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**Department of
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**Office of Conservation and Renewable
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**10 CFR Part 440
Weatherization Assistance Program for
Low-Income Persons; Final Rule**

DEPARTMENT OF ENERGY

Office of Conservation and Renewable Energy

10 CFR Part 440

[Docket No. CE-RM-91-110]

Weatherization Assistance Program for Low-Income Persons

AGENCY: Department of Energy

ACTION: Notice of final rulemaking

SUMMARY: The Department of Energy (DOE) is today issuing final amendments to the regulation for the Weatherization Assistance Program for Low-Income Persons to implement statutory changes enacted as the State Energy Efficiency Programs Improvement Act of 1990. In addition to these statutory changes, DOE is adding other changes based on program experience gained over the past 5 years since issuance of the last version of the regulation. These changes add clarifying language or delete obsolete language in the regulation in order to ensure uniform interpretation of this regulation by State and local agencies administering the program. The amendments in this final rule will give States and local agencies additional flexibility in addressing the particular weatherization needs of their low-income citizens.

The principal amendments in today's final rule are for the purposes of: Adding certain cooling measures; addressing the needs of renters; clarifying the allowability of costs to abate energy-related health and safety hazards; establishing procedures and standards for waiver of the 40 percent materials average; establishing procedures and standards for adjustment of the average unit dwelling cost limitation for furnace and cooling efficiency modifications; allowing States to increase by up to 5 percent the amount of funds certain eligible local agencies can use for administrative purposes; allowing States the option of requiring financial participation from landlords when weatherizing their multifamily buildings; and repealing the performance fund.

EFFECTIVE DATE: This regulation is effective April 5, 1993. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 5, 1993.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The Department of Energy (DOE or Department) today gives notice of final amendments to revise the program regulations for the Weatherization Assistance Program for Low-Income Persons (WAP), which are codified in 10 CFR part 440 and which are authorized by title III of the Energy Conservation and Production Act, as amended (Act), 42 U.S.C. 6861, et seq. (WAP is also subject to the DOE general financial assistance regulations in 10 CFR part 600.) The principal purpose of the regulatory amendments finalized today is to implement most of the amendments to the Act by the State Energy Efficiency Programs Improvement Act of 1990 (Amending Act) (Pub. L. 101-440). Pursuant to the new statutory amendments, today's final amendments: (1) Add specific cooling measures to the program; (2) add provisions for a waiver to the requirement to spend an average of 40 percent of grant funds on weatherization materials; (3) add provisions for annual adjustment of the statewide average per-home expenditure; (4) allow local agencies receiving grants of less than \$250,000 of appropriated funds to use up to an additional 5 percent for administrative purposes; (5) require States to ensure tenants' protection from rent increases and related actions due solely to weatherization work, and allow States to require landlord participation in the weatherization of multifamily buildings; (6) repeal the performance fund; (7) encourage States to actively seek non-Federal funds to increase the amount of funds available for low-income weatherization; and (8) require States to collect data annually on the average costs incurred in weatherization of individual dwelling units, the average size of the dwellings weatherized, and the average income of households receiving assistance. DOE expects to complete implementation of the WAP portion of the Amending Act by conducting at an appropriate point in time a rulemaking to establish regulations for the award of incentive funds to reward best performance by States or subgrantees. 42 U.S.C. 6865 (d), (e).

In addition to the parts of today's final rule to implement the amendments to

the Act, DOE has made certain clarifications, corrections, and other discretionary changes to the existing rule. This action is necessitated by the evolution of the program since the last major rulemaking issued on January 4, 1984, 50 FR 708. These changes will help States by clarifying sections of the rule, thereby encouraging a uniform interpretation and application of the program requirements. DOE has also updated appendix A to include all new materials approved for use in the program through November 30, 1992, and the standards for those materials. Some of the definitions in § 440.3 have been clarified, and, where needed, new definitions have been added which will provide a clearer and more concise meaning to States and local agencies who must interpret these regulations. Other sections applying to energy audits, allowable expenditures, and subgrantees have been clarified to enhance their meanings; and certain obsolete items have been deleted.

On October 23, 1991 (56 FR 54932), DOE issued a Notice of Proposed Rulemaking, Public Hearings and Request for Public Comments for the Weatherization Assistance Program for Low-Income Persons. In response to this notice, DOE received 290 written comments and heard testimony from 49 individuals at public hearings held November 20, 1991, in San Francisco, CA; December 13, 1991, in Baltimore, MD; December 17, 1991, in Dallas, TX; and December 19, 1991, in Chicago, IL. As a result of the large number of comments received expressing concerns on several areas of the NOPR, a number of significant, as well as minor, changes have been made to the final rule, and those changes are reflected herein.

DOE consulted with the State Energy Advisory Board chartered under Public Law 101-440, and provided the members of the Board an opportunity to give advice on the major issues in the rulemaking including appropriate energy audit procedures.

II. Amendments to the Weatherization Assistance Program

§ 440.3 Definitions

The Amending Act added "children" to the "elderly" and "handicapped" as groups identified by § 411(b) as especially deserving of WAP services. DOE proposed a definition for "children" in § 440.3 which included dependents under the age of 18, or age 19 if a full-time student in a secondary school or equivalent technical or vocational school and who may reasonably be expected to complete the program before reaching the age of 19.

DOE believed that this definition would help facilitate the eligibility certification process for States and subgrantees that administer both the Health and Human Services and DOE weatherization programs. Twenty-three commenters suggested that States be given the option to limit the definition, for example to age 12 and under or age 8 and under. DOE agrees that the States should have some flexibility to define "children" in light of their assessments of how priorities should be assigned among their low-income population segments. Therefore, DOE has modified the definition of "children" and will allow States to define that term in a manner which meets their specific needs, provided it does not exceed 19 years of age. This change has been adopted in the final rule.

DOE has deleted the definition for "Operations Office Manager" and replaced it with "Support Office Director" as a result of DOE field realignment.

DOE proposed a change in the definition for "separate living quarters" which includes a reference to "shelters" for homeless persons. Additionally, a definition for "shelter" was proposed which would specifically address units that house individuals on a temporary basis. The current regulation does not specifically state that these units can be weatherized. This has led to confusion among States when addressing this issue. Two commenters contended that WAP funds should not be used to weatherize shelters, stating that other resources are available for shelters. DOE and 133 commenters believe that it is appropriate to include shelters under WAP. These shelters and their occupants generally meet all of WAP eligibility criteria. While it may be true in some States that other resources are available, DOE has no discretion to eliminate dwellings that are otherwise eligible on that basis. Therefore, § 440.22(f) specifically authorizes weatherization of shelters and defines their eligibility. Further, DOE wishes to clarify that shelters such as group homes, transitional housing, homes for battered women, and other types of living arrangements which meet the WAP definition of a shelter are dwelling units which are eligible for weatherization.

DOE also proposed to amend § 440.3, as required by the Amending Act, to allow States to include under "weatherization materials" the following items: Cooling efficiency modifications, which include replacement air-conditioners, ventilation equipment, screening, window films, and shading devices.

Standards for purchasing these materials are listed in Appendix A. Adding these measures will allow States, especially in warm climates, to better address weatherization priorities where reducing energy consumption for cooling requirements is just as important as reducing energy consumption for heating requirements. Fifty-seven commenters supported the additional cooling measures.

With respect to air conditioners, DOE proposed to allow the replacement of existing ones only. Air conditioners include window units, central units, and heat pumps which perform a dual heating/cooling function. States which opt to include replacement air conditioners would have to follow applicable Federal, State, and local environmental laws covering the disposal of old air conditioners due to the types of chemicals used in these units. The costs associated with the disposal of old air conditioners which are replaced under this program would be an allowable program cost. Thirty-one commenters recommended that air conditioners not be limited to warm States. As with any other measure, the energy audit procedure must determine whether an air conditioner should be replaced. Thus, depending on the audit results, replacement air conditioners could possibly be installed in both warm- and cold-weather States. Five commenters recommended against including replacement air conditioners except for medical reasons. Still other commenters argued against the inclusion of air conditioners under any circumstances. However, the Amending Act explicitly requires inclusion of this measure. 104 Stat. 1012. Thus, this measure will be retained in the final rule.

With respect to ventilation equipment, DOE proposed to amend appendix A to include ceiling fans, attic fans, whole house fans, and evaporative coolers. Most comments were generally supportive, and DOE has retained the change in the final rule. Although several commenters recommended adding certain other types of ventilation equipment, such as table fans and window fans, DOE has decided to exclude them. These types of ventilation equipment are energy-inefficient and therefore not cost-effective.

Despite several comments received with respect to shading devices, DOE believes this measure should continue to be limited to items such as screens, window films, and reflective materials which are already listed in appendix A. Two commenters suggested that DOE include window shades, window blinds, and fabricated storm windows

treated with ultraviolet plastic as shading devices. Window shades and fabricated storm windows treated with plastic window films are already included in appendix A. Window blinds have been added to appendix A for use as a shading device. Eleven commenters suggested that trees be included as shading devices. DOE believes that trees are not a viable option for this program because of the considerable amount of time it takes for trees to grow to a height which would provide sufficient shade to cool the exterior of the dwelling unit. DOE program funds would be better spent on measures which would provide immediate relief from areas experiencing extreme heat.

As a result of comments received, DOE is including a definition for the term "capital-intensive furnace and cooling efficiency modifications" which is used in § 440.18(b)(2). That term refers to those major improvements which require the expenditure of a substantial amount of funds to complete. These include, but are not limited to, furnaces or cooling unit replacements, certain repairs and replacement of parts to boilers and furnaces, replacement of wood stoves, and others as listed in appendix A. In the absence of capital intensive furnace or cooling efficiency modifications, those items which are not capital-intensive should not be used to apply for an increase to the average per dwelling unit limitation on expenditures under § 415(c)(4)(A) of the Act. Examples of such items are furnace or cooling unit tune-ups, repairs, filters, or other inexpensive modifications listed in appendix A which improve the efficiency of the unit. 42 U.S.C. 6865(c)(4)(A). These relatively low-cost items should be included as a part of a State's regular weatherization program and the costs absorbed within the annually adjusted average per dwelling unit limitation on expenditures under § 415(c)(3) of the Act. 42 U.S.C. 6865(c)(3).

§ 440.12 State Application

DOE proposed to amend this section to require States to include, as a part of their application, a rental plan implementing the provisions in § 440.22(b)(3). Several commenters argued for modification of this provision to allow greater flexibility for States to describe and update as necessary what the procedures would be for meeting the requirements of § 440.22(b)(3). DOE agrees that such a modification is appropriate because the primary responsibility for ensuring that weatherization benefits accrue to tenants is on the States. 42 U.S.C.

6863(b)(2); 1990 U.S. Code Cong. and Admin. News 1657. The content of the rental plan is further discussed under § 440.22. Therefore, the rental plan requirement in § 440.12 has been eliminated, and the substance of it has been added to § 440.16(f) in order to reflect the statutory requirement on States to establish implementing procedures and processes. 42 U.S.C. 6863(b)(2)(B).

§ 440.13 Local Applications

DOE proposed to amend § 440.13 which describes what actions will take place in the event a local applicant becomes a direct grantee of the weatherization program. The proposed amendment is largely technical and would conform § 440.13 to the appeal procedures in § 440.30. Since there were no comments received to this proposed change, it has been adopted in the final regulation.

§ 440.14 State Plans

DOE proposed to amend this section to require States to include the criteria they will use for providing additional administrative funds to subgrantees as specified in § 440.18(d). Also, § 440.14(b)(9)(xii) was proposed to be amended to include the phrase "for use statewide" when referring to the definition of low income. This would clarify that a State must use the same eligibility criteria throughout the State. That is, when the State determines what income levels it will use for determining low income, those income levels would be applied uniformly throughout the State. The current regulation defines low income using three categories and is often misinterpreted to mean that the State can use any or all of the categories; thus, more than one income level could possibly be used throughout the State—for example, 125 percent of poverty for rural areas and 150 percent of poverty for urban areas. DOE wishes to make clear that a State may not use more than one income level in defining low income. Comments received in these areas were supportive, and DOE has retained its proposed changes.

Consistent with the new statutory amendments, DOE proposed to add § 440.14(b)(9)(xiv) which allows DOE to approve established plans and procedures, submitted by States as a part of the State plan, for using Federal funds to increase the amount of weatherization assistance that a State obtains from non-Federal sources including private sources. States may take a percentage of their base grant (including Petroleum Violation Escrow funds used under the weatherization program) or a percentage of their

training and technical assistance funds or a portion of both to undertake leveraging activities. States must identify in their annual plans the specific amount of funds, details of how those funds will be used for obtaining non-Federal resources for their weatherization programs, and the expected leveraging effect from the use of those Federal funds. States must also explain how the amount to be used for leveraging is reasonable when considered in the context of § 440.15(b) of the regulation which requires funds to be allocated on the basis of relative need in each area.

Thirty-five commenters expressed concern that leveraging is important, but must supplement, not supplant, Federal allocations. In other words, States' leveraging of funds should not result in less Federal funding for WAP. DOE views leveraged funds as a way to supplement rather than supplant the Federal allocations. No changes in the proposed regulations appear necessary.

Another 45 commenters said that the regulations regarding leveraging should be more flexible. States do have the flexibility in developing leveraging approaches, and DOE encourages them to be innovative with their ideas. However, as stated above, DOE does require careful planning when using program funds for this activity. Nineteen commenters felt that leveraged funds should not be required to be used in accordance with WAP regulations. The funds discussed in this section are DOE appropriated funds of which a limited amount may be used to conduct leveraging activities. The types of leveraging undertaken pursuant to this provision may be different from those leveraging activities under the incentive fund provisions of the Amending Act. 42 U.S.C. 6865(d),(e). These leveraged funds obtained and used under this section are generally not considered "program income" under 10 CFR part 600 and, therefore, may be used to conduct activities that support WAP but are not subject to WAP rules.

DOE invited comments from States and other interested parties on possible changes that could be made to this section to eliminate duplication, reduce unnecessary paperwork, and help ease the reporting requirements consistent with the governing Act. Twenty-nine commenters said certain sections of the application and plan rarely changed, and it is a duplication of effort to provide these items each year as a part of the plan process. DOE is bound by the Act to certain specific content requirements; however, these requirements are in some instances redundant and unnecessary to repeat

each year if no change has occurred. Thus, DOE will allow States to submit only those sections of the plan which have changed from the previous year. The sections needing changes must be updated by the States as warranted. This action will help to streamline the application process and reduce the amount of time, effort, and costs that go into the preparation of a State plan.

DOE proposed to amend § 440.14(a) to require that a State prepare a "court" transcript of State plan public hearings. Four commenters suggested that to require a court transcript of the public hearing on the State plan was unnecessary. They contended that the costs associated with providing a court transcript, which requires the services of a court reporter, were not justified. It was their view that a State-supplied transcript, regardless of whether a court reporter was used, is sufficient. DOE agrees and has not finalized the proposed amendment. Section 440.14(a) continues to require a verbatim transcript of the hearing proceedings.

§ 440.15 Subgrantees

DOE also proposed to clarify subgrantee selection and removal procedures in § 440.15 by adding a new paragraph (e) which would make clear that a subgrantee found in non-compliance must be offered a rulemaking-type public hearing as part of the removal or defunding process. Grantees have sometimes been unsure of procedural requirements when they determine to replace a subgrantee for non-compliance or for other reasons. DOE received 80 comments in response to the public hearing requirement.

With regard to terminations during a grant period, sixty-six commenters suggested that DOE drop the requirement to hold a rulemaking-type hearing in favor of an "administrative" hearing or offer the State the choice of either type of hearing. Fourteen commenters supported the requirement for a rulemaking-type hearing. Most of the commenters felt that the administrative hearing process offers the State and subgrantee the proper forum for resolving disputes with legal representation (if desired). They also noted that under most, if not all, State Administrative Procedure Acts (APAs), subgrantees would be able to receive a fair hearing on the issues involved. Additionally, these APAs allow affected parties to appeal to a State court.

With regard to selection of subgrantees for a new grant period, §§ 414(b)(4) and 415(b)(1) of the Act require a rulemaking-type proceeding with adequate notice, opportunity for public comment, and a public hearing.

