

**Draft Outline for AGA’s Comments on
DOE’s Supplemental Notice of Proposed Rulemaking—Clean Energy for New
Federal Buildings and Major Renovations of Federal Buildings
Docket EERE–2010–BT–STD–0031, RIN 1904–AB96**

I. Introduction

- a. Introduce AGA
- b. AGA’s Commitment to Climate/Clean Energy/Energy Access: Highlight measures currently taken by members that support clean energy goals, etc.
- c. Short summary: Provide a short summary of the points addressed below on the Supplemental Notice of Proposed Rulemaking (“proposal” or “SNOPR”).

II. Statutory Interpretation

- a. The DOE’s interpretation of “fossil fuel-generated energy consumption of the buildings” in 42 U.S.C. § 6834 is contrary to the language, context, and history of the statute.
 - i. To “determine a statute’s objectives and thereby illuminate its text,” courts examine the “statute’s language, structure, subject matter, context, and history.” *Torres v. United States*, 523 U.S. 224, 229 (1998); *see also Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 206 (D.C. Cir. 2002) (“We consider the provisions at issue in context, using traditional tools of statutory construction and legislative history.”).
 - ii. Statutory Mandate: 42 U.S.C. § 6834 requires that the DOE establish, by rule, “revised Federal building energy efficiency performance standards” for both new federal buildings and federal buildings undergoing major renovations. These standards must ensure that “[t]he buildings shall be designed so that *the fossil fuel-generated energy consumption of the buildings* is reduced” by certain percentages by certain fiscal years.¹ 42 U.S.C. § 6834(a)(3)(D)(i)(I) (emphasis added).

¹ Specifically, the energy consumption must be reduced “as compared with such energy consumption by a similar building in fiscal year 2003 (as measured by Commercial Buildings Energy Consumption Survey or Residential Energy Consumption Survey data from the Energy Information Agency), by the percentage specified in the following table[.]” 42 U.S.C. § 6834(a)(3)(D)(i)(I).

Fiscal Year	Percentage Reduction
2010.....	55
2015.....	65
2020.....	80

iii. In this proposal, the DOE is violating its statutory responsibility to set standards that would ensure certain federal buildings are designed to reduce “the fossil fuel-generated energy consumption of the buildings.” 42 U.S.C. § 6834(a)(3)(D)(i)(I). In the current proposal, the DOE attempts to fulfill this mandate by narrowly focusing on only on-site fossil fuel-generated energy consumption and disregarding a building’s off-site fossil fuel-generated energy consumption. *See* 87 Fed. Reg. 78,382, 78,430 (defining “fossil fuel-generated energy consumption” as “the on-site stationary combustion of fossil fuels that contribute to Scope 1 emissions for generation of electricity, heat, cooling or steam”). Because the plain text, context, and history of the statutory mandate require that the DOE’s standards examine the total “fossil fuel-generated energy consumption” of the buildings, the proposal’s narrow view will not accomplish the DOE’s statutory directive.

1. Text: As explained, the text of the statute requires a reduction in “the fossil fuel-generated energy consumption of the buildings.” 42 U.S.C. § 6834(a)(3)(D)(i)(I). The plain meaning of this language controls.

- a. *King v. Burwell*, 576 U.S. 473, 486 (2015) (“If the statutory language is plain, we must enforce it according to its terms.”).
- b. The key phrase “consumption of the buildings” is best understood to include the energy consumption of the building, not just the consumption from on-site energy sources. The statute does not say, as the SNOPR would suggest, “on-site energy consumption,” or energy consumption “from fossil fuel sources within the buildings” or “at the building site.” Because the plain meaning of “consumption of the buildings” includes the total consumption of the building—both on-site and off-site fossil fuel-generated energy consumption—the current SNOPR’s new interpretation of the phrase is incorrect.

2. Context: The proposal’s interpretation of the phrase “fossil fuel-generated energy consumption of the buildings” also ignores its statutory context.

- a. *See Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction

2025.....	90
2030.....	100

42 U.S.C. § 6834(a)(3)(D)(i)(I).

that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

- b. The original Act that established energy conservation requirements for federal buildings (but did not include the precise requirement for reductions in fossil fuel-generated energy at issue in this proposal), Section 305 of the Energy Conservation and Production Act, illuminates the context of the phrase “fossil fuel-generated energy consumption of the buildings.” Pub. L. No. 94-385, § 305 (“ECPA”). The Act was focused, in part, on providing “energy conservation standards for new buildings” and, as its name suggests, is focused on energy conservation as a whole. *Id.* Similarly, the Act that added the precise language at issue in the proposal, the Energy Independence and Security Act of 2007, was focused on moving “the United States toward greater energy independence and security” and to “increase the efficiency of . . . buildings.” Pub. L. No. 110-140.
- c. The key phrase’s surrounding statutory language also helps confirm its broader meaning. For example, Section 6834(a)(3)(D)(i)(I) starts out by requiring that “[t]he buildings shall be designed” so the fossil fuel-generated energy consumption of the buildings is reduced. The statute therefore focuses on the buildings’ overall design to conserve energy and not the origin of the energy.
 - i. The proposal should focus on efforts to decrease the overall energy demands of buildings, rather than whether the energy demands are met off or on-site.
- d. The statutory focus on overall building design and efficiency is also demonstrated by the general context in which the program was developed.
- e. The DOE’s overall mission is to help balance efficiency goals and increase energy efficiency without picking winners and losers. The Department typically has done so by adhering to a policy of fuel neutrality. This has allowed the Department to focus on overall energy efficiency without regard to the source of the energy. Similarly speaking, it is important to focus on the overall efficiency of the buildings without regard to whether the source of energy is natural gas consumed at the building or the power plant down the street.

- f. Further, the use of source energy instead of site energy is consistent with other federal agency approaches. For example, EPA's Energy Star program focuses on source energy instead of site energy in evaluating the energy efficiency of buildings. *See* EPA, The Difference Between Source and Site Energy (last visited Jan. 6, 2023) https://www.energystar.gov/buildings/benchmark/understand_metrics/source_site_difference ("EPA has determined that source energy is the most equitable unit of evaluation for comparing different buildings to each other.").
 - g. DOE has also adopted the use of full-fuel-cycle (FFC) measures of energy instead of site energy measures in other context. *Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Statement of Policy for Adopting Full-Fuel-Cycle Analyses Into Energy Conservation Standards Program*, 76 Fed Reg. 51281 (2011).
3. History: Interpreting the phrase "fossil fuel-generated energy consumption of the buildings" to evaluate source energy also best comports with the history of the statute.
- a. The DOE has traditionally interpreted this phrase to include source energy rather than only site energy.
 - i. For example, as DOE acknowledges, in both its 2010 Proposed Rulemaking ("2010 PR") and 2014 Supplemental Notice of Proposed Rule Making ("2014 SNO PR") interpreting this statutory phrase, DOE measured "energy consumption of the building" to include source energy. 2012 PR, 75 Fed. Reg. at 63,4077 ("Fossil fuel-generated energy consumption = Direct consumption of fossil fuels in the building plus the amount of electrical energy consumption that is generated from fossil fuels."); *see also* 2014 SNO PR, 79 Fed. Reg. 61,694, 61,711 ("DOE continues to believe that source energy is the correct metric to use for this rulemaking.").
 - ii. Further, even in the current SNO PR, the DOE acknowledges that it "may address emissions generated off-site . . . at a later time." 87 Fed. Reg. 78, 385. This statement implicitly acknowledges that the plain reading of the statutory mandate requires DOE to consider all energy consumption in setting the emissions standards required by 42

U.S.C. § 6834(a)(3)(D)(i)(I). The current proposal not only sets standards divorced from the language, context, and history of the statute, but creates a perverse incentive for building designers to decrease on-site consumption (even at the expense of the building consuming more fossil fuel-generated energy overall).

- b. The legislative history of the Act that adopted this language also counsels that source energy rather than site energy is the proper interpretation of the phrase.

- i. The preamble of the Energy Independence and Security Act of 2007 states that its purpose, in part, is to “increase the production of clean renewable fuels” and to “increase the efficiency of . . . buildings.” Pub. L. No. 110-140, 121 Stat. 1492. The legislators that enacted this legislation touted its purpose was to “make our . . . buildings . . . more energy efficient so that we can reduce our consumption of foreign oil and our emissions of greenhouse gasses.” Cong. Rec. H708 (daily ed. Jan. 18, 2007) (statement of Rep. Markey). If only site energy is considered, this intent of the legislature is distorted. An overly narrow view of “fossil fuel-generated energy consumption of the buildings” distorts the Act’s purpose to increase energy efficiency overall and reduce the need to rely on foreign fossil fuels for energy in our federal buildings.

- iv. The statute states that DOE “shall establish” a rule for revised federal revised Federal building energy efficiency performance standards by December 19, 2008.

- 1. Congress’ use of the word “shall” imposes a nondiscretionary duty on DOE.
 - 2. DOE was supposed to issue a rule by 2008, and that rule was to have percentage reductions for 2010, 2015, 2020, 2025 and 2030. DOE skipped 3 steps, rendering it impossible to comply or issue a rule consistent with the statute. DOE cannot contort the interpretation of the statute because it failed to act in 2008.

- b. The SNOPR would be arbitrary and capricious if finalized.

- i. A reviewing court will hold unlawful and set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. 706(2)(A). An agency action is arbitrary and capricious if it is not “reasonably explained,” *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015), or if the agency “entirely failed to consider an important aspect of the problem.” *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1010 (9th Cir. 2009).
- ii. The SNO PR acknowledges that the proposal, by evaluating only on-site fossil fuel-generated energy consumption of the buildings, would not increase the overall energy efficiency of the buildings and would not result in a reduction of harmful environmental emissions.
 1. *E.g.*, 87 Fed. Reg. at 78,410 (“DOE acknowledges exchanging on-site fossil fuel generated energy for reliance on the electric grid, which may still be generating energy with fossil fuels, doesn’t necessarily lead to an immediate reduction in emissions of GHGs and SO₂.”).
- iii. The SNO PR does not explain the divergence from EPA’s Energy Star approach, which uses source energy, the most “equitable unit of evaluation for comparing different buildings to each other,” in evaluating fossil fuel-generated energy consumption. *See* EPA, The Difference Between Source and Site Energy (last visited Jan. 6, 2023) https://www.energystar.gov/buildings/benchmark/understand_metrics/source_site_difference.
- iv. The SNO PR increase overall energy consumption and fails to explain why this would be a policy outcome desired by Congress.
- v. The costs of the proposal, if implemented, would outweigh the benefits.
- vi. The SNO PR irrationally relies on the assumption that the U.S. will have a zero emissions grid in the future, but it does not calculate the emissions impacts from alternative scenarios.
- vii. The SNO PR acknowledges that it would increase overall emissions and have negative health consequences but fails to explain why these negative consequences are justified.

III. Technical Matters

- a. Discuss inconsistencies with codes and standards
- b. Discuss inaccurate assumptions and data
- c. Discuss the understated costs and overstated benefits

- i. DOE should fully consider the potential impacts that a site fuel ban would have on the entire energy system and customers.
 1. DOE should analyze the impact of fuel switching
 2. DOE should account for the cost related to the cost of upgrading the electric transmission and distribution systems
 3. DOE should analyze the impact on utilities and the gas system, and if the proposal will increase costs on gas customers
 4. Reference AGA study on Implications of Policy-Driven Residential Electrification (https://www.aga.org/wp-content/uploads/2018/07/aga_study_on_residential_electrification.pdf)
- d. DOE's implementation of ECPA § 305(a)(3)(D) should provide as much flexibility as possible, and should avoid bias against efficient on-site use of natural gas
- e. Highlight that in the past DOE has been supportive of using natural gas for various reasons

IV. Conclusion