishing this rule to comply with a requirement of the Defense Production Act Reauthorization of 2009 to publish regulations providing standards and procedures for prioritization of contracts and orders and for allocation of materials, services, and facilities to promote the national defense.

The final rule has an effective date of July 11, 2011. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is

later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on June 9, 2011, but we did not receive the rule until June 16, 2011. Therefore, the final rule does not have the required 60-day delay in its effective date.

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 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
"ENERGY PRIORITIES AND ALLOCATIONS SYSTEM REGULATIONS"
(RIN: 1901-AB28)

(i) Cost-benefit analysis

In its submission to the Comptroller General, DOE did not include a cost-benefit analysis of the final rule.

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

DOE reviewed the final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003 (68 Fed. Reg. 7990), which ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process, as required by Executive Order 13,272, "Proper Consideration of Small Entities in Agency Rulemaking," (67 Fed. Reg. 53,461).

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

In its submission to the Comptroller General, DOE did not include an analysis under the Act.

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

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

DOE published its proposed Energy Priorities and Allocations System (EPAS) rule on July 16, 2010 (75 Fed. Reg. 41,405). DOE solicited public comment on the proposed rule, but no comments were received. DOE is finalizing its proposed regulation without change.

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

This rule contains a collection of information requirement subject to the Paperwork Reduction Act and which has been approved by the Office of Management and Budget (OMB) under control number 1910-5159. This requirement has been submitted to OMB for approval.

Statutory authorization for the rule

DOE states that the final rule is authorized under section 101(c) of the Defense Production Act (50 U.S.C. app. § 2071 et seq.) (DPA) as delegated by Executive Order 12,919 (June 3, 1994) and under the Defense Production Act Reauthorization of 2009 (Pub. L. No. 111–67).

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

This rule has been determined to be significant for purposes of Executive Order 12,866.

Executive Order No. 13,132 (Federalism)

DOE determined that the rule would 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.