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Docket No. EERE-2009-BT-BC-0021

10 CFR Part 460 Energy Conservation Standards for Manufactured Housing

**COMMENTS OF:
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The International Code Council, Inc. (ICC) offers the following comments on DOE EERE Energy Conservation Standards for Manufactured Housing, published in the Federal Register on June 17, 2016.

Background

The International Code Council, Inc. (ICC) is a non-profit membership association dedicated to building safety, fire prevention, and energy efficiency. The International Codes, or I-Codes, published by ICC, provide minimum safeguards for people at home, at school and in the workplace. Building codes benefit public safety and support the industry's need for one set of codes without regional limitations. Fifty states and the District of Columbia have adopted the I-Codes at the state or other jurisdictional levels. Federal agencies including the Architect of the Capitol, General Services Administration, National Park Service, Department of State, U.S. Forest Service and the Veterans Administration also use the I-Codes for the facilities that they own or manage. The Department of Defense references the International Building Code for constructing military facilities, including those that house U.S. troops, domestically and abroad. Puerto Rico and the U.S. Virgin Islands enforce one or more of the I-Codes.

The International Code Council, Inc. (ICC) was established in 1994 as a non-profit organization in order to develop a single set of comprehensive and coordinated national model construction codes that could be used nationwide. The founders of the ICC were the Building Officials and Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), and Southern Building Code Congress International, Inc. (SBCCI). Since the early part of the last century, these non-profit

organizations developed three separate sets of model codes used throughout the United States. Although originally regional code development was effective and responsive to our country's needs, the time came for a single set of codes. The nation's three model code groups responded by creating the International Code Council, Inc. (ICC) and by developing codes without regional limitations: the International Codes.

ICC's members are the code officials who develop, adopt and enforce building, fire and energy codes, and the architects, engineers, builders and contractors who build and maintain structures in the built environment. Over 57,000 code officials are active members of ICC. www.iccsafe.org

Most recently, the International Residential Code (IRC) and International Building Code (IBC) were recognized as key components in the new Federal Earthquake Safety Standard to assure the safety of Federal owned and leased buildings, in Presidential Executive Order 13717, signed February 2, 2016.

ICC Comments

DOE's Building Technology Program, a program within the Energy Efficiency and Renewable Energy Office of DOE, is a member of ICC and a regular participant in the ICC code development process, including valuable participation in the development of ICC's International Energy Conservation Code (IECC). In addition, DOE works with states and local governments to assist in the adoption and implementation of the latest version of the IECC, in order to achieve agency objectives of reducing energy consumption, and increasing energy efficiency of homes and buildings.

In connection with this rulemaking, we have some general comments regarding the modifications being proposed to the IECC, which would mean that residential buildings manufactured in a factory setting, would have different rules and different requirements applied to them than residential dwellings built on-site. In general, the codes published by ICC, and adopted by state and local jurisdictions in all 50 states, apply to residential and commercial buildings located within those jurisdictions, and do not generally apply differing rules to buildings based on where the structure or its components are built or manufactured. While we understand that there may be some technical reasons to modify energy efficiency standards and minimum requirements contained in the IECC, we believe that any change that reduces the energy efficiency of the residential unit as ultimately installed, should be scrutinized carefully, and justified individually, based on a showing of impossibility or incompatibility with the manufacturing process. In general, we believe that due to the ability to monitor and control the manufacturing process in a factory environment, it should be easier to attain higher levels of energy efficiency in a factory setting, than in an on-site construction site, where labor and weather variables can affect the consistency and uniformity of energy efficiency features and materials.

In keeping with principles of federalism, especially those expressed within the recently revised OMB Circular A-119, ICC believes that to the extent such manufactured homes will be installed in communities that are governed by building codes that apply to ALL residential structures, that the ideal policy is a policy that applies the same rules and standards to all residential dwellings, regardless of how or where they are constructed.

We also have a specific concern with the apparent manner that DOE proposes to use the copyright-protected IECC, and publish a modified version of the IECC as part of the Code of Federal Regulations.

OMB Circular A-119, recently revised and re-issued on January 27, 2016, requires all Federal agencies to use voluntary consensus standards in both procurement and regulatory activities. The OMB requirement is stated clearly and unequivocally, in Section 5 of the circular:

“5. What is the Policy for Federal Use of Standards?

Consistent with Section 12 (d)(1) of the NTTAA, all Federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical. In these circumstances, your agency must submit a report describing the reason(s) for its use of government-unique standards in lieu of voluntary consensus standards as explained in Sections 9-11.”¹

The circular is clear that use of voluntary consensus standards is not simply a suggestion, but a REQUIREMENT, unless the agency can articulate its specific reasons for NOT using or adapting an available voluntary consensus standard.

In addition, the circular is very clear on how agencies should reference standards, when they are proposed to be used by an agency for a regulatory or procurement purpose. Section 5.g. spells out how agencies should reference standards.

“g. How should my agency reference standards?

Where your agency seeks to incorporate a standard by reference, **your agency should reference the standard, along with sources from which a copy of the standard may be obtained**, in relevant publications, regulations, and related internal documents. The Office of the Federal Register’s regulations at 1 CFR Part 51 govern the use of incorporation by reference in regulation. For all other uses, your agency must determine the most appropriate form of reference. **If a standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder** and meet any other similar obligations, such as those relating to patented technology that must be used to comply with the standard.” (*Emphasis added*)²

In the instant proposed rule, DOE states that it intends, consistent with “its statutory mandate under EISA”, to publish energy conservation standards for manufactured housing based on the *2015 International Energy Conservation Code (IECC)*, the most recent version of the IECC. While the proposed rule acknowledges that the IECC is a model voluntary consensus code, produced through a voluntary consensus process by the ICC, and published by the ICC, the proposed rule fails to mention that the IECC is copyrighted by ICC, and as such, DOE is required to “observe and protect the rights of the copyright holder [ICC]” in its proposed use of the content of the IECC.

Within the proposed standard, DOE references provisions it is proposing to use from the IECC in a number of different ways. In several places it indicates that pursuant to the recommendations of its working group it is “incorporating” certain provisions from the IECC; in others it says it is “adopting” provisions from the IEC; and in other cases it says it is “modifying” or otherwise using IECC provisions with some changes. Finally, in several cases, DOE states that it is proposing not to include certain provisions from the IECC, as either inapplicable or inappropriate for manufactured housing. Further, it is clear that DOE is proposing to publish a standard that uses the same structure, organization and most of the definitions in the 2015 IECC, with some additions, deletions and modifications.

¹ https://www.whitehouse.gov/omb/inforeg_infopoltech, accessed, July 14, 2016

² https://www.whitehouse.gov/omb/inforeg_infopoltech, accessed July 14, 2016

Reading the proposed standard, it is clear that dozens of sections of the standard are simply copied, some with minor changes, from the 2015 IECC copyrighted document, and incorporated into the proposed standard.

What is most surprising is that, despite DOE's copying of ICC's copyrighted IECC, DOE does not even list the 2015 IECC as a reference standard, in its list of referenced standards in Sec.460.3. DOE does list several other standards, from the Air Conditioning Contractors of America and from HUD, but makes no mention of dozens of references and incorporations by reference from the copyrighted IECC published and owned by ICC. Whether this is an oversight, or an intentional omission, it must be corrected in the final rule.

At a very minimum, in order to comply with OMB-A119 DOE must: (a) expressly acknowledge that the IECC is a copyright protected document, published and owned by ICC; (b) explicitly state that any reproduction or copying of the standard (other than for personal, non-commercial purposes) requires express written permission or license from ICC; and (c) state that copies of the IECC are available for purchase from ICC at its website, www.iccsafe.org.

If DOE or the standard does not comply fully with OMB-A119, ICC is prepared to appeal DOE's adoption of the standard based on such non-compliance.