The Department of Energy is proposing to rescind key energy efficiency requirements. It is beyond ironic that this is happening at a time when the President has proclaimed an energy emergency. Trump says the grid is struggling desperately to meet surging power demand. That's a strange time to eliminate regulations that are saving energy. DOE's action is also illegal, because the law in question has a provision prohibiting rollbacks.

DOE is attempting to get around the anti-rollback provision with a clever dodge. Maybe that would have worked in the days of *Chevron*, when an agency interpretation only had to be reasonable. But *Chevron* is gone, and the agency will need to show that its strained reading of the law is the single best interpretation. It's not going to be able to satisfy that standard.

It's important to grasp the Trump DOE's argument at the onset. When it passed the law, in 1975, Congress set efficiency standards for a long list of specific products. It also authorized DOE to revise those standards. The way this works is that Congress set a standard for a product in the original law and then, based on improved technology, DOE later set a stricter standard for that product. For instance, lighting today is required to be much more energy efficient than the standard originally set by Congress.

Until now, people assumed that DOE's most recent (and strictest) standard would then become the floor for future DOE actions; any new standard would have to be at least as strict. But according to the Trump DOE, the floor remains the standard that Congress provided in the original law. So DOE could backpedal on the standard so long as it didn't go below the original law, taking requirements back to where they were decades ago before modern lighting technologies were available.

I don't think that makes much policy sense, but explaining why it violates the law requires attention to some legalistic details. (Sorry about that, but "legalistic" is pretty inevitable when you're talking about law.) I'll start with the text of the statute and then discuss other arguments.

Textual Arguments

As the Supreme Court constantly reminds us, the place to start in interpreting a statute is its exact language. The anti-rollback provision reads as follows:

> "The Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy

> efficiency, of a covered product."

The most natural reading of this provision is that DOE cannot weaken whatever current energy efficiency requirement applies to a type of product, regardless of whether the requirement was set by Congress or by DOE.

Trump's DOE proposes a different interpretation. Under its interpretation, "maximum" and "minimum" requirements refer to the original baseline standards imposed by Congress itself rather than any new standards that DOE itself issues.

As support, Trump's DOE points out that the standards set by Congress frequently use these two buzzwords (maximum and minimum). On its own terms, that's not a very strong argument. It's natural that those words would be used throughout the statute, along with words like energy, watts, and standards, because that's what the statute is about.

Today's DOE's reading is not the most natural interpretation of the language of the anti-rollback provision. It speaks of what is "allowable" or "required," without any restriction on whether that limit came from the original statute or a DOE regulation.

Apart from being strained, DOE's new interpretation also runs into four textual problems. First, DOE's new interpretation assumes that every product it regulates started out with an efficiency standard set by Congress. That's not true. The anti-rollback provision applies to any "covered product, " which includes products added by DOE to Congress's original list. Congress obviously didn't specify any standards for those products, so the anti-rollback provision has to be referring to those DOE regulations. Thus, the language used in the anti-rollback provision can't be understood to refer exclusively to product standards set by Congress in the original law.

Second, the very next subsection uses "maximum" in connection with DOE regulations, not congressionally established standards. It provides:

> "Any new or amended energy conservation standard prescribed by the Secretary … shall be designed to achieve the ***maximum*** **improvement** in energy efficiency, or, in the case of showerheads, faucets, water closets, or urinals, water efficiency, which the Secretary determines is technologically feasible and economically justified."

Notice another point about this provision. It says a new or amended standard has to achieve an "improvement" in efficiency. This implies that DOE can't issue a regulation that lowers efficiency requirements.

Third, if Trump's DOE were right about what Congress intended, Congress picked quite an oblique (if not completely opaque) way of expressing itself. If Congress actually meant what the Trump DOE says it does, it would have been much easier to simply say, "An amended standard must be at least as stringent as any applicable numerical standard contained in this statute." Congress didn't say that, and the language it did pick doesn't convey the same meaning.

Fourth, the statute has a subsection called "petition for amended standard." Such a petition has to show that "amended standards will result in significant conservation of energy." Presumably, that has to mean a decrease in energy use. In other words, this subsection equates "amended standard" with "stricter standard." There's no way to petition DOE to roll back a standard or to rescind one.

Policy and Legislative History

Trump's DOE relies on legislative history to support its interpretation. Even assuming the scattered statements cited did make this fine distinction, the Supreme Court places no credence in legislative history these days. Moreover, the quotations they refer to don't explicitly support their interpretation.

The current DOE also makes a policy argument that standards might make economic sense when promulgated but might not make sense later. (But surely, they would make sense in an energy emergency, wouldn't they?) Maybe, but there are also strong policy arguments on the other side. An anti-backsliding provision increases the incentives for industry to find cheaper ways to comply, knowing that they won't have the alternative of lobbying DOE for lower standards. Congress could reasonably have expected that with technological progress, energy efficiency standards would become easier to meet over time — as indeed they have.

In any event, the Supreme Court has said time and time again that statutory interpretation must be based on the text of the statute, not on policy arguments or legislative history. In terms of law rather than policy, DOE's arguments are strained at best.

To conclude: I doubt that DOE can back up its arguments that current standards are no longer economically justified. Careful economic analysis wasn't exactly the hallmark of

Trump’s first Administration, and if anything, the level of expertise has gone down this time around. But even if they can get past that barrier, the statute simply doesn’t allow them to roll back existing standards.