Appliance Standards Awareness Project
American Council for an Energy-Efficient Economy
Ceres
Consumer Federation of America
Earthjustice
National Consumer Law Center, on behalf of its low-income clients
Natural Resources Defense Council

July 15, 2025

Mr. David Taggart
U.S. Department of Energy
Office of the General Counsel, GC-1
1000 Independence Avenue SW, Washington, DC 20585

RE: Docket Number EERE-2025-BT-DET-0024: Proposed Withdrawal of Determination of Portable Air Conditioners as a Covered Consumer Product

Dear Mr. Taggart:

This letter constitutes the comments of the Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy (ACEEE), Ceres, Consumer Federation of America (CFA), Earthjustice, National Consumer Law Center, on behalf of its low-income clients (NCLC), and Natural Resources Defense Council (NRDC) on the notice of proposed withdrawal of determination of portable air conditioners as a covered consumer product ("proposal" or "NOPR"). 90 Fed. Reg. 20,876 (May 16, 2025).[1] We appreciate the opportunity to provide input to the Department.

1. About the signatories

ASAP advocates for appliance, equipment, and lighting standards that cut planet-warming emissions and other air pollution, save water, and reduce economic and environmental burdens for low- and moderate-income households. ASAP's steering committee includes representatives from environmental and efficiency nonprofits, consumer groups, the utility sector, and state government.

ACEEE, a nonprofit research organization, develops policies to reduce energy waste and combat climate change. Its independent analysis advances investments, programs, and behaviors that use energy more effectively and help build an equitable clean energy future.

[1] Relevant excerpts of documents cited below, except for statutes, regulations, published judicial decisions, and Federal Register notices, are provided in an appendix to these comments.

Ceres builds a cleaner and more resilient economy by working alongside over 80 major businesses to support clean energy policies at the state and national level.

CFA is an association of more than 250 non-profit consumer and cooperative groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education.

Earthjustice is the premier nonprofit public interest environmental law organization, wielding the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change.

NCLC has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. since 1969 through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. Throughout its history, NCLC has advocated for policies and programs that increase energy efficiency in the homes of low-income consumers and that, therefore, reduce their energy bills.

NRDC is an international, non-profit environmental organization with more than three million members and online activists. NRDC advocates to reduce greenhouse gas emissions that cause climate change, increase the resilience of communities to the unavoidable impacts of climate change, and safeguard human health for all. NRDC advocates for clean energy policies that will build the U.S. economy, reduce air pollution, help keep electricity prices affordable and strengthen the electricity grid.

2. Introduction

Energy and water conservation standards save consumers significant amounts of money by reducing utility bills. According to DOE, efficiency standards reduced Americans' utility bills by $105 billion in 2024 alone, with a typical household saving $576.[2] Efficiency standards also saved 6.0 quadrillion Btus ("quads") of primary energy in 2024, which is equivalent to 6.5% of total U.S. annual energy consumption, and 1.7 trillion gallons of water, which is equivalent to approximately 12% of the annual water withdrawals for public supply in the United States in 2015.[3] These tremendous savings can help avoid costly buildout of new infrastructure like power plants, power lines, and water treatment facilities, which would further increase energy and water prices.

In the notice, DOE is proposing to withdraw its prior determination that portable air conditioners (portable ACs) are covered products. DOE is also proposing to withdraw the

[2] U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, Appliance Standards Fact Sheet (March 2025). www.energy.gov/sites/default/files/2025-03/Appliance%20Standards%20Fact%20Sheet-02.pdf.

[3] Lawrence Berkeley National Laboratory, Energy and economic impacts of U.S. federal energy and water conservation standards adopted from 1987 through 2024 Report (January 2025). eta-publications.lbl.gov/sites/default/files/2025-01/standards_1987-2024_impacts_overview3.pdf. p. 4.

energy conservation standards for portable ACs. This action does not stand on its own. It is one of 17 proposals issued the same day to roll back efficiency standards.

On his first day in office, President Trump issued an Executive Order "Declaring a National Energy Emergency."[4] That order focused on the "active threat to the American people from high energy prices," highlighted the "high energy prices that devastate Americans, particularly those living on low- and fixed-incomes," and described "our Nation's inadequate energy supply." Weakening efficiency standards would only exacerbate these issues. If less efficient appliances are allowed to enter the market, consumers will end up using more energy and spending more money, worsening the "Energy Emergency" described in President Trump's order.

Below we describe how DOE's proposal would raise costs for consumers; increase energy waste and strain the electric grid; increase emissions that harm human health and the environment; and undermine manufacturer investments. We also outline the numerous reasons why DOE's proposal is unlawful. DOE should therefore withdraw the proposed rule.

3. DOE's proposal would raise costs for consumers. Eliminating the standards would increase costs for purchasers of the more than 1.4 million portable ACs that are sold annually.[5] In the January 2020 final rule, DOE found that the standards save households who purchase a portable AC an average of $226 in electricity bills over the life of the product compared to a baseline model at the time of the rulemaking.[6] Taking into account the additional upfront cost, DOE estimated that the standards net consumers $150 in savings.[7] In other words, eliminating the standards could raise electricity bills for households by $226 over the life of a portable AC and increase net costs by $150. DOE also found in the January 2020 final rule that the standards for portable ACs will provide net present value (NPV) savings for purchasers of between $1.25 billion and $3.06 billion over 30 years of sales.[8] In other words, eliminating the standards for portable ACs could cost consumers billions of dollars over the coming decades.

These higher costs for consumers would come at a time when both electricity prices and bills are rising. The U.S. Energy Information Administration's (EIA's) forecast shows

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[4] Exec. Order No. 14,156, Declaring a National Energy Emergency, 90 Fed. Reg. 8,433 (Jan. 29, 2025), available at www.govinfo.gov/content/pkg/FR-2025-01-29/pdf/2025-02003.pdf.

[5] DOE, Portable Air Conditioners, January 2020 Final Rule Technical Support Document (TSD). Table 9.6.1 (2025 shipments). www.regulations.gov/document/EERE-2013-BT-STD-0033-0047.

[6] 85 Fed. Reg. 1,428 (January 10, 2020). Table V.2. Calculated as the difference between the lifetime operating cost at the baseline efficiency level ($995) and the lifetime operating cost at the standard level adopted, Trial Standard Level (TSL) 2 ($769). For commercial customers, the average lifetime operating cost savings are $399 (from Table V.4: the baseline lifetime operating cost is $1,818 and the lifetime operating cost at TSL 2 is $1,419).

[7] *Id*. Calculated as the difference between the total life-cycle cost (LCC) at the baseline efficiency level ($1,554) and the LCC at the standard level adopted, TSL 2 ($1,404). For commercial customers, the net savings are $323 (from Table V.4: the baseline LCC is $2,378 and the LCC at TSL 2 is $2,055).

[8] 85 Fed. Reg. 1,380 (January 10, 2020). NPV = present value of operating cost savings – present value of total incremental installed costs; range corresponds to 7% and 3% discount rates, respectively.

average residential electricity prices rising by 13% in 2025 and 18% in 2026 relative to 2022 prices.[9] Some regions of the country are experiencing even larger increases in electricity prices, with the EIA forecast showing electricity price increases of 19% between 2022 and 2025 for New England and the Middle Atlantic and an increase of 26% for the Pacific region in the same period.[10] Rising prices are resulting in higher bills; the average U.S. household spent about $1,750 on electricity costs in 2023, hundreds of dollars more than the average of about $1,500 in 2020.[11] These high costs hurt families, with one in five American households (nearly 25 million families) foregoing necessary expenses, such as food or medicine, to pay their energy bills in 2020.[12] Eliminating the standards for portable ACs would further increase electricity costs and strains on household budgets.

Independent of the harm caused by eliminating the standard, the proposed rule would also harm consumers by depriving them of information to make purchasing decisions. Manufacturers must test and certify all covered products, and the efficiency metrics they report for each model are made public through DOE's Compliance Certification Management System. This data can be used by consumers, consumer advocates, consumer reporting publications, and retailers to inform purchasing decisions across the full range of efficiency levels for a given product. The proposed rule, by proposing to eliminate coverage for portable ACs, would deprive consumers of this valuable information.

4. DOE's proposal would increase energy waste and strain the electric grid unnecessarily. In the January 2020 final rule, DOE found that the standards will save 0.49 quads of energy over 30 years of product sales.[13] DOE's current proposal threatens those savings. DOE further found in the January 2020 final rule that the standards will reduce electricity consumption by 1,284 gigawatt-hours (GWh) in 2030 and 1,621 GWh in 2040 and lower total installed generation capacity by 368 megawatts (MW) in 2030 and 473 MW in 2040.[14] By eliminating the standards for portable ACs, DOE's proposal would increase electricity demand at a time when the electric grid is already challenged by increased demand from data centers, growing domestic manufacturing, and other factors.

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[9] U.S. EIA, Today in Energy. U.S. electricity prices continue steady increase (May 2025). www.eia.gov/todayinenergy/detail.php?id=65284.

[10] *Id.*; see also Federal Reserve Bank of St. Louis, Average Price: Electricity per Kilowatt-Hour in U.S. City Average (May 13, 2025). fred.stlouisfed.org/series/APU000072610.

[11] U.S. EIA, Today in Energy. U.S. electricity prices continue steady increase (May 2025). www.eia.gov/todayinenergy/detail.php?id=65284.

[12] U.S. EIA, RECS 2020, Table HC11.1. Household energy security, 2020. www.eia.gov/consumption/residential/data/2020/hc/pdf/HC%2011.1.pdf.

[13] 85 Fed. Reg. 1,380 (January 10, 2020).

[14] DOE, Portable Air Conditioners, January 2020 Final Rule Technical Support Document (TSD), p. 15-8. www.regulations.gov/document/EERE-2013-BT-STD-0033-0047. DOE adopted TSL 2.

A recent report estimates that U.S. electricity demand will grow 25% by 2030 and 78% by 2050 relative to 2023 levels, with peak demand growing 14% by 2030 and 54% by 2050.[15] Greater electricity demand means increased spending on generation, transmission, and distribution infrastructure, which translates to higher electricity bills for consumers. The same recent report projects that rising electricity demand could result in residential retail electricity rates increasing by between 15% and 40% by 2030, with electricity rates doubling for some utilities by 2050.[16] Eliminating the standards for portable ACs would further exacerbate these trends.

5. DOE's proposal would increase emissions that harm human health and the environment. In the January 2020 final rule, DOE found that the standards will result in cumulative emissions reductions over 30 years of sales of 25.6 million metric tons of carbon dioxide, 16.4 thousand tons of sulfur dioxide, 32.2 thousand tons of nitrogen oxides, 124.8 thousand tons of methane, 0.4 thousand tons of nitrous oxide, and 0.06 tons of mercury.[17] In other words, eliminating the standards for portable ACs would increase emissions of these harmful pollutants.

6. DOE's proposal would undermine manufacturer investments. Manufacturers have been required to comply with the standards in the 2020 final rule since January 10, 2025. To meet the standards, manufacturers likely incurred conversion costs including capital costs (one-time investments in plant, property, and equipment) and product conversion costs (research and development, testing, and marketing costs). DOE estimated that manufacturers would incur total conversion costs of $320.9 million to comply with the current standards for portable ACs.[18] These investments would be undermined by DOE's proposal to eliminate the standards. Furthermore, the manufacturers that made these investments and who sell products in the U.S. could be undercut by manufacturers that currently serve other markets.

7. DOE lacks the authority to withdraw standards. The proposed rule states that DOE is proposing to "withdraw" the energy conservation standards for portable ACs. EPCA authorizes DOE to promulgate new standards and to prescribe amended standards.[19] But no provision in EPCA authorizes DOE to withdraw or repeal existing standards.[20]

Section 6292(b) authorizes DOE to classify new products as covered products. But Section 6292(b) provides no express authority to remove coverage for a product it has already covered. It is true that DOE has withdrawn coverage determinations before. But

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[15] ICF, Rising current: America's growing electricity demand. www.icf.com/-/media/files/icf/reports/2025/energy-demand-report-icf-2025_report.pdf?rev=c87f111ab97f481a8fe3d3148a372f7f. p. 3.
[16] *Id*.
[17] 85 Fed. Reg. 1,381 (January 10, 2020). The units for nitrogen oxides are listed as "tons," which appears to be a typo. At 85 Fed. Reg. 1,435, 1,439, 1,441 the units are noted as "thousand tons."
[18] 85 Fed. Reg. 1,380 (January 10, 2020).
[19] 42 U.S.C. § 6295(a)(2), (*l*), (m), (n), (o), & (p).
[20] *See also* Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 202 (2d Cir. 2004) (holding that under EPCA DOE lacks any "inherent power to reconsider a final rule following its announcement in the Federal Register.").

DOE has only done so in circumstances where no standard was in effect and no direct regulatory consequence flowed from its coverage withdrawal; thus, the legality of those withdrawals has never been tested. In any event, the complete absence of statutory language permitting DOE to withdraw coverage determinations must mean, at a minimum, that section 6292(b) does not provide DOE with a backdoor authority to repeal standards in a manner that it plainly lacks authority to do under section 6295, the section of EPCA that governs modifications to existing standards.

8. DOE's proposed amended standard for portable ACs violates the anti-backsliding provision. EPCA's anti-backsliding provision, section 6295(o)(1), plainly applies to the purported withdrawal of an energy conservation standard. An action that exempts products from a standard "prescribe[s] [an] amended standard which . . . decreases the minimum required energy efficiency, of a covered product."[21]

It is implausible that when Congress prohibited DOE from prescribing "any amended standard which . . . decreases the minimum required energy efficiency, of a covered product,"[22] it nevertheless intended to permit the complete elimination of a standard. As the U.S. Court of Appeals for the Second Circuit explained in *NRDC v. Abraham*, the anti-backsliding provision must be interpreted in light of "the appliance program's goal of steadily increasing the energy efficiency of covered products" and Congress' intent to provide a "sense of certainty on the part of manufacturers as to the required energy efficiency standards."[23]

Allowing DOE the discretion to exempt products from standards entirely "would completely undermine any sense of certainty on the part of manufacturers as to the required energy efficiency standards" for any particular product.[24] "Finally, and most importantly, such a reading would effectively render section 325(o)(1)'s 'anti-backsliding' mechanism inoperative, or a nullity, in these circumstances."[25]

The Act also makes clear that the anti-backsliding provision applies to any DOE action that purports, as here, to withdraw a final rule. In 42 U.S.C. § 6295(p)(4), Congress granted DOE the option to take action in limited circumstances via "direct final rules," without first issuing a notice of proposed rulemaking. If DOE receives adverse comments on a direct final rule and "determines that such adverse public comments . . . may provide a reasonable basis for withdrawing the direct final rule," DOE may withdraw it. In that event, the withdrawn rule "shall not be considered to be a final rule for purposes of [42 U.S.C. § 6295(o)]," which imposes the anti-backsliding provision. The express exemption from the anti-backsliding provision for direct final rules demonstrates that Congress intended the provision to cover the withdrawal of final rules for which the Department had to issue a notice of proposed rulemaking and undertake full public notice and comment.

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[21] 42 U.S.C. § 6295(o)(1).
[22] *Id.*
[23] 355 F.3d 179, 197 (D.C. Cir. 2004).
[24] *Id.*
[25] *Id.*

9. When Congress intended to allow DOE to exempt products from coverage, it specifically authorized that action. The Act provides expansive authority to DOE to increase the coverage of federal energy conservation standards, but only limited opportunities to create exemptions from standards. EPCA broadly authorizes DOE to classify additional consumer products and commercial equipment as covered products and equipment subject to energy conservation standards.[26] By contrast, however, the Act confers no similarly broad authority to terminate the coverage of a product.

Indeed, the Act only allows DOE to exempt products from standards under specified circumstances. Of the many dozens of items EPCA covers, the Act only authorizes DOE to grant exemptions for a few, none of which cover portable ACs.[27] When a statute confers authority on an agency to create specific exemptions, broader authority to create other types of exemptions cannot be inferred.[28] Because EPCA confers authority on DOE to create exemptions for specific types of products—none of which include portable ACs—DOE cannot conclude that it has authority to exempt portable ACs from coverage.

10. DOE's proposal does not provide a rational basis for rescinding coverage of portable ACs. The Administrative Procedure Act (APA) requires an agency to provide a rational basis for its action.[29] But in DOE's proposal, the only reason the Department gives for withdrawing portable ACs from the Act's coverage is the cryptic statement that it "has tentatively determined that there are other avenues to conserve energy supplies than classifying portable ACs as a covered product and establishing standards."[30] The proposal does not even explain what these supposed "other avenues" might be, making it impossible for stakeholders to meaningfully comment on the proposed action.

Even if the alternative measures to which DOE alludes were made clear, however, the proposal does not connect these alternatives to the statutory criteria for coverage. For example, the mention of "other avenues to conserve energy supplies" could suggest DOE believes that covering portable ACs is no longer necessary to carry out the purposes of EPCA,[31] but the Department does not provide any explanation of why this is so. Nor does it

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[26] 42 U.S.C. §§ 6292(a)(20, 6311(1)(L), 6312(b).

[27] *See* 42 U.S.C. § 6291(33)(B)(ii) (permitting DOE to exclude products from the definition of "commercial prerinse spray valve"); *id.* § 6291(35)(B)(iii) (same as to distribution transformers); *id.* § 6295(e)(5)(F) (DOE may exclude water heaters from EPCA's uniform efficiency descriptor); *id.* § 6295(u)(5)(B)(i) (DOE may exempt certain external power supplies); *id.* § 6313(b)(3) (authorizing DOE to grant exemptions for types or classes of electric motors); *id.* § 6291(30)(S)(ii)(II) (DOE may exclude from the term "medium base compact fluorescent lamp" any lamp that is "designed for special applications" and "unlikely to be used in general purpose applications"); *id.* § 6291(30)(E) (DOE may exclude from the terms "fluorescent lamp" and "incandescent lamp" any lamp as to which the Department makes "a determination that standards for such lamp would not result in significant energy savings because such lamp is designed for special applications or has special characteristics not available in reasonably substitutable lamp types").

[28] *See Law v. Siegel*, 571 U.S. 415, 424 (2014).

[29] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43 (1983) (an "agency must … articulate a rational connection between the facts found and the choice made").

[30] 90 Fed. Reg. 20,877.

[31] 42 U.S.C. §6292(b)(1) (allowing classification of new covered product if, among other things, doing so is necessary and appropriate to carry out the purposes of EPCA).

explain how it would further the purposes of EPCA to regulate all other types of air conditioners but to exempt only portable ACs.

The absence of support for the proposed action contrasts sharply with the well-reasoned coverage determination that DOE issued in 2016.[32] There, the Department found that portable ACs satisfied the criteria for coverage in 42 U.S.C. § 6292(b)(1), which allows the Department to classify a consumer product as a covered product if (1) doing so is necessary or appropriate to carry out the purposes of EPCA; and (2) the average annual per household energy use by products of such type is likely to exceed 100 kWh per year. On the first statutory criterion for coverage, DOE found that "the aggregate energy use of portable ACs has been increasing as these units have become popular in recent years," with an 80% increase in units shipped in North America from 2012 to 2018.[33] In addition, "there is significant variation in the annual energy consumption of different models currently available, such that technologies exist to reduce the energy consumption of portable ACs."[34] DOE also considered comments showing that portable AC shipments were growing, that portable ACs have high per-unit energy use, and that competing products were already covered under the Act.[35] On the second statutory criterion, DOE conducted a detailed technical analysis to determine the average annual per-household energy use of portable ACs.[36]

Instead of engaging with the Department's prior findings under 42 U.S.C. § 6292(b)(1) in the 2016 rule, DOE's proposal ignores them. The Department cannot lawfully reverse its prior findings without explaining why it is doing so.[37]

11. DOE's proposal fails to apply the statutory criteria applicable to amendments to energy conservation standards. Even if DOE had legal authority to withdraw energy conservation standards for portable ACs, the proposal does not provide a rational basis for doing so. For an agency action to withstand judicial review, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[38] This requirement applies in equal force when an agency, like DOE here, is proposing to rescind earlier rules that were themselves supported by substantial evidence. When an agency reverses itself, it must provide a "reasoned explanation . . . for disregarding facts and circumstances that

[32] 81 Fed. Reg. 22,514 (April 18, 2016).
[33] *Id.* at 22,517.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").
[38] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also id.* (a rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency").

underlay or were engendered by the prior policy,"[39] a category that includes the technical and economic data that was presented to justify the existing standards.

EPCA sets forth specific criteria under which DOE may amend energy conservation standards. Under 42 U.S.C. § 6295(o)(2)(A), DOE must establish that its proposed standard represents the "maximum improvement in energy efficiency" that is "technologically feasible and economically justified." DOE's proposal, however, provides no information at all regarding portable AC technology or alternative energy efficiency levels that might have been considered. Nor does the proposal provide any information to support the conclusion that its proposed withdrawal of standards is "economically justified." Section 6295(o)(2)(B) provides that, when evaluating "whether a standard is economically justified" DOE must, to the maximum extent practicable, consider:

(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;
(II) the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;
(III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;
(IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
(V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
(VI) the need for national energy and water conservation; and
(VII) other factors the Secretary considers relevant.

The proposal does not consider any of these factors, even on a preliminary basis. This renders DOE's proposed action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.[40]

Nor has DOE provided any explanation for disregarding the analysis and data it presented in its January 2020 final rule, which demonstrated that the current efficiency standards fulfilled the statutory criteria in § 6295(o)(2)(A). The data and analysis presented in the 2020 rule, which DOE ignores here, certainly do not support the conclusion that withdrawing standards for portable ACs results in the "maximum improvement in energy efficiency" that is "technologically feasible and economically justified."

[39] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).
[40] 5 U.S.C. § 706(2)(A); *see also Defenders of Wildlife*, 958 F. Supp. at 684 ("The failure of the agency … to articulate a rational reason for its decision under the … statutory factors, establishes the arbitrary and capricious nature of the agency's decision-making.").

When DOE finalized the current standards for portable ACs it estimated significant energy savings (0.49 quads);[41] average life-cycle cost (LCC) savings for purchasers of $125;[42] and total NPV savings of $1.25-$3.06 billion.[43] The savings for consumers vastly outweigh the costs to manufacturers; DOE estimated that the NPV savings outweigh the maximum estimated loss of industry net present value (INPV) by a factor of 5.[44] DOE concluded that the levels adopted represented the maximum improvement in energy efficiency that is technologically feasible and economically justified. DOE's proposal fails to justify withdrawing the portable AC standards in light of those prior findings, including by identifying any energy savings or estimated changes in energy consumption that may result from the withdrawal of standards.[45]

Finally, DOE diverges—without any justification—from the Department's longstanding practice of conducting a careful economic analysis to determine whether amended standards meet the applicable statutory criteria. DOE's Process Rule explains the Department's rigorous approach to selecting new or amended energy conservation standards.[46] Among other things, the Process Rule identifies several factors to consider in selecting a proposed standard, including consensus stakeholder recommendations, impacts on manufacturers, impacts on consumers, impacts on competition, and impacts on utilities.[47] Because DOE's proposal engages in none of the detailed technical analysis required to evaluate these factors, and it does not explain why it fails to comply with the Process Rule, it is arbitrary and capricious.

12. The proposed rule fails to determine "max-tech" as required by 42 U.S.C. § 6295(p)(1). Subsection 6295(p)(1) provides:

> A proposed rule which prescribes an amended or new energy conservation standard or prescribes no amendment or no new standard for a type (or class) of covered products shall be published in the Federal Register. In prescribing any such proposed rule with respect to a standard, *the Secretary shall determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered products*. If such standard is not designed to achieve such efficiency or use, the Secretary shall state in the proposed rule the reasons therefor.

[41] 85 Fed. Reg. 1,380 (January 10, 2020).
[42] *Id*.
[43] *Id*.
[44] *Id*. Based on the NPV savings using the more conservative discount rate ($1.25 billion) and the maximum estimated loss of INPV of $253.4 million.
[45] *See F.C.C. v. Fox*, 556 U.S. at 516.
[46] 10 C.F.R. Part 430, Appendix A to Subpart C, Process Rule | Department of Energy.
[47] *Id*. at 490.

This provision requires the Secretary, at the proposed rule stage, to determine the maximum improvement in energy efficiency that is technologically feasible.[48] DOE colloquially refers to this maximum threshold as "max tech."[49] Of course, DOE is not obligated to select the max-tech efficiency level for every standard, and very frequently does not. The last sentence of section (p)(1) requires DOE to provide its reasons if it declines to set a standard based on max-tech.

As the D.C. Circuit has explained, EPCA "establishes a clear decisionmaking procedure,"[50] pursuant to which "DOE must first identify, for all product types or classes, the maximum improvement in energy efficiency that is technologically feasible."[51] In the proposed rule, DOE has ignored that obligation entirely. Indeed, the proposed rule contains no discussion of portable AC technology at all. This omission is not one that DOE can remedy at the final rule stage. Congress specified that the determination of max-tech must be in the "proposed rule."[52] DOE may not "ignore the decisionmaking procedure Congress specifically mandated because the agency thinks it can design a better procedure."[53]

13. DOE's complete failure to substantiate its factual claims means that it must issue a new proposal for public comment if it wishes to proceed. Agencies must present critical factual material at the proposed rule stage in order to ensure a meaningful opportunity for public comment.[54] When it has new or revised data that it wants to rely on that arises after the publication of a NOPR, DOE will often issue a Notification of Data Availability and Request for Comment in order to fulfill this requirement.[55]

In the NOPR, DOE has provided no evidence. Thus, any evidence relied upon at the final rule stage will necessarily be both new and critical to the ultimate decision. Any such critical factual material must be made available for public comment before DOE issues a final rule. This obligation to accept further comment applies as well to any analysis conducted under the National Environmental Policy Act (NEPA), as described below.

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[48] *See* 10 C.F.R. § Pt. 430, Subpt. C, App. A ("As required by 42 U.S.C. 6295(p)(1) of EPCA, the NOPR also will describe the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards.").

[49] *See, e.g.,* Energy Conservation Program: Energy Conservation Standards for Dedicated Purpose Pool Pump Motors, 88 Fed. Reg. 66,966, 66,978 (Sept. 28, 2023).

[50] *NRDC v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985).

[51] *Id*. at 1391-92.

[52] 42 U.S.C. § 6295(p)(1).

[53] *NRDC*, 768 F.2d at 1396.

[54] *See Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) ("the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation."); *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (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[.]").

[55] *See, e.g.*, Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters, 89 Fed. Reg. 59,692 (July 23, 2024).

14. DOE has failed to comply with the National Environmental Policy Act (NEPA).
The proposed rule fails to comply with the requirements of NEPA, which requires agencies to prepare detailed environmental analyses of major actions significantly affecting the quality of the environment.[56] Agencies may adopt categorical exclusions (CXs) to this requirement, but only for actions that do not "individually or cumulatively have a significant effect on the human environment."[57] Not only would the proposed rule itself have a significant effect on the human environment by rolling back energy savings, but this action must be considered cumulatively with the many other proposed rollbacks that have also been issued by DOE.[58]

Nor does the proposed rule meet DOE's own regulatory conditions for the applicability of CXs. It is DOE's burden to demonstrate why it believes a CX applies, and it must consider whether a nominally excluded action would nevertheless significantly affect the environment.[59] Indeed, as a predicate matter, DOE has an affirmative obligation, before applying a CX, to determine whether the unique circumstances of an action would lead to significant environmental effects.[60] DOE has offered no explanation of its reasoning on this point, despite that, as described below, the proposed rule would undo significant benefits to the environment. Instead, in its proposal, DOE invites comment on the use of CX B5.1, which applies to "actions to conserve energy or water."[61]

But the plain language of CX B5.1 demonstrates its inapplicability. This CX applies specifically for "*improvements* in appliance efficiency ratings" and "water *conservation*." It makes sense that this CX would ordinarily apply to EPCA rules, because EPCA requires that new or amended standards must improve energy and/or water efficiency. When DOE adopted this CX to complement its EPCA rulemaking activities, it emphasized the purpose of energy conservation, and it further specified that the CX does not apply for appliance efficiency standards that would "have the potential to cause a significant increase in energy consumption in a state or region."

The proposed rule fails to meet the CX B5.1 requirements on numerous fronts. First, it is not "an action[s] to conserve energy or water" because it does the opposite: it would increase energy use. Second, it does not propose an improvement in efficiency ratings because it would result in a *diminishment* of efficiency ratings. Finally, it has the potential to cause a significant increase in energy consumption in a state or region because it would

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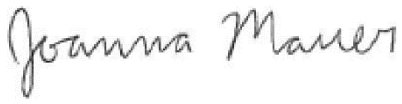
[56] 42 U.S.C § 4332(C); *NRDC v. Herrington*, 768 F.2d 1355, 1429-33 (D.C. Cir. 1985) (holding a DOE rule promulgated under EPCA violated NEPA).
[57] *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 991 (9th Cir. 2023).
[58] *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) ("when several proposals . . . will have cumulative or synergistic environmental impact . . . their environmental consequences must be considered together").
[59] *Pub. Employees for Env't. Responsibility v. Nat'l Park Serv.*, 605 F. Supp. 3d 28, 56 (D.D.C. 2022); *see also California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) ("concern for adequate justification of the categorical exclusion is heightened because there is substantial evidence in the record that exceptions to the categorical exclusion are applicable").
[60] 10 C.F.R. § 1021.102(b)(2); *see Oak Ridge Env't. Peace Alliance v. Perry*, 412 F. Supp. 3d 786, 846-47 (E.D. Tenn. 2019).
[61] *See* 90 Fed. Reg. 20,878.

roll back the savings in energy consumption that provided part of the original justification for the standard.

Thank you for considering these comments.

Sincerely,



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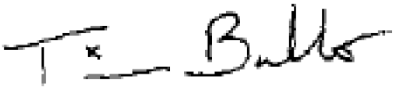

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