

Two substantively identical versions of that memorandum were posted to the website of the Office of Postsecondary Education, dated January 12 and January 18 (collectively, the “January 2021 memorandum”). Having reviewed the memorandum in consultation with the Office of Legal Counsel, we have determined that although it accurately describes the core features of the HEROES Act, its ultimate conclusions are unsupported and incorrect.⁵ As such, it should be rescinded.

As an initial matter, the bulk of the January 2021 memorandum’s discussion of HEROES Act authority describes and quotes the key provisions of the HEROES Act. The memorandum explains that the HEROES Act provides the Secretary “authority to provide specified [6] waivers or modifications to Title IV federal financial student aid program statutory and regulatory requirements because of the declared National Emergency,” identifies that declared emergency as the COVID–19 national emergency declared on March 18, 2020, and characterizes this authority as “narrowly cabined” to achieving five enumerated purposes, including “ensur[ing] that . . . recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.” Jan. 2021 Mem. at 5–6.

The memorandum goes on to read in purported limitations on the scope of relief that may be afforded that are contrary to the clear text of the Act. The memorandum

⁵ In addition to determining that the conclusions contained in the January 2021 memorandum were substantively incorrect, we have determined that the memorandum was issued in contravention of then-effective Department processes for issuing significant guidance. An Interim Final Rule issued by the Department on October 5, 2020, pursuant to Executive Order 13,891, established additional procedures for the issuance of guidance documents. See Rulemaking and Guidance Procedures, 85 FR 62,597 (Oct. 5, 2020); see also Exec. Order No. 13,891, 84 FR 55,235 (Oct. 9, 2019). That rule established new requirements for the issuance of guidance and “significant guidance,” defining the latter term to include guidance documents that “[r]aise novel, legal, or policy issues arising out of legal mandates [or] the President’s priorities.” 85 FR at 62,608. The public dissemination of the January 2021 memorandum violated a number of provisions of this rule, including that guidance must be “accessible through the Department’s guidance portal,” and that, barring compelling cause, all significant guidance may be published only after a 30-day public comment period and review by the Office of Management and Budget under Executive Order 12,866 of September 30, 1993. *Id.* That rule was rescinded in September 2021, 86 FR 53,863 (Sept. 29, 2021), but it was in effect at the time of the January 2021 memorandum’s publication. Thus, OGC has determined that the January 2021 memorandum was not properly promulgated.

⁶ We read the term “specified” as acknowledging statutory limits on HEROES Act authority, including the enumerated purposes of 20 U.S.C. 1098bb(b)(1), and not as suggesting any atextual limitations on the Act’s clear grant of authority to waive or modify “any” statutory or regulatory provision applicable to student aid programs, provided other HEROES Act requirements are met.

advances three primary arguments in support of a conclusion that “Congress never intended the HEROES Act as authority for mass cancellation, compromise, discharge, or forgiveness of student loan principal balances, and/or to materially modify repayment amounts or terms.” Jan. 2021 Mem. at 6.

First, the memorandum recites certain statutory limits on the Secretary’s authority, including the HEROES Act’s statutory definition of individuals eligible for relief, 20 U.S.C. 1098ee(2), and the enumerated purposes for which waivers or modifications may be issued, *id.* § 1098bb(a)(2).

The memorandum is correct that such statutory provisions exist but provides no support for the suggestion that these provisions impose limitations beyond their clear terms. See Jan. 2021 Mem. at 6.

Second, the memorandum points to the HEROES Act’s references to avoiding “defaults” and a “cross-cite” to a separate provision of the Higher Education Act relating to the “return” of student loan funds, concluding that these provisions “provide a strong textual basis for concluding Congress intended loans to be repaid.” *Id.* But these provisions—which identify as allowable purposes issuing waivers or modifications to avoid defaults and granting relief from certain requirements that borrowers return certain payments—in no way impose a requirement that any exercise of HEROES Act authority must ensure that every borrower is left with a remaining balance on their loan. The reference to “defaults” authorizes the Secretary to “avoid” defaults; it does not require that he preserve their possibility. And the Higher Education Act provisions regarding the “return” of overpayments relate only to specific processes and calculations under which students are required to return grant and loan assistance if they withdraw from their school, see 20 U.S.C. 1091b; there is no conceivable reading of this provision that reflects a congressional intent that all borrowers, including those not covered by the section 1091b overpayment provisions, are required to repay their loans in full.

Third, the memorandum concludes that the authority to “waive or modify any statutory or regulatory provision” is limited to the definition of “modify” that was adopted for an unrelated telecommunications statute, and “does not authorize major changes.” Jan. 2021 Mem. at 6. The memorandum draws its definition of modify from *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994). In that case, the statutory provisions under review applied no clear limiting principle to a grant of modification authority to the FCC; the statute allowed modifications “in [the FCC’s] discretion and for good cause shown.” *Id.* at 224 (quoting 47 U.S.C. 203 (1988 ed. and Supp. IV)). Here, the HEROES Act itself clearly speaks to the scope of modification authority: the Secretary may make those modifications as may be “necessary to ensure” specific enumerated purposes. 20 U.S.C. 1098bb. The Secretary may not make modifications going beyond that limit, but nor is he restricted to a degree of modifications that would fall short of “ensur[ing]” the enumerated purposes are

achieved. Moreover, the HEROES Act broadly authorizes the Secretary to act as he “deems necessary” to “waive or modify” any statutory or regulatory provision applicable to the student aid program. The January 2021 memorandum’s interpretation of “modify” would read the Act to authorize the Secretary to waive entirely or to make non-major changes in the relevant statutory or regulatory provisions, but not authorize the Secretary to do anything in between. That interpretation is illogical, and nothing in the HEROES Act’s broad grant of authority supports such a reading.

We have discussed these and other aspects of the January 2021 memorandum with the Office of Legal Counsel, and we further find persuasive the discussion of the January 2021 memorandum offered in the Office of Legal Counsel’s memorandum, which will be published in tandem with this memorandum’s recommended publication.

Conclusion

For the reasons detailed above, I recommend that you (1) determine that the January 2021 memorandum is formally rescinded as substantively incorrect and (2) authorize publication in the **Federal Register** and public posting of this memorandum as the Department’s interpretation of the HEROES Act.

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DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: Bonneville Power Administration, Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE), Bonneville Power Administration (BPA), invites public comment on a collection of information that BPA is developing for submission to OMB pursuant to the Paperwork Reduction Act of 1995. The proposed collection, Contractor Safety, will be used to manage portions of the Safety program that are related to contractors. These collection instruments allow for compliance with Occupational Safety and Health Administration (OSHA) requirements.

DATES: Comments regarding this proposed information collection must be received on or before October 31, 2022. If you anticipate any difficulty in submitting comments within that period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent

within 60 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 60 day Review—Open for Public Comments” or by using the search function. Written comments may be sent to Bonneville Power Administration, Attn: Stephanie Noell, Privacy Program, CGI-7, PO Box 3621, Portland, OR 97208-3621, or by email at privacy@bpa.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Attn: Stephanie Noell, Privacy Program, by email at privacy@bpa.gov, or by phone at (503) 230-3881.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains:

- (1) *OMB No.:* New;
 - (2) *Information Collection Request Titled:* Contractor Safety;
 - (3) *Type of Review:* New;
 - (4) *Purpose:* This information collection will be used to manage BPA safety programs that relate to contractors: BPA F 5480.28e, Excavation/Trenching Permit, BPA F 6410.15e, Contractor’s Report of Injury or Illness, BPA F 6410.18e, Contractor’s Report of Incident/Near-Hit, BPA F 6410.42e, Contract Energized Electrical Work Permit;
 - (5) *Annual Estimated Number of Respondents:* 190;
 - (6) *Annual Estimated Number of Total Responses:* 190;
 - (7) *Annual Estimated Number of Burden Hours:* 50;
 - (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* \$0.
- Statutory Authority:* The Bonneville Project Act of 1937, 16 U.S.C 832a; and the following additional authorities: 42 U.S.C. 7101; 5 U.S.C. 301; E.O. 12009; 29 U.S.C. 657 and 29 CFR part 1926.

Signing Authority

This document of the Department of Energy was signed on August 8, 2022, by Candice D. Palen, Information Collection Clearance Manager, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on August 25, 2022.

Treana V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

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DEPARTMENT OF ENERGY

Extension of a Currently Approved Information Collection for the Weatherization Assistance Program

AGENCY: Office Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE or the Department), pursuant to the Paperwork Reduction Act of 1995), intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). The information collection request, Historic Preservation for Energy Efficiency Programs, was initially approved on December 1, 2010, under OMB Control No. 1910-5155 and expired on September 30, 2015. The information collection request was previously approved on February 24, 2020 under OMB Control No. 1910-5155 and its current expiration date is February 28, 2023. This extension will allow DOE to continue data collection on the status of the Weatherization Assistance Program (WAP), the State Energy Program (SEP), and the Energy Efficiency and Conservation Block Grant (EECBG) Program. Program activities will ensure compliance with the National Historic Preservation Act (NHPA).

DATES: Comments regarding this propose information collection must be received on or before October 31, 2022. If you anticipate difficulty in submitting comments within that period, contact the person listed **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

ADDRESSES: Written comments may be sent to Michael Tidwell by email to the following address: michael.tidwell@ee.doe.gov with the subject line “Historic Preservation for Energy Efficiency Programs (OMB No. 1910-5155)” included in the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption. No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments, see **ADDRESSES** section of this document. Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing Covid-19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact the DOE staff person listed in this notice.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Michael Tidwell, EE-5W, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585-0121 or by email or phone at michael.tidwell@ee.doe.gov, (240) 285-8937.

Additional information and reporting guidance concerning the Historic Preservation reporting requirement for the WAP, SEP, and EECBG programs are available for review at: www.energy.gov/eere/wipo/downloads/wpn-10-12-historic-preservation-implementation.

SUPPLEMENTARY INFORMATION: Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information