

Appliance Standards Awareness Project  
American Council for an Energy-Efficient Economy  
Consumer Federation of America  
National Consumer Law Center, on behalf of its low-income clients  
Northeast Energy Efficiency Partnerships

September 13, 2021

John Cymbalsky  
U.S. Department of Energy  
Office of Energy Efficiency and Renewable Energy  
Building Technologies Office, EE-5B  
1000 Independence Avenue, SW  
Washington, DC 20585

**RE: Docket Number EERE–2021–BT–STD–0003/RIN 1904–AF13: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment**

Dear Mr. Cymbalsky:

This letter constitutes the comments of the Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy (ACEEE), Consumer Federation of America (CFA), National Consumer Law Center, on behalf of its low-income clients (NCLC), and Northeast Energy Efficiency Partnerships (NEEP) on the notice of proposed rulemaking (NOPR) for procedures, interpretations, and policies for consideration in new or revised energy conservation standards and test procedures for consumer products and commercial/industrial equipment (the “Process Rule”). 86 Fed. Reg. 35668 (July 7, 2021). We appreciate the opportunity to provide input to the Department.

We strongly support the proposed changes to the Process Rule. The proposed changes will help avoid unnecessary rulemaking delays while still providing substantial opportunity for stakeholder input; remove constraints that would impede DOE’s ability to achieve EPCA’s energy conservation purposes; and help ensure that the description of DOE’s analytical methodologies reflects the Department’s current practice. In addition to finalizing the proposals in the NOPR, we also encourage DOE to make two additional changes, which we describe below: (1) amend the Process Rule to allow for finalizing a coverage determination concurrent with finalizing any energy conservation standards; and (2) make additional changes to the description of the analytical methodology to ensure that it reflects the Department’s current practice.

We also note that some of us have submitted consensus recommendations regarding the Process Rule with the Association of Home Appliance Manufacturers (AHAM), American Lighting Association (ALA), Hearth Patio and Barbeque Association (HPBA), National Electrical Manufacturers Association (NEMA), and Plumbing Manufacturers Institute (PMI).<sup>1</sup> We urge DOE to implement those consensus recommendations either as part of the Part 1 Process Rule NOPR or the current Part 2 NOPR.

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<sup>1</sup> [https://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](https://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).

**We support the proposed changes to the process for coverage determinations but encourage DOE to allow for finalizing coverage determinations concurrent with finalizing any energy conservation standards.** As DOE describes in the NOPR, in the February 2020 final rule, DOE added a section to the Process Rule on coverage determinations that requires the Department to initiate a coverage determination rulemaking with a notice of proposed determination; publish final coverage determinations prior to the initiation of any test procedure or energy conservation standards rulemaking and at least 180 days prior to publication of a test procedure NOPR; and, if DOE finds it necessary to amend the scope of coverage, finalize the amended coverage determination before proceeding with a test procedure or standards rulemaking.<sup>2</sup>

As DOE explains in the NOPR, in some cases it may be necessary to gather information before issuing a proposed coverage determination.<sup>3</sup> We therefore support DOE's proposal to specify that the Department may issue an RFI or other pre-rulemaking document prior to a notice of proposed coverage determination. We also support DOE's proposal to eliminate the requirement that a final coverage determination be published prior to the initiation of any test procedure or standards rulemaking. As we explained in our comments on the February 2019 NOPR, the coverage process for miscellaneous refrigeration products illustrates how information that is learned during the rulemaking process for test procedures and standards through both stakeholder input and DOE's own research can ultimately inform the determination of coverage.<sup>4</sup>

However, in addition to DOE's proposed changes to the section of the Process Rule on coverage determinations, we encourage the Department to make an additional change to allow for finalizing a coverage determination concurrent with finalizing any energy conservation standards. While DOE is proposing to eliminate the requirement that a final coverage determination be published 180 days prior to publication of a test procedure NOPR, the proposed Code of Federal Regulations (CFR) language would still require DOE to finalize a coverage determination prior to publishing a proposed test procedure. As noted above, in the case where DOE finds it necessary to amend the scope of coverage, the Department would also be required to finalize the amended coverage determination before proceeding with a test procedure or standards rulemaking.<sup>5</sup> We are concerned that these requirements would limit DOE's ability to incorporate information learned during the test procedure and standards rulemakings into the coverage determination and could result in unnecessary delays if the Department is required to pause the rulemaking process in order to amend the coverage determination.

We recognize the desire of manufacturers to have clarity on the scope of coverage when responding to proposals related to test procedures or standards. However, there is often uncertainty regarding the scope of products that may be subject to an amended test procedure or standards during the rulemaking process. For example, pumps have long been a covered product even though there were no energy conservation standards for pumps prior to 2020. However, the term "pumps" is not defined in the Energy Policy and Conservation Act (EPCA), and the definition adopted in the January 2016 test

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<sup>2</sup> 86 Fed. Reg. 35672.

<sup>3</sup> Ibid.

<sup>4</sup> <https://www.regulations.gov/comment/EERE-2017-BT-STD-0062-0126>.

<sup>5</sup> 86 Fed. Reg. 35683.

procedures final rule is very broad.<sup>6</sup> The scope of products covered by the test procedure and standards that were adopted was determined as part of those rulemakings. Furthermore, the scope of a final coverage determination will not necessarily correspond to the scope of any test procedure or standards that are ultimately adopted since DOE must determine that both the test procedure and standards meet the relevant statutory criteria. For example, DOE could find that no standards are justified or that standards are justified for some product classes but not others. In addition, even if the coverage determination has not been finalized, any proposed test procedure or standards would indicate the scope of coverage being considered by DOE.

We therefore encourage DOE to allow for finalizing coverage determinations concurrent with finalizing any energy conservation standards. This change would allow DOE further opportunity to incorporate information learned during the rulemaking process into the coverage determination and would avoid potential delays from having to amend the coverage determination after it was initially finalized.

**We support the proposed changes to the process for developing energy conservation standards.** As part of the February 2020 final rule, DOE modified the Process Rule to require that for any standards rulemaking, the Department must first conduct an “early assessment;” if DOE decides to proceed with a rulemaking, the Department must publish a Framework Document and Preliminary Analysis, or an Advanced Notice of Proposed Rulemaking (ANOPR), prior to publishing a NOPR.<sup>7</sup> As we described in our comments on the April 2021 NOPR, while we support providing an opportunity for stakeholder input prior to the publication of a proposed rule, the early assessment process in the current Process Rule is too prescriptive regarding what the early steps need to be and, in many cases, would likely unnecessarily delay rulemakings.<sup>8</sup>

In the current NOPR, DOE is proposing to publish at least one document soliciting stakeholder input prior to a standards NOPR.<sup>9</sup> We support this proposal, which would provide DOE with the flexibility to determine the specific rulemaking steps that are appropriate in each case and thereby avoid unnecessary delays, while still providing an opportunity for early stakeholder input. This proposal is also consistent with the August 2021 joint stakeholder consensus proposal.<sup>10</sup>

DOE is also proposing to remove the requirement in the February 2020 final rule that requires a 75-day comment period for standards rulemaking documents. For standards NOPRs, DOE is proposing to replace the 75-day comment period with a 60-day comment period as required by EPCA.<sup>11</sup> We agree with DOE that for pre-NOPR documents, the Department should be able to determine an appropriate comment period on a case-by-case basis, and that for standards NOPRs, the Process Rule should not require a longer period than the 60 days required by statute. These proposed changes will avoid unnecessary delays while still allowing the Department to provide longer comment periods when merited.

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<sup>6</sup> 81 Fed. Reg. 4147 (January 25, 2016). The term “pump” means equipment designed to move liquids (which may include entrained gases, free solids, and totally dissolved solids) by physical or mechanical action and includes a bare pump and, if included by the manufacturer at the time of sale, mechanical equipment, driver, and controls.

<sup>7</sup> 85 Fed. Reg. 8704 (February 14, 2020).

<sup>8</sup> <https://www.regulations.gov/comment/EERE-2021-BT-STD-0003-0038>.

<sup>9</sup> 86 Fed. Reg. 35673.

<sup>10</sup> <https://www.energy.gov/sites/default/files/2021-08/Ex%20Parte%20Memo%20August%206%2C%202021%20Joint%20Stakeholder%2C%20Process%20Rule%20Part%201%20%2800105038%29.pdf>.

<sup>11</sup> 86 Fed. Reg. 35673-74.

**We support the proposed changes to the process for developing test procedures.** As with the process for energy conservation standards, the February 2020 final rule also required that the Department first conduct an early assessment for test procedures; if DOE decides to proceed with a rulemaking, the Department would be required to provide further opportunities for early public input.<sup>12</sup> In the current NOPR, DOE is proposing to specify that the Department will publish at least one document soliciting stakeholder input prior to a test procedures NOPR.<sup>13</sup> We support this proposal, which, as with the proposal for the standards rulemaking process, would provide DOE with the flexibility to determine the specific rulemaking steps that are appropriate in each case and thereby avoid unnecessary delays, while still providing an opportunity for early stakeholder input. This proposal is also consistent with the August 2021 joint stakeholder consensus proposal.<sup>14</sup>

The February 2020 final rule also required DOE to identify any necessary modifications to established test procedures prior to initiating the standards development process.<sup>15</sup> In the current NOPR, DOE is proposing to clarify that the Department would not be precluded from issuing pre-rulemaking documents for standards prior to a test procedure final rule. DOE is also proposing to clarify that the Department will provide a minimum 60-day comment period for test procedure NOPRs.<sup>16</sup> We support these clarifications, which will help avoid unnecessary delays. Furthermore, because the test procedure and standards rulemakings can inform one another, providing the ability for DOE to conduct initial stages of a standards rulemaking before finalizing any test procedure changes will allow issues identified in the early phases of a standards rulemaking related to the test procedure to be addressed in the test procedure rulemaking.

**We support removing the constraints related to establishing test procedures and standards for ASHRAE equipment.** In the February 2020 final rule, DOE modified the Process Rule to state that DOE will adopt the ASHRAE levels or the industry test procedure “except in very limited circumstances.” The final rule further stated that in considering standards more stringent than the ASHRAE levels or a test procedure different than the industry test procedure, clear and convincing evidence would exist only when there is “no substantial doubt” that a more-stringent standard would result in a significant additional amount of energy savings, 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>17</sup>

We believe that Congress clearly intended for DOE to be able to adopt more-stringent standards than the ASHRAE levels in those cases where clear and convincing evidence would support such standards and that DOE historically has appropriately applied the clear and convincing evidence threshold. As we described in our comments on the February 2019 NOPR, in the past decade, DOE has in most cases adopted the ASHRAE levels. However, the ability for DOE to go beyond the ASHRAE levels when appropriate enabled the largest energy savings of any standard ever established by DOE from the standards finalized in 2016 for commercial package air conditioners and heat pumps.<sup>18</sup> We agree with

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<sup>12</sup> 85 Fed. Reg. 8707-08.

<sup>13</sup> 86 Fed. Reg. 35674-75.

<sup>14</sup> [https://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](https://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).

<sup>15</sup> 85 Fed. Reg. 8708.

<sup>16</sup> 86 Fed. Reg. 35675.

<sup>17</sup> 85 Fed. Reg. 8708.

<sup>18</sup> <https://www.regulations.gov/comment/EERE-2017-BT-STD-0062-0126>

DOE that the constraints in the February 2020 final rule regarding ASHRAE equipment are not compelled by the statute and would impede DOE's ability to achieve EPCA's energy conservation purposes.<sup>19</sup> We therefore support removing the statement that DOE will adopt the revised ASHRAE levels or the industry test procedure, except in very limited circumstances, and removing the discussion of what constitutes clear and convincing evidence.

**We support the proposed changes to the description of the analytical methodology but encourage DOE to make additional changes to reflect the Department's current practice.** In the NOPR, DOE proposes to make revisions to the description of the analyses that DOE conducts to reflect the current state of the Department's analytical methodologies.<sup>20</sup> We support these changes, which will help the Process Rule reflect current DOE practice. However, we believe that there are still a few areas where the description of the analytical methodology does not reflect current practice, including the following:

- Section 6(4)(ii) says that "DOE and its contractors will perform engineering and life-cycle cost analyses of the design options,"<sup>21</sup> and Section 6(4)(v) says that "Based on the results of the engineering and life-cycle cost analysis of design options and the policies stated in paragraph (a)(3)(iii) of this section, DOE will select the candidate standard levels for further analysis."<sup>22</sup> However, DOE does not conduct life-cycle cost analysis of "design options," but rather of efficiency levels. For example, in the 2021 preliminary technical support document (PTSD) for consumer clothes dryers, DOE retained 13 design options after the screening analysis.<sup>23</sup> As part of the engineering analysis, DOE identified six efficiency levels for each of the vented electric clothes dryer product classes.<sup>24</sup> DOE then conducted the life-cycle cost analysis for those six efficiency levels. (DOE explained in the PTSD that the efficiency levels "are also referred to as candidate standard levels [CSLs].")<sup>25</sup>
- Section 7(b)(1) says that "Technologies that are not incorporated in commercial products or in *commercially viable, existing prototypes* [emphasis added] will not be considered further."<sup>26</sup> However, this language is not consistent with DOE's practice of screening out design options which are not incorporated in commercial products or in *working prototypes*.<sup>27</sup> DOE's current practice is accurately reflected in Section 6(a)(3)(iii)(A).
- Section 7(c)(1) says that "Design options that have payback periods that exceed the median life of the product or which result in life-cycle cost increases relative to the base case, using typical fuel costs, usage, and private discount rates, will not be used as the basis for candidate standard levels."<sup>28</sup> As described above, DOE does not conduct life-cycle cost or payback period analysis of the "design options," but rather of the efficiency levels (or CSLs). Furthermore, DOE always

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<sup>19</sup> 86 Fed. Reg. 35675.

<sup>20</sup> 86 Fed. Reg. 35677.

<sup>21</sup> 86 Fed. Reg. 35684. There is similar language in Section 6(4), which says that "After design options are identified and screened, DOE will perform the engineering analysis and the benefit/cost analysis and select the candidate standard levels based on these analyses."

<sup>22</sup> There is similar language in Section 7(c), which says that "Based on the results of the engineering and cost/benefit analyses of design options, DOE will identify the candidate standard levels for further analysis."

<sup>23</sup> <https://www.regulations.gov/document/EERE-2014-BT-STD-0058-0016>. p. 4-3.

<sup>24</sup> *Ibid.* pp. 5-7, 5-8.

<sup>25</sup> *Ibid.* p. 8-39.

<sup>26</sup> 86 Fed. Reg. 35685.

<sup>27</sup> See for example: <https://www.regulations.gov/document/EERE-2014-BT-STD-0058-0016>. p. 4-1.

<sup>28</sup> 86 Fed. Reg. 35685.

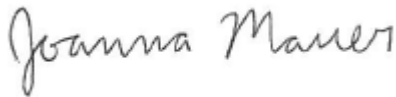
evaluates a “max-tech” level, which represents the maximum technologically feasible level regardless of cost. DOE cannot screen out a design option on the basis of cost. Rather, cost impacts are considered as part of the selection of standard levels.

- Section 7(c)(3) says that the candidate standard levels “will be identified in the pre-NOPR documents.”<sup>29</sup> While the CSLs may in some cases be identified in pre-NOPR documents—for example, in a PTSD—DOE does not always identify CSLs in pre-NOPR documents. For example, the August 2021 request for information (RFI) for commercial and industrial pumps does not identify CSLs.<sup>30</sup>

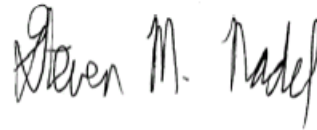
We encourage DOE to make additional changes to the description of the analytical methodology to ensure that it reflects the Department’s current practice.

Thank you for considering these comments.

Sincerely,



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<sup>29</sup> Ibid.

<sup>30</sup> 86 Fed. Reg. 43430 (August 9, 2021).