

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  
Sierra Club

August 21, 2026

Mr. Pete Cochran  
U.S. Department of Energy  
Office of the General Counsel, GC-33  
Building Technologies Office, CM-5B  
1000 Independence Avenue SW  
Washington, DC 20585

**RE: Docket Number EERE-2025-BT-STD-0001: Notice of Proposed Rulemaking for Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment**

Dear Mr. Cochran:

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”), Natural Resources Defense Council (“NRDC”), and Sierra Club on the notice of proposed rulemaking (“NOPR”) for procedures, interpretations, and policies for consideration of new or revised energy conservation standards and test procedures for consumer products and certain commercial/industrial equipment (“the Process Rule”). 91 Fed. Reg. 42034 (July 7, 2026). We appreciate the opportunity to provide input to the Department of Energy (“DOE” or “the Department”).

Updating national efficiency standards could save a typical U.S. household about \$160 annually on their utility bills over two decades and collectively save businesses almost \$15 billion annually while reducing summer peak electricity demand by 34 gigawatts (GW) in 2040 and 56 GW in 2050.<sup>1</sup> Yet by adding numerous procedural hurdles, arbitrary thresholds for setting standards, and unlawful processes for selecting standard levels, DOE’s NOPR would make it impossible to achieve many of those savings and much harder to achieve

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<sup>1</sup> Margolis, R. and J. Mauer, More Savings Ahead: How Updating National Efficiency Standards Would Reduce Costs in Every State (June 2026), <https://appliance-standards.org/sites/default/files/2026-06/More-Savings-Ahead-Policy-Analysis.pdf> (attached).

the remainder. For example, DOE's proposed unlawful energy-savings and economic thresholds would block many cost-saving standards. Similarly, DOE's proposed "walk up" approach for selecting standard levels—which would also be unlawful—would result in lost savings when DOE considers setting future standards. Furthermore, DOE's proposal to make the Process Rule binding on the agency for "regulatory actions" would eliminate necessary flexibility and tie the Department's hands. Other proposed changes, such as DOE's proposals to add an "early assessment" process and to extend minimum comment periods beyond what the statute requires, would in many cases delay rulemakings unnecessarily.

DOE's current Process Rule, which already lays out in significant detail the Department's procedures for conducting test procedure and standards rulemakings, strikes the appropriate balance between providing predictability and flexibility. Furthermore, the current Process Rule implements a 2021 joint proposal from a broad group of stakeholders including manufacturer trade associations and efficiency advocates.<sup>2</sup> DOE should maintain the approach established in the current Process Rule and withdraw the NOPR.

Below we provide our comments on specific issues raised in the NOPR. In summary:

- DOE's proposed changes to the "objectives" section conflict with EPCA.
- The Process Rule should remain non-binding on the agency.
- Meeting EPCA's deadlines for action must be DOE's highest priority.
- DOE's proposed changes regarding coverage determinations are counterproductive and unnecessary.
- DOE's proposed energy-savings threshold is unlawful and would block many cost-saving standards.
- DOE's proposal to add an "early assessment" process and to specify early rulemaking steps would unnecessarily delay rulemakings and be overly prescriptive.
- DOE should not extend minimum comment periods beyond what the statute requires.
- DOE's proposed changes to the selection factors the Department uses to choose a proposed standard level arbitrarily and unlawfully tilt the table against stronger standards.
- DOE's proposed "walk up" approach would be unlawful.
- DOE's proposed economic thresholds are arbitrary and capricious and would sacrifice significant savings.
- DOE provides no rationale for reinstating additional presumptions constraining DOE's discretion.

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<sup>2</sup> See Joint Proposal from Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), National Electrical Manufacturers Association (NEMA), Plumbing Manufacturers International (PMI), ASAP, and ACEEE (Aug. 9, 2021), [http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo\\_August%206%2C%202021\\_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf](http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo_August%206%2C%202021_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf) (attached).

- The proposal to require 180 days between a test procedure final rule and publication of a standards NOPR is both unnecessary and unsupported.
- Adopting industry test procedures as proposed in the NOPR would improperly delegate important discretion that Congress intended DOE to maintain.
- DOE lays an inadequate foundation for the new “no substantial doubt” standard it would impose for departures from ASHRAE/IES Standard 90.1.
- DOE should maintain its case-by-case determination as to whether a group of persons submitting a direct final rule (DFR) proposal is “fairly representative of relevant points of view.”
- DOE incorrectly asserts that the DFR provision is not a separate grant of rulemaking authority.

**1. DOE’s proposed changes to the “objectives” section conflict with EPCA.** In EPCA, Congress explained its purposes in enacting the federal energy conservation standards program:

- “to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;”
- “to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;” and
- “to conserve water by improving the water efficiency of certain plumbing products and appliances.”<sup>3</sup>

DOE’s work to implement EPCA must be aligned with and further the achievement of these purposes. Although supplementing the purposes established by Congress with the Department’s own policy objectives is unnecessary, to the extent the Process Rule contains objectives intended to guide DOE’s future decisions, those objectives must not conflict with or hinder progress toward the purposes that Congress prescribed.

Several of the objectives set out in the existing Process Rule are not in tension with the purposes of EPCA. Objectives that establish procedural goals for DOE’s rulemakings, focused on issues such as the timetable for action, the rigor of DOE’s analytical methods, and fostering public engagement, do not hinder the achievement of Congress’s own plan for the program.<sup>4</sup>

In contrast, the additional objectives proposed for a new section 1(h) would inject a substantive focus at odds with the ends Congress has declared. For example, DOE claims as a policy goal that it will implement EPCA’s “unavailability provision” so as to “safeguard the American people’s freedom to choose from a variety of goods and appliances.”<sup>5</sup> That policy goal exceeds the scope of the unavailability provision, which seeks only to avoid the elimination of performance characteristics where the market for a covered product would

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<sup>3</sup> 42 U.S.C. § 6201(4), (5), & (8).

<sup>4</sup> See 10 C.F.R. Part 430, Subpart C, Appendix A § 1(a), (b), & (f).

<sup>5</sup> 91 Fed. Reg. at 42075; see also 42 U.S.C. § 6295(o)(4) (unavailability provision).

otherwise be destroyed.<sup>6</sup> Nothing in the unavailability provision seeks to guarantee an enhanced level of consumer choice. Similarly, DOE proposes the goal of “*promoting* market competition and innovation within the manufacturing and appliance industries.”<sup>7</sup> EPCA requires DOE to consider the impacts of proposed standards on competition, but the weighing of this factor recognizes that technologically feasible and economically justified standards may nonetheless entail some loss of competitive vigor.<sup>8</sup> That is why EPCA requires DOE to consider “the impact of any *lessening* of competition . . . that is likely to result from the imposition of the standard.”<sup>9</sup> Nothing in EPCA suggests Congress intended DOE to exercise its rulemaking authority to affirmatively enhance competition.

Finally, DOE includes in the proposed section 1(h) “the goal of eliminating counterproductive requirements that raise the costs of home appliances in a manner consistent with the requirements of EPCA, which includes the consideration of energy savings relative to costs to consumers and manufacturers and impacts to markets for covered products.”<sup>10</sup> The NOPR does not explain what sort of allegedly “counterproductive requirements” DOE believes exist, but to the extent DOE intends this statement to encompass an objective to eliminate existing standards, such action would violate EPCA’s anti-backsliding provision.<sup>11</sup> Furthermore, to the extent this objective speaks to test procedure requirements, EPCA’s criteria for test procedures requires that they be designed to “measure energy efficiency, energy use, water use . . . , or estimated annual operating cost of a covered product during a representative average use cycle or period of use, . . . , and shall not be unduly burdensome to conduct.”<sup>12</sup> If DOE believes a particular test method fails to meet this statutory test, that finding, not any objective to “eliminat[e] counterproductive requirements” must guide the Department’s actions with respect to the test procedure.

In sum, on balance, implementing DOE’s proposed policy objectives runs counter to the text and purposes of EPCA. DOE should abandon the effort to inject substantive policy goals into the Process Rule.

**2. The Process Rule should remain non-binding on the agency.** The Department’s proposal to have the Process Rule binding for all but de-regulatory actions would make it

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<sup>6</sup> The legislative history of the unavailability provision confirms that the problem Congress intended it to address is the possibility that a standard could completely destroy the market for a covered product. As the Senate Energy and Natural Resources Committee explained, the provision would forbid a standard from “being set at a level that would increase the price to the point that the product would be noncompetitive and that would result in minimal demand for the product.” S. Rpt. 100-6 at 8-9 (Jan. 30, 1987), reprinted in 1987 U.S.C.C.A.N 52, 59.

<sup>7</sup> 91 Fed. Reg. at 42075 (emphasis added).

<sup>8</sup> See 42 U.S.C. §§ 6295(o)(2)(B)(i)(V), 6295(o)(2)(B)(ii).

<sup>9</sup> *Id.* § 6295(o)(2)(B)(i)(V) (emphasis added). See also *id.* § 6295(o)(2)(B)(ii) (requiring the Attorney General to determine “the impact, if any, of any lessening of competition likely to result from [a proposed] standard”).

<sup>10</sup> 91 Fed. Reg. at 42075.

<sup>11</sup> See 42 U.S.C. § 6295(o)(1) (prohibiting DOE from “prescrib[ing] any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product”).

<sup>12</sup> *Id.* § 6293(b)(3).

more difficult to adopt new regulations. But EPCA does not countenance any such anti-regulatory presumption. Rather, EPCA specifically requires DOE to review its standards regularly for opportunities to *improve* energy efficiency, and specifically prohibits DOE from weakening existing energy efficiency standards. Tying the agency's hands for regulatory actions but not de-regulatory actions flouts EPCA's intent. Instead, the Department should retain its current approach, under which the Department retains discretion to deviate from the Process Rule as necessary.

The current Process Rule strikes the appropriate balance between predictability and flexibility. Prior to 2020, the Process Rule was non-binding. In the 2020 final rule, DOE made the Process Rule binding for all actions.<sup>13</sup> Subsequently, in the 2021 final rule, DOE returned the Process Rule to its previous non-binding status but added language stating that "In those instances where the Department may find it necessary or appropriate to deviate from these procedures, interpretations or policies, DOE will provide interested parties with notice of the deviation and an explanation."<sup>14</sup> This approach reflected a joint proposal from the Association of Home Appliance Manufacturers ("AHAM"), American Lighting Association ("ALA"), Hearth Patio and Barbecue Association ("HPBA"), National Electrical Manufacturers Association ("NEMA"), Plumbing Manufacturers International ("PMI"), ASAP, and ACEEE.<sup>15</sup>

As DOE explained in the 2021 final rule, the Department has energy conservation standards and test procedures in place for more than 60 categories of covered products and equipment and "is typically working on anywhere from 50 to 100 rulemakings."<sup>16</sup> DOE further explained that "these covered products and equipment encompass a wide variety of industries" and that "it is simply not feasible to anticipate every instance of when flexibility or an exception to the generally applicable procedures of appendix A would be warranted for the more than 60 categories of covered products and equipment that DOE regulates."<sup>17</sup> The non-binding status of the original Process Rule allowed DOE "to tailor rulemaking procedures to fit the specific circumstances of a particular rulemaking" and provided DOE with flexibility to be able to better meet statutory review requirements.<sup>18</sup>

While the Process Rule has been non-binding, DOE has deviated from its requirements in limited, reasonable ways. For example, in the February 2023 NOPR for energy conservation standards for refrigerators, refrigerator-freezers, and freezers, DOE deviated from the framework document/preliminary analysis/ANOPR requirement (in place at the time),

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<sup>13</sup> See 85 Fed. Reg. 8626, 8704 (Feb. 14, 2020).

<sup>14</sup> 86 Fed. Reg. 70892, 70925 (Dec. 13, 2021).

<sup>15</sup> See Joint Proposal from Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), National Electrical Manufacturers Association (NEMA), Plumbing Manufacturers International (PMI), ASAP, and ACEEE (Aug. 9, 2021), [http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo\\_August%206%2C%202021\\_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf](http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo_August%206%2C%202021_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf) (attached).

<sup>16</sup> 86 Fed. Reg. at 70900.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 70892.

explaining that because it was “using similar analytical methods ... to previous amendments,” a framework document “would be largely redundant of previously published documents” because “[s]takeholders have previously provided numerous rounds of input on these methodologies in the most recent rulemaking.”<sup>19</sup>

In the July 2023 NOPR for energy conservation standards for consumer water heaters, DOE deviated from the general requirement to finalize new or amended test procedures at least 180 days prior to the close of the comment period on a standards NOPR. In this case, the test procedure was finalized about 90 days before the close of the comment period on the standards NOPR.<sup>20</sup> In explaining the deviation, DOE noted that the finalized test procedure amendments “will not alter the measured efficiency of consumer water heaters, or require retesting or recertification solely as a result of DOE’s adoption of the amendments to the test procedures,” and that the test procedure amendments “are expected to be generally understood by stakeholders and would not impact the analysis of this standards rulemaking.”<sup>21</sup> At the time the standards NOPR was issued, DOE was already seven years delayed in meeting its statutory deadline for reviewing the water heater standards;<sup>22</sup> further delaying the release of the standards NOPR to meet the general guidelines in the Process Rule would have simply resulted in additional delay without providing a corresponding benefit to stakeholders since, as DOE noted, the test procedure amendments did not affect measured efficiency.

As another example, in the October 2022 NOPR for test procedures for air cleaners, DOE deviated from the general requirement (in place at the time) to finalize a coverage determination at least 180 days prior to publishing a test procedures proposed rule. In this case, the test procedures proposed rule was published about 90 days after the finalization of the coverage determination.<sup>23</sup> As DOE explained in the test procedures NOPR, there was “broad support for the development of test procedures and energy conservation standards” as evidenced by a Joint Proposal from manufacturers and efficiency advocates.<sup>24</sup> Furthermore, the Joint Stakeholders had urged DOE to publish final rules for test procedures and standards no later than December 31, 2022, which required DOE to publish the test procedures NOPR less than 180 days after finalization of the coverage determination.<sup>25</sup> Therefore, delaying the release of the test procedures NOPR to meet the general guidelines in the Process Rule would have prevented DOE from meeting the requested timeline of a broad group of stakeholders.

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<sup>19</sup> 88 Fed. Reg. 12452, 12462 (Feb. 27, 2023).

<sup>20</sup> The final test procedure was published on June 21, 2023, and the close of the comment period on the standards NOPR was September 26, 2023.

<sup>21</sup> 88 Fed. Reg. at 49069.

<sup>22</sup> The current standards for consumer water heaters were finalized in April 2010. DOE was thus required to publish either a NOPR proposing amended standards or a proposed determination of no change by April 2016.

<sup>23</sup> The final coverage determination was published on July 15, 2022, and the test procedures proposed rule was published on October 18, 2022.

<sup>24</sup> 87 Fed. Reg. 63324, 63327 (Oct. 18, 2022).

<sup>25</sup> *Id.*

Such deviations do nothing to limit the “Department’s ability to gather and weigh the relevant evidence needed to support a reasoned decision under” EPCA.<sup>26</sup> Rather, they reflect reasonable, limited flexibility in response to varied rulemaking conditions.

**3. Meeting EPCA’s deadlines for action must be DOE’s highest priority.** EPCA imposes a regular review requirement to ensure that federal energy conservation standards remain up to date. The statute requires that “[n]ot later than 6 years after issuance of any final rule establishing or amending a standard,” DOE must publish either “a notice of the determination of the Secretary that standards for the product do not need to be amended” or “a notice of proposed rulemaking including new proposed standards” for the product.<sup>27</sup> DOE then has two additional years to complete the rulemaking.<sup>28</sup> EPCA’s “8-year review” cycle has led to continuous improvement in the energy efficiency of covered products and equipment.<sup>29</sup>

DOE’s rulemaking priorities cannot override these statutory deadlines. Any prioritization framework in the Process Rule must acknowledge that EPCA’s deadlines for action take precedence over the Department’s policy preferences in determining DOE’s agenda. The Process Rule cannot authorize a delay or suspension of work that would lead to or exacerbate the violation of a statutory deadline.<sup>30</sup> Accordingly, the Process Rule includes language limiting DOE’s discretion in prioritizing among rulemakings to only those situations when doing so is “consistent with applicable legal obligations.”<sup>31</sup> DOE has appropriately retained this limiting language in the NOPR.<sup>32</sup>

However, in two respects, the NOPR’s approach to the Process Rule’s prioritization framework appears to rest on a dubious interpretation of EPCA.

First, the NOPR proposes to remove a requirement that DOE consider potential environmental and energy security benefits when prioritizing among rulemakings.<sup>33</sup> However, the NOPR retains the requirement to consider social benefits, which encompass environmental and energy security benefits.<sup>34</sup> To the extent DOE intends the removal of the command to consider environmental and energy security benefits to foreclose their consideration, DOE must abandon that effort. Environmental and energy security benefits are among the most significant impacts of energy conservation standards, and singling

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<sup>26</sup> *Contra* 91 Fed. Reg. at 42038.

<sup>27</sup> 42 U.S.C. § 6295(m)(1).

<sup>28</sup> *Id.* § 6295(m)(3)(A).

<sup>29</sup> See, e.g., 89 Fed. Reg. 3026, 3035-36, 3030 (Jan. 17, 2024) (recounting the three prior iterations of DOE-prescribed standards for refrigerators, refrigerator-freezers, and freezers in a final rule that DOE found would reduce energy consumption from these products by an additional 11 percent).

<sup>30</sup> See *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999) (rejecting argument that executive order requiring submission to OMB made compliance with statutory deadline impossible).

<sup>31</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 4(a).

<sup>32</sup> See 91 Fed. Reg. at 42075.

<sup>33</sup> See *id.* at 42046.

<sup>34</sup> *Id.*

those factors out to exclude them from consideration when DOE prioritizes among its rulemaking obligations would be arbitrary and capricious.<sup>35</sup>

Second, DOE's proposal to include two new considerations originating in Executive Order 14154 leaves unclear how the Department will take into account and act on those considerations. The ambiguity in the NOPR makes it impossible for stakeholders to comment meaningfully on this issue.

It is not at all clear what DOE intends by proposing a requirement to prioritize rulemakings that have a high "[p]otential to protect consumer choice."<sup>36</sup> EPCA includes provisions applicable to the adoption of energy conservation standards that Congress specifically designed to ensure that standards do not unduly restrict consumer choice.<sup>37</sup> For consumer products, every standards rulemaking would appear to have an equal potential to protect consumer choice, because the same statutory provisions that protect consumer choice apply equally to each product.<sup>38</sup> DOE has cited no examples of prior rulemakings in which it believes consumer choice was especially well-protected, nor has the NOPR offered a hypothetical future application of this criterion.

Similarly, the impact of DOE's proposal to add a requirement that the Department consider a rulemaking's "[p]otential to eliminate counterproductive requirements that increase the costs of appliances" is also uncertain.<sup>39</sup> It is not clear how DOE could determine that completing a rulemaking to update a standard – resulting in either a stronger standard or no change – carries a high degree of potential to eliminate supposedly counterproductive requirements that allegedly increase the costs of appliances. Nor has DOE cited test procedure rulemakings that the Department believes illustrate the application of this criterion.

To the extent that the NOPR is signaling that DOE intends to facilitate the prioritization of rulemakings that roll back energy conservation standards, DOE is ignoring EPCA's anti-backsliding provision.<sup>40</sup> That provision prohibits DOE from prescribing "any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product."<sup>41</sup> Because DOE cannot lawfully weaken a standard, DOE can only weigh the Process Rule's prioritization factors when evaluating rulemakings that would move standards forward.

#### **4. DOE's proposed changes regarding coverage determinations are counterproductive and unnecessary.** The current Process Rule already contains a

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<sup>35</sup> See *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1203 (9th Cir. 2008) (rejecting an agency's failure to evaluate the economic benefits of reduced environmental harms as arbitrary and capricious).

<sup>36</sup> See 91 Fed. Reg. at 42046.

<sup>37</sup> See, e.g., 42 U.S.C. §§ 6295(o)(2)(B)(i)(IV), 6295(o)(4), & 6295(q).

<sup>38</sup> See *id.*

<sup>39</sup> 91 Fed. Reg. at 42075.

<sup>40</sup> See 42 U.S.C. § 6295(o)(1).

<sup>41</sup> *Id.*

detailed description of DOE's process for conducting coverage determinations. Furthermore, the current rule provides significant opportunity for stakeholder input on coverage determinations and ensures that there is clarity on the coverage determination before any test procedures or standards are established. Specifically, the current rule states that DOE may publish one or more preliminary documents to gather information on key issues.<sup>42</sup> If DOE proceeds with a coverage determination process, the Department will publish a notice of proposed determination with a comment period of at least 60 days before proceeding with a final rule.<sup>43</sup> The current rule further provides that DOE will finalize coverage for a product/equipment prior to publishing a test procedures NOPR.<sup>44</sup> Additionally, the current rule states that if DOE subsequently finds it necessary and appropriate to amend the scope of coverage, DOE will propose an amended coverage determination prior to moving forward with the test procedure or standards rulemaking.<sup>45</sup>

While the current Process Rule allows DOE to publish one or more preliminary documents prior to publishing a proposed determination of coverage, DOE instead is now proposing to require that the first step in a coverage determination rulemaking be a notice of proposed determination.<sup>46</sup> As DOE explained in the 2024 final rule on the Process Rule, "in some cases it may be necessary to gather information about a consumer product or commercial/ industrial equipment before issuing a proposed determination of coverage."<sup>47</sup> Therefore, we believe it would be counterproductive to prohibit DOE from gathering preliminary information in advance of publishing a proposed determination of coverage.

DOE is also proposing to require that coverage determinations be finalized prior to the initiation of any test procedure or standards rulemaking. Because information learned during the early stages of considering test procedures and standards can inform the coverage determination, requiring that a coverage determination be finalized prior to even initiating any test procedure or standards rulemaking would mean that the coverage determination would not be informed by such learnings. As DOE noted in the 2024 final rule, "coverage determination, test procedure, and energy conservation standard rulemakings are interdependent."<sup>48</sup> Furthermore, if information learned during the subsequent test procedure and standards rulemakings impacted the coverage determination, DOE would need to reopen the coverage determination and presumably restart the process of considering test procedures and standards, resulting in unnecessary delay. As noted above, the current Process Rule already requires that a coverage determination be finalized prior to publishing a test procedures proposed rule, ensuring that there is clarity on the scope of the coverage determination before any test procedures

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<sup>42</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 5(a).

<sup>43</sup> *Id.* § 5(b).

<sup>44</sup> *Id.* § 5(c).

<sup>45</sup> *Id.* § 5(d).

<sup>46</sup> 91 Fed. Reg. at 42075.

<sup>47</sup> 89 Fed. Reg. 24345 (April 8, 2024).

<sup>48</sup> *Id.*

or standards are established. Therefore, requiring DOE to finalize a coverage determination prior to the initiation of any test procedures or standards rulemaking is unnecessary.

Finally, DOE is proposing that a coverage determination must be finalized 180 days prior to publication of a test procedures NOPR.<sup>49</sup> The current Process Rule states that any amended test procedure will be finalized at least 180 days prior to the close of the comment period on a standards NOPR,<sup>50</sup> providing time for stakeholders to gain experience with the amended test procedure before evaluating a standards NOPR. However, as DOE explained in the 2024 final rule, because a coverage determination is simply establishing a definition for the newly covered product or equipment, there does not appear to be “a corresponding potential benefit for delaying publication of a test procedure NOPR after a coverage determination.” Therefore, the proposal to require that DOE finalize a coverage determination 180 days before publishing a test procedures NOPR would simply result in unnecessary delay.

## **5. DOE’s proposed energy-savings threshold is unlawful and would block many cost-saving standards.**

### **A. DOE’s new definition of “significant energy savings” is unlawful.**

Although EPCA does not define the phrase “significant conservation of energy,” DOE’s regulatory definition “must show some awareness of the energy savings Congress thought worth pursuing.”<sup>51</sup> The fixed thresholds DOE has proposed in the NOPR, however, would forfeit the incremental savings that Congress created EPCA to capture. Like the thresholds rejected by the D.C. Circuit Court of Appeals in *Herrington*, DOE’s new thresholds depart from the purpose and structure of EPCA. DOE has adopted an impermissible interpretation of the statute.

DOE’s interpretation is at odds with EPCA. EPCA’s significant savings requirement is a quick “first look” to “weed out” only those standards with the paltriest of savings, for which it is “truly obvious” that a “more thorough review” for economic justification would be pointless.<sup>52</sup> Congress recognized that even small amounts of energy savings could be significant, because over time, small savings add up.<sup>53</sup> Congress reinforced this gradualist approach by amending EPCA to require DOE to reevaluate standards on an eight-year cycle.<sup>54</sup> Periodic updates to standards ensure that incremental savings available from new technology will be locked in promptly. DOE’s imposition of thresholds to “prevent a

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<sup>49</sup> 91 Fed. Reg. at 42076.

<sup>50</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 8.

<sup>51</sup> *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1377 (D.C. Cir. 1985).

<sup>52</sup> *Id.* at 1373 & n.19.

<sup>53</sup> *Id.*; see also Significant, Merriam-Webster Dictionary Online (last accessed Aug. 11, 2026), <https://www.merriam-webster.com/dictionary/significant> (defining “significant” as “having meaning” or “having or likely to have influence”).

<sup>54</sup> Pub. L. No. 110-140, § 305(a), 121 Stat. 1492, 1553 (2007) (codified at 42 U.S.C. § 6295(m)(1)).

process” of standards amendment “every time there is an incremental improvement in energy efficiency” flies in the face of this statutory scheme.<sup>55</sup>

The specific thresholds proposed in the NOPR—either a 10-percent energy savings or a two-quad reduction in full-fuel-cycle (“FFC”) energy use over a 30-year period—will preclude far too many potentially beneficial standards. Not only do they “weed out standards promising such negligible benefits that they [are] not worth the trouble of further examination,”<sup>56</sup> but they also would block standards that would pass the economic justification test with flying colors—standards that would generate billions of dollars in net benefits.<sup>57</sup> Such valuable standards are plainly worth the comparatively minor investment of time and resources to evaluate their economic justification through a rulemaking.

The NOPR would forfeit these savings to avoid manufacturer “conversion costs” and “up-front purchase costs.”<sup>58</sup> In setting thresholds, DOE can and should consider the “rough fixed costs” of administering the appliance program and the “generic burdens of regulation on industry” from participating in standards rulemakings.<sup>59</sup> But the costs of *implementing* the proposed standard are fully accounted for in DOE’s economic justification inquiry.<sup>60</sup> Further, the burdens the NOPR is so keen to avoid—which, in contrast to the 2020 final rule,<sup>61</sup> DOE has not even attempted to quantify—are dwarfed by the billions in benefits from standards that fall below DOE’s new thresholds. The NOPR notes DOE’s estimate “that without a threshold, 35 percent of DOE’s rulemakings have imposed those costs on the market, while contributing to less than 9 percent of the total energy savings from the program.”<sup>62</sup> But DOE ignores that when adopting each standard, DOE determined that the standard was economically justified.

The NOPR tries to justify its thresholds on the grounds that “significant” energy savings can be achieved eventually through catch-up rulemakings, instead of the “burdensome process of . . . complying with frequent incremental changes to DOE’s standards.”<sup>63</sup> But that justification is flatly inconsistent with EPCA’s process for improving appliance efficiency. Congress chose repeated cycles of rulemaking as the means to improve appliance efficiency. DOE must review and consider updates to each standard on an eight-year cycle—unless DOE previously determined that an amendment was not warranted, in which case the agency must review the standard in three years.<sup>64</sup> DOE cannot repurpose the significance requirement to short-circuit these mandatory rulemakings and thereby

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<sup>55</sup> 91 Fed. Reg. at 42049.

<sup>56</sup> *Herrington*, 768 F.2d at 1373.

<sup>57</sup> See *infra* section 5.B.

<sup>58</sup> 91 Fed. Reg. at 42049.

<sup>59</sup> *Herrington*, 768 F.2d at 1373 n.19.

<sup>60</sup> 42 U.S.C. § 6295(o)(2)(B)(i)(I).

<sup>61</sup> See 85 Fed. Reg. at 8700-01.

<sup>62</sup> 91 Fed. Reg. at 42049.

<sup>63</sup> *Id.*

<sup>64</sup> 42 U.S.C. § 6295(m)(1), (3)(B).

thwart EPCA's command to reevaluate standards at regular intervals. The agency must follow the process Congress selected.<sup>65</sup>

Further, the kind of catch-up rulemakings DOE envisions may be impossible in practice. EPCA's innovation-forcing mechanism helps push the market towards market-leading technologies. But the technologies available today depend on advances made in years past. If DOE defers regulation to some future date on the theory that the energy savings achievable will be greater, those greater energy savings may never be attained at all.<sup>66</sup>

DOE predicts that its thresholds, though sacrificing energy savings from smaller rules, will still capture the majority of total energy savings available from efficiency standards.<sup>67</sup> Historically, blockbuster standards have generated a large proportion of the appliance program's energy savings.<sup>68</sup> Even if that trend continues, however, DOE is still wrong to write off the more modest savings from smaller rules. With EPCA, Congress decided to advance appliance efficiency through both giant leaps and small steps. DOE may shrug off the savings cast aside by its thresholds as "incremental,"<sup>69</sup> but Congress expected "standards for some covered products [to] produce quite modest incremental gains in efficiency and consequently in energy conserved."<sup>70</sup> It ordered DOE to pursue them anyway because "the cumulative impact of a series of conservation initiatives, which in themselves might appear insignificant, could be enormous."<sup>71</sup>

In addition to running afoul of EPCA's purpose and structure, the thresholds proposed in the NOPR also ignore guideposts in the statute and legislative history signaling the "range of energy savings Congress thought worth pursuing."<sup>72</sup> Most prominently, Congress itself has pursued savings that fall below DOE's two-quad threshold. The Energy Independence and Security Act of 2007 directly established standards for electric motors, residential boilers, and dehumidifiers.<sup>73</sup> These standards, which were estimated in advance to save

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<sup>65</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))).

<sup>66</sup> *Contra* 91 Fed. Reg. at 42049; see also R D Van Buskirk, et al., "A retrospective investigation of energy efficiency standards: policies may have accelerated long term declines in appliance costs," *Environ. Res. Lett.* 9 (2014) 114010 at 4-5 (tracing declines in the cost of energy efficiency improvements through multiple rounds of DOE standards for refrigerators), <https://iopscience.iop.org/article/10.1088/1748-9326/9/11/114010/pdf> (attached).

<sup>67</sup> 91 Fed. Reg. at 42049.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Herrington*, 768 F.2d at 1382

<sup>71</sup> *National Energy Act, Part I: Hearings Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong. 2 (May 9, 1977) (statement of Rep. Dingell, Chairman, Subcomm. on Energy and Power), available at <https://www.govinfo.gov/content/pkg/CHRG-95hhrg91931Op1/pdf/CHRG-95hhrg91931Op1.pdf> (excerpt attached).

<sup>72</sup> *Herrington*, 768 F.2d at 1377.

<sup>73</sup> Pub. L. 110-140, §§ 303, 311(a)(1)-(2), 313, 121 Stat. at 1552-53, 1563, 1568-69.

0.14, 0.16, and 0.17 quads on a primary-energy source basis, respectively, would not satisfy DOE's thresholds.<sup>74</sup>

The NOPR altogether ignores these standards established by Congress, but the agency's interpretation of "significant conservation of energy" must account for amendments to EPCA indicating the amount of energy Congress deems worth pursuing.<sup>75</sup>

DOE also fails to square its thresholds with the same portions of the statute and legislative history that *Herrington* considered when vacating the agency's previous attempt at fixed thresholds. For instance, DOE can prescribe a standard for an appliance not named as a "covered product" in the statute only if the total energy consumed by that appliance nationwide exceeds 0.43 quads over 30 years.<sup>76, 77</sup> Therefore, "Congress plainly thought that saving some part" of 0.43 quads "would be significant."<sup>78</sup> *Herrington* faulted DOE for setting its thresholds higher than 0.43 quads and "thus reject[ing] savings that exceeded 100 percent of consumption for appliances Congress was willing to regulate."<sup>79</sup> As in *Herrington*, the two-quad threshold proposed in the NOPR would lead DOE to reject as insignificant savings that exceed 100 percent of the threshold Congress deemed significant.

The court in *Herrington* was also troubled by the DOE threshold requiring at least a 16.67% improvement in product efficiency, which appeared to demand greater efficiency gains than Congress expected from the program.<sup>80</sup> The court pointed to legislative history indicating that Congress predicted standards would increase product efficiency by as little as 3% compared to efficiency improvements without standards.<sup>81</sup> The proposed 10% efficiency improvement threshold would likewise forgo many of the incremental gains Congress intended to secure.

Finally, recent proposed legislation to amend EPCA further confirms that a 10% savings threshold is inconsistent with EPCA. The *proposed* legislation would define "significant energy savings" to mean "a reduction, over a 30-year period, of not less than 10 percent in

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<sup>74</sup> See U.S. Dep't of Energy, Technical Support Document: Impacts on the Nation of the Energy Independence and Security Act of 2007 at 23, 25 (Mar. 2009), available at [https://www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/en\\_masse\\_tsd\\_march\\_2009.pdf](https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/en_masse_tsd_march_2009.pdf) (attached).

<sup>75</sup> See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

<sup>76</sup> See 42 U.S.C. § 6295(l)(1)(B).

<sup>77</sup> EPCA expresses this threshold as 4,200,000 kilowatt-hours per year. 42 U.S.C. § 6295(l)(1)(B). This amount of energy is equal to 0.014335 quads per year, *Herrington*, 768 F.2d at 1373, or 0.43 quads over 30 years, 85 Fed. Reg. at 8669-70. Because, as discussed below, EPCA is principally concerned with site energy, the threshold is also expressed in terms of site energy. On an FFC basis, the 0.43 quads threshold translates to 1.449 quads.

<sup>78</sup> *Herrington*, 768 F.2d at 1373-74.

<sup>79</sup> *Id.* at 1374.

<sup>80</sup> *Id.* at 1382.

<sup>81</sup> *Id.*

full fuel cycle energy use.”<sup>82</sup> Such a provision—amending EPCA to allow for precisely the change the NOPR now proposes—would be unnecessary if EPCA, as enacted, allowed for such a crabbled definition of “significant energy savings.” But as *Herrington* makes plain, it does not.

**B. The NOPR fails to account for the benefits of the energy savings its proposed thresholds would forgo.**

DOE’s proposed thresholds would impose enormous costs on consumers, public health, and the environment. Yet DOE has failed to give those costs any consideration.<sup>83</sup> The NOPR does not account for the energy savings—and related benefits to consumers and public health—that its proposed thresholds would forfeit. Such a failure to account for the costs of the proposal is a hallmark of arbitrary decisionmaking.<sup>84</sup>

If DOE’s proposed energy-savings threshold had been in place historically, it would have blocked at least 30 standards that are collectively delivering very large energy, water, and utility bill savings while cutting air pollution and greenhouse gas emissions. A recent ASAP analysis found that, according to DOE’s own prior estimates, the proposed threshold would have blocked at least 11.3 quads of energy savings, 2.4 trillion gallons of water savings, \$98 billion in operating cost savings for consumers and businesses, 1 million tons of nitrogen oxides (“NO<sub>x</sub>”) reductions, and 451 million metric tons (“MMT”) of carbon dioxide (“CO<sub>2</sub>”) reductions.<sup>85</sup> Consequently, although standards failing to meet DOE’s new threshold “may form a ‘very small portion’ of a gargantuan source of” energy savings from the appliance standards program as a whole, they still “constitute[] a gargantuan source of” energy savings on their “own terms.”<sup>86</sup>

The proposed energy-savings threshold would likely also block many future standards. For example, in 2023, DOE issued four NOPRs proposing amended standards for external power supplies, automatic commercial ice makers, ceiling fans, and dehumidifiers. As shown in Table 1 below, while DOE found the proposed standards for all four products to be technologically feasible and economically justified, the Department’s new proposed savings threshold would block these rules from being finalized. As shown in Table 1, DOE estimated that these four NOPRs together would yield cumulative energy savings of 1.5

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<sup>82</sup> See Energy Efficiency Reform Act of 2026, S. Bill \_\_\_, § 3 (proposing to amend 42 U.S.C. § 6291), available at <https://www.energy.senate.gov/services/files/78BA69CF-8892-414D-9718-8EEA2DA199EE> (excerpt attached).

<sup>83</sup> *Cf. Herrington*, 768 F.2d at 1433 (criticizing DOE for “ma[king] persistently pessimistic assumptions about the burdens of standards and [being] conspicuously reluctant to address their benefits”).

<sup>84</sup> See *Michigan v. EPA*, 576 U.S. 743, 753 (2015) (“[R]easonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”).

<sup>85</sup> J. Mauer, DOE’s Proposed Energy Savings Threshold Would Have Blocked \$100 Billion in Utility Bill Savings (July 2026), <https://appliance-standards.org/sites/default/files/Savings-threshold-would-have-blocked-100-billion-bill-savings.pdf> (attached).

<sup>86</sup> *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1027 (5th Cir. 2019).

quads, which is equivalent to about 1.5% of total annual U.S. energy consumption.<sup>87</sup> These NOPRs would also provide more than \$8 billion in net present value savings for consumers and businesses while cutting 34 MMT of CO<sub>2</sub>, 255 thousand tons of methane (“CH<sub>4</sub>”), 57 thousand tons of NO<sub>x</sub>, 10 thousand tons of sulfur dioxide (“SO<sub>2</sub>”), and 0.07 tons of mercury (“Hg”). These savings would all be blocked by DOE’s proposed energy-savings threshold, and many other potential future standards could similarly be blocked by the proposed threshold.

**Table 1. Savings from recent NOPRs that would be blocked from being finalized by the proposed energy-savings threshold.**

| Product                         | Cumulative energy savings (quads) | Reduction in energy use (%) | Net present value savings (\$billion) | Cumulative emissions reductions |                               |                               |                               |             |
|---------------------------------|-----------------------------------|-----------------------------|---------------------------------------|---------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------|
|                                 |                                   |                             |                                       | CO <sub>2</sub> (MMT)           | CH <sub>4</sub> (thous. tons) | NO <sub>x</sub> (thous. tons) | SO <sub>2</sub> (thous. tons) | Hg (tons)   |
| External power supplies         | 0.11                              | 2.9%                        | 0.45                                  | 3.9                             | 26.3                          | 6                             | 1.7                           | 0.01        |
| Automatic commercial ice makers | 0.16                              | 4%                          | 0.38                                  | 5                               | 36                            | 8                             | 2                             | 0.015       |
| Ceiling fans                    | 0.92                              | 9%                          | 4.96                                  | 18.3                            | 141                           | 31.3                          | 4.5                           | 0.03        |
| Dehumidifiers                   | 0.33                              | 5.8%                        | 2.61                                  | 6.94                            | 51.94                         | 11.81                         | 1.76                          | 0.01        |
| <b>Total</b>                    | <b>1.52</b>                       | <b>--</b>                   | <b>8.4</b>                            | <b>34.1</b>                     | <b>255.2</b>                  | <b>57.1</b>                   | <b>10.0</b>                   | <b>0.07</b> |

**Note:** The net present value savings reflect a 3% discount rate.

**Sources:** February 2023 NOPR for external power supplies: 88 Fed. Reg. 7284, 7287 (Feb. 2, 2023); May 2023 NOPR for automatic commercial ice makers: 88 Fed. Reg. 30508, 30512 (May 11, 2023); June 2023 NOPR for ceiling fans: 88 Fed. Reg. 40932, 40934 (June 22, 2023); November 2023 NOPR for dehumidifiers: 88 Fed. Reg. 76510, 76512 (Nov. 6, 2023).

In addition to increasing energy and water waste and harmful emissions, DOE’s proposed energy-savings threshold would only worsen the affordability crisis. Average residential electricity prices increased by more than 30% between 2020 and 2025.<sup>88</sup> Recent data from the Energy Information Administration (EIA) showed that nearly 1 in 3 U.S. households experience some form of energy insecurity, with nearly 1 in 4 households reducing or

<sup>87</sup> Total U.S. annual energy consumption in 2025 was 96.2 quads. See Energy Information Administration, U.S. Energy Consumption by Source and Sector, 2025, <https://www.eia.gov/energyexplained/us-energy-facts/images/consumption-by-source-and-sector.pdf> (attached).

<sup>88</sup> Average residential electricity price increased from 13.15 cents/kilowatt-hour (kWh) in 2020 to 17.30 cents/kWh in 2025. Energy Information Administration, Electric Power Monthly: Table 5.3. Average Price of Electricity to Ultimate Customers: Total by End-Use Sector, 2016 – May 2026 (last accessed Aug. 11, 2026), [https://www.eia.gov/electricity/monthly/epm\\_table\\_grapher.php?t=table\\_5\\_03](https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=table_5_03) (attached).

forgoing food or medicine to pay energy costs.<sup>89</sup> By blocking standards that reduce utility bills, DOE's proposal would keep bills higher than they otherwise would be.

### C. Relying on Full-Fuel Cycle Energy Use is Inconsistent with EPCA

FFC energy use can be an important measure of the impact of an energy conservation standard, and has, accordingly, been used as a factor in DOE's analysis for years. But in determining the "energy use" of a product subject to regulation, EPCA does not allow DOE to rely on FFC. Rather, EPCA defines "energy use" as "the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures under section 6293."<sup>90</sup> By defining "energy use" as the energy consumed "at point of use," EPCA requires DOE to measure an appliance's energy consumption by reference to its site energy.<sup>91</sup> As the Second Circuit Court of Appeals recently explained:

There are two ways to measure an appliance's energy consumption: site energy and source energy. Site energy, in the words of DOE, "is the amount of energy consumed at the point of sale (e.g., that enters the home, building, or establishment) without adjustment for any energy loss in the generation, transmission, and distribution of that energy." *Energy Intensity Indicators: Terminology and Definitions*, U.S. Dep't of Energy (last visited Apr. 12, 2026), <https://www.energy.gov/eere/analysis/energy-intensity-indicators-terminology-and-definitions>. In other words, site energy is the energy consumed at an appliance's "point of use." In contrast, "source energy" is the site energy "plus the energy losses associated with the production of electricity by the utility sector (i.e., losses that occur in the generation, transmission, and distribution)." *Id.* Simply put, source energy casts a wider net.

*Id.*<sup>92</sup>

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<sup>89</sup> Energy Information Administration, Household Energy Insecurity, 2024 (Mar. 2026), [http://www.eia.gov/consumption/residential/data/2024/hc/pdf/HC11.1\\_2024.pdf](http://www.eia.gov/consumption/residential/data/2024/hc/pdf/HC11.1_2024.pdf) (attached).

<sup>90</sup> 42 U.S.C. § 6291(4).

<sup>91</sup> See *Ass'n of Contracting Plumbers of the City of New York, Inc. v. City of New York*, 180 F.4th 434, 451–52 (2d Cir. 2026).

<sup>92</sup> See also *California Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1123 (9th Cir. 2024) (Friedland, J., dissenting from denial of rehearing en banc) ("The fact that EPCA defines 'energy use' as the quantity of energy consumed at the 'point of use' does not change this analysis. 'Point of use' has a well-established technical meaning that must be applied here: To measure energy at the 'point of use,' one measures only 'site energy,' the energy that is directly consumed by the appliance from the pipe or outlet. By contrast, 'source energy' includes all the energy measured at the point of use (the 'site energy') plus the energy required to produce and deliver the energy to that site. For instance, energy as measured at the 'point of use' would include only the natural gas needed to operate a gas stove, whereas 'source energy' would also include the energy consumed in extracting that natural gas, removing its impurities, and transporting it to the location of the stove.").

The Second Circuit noted that a site-use definition is “in lockstep with the interpretation pressed by DOE on multiple occasions.”<sup>93</sup>

In a 2004 notice of proposed rulemaking, DOE explained that “EPCA ... do[es] not permit the regulation of source energy” because it “specif[ies] that efficiency must be based on the energy consumption at the point of use.” Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces and Boilers, 69 Fed. Reg. 45420, 45426 (July 29, 2004) (citing 42 U.S.C. § 6291(4)). And in a separate 2010 notice of proposed rulemaking, DOE stated that “existing law ... requires” measures of a covered product’s energy consumption “to be based solely on the energy consumed at the point of use” rather than “the energy consumed in extracting, processing, and transporting primary fuels and energy losses associated with generation, transmission, and distribution of electricity.” Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Public Meeting and Availability of Statement of Policy for Adopting Full-Fuel-Cycle Analyses into Energy Conservation Standards Program, 75 Fed. Reg. 51423, 51424 (Aug. 20, 2010) (citing 42 U.S.C. § 6291(4)).

*Id.*<sup>94</sup>

The NOPR nowhere acknowledges this past practice, nor does it grapple with EPCA’s plain text. Instead, it merely notes that “the choice of site energy vs source (or primary) energy is important.”<sup>95</sup> True. But in the context of determining energy use under EPCA, Congress has made that “important” choice. DOE must abide by it. Insofar as DOE persists in its attempt to craft fixed thresholds for energy significance that comport with *Herrington* and EPCA’s structure, it must determine those thresholds based on the “energy use” of the product at issue: i.e., with reference only to the product’s site energy.

## **6. DOE’s proposal to add an “early assessment” process and to specify early rulemaking steps would unnecessarily delay rulemakings and be overly prescriptive.**

The current Process Rule already provides stakeholders an opportunity to provide early input on rulemakings. Specifically, the current Process Rule states that for both test procedure and standards rulemakings, DOE will publish one or more preliminary documents prior to issuing a NOPR.<sup>96</sup> This existing provision of the Process Rule is consistent with the 2021 joint proposal from industry and advocate stakeholders, which recommended that any proposed rule “be preceded by some form of outreach to the public that includes formal notice and public comment.”<sup>97</sup> However, DOE is now

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<sup>93</sup> *Id.* at 452.

<sup>94</sup> See also *California Rest. Ass’n*, 89 F.4th at 1123-24 (listing additional examples).

<sup>95</sup> 91 Fed. Reg. at 42049.

<sup>96</sup> 10 C.F.R. Part 430, Subpart C, Appendix A §§ 6, 8.

<sup>97</sup> Joint Proposal from Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), National Electrical Manufacturers Association (NEMA), Plumbing Manufacturers International (PMI), ASAP, and ACEEE (Aug. 9, 2021),

proposing to add an “early assessment” step to both test procedure and standards rulemakings that would often be duplicative of other early rulemaking steps and simply serve to add delay.

In the NOPR, DOE’s stated rationale for adding the early assessment stage is that it “provides an important opportunity for public input and provides regulatory certainty to stakeholders.”<sup>98</sup> However, the current Process Rule already fulfills these objectives by stating that DOE will solicit early input from stakeholders at least once prior to issuing a NOPR.

In recent years, DOE has typically initiated both test procedure and standards rulemakings with a request for information (“RFI”).<sup>99</sup> For energy conservation standards, the information that DOE collects in comments from stakeholders on an RFI as well as the Department’s own research allows for proceeding with either a proposed negative determination (i.e., a proposal not to amend the standards) or with additional rulemaking steps to consider amended standards. For example, for metal halide lamp fixtures, DOE issued an RFI in October 2022<sup>100</sup> and subsequently issued a notice of proposed determination in October 2023<sup>101</sup> after tentatively determining that amended standards would not be warranted. For refrigerators and freezers, DOE issued an RFI in November 2019<sup>102</sup> followed by a preliminary technical support document (“TSD”) in October 2021.<sup>103</sup> Therefore, there is no need for a separate “early assessment” process as the existing process provides an opportunity for early input and a pathway for DOE to quickly proceed with a determination of no change when warranted.

The 2021 joint proposal from industry and advocate stakeholders also recommended providing DOE the ability to “determine the appropriate regulatory tool” for early stakeholder input prior to a NOPR.<sup>104</sup> In the current NOPR, DOE notes that, in response to the 2025 RFI, various stakeholders representing manufacturers and utilities offered different suggestions for what pre-NOPR rulemaking stages should look like, including multiple commenters who suggested a range of potential options (e.g., an ANOPR or

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[http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo\\_August%206%2C%202021\\_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf](http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo_August%206%2C%202021_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf) (attached).

<sup>98</sup> 91 Fed. Reg. at 42050.

<sup>99</sup> See, for example, the most recent rulemakings for test procedures and standards for refrigerators and freezers: 82 Fed. Reg. 29780 (June 30, 2017); 84 Fed. Reg. 62470 (Nov. 15, 2019).

<sup>100</sup> 87 Fed. Reg. 60555 (Oct. 6, 2022).

<sup>101</sup> 88 Fed. Reg. 67989 (Oct. 3, 2023).

<sup>102</sup> 84 Fed. Reg. 62470 (Nov. 15, 2019).

<sup>103</sup> 86 Fed. Reg. 57378 (Oct. 15, 2021).

<sup>104</sup> Joint Proposal from Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), National Electrical Manufacturers Association (NEMA), Plumbing Manufacturers International (PMI), ASAP, and ACEEE (Aug. 9, 2021),

[http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo\\_August%206%2C%202021\\_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf](http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo_August%206%2C%202021_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf) (attached).

framework document or preliminary analysis).<sup>105</sup> Yet DOE is now proposing to require very specific early rulemaking steps following the early assessment—either a framework document and preliminary analysis or an ANOPR—with almost no explanation. DOE simply states that “specifying limited pathways as opposed to numerous options provides more regulatory certainty to stakeholders.”<sup>106</sup> Notably, these prescriptive steps do not include the most common set of early rulemaking steps that DOE has employed in recent years—an RFI followed by a preliminary TSD.<sup>107</sup> DOE’s current proposal would require the Department to instead use alternate early rulemaking steps without providing any rationale for why those steps would be better than DOE’s current approach.

For test procedures, DOE has often issued an RFI followed by a NOPR. DOE is now proposing that, following the early assessment, if the Department determines that it is appropriate to continue the test procedure rulemaking, “it would provide further opportunities for early public input.”<sup>108</sup> This change would simply serve to delay test procedure rulemakings in many cases where it would otherwise be appropriate to publish a NOPR following an early opportunity for stakeholder input (e.g., an RFI).

**7. DOE should not extend minimum comment periods beyond what the statute requires.** EPCA requires that DOE provide, at a minimum, a 60-day comment period for NOPRs. The required minimum 60-day comment period is also consistent with Executive Order 12866, “Regulatory Planning and Review,” which states that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”<sup>109</sup> For early rulemaking steps, DOE has typically provided a comment period of between 30 days and 60 days, depending on the specific rulemaking step. For example, for RFIs, which may be just a few pages, the Department has often provided a 30-day comment period, while for preliminary TSDs, which are typically hundreds of pages and include DOE’s preliminary engineering and economic analyses, DOE has typically provided a 60-day comment period.

DOE is now proposing a minimum comment period of 75 days for all pre-NOPR and NOPR documents.<sup>110</sup> We believe that it is important for DOE to have discretion regarding the length of the comment periods for early rulemaking steps given the wide variation in specific document types. As DOE explained in the 2024 final rule, while the standards rulemaking process is complex and stakeholders need sufficient time to comment on rulemaking documents, “there are also instances where DOE issues rulemaking documents of limited scope and a 30-day comment period, or even less, is more than

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<sup>105</sup> 91 Fed. Reg. at 42050.

<sup>106</sup> *Id.* at 42051.

<sup>107</sup> For example, for the most recent rulemakings for refrigerators, clothes dryers, water heaters, commercial refrigeration equipment, and electric motors, in each case DOE issued an RFI and a preliminary TSD in advance of a NOPR.

<sup>108</sup> 91 Fed. Reg. at 42079.

<sup>109</sup> 58 Fed. Reg. 51735 (Oct. 4, 1993).

<sup>110</sup> 91 Fed. Reg. at 42051.

sufficient.”<sup>111</sup> DOE also stated in the 2024 final rule that the Department saw “no reason to establish a longer minimum comment period than required by EPCA or recommended under E.O. 12866, which applies to other Federal agencies that conduct rulemaking analyses of comparable complexity.”<sup>112</sup>

Importantly, the required minimum 60-day comment period for NOPRs is just that—a minimum. DOE can extend the comment period for NOPRs or any other rulemaking steps on a case-by-case basis when a longer comment period is warranted. Therefore, in order to avoid unnecessary delay, DOE should not extend minimum comment periods in the Process Rule beyond what the statute requires.

**8. DOE’s proposed changes to the selection factors the Department uses to choose a proposed standard level arbitrarily and unlawfully tilt the table against stronger standards.** The Process Rule has long specified a list of factors for DOE to consider in evaluating the economic justification for a proposed standard level. The NOPR would make three key changes to the current list, all of which will skew DOE’s analysis against stronger standards.

First, the NOPR proposes to remove a requirement that DOE consider the impacts of a proposed standard on the environment, which currently includes “estimated impacts on emissions of carbon and relevant criteria pollutants.”<sup>113</sup> The NOPR replaces this language with a provision allowing DOE to consider “[o]ther factors the Secretary considers relevant.” Although the replacement provision arguably leaves open the possibility that DOE may continue to consider the environmental impacts of a proposed standard, the NOPR preamble makes clear that DOE’s intent is to eliminate its consideration of environmental impacts. The NOPR explains that DOE “has tentatively determined” that environmental impacts “are no longer relevant as an additional factor for [DOE’s] consideration.”<sup>114</sup> The NOPR then points to Executive Order 14154, which, according to the NOPR, specifies that all federal agencies “shall adhere to only the relevant legislated requirements for environmental considerations, and any considerations beyond those requirements are eliminated.”<sup>115</sup>

To the extent DOE intends this removal of the command to consider environmental benefits to foreclose their consideration, DOE must abandon that effort. Environmental impacts are among the most significant impacts of energy conservation standards, and

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<sup>111</sup> 89 Fed. Reg. 24340, 24349 (Apr. 8, 2024). DOE provided the example of cases where DOE is revisiting a determination not to amend standards within three years; in such cases, DOE may issue an RFI of limited scope, in which case a 30-day comment period may be “more than sufficient” to allow stakeholders a meaningful opportunity to comment.

<sup>112</sup> *Id.*

<sup>113</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 6(a)(5)(iv)(F).

<sup>114</sup> 91 Fed. Reg. at 42052.

<sup>115</sup> *Id.*

singling those factors out to exclude them from consideration when DOE prioritizes among its rulemaking obligations would be arbitrary and capricious.<sup>116</sup>

In addition, the NOPR fails to confront or even acknowledge DOE's prior conclusion that environmental benefits are a legislated requirement. DOE has previously "maintain[ed] that climate and health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy and water conservation," one of the factors DOE must consider, to the maximum extent practicable, under EPCA.<sup>117</sup>

The second major change to the factors used to select a proposed standard is the NOPR's proposal to include new considerations originating in Executive Order 14154. According to the NOPR preamble, these changes address the protection of consumer choice and certain private economic impacts.<sup>118</sup> However, beyond simply pointing to Executive Order 14154, the NOPR does not address why these proposed changes are necessary. The lack of a rationale in the NOPR makes it impossible for stakeholders to comment meaningfully on this proposed change, and DOE's sole reliance on the Executive Order's text provides stakeholders with no confidence that DOE is exercising any independent judgment on this issue.

Third, the NOPR proposes a significant change to the evaluation of a standard level's impact on the utility sector. Currently, DOE analysis of the utility impacts of a standard "include[s] estimated marginal impacts on electric and gas utility generation and capacity."<sup>119</sup> This focus on generation and capacity is fully consistent with EPCA's purposes of "conserv[ing] energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses."<sup>120</sup> The NOPR proposes to change the relevant analytical consideration to "estimated marginal impacts on electric and gas utility costs and revenues."<sup>121</sup> This focus on maximizing the profits of utility companies, even where doing so would conflict with the interests of consumers and manufacturers and the need for energy and water conservation, finds no support in the text of EPCA. Moreover, the NOPR preamble does not even mention this proposed change. Because DOE has not explained the basis for this change, it is impossible for stakeholders to comment meaningfully on this issue, other than by simply pointing out its lack of statutory support.

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<sup>116</sup> See *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1203 (9th Cir. 2008) (rejecting an agency's failure to evaluate the economic benefits of reduced environmental harms as arbitrary and capricious).

<sup>117</sup> 89 Fed. Reg. at 24356 (citing 42 U.S.C. § 6295(o)(2)(B)(i)(VI)).

<sup>118</sup> See 91 Fed. Reg. at 42052.

<sup>119</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 6(a)(5)(iv)(D).

<sup>120</sup> 42 U.S.C. § 6201(4).

<sup>121</sup> 91 Fed. Reg. at 42077 (emphasis added).

**9. DOE’s proposed “walk up” approach would be unlawful.** The NOPR’s proposed “walk up” proposal contravenes EPCA’s plain text and long-standing precedent. It should be withdrawn.

As the NOPR recognizes, the 2020 Process Rule attempted a substantively identical end-run around EPCA’s mandated process.<sup>122</sup> Just like the 2020 Process Rule, the NOPR’s “walk up” approach suffers from a fatal defect: it ignores the decision-making process Congress itself mandated in 42 U.S.C. § 6295(p). But DOE “may not ignore the decision-making procedure Congress specifically mandated because the agency thinks it can design a better procedure.”<sup>123</sup> DOE’s current approach—the “walk down”—is mandated by EPCA and the direct result of the D.C. Circuit’s *Herrington* decision, rejecting DOE’s earlier attempt to circumvent EPCA’s required process.

EPCA establishes the process that DOE must follow when prescribing new energy conservation standards or updating existing standards. This process applies to consumer appliances and commercial and industrial equipment.<sup>124</sup> DOE must first determine whether a proposed standard will result in “significant conservation of energy.”<sup>125</sup> If so, DOE then evaluates different designs for the proposed standard, referred to as “Trial Standard Levels” (“TSLs”), to “determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible” for the product.<sup>126</sup> DOE dubs the TSL that saves the most energy the “max-tech standard.”<sup>127</sup> DOE must adopt the max-tech standard if it is “economically justified,”<sup>128</sup> that is, if “the benefits of the standard exceed its burdens.”<sup>129</sup> If DOE does not adopt the max-tech standard, it must explain why.<sup>130</sup>

DOE’s walk down approach adheres to this directive. The walk down approach begins with the agency’s assessment of the max-tech standard’s costs and benefits relative to the status quo.<sup>131</sup> If its benefits exceeded its burdens, the max-tech standard is economically justified,<sup>132</sup> and DOE will adopt it as the standard design that maximized energy savings.<sup>133</sup> If the max-tech standard is not economically justified, DOE will “walk down” to the next most stringent TSL and determine whether that standard design is economically justified. And so on, until DOE either finds the economically justified standard that saves the most

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<sup>122</sup> *Id.* at 42055 (“The 2020 Process Rule referred to this framework as the “comparative” approach. To reflect the general framework of that comparative approach, as well forthcoming analytic updates consistent with 42 U.S.C. 6295(o)(2)(B), this proposal refers to this concept as a “walk up.””).

<sup>123</sup> *Herrington*, 768 F.2d at 1396.

<sup>124</sup> 42 U.S.C. §§ 6292(a), 6295(a), 6311(a), 6316(a).

<sup>125</sup> *Id.* § 6295(o)(3)(B).

<sup>126</sup> *Id.* § 6295(p)(1).

<sup>127</sup> See 10 C.F.R. Part 430, Subpart C, Appendix A § 6(b)(2).

<sup>128</sup> See 42 U.S.C. § 6295(o)(2)(A).

<sup>129</sup> *Id.* § 6295(o)(2)(B)(i).

<sup>130</sup> See *id.* § 6295(p)(1).

<sup>131</sup> *Id.*

<sup>132</sup> See 42 U.S.C. § 6295(o)(2)(B)(i).

<sup>133</sup> See *id.* § 6295(o)(2)(A).

energy or runs out of technologically feasible TSLs, in which case it adopts no new standard.<sup>134</sup>

This approach recognizes that EPCA sorts economically justified standards according to their energy savings, not their cost/benefit ratios. EPCA does not allow DOE to forgo a standard that passes EPCA's test for economic justification in favor of a less stringent standard with a cost-benefit mix preferred by the agency.

In attempting to justify its new proposed approach, DOE betrays its misunderstanding of the task EPCA sets out. As the NOPR explains, the “main difference between the ‘walk down approach’ and the ‘walk up approach’ is that the walk down approach starts at the most stringent possible standard and ‘walks down’ to different levels of stringency, presumptively stopping at the most-stringent standard that DOE determines is economically justified.”<sup>135</sup> That much is true. But then the NOPR says, “This approach favors technological feasibility over economic justification, resulting in more stringent standards than may be appropriate under EPCA’s balancing factors.”<sup>136</sup> But there are no “balancing factors” under EPCA. To be sure, DOE must consider whether a standard is economically justified.<sup>137</sup> And many factors may be relevant to that analysis, including possible consumer behavioral changes.<sup>138</sup> But EPCA recognizes that multiple standard levels could be technologically feasible and economically justified. Where that is so, EPCA resolves any question of balancing: DOE *must* select the standard that “achieves the maximum improvement in energy efficiency.”<sup>139</sup>

A walk up approach is not necessary to “allow DOE and the public to compare easily a proposed standard’s proposed energy and operating savings and economic impacts to the status quo and to the standard just below.”<sup>140</sup> Under DOE’s existing walk down approach, DOE analyzes and presents for public comment energy and operating cost savings and economic impacts for each TSL.<sup>141</sup> And to the extent DOE believes that its economic analysis needs to better reflect behavioral impacts that would diminish energy savings, its economic analysis can be updated to reflect such analysis (as long as such analysis is not arbitrary and capricious). The NOPR confuses matters when it argues that a walk up approach is necessary to account for technologies that, though technically feasible, may be too expensive to achieve widespread uptake.<sup>142</sup> Again, the existing walk down approach accounts for such circumstances: a standard that is technologically feasible but wildly expensive would likely be rejected as not economically justified, prompting DOE to “walk

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<sup>134</sup> See, e.g., 62 Fed. Reg. 23,102, 23,111-12 (Apr. 28, 1997) (applying the walk down approach); 82 Fed. Reg. 6826, 6842 (Jan. 19, 2017) (same).

<sup>135</sup> 91 Fed. Reg. at 42055.

<sup>136</sup> *Id.*

<sup>137</sup> See 42 U.S.C. § 6295.

<sup>138</sup> See 91 Fed. Reg. at 42055.

<sup>139</sup> 42 U.S.C. § 6295(o)(2)(A).

<sup>140</sup> 91 Fed. Reg. at 42055.

<sup>141</sup> See, e.g., Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 87 Fed. Reg. 40,590, 40,064 (proposed July 7, 2022).

<sup>142</sup> See 91 Fed. Reg. at 42056.

down” to the next technologically feasible standard level. In all cases, though, DOE must remain oriented towards identifying the technologically feasible, economically justified standard that achieves the maximum improvement in energy efficiency.

In abandoning its longstanding walk down approach to assessing economic justification, DOE proposes to ignore Congress’s unambiguous instruction to adopt the economically justified standard design that maximizes energy efficiency. “[T]he statute . . . on its face requires actual determinations of maximum technologically feasible levels and specific explanations if standards are not set at those levels.”<sup>143</sup> Contrary to EPCA, DOE plans to pass over stringent standard designs for which benefits exceed burdens in favor of standards with lower savings but a mix of benefits and burdens preferred by DOE. DOE’s policy preference to value the economic impact of standards over their savings contradicts both EPCA’s overriding purpose to save energy,<sup>144</sup> and the statute’s unambiguous command to maximize savings. The agency is “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”<sup>145</sup>

Not only does EPCA’s plain-text mandate DOE’s walk down approach, but Congress has also ratified that approach through subsequent legislation. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”<sup>146</sup>

In 1985, the *Herrington* court interpreted EPCA as requiring DOE to use the walk down approach, though it did not label it as such:

DOE must first identify . . . the maximum improvement in energy efficiency that is technologically feasible. If a standard at that level would be economically justified, DOE must set the standard there. If a standard requiring the maximum technologically feasible level would not be economically justified, DOE must set the standard at the highest level that is both technologically feasible and economically justified. In that event, EPCA requires DOE to explain specifically why a standard achieving the maximum technologically feasible improvement in efficiency was rejected.

768 F.2d at 1391-92 (footnote and citations omitted).

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<sup>143</sup> *Herrington*, 768 F.2d at 1395.

<sup>144</sup> 42 U.S.C. § 6201(4), (5).

<sup>145</sup> *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994).

<sup>146</sup> *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Curran*, 456 U.S. 353, 383 n.66 (1982) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)).

Two years later, in 1987, Congress readopted economic justification provisions nearly identical to those interpreted by *Herrington*.<sup>147</sup> Congress thereby ratified that interpretation.<sup>148</sup>

Following the 1987 amendments, DOE applied the walk down approach repeatedly and consistently.<sup>149</sup>

Against the backdrop of this consistent agency interpretation, Congress amended portions of EPCA relevant to the economic justification inquiry on three occasions. The Energy Policy Act of 1992 left the provisions relating to economic justification of consumer products untouched, while using virtually identical language to establish the economic justification inquiry for commercial and industrial equipment.<sup>150</sup> In other words, not only did Congress not disturb DOE's, and the D.C. Circuit's, interpretation of DOE's economic justification obligations, it extended that language, and that interpretation, to cover additional products.<sup>151</sup>

DOE cannot rewrite EPCA in order to enact its preferred policies. The text of the economic justification provisions, the instruction to maximize energy savings, and repeated Congressional ratification of the preexisting walk down procedure all lead to the same conclusion: DOE's proposed "walk up" approach violates the unambiguous intent of Congress.

Past practice suggests that the "walk up" approach would result in lost savings when DOE considers setting future standards. For example, in May 2023, DOE proposed amended standards for automatic commercial ice makers (ACIMs) at TSL 3.<sup>152</sup> Yet DOE's proposed "walk up" approach would potentially block the Department from finalizing the proposed standards. DOE's analysis for ACIMs found positive average life-cycle cost ("LCC") savings

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<sup>147</sup> *Compare* National Energy Conservation Policy Act of 1978 (Pub. L. 95-619, Sec. 422, 92 Stat. 3206 at 3259), *with* National Appliance Energy Conservation Act of 1987 (Pub. L. 100-12, Sec. 5, 101 Stat. 103 at 114).

<sup>148</sup> *See Merrill Lynch*, 456 U.S. at 383 n.66.

<sup>149</sup> *See, e.g.*, 54 Fed. Reg. 47916, 47920, 47937-38 (Nov. 17, 1989) (applying walk down approach by rejecting two more stringent TSL that were not economically justified before adopting the third-most-stringent TSL); 62 Fed. Reg. 23102, 23111-13 (April 28, 1997) (utilizing the walk down approach); 62 Fed. Reg. 50122, 50145-46 (Sept. 24, 1997) (same); 66 Fed. Reg. 3314, 3326-28 (Jan. 12, 2001) (same); 72 Fed. Reg. 58190, 58228-31 (Oct. 12, 2007).

<sup>150</sup> Pub. L. 102-486, Sec. 122(d), 106 Stat. 2776, 2813, codified at 42 U.S.C. § 6313(a)(6)(B)(ii). *See also* Energy Policy Act of 2005, Pub. L. 109-58, Sec. 135(c)(1), 119 Stat. 594, 628-29, codified at 42 U.S.C. § 6295(f)(4)(D) (relying on existing interpretation of economic justification in sec. 6295(o)); Energy Independence and Security Act of 2007, Pub. L. 110-140, Sec. 305(a), 121 Stat. 1492, 1553-54, codified at 42 U.S.C. § 6295(m)(1)(B) (relying on DOE's existing economic justification criteria and walk down approach).

<sup>151</sup> *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *New York v. National Highway Traffic Safety Administration*, 974 F.3d 87, 98 (2nd Cir. 2020) (stating that "any ambiguity" that had existed in the phrase "civil monetary penalty" in the Inflation Adjustment Act was "resolved" when Congress passed a subsequent statute reusing the phrase "after [the agency] had consistently applied it" in a particular way).

<sup>152</sup> 88 Fed. Reg. 30508 (May 11, 2023).

at TSL 3 for all equipment classes,<sup>153</sup> as well as positive consumer net present value (NPV) savings at both 3% and 7% discount rates.<sup>154</sup> However, the shipment-weighted average LCC savings are higher at TSL 2 (\$28) than at TSL 3 (\$17).<sup>155</sup> Similarly, the NPV savings are higher at TSL 2 than at TSL 3.<sup>156</sup> Therefore, if DOE were required to assess “the incremental changes in costs and benefits for each TSL’s benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs,”<sup>157</sup> such an assessment would likely lead to adopting TSL 2 even though TSL 2 is not the maximum level that is technologically feasible and economically justified.

In this example, if DOE were to adopt TSL 2 rather than TSL 3 for ACIMs due to the proposed “walk up” approach, the lost savings would include 0.04 quads of energy savings, 1 MMT of CO<sub>2</sub> reductions, 8 thousand tons of CH<sub>4</sub> reductions, 0.02 thousand tons of nitrous oxide (“N<sub>2</sub>O”) reductions, 2 thousand tons of NO<sub>x</sub> reductions, 0.003 tons of Hg reductions, and between \$0.05 billion and \$0.09 billion in total net benefits.<sup>158</sup>

As another example, in November 2023, DOE proposed amended standards for refrigerated bottled or canned beverage vending machines (“BVMs”) at TSL 4.<sup>159</sup> While DOE found TSL 4 to be economically justified, the average LCC savings are higher at TSL 2 for all four equipment classes.<sup>160</sup> Therefore, DOE’s proposed “walk up” approach would likely lead to finalizing standards at TSL 2 rather than TSL 4, which would sacrifice 0.036 quads of energy savings, 1.1 MMT of CO<sub>2</sub> reductions, 8 thousand tons of CH<sub>4</sub> reductions, 0.01 thousand tons of N<sub>2</sub>O reductions, 1.8 thousand tons of NO<sub>x</sub> reductions, 0.6 thousand tons of SO<sub>2</sub> reductions, 0.004 tons of Hg reductions, and between \$0.09 and \$0.19 billion in total net benefits.<sup>161</sup>

**10. DOE’s proposed economic thresholds are arbitrary and capricious and would sacrifice significant savings.** In the NOPR, DOE is proposing that a standard that exceeds any of the following thresholds would not be economically justified:

- Life-cycle cost increases relative to the base case, using typical fuel costs, usage, and private discount rates;
- More than a 10 percent increase in installed cost relative to the baseline total installed cost;
- More than 20 percent of consumers projected to incur net costs;

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<sup>153</sup> Table V.57, 88 Fed. Reg. at 30584.

<sup>154</sup> Table V.56, 88 Fed. Reg. at 30583. At TSL 3, DOE found “consumer net benefits” of \$0.38 billion at a 3% discount rate and \$0.14 billion at a 7% discount rate.

<sup>155</sup> Table V.57, 88 Fed. Reg. at 30584.

<sup>156</sup> \$0.47 billion vs. \$0.38 billion at a 3% discount rate and \$0.20 billion vs. \$0.14 billion at a 7% discount rate.

<sup>157</sup> 91 Fed. Reg. at 42078.

<sup>158</sup> Difference between TSL 2 and TSL 3 at Table V.56, 88 Fed. Reg. at 30583.

<sup>159</sup> 88 Fed. Reg. 33968 (May 25, 2023).

<sup>160</sup> Table V.32, 88 Fed. Reg. at 34017.

<sup>161</sup> Difference between TSL 2 and TSL 4 at Table V.31, 88 Fed. Reg. at 34017.

- A simple payback period as a percentage of average lifetime of more than 50 percent.<sup>162</sup>

We first note that while the preamble to the NOPR states that DOE is proposing the thresholds as a basis for determining whether a “potential standard level” is not economically justified,<sup>163</sup> the proposed regulatory text instead refers to determining whether the “design options” would meet the proposed thresholds.<sup>164</sup> DOE does not conduct life-cycle cost analysis of “design options,” but rather of potential efficiency levels. For example, in the 2024 final rule for refrigerators and freezers, certain efficiency levels included the addition of multiple design options.<sup>165</sup> Therefore, it is unclear exactly what DOE is proposing.

Another way in which DOE frustrates public comment is by failing to offer any rationale for selecting the specific thresholds set out in the NOPR. The NOPR does not explain, for example, why a 10 percent increase in installed costs is an appropriate maximum and not 20 percent. Nor does the NOPR examine how that cost increase threshold would have impacted previous DOE rulemakings to provide a sense of the likely significance of the threshold. DOE must have had some reason for proposing these specific thresholds, but the NOPR withholds that critical information from stakeholders. Adopting governing thresholds without any justification surely qualifies as arbitrary and capricious rulemaking.<sup>166</sup>

In determining whether a standard is economically justified, EPCA requires DOE to consider, among other factors, “the economic impact of the standard . . . on the consumers of the products subject to such standards” and “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.”<sup>167</sup> In every rulemaking, DOE evaluates the economic impacts referenced in the proposed thresholds (i.e., changes in life-cycle cost, increases in installed cost, portion of consumers incurring net costs, and simple payback period). Yet as the examples below illustrate, it is essential for the Department to evaluate the impacts of potential standards holistically in each individual rulemaking. If the proposed arbitrary economic thresholds

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<sup>162</sup> 91 Fed. Reg. at 42078.

<sup>163</sup> *Id.* at 42061.

<sup>164</sup> *Id.* at 42078 (“Design options will not be used as the basis for candidate standard levels if the design options result in: ...”).

<sup>165</sup> Dep’t of Energy, Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Refrigerators, Refrigerator-freezers, and Freezers, at 5-17, 5-18 (Dec. 2023), available at <https://www.regulations.gov/document/EERE-2017-BT-STD-0003-0108> (excerpt attached). For example, for Product Class (PC) 7, Efficiency Level (EL) 2 includes the addition of two design options: a brushless-DC evaporator fan motor and a variable-speed compressor system.

<sup>166</sup> See, e.g., *Ass’n of Priv. Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133, 154 (D.D.C. 2012) (where regulatory threshold is “not based on any facts at all” and determined without a “reasonable explanation” court “must conclude that it was chosen arbitrarily.”).

<sup>167</sup> 42 U.S.C. § 6295(o)(2)(B).

had been in place historically, they would have blocked many standards that are delivering very large economic benefits for consumers in addition to significant energy savings and emissions reductions.

Some standards impose upfront costs that exceed DOE’s proposed threshold but deliver savings that almost immediately make consumers better off. For example, in the 2017 final rule for dedicated-purpose pool pumps, the standard level adopted for standard-size self-priming pool filter pumps reflected an increase in installed cost relative to the baseline of \$372 (\$853 vs. \$481), or an increase of 77%.<sup>168</sup> Yet the adopted standard also represented a decrease in first-year operating cost of \$551 (\$223 vs. \$774). In other words, DOE’s analysis showed that the incremental installed cost would be paid back in operating cost savings in just over 8 months, for a simple payback period of 0.7 years.<sup>169</sup> Over the life of such a pool filter pump, DOE found that, after accounting for the upfront incremental cost, consumers save \$2,140 on average,<sup>170</sup> with total NPV savings at a 3% discount rate of \$21.9 billion.<sup>171</sup> Yet had DOE’s proposed economic thresholds been in place, they would have blocked this standard, which is delivering very large savings for consumers in addition to large energy savings (3.4 quads).<sup>172</sup>

In the 2024 final rule for general service lamps (GSLs), the standard level adopted for the most common lamp type—integrated omnidirectional short GSLs—reflected an increase in installed cost relative to the baseline of 57% for residential customers and 38% for commercial customers.<sup>173</sup> Yet the absolute increases in estimated installed costs were just \$2.05 and \$2.04 for residential and commercial customers, respectively.<sup>174</sup> Furthermore, the estimated annual operating cost savings were \$2.26 and \$3.46, respectively, for simple payback periods of 0.9 and 0.6 years for residential and commercial customers, respectively. (DOE estimated average lifetimes of 11.8 and 4.1 years, respectively.) Yet, as with standard-size self-priming pool filter pumps, had DOE’s proposed economic thresholds been in place, they would have blocked this standard that

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<sup>168</sup> DOE adopted TSL 3. See Table V-2, 82 Fed. Reg. 5650, 5715 (Jan. 18, 2017).

<sup>169</sup> Table I-3, 82 Fed. Reg. at 5652.

<sup>170</sup> *Id.*

<sup>171</sup> Dep’t of Energy, Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Dedicated-Purpose Pool Pumps at 10-20 (Dec. 2016), available at: <http://www.regulations.gov/document/EERE-2015-BT-STD-0008-0105> (excerpt attached). Sum of “standard-size self-priming pool filter pumps (1 hp rep size)” (\$7.9 billion) and “standard-size self-priming pool filter pumps (3 hp rep size)” (\$13 billion).

<sup>172</sup> *Id.* at 10-19. Sum of “standard-size self-priming pool filter pumps (1 hp rep size)” (1.3 quads) and “standard-size self-priming pool filter pumps (3 hp rep size)” (2.1 quads).

<sup>173</sup> Table V.2, 89 Fed. Reg. 28927 (April 19, 2024). DOE adopted TSL 6, which corresponded to EL 7 for integrated omnidirectional short GSLs. For residential customers, comparing the installed cost at EL 7 (\$5.62) and the installed cost at EL 0 (\$3.57). For commercial customers, comparing the installed cost at EL 7 (\$7.35) and the installed cost at EL 0 (\$5.31).

<sup>174</sup> *Id.*

DOE found will deliver 3.3 quads of energy savings<sup>175</sup> and \$16.6 billion in NPV savings for consumers and businesses.<sup>176</sup>

Other rules generate significant net savings even if they impose costs on more than 20% of consumers. For example, in a May 2023 final rule for room air conditioners, DOE estimated that 26% of consumers purchasing a common-sized room air conditioner in Product Class 3 would incur a net cost.<sup>177</sup> However, more than twice as many consumers, including more than twice as many low-income households, would see a net benefit.<sup>178</sup> In other words, the proposed economic thresholds would have blocked this standard that is delivering benefits to nearly two-thirds of households. DOE additionally found that this standard will provide average LCC savings of \$100 with a simple payback period of less than 3 years.<sup>179</sup>

The proposed economic thresholds could block many future standards. For example, in June 2023, DOE proposed amended standards for ceiling fans, finding the proposed standards to be technologically feasible and economically justified.<sup>180</sup> Yet DOE's proposed economic thresholds would block the June 2023 proposed standards for standard ceiling fans, hugger ceiling fans, and high-speed belt-driven (HSBD) ceiling fans from being finalized.

For standard and hugger ceiling fans, the June 2023 proposed standards would be blocked by the recently proposed threshold of no more than 20% of consumers projected to incur net costs.<sup>181</sup> Yet that arbitrary threshold fails to account for the holistic economic impacts. In the case of standard and hugger ceiling fans, the average life-cycle cost savings are positive,<sup>182</sup> the simple payback periods are far shorter than the average 14.6-year lifetimes,<sup>183</sup> and the net present value savings are large.<sup>184</sup> Furthermore, the proposed standards for standard and hugger ceiling fans would achieve large national energy savings—0.63 quads and 0.26 quads, respectively.<sup>185</sup>

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<sup>175</sup> Full-fuel-cycle energy savings. Table V.19, 89 Fed. Reg. 28856, 28941 (Apr. 19, 2024).

<sup>176</sup> NPV savings at a 3% discount rate. Table V.21, 89 Fed. Reg. at 28943.

<sup>177</sup> DOE adopted TSL 3. See Table V.28, 88 Fed. Reg. 34298, 34342-43 (May 26, 2023).

<sup>178</sup> DOE estimated that at TSL 3, for Product Class 3, 26% of all households and 25% of low-income households would see a net cost, while 64% of all households and 64% of low-income households would see a net benefit. *Id.*

<sup>179</sup> Product Class 3. Table I.2, 88 Fed. Reg. at 34299.

<sup>180</sup> 88 Fed. Reg. 40932 (June 22, 2023).

<sup>181</sup> 88 Fed. Reg. at 40983-85. Table V.3 shows that 36% of consumers of standard ceiling fans would incur a net cost at the proposed standard level—TSL 3. Table V.5 shows that 33% of consumers of hugger ceiling fans would incur a net cost at TSL 3.

<sup>182</sup> *Id.* Tables V.3 and V.5 show that the average LCC savings at the proposed standard level (TSL 3) are \$16.69 and \$5.14 for standard and hugger ceiling fans, respectively.

<sup>183</sup> *Id.* Tables V.2 and V.4 shows that the average simple payback periods are 4.1 years and 6.6 years for standard and hugger ceiling fans, respectively.

<sup>184</sup> \$3.55 billion for standard ceiling fans and \$1.33 billion for hugger ceiling fans at a 3% discount rate. Table V.25, 88 Fed. Reg. at 40996.

<sup>185</sup> Full-fuel-cycle national energy savings. Table V.23, 88 Fed. Reg. at 40995.

For HSBD ceiling fans, the June 2023 proposed standards would be blocked by the proposed threshold of no more than a 10% increase in installed cost.<sup>186</sup> Yet again, that arbitrary threshold fails to account for the holistic economic impacts. For HSBD ceiling fans, that increase in installed cost is paid back in just over 2 years, while the estimated average lifetime is 14.5 years;<sup>187</sup> average LCC savings are \$663.92, with 0% of consumers incurring a net cost.<sup>188</sup>

**11. DOE provides no rationale for reinstating additional presumptions constraining DOE’s discretion.** The NOPR would reinstate several additional presumptions against the adoption of energy conservation standards.<sup>189</sup> The NOPR incorrectly asserts these presumptions were removed in a December 2021 final rule.<sup>190</sup> In fact, the presumptions were removed during the first Trump administration.<sup>191</sup> DOE’s only purported justification for now bringing back these abandoned presumptions is that doing so will “provide additional clarity to stakeholders in terms of how the Secretary makes decisions regarding economic justification.”<sup>192</sup> But any regulatory provision that constrains DOE’s discretion can provide clarity to stakeholders about *how* DOE decided not to strengthen an energy conservation standard. The NOPR entirely fails to explain *why* these additional presumptions constraining DOE’s discretion are warranted.

**12. The proposal to require 180 days between a test procedure final rule and publication of a standards NOPR is both unnecessary and unsupported.** The current Process rule already provides stakeholders an opportunity to gain familiarity with a new or amended test procedure in advance of having to comment on a standards proposal. Specifically, the current Process Rule states that new and amended test procedures will be finalized at least 180 days prior to the close of the comment period for a NOPR proposing new or amended standards (or a proposed negative determination).<sup>193</sup> This existing provision of the Process Rule is consistent with the 2021 joint proposal from industry and advocate stakeholders, which recommended that DOE “provide a 180-day time period between the finalization of a new or amended test procedure and the end of the comment period on the proposed standard.”<sup>194</sup> However, DOE is now proposing to require 180 days between a test procedure final rule and issuance of a standards NOPR.<sup>195</sup>

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<sup>186</sup> 88 Fed. Reg. at 40984. Table V.5 shows an increase in installed cost of 38% (\$769.49 vs. \$559.52).

<sup>187</sup> DOE adopted TSL 3. Table V.6, 88 Fed. Reg. at 40984.

<sup>188</sup> Table V.7, 88 Fed. Reg. at 40985.

<sup>189</sup> See 91 Fed. Reg. at 42078-79.

<sup>190</sup> *Id.* 42061.

<sup>191</sup> See 90 Fed. Reg. 50937, 50944 (Aug. 19, 2020) (revising paragraph 7(e) of the Process Rule).

<sup>192</sup> 91 Fed. Reg. at 42061.

<sup>193</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 8.

<sup>194</sup> Joint Proposal from Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbecue Association (HPBA), National Electrical Manufacturers Association (NEMA), Plumbing Manufacturers International (PMI), ASAP, and ACEEE (Aug. 9, 2021), [http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo\\_August%206%2C%202021\\_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf](http://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo_August%206%2C%202021_Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf) (attached).

<sup>195</sup> 91 Fed. Reg. at 42079.

Importantly, because DOE is also proposing to make the Process Rule binding on the agency for “regulatory actions,” the Department would no longer be able to deviate from the 180-day requirement when warranted.

As DOE described in the 2021 final rule for the Process Rule, the approach in the current Process Rule meets the Department’s goal “of avoiding the inefficiencies and unnecessary delays of a one-size-fits-all rulemaking approach while assuring stakeholders they will have sufficient time to gain familiarity with a new or amended test procedure prior to commenting on a standards proposal.”<sup>196</sup> In regards to the current approach of providing 180 days between the finalization of a test procedure and the close of the comment period on a standards NOPR, DOE noted that “the comment period, which is at least 60 days, also provides stakeholders with an opportunity to gain familiarity with the new or amended test procedure,” and that “it provides DOE with more flexibility in issuing standards proposals, which can benefit both DOE and stakeholders.”<sup>197</sup>

In the NOPR, DOE provides no rationale for the proposed change to the timing between a test procedure final rule and the issuance of a standards NOPR. Rather the Department simply states that “DOE has tentatively determined to amend the language in the current Process Rule to match the 2020 Process Rule language that provides 180 days between a test procedure final rule and issuance of a standards NOPR.”<sup>198</sup>

DOE should maintain the current approach of providing 180 days between a test procedure final rule and the close of the comment period on a standards NOPR, as the proposed change is both unnecessary and unsupported.

**13. Adopting industry test procedures as proposed in the NOPR would relinquish important discretion that Congress intended DOE to maintain.** The NOPR proposes modifying section 8(c) of the Process Rule to mandate adoption of “industry test standards as DOE test procedures,”<sup>199</sup> and limit departures from industry test procedures to “those required for compliance with EPCA.”<sup>200</sup> The NOPR also proposes to remove language from the Process Rule allowing DOE to “adopt industry test procedure standards with modifications or craft its own procedures as necessary to ensure compatibility with the relevant statutory requirements, as well as DOE’s compliance, certification, and enforcement requirements.”<sup>201</sup>

DOE should not limit its own discretion to depart from industry test procedures when it determines doing so is appropriate. In the past, DOE has frequently modified industry test

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<sup>196</sup> 86 Fed. Reg. 70892, 70911 (Dec. 13, 2021).

<sup>197</sup> *Id.* at 70912. The 2021 final rule noted, as an example, that if DOE needs to meet a statutory deadline for issuing a standards NOPR, the Department could choose to issue a standards NOPR with a longer comment period, which would help DOE meet its deadline while also giving stakeholders more time to comment on the standards NOPR.

<sup>198</sup> 91 Fed. Reg. at 42062.

<sup>199</sup> *Id.* at 42079.

<sup>200</sup> *Id.* at 42063.

<sup>201</sup> 10 C.F.R. Part 430, Subpart C, Appendix A § 8(d).

standards where it found doing so was justified to improve test accuracy.<sup>202</sup> Allowing such modifications can help protect consumers by ensuring they achieve the utility bill savings the EPCA standards are designed to secure. And such a use of DOE's discretion is also consistent with EPCA's statutory framework. When Congress intended DOE to give deference to the regulated industry's preferred methods of testing products, it explicitly cabined DOE's review of such test methods. For example, 42 U.S.C. § 6314(a)(4)(B) requires DOE to maintain consistency with industry test procedures for many types of commercial equipment, unless clear and convincing evidence demonstrates that doing so would not meet the statutory criteria for DOE's test procedures. The NOPR recognizes that EPCA limits DOE's discretion in this way as to several products,<sup>203</sup> but fails to consider the implication of Congress's decision to confine this more narrow review of industry standards to specific products while leaving DOE with broad discretion to depart from other standards.

In addition, the NOPR does not address why DOE is reviving the section 8(c) test procedure language from the 2020 Process Rule despite having previously concluded that this language creates "the false impression" of a "presumption for an 'as-is' adoption of consensus industry standards without meaningful review."<sup>204</sup> The NOPR's failure to explain this complete reversal of position deprives stakeholders of a meaningful opportunity to comment on the change in policy.

Last, the proposed rule removes DOE's ability to depart from industry test procedures when "necessary to ensure compatibility" with "DOE's compliance, certification, and enforcement requirements," instead only permitting departure when required for compliance with EPCA.<sup>205</sup> As DOE previously recognized, if the Department was unable to ensure that industry test procedures produce results consistent with compliance, certification, and enforcement regulations it would "render such test procedure impractical for regulatory purposes."<sup>206</sup> Accordingly, DOE should not finalize its proposed amendments to section 8(c).

**14. The NOPR's new "no substantial doubt" standard for departures from ASHRAE/IES Standard 90.1 contravenes the D.C. Circuit's interpretation of "clear and convincing evidence."** EPCA requires DOE to adopt as energy conservation standards for certain commercial equipment the requirements specified for those products in ASHRAE/IES Standard 90.1, unless DOE determines "by rule published in the Federal Register, and supported by clear and convincing evidence, that adoption of a uniform national standard more stringent than the amended ASHRAE/IES Standard 90.1 for the

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<sup>202</sup> *E.g.*, 80 Fed. Reg. 45801, 45807 (July 31, 2015) (modifying the industry test standard for dehumidifiers to be more representative of dehumidifiers' average use cycle); 81 Fed. Reg. 35241, 35250, 35248, 35253 (June 1, 2016) (departing from the industry test standard for portable air conditioners to generate results more representative of typical use).

<sup>203</sup> See 91 Fed. Reg. at 42064 (citing 42 U.S.C. § 6314(a)(4)(B)).

<sup>204</sup> 86 Fed. Reg. at 70908.

<sup>205</sup> Compare 110 C.F.R. Part 430, Subpart C, Appendix A § 8(d) with 91 Fed. Reg. at 42079; see also *id.* at 42063.

<sup>206</sup> 86 Fed. Reg. 18901, 18907 (Apr. 12, 2021).

product would result in significant additional conservation of energy and is technologically feasible and economically justified.”<sup>207</sup> The NOPR proposes amending the language in section 9(b)<sup>208</sup> of the Process Rule to assert that the “clear and convincing evidence” threshold is only met when “there is no substantial doubt that a standard more stringent than that contained in the ASHRAE Standard 90.1 amendment is permitted because it would result in a significant additional amount of energy savings and is technologically feasible and economically justified, or, in the case of test procedures, that the industry test procedure does not meet the EPCA requirements.”<sup>209</sup>

The gloss DOE proposes to apply to the statutory requirement for “clear and convincing evidence” is a legal interpretation. However, the NOPR’s assertion that evidence is only “clear and convincing” for the purposes of EPCA when it leaves “no substantial doubt” does not align with how courts have interpreted this very EPCA provision. As DOE recognizes, the D.C. Circuit has recently held that EPCA’s “clear and convince evidence” standard requires the Secretary “to have an ‘abiding conviction’ that her findings (in this case that a more stringent standard would result in significant additional conservation of energy, would be technologically feasible, and is economically justified) are ‘highly probable’ to be true.”<sup>210</sup>

Instead of defining “clear and convincing evidence” based on these on-point cases,<sup>211</sup> the NOPR instead seeks to reinstate the 2020 Process Rule’s “no substantial doubt” language.<sup>212</sup> DOE attempts to justify this definition by citing to cases that have nothing to do with EPCA, but that use the desired “no substantial doubt” language. For example, the NOPR cites a Ninth Circuit decision on state punitive damage laws that uses the phrase “no substantial doubt” when discussing clear and convincing evidence, despite this case being about California statutory punitive damages and nonprecedential.<sup>213</sup> The other cases and sources the NOPR cites that invoke “no substantial doubt” are similarly inapt.<sup>214</sup>

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<sup>207</sup> 42 U.S.C. § 6313(a)(6)(A)(ii)(II) (emphasis added).

<sup>208</sup> DOE asserts that it is adding this “language in section 9(e) of the Process Rule,” 91 Fed. Reg. at 42064, but the proposed revision is actually located at 9(b), as there is no section 9(e) in the proposed rule. *Id.* at 42080.

<sup>209</sup> 91 Fed. Reg. at 42064, 42080 (emphasis added).

<sup>210</sup> *American Public Gas Ass’n v. U.S. Dep’t of Energy*, 72 F.4th 1018, 1025 (D.C. Cir. 2022) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); see also *Am. Pub. Gas Ass’n v. U.S. Dep’t of Energy*, 72 F.4th 1324, 1336 (D.C. Cir. 2023); 91 Fed. Reg. at 42065 (citing these cases)).

<sup>211</sup> Although this would result in a more accurate legal definition of EPCA’s “clear and convincing” standard, including such a definition at all is superfluous because it would not add anything to existing case law interpreting this EPCA provision.

<sup>212</sup> 91 Fed. Reg. at 42064.

<sup>213</sup> *Id.* 42065 (citing *Ittella Foods, Inc. v. Zurich Ins. Co.*, 98 F. App’x 689, 691 (9th Cir. 2004)); see 9th Cir. R. 36-3 (stating that “unpublished opinions are not precedent, and the Court does not allow citation of unpublished opinions issued before 2007”).

<sup>214</sup> *E.g.*, *Hunt v. Pan Am. Energy*, 540 F.2d 894 (8th Cir. 1976) (applying North Dakota trust law); *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113 (2d Cir. 2013) (applying Connecticut defamation law); *Mandel v. Boston Phoenix, Inc.*, 492 F.Supp.2d 26 (D. Mass. 2007) (applying Massachusetts defamation law). And while the NOPR cites a definition found in the *Handbook of Federal Evidence* (8th ed. 2018), it does not explain why a 2018 definition should be used to interpret a provision Congress passed in 1976. See *Wisconsin Cent. Ltd v. U.S.*, 585 U.S.

DOE's use of a proposed definition divorced from on-point EPCA precedent directly contradicts its assertion that "the Department is simply explaining the existing requirements of the statute, rather than seeking to change or reinterpret those requirements."<sup>215</sup> And as the Supreme Court has recognized, if an agency's interpretation of a federal statute "is not the best, it is not permissible."<sup>216</sup>

The NOPR also fails to provide a clear foundation as to why its chosen "no substantial doubt" definition is preferable to or more accurate than the D.C. Circuit's "abiding conviction that her findings are highly probable to be true" definition that directly interprets this EPCA provision. DOE's failure to explain its departure from the D.C. Circuit's definition deprives stakeholders from a meaningful opportunity to comment on any claimed equivalency. Can one arrive at an "abiding conviction" that something is "highly probable to be true" while recognizing the existence of "substantial doubt?" The NOPR leaves the question unanswered and leaves stakeholders to guess at the extent to which the proposed amendments to the Process Rule comply with EPCA and relevant case law.

**15. DOE should maintain its case-by-case determination as to whether a group of persons submitting a direct final rule (DFR) proposal is "fairly representative of relevant points of view."** DOE has sought comment on its process for considering direct final rules.<sup>217</sup> Whether a group represents the "relevant" points of view will necessarily depend on which points of view are relevant to a specific rulemaking. The current Process Rule rightly recognizes that it will be necessary to evaluate the meaning of "fairly representative" on a case-by-case basis, subject to the circumstances of a particular rulemaking, to determine whether additional parties must be part of a joint statement in order to be "fairly representative of relevant points of view."

**16. DOE incorrectly asserts that the DFR provision is not a separate grant of rulemaking authority.** DOE has *not* sought comment on its unreasoned legal conclusion that the DFR provision is "not a separate grant of rulemaking authority," for which it has offered no explanation in the preamble.<sup>218</sup> That interpretation is wrong. The direct final rule provision, 42 U.S.C. § 6295(p)(4), grants the Secretary authority to "issue a final rule."<sup>219</sup> It specifies the procedural and substantive obligations that the Secretary must discharge before doing so. In particular, as a matter of process, it requires the Secretary to "determine[]" that a recommended energy or water conservation standard is submitted by "persons that are fairly representative of relevant points of view."<sup>220</sup> And it requires the Secretary to issue a NOPR at the same time as the DFR, with an extended comment deadline.<sup>221</sup> Substantively, the DFR provision requires the Secretary to "determine[]" that

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274, 277 (2018) (to interpret statutes, court looks to the ordinary meaning of a word "at the time Congress enacted the statute") (internal citations omitted).

<sup>215</sup> 91 Fed. Reg. at 42064-65.

<sup>216</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

<sup>217</sup> See 91 Fed. Reg. at 42067.

<sup>218</sup> *Id.* at 42080 (proposed section 10(a)(2)).

<sup>219</sup> 42 U.S.C. § 6295(p)(4)(A)(i).

<sup>220</sup> *Id.* § 6295(p)(4)(A).

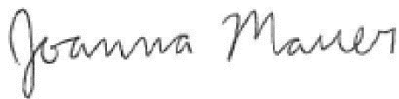
<sup>221</sup> *Id.* § 6295(p)(4)(A)(i), (B).

the recommendation is “in accordance with” section 6295(o)—i.e., the substantive “criteria for prescribing new or amended standards.” But the DFR provision does not impose any of EPCA’s *other* requirements. So, DOE is wrong to assert (again, without any explanation or even notice in the preamble) that a “standard issued under the DFR process must comply fully with the provisions of the EPCA subsection under which the rule is authorized.”<sup>222</sup> That assertion reflects a categorical misunderstanding: the “EPCA subsection under which the rule is authorized” *is* the DFR provision.

Not only is DOE’s interpretation wrong, but it also reflects an arbitrary about-face from DOE’s longstanding practice.<sup>223</sup> DOE “must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”<sup>224</sup> DOE has not done so here.

Thank you for considering these comments.

Sincerely,



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Appliance Standards Awareness Project



Matt Malinowski  
Director, Buildings Program  
American Council for an Energy-Efficient  
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Raagan Wilhelm  
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Berneta Haynes  
National Consumer Law Center  
(On behalf of its low-income clients)

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<sup>222</sup> 91 Fed. Reg. at 42080 (proposed section 10(a)(2)).

<sup>223</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

<sup>224</sup> *Id.* at 221 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

A handwritten signature in blue ink, appearing to read 'AR'.

Adeline Rolnick  
Senior Attorney  
Natural Resources Defense Council

A handwritten signature in black ink, appearing to read 'Bridget Lee'.

Bridget Lee  
Senior Attorney  
Sierra Club