

**COMMENTS OF ATTORNEYS GENERAL OF CALIFORNIA, COLORADO,
CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN,
MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OREGON, PENNSYLVANIA,
VERMONT, WASHINGTON, THE DISTRICT OF COLUMBIA, AND THE CITY OF
NEW YORK**

May 27, 2021

Comments submitted via e-mail:
Processrule2021STD0003@ee.doe.gov
U.S. Department of Energy
Appliance and Equipment Standards Program

**Re: EERE-2021-BT-STD-0003
RIN 1904-AF13
Energy Conservation Program for Appliance Standards: Procedures,
Interpretations, and Policies for Consideration in New or Revised Energy
Conservation Standards and Test Procedures for Consumer Products and
Commercial/Industrial Equipment**

The undersigned Attorneys General and local government entities (“State Commenters”) respectfully submit these comments on the United States Department of Energy’s (“DOE”) notice of proposed rulemaking, proposing revisions to its Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, commonly referred to as the Process Rule.¹ 86 Fed. Reg. 18,901 (Apr. 12, 2021) (“Proposal”). The Process Rule governs DOE’s consideration and promulgation of energy efficiency regulations under the Energy Policy and Conservation Act (“EPCA”),² including efficiency standards, test procedures, and coverage determinations. As explained below, the Proposal would make beneficial changes to the Process Rule by reversing many of the changes made by the prior administration in DOE’s most recent revisions to the Process Rule. These 2020 revisions created unnecessary and often unlawful obstacles for DOE’s energy efficiency regulations and prevented the public from realizing associated consumer and energy savings benefits.³ Many of the State Commenters opposed the 2020 revisions and, thus, support their reversal in this Proposal.⁴ We also urge DOE to make changes beyond those in the Proposal to undo the most recent revisions and return the Process Rule to its rightful role of facilitating, instead of obstructing, DOE’s energy efficiency program. Therefore, we urge DOE to finalize the Proposal and promptly pursue additional such modifications to the Process Rule in a subsequent rulemaking.

¹ 10 C.F.R. part 430, subpart C, appendix A (in citations, “Proc. Rule”).

² 42 U.S.C. §§ 6291, *et seq.*

³ *Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 85 Fed. Reg. 8626 (Feb. 14, 2020) (“2020 Final Rule”).

⁴ Comments of Attorneys General of California, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, New York, New Jersey, North Carolina, Oregon, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York, EERE-2017-BT-STD-0062-0111 (May 6, 2019) (“2019 Comments”), attached here as Exhibit A.

As noted in the 2019 Comments, DOE’s energy efficiency program has resulted in substantial economic and environmental benefits: by 2030, DOE projects the program will have resulted in more than \$2 trillion dollars in cumulative utility bill savings for consumers and 2.6 billion tons in avoided greenhouse gas emissions. DOE achieved virtually all of those benefits through rulemakings subject to the Process Rule as it preceded the 2020 Final Rule.

As explained below, the changes included in the Proposal would reverse many of the ill-conceived and damaging revisions introduced by the 2020 Final Rule. The Proposal’s restorative changes include: (1) removing the binding provision; (2) removing the energy savings threshold; (3) resuming the so-called walk-down economic justification analysis; (4) helpfully clarifying and adjusting the assessment of industry test procedures; and (5) removing the 180-day delay between test procedure finalization and standards proposals. Under the 2020 Final Rule, each of these provisions had improperly or unnecessarily limited DOE’s discretion, improperly deferred to industry, and/or would have resulted in the wrongful squandering of funds and precious resources. By restoring the Process Rule to its pre-2020 Final Rule status, the Proposal will allow DOE to pursue energy efficiency regulations appropriately within the confines of EPCA without facing obstacles created by the agency’s prior misguided internal regulation.

Although these restorative changes address the most significant problems with the 2020 Final Rule, DOE should also reverse other misguided and unlawful modifications resulting from that amendment, including: (1) a separate 180-day delay between coverage determination issuance and the proposal of test procedures; and (2) the further interpretation of the “clear and convincing” evidence standard relevant to commercial and industrial equipment standards rulemakings.

With the restoration of the Process Rule to its proper position as an aid to facilitate DOE’s energy efficiency rulemakings, DOE will be better able to implement its mandate under EPCA and provide the benefits of energy efficiency to the public. For those reasons, as further explained below, the State Commenters support the Proposal and urge further consistent action in the expected subsequent rulemaking stage.

I. BACKGROUND: THE ENERGY POLICY AND CONSERVATION ACT, THE PROCESS RULE, AND THE PROPOSAL

A. The Legislative History of the Energy Policy and Conservation Act

EPCA was enacted in 1975 for the purpose of conserving energy and reducing its unnecessary use, among other goals.⁵ *See* 42 U.S.C. § 6201(4), (5) (describing EPCA’s purpose as “conserv[ing] energy supplies through energy conservation programs” and “provid[ing] for improved energy efficiency of . . . major appliances[] and certain other consumer products”). As initially enacted, the statute empowered DOE to impose efficiency standards for household appliances at its discretion.⁶ Five years later, Congress amended EPCA to mandate that DOE

⁵ Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified at 42 U.S.C. §§ 6291-6309).

⁶ H.R. Rep. 94-340, at 17 (1975).

prescribe standards for thirteen classes of major appliances.⁷ Congress intended that the law's nondiscretionary mandates to DOE would yield expeditious improvements in energy efficiency⁸ and, for that purpose, the statute required DOE to set standards that would achieve the maximum energy conservation while still technologically feasible and economically justified.⁹

Following these amendments, and several missed deadlines, DOE determined that no standards were technologically feasible and economically justified for almost all of the priority products it was statutorily charged with regulating, in part based on a significant energy savings threshold. *See Herrington*, 768 F.2d at 1363. Efficiency advocates successfully challenged those determination in the D.C. Circuit, holding that DOE's definition of significant energy savings was "inconsistent" with EPCA. *Id.* at 1368.

In 1987, Congress again amended EPCA, strengthening and expanding the law's mandate for energy efficiency by establishing specific standards for household appliances such as room air conditioners, water heaters, and furnaces.¹⁰ Those revisions also required DOE to periodically review and amend the standards when justified, and prohibited the weakening of standards in order to ensure the continued progression toward more efficient products.¹¹

Subsequent congressional action further strengthened the law and continued to hasten DOE's standard-setting process. In 1992, statutory amendments prescribed standards for commercial and industrial equipment. *See Energy Policy Act of 1992*, Pub. L. No. 102-486, 106 Stat. 2776. Two more rounds of amendments, passed in 2005 and 2007, also required DOE to evaluate light bulb and battery charger efficiency for potential regulation, among other changes.¹²

B. DOE's Energy Efficiency Regulatory Obligations Under EPCA

As currently constituted, EPCA mandates that DOE establish and amend energy efficiency standards for covered products that result in the maximum energy savings while being technologically feasible and economically justified. 42 U.S.C. §§ 6295(o)(2)(A), 6316(a). DOE is required to review those standards every six years and, if justified, propose and finalize amended standards within two years. *Id.* §§ 6295(m)(1)(A), (3)(A), 6313(a)(6)(C)(i)(I), (iii)(I). If DOE determines that the amendment of standards is not justified, it must issue a notice stating no new standards are necessary and review the standards again within three years. *Id.* §§ 6295(m)(1)(B), (3)(B), 6313(a)(6)(C)(i)(II), (iii)(II).

To determine a product's compliance with efficiency standards, DOE is also required to issue test procedures, which measure products' energy efficiency, and review those test procedures

⁷ National Energy Conservation Policy Act (NECPA), Pub. L. No. 95-619, 92 Stat. 3206.

⁸ H.R. Conf. Rep. No. 95-1751, at 114 (1978); *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1362 (D.C. Cir. 1985) (noting home appliance provision was amended to ensure improvements in energy efficiency would be made more "expeditiously" (quoting H.R. Rep. No. 95-496, at 46 (1978))); *see Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 185 (2d Cir. 2004).

⁹ NECPA, sec. 422, § 325(a) & (c), 1978 U.S.C.C.A.N. (92 Stat.) at 3259; *Abraham*, 355 F.3d at 186.

¹⁰ *See National Appliance Energy Conservation Act of 1987*, Pub. L. No. 100-12, 101 Stat. 103.

¹¹ *Id.* (codified at 42 U.S.C. § 6295(m), (o)(1)).

¹² *See Energy Policy Act of 2005*, Pub. L. No. 109-58, 119 Stat. 594; *Energy Independence and Security Act of 2007*, Pub. L. No. 110-140, 121 Stat. 1492; 42 U.S.C. § 6295(u)(1)(E)(i)(II).

every seven years. *Id.* § 6293(b). EPCA also specifies which products are covered by the program and allows DOE to include additional products where those products consume sufficient energy on an annual and national basis and their inclusion would further the purposes of EPCA. *Id.* § 6292. Lastly, as particularly relevant to this rulemaking, EPCA requires DOE to adopt standards for certain industrial and commercial equipment, or to promulgate more stringent standards than industry standards where there is “clear and convincing” evidence that a more stringent standard would result in significant additional energy conservation, is technologically feasible, and is economically justified. *Id.* § 6313(a)(6)(C)(ii).

C. The Process Rule and the 2020 Final Rule

The Process Rule was originally promulgated¹³ in 1996 to “improve the process [DOE] follows to develop energy conservation standards for covered appliance products” through an “effort involv[ing] . . . many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties.” 86 Fed. Reg. at 18,903. Per its promulgating notice, the Process Rule intended to “elaborate on the procedures, interpretations and policies that will guide the Department in establishing new or revised energy efficiency standards for consumer products” and provide “for greatly enhanced opportunities for public input, improved analytical approaches, and encouragement of consensus-based standards.” 61 Fed. Reg. at 36,974. As originally conceived, and until the 2020 Final Rule, the Process Rule was discretionary guidance meant to improve DOE’s energy efficiency rulemakings but not cabin the agency’s discretion.

On December 18, 2017, DOE issued a request for information¹⁴ on potential revisions to the Process Rule and then, on February 13, 2019, published a notice of proposed rulemaking proposing substantial revisions to the Process Rule.¹⁵ Most significantly, DOE proposed to make the Process Rule mandatory for DOE, eliminating the agency’s discretion to deviate from its requirements when necessary or appropriate to fulfill its duties. Proc. Rule, Sec. 3. The 2019 NOPR also proposed a rigid significant energy savings threshold applicable across all product rulemakings,¹⁶ which would prevent the agency from proceeding with potential energy efficiency standards unless they produced at least that set amount of energy savings without consideration for the specific benefits or burdens of the energy savings from the standards at issue.¹⁷ Proc. Rule, Sec. 6(b). Among other problematic changes, the 2019 NOPR proposed to add unjustified delays to the energy efficiency rulemaking process, *id.*, Sec. 5(c), which is already frequently

¹³ See *Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 61 Fed. Reg. 36,974 (July 15, 1996).

¹⁴ *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products: Request for information and notification of public meeting*, 82 Fed. Reg. 59,992 (Dec. 18, 2017).

¹⁵ *Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 84 Fed. Reg. 3910 (Feb. 13, 2019) (“2019 NOPR”).

¹⁶ Under 42 U.S.C. § 6295(n)(2)(A), DOE may only promulgate energy efficiency standards if they “result in significant conservation of energy.”

¹⁷ The benefits from reduced energy consumption, among them reduced emissions and reduced costs for energy generation as well as grid maintenance, depend on a variety of factors related to the product’s energy use, including its time of day, time of year, location, and fuel source.

delayed;¹⁸ required improper deference to industry test procedures, *id.*, Sec 8(c); illogically altered the economic justification assessment process for potential energy efficiency standards, *id.*, Sec. 7(e)(2)(i); and unnecessarily and unlawfully interpreted the appropriate deference to industry standards, *id.*, Sec 9(b). Many of the State Commenters joined comments on the 2019 NOPR, attached as Exhibit A, asserting that the proposed changes violated EPCA’s text, were contrary to EPCA’s intent, and were unnecessary and/or unjustified.

DOE then issued two further rulemaking notices prior to finalizing the proposed changes. First, it issued a notice of data availability,¹⁹ which provided additional information related to the proposed energy savings significance threshold and DOE’s past rulemakings. Specifically, the notice addressed whether the energy savings significance threshold would be determined based on source or site energy savings, seeking to clarify the mixed metrics used in the 2019 NOPR and stating the threshold would be based on site energy savings. DOE further provided the estimated site energy savings from its past rulemakings and delineated which would have been precluded by the proposed energy savings significance threshold depending on the level of the threshold. 84 Fed. Reg. at 36,038. Second, concurrent to its finalization of the other revisions in the 2020 Final Rule, DOE published a supplemental notice of proposed rulemaking,²⁰ proposing a different change to the “walk-down” analysis. Instead of the “economically rational consumer” analysis for economic justification proposed in the 2019 NOPR, the supplemental notice proposed a comparative analysis that would require DOE to analyze the relative costs and benefits of all potential technologically feasible standard levels, without ordering the analysis based on the potential levels’ energy saving potential. 85 Fed. Reg. 8483 (Feb. 14, 2020).

DOE promulgated the 2020 Final Rule on February 14, 2020, finalizing almost all of the changes as originally proposed. 85 Fed. Reg. 8626. In the only significant change from the proposal, DOE amended the significant energy savings threshold and further confirmed its application based on site energy savings, but did not address the threshold’s failure to account for the burdens and benefits of a potential energy efficiency standard level or the varying value of energy savings. *Id.* at 8675.

Due to DOE’s failure to effectively address any of the concerns raised by the 2019 Comments, California and many of the undersigned filed a petition for review of the 2020 Final Rule in the Ninth Circuit, which was consolidated with an equivalent petition filed by efficiency advocates. *State of California, et al. v. U.S. Dep’t of Energy, et al.*, 9th Cir. Case Nos. 20-71068, 20-71071 (Apr. 14, 2020). As industry parties were permitted to intervene, the case was placed in abeyance

¹⁸ The California Attorney General led another coalition of states and local governments in comments on a rulemaking prioritization process instituted by the 2020 Final Rule. The comments criticized the utter failure of DOE under the prior administration to comply with EPCA’s energy efficiency rulemaking deadlines, completing almost none of the required rulemakings, and thereby providing almost none of the rightful benefits of those missed rulemakings to the American people. See Comments of Attorneys General of California Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Vermont, Washington, Commonwealth of Massachusetts, District of Columbia, and City of New York, EERE-2020-BT-STD-0004-0014 (May 15, 2020).

¹⁹ *Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products; Notice of data availability*, 84 Fed. Reg. 36,037 (July 26, 2019).

²⁰ *Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards; Supplemental notice of proposed rulemaking*, 85 Fed. Reg. 8483 (Feb. 14, 2020).

pending the completion of the companion supplemental rulemaking on the economic justification analysis. *Id.*, Dkt. No. 37. After the supplemental rulemaking concluded,²¹ efficiency advocates filed a petition for review, which was consolidated with the other petitions. *Natural Res. Def. Council, et al. v. Brouillette, et al.*, 9th Cir. Case No. 20-73091 (Oct. 16, 2020).

D. The Proposal and the Authorizing Executive Order

On January 20, 2021, the Biden White House issued Executive Order 13,990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”²² The Executive Order directed federal agencies to identify and reconsider regulatory actions taken by the prior administration that undermined or weakened the federal government’s programs, actions, and regulations that address the proper use of science, the protection of public health and the environment, and addressing the climate crisis. Under the Executive Order, agency heads were directed to immediately review agency actions taken during the prior administration to identify regulatory actions constituting such negative actions and submit a preliminary list of those actions that would be subject to reconsideration. *Id.* at 7037–38. The Executive Order specifically identified DOE’s Process Rule as one of four priority regulations for reconsideration and possible suspension, revision, or rescission, directing that major revisions to the Process Rule be proposed by March 2021 and remaining revisions proposed by June 2021. *Id.* Following the Executive Order, DOE issued a memorandum²³ identifying actions by the prior administration for review, including the 2020 Final Rule, as well as the final rule resulting from the supplemental rulemaking. Based on the change in administration and the stated intention of DOE to reconsider the 2020 Final Rule, the petitioners in the consolidated petitions and DOE agreed to a 150-day abeyance to allow DOE to proceed with its reconsideration, which will run through August 2, 2021. *State of California, supra*, Dkt. 56.

On March 31, 2021, DOE issued a pre-publication version of the Proposal on,²⁴ which was subsequently published in the Federal Register on April 12, 2021. 86 Fed. Reg. 18,904.²⁵ As summarized above, the Proposal advanced the following proposed changes to the Process Rule, *id.* at 18,904–10, which would undo many of the deleterious changes made by the 2020 Final Rule by:

- Removing the binding provision, restoring DOE’s discretion to depart from the Process Rule where appropriate;

²¹ *Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards*, 85 Fed. Reg. 50,937 (Aug. 19, 2020).

²² 86 Fed. Reg. 7037 (Jan. 20, 2021) (Executive Order).

²³ *Review of Actions of the Prior Administration*, Kelly Speakes-Backman, Acting Assistant Secretary for Energy Efficiency and Renewable Energy (Feb. 19, 2021).

²⁴ The pre-publication version is available at: <https://www.energy.gov/sites/default/files/2021-03/process-rule.pdf>.

²⁵ As a basis for the Proposal, the Proposal identified the lawsuit led by the New York Attorney General and joined by the California Attorney General and many of the other undersigned entities, along with the parallel suit filed by advocacy organizations, which alleged DOE has violated numerous deadlines for energy efficiency rulemakings. *State of New York, et al. v. Dep’t of Energy, et al.*, S.D.N.Y. Case No. 20-CV-9362 (Nov. 9, 2020). In the Proposal, DOE reasonably said those cases caused it “to reconsider whether the benefits of a one-size-fits-all rulemaking approach outweigh the increased difficulty such an approach poses in meeting DOE’s statutory deadlines.” 86 Fed. Reg. at 18,902.

- Removing the significant energy savings threshold, allowing case-specific determinations of whether potential efficiency standards meet the significant energy savings requirement;
- Restoring the “walk-down” economic justification analysis framework and removing the comparative analysis requirement;
- Clarifying the treatment of industry test standards, confirming that they will only be adopted if DOE determines they comply with EPCA’s requirements; and
- Removing the requirement to finalize test procedures 180 days before the proposal of energy efficiency standards.

The Proposal further stated that DOE “may propose additional revisions in a subsequent NOPR.” 86 Fed. Reg. at 18,902.

II. THE PROPOSAL WOULD SUPPORT A MORE EFFECTIVE ENERGY EFFICIENCY PROGRAM CONSISTENT WITH EPCA.

The State Commenters affirm the benefits and propriety of the Proposal’s anticipated changes and urge DOE to finalize them. The Proposal advances modifications to the Process Rule that will undo the ill-conceived, largely unlawful, and woefully counterproductive changes wrought by the 2020 Final Rule, to make DOE’s energy efficiency rulemakings more expeditious while also providing appropriate flexibility for DOE to take into account product- or rulemaking-specific concerns during the regulatory process. As EPCA’s legislative history demonstrates, Congress clearly and repeatedly has mandated, through multiple revisions of EPCA, that DOE regularly and timely promulgate the most stringent energy efficiency standards that are technologically feasible and economically justified. Because the changes instituted by the 2020 Final Rule were detrimental to DOE’s energy efficiency rulemaking process and counter to DOE’s congressional mandate, the Proposal appropriately reverses those changes, restores DOE’s flexibility in its energy efficiency rulemakings, and removes unnecessary burdens and obstacles for those rulemakings. Thus, in a broader view, the Proposal would make DOE’s energy efficiency rulemakings more consistent with EPCA, and thereby ensure the American public receives the consumer and energy savings benefits to which they are rightfully entitled under EPCA. As explained more fully below, the following five specific revisions in particular from the Proposal would make the Process Rule more consistent with EPCA and support a more effective energy efficiency program.

A. DOE should proceed with restoring its discretion to depart from the Process Rule.

In the Proposal, DOE proposes to restore its discretion to deviate from the provisions of the Process Rule when appropriate, thereby making the Process Rule discretionary and not binding, avoiding potential litigation, and providing necessary flexibility to DOE. *See* 86 Fed. Reg. at 18,905. Under the 2020 Final Rule, DOE made the Process Rule binding on all rulemakings under EPCA, ostensibly to increase predictability and consistency in agency rulemaking. *See* 2019 Proposed Process Rule, 84 Fed. Reg. at 3,911–12. In the 2019 Comments on the then-proposed rule, the State Attorneys General opposed DOE making the Process Rule binding, as opposed to discretionary, because a rigid application of this rule would jeopardize DOE’s ability

to meet its legal obligations under EPCA. 2019 Comments, Exh. A at pp. 6–7. We commented that numerous Process Rule provisions would conflict with EPCA’s statutory requirements if the Rule were made binding. We also commented that making the Process Rule binding on all rulemakings, including instances where doing so conflicts with EPCA mandates, exposes DOE to increased litigation that would further delay promulgation of final standards on statutorily mandated timelines.

Now, DOE “proposed to revert the Process Rule back to its original, non-binding status” and “requests comments . . . on whether the Process Rule should be non-binding.” 86 Fed. Reg. at 18,905. Specifically, in its Proposal, DOE asserts that by making the Process Rule mandatory, instead of discretionary, DOE would be hard-pressed to meet its statutory deadlines under EPCA. *Id.* at 18,904–05. We support DOE’s proposal here for the reasons outlined in the 2019 Comments. *See* Exh. A at 6–7. We agree that application of the Process Rule should be determined on a case-by-case basis so that DOE is accorded the latitude and discretion to pursue the most appropriate approach to gathering, analyzing, and synthesizing stakeholder input for different standards. Granting DOE this procedural flexibility will help ensure that DOE is able to fulfill its EPCA mandates as efficiently as possible with minimal delay and litigation risk.

B. DOE should proceed with eliminating the energy savings threshold.

DOE also proposes to eliminate the energy savings threshold created by the 2020 Final Rule. 86 Fed. Reg. at 18,905. Under the previous rule, DOE had adopted a numerical threshold for “significant conservation of energy”—a 0.30 quad reduction in site energy use over a 30-year period or a 10 percent reduction in site energy use over that same period. 85 Fed. Reg. 8626, 8670. In the 2019 Comments on the 2019 NOPR, the State Attorneys General strongly opposed the creation of an energy savings threshold and provided extensive reasons for why DOE should not have developed a threshold. *See* Exh. A at 9–12. Thus, we support DOE’s effort to eliminate the threshold created by the 2020 Final Rule.

In particular, in its Proposal, DOE “proposes to eliminate the current threshold for determining significant conservation of energy and to revert to its prior practice of making such determinations on a case-by-case basis.” 86 Fed. Reg. at 18,905. DOE states that it is “reevaluating whether the significance of energy savings offered by a new or amended energy conservation standard can be determined without knowledge of the specific circumstances surrounding a given rulemaking.” *Id.* It cannot, and we agree with the specific examples DOE offers to show why the significance of energy savings cannot be determined without knowledge of the specific circumstances. *See id.*

Consistent with the 2019 Comments, the State Commenters agree with DOE’s proposal to eliminate the energy savings threshold. The threshold fails to comply with the text and intent of EPCA due to its failure to consider the relative contextual benefits and burdens of a potential standard’s energy savings. Indeed, the current bright-line rule is contrary to the D.C. Circuit’s interpretation of the significant energy savings requirement in *Herrington*, 768 F.2d at 1362. Like the threshold in *Herrington*, the current threshold prevents DOE from appropriately promulgating energy efficiency standards where those standards would result in valuable energy savings and consequently would result in “missed” energy savings achievable at minimal or no cost. Moreover, the thresholds imposed by the 2020 Final Rule were arbitrary and unnecessary,

and would serve only to frustrate EPCA’s purpose of securing the benefits of energy efficiency, whether through large individual rulemakings or smaller rulemakings with substantial cumulative effect.

In sum, the bright-line requirement is an unlawful interpretation of EPCA and contrary to existing caselaw and congressional intent, and will result in lost public benefits. Removing this threshold would, therefore, allow DOE to provide the most benefits for consumers and the environment through the energy efficiency program.

C. DOE should restore the “walk-down” economic justification analysis.

Through the Proposal, DOE also seeks to restore the “walk-down” economic justification analysis and remove the comparative analysis of all potential standard levels imposed by the 2020 Rule. Under its 2020 supplement to the Process Rule, DOE transformed the previous “walk-down” framework—under which DOE evaluates potential standard levels determined based on technical feasibility for economic justification from the most to least energy savings potential standard levels until it finds one that is economically justified—to require DOE to perform a comparative analysis for economic justification on every potential standard level. 85 Fed. Reg. at 50,937.

Now, DOE “proposes to eliminate the requirement to conduct a comparative analysis when determining whether a specific trial standard level is economically justified.” 86 Fed. Reg. at 18,906. DOE explained that the comparative analysis added by the previous rulemaking only “generated considerable confusion amongst DOE’s stakeholders,” specifically with respect to whether the comparative analysis “would conflict with DOE’s statutory mandate to select the [trial standard level] that results in the maximum improvement in energy efficiency that is technologically feasible and economically justified.” *Id.*

The State Commenters support DOE’s proposal to restore the walk-down economic justification analysis and remove the comparative analysis of all potential standard levels imposed by the 2020 Rule. A comparative analysis of the other technologically feasible standard levels would represent a waste of resources once an appropriate standard level has been identified in this way. A comparative analysis framework therefore would only serve to support a standard that results in less energy savings than would be economically justified and technologically feasible, removing this provision would confirm DOE’s adherence to EPCA.

D. DOE should proceed with clarifying and revising the treatment of industry test procedures.

DOE proposes to clarify and revise the Process Rule regarding its treatment of industry procedures. Specifically, DOE’s Proposal will “clarify that while DOE will first consider applicable industry consensus standards, such standards must first undergo a thorough agency review to ensure that they meet the requirements of the statute, either with or without modification.” 86 Fed. Reg. at 18,906. The 2020 Final Rule changed the original Process Rule “to require adoption, without modification, of industry standards as test procedures for covered products and equipment, unless such standards d[id] not meet the EPCA statutory criteria for test procedures.” *Id.* Now, DOE seeks to adjust the language of this provision, making clear that

DOE needs to make the proper determinations to justify the adoption of industry test procedures, placing the burden appropriately on industry to justify any test procedures. In particular, DOE explains that “DOE has come to see that its attempt at clarification may have had the opposite effect, creating the false impression that DOE had put in place a new presumption for an ‘as-is’ adoption of industry consensus standards without meaningful review.” *Id.*; *see also id.* at 18,907 (“If the consensus standard does not meet both relevant statutory criteria (as detailed earlier) and CC&E requirements, DOE will not adopt the consensus standard without modification. It will then be necessary for DOE and stakeholders, during the notice and comment rulemaking process, to determine what specific modifications, if any, will bring the consensus standard into compliance with the statutory criteria and CC&E requirements. If the consensus standard cannot be modified to meet the statutory criteria and CC&E requirements, DOE will not use it and will need to craft its own test procedure.”).

The State Commenters wholly support DOE’s attempt to clarify the treatment of industry test procedures, which appropriately situates the burden on the industry test procedures, not DOE. The industry test procedure provision from the 2020 Final Rule imposes a duty on DOE to adopt industry test procedures unless DOE made a contrary determination. 84 Fed. Reg. at 3,927. But industry test procedures are generally not created to measure energy efficiency and, thus, may not be appropriate under EPCA. Further, for some products, there will be multiple industry test procedures, and the 2020 Final Rule provides no explanation for how DOE would determine which test procedure to adopt. Though industry test procedures may be appropriate at times, DOE should not impose this duty on itself because it will hinder the agency’s ability to satisfy the test procedure adoption requirements of EPCA.

E. DOE should remove the 180-day test procedure standards delay.

In the Proposal, DOE also seeks to remove the newly required and misguided 180-day delay between completion of a test procedure final rule and proposal of an energy conservation standard proposal, which precluded test procedures from being developed concurrently with the standards rulemaking. 84 Fed. Reg. at 3,926. Removing this 180-day “pause” would, in essence, revert back to the original intent of the Process Rule, which is “that test procedure rulemakings ‘will be finalized prior to publication of a NOPR proposing new or amended energy conservation standards.’” 86 Fed. Reg. at 18,907. According to DOE, “[n]ot every test procedure rulemaking would be expected to involve the same level of complexity,” and “DOE has tentatively concluded that it should have flexibility to address such situations on a case-by-case basis as they arise.” *Id.* at 18,908.

The State Commenters agree and maintain that DOE’s approach in the Proposal to remove this unnecessary delay is appropriate and will improve compliance with its statutory deadlines. The 2020 Rule’s rigid delay requirement jeopardizes DOE’s ability to meet statutory timelines without any reasoned basis and is, therefore, contrary to Congress’s intent in EPCA. In addition, this delay disincentivizes fixes to test procedures because then rulemakings on efficiency standards would have to be restarted.

Thus, for all these reasons and the reasons set forth in the 2019 Comments, the State Commenters support DOE’s Proposal.

III. IN THE SUBSEQUENT RULEMAKING STAGE, DOE SHOULD MAKE ADDITIONAL CHANGES TO REVERSE THE NEGATIVE CHANGES OF THE 2020 FINAL RULE.

Although the Proposal advances many beneficial adjustments to the Process Rule that would reverse the negative changes instituted by the 2020 Final Rule, the Proposal does not address all the problematic changes made through that prior rulemaking. The Executive Order directs DOE to engage in additional rulemaking beyond the first step represented by the Proposal if necessary, and DOE acknowledges this direction in the Proposal. 86 Fed. Reg. at 18,902. Because additional changes can and should be made, DOE should pursue a second round of rulemaking that includes at least the removal of the coverage determination-test procedure proposal delay and the rescission of the unnecessary “clear and convincing” evidence interpretation.

A. DOE should eliminate the delay period between the finalization of coverage determination and the proposal of test procedures.

In addition to requiring delay for test procedure finalization-standards proposal delay (described above), the 2020 Final Rule also imposed a similar 180-day delay between the finalization of coverage determinations and the proposal of subsequent regulations, requiring DOE to defer publication of a subsequent rulemaking notice regardless of the specific circumstances in the rulemaking. Proc. Rule, Sec. 5(c). The State Commenters argued against that change in their 2019 Comments (pp. 8–9) and urge DOE to reverse the change in its next rulemaking proposal, as is consistent with its removal of the test procedure finalization-standards proposal delay. 86 Fed. Reg. at 18,907–08.

The primary harm of the delay, unsurprisingly, is the unnecessary, wasteful lost time when energy efficiency standards could more quickly benefit delivered to the American public, if DOE has to wait after the issuance of a coverage determination to proceed with the subsequent steps of an energy efficiency rulemaking. The delay also creates other harms, however, due to its constraint of DOE’s flexibility in its rulemaking. First, it disincentivizes DOE from adjusting coverage determinations where appropriate, if it finds a change is necessary after the finalization of the coverage determination, because the rulemaking would need to in effect be restarted to comply with the delay requirements. Second, the delay prevents DOE from using information learned during subsequent rulemaking stages to support an adjustment to the coverage determination, even when justified, unless DOE returns the start of the other rulemaking stages as well. Third, the 2020 Final Rule change prevents DOE from even initiating a subsequent test procedure or energy efficiency standards rulemaking through the issuance of information-gathering notices such as Requests for Information or Notices of Data Availability. Thus, under the current framework, DOE is precluded from working concurrently on separate rulemaking stages to ensure the expeditious completion of energy efficiency regulations, even though stakeholders would have a subsequent opportunity to comment. As DOE recognizes with respect to the test procedure-standards delay, this delay similarly fails to recognize the benefits of flexibility and the potential for delays to frustrate EPCA’s timely and iterative rulemaking processes. Finally, at times, this provision could conflict directly with EPCA if DOE is prohibited from publishing a rulemaking notice which is past due under the statutory deadlines.

For these reasons, the 180-day delay between coverage determinations and subsequent rulemaking is both counterproductive and inconsistent with EPCA. As with the test procedure-

standards delay, it should be removed to return to the original flexible expectation that DOE will complete coverage determinations prior to subsequent rulemakings, but will not observe a strict but unnecessary delay as required under the current Process Rule.

B. DOE should rescind the unnecessary interpretation of the “clear and convincing” evidence standard applicable to industrial/commercial equipment rulemakings.

In the next rulemaking step, DOE should rescind the unnecessary interpretation of the “clear and convincing” evidence standard applicable in energy efficiency standards rulemakings for certain industrial and commercial equipment. This interpretation only confuses the appropriate analysis as it is either superfluous or contrary to EPCA, and thus should be removed.

Currently, the Process Rule provides that for certain types of commercial and industrial equipment (i.e., air conditioning and heating equipment) DOE will only consider amended standards and test procedures more stringent than the ASHRAE 90.1, or industry standard, if it can reach “a very high bar” to meet the “clear and convincing evidence” threshold under 42 U.S.C. 6313(a)(6)(A)(ii). The Rule further states that clear and convincing evidence would exist only where there is “no substantial doubt” that such a standard would result in a significant additional amount of energy savings, is technologically feasible and economically justified. These interpretations of EPCA’s requirements for ASHRAE equipment are superfluous, potentially inconsistent with EPCA and should be rescinded as part of DOE’s next Process Rule review. DOE has successfully updated standards and test procedures for ASHRAE equipment without the Process Rule’s characterization of EPCA’s statutory requirements. If the “no substantial doubt” standard is equivalent to the “clear and convincing” evidence standard, the further interpretation serves no purpose and is fundamentally superfluous. On the other hand, if the “no substantial doubt” standard is *different* than the “clear and convincing” evidence standard, it would violate EPCA by contradicting the standard supplied by the statute. In light of this, the interpretation cannot serve any actual purpose and should, therefore, be removed to avoid the likely confusion that will result. DOE should proceed by evaluating potential standards in relation to the statutory standard, as Congress has mandated.

IV. CONCLUSION

For the reasons explained above, the State Commenters support DOE’s Proposal and urge DOE promptly to pursue additional changes in any subsequent rulemaking to reverse modifications to the Process Rule imposed in the 2020 Final Rule, but not addressed in the 2021 Proposal.

Respectfully submitted,

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Exhibit A

2019 Comments

**COMMENTS OF ATTORNEYS GENERAL OF CALIFORNIA, COLORADO,
CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW
YORK, NORTH CAROLINA, OREGON, VERMONT, WASHINGTON, THE
COMMONWEALTH OF MASSACHUSETTS, THE DISTRICT OF COLUMBIA, AND
THE CITY OF NEW YORK**

May 6, 2019

Comments submitted via e-mail:
Process.Rule@ee.doe.gov
U.S. Department of Energy
Appliance and Equipment Standards Program

**Re: Docket No. 2019-01854
EERE-2017-BT-STD-0062
RIN 1904-AD38
Energy Conservation Program for Appliance Standards: Proposed
Procedures for Use in New or Revised Energy Conservation Standards and
Test Procedures for Consumer Products and Commercial/Industrial
Equipment**

The undersigned Attorneys General and local government entities respectfully submit these comments on the Department of Energy's (DOE) notice of proposed rulemaking for Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, commonly referred to as the Process Rule. 84 Fed. Reg. 3,910 (Feb. 13, 2019) (the Proposed Revisions). As explained below, the Proposed Revisions would unlawfully impede DOE's energy efficiency rulemakings and frustrate the purpose of the Energy Policy and Conservation Act, 42 U.S.C. § 6291, *et seq.* (EPCA). Therefore, we urge DOE to withdraw its Proposed Revisions.

DOE's energy efficiency program has resulted in substantial economic and environmental benefits: by 2030, DOE projects the program will have resulted in more than \$2 trillion dollars in cumulative utility bill savings for consumers and 2.6 billion tons in avoided carbon dioxide emissions.¹ DOE has achieved many of those benefits through rulemakings subject to the current

¹See DOE Fact Sheet, "Saving Energy and Money with Appliance Equipment Standards in the United States" (Jan. 2017), *available at*:

https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf. See DOE Fact Sheet, "Saving Energy and Money with Appliance and Equipment Standards in the United States" (Feb. 2016), *available at*:

<https://www.energy.gov/sites/prod/files/2016/02/f29/Appliance%20Standards%20Fact%20Sheet%20-%202017-2016.pdf>. Further, recent reports from the federal government and leading international bodies confirm that greenhouse gas emissions are already harming our nation's environment, public health and economy, and that substantial reductions are needed in the next decade to avoid far worse consequences. Climate Science Special Report: Fourth National Climate Assessment, Vol. II., U.S. Global Change Research Program, Washington, D.C., USA (USGCRP), doi: 10.7930/JIM32SZG; Intergovernmental Panel on Climate Change (IPCC), 1.5°C Report, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global GHG emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty, Summary for Policymakers.

Process Rule, which provides guidance and transparency to the public while also ensuring DOE meets EPCA’s mandate to promulgate energy conservation standards that benefit the public within the prescribed statutory deadlines.

The Proposed Revisions² are both unnecessary and counterproductive. Since 2017, after a period of improved compliance with EPCA’s requirements, DOE has again fallen behind on meeting EPCA’s mandatory deadlines. While Congress’s revisions to EPCA show the importance of timely rulemakings, as discussed below, the Proposed Revision would likely slow—and in some cases halt—energy efficiency rulemakings while exposing DOE to frequent litigation. The revisions also misinterpret the factors Congress required DOE to consider under EPCA and improperly favor recalcitrant elements within industry that oppose energy efficiency standards.

Furthermore, DOE’s allocation of resources to this unnecessary rulemaking while the agency falls further behind its statutorily mandated energy efficiency rulemaking deadlines is contrary to the statute. DOE should allocate its resources to complying with those statutory deadlines and providing the public with the benefits of timely appropriate energy efficiency standards.

I. The Proposed Revisions Frustrate EPCA’s Purposes

DOE claims that the Proposed Revisions will “increase[] transparency and public engagement and achieve[] meaningful burden reduction, while at the same time continuing to meet the Department’s statutory obligations under EPCA.” 84 Fed. Reg. at 3912. However, the Proposed Revisions would accomplish a contrary result by introducing obstacles to meeting EPCA’s core statutory requirements in a timely manner. These core statutory requirements include:

- Establishing and subsequently amending, as justified, energy conservation standards to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. §§ 6295(o)(2)(A), 6316(a);
- Reviewing DOE’s existing standards at least every six years to determine whether standards should be amended and, if so, proposing new standards. *Id.* §§ 6295(m)(1), 6313(a)(6)(C)(i); and,
- After proposing new standards, publishing a final rule within two years of issuing a notice of proposed rulemaking. *Id.* §§ 6295(m)(3), 6313(a)(6)(C)(iii).

² The Proposed Revisions address the following topics: “(1) Emphasizing that the procedures outlined in the Process Rule are binding on the agency; (2) formalizing DOE’s past practice of applying the Process Rule to both consumer products and commercial equipment; (3) clarifying the Process Rule’s application with regard to equipment covered by ASHRAE Standard 90.1; (4) expanding the Process Rule to test procedure rulemakings, as well as energy conservation standards rulemakings; (5) committing to both an “early look” process and other robust methods for early stakeholder input; (6) defining a significant energy savings threshold that must be met before DOE will update an energy conservation standard; (7) clarifying DOE’s commitment to publish a test procedure six months before a related standards NOPR; (8) articulating DOE’s authority under the Negotiated Rulemaking Act and EPCA’s direct final rule (“DFR”) provision, while clarifying that negotiated rulemakings and DFRs are two separate processes with their own sets of requirements; and (9) addressing other miscellaneous issues.” 84 Fed. Reg. at 3,911.

As detailed below, the proposed procedural and substantive changes to the Process Rule conflict with EPCA's statutory mandates. The Proposed Revisions will not facilitate better implementation of the statute's purposes or more consistent compliance with its mandates. Instead, they would frustrate those goals and the Congressional intent underlying EPCA by making the process more difficult, impeding the ostensibly intended results.

A. EPCA's History and Purpose.

EPCA's legislative history shows that Congress has consistently strengthened the applicable statutory provisions. Congress intended the statute to rapidly and iteratively increase the energy efficiency of covered products. Indeed, Congress has gone as far as mandating energy efficiency improvements for specific products in response to DOE's inability to accomplish the statute's goals.

Congress initially enacted EPCA in response to the energy crisis instigated by the 1973 oil embargo.³ The initial version of the statute gave DOE the discretionary authority to establish energy conservation standards for household appliances. Rather than implementing mandatory standards, the statute envisioned a market-based approach relying on labels disclosing appliances' energy use.⁴

Five years later, Congress amended EPCA to mandate that DOE prescribe standards for thirteen classes of major appliances. *See National Energy Conservation Policy Act (NECPA)*, Pub. L. No. 95-619, 92 Stat. 3206. Congress intended that the law's nondiscretionary mandates to DOE would yield expeditious improvements in energy efficiency.⁵ The statute required DOE to set standards that would achieve the maximum improvement in energy efficiency that was technologically feasible and economically justified.⁶

After missing several deadlines, DOE determined that no standards were technologically feasible and economically justified for nine products, which prompted a legal challenge from efficiency advocates. *See Herrington*, 768 F.2d at 1363. In evaluating this action, the D.C. Circuit stated that, even according DOE deference, the Department's decision and many methods it used were unsupported by the administrative record. *Id.* at 1363, 1369-83, 1391-1407, 1411-14, 1417-24, 1433; *see Abraham*, 355 F.3d at 186.

Congress then stepped in again to amend EPCA, establishing standards for household appliances such as room air conditioners, water heaters, and furnaces. These amendments required DOE to

³ *See* H.R.Rep. No. 94-340, pts. I & II, at 1-3 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763-65; *see also id.*, pt. V, at 20, *reprinted in* 1975 U.S.C.C.A.N. at 1782; EPCA § 2, 1975 U.S.C.C.A.N. (89 Stat.) at 874; *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 185 (2d Cir. 2004).

⁴ *See* EPCA §§ 323-26, 1975 U.S.C.C.A.N. (89 Stat.) at 919-26; *see also* H.R. Rep. 94-340, pt. II, at 10, *reprinted in* 1975 U.S.C.C.A.N. at 1772; S. Conf. Rep. 94-516, pt. III, at 119-20 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1960; *Abraham*, 355 F.3d at 185.

⁵ *See* H.R. Conf. Rep. No. 95-1751, at 114 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8134, 8158; *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1362 (D.C. Cir. 1985) (noting home appliance provision was amended to ensure improvements in energy efficiency would be made more "expeditiously" (quoting H.R.Rep. No. 95-496, pt. IV, at 46 (1978), *reprinted in* 1978 U.S.C.C.A.N. 8454, 8493)); *see Abraham*, 355 F.3d at 185.

⁶ *See* NECPA, sec. 422, § 325(a) & (c), 1978 U.S.C.C.A.N. (92 Stat.) at 3259; *Abraham*, 355 F.3d at 186.

periodically review and update these standards in accordance with specific deadlines. *See* National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103; 42 U.S.C. §§ 6291-6309. Furthermore, the amended standards were to “be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.” *Id.* sec. 5, § 325(1)(2)(A), 1987 U.S.C.C.A.N. (101 Stat.) at 114; *see Abraham*, 355 F.3d at 186.

Subsequent Congressional action once again strengthened the law and continued to hasten DOE’s standard-setting process. In 1992, statutory amendments prescribed standards for commercial and industrial equipment. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776. Two more rounds of amendments, passed in 2005 and 2007, required DOE to evaluate light bulb and battery charger efficiency for potential regulation, among other changes.⁷

B. The Process Rule Revisions Contravene EPCA’s Purpose.

The Proposed Revisions contravene this history of steadily expanding coverage and increasing efficiency. They are also contrary to the Congressional desire for timely and expeditious energy conservation rulemakings. While the divergence of specific proposed changes is examined more fully below, the contradictions between the Proposed Revisions and EPCA’s broad policy purposes are reviewed here.

Instead of facilitating quicker and more agile standard-setting, many aspects of the proposed Process Rule add administrative barriers, likely leading to further delay. The proposed Process Rule is binding on all DOE standards processes, eliminating DOE’s flexibility to follow a different course when necessary to meet statutory requirements. The proposal also adds unnecessary procedural steps for the establishment of standards, making it more difficult to complete the process.

Additionally, the Proposed Revisions limit when DOE can pursue setting a new standard at all. For instance, DOE proposes a narrow view of how to appropriately carry out EPCA’s purposes, a view that is unsupported by EPCA’s statutory language and by Congressional intent. Specifically, DOE’s proposed “limited” approach to identifying new covered products is contrary to Congressional intent to continue expanding covered products. Furthermore, DOE proposes giving industry undue influence in test procedure rulemakings by deferring to industrial standards over DOE’s own analysis and determination. Perhaps most glaringly, DOE would require a threshold level of energy savings before engaging in the standards-setting process, which contravenes Congressional intent to save energy whenever technically feasible and economically justified. Considering Congress’s focus on accelerating standards rulemakings, removing this objective is both arbitrary and unreasonable. Together, these changes show the plain conflict between EPCA’s purpose and the Proposed Revisions’ foreseeable effect.

These added barriers would introduce further delay when DOE is already behind. DOE has missed statutory deadlines to update standards for 16 covered products, including refrigerators,

⁷ *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; 42 U.S.C. §§ 6295(u)(1)(E)(i)(II).

washing machines, and room air conditioners.⁸ DOE's Proposed Revisions do not fulfill Congressional intent reflected when it passed and updated EPCA. Instead, these updates would further delay a program that is already critically behind.

C. DOE's changes to the Process Rule's Objectives are contrary to EPCA's purpose and its failure to explain them is arbitrary and capricious.

DOE's arbitrary action and its failure to adhere to EPCA begin with its revisions to the Objectives of the Process Rule in Section 1. While maintaining eight out of ten objectives from the original Process Rule, DOE removes two: "Articulate policies to guide the selection of standards" and "Reduce time and cost of developing standards." 84 Fed. Reg. at 3,495; *cf.* Energy Conservation Program for Consumer Products: Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 61 Fed. Reg. 36,974, 36,975 (July 15, 1996) (Original Process Rule). The rulemaking notice fails to explain either removal. However, an agency is required by the Administrative Procedure Act ("APA") to justify its divergence from past agency policy by "display[ing] awareness that it its changing position," providing "good reasons" for the change, and demonstrating that the new policy is "permissible under the statute." *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009). "An agency may not . . . depart from a prior policy *sub silentio*." *Id.* (emphasis original). Here, DOE has failed to recognize, and thereby "display awareness that it is changing its position," let alone explain this substantial change with "good reasons" in the notice of proposed rulemakings. Thus, DOE failed to appropriately justify its substantial changes of the Process Rule's purpose, in violation of the APA.

Furthermore, removing the timeliness objective is contrary to the intent of Congress's repeated revisions of the statute, recounted above, which sought to accelerate energy conservation rulemakings. Therefore, removing that objective is not only arbitrary and capricious but also contrary to clear Congressional intent.⁹

II. The Proposed Revisions Impose Procedural Obstacles to Timely Standard Setting Under the Guise of "Predictability and Consistency"

The Proposed Revisions would impose multiple new procedural hurdles that would impede DOE's promulgation of appropriate energy efficiency standards in compliance with EPCA. These impediments are exacerbated by DOE's proposal to make the Process Rule binding and thus a potential basis for litigation. Combined, the procedural hurdles and binding nature of the proposed Process Rule would make DOE's compliance with EPCA more difficult: it reduces DOE's rulemaking flexibility while also exposing the agency to potential litigation challenging actions that are in fact consistent with EPCA's purpose and intent.

⁸ Press Release, House Energy & Commerce Committee Newsroom, "Pallone Remarks at Hearing on Department of Energy's Missed Energy Efficiency Standards Deadlines," *available at*: <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/0307%20Opening%20Remarks%20-%20Energy%20Efficiency%20Hearing.pdf>.

⁹ DOE's intent in removing the 'standard selection policies' objective is perplexing, as the revisions in fact include various policies that in fact would guide standards selection in DOE rulemakings. This unexplained internal inconsistency is itself also arbitrary and capricious. *Air Transport Ass'n of America v. Dept. of Transportation*, 119 F.3d 38, 43 (D.C. Cir. 1997).

A. Making DOE's Process Rule binding on all rulemakings establishing energy efficiency standards conflicts with EPCA.

DOE proposes making the Process Rule binding on all rulemakings under EPCA, ostensibly to increase predictability and consistency in agency rulemaking. *See* 84 Fed. Reg. at 3,911-12. The undersigned parties strongly oppose DOE making the Process Rule binding, as opposed to guidance, because a rigid application of this rule would jeopardize DOE's ability to meet its legal obligations under EPCA. Statutory requirements must take precedence over both agency regulations and guidance.

Numerous Process Rule provisions would conflict with EPCA's statutory requirements if made binding. For example, the requirement to restart a test procedure or energy conservation standard rulemaking if a coverage determination were changed would force DOE to take unnecessary and time-consuming procedural steps even when the agency was in violation of a statutory deadline. While DOE currently follows the Process Rule in the majority of its rulemakings, the agency can deviate from the Process Rule where appropriate. In making the Process Rule mandatory, DOE would lose this discretion and risk falling into noncompliance with EPCA mandates. This risk only increases if DOE adopts many of its proposed changes to the Process Rule, such as the coverage determination restart requirement or the similar requirement for test procedures, which could further delay rulemaking. Furthermore, eliminating any procedural flexibility could also preclude DOE from pursuing the most appropriate approach to gathering, analyzing, and synthesizing stakeholder input for different standards.

Making the Process Rule binding on all rulemakings, including instances where doing so conflicts with EPCA mandates, exposes DOE to increased litigation that would further delay promulgation of final standards on statutorily mandated timelines. Such litigation would ultimately increase uncertainty in the rulemaking process, thereby frustrating DOE's stated objectives of predictability and consistency in the rulemaking process. These delays would also frustrate EPCA's purpose by unduly denying consumers and businesses the full and timely benefit of the energy and cost savings associated with the implementation of energy conservation standards. Imposing a binding Process Rule on the agency will only further exacerbate DOE's noncompliance with the statute, especially given the current state of DOE's missed deadlines under EPCA.

Making the Process Rule binding on DOE would also impose many new obligations on the agency, even as DOE fails to meet its statutory duties. However, DOE fails to explain how making the Process Rule mandatory would accord with these statutory duties. Given the clear potential for conflict between the Proposed Revisions and DOE's statutory duties, the agency must evaluate how it would manage those conflicts when they unavoidably arise. Because DOE fails to examine those issues, it has failed to provide sufficient detail to allow for meaningful and informed comment, as required by the APA. *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) ("Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment.").

If DOE nonetheless binds itself through the Process Rule, it should include a good cause waiver, which would allow it to deviate from the Process Rule's constraints where DOE finds it is appropriate to further the purpose of EPCA or necessary to comply with its statutory obligations under the law. Under this procedure, DOE would provide notice in instances where deviation from the Process Rule was justified on those grounds. Under the current Process Rule, DOE has notified the public when deviating from the current Rule's requirements, even though it is not binding. 10 C.F.R. Pt. 430, Subpt. C., App. A, Sec. 14; *see, e.g.*, 81 Fed. Reg. 62980, 62986 (DOE deviated from Process Rule by not finalizing test procedure before standards rulemaking because test procedure amendment recommended by working group). A good cause waiver would allow DOE to avoid situations where the Process Rule conflicted with the text or purpose of EPCA, thus better implementing its mandates.

B. Requiring issuance of test procedures 180 days prior to the issuance of a NOPR for new or amended standards threatens DOE's ability to meet EPCA statutory deadlines.

Proposed Section 8(d) of the Process Rule would require DOE to issue test procedures 180 days before publishing a Notice of Proposed Rulemaking for an energy efficiency standard, instead of allowing test procedures to be developed concurrently with the standards rulemaking. 84 Fed. Reg. at 3,926. This new requirement would unnecessarily delay the rulemaking process by requiring DOE to wait a minimum of 180 days between issuing its test procedures and commencing rulemaking and requiring test procedures to be finalized before a standards rulemaking begins.

While DOE should strive to finalize test procedures before a standards rulemaking commences, there is no reason for DOE to impose a 180 day "waiting period" between test procedure issuance and the start of rulemaking. As explained below, this also introduces inefficiency into the process by allowing one set of stakeholders—manufacturers—to drive the timing of the rulemaking to the detriment of the interests of the public and other stakeholders.

Test procedures are generally based on information made available by manufacturers. By making the initiation of standards rulemaking contingent on the finalization of test procedures (a process that requires the cooperation of manufacturers), manufacturers would have inordinate influence over when rulemaking can begin. Not only is this contrary to the spirit of EPCA—*i.e.*, that diverse stakeholders are afforded equal opportunity to participate in the process—but any delay on the part of the manufacturers in providing the relevant information may render DOE unable to meet the statutory deadlines.

Additionally, it is unclear whether DOE's proposal would mean that revisions to test procedures, which are common, would require a standards rulemaking to restart. Under DOE's current practice, such revisions could take place after publishing final standards or simultaneously to the standards rulemaking. However, DOE's current proposal is silent on whether such revisions would be allowed after rulemaking commences, or whether a minor revision to test procedures would require the entire rulemaking process (both for test procedures and standards) to start over. This rigid requirement jeopardizes DOE's ability to meet statutory timelines and is therefore contrary to Congress's intent. Furthermore, independent of its propriety, because DOE has failed to explain whether rulemakings would restart after minor revisions to test procedures,

it failed to explain a substantial impact of its revisions and therefore has not provided adequate notice to allow for “meaningful and informed comment” on its proposal. *See American Medical Ass’n*, 57 F.3d at 1132-33.

C. The replacement of the ANPR with a “quick hard look” early assessment review undermines transparency and stakeholders’ opportunity to review critical data and analysis underlying DOE determinations.

DOE’s proposal in Section 6(a) for an Early Assessment Review as an alternative avenue for early stakeholder input in lieu of the Advanced Notice of Proposed Rulemaking (“ANPR”) requirement represents a significant step back from meaningful early-stage stakeholder involvement and public review of the foundation of DOE’s determinations. Specifically, the new proposed Early Assessment Review would remove the formal process for early input on a potential standards rule and deny stakeholders the opportunity to formally and fully review the agency’s consideration of whether to amend or propose a new standard. Indeed, it is unclear if DOE will produce any substantive analysis at this stage. Notice and comment on a no-new- or amended standards determination, while critical, is not sufficient on its own to afford the public a meaningful opportunity to comment on the underlying data and analysis considered by DOE in arriving at the no standards determination.

Currently, DOE provides full notice and comment on the initial review of whether standards should be amended. This allows the agency to conduct an early stage assessment and focus on areas that warrant further rulemaking due to changed circumstances or potential for significant energy savings. Additionally, this approach properly balances that objective with the need for DOE to collect and utilize a wide array of stakeholder input and analysis to inform those decisions. This proposed revision is unwarranted and would dilute early stakeholder input and public review that will result from the proposed changes.

D. Issuing final coverage determinations six months prior to rulemaking would delay promulgation of necessary and beneficial standards in the public interest.

DOE’s proposed changes to the coverage determination process in Section 5 require the agency to issue a final coverage determination at least six months before initiating a rulemaking for the associated test procedures or standards. 84 Fed. Reg. at 3,945-46. This would again delay rulemaking by requiring a rulemaking to restart if a coverage determination is modified after finalization, further delaying the standards setting process. This will also act as a disincentive to modify coverage determinations, even if such changes are warranted based on new information obtained during the rulemaking process.

DOE normally conducts substantial data gathering and analysis on the product or category of products in question to determine the appropriate energy conservation standards during the standards determination phase. The information learned during the standards determination phase by the agency may therefore inform certain adjustments to the coverage determination. The current approach allows for such changes to the coverage determination to occur concurrently with the standards setting without unduly delaying the rulemaking process. In contrast, under the proposed approach, if DOE determines that changes to the coverage

determination were justified or necessary upon further examination during the standards rulemaking, the agency must re-notice the coverage determination, re-finalize, and restart the six-month clock to commence the standards determination once again. This approach therefore creates significant risk that DOE may be unable to meet its statutory deadlines for the issuance of final standards if it decides to pursue a change to the coverage determination. DOE's regulations cannot supersede these statutory obligations imposed by EPCA. Additionally, this provision could further thwart EPCA's purposes by discouraging the inclusion of additional products or category of products in a coverage determination after a final determination is issued, six months prior to the start of rulemaking.

Finally, as coverage determination rulemakings allow for the issuance of energy conservation standards for new consumer products and industrial equipment previously not covered under EPCA, these determinations can result in new and potentially significant benefits from previously unregulated products. This compounds the harm caused by the delay of significant energy savings by the consumers and businesses that use the relevant product or equipment, and hinders a core objective of EPCA to propel the market for new efficient consumer and industrial technologies.

III. Proposed Revisions Regarding Substantive Considerations in EPCA Rulemakings

In addition to the overarching and procedural flaws described above, the Proposed Revisions will also undermine DOE's substantive decision-making in energy efficiency and test procedures rulemakings and would reduce the public benefits secured through energy conservation standards in violations of EPCA.

A. The proposed significance requirements are contrary to EPCA and will eliminate public benefits from foregone energy conservation standards.

Proposed section 6(b) of the Process Rule imposes a bright-line threshold for potential standards to meet EPCA's requirement for a "significant conservation of energy" to justify a standard. 42 U.S.C. § 6295(o)(3)(B). Specifically, under the Proposed Revisions, prospective energy conservation standards would need to result in either (1) 0.5 quads¹⁰ in energy savings or (2) a relative 10% improvement in the covered products' energy efficiency. This bright-line requirement is an unlawful interpretation of EPCA, contrary to existing caselaw and Congressional intent, and will result in lost public benefits.

To begin, the significance thresholds are arbitrary and thus contrary to the APA (5 U.S.C. § 706(2)(A)) because DOE has not provided substantive justification for the specific thresholds chosen. DOE has a responsibility to "offer a rational connection between facts and judgment" in support of its determination that these thresholds are appropriate in light of the Congressional intent. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). Here, DOE has

¹⁰ A "quad" refers to 1 quadrillion British thermal units, a measure of energy, and is equivalent to 5% of total annual household energy use in the United States, enough to power 3 million homes for a year. See U.S. Energy Information Administration, Annual Energy Outlook 2019, Table: Residential Sector Key Indicators and Consumption, available at: <https://www.eia.gov/outlooks/aeo/data/browser/#/?id=4-AEO2019&cases=ref2019&sourcekey=0>.

provided no basis for the specific thresholds selected, beyond the tautology that the smaller standards produced less savings. *See* 84 Fed. Reg. at 3,923. DOE asserts that “[t]hese figures suggest that instituting an appropriate threshold for energy savings may significantly reduce the burdens of regulation without significantly reducing energy savings.” *Id.* However, DOE fails to explain why these specific thresholds reach the appropriate balance between lost energy savings and reduced regulatory burden, consistent with EPCA.

DOE also fails to explain whether the purported reduction in regulatory burden would outweigh the commensurate reduction in benefits that would result from the failure to adopt those standards. DOE admits that 4.24 quads¹¹ of energy savings would be lost if the proposed thresholds had been applied in prior rulemakings since the *Herrington* decision. 84 Fed. Reg. at 3,923. Indeed, because all prior DOE regulations were supported by a finding that they were economically justified, the threshold would have eliminated regulations that DOE ultimately determined were on the whole beneficial. DOE does not explain why reducing regulatory burdens imposed as part of a comprehensively beneficial regulation is appropriate and consistent with EPCA.

The U.S. Court of Appeals for the Fifth Circuit interpreted the “significant conservation of energy” requirement in *Herrington*, 768 F.2d at 1380. In that case, DOE had similarly set specific significance thresholds which potential standards were required to meet in order to proceed through rulemaking: (1) energy savings equal to 10,000 barrels of oil per day or an equivalent amount of natural gas; (2) savings equal to 1% of national energy usage; or (3) savings equal to 20% of a product’s expected energy usage if the standard was not imposed. *Id.* at 1372. While an earlier interpretation of the significance threshold had resulted in the proposal of multiple energy conservation standards, evaluation under the new thresholds resulted in no proposed energy conservation standards. *Id.* at 1370-71. Faced with the substantial change between DOE’s earlier, less stringent interpretation and the restrictive new thresholds, the court considered “whether . . . Congress meant to exclude only ‘marginal’ savings as insignificant, or . . . Congress licensed DOE to create so formidable an obstacle that it blocked standards for seven of the eight priority products at issue.” *Id.* at 1373. The court observed that “DOE may not issue a standard it has disqualified under the significance provision *even if that standard imposed absolutely no burdens at all.*” *Id.* (emphasis original). Further, it noted the statements of Congresspersons that “conservation must be approached on a nickel and dime basis” and “the cumulative impact of a series of conservation initiatives, which in themselves might appear insignificant, could be enormous” and reasoned that it was “unlikely” that Congress would enact EPCA and its amendments with the expectation that DOE would “throw away a cost-free chance to save energy unless the amount of energy was genuinely trivial.” *Id.* at 1372. On these grounds, the *Herrington* court invalidated DOE’s thresholds as inconsistent with EPCA.

¹¹ DOE states that 23 out of 57 previous rulemakings since the *Herrington* decision would have been blocked by the proposed significance threshold, representing over 40% of those rulemakings. 84 Fed. Reg. at 3,922-23. However, DOE fails to disclose which specific rulemakings would have been blocked and thus the underlying data which purportedly supports its proposed threshold. This failure to disclose the underlying data represents a “serious procedural error” in violation of the APA. *Conn. Light Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); 42 U.S.C. § 7607(d)(3) (notice of proposed rulemaking shall include “the factual data upon which the proposed rule is based; [and] the methodology used in obtaining and in analyzing the data”); *see also Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (explaining requirement).

Although the *Herrington* court did not expressly resolve the binary question it initially raised, its holding indicated that EPCA requires DOE to evaluate standards for a given product unless the initial evaluation of potential energy savings shows they would be *de minimis*. *Id.* at 1372. The Court implied that Congress expected DOE to evaluate standards unless the energy savings were “genuinely trivial” to avoid foregoing cost-free benefits. *Id.* at 1373. The proposed thresholds derive from the same misinterpretation of the significance threshold’s function within EPCA’s regulatory framework as those evaluated in *Herrington*, and are unlawful for the same reasons. The thresholds would result in the elimination of potentially appropriate energy conservation standards, based on an initial energy savings determination, without any further evaluation of the standard’s potential costs or burdens. This in turn would preclude regulations that, while relatively small individually, would result in substantial benefits cumulatively. As the Fifth Circuit stated, “DOE may not . . . close its eyes to the cumulative effect of imposing standards.” *Id.* at 1380.

As the *Herrington* court recognized, EPCA already addresses DOE’s concern for worthwhile and substantively beneficial rulemakings. “[A] finding that a proposed standard results in significant conservation is far from a prologue to inevitable promulgation of a mandatory standard; instead, that finding simply triggers a much more thorough review in which the amount of energy a standard would save is assessed in light of any other benefits and countervailing burdens.” *Id.* at 1373. Indeed, EPCA provides various factors to be considered when DOE evaluates whether a standard is economically justified, including the total energy savings, the economic impacts on consumers and manufacturers, and the savings in operating costs. 42 U.S.C. § 6295(o)(2)(B)(i). The evaluation of these factors, combined with the significance threshold, ensures that DOE will only promulgate standards that substantially benefit the public. The arbitrary bright-line savings thresholds imposed in Section 6(b) are thus unnecessary and would serve only to frustrate EPCA’s purpose of securing the benefits of energy efficiency, whether through large individual rulemakings or smaller rulemakings with substantial cumulative effect.

Furthermore, DOE’s discussion of the “genuinely trivial” language in the *Herrington* decision demonstrates the inconsistency of its approach with the opinion. DOE states that its past interpretation of *Herrington* “largely focused on the court’s ‘genuinely trivial’ language, without accounting for the fact that this language was in reference to ‘cost-free’ standards.” 84 Fed. Reg. at 3922. However, the proposed significance thresholds in fact fail to account for this language, as they would eliminate cost-free standards that do not meet the thresholds prior to DOE’s consideration of their economic burdens, just like the thresholds at issue in *Herrington*.

DOE’s stated purpose for the significance threshold is to “more readily ascertain whether pursuing a standards rulemaking for a given product/equipment would yield energy savings that the Secretary would consider significant.” 84 Fed. Reg. at 3,923. DOE does not explain, however, how ceasing examination of a standard at an early stage would advance this goal when further examination could reveal that a standard does in fact pass the threshold. The final consideration of whether a standard meets the significance threshold is better accomplished at a later point in the rulemaking, as discussed above, when the record of a standard’s potential energy savings is more fully analyzed. This factor should be considered at the same time as the other factors in 42 U.S.C. § 6295(o)(2)(B)(i), which would allow DOE to evaluate this factor appropriately instead of using it arbitrarily to block potentially beneficial standards.

DOE's other justifications for the threshold ring similarly hollow. "Provid[ing] the public with greater transparency and predictability" on "DOE's analytical process" cannot override DOE's duty to implement appropriate energy efficiency standards, and neither should industry's "product planning" interests. 84 Fed. Reg. at 3,923. DOE does not explain how the thresholds will "encourage the development of gradual efficiency improvements independent of mandatory regulatory requirements." *Id.* Ultimately, then, the thresholds appear intended to foreclose appropriate rulemaking for an entrenched industry's benefit, at the expense of the public good and innovation.

The significance thresholds are also highly vulnerable to gaming that would frustrate the purpose of EPCA and Congress's intent. In short, because the significance threshold would eliminate standards from consideration, the divisions DOE makes within or between product classes will impact whether a given standard could proceed—*i.e.*, whether DOE evaluates a standard regulating all residential furnaces or only specific types of furnaces. The division of regulated products for standards purposes could thus effectively determine whether a product is regulated at all. DOE has failed to discuss or account for this possibility in the Proposed Revisions or to put any guardrails up against its misuse.

Fundamentally, the proposed significance thresholds are not consistent with the text or the purpose of EPCA's significance requirement. Further, they are not a reasonable interpretation or application of 42 U.S.C. 6295(o)(3)(B), because they will preclude beneficial energy conservation standards that Congress has directed DOE to adopt. 84 Fed. Reg. at 3,923 (4.24 quads of lost energy savings under proposal). Properly interpreted, EPCA's significance threshold, as interpreted by *Herrington*, only precludes the evaluation of standards with such low energy savings that they would not be worthwhile even if they imposed no costs. DOE's proposed significance thresholds are thus arbitrary and capricious, and inconsistent with EPCA. They must therefore be stricken from the proposal and cannot be promulgated.

B. The proposed revision of the ASHRAE 90.1 Standard framework improperly abdicates DOE's duties to assess the standard and engage in rulemaking.

Section 9 of the proposed Process Rule addresses DOE's treatment of the ASHRAE¹² 90.1 Standard, which provides efficiency standards for heating, cooling and other building equipment.¹³ Under EPCA, when ASHRAE updates the 90.1 Standard, DOE is required to, first, publish an analysis of the updated standards for public comment and, second, publish a rule either adopting the updated standards or adopting a more stringent standard, if DOE determines by "clear and convincing evidence" that the more stringent standards would save "significant additional" energy while being economically justified and technologically feasible. 42 U.S.C. § 6313(a)(1)(A)-(B). DOE must publish the initial analysis within 180 days of ASHRAE's adoption of the standard; then, it must either adopt the ASHRAE standard within 18 months of ASHRAE's adoption of them, or publish more stringent standards within 30 months. As with

¹² The acronym ASHRAE refers to the American Society of Heating, Refrigerating and Air-Conditioning Engineers, a global professional association seeking to advance heating, ventilation, air conditioning and refrigeration systems design and construction.

¹³ The 90.1 Standard applies to equipment in all buildings except low-rise residential buildings.

other energy efficiency standards under EPCA, standards promulgated under these provisions must not “increase[] the maximum allowable energy use, or decrease[] the minimum required energy efficiency[] of a covered product.” 42 U.S.C. § 6313(a)(6)(A)(iii).

The Proposed Revisions propose to re-interpret the evidentiary requirement of 42 U.S.C. § 6313(a)(6)(A)(ii)(II), which requires “clear and convincing evidence” to support the adoption of more stringent standards. Specifically, Section 9 interprets this provision to mean that “the facts and data made available to DOE . . . demonstrates that there is *no substantial doubt* that the more stringent standard” meets the significant energy conservation, technologically feasible, economically justified requirements for any standard. 84 Fed. Reg. at 3,915. Limited federal case law, generally applying California law, suggests that these two standards are identical, raising the question of why DOE would need to make this additional elaboration. *See, e.g., Inamed Corp. v. Medmarc. Cas. Ins. Co.*, 258 F.Supp.2d 1117, 1123 (C.D. Cal. 2002) (citing *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287–1288 (1994)). If DOE is simply providing a different way of saying the same thing, such a change would be purposeless and arbitrary. However, if DOE does intend to interpret its “no substantial doubt” standard differently than the “clear and convincing evidence” standard in EPCA, it would be contrary to the statute and thus unlawful. Specifically, the elimination from consideration of ASHRAE-covered product standards for which “clear and convincing evidence” supports a more stringent standard but does not equate to “no substantial doubt” under DOE’s proposed interpretation would be contrary to EPCA. The Secretary has a duty to analyze the ASHRAE standards to determine whether more stringent standards are justified under EPCA’s criteria, and to adopt such a standard if so. 42 U.S.C. § 6313(a)(6)(A)-(B). The promulgation of standards more stringent than ASHRAE’s has resulted in significant energy savings in the past, including the commercial air conditioner and warm air furnace standard, which DOE described as the “largest energy saving standard in history.” *See Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment and Commercial Warm Air Furnaces*, 81 Fed. Reg. 2,420 (Jan. 15, 2016).¹⁴ Neglecting to adopt more stringent standards when justified under EPCA’s criteria would be contrary to the statute and defer improper authority to ASHRAE.

The Proposed Revisions also improperly apply the clear and convincing evidence standard and ASHRAE deference of 42 U.S.C. § 6313(a)(1)(A)-(B) into DOE’s independent six-year review of industrial equipment standards under 42 U.S.C. § 6313(a)(6)(C). 84 Fed. Reg. at 3,916. That subparagraph, applying to industrial equipment, effectively mirrors 42 U.S.C. § 6295(a)(1)(A)’s process for evaluating the amendment of consumer product standards: DOE is required to evaluate each class of covered equipment every six years to determine whether to amend the

¹⁴ DOE determined that these standards met the clear and convincing evidence standard necessary to promulgate standards more stringent than the ASHRA 90.1 Standard (81 Fed. Reg. at 2,439) and described them as the “largest energy-saving standard in history” on its website. *See* “Energy Dept. Announces Largest Energy Efficiency Standard in History,” Dept. of Energy, *available at*: <https://www.energy.gov/articles/energy-department-announces-largest-energy-efficiency-standard-history>; *see also* *Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards for Small, Large, and Very Large Air-Cooled Commercial Package Air Conditioning and Heating Equipment and Commercial Warm Air Furnaces*, 81 Fed. Reg. 2420 (Jan. 15, 2016) (promulgating standards more stringent than ASHRAE), *Energy Conservation Program: Energy Conservation Standards for Single Package Vertical Air Conditioners and Single Package Vertical Heat Pumps*, 80 Fed. Reg. 57438 (Sept. 23, 2015) (adopting standards more stringent than ASHRAE for certain products but not others).

applicable energy efficiency standards. Because Congress did not specify any more stringent requirement, DOE must amend the standards if it determines by a preponderance of the evidence that the amendment is justified under EPCA's criteria. DOE would violate EPCA if it did not amend standards when such amendment met EPCA's criteria (*i.e.*, as the "maximum improvement" that is "technologically feasible" and "economically justified") by a preponderance of the evidence, but was not supported by clear and convincing evidence. The agency must remove this limit on its duty to consider viable energy efficiency standards.

C. DOE must independently determine appropriate test procedures and cannot presume industry test procedures satisfy EPCA's requirements.

Section 8(c) of the proposed Process Rule revision states "DOE will adopt industry test standards as DOE test procedures for covered products and equipment, unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use . . . or estimated operating costs of that equipment during a representative or estimated operating costs of that equipment during a representative average use cycle." 84 Fed. Reg. at 3,927. Because the Proposed Revisions would be binding on DOE, this provision will interfere with DOE's duty to promulgate appropriate test procedures under EPCA and expose DOE to unnecessary litigation.

Most problematically, the provision imposes a duty on DOE to adopt industry test procedures unless DOE made a contrary determination. 84 Fed. Reg. at 3,927. If DOE determined the industry test procedures did not comply with EPCA, DOE would be required to make an affirmative finding to that effect. *Id.* That finding, though presumably reached through what is currently DOE's normal process for adopting test procedures, would be subject to litigation in which DOE would bear the burden of demonstrating that the industry test procedures *did not* meet EPCA's requirements. This would improperly constrain DOE's ability to carry out its Congressionally mandated duty to adopt appropriate test procedures, and improperly favor industry test procedures over DOE's own analysis.

This provision raises other concerns that the Proposed Revisions leave unaddressed. Industry test procedures are generally not created to measure energy efficiency and are likely not appropriate under EPCA. The presumption also opens the possibility that industry interests hostile to stronger efficiency standards could manipulate industry test procedures in a manner that serves their interests but frustrates EPCA's goals and DOE's duties. Further, for some products there will be multiple industry test procedures, and the Proposed Revisions provide no explanation for how DOE would determine which test procedure to adopt.

This presumption in favor of industry test procedures unnecessarily limits DOE's flexibility and will expose the agency to unnecessary litigation. While industry test procedures may be appropriate at times, DOE should not impose this duty on itself because it will hinder the agency's ability to satisfy the test procedure adoption requirements of EPCA.

D. DOE’s consideration of the purported “economically rational consumer” is arbitrary and capricious, inconsistent with EPCA, and not adequately described to provide proper notice and allow meaningful comment.

Proposed section 6(e)(2)(G) of the Process Rule requires DOE to determine whether a candidate/trial standard level is economically justified, based in part on “whether an economically rational consumer would choose a product meeting the candidate/trial standard level over products meeting other feasible trial standard levels after considering all relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs.” This consideration is inconsistent with EPCA and would be unlawfully arbitrary without further specification.

Preliminarily, we note the widespread skepticism toward the concept of an “economically rational consumer.”¹⁵ Economists and other social scientists have recognized that consumers frequently act irrationally in their economic decisions. Evaluating only “rational consumers” may therefore not reflect the real-life conditions in which actual consumers make decisions affected by energy conservation standards. Yet, the agency uncritically incorporates this concept in its proposal.

More significantly, even assuming the hypothetical “economically rational consumer” is a useful concept, DOE fails to adequately describe how it would conceive this purported rational consumer. There is no single standard consumer for energy-using products. While certain consumers (*e.g.*, apartment landlords) would rationally seek the lowest up-front costs, because tenants pay for their energy use, others (*e.g.*, homeowners) would rationally seek products with the lowest life-cycle costs. As noted above, an agency’s rulemaking notice must provide “sufficient detail . . . to allow for meaningful and informed comment.” *American Medical Ass’n*, 57 F.3d at 1132-33. Therefore, DOE’s reference must be sufficiently concrete to allow the public to understand what it considers a “rational consumer” and how that will affect the agency’s economic evaluation of a standard.

DOE may only consider an “economically rational consumer” consistent with EPCA’s payback presumption in 42 U.S.C. § 6295(o)(2)(B)(iii). That section creates a “rebuttable presumption that [a] standard is economically justified” if DOE determines that “the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy, or, as applicable, water, savings during the first year that the consumer will receive as a result of the standard.” *Id.* EPCA thus provides affirmative guidance for DOE’s consideration of energy savings and life-cycle costs. Diverging from that presumption based on the consideration of a hypothetical economically rational consumer would be violate EPCA.

¹⁵ See, *e.g.*, Richard Thaler, “Unless You Are Spock, Irrelevant Things Matter in Economic Behavior,” *New York Times*, May 8, 2018, <https://www.nytimes.com/2015/05/10/upshot/unless-you-are-spock-irrelevant-things-matter-in-economic-behavior.html>; Derek Thompson, “The Irrational Consumer: Why Economics Is Dead Wrong About How We Make Choices,” *The Atlantic*, Jan. 2013, <https://www.theatlantic.com/business/archive/2013/01/the-irrational-consumer-why-economics-is-dead-wrong-about-how-we-make-choices/267255/>

Furthermore, regardless of DOE’s conception of an “economically rational consumer,” DOE is required to consider the factors specifically provided by EPCA for its determination of economic justification. 42 U.S.C. § 6295(o)(2)(B)(i). While those factors include economic concerns related to consumers (*see, e.g., id.* § 6295(o)(2)(B)(i)(I) (“the economic impact of the standard . . . on consumers”)), they also include others, such as the potential energy savings of a standard (*id.* § 6295(o)(2)(B)(i)(III)) and the national need for energy conservation (*id.* § 6295(o)(2)(B)(i)(VI)). DOE must weigh these factors along with the consumer impacts of a standard. However, DOE states in the Notice of Proposed Rulemaking that “[i]f an economically rational consumer would not choose the candidate trial standard level after considering these factors, it would be rejected as economically unjustified.” 84 Fed. Reg. at 3938. This expressly ignores the EPCA-defined factors that DOE must consider and thus violates the statute. Whether an “economically rational consumer” would buy a product, under DOE’s conception thereof, cannot be the sole determinant in whether to adopt an energy efficiency standard, and DOE may not pursue its analysis in the manner it has proposed.

DOE may only consider the “economically rational consumer”—fictional creation that it may be—consistent with the other factors provided by EPCA, and considering this factor exclusive of all others would violate EPCA. Further, DOE must define “economically rational consumer” in greater detail, consistent with EPCA and based on a reasonable conception supported by substantive evidence, to allow the public to properly evaluate and comment on the proposal.

IV. DOE Has Failed to Comply with the National Environmental Policy Act in Promulgating the Revised Process Rule

The National Environmental Policy Act (NEPA) “is a procedural statute that requires the Federal agencies to assess the environmental consequences of their actions before those actions are undertaken.” *Klamath–Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 992-93 (9th Cir. 2004). “For ‘major federal actions significantly affecting the quality of the human environment,’ 42 U.S.C. § 4332(2)(C), the agency is required to prepare an environmental impact statement” to evaluate the action’s potential effects on the environment. *Id.* If an agency is unsure whether an action will have significant environmental impacts, it may prepare an environmental assessment, in order to provide “sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9. Consistent with these mandates, certain actions may fall within categorical exclusions created by agencies, which cover actions the agency “has determined do not ‘have a significant effect on the human environment’” and thus do not require the preparation of any NEPA documentation. *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013) (quoting 40 C.F.R. § 1508.4). However, even where an agency has adopted categorical exclusions in compliance with NEPA, the exclusions must “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” making NEPA documentation necessary. 40 C.F.R. § 1508.4.

To comply with NEPA in its revision of the Process Rule, DOE invokes the agency’s categorical exclusion for “Procedural Rulemakings.” 84 Fed. Reg. at 3,941; 10 C.F.R. part 1021, subpart D, appendix A, paragraph A6. This categorical exclusion does not cover the current rulemaking and, even if it did, the current rulemaking’s extraordinary circumstances, relative to other purportedly procedural rulemakings, would nonetheless necessitate further analysis to comply with NEPA.

10 C.F.R. 1021.400(c)-(d). In failing to conduct that analysis, DOE would violate NEPA and render the Proposed Revisions invalid.

A. The “Procedural Rulemaking” Categorical Exclusion Invoked by DOE Does Not Apply to the Process Rule Revisions.

DOE cites its categorical exclusion for “Procedural Rulemakings” to assert that it does not need to prepare an environmental impact statement assessing the potentially significant environmental impacts of its Process Rule revisions. 84 Fed. Reg. at 3,941. That exclusion applies to “[r]ulemakings that are strictly procedural, including, but not limited to, rulemaking . . . establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking . . . establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements.” 10 C.F.R. part 1021, subpart D, appendix A, paragraph A6.

In discussing the requirements of NEPA, DOE describes the Process Rule as “the procedures DOE will follow in conducting rulemakings for new or amended energy conservation standards and test procedures for covered consumer products and commercial/industrial equipment” and asserts that the rulemaking is “strictly procedural.” 84 Fed. Reg. at 3,941. This categorical exclusion does not apply to the Proposed Revisions because they are in fact not strictly procedural and thus DOE would violate NEPA if it moved forward with the revisions without any environmental review on that basis.

The Proposed Revisions are not “strictly procedural” because they include embedded substantive decisions that will affect the environment through their stifling of future energy efficiency rulemakings. Most notably, the significance threshold in proposed Section 6(b) will preclude consideration of many potential energy efficiency standards, reducing the amount of future energy savings and thereby increasing the demand for generation of electricity and the attendant greenhouse gas emissions. DOE admits that the significance threshold will result in a substantial prospective reduction in energy savings when it is implemented in future rulemakings, as it notes it would have reduced energy savings by 4.24 quads over 30 years if it were applied in rulemakings since the *Herrington* decision. 84 Fed. Reg. at 3,923. Foregoing those substantial energy savings will result in a concomitant substantial increase in greenhouse gas emissions, causing substantial environmental impacts. This same issue is present in DOE’s proposed deference to the ASHRAE standards in Section 8, which will also reduce future energy savings and thus increase greenhouse gas emissions.

The “procedural rulemaking” categorical exclusion can only apply to regulations that solely affect an agency’s internal procedures and cannot cover regulations making substantive decisions or altering an agency’s future substantive decisions. Although this categorical exclusion has not been interpreted by courts, “procedural” is defined alternatively as “of or relating to the procedure used by courts or other bodies administering substantive law,” (<https://www.merriam-webster.com/dictionary/procedural>) “relating to the usual or official way something is done,” (<https://dictionary.cambridge.org/us/dictionary/english/procedural>) or “relating to an established or official way of doing something.” (<https://en.oxforddictionaries.com/definition/procedural>) Similarly, “procedure” means “a particular way of accomplishing something or of acting”

(<https://www.merriam-webster.com/dictionary/procedure>) or “an order or method of doing something” (<https://dictionary.cambridge.org/us/dictionary/english/procedure>). These definitions show that procedure or procedural things relate to *how* something is done, not what will be done. Under this definition, it is clear that multiple aspects of the Proposed Revisions are not procedural, as they preemptively make substantive determinations for future rulemakings.

The Proposed Revisions are also not the same type of procedural rulemakings that the categorical exclusion provides as examples of the scope of the exclusion. While the revised Process Rule would govern the agency’s exercise of its regulatory authority—that is, the process of promulgating binding regulations that are enforceable against manufacturers of covered products—the examples of procedural rulemakings in the DOE regulation pertain to contracting, grants, and cooperative agreements, which affect DOE’s relations with individual entities, instead of an entire economic sector. These types of agency actions are more suited for a categorical exclusion because they are more limited in scope and considerably less likely to have an effect on the environment than the Proposed Revisions. Therefore, even if the Proposed Revisions could be described as a procedural rulemaking, which is only possible by ignoring the substantive gate-keeping determinations embedded in the proposal, the categorical exclusion does not apply to them.

B. NEPA Requires DOE to Evaluate the Potentially Significant Environmental Impacts of this Rulemaking.

Even if the Proposed Revisions are in fact procedural, DOE must nonetheless evaluate the potential environmental impacts because the extraordinary circumstances of the Proposed Revisions may cause significant environmental effects. The Council on Environmental Quality’s (CEQ) implementing regulations for NEPA require federal agencies to evaluate the environmental impacts of an action that would otherwise be subject to a categorical exclusion if there are “extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” 40 C.F.R. § 1508.4. DOE’s internal NEPA regulations, which provide the invoked categorical exclusion, also include an “extraordinary circumstances” exception as required by the CEQ regulations. *See* 10 C.F.R. § 1021.400. Specifically, the provision states that “if there are extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal, DOE shall either: . . . (1) Prepare an EA and, on the basis of that EA, determine whether to prepare an EIS or a FONSI; or (2) Prepare an EIS and ROD.” *Id.*, § 1021.400(c)(d).

As discussed above, the changes made by the Proposed Revisions will have significant environmental impacts and therefore qualify as “extraordinary circumstances” which require an environmental assessment, regardless of the potential application of the categorical exclusion. Most clearly, the significance threshold of the Proposed Revisions will bar DOE from even considering many potential energy efficiency standards, regardless of the potential environmental benefits of those standards. Also, the binding deference to ASHRAE standards will preclude consideration and adoption of other environmentally beneficial regulations. The preclusion of these potential energy efficiency standards from consideration will result in increased energy use, and therefore increased greenhouse gas emissions, as a direct consequence of the Proposed Revisions. These “extraordinary circumstances . . . affect the significance of the

environmental effects” of the Proposed Revisions, making environmental review necessary under NEPA and DOE’s NEPA regulations even if the rulemaking is procedural.

V. Conclusion

For the reasons explained above, the undersigned government entities urge DOE to withdraw its Proposed Revisions to the Process Rule.

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