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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2021-BT-STD-0003]

RIN 1904–AF13

Energy Conservation Program for Appliance Standards: Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy ("DOE" or the "Department") is revising its "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 revisions are consistent with current DOE practice and will allow DOE to better meet its statutory obligations under the Energy Policy and Conservation Act ("EPCA").

DATES: This rule is effective **[INSERT DATE 75 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: The docket for this rulemaking, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov*. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The docket webpage can be found at:

www.regulations.gov/docket/EERE-2021-BT-STD-0003. The docket webpage contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue, SW, Washington, DC, 20585-0121. Email: *ApplianceStandardsQuestions@ee.doe.gov*.

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SUPPLEMENTARY INFORMATION:

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I. Summary of the Final Rule

In July of 1996, the United States Department of Energy ("DOE" or "the Department") issued a final rule that codified DOE's "Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products" at 10 CFR part 430, subpart C, appendix A ("appendix A"). 61 FR 36974 (July 15, 1996) ("July 1996 Final Rule"). The July 1996 Final Rule acknowledged that the guidance contained in appendix A would not apply to every rulemaking and that the circumstances of a particular rulemaking should dictate application of these generally applicable practices. 61 FR 36979.

On February 14, 2020, DOE published a final rule ("February 2020 Final Rule") in the *Federal Register* that made significant revisions to appendix A. 85 FR 8626. DOE also published a companion final rule on August 19, 2020 ("August 2020 Final Rule"), that clarified how DOE would conduct a comparative analysis across all energy conservation standard "trial standard levels" ("TSLs") when determining whether a particular TSL was economically justified. *See* 85 FR 50937. Contrary to the July 1996 Final Rule, the revisions made in the February 2020 Final Rule sought to create a standardized rulemaking process that was binding on the Department. 85 FR 8626, 8634. In creating this "one-size-fits-all" approach, the February 2020 Final Rule and the August 2020 Final Rule also added additional steps to the rulemaking process that are not required by any applicable statute.

Subsequent events have caused DOE to reconsider the merits of a one-size-fits-all rulemaking approach to establishing and amending energy conservations standards and test procedures. Two of these events are particularly salient. First, on October 30, 2020, a coalition of non-governmental organizations filed suit under EPCA alleging that DOE has failed to meet rulemaking deadlines for 25 different consumer products and

commercial equipment.[1] On November 9, 2020, a coalition of States filed a virtually identical lawsuit.[2] In response to these lawsuits, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach outweigh the increased difficulty such an approach poses in meeting DOE's statutory deadlines and obligations under EPCA. As mentioned previously, the July 1996 Final Rule allowed for "case-specific deviations and modifications of the generally applicable rule." 61 FR 36974, 36979. This allowed DOE to tailor rulemaking procedures to fit the specific circumstances of a particular rulemaking. For example, under the July 1996 Final Rule, minor modifications to a test procedure would not automatically result in a 180-day delay before DOE could issue a notice of proposed energy conservation standards. Eliminating these unnecessary delays would better enable DOE to clear this backlog of missed rulemaking deadlines in a timely manner and meet future obligations and deadlines under EPCA while not affecting the ability of any interested person, including small entities, to participate in DOE's rulemaking process. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the greater the resulting energy savings and environmental benefits.

Second, on January 20, 2021, the White House issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 FR 7037 (Jan. 25, 2021). Section 1 of that order lists a number of policies related to the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation's resilience to climate change. *Id.* at 86 FR 7037, 7041. Section 2 of the order instructs all agencies to review "existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January

[1] *Natural Resources Defense Council v. DOE*, Case No. 20-cv-9127 (S.D.N.Y. 2020).
[2] *State of New York v. DOE*, Case No. 20-cv-9362 (S.D.N.Y. 2020).

20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies]." *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.* Under that same section, for certain explicitly enumerated agency actions, including the February 2020 and the August 2020 Final Rules, the order directs agencies to consider publishing for notice and comment a proposed rule suspending, revising, or rescinding the agency action within a specific time frame. Under this mandate, DOE was directed to propose any major revisions to these two rules by March 2021, with any remaining revisions to be proposed by June 2021. *Id.* at 86 FR 7038.

In light of these events, DOE has identified several aspects of the February 2020 and the August 2020 Final Rules that present obstacles to DOE's ability to expeditiously clear the backlog of missed rulemaking deadlines while meeting future obligations under EPCA. In accordance with E.O. 13990, DOE proposed major revisions to appendix A in a notice of proposed rulemaking ("NOPR") that was published on April 12, 2021 ("April 2021 NOPR"). 86 FR 18901. DOE proposed additional revisions to appendix A in a second NOPR that was published on July 7, 2021 ("July 2021 NOPR"). 86 FR 35668. DOE finalized the major revisions from the April 2021 NOPR in a final rule published on December 13, 2021 ("December 2021 Final Rule"). 86 FR 70892.

In this document, DOE is finalizing the revisions listed in table I.1. As noted in the table, DOE is not finalizing any of the proposed revisions that would have updated the methodology sections in appendix A to reflect the Department's current rulemaking practice. Prior to issuing the July 2021 NOPR, DOE had entered into a contract with the National Academies of Sciences, Engineering, and Medicine ("NAS") to conduct a peer review of the analytical methods used in the Department's energy conservation standards rulemakings. The peer review was originally scheduled to be completed in May of 2020.

However, when DOE began to consider revisions to appendix A in early 2021, the NAS peer review process was still ongoing without a definitive completion date. At that point, DOE decided that the benefits of updating the analytical methodology in the July 1996 Final Rule to reflect the Department's current practice outweighed the potential inefficiency of having to amend these methods again in a subsequent proceeding. As a result, the July 2021 NOPR contained proposed revisions to the methodology sections in appendix A. DOE stated that if it made any revisions to its analytical methods based on the NAS peer review, the Department would propose any necessary corresponding revisions to appendix A in a subsequent proceeding. *Id.* at 86 FR 35677.

In response to the July 2021 NOPR, DOE received numerous comments from stakeholders that the Department should wait to revise its analytical methodologies until NAS had completed its peer review. (*See*, *e.g.*, Carrier, No. 54 at p. 4; Lutron, No. 64 at p. 4; GEA, No. 72 at p. 4; Joint Industry Commenters, No. 62 at pp. 10-11)[3] While DOE was in the process of considering those comments, NAS completed the peer review and transmitted to DOE its report, "Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards" ("NAS Report"), on January 7, 2022.[4] In light of the publication of the NAS report and stakeholder comments in response to the July 2021 NOPR, DOE has decided not to finalize the proposed revisions to the methodology sections in appendix A in this rule. Instead, DOE will consider changes to its methodologies in a separate notice-and-comment process that is informed by the results of the NAS Report.

[3] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to revise appendix A. (Docket No. EERE-2021-BT-STD-0003, which is maintained at *www.regulations.gov*) The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[4] The NAS Report is available at *www.nap.edu/catalog/25992/review-of-methods-used-by-the-us-department-of-energy-in-setting-appliance-and-equipment-standards*.

Table I.1 List of Revisions in this Document

Section	Proposed Revisions from the July 2021 NOPR	Final Revisions
1. Objectives	No revisions proposed.	No revisions.
2. Scope	No revisions proposed.	No revisions.
3. Mandatory Application of the Process Rule	No revisions proposed.	No revisions.
4. Setting Priorities for Rulemaking Activity	No revisions proposed.	No revisions.
5. Coverage Determination Rulemakings	Revise introductory text and paragraph (a) to eliminate the requirement that a coverage determination rulemaking begins with a notice of proposed determination and allow DOE to seek early stakeholder input through preliminary rulemaking documents; revise paragraphs (b) and (c) to eliminate the requirement that final coverage determinations be published prior to the initiation of any test procedure or energy conservation standard rulemaking and at least 180 days prior to publication of a test procedure NOPR; revise paragraph (d) to allow DOE to propose, if necessary, an amended coverage determination before proceeding with a test procedure or standards rulemaking.	Revised, as proposed, introductory text and paragraph (a) to eliminate the requirement that a coverage determination rulemaking begins with a notice of proposed determination and allow DOE to seek early stakeholder input through preliminary rulemaking documents; revise paragraphs (b) and (c) to eliminate the requirement that final coverage determinations be published prior to the initiation of any test procedure or energy conservation standard rulemaking and at least 180 days prior to publication of a test procedure NOPR; revise paragraph (d) to allow DOE to propose, if necessary, an amended coverage determination before proceeding with a test procedure or standards rulemaking.
6. Process for Developing Energy Conservation Standards	Revise to modify these provisions to allow for a more expedited rulemaking process in appropriate cases, including but not limited to eliminating the requirement for a separate early assessment request for information ("RFI") and clarify that DOE will issue	Revised, as proposed, to allow for a more expedited rulemaking process in appropriate cases, including but not limited to eliminating the requirement for a separate early assessment request for information ("RFI") and clarify that DOE will issue one or more

Section	Proposed Revisions from the July 2021 NOPR	Final Revisions
	one or more documents during the pre-NOPR stage of a rulemaking and revisions to clarify public comment periods for pre-NOPR and NOPR documents.	documents during the pre-NOPR stage of a rulemaking and revisions to clarify public comment periods for pre-NOPR and NOPR documents.
7. Policies on Selection of Standards	No revisions proposed.	No revisions.
8. Test Procedures	Revise paragraph (a) to eliminate the requirement for a separate early assessment RFI and clarify that DOE will issue one or more documents during the pre-NOPR stage of a rulemaking; revise paragraphs (a) and (b) to clarify public comment periods for pre-NOPR and NOPR documents and eliminate the requirement that DOE identify necessary modifications to a test procedure prior to initiating an associated energy conservation standard rulemaking.	Revised, as proposed, paragraph (a) to eliminate the requirement for a separate early assessment RFI and clarify that DOE will issue one or more documents during the pre-NOPR stage of a rulemaking; paragraphs (a) and (b) to clarify public comment periods for pre-NOPR and NOPR documents and eliminate the requirement that DOE identify necessary modifications to a test procedure prior to initiating an associated energy conservation standard rulemaking.
9. ASHRAE Equipment	Revise section to follow ASHRAE rulemaking requirements in EPCA.	Revised section to follow ASHRAE rulemaking requirements in EPCA.
10. Direct Final Rules	No revisions proposed.	No revisions.
11. Principles for Distinguishing Between Effective and Compliance Dates	No revisions proposed.	No revisions.
12. Principles for the Conduct of the Engineering Analysis	Revise to reflect current DOE rulemaking practice.	No revisions.
13. Principles for the Analysis of Impacts on Manufacturers	Revise to reflect current DOE rulemaking practice.	No revisions.
14.Principles for the Analysis of Impacts on Consumers	Revise to reflect current DOE rulemaking practice.	No revisions.

Section	Proposed Revisions from the July 2021 NOPR	Final Revisions
15. Consideration of Non–Regulatory Approaches	Revise to reflect current DOE rulemaking practice.	No revisions.
16. Cross-Cutting Analytical Assumptions	Revise to reflect current DOE rulemaking practice; move discussion of emissions analysis into new section 17.	No revisions.

* As part of the proposed revisions, DOE will reorganize and redesignate sections and paragraphs as required.

II. Authority and Background

A. Authority

Title III, Parts B[5] and C[6] of the Energy Policy and Conservation Act, as amended, ("EPCA" or "the Act"), Public Law 94-163 (42 U.S.C. 6291-6317, as codified), established the Energy Conservation Program for Consumer Products and Certain Industrial Equipment.[7] Under EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, water use (as applicable), or estimated annual operating cost of each covered product and covered equipment during a representative average use cycle or period of use. (42 U.S.C. 6293; 42 U.S.C. 6314) Manufacturers of covered products and covered equipment must use the prescribed DOE test procedure when certifying to DOE that their products and equipment comply with the applicable energy conservation standards adopted under EPCA and when making any other representations to the public regarding the energy use or efficiency of those products. (42

[5] For editorial reasons, upon codification in the U.S. Code, part B was redesignated part A.
[6] Part C was added by Public Law 95-619, title IV, section 441(a). For editorial reasons, upon codification in the U.S. Code, part C was redesignated part A-1.
[7] All references to EPCA in this document refer to the statute as amended through Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

U.S.C. 6293(c); 42 U.S.C. 6295(s); 42 U.S.C. 6314(a); and 42 U.S.C. 6316(a)) Similarly, DOE must use these test procedures to determine whether the products comply with energy conservation standards adopted pursuant to EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316(a))

In addition, pursuant to EPCA, any new or amended energy conservation standard for covered products (and at least certain types of equipment) must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a)) In determining whether a standard is economically justified, EPCA requires DOE, to the greatest extent practicable, to consider the following seven factors: (1) the economic impact of the standard on the manufacturers and consumers; (2) the savings in operating costs, throughout the estimated average life of the products (*i.e.*, life-cycle costs), compared with any increase in the price of, or in the initial charges for, or operating and maintaining expenses of, the products which are likely to result from the imposition of the standard; (3) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard; (4) any lessening of the utility or the performance of the products likely to result from the imposition of the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (6) the need for national energy and water conservation; and (7) other factors DOE finds relevant. (42 U.S.C. 6295(o)(2)(B)(i)) Furthermore, the new or amended standard must result in a significant conservation of energy (42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6313(a)(6); and 42 U.S.C. 6316(a)) and comply with any other applicable statutory provisions.

B. Background

DOE conducted an effort between 1995 and 1996 to improve the process it follows to develop energy conservation standards for covered appliance products. As part of this effort, DOE reached out to many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties for input on the procedures, interpretations, and policies used by DOE in considering whether to issue new or amended energy conservation standards. This process resulted in publication of the July 1996 Final Rule which codified these procedures, interpretations, and policies in appendix A. The goal of the July 1996 Final Rule was to elaborate on the procedures, interpretations, and policies that would guide the Department in establishing new or revised energy conservation standards for consumer products. The rule was issued without notice and comment under the Administrative Procedure Act's ("APA") exception for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." (5 U.S.C. 553(b)(A))

On December 18, 2017, DOE issued a request for information ("RFI") on potential revisions to appendix A. 82 FR 59992. DOE subsequently published a NOPR regarding appendix A in the *Federal Register* on February 13, 2019. 84 FR 3910. On July 26, 2019, DOE subsequently issued a notice of data availability ("NODA") in the *Federal Register*. 84 FR 36037 ("July 2019 NODA"). After considering the comments it received DOE then published a final rule in the *Federal Register* on February 14, 2020, which significantly revised appendix A. 85 FR 8626.

While DOE issued the July 1996 Final Rule without notice and comment as an interpretative rule, general statement of policy, or rule of agency organization, procedure, or practice, the February 2020 Final Rule was issued with notice and comment. As discussed in the December 2021 Final Rule, DOE believes appendix A is best described

and utilized not as a legislative rule but instead as generally applicable guidance that may guide, but not bind, the Department's rulemaking process. In accordance with Executive Order 13990, DOE used a notice and comment process to revise appendix A. 86 FR 7037. DOE held a public webinar for the July 2021 NOPR on August 10, 2021.

In response to the July 2021 NOPR and public webinar, DOE received comments from the following parties:

Table II.1 List of Commenters

Commenter(s)	Affiliation	Acronym, Identifier
Air-Conditioning, Heating, and Refrigeration Institute	Manufacturer Trade Group	AHRI
Air-Conditioning, Heating, and Refrigeration Institute (AHRI), AMCA International (AMCA), American Lighting Association (ALA), Association of Home Appliance Manufacturers (AHAM), Consumer Technology Association (CTA), Hearth, Patio & Barbecue Association (HPBA), Heating, Air-conditioning & Refrigeration Distributors International (HARDI), Information Technology Industry Council (ITI), International Sign Association (ISA), Manufactured Housing Institute (MHI), National Association of Manufacturers (NAM), National Electrical Manufacturers Association (NEMA), North American Association of Food Equipment Manufacturers (NAFEM), Power Tool institute, Inc. (PTI), and Plumbing Manufacturers International (PMI)	Manufacturer Trade Groups	Joint Industry Commenters
American Boiler Manufacturers Association	Manufacturer Trade Group	ABMA
American Gas Association, American Public Gas Association, Spire, Inc., and Spire Missouri, Inc.	Utility Trade Group	AGA
Appliance Standards Awareness Project (Joint Comments filed with the American Council for an Energy-Efficient Economy, Consumer	Advocacy Group	Joint Advocacy Commenters

Commenter(s)	Affiliation	Acronym, Identifier
Federation of America, and National Consumer Law Center)		
Attorneys General of California, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York	State, Local Governments	State Commenters
Bradford White Corporation	Manufacturer	BWC
California Energy Commission	State	CEC
California Investor-Owned Utilities	Utilities	Cal-IOUs
Carrier Corporation	Manufacturer	Carrier
Crown Boiler Company	Manufacturer	Crown Boiler
Edison Electric Institute	Utility Trade Group	EEI
GE Appliances	Manufacturer	GEA
Goodman Manufacturing Company, L.P.	Manufacturer	Goodman
Grundfos Americas Corporation	Manufacturer	Grundfos
Ahmed Ahmed Hamdi	Individual	
Hoshizaki America, Inc.	Manufacturer	Hoshizaki
Hussmann Corporation	Manufacturer	Hussmann
Hydraulic Institute	Manufacturer Trade Group	HI
Hydronic Industry Alliance -- Commercial	Manufacturer Trade Group	HIA
Institute for Policy Integrity – New York University School of Law	Academic Institution	IPR
Lennox International	Manufacturer	Lennox
Lutron	Manufacturer	Lutron
Manufactured Housing Institute	Manufacturer Trade Group	MHI
New Yorker Boiler Company, Inc.	Manufacturer	New Yorker Boiler
North American Association of Food Equipment Manufacturers	Manufacturer Trade Group	NAFEM
National Propane Gas Association	Utility Trade Group	NPGA
Natural Resources Defense Council, Earthjustice & Sierra Club	Advocacy Groups	Joint Environmentalist Commenters
Nortek Global HVAC, LLC	Manufacturer	Nortek
Northwest Power and Conservation Council	Advocacy Group	NPCC
Northwest Energy Efficiency Alliance	Advocacy Group	NEEA
Signify	Manufacturer	Signify

Commenter(s)	Affiliation	Acronym, Identifier
Small Business Administration (SBA) Office of Advocacy	Federal Government Agency	SBA Office of Advocacy
Southern Company	Utility	Southern
Sullivan-Palatek, Inc.	Manufacturer	Sullivan-Palatek
Sara Taylor	Individual	
Trane Technologies	Manufacturer	Trane
Unico, Inc.	Manufacturer	Unico
U.S. Boiler Company	Manufacturer	U.S. Boiler
Weil-McLain Company	Manufacturer	Weil-McLain
Westinghouse Lighting Corporation	Manufacturer	Westinghouse
Whirlpool Corporation	Manufacturer	Whirlpool
Zero Zone, Inc.	Manufacturer	Zero Zone

III. Discussion of Specific Revisions to Appendix A

A. Coverage Determinations

In addition to specifying a list of covered products and equipment, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products and commercial/industrial equipment as "covered" within the meaning of EPCA. (42 U.S.C. 6292(b); 42 U.S.C. 6312(b)) This authority allows DOE to consider regulating additional products and equipment to further the goals of EPCA, *i.e.*, to conserve energy, as long as certain statutory requirements are met. Under 42 U.S.C. 6312(b), DOE is required to include commercial/industrial equipment as covered equipment "by rule." While there is no corresponding requirement to include consumer products as covered products by rule,[8] DOE conducts coverage determination rulemakings for both commercial/industrial equipment and consumer products.

In the February 2020 Final Rule, DOE added a section on coverage determination rulemakings. Among other things, the new section provided that DOE will: (1) initiate a coverage determination rulemaking with a notice of proposed determination; (2) publish final coverage determinations as separate notices prior to the initiation of any test

[8] Under 42 U.S.C. 6292(b), DOE is authorized to "classify" a consumer product as a covered product if certain conditions are met. But there is no mention of DOE having to make such classifications by rule.

procedure or energy conservation standard rulemaking and at least 180 days prior to publication of a test procedure NOPR; and (3) finalize any changes to an existing scope of coverage before proceeding with a test procedure or energy conservation standard rulemaking. 85 FR 8626, 8648-8653.

As discussed in the July 2021 NOPR, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach that lacks flexibility and includes extra procedural steps not required by EPCA outweigh the increased difficulty such an approach poses in achieving EPCA's goal of increased energy conservation. First, with respect to the requirement that DOE initiate a coverage determination rulemaking with a notice of proposed determination, DOE noted in the July 2021 NOPR that 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. DOE went on to state that it may only classify a consumer product as a covered product if it is necessary or appropriate to carry out the purposes of EPCA and the average annual per-household energy use of the consumer product is likely to exceed 100 kilowatt-hours per year. As such, DOE explained that it may be beneficial to first issue an RFI or other document to solicit comment on whether a consumer product is likely to meet these requirements. Accordingly, DOE proposed to clarify that it may issue an RFI or other pre-rule document prior to a notice of proposed coverage determination. 86 FR 35668, 35672.

Second, regarding the requirements to finalize coverage determinations prior to the initiation of any test procedure or energy conservation standard rulemaking and at least 180 days prior to publication of a test procedure NOPR, DOE noted in the July 2021 NOPR that coverage determination, test procedure, and energy conservation standard rulemakings are interdependent. *Id*. A coverage determination defines the product/equipment scope for which DOE can establish test procedures and energy

conservation standards. It also signals that inclusion of the consumer product or commercial/industrial equipment is necessary to carry out the purposes of EPCA, i.e., to conserve energy and/or water. In order to make this determination, DOE needs to consider whether a test procedure and energy conservation standard can be established for the consumer product or commercial/industrial equipment. If DOE cannot develop a test procedure that measures energy use during a representative average use cycle and is not unduly burdensome to conduct (42 U.S.C. 6293(b)(3); 42 U.S.C. 6314(a)(2)) or prescribe energy conservation standards that result in significant energy savings (42 U.S.C. 6295(o); 42 U.S.C. 6316(a)), then making a coverage determination is not necessary as it will not result in the conservation of energy. Thus, DOE explained in the July 2021 NOPR that it was important that the Department be able to initiate test procedure and energy conservation standard rulemakings while considering whether to establish coverage for a new consumer product or commercial equipment. Accordingly, DOE proposed to eliminate the requirement that coverage determination rulemakings must be finalized prior to initiation of a test procedure or energy conservation standard rulemaking. 86 FR 35668, 35672.

As for the requirement that a coverage determination be finalized 180 days prior to publication of a test procedure NOPR, DOE explained in the July 2021 NOPR that there are significant differences between the benefits of finalizing a coverage determination prior to publishing a test procedure NOPR and the benefits of finalizing a test procedure prior to publishing an energy conservation standards NOPR. *Id*. As discussed in the December 2021 Final Rule, a delay between publication of a test procedure final rule and an energy conservation standards NOPR may be beneficial in some cases as it could allow stakeholders to gain greater familiarity with complex test procedure amendments before providing comment on a proposal to amend standards. 86 FR 70892, 70911. But DOE does not see a corresponding potential benefit for delaying

publication of a test procedure NOPR after a coverage determination, which establishes the scope of coverage, *i.e.*, a definition, for the newly covered product or equipment, is finalized. Accordingly, DOE proposed to eliminate the 180-day period and require that coverage determination rulemakings be finalized prior to publication of a test procedure NOPR. 86 FR 35668, 35672.

Finally, the February 2020 Final Rule also stated that, if DOE finds it necessary and appropriate to expand or reduce the scope of a finalized coverage determination during a test procedure or standards rulemaking, the Department will initiate a new coverage determination process prior to moving forward with the test procedure or standards rulemaking. As DOE would be expanding or reducing the scope of an existing coverage determination, DOE proposed in the July 2021 NOPR to clarify that in instances where DOE needed to modify the scope of a coverage determination, DOE would simply amend that determination, as opposed to initiating an entirely new coverage determination. 86 FR 35668, 35670.

Comments Supporting DOE's Proposal on Coverage Determination Rulemakings

A number of commenters supported DOE's proposal to allow for early stakeholder input prior to issuing a notice of proposed coverage determination. (*See, e.g.*, ASAP, No. 53 at p. 14; Carrier, No. 54 at p. 2; Lutron, No. 64 at p. 2; NEEA, No. 71 at p. 2; Advocacy Groups, No. 70 at p. 2; State Commenters, No. 67 at p. 6) For example, State Commenters noted that DOE's proposal would allow the Department to collect necessary information prior to issuing a proposed coverage determination. (State Commenters, No. 67 at p. 6) Similarly, Lutron also favored allowing DOE to obtain public input before issuing a proposed coverage determination. (Lutron, No. 64 at p. 2)

Several commenters also supported DOE's proposal to remove the requirement that coverage determinations be finalized before initiating test procedure and standards rulemakings. (*See, e.g.*, ASAP, No. 53 at p. 14; Carrier, No. 54 at p. 2; Lutron, No. 64 at

p. 2; CA IOUs, No. 69 at p. 2; NEEA, No. 71 at p. 2; CEC, No. 55 at p. 2; State Commenters, No. 67 at p. 6; Advocacy Groups, No. 70 at p. 2) Appliance Standards Awareness Project (ASAP), in expressing its support, noted that information learned during test procedure and standards rulemakings can help inform the coverage determination and avoid potential delays resulting from DOE having to amend a coverage determination after it was initially finalized. (ASAP, No. 53 at p. 14) The California Investor-Owned Utilities (CA IOUs) also cited several successful negotiated rulemakings where standards, test procedures, and scope were considered simultaneously as evidence of the potential benefits of DOE's proposal. (CA IOUs, No. 69 at p. 2) While recognizing that information obtained during a test procedure rulemaking may help inform a coverage determination, Carrier and Lutron emphasized that test procedure and NOPRs should not be issued before a coverage determination is finalized. (Carrier, No. 54 at p. 2; Lutron, No. 64 at p. 2)

DOE also received support for its proposal to eliminate the 180-day required period between finalization of a coverage determination and publication of a test procedure NOPR. (*See, e.g.*, NEEA, No. 71 at p. 2; CEC, No. 55 at p. 2; State Commenters, No. 67 at p. 5) In particular, Northwest Energy Efficiency Alliance (NEEA) supported removal of the 180-day requirement between a finalized coverage determination and a test procedure NOPR as there are times when completing these rulemakings in parallel would be the most efficient use of DOE's and stakeholders' time. NEEA stated that DOE should consider the appropriate timeline between a coverage determination and a test procedure NOPR on a case-by-case basis, as there are many circumstances when a 6-month delay may be unnecessary. (NEEA, No. 71 at p. 2) State Commenters also agreed with DOE that a mandatory delay between finalization of a coverage determination and issuance of a test procedure NOPR did not offer the same

benefits as a delay between finalization of a test procedure and issuance of a standards NOPR. (State Commenters, No. 67 at p. 5)

Comments Opposing DOE's Proposal on Coverage Determination Rulemakings

While many commenters expressed support for most, if not all, of DOE's proposals, some commenters expressed concerns with and/or alternatives to DOE's proposed revisions to its coverage determination rulemaking process. These concerns and alternative proposals were centered around DOE's proposed elimination of the 180-day period between finalization of a coverage determination and publication of a test procedure NOPR. (*See, e.g.*, ASAP, No. 53 at p. 14; Grundfos, No. 53 at p. 16; Carrier, No. 54 at p. 2; ABMA, No. 61 at p. 2; Lutron, No. 64 at p. 2)

Several of these commenters stated that some period of time between finalization of a coverage determination and publication of a test procedure NOPR is necessary. For example, the American Boiler Manufacturers Association (ABMA) stated that although it supported the 180-day delay between finalization of a coverage determination and publication of a test procedure NOPR, it is also sensitive to DOE's concerns about delays to the rulemaking process that jeopardize its ability to meet statutory deadlines. Consequently, ABMA suggested a compromise approach of shortening the required spacing from 180 days to 90 days. (ABMA, No. 61 at p. 2) Lutron and the Joint Industry Commenters stated that there could be a number of reasons why adequate time is needed between those two events, so DOE should consider whether such time is necessary in each case and seek stakeholder feedback on that matter during the coverage determination process. (Lutron, No. 64 at p. 2; Joint Industry Commenters, No. 62 at p. 4) The Joint Industry Commenters specifically mentioned a scenario where a standards development organization is developing a test procedure as a reason for having some period of time between finalization of a coverage determination and publication of a test

procedure NOPR. Similarly, Carrier recommended that DOE should make it a standard practice to seek early public input through an RFI (or other appropriate mechanism) to obtain input on the appropriate time needed between a coverage final rule and a test procedure NOPR. (Carrier, No. 54 at p. 2)

In contrast to these comments requesting some period of time between finalization of a coverage determination and publication of a test procedure NOPR, DOE also received comments to eliminate the requirement altogether that DOE finalize coverage determinations prior to publishing test procedure NOPRs. ASAP suggested that DOE should be able to finalize a coverage determination concurrent with finalization of any energy conservations standards. ASAP contended that allowing the Department to incorporate information learned during the rulemaking process into the coverage determination would avoid any potential delays associated with having to amend the coverage determination after it was initially finalized. (ASAP, No. 53 at p. 14) Similarly, the Advocacy Groups encouraged DOE to adopt an approach allowing for concurrent coverage and standards finalizations. They noted that the proposed regulatory text would still require DOE to finalize a coverage determination prior to publishing a proposed test procedure and, in their view, this requirement would limit DOE's ability to incorporate information learned during the related test procedure and standards rulemakings into the coverage determination, which could result in unnecessary delays if DOE is required to pause the rulemaking process to amend the coverage determination. (Advocacy Groups, No. 70 at p. 2)

DOE's Response to Comments

In response to comments, DOE first notes a large majority of commenters, representing a wide variety of stakeholders, supported both the elimination of the requirement to begin a coverage determination rulemaking with a notice of proposed determination and the requirement that a coverage determination be finalized prior to

initiation of a test procedure or standards rulemaking. In both cases, commenters recognized that allowing for more early stakeholder input, including information on prospective test procedures and standards, will help make for a better, more-informed coverage determination rulemaking process. Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is removing the requirements from section 5 of appendix A that a coverage determination begin with a notice of proposed determination and be finalized prior to initiation of a test procedure or standards rulemaking.

Additionally, DOE did not receive any comments regarding its proposed clarification that, if DOE finds it necessary and appropriate to expand or reduce the scope of a finalized coverage determination during a test procedure or standards rulemaking, the Department will amend the existing coverage determination prior to moving forward with the test procedure or standards rulemaking. Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 5(d) of appendix A to clarify that, if necessary and appropriate, the Department will amend the existing coverage determination prior to moving forward with a test procedure or standards rulemaking.

As for the comments regarding the 180-day period and sequencing of the coverage determination, test procedure, and standards rulemakings, DOE first notes that several commenters stated there could be potential benefits of having a period of time between finalization of a coverage determination and publication of a test procedure NOPR. Specifically, the Joint Industry Commenters gave an example of where a delay between finalization of a coverage determination and publication of a test procedure may allow a standards development organization more time to develop an industry test procedure. DOE does not disagree with these commenters in that a delay between finalization of a coverage determination and publication of a test procedure NOPR may

offer some benefits in certain cases. But, as stated throughout this rulemaking process, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach that lacks flexibility and includes extra procedural steps not required by EPCA outweigh the increased difficulty such an approach poses in accomplishing the purposes of EPCA, *i.e.*, to conserve energy. So, while a 180-day period in between finalization of a coverage determination and publication may offer benefits in certain situations, in other cases it will simply result in a 180-day delay in implementing energy conservation standards without benefiting the rulemaking process. Thus, DOE is declining to adopt a specific time frame associated with the sequencing of a coverage determination and test procedure rulemaking.

As for those comments suggesting DOE allow concurrent finalization of coverage determinations and energy conservation standards, the Department believes any benefits from concurrent finalization of coverage determinations and energy conservation standards are more than outweighed by the uncertainty this would add to the rulemaking process. The commenters argued that concurrent determinations could avoid potential delays by incorporating information learned during the standards rulemaking process into the final coverage determination. But DOE's proposal already allows for coverage determination rulemakings to be informed by the preliminary stages of test procedure and standards rulemakings. Further, DOE notes that the negotiated rulemaking process allows stakeholders to simultaneously consider scope of coverage, test procedures, and energy conservation standards.[9]

Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 5 of appendix A to eliminate the 180-day required period

[9] DOE, through its Appliance Standards Rulemaking Federal Advisory Committee ("ASRAC"), established a working group to negotiate energy conservation standards for commercial and industrial fans and blowers. 80 FR 17359 (Apr. 1, 2015). The working group submitted a term sheet containing recommendations on scope of coverage, test procedures, and energy conservation standards analysis methodology. The term sheet is available at *https://www.regulations.gov/document/EERE-2013-BT-STD-0006-0179*.

between finalization of a coverage determination and publication of a test procedure and, instead, provide that coverage determinations be finalized prior to publication of a test procedure NOPR.

B. Process for Developing Energy Conservation Standards

As part of the February 2020 Final Rule, DOE made a number of changes to its process for developing energy conservation standards. The February 2020 Final Rule, among other changes: (1) required that DOE initiate a standards rulemaking with an early assessment RFI; (2) required that the preliminary stages of a standards rulemaking include either a framework document/preliminary analysis or an advance notice of proposed rulemaking ("ANOPR"); and (3) set minimum comment periods for NOPR and pre-NOPR documents. 85 FR 8626, 8704-8706.

As discussed throughout this rulemaking process, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach that lacks flexibility and includes extra procedural steps not required by EPCA outweigh the increased difficulty such an approach poses in meeting DOE's statutory deadlines and obligations under EPCA. As such, DOE proposed additional revisions to the process for developing energy conservation standards in the July 2021 NOPR. First, DOE proposed to eliminate the requirement for an early assessment RFI. DOE reasoned that because stakeholders can comment on whether a new or amended standard would meet the relevant statutory criteria at any stage of the rulemaking process, a separate rulemaking document limited to only that topic (*i.e.*, the early assessment RFI) may delay the overall process without adding an appreciable benefit. Instead, DOE noted that it would welcome the same type of information in the context of an RFI, preliminary analysis, ANOPR, or some other pre-NOPR document, while at the same time asking other relevant questions and gathering information in the event that the Department decides to proceed with an energy conservation standards rulemaking. 86 FR 35668, 35673.

Second, in conjunction with the proposal to eliminate the early assessment RFI, DOE also proposed to eliminate the requirement that the pre-NOPR stage of a standards rulemaking include either a framework document/preliminary analysis or an ANOPR. DOE tentatively concluded that one round of pre-NOPR input may be sufficient for some rulemakings. For instance, DOE is required to revisit final determinations that energy conservation standards do not need to be amended within three years. (42 U.S.C. 6295(m)(3)(B)) In such cases, it may not be necessary to issue a framework document/preliminary analysis or an ANOPR, as an RFI or NODA may be sufficient to update DOE's rulemaking analysis in preparation for proposing amended standards or a determination that standards do not need to be amended. Another example for which a single round of pre-NOPR input may be sufficient would be if a product has been subject to multiple rounds of rulemaking, relies on mature technologies, and for which the market is well-understood. As such, DOE proposed to publish one or more documents in the *Federal Register* during the pre-NOPR stage of a rulemaking to gather information on key issues. Such document(s) could take several forms depending upon the specific proceeding, including a framework document, RFI, NODA, preliminary analysis, or ANOPR. 86 FR 35668, 35673.

Finally, DOE proposed revisions to the comment periods for pre-NOPR and NOPR rulemaking documents. For pre-NOPR documents, which do not have a statutorily required minimum comment period, DOE proposed to eliminate the 75-day minimum public comment period and, instead, determine the appropriate comment period for these documents on a case-by-case basis. This would allow DOE to establish comment periods that are commensurate with the nature and complexity of the issues presented in a pre-NOPR document, while also allowing DOE to proceed more expeditiously with its rulemaking process. *Id.* DOE also proposed to eliminate the 75-day minimum public comment period for standards NOPRs and revert to the

Department's prior practice, consistent with EPCA, of requiring a 60-day minimum public comment period. DOE stated that 60 days offers an adequate amount of time for comment in most standards rulemakings, while helping to streamline the rulemaking process. And, for those rulemakings involving more complex issues, DOE noted that 60 days is the minimum comment period, and the Department may extend comment periods as appropriate. 86 FR 35668, 35673-35674.

Comments Supporting DOE's Proposal on Energy Conservation Standards Rulemakings

Several commenters supported DOE's proposal to eliminate the requirement for an early assessment RFI and instead clarify that DOE will issue one or more pre-NOPR documents intended to gather information on key issues, including whether new or amended standards would satisfy the relevant statutory criteria. (*See, e.g.*, ABMA, No. 61 at p. 3; Grundfos, No. 53 at pp. 24-25; ASAP, No. 53 at p. 24; CA IOUs, No. 69 at pp. 1-2; NEEA, No. 71 at p. 2) In expressing their support, the CA IOUs stated that the decision of whether a rulemaking should move forward can be made through a normal RFI, rather than through a formal, mandatory early assessment stage. (CA IOUs, No. 69 at pp. 1-2) Similarly, ASAP supported DOE's proposal to eliminate the requirement for an early assessment RFI because the Department can elicit the same type of information through other types of pre-NOPR documents, and DOE should be allowed the flexibility to determine the specific rulemaking documents that are appropriate in each case. (ASAP, No. 53 at p. 24) Grundfos and ABMA supported eliminating the early assessment RFI as long as DOE continued to provide opportunities for early stakeholder input. The Advocacy Groups supported DOE's proposal because it would provide DOE with the flexibility to determine the specific rulemaking steps that are appropriate in individual cases, thereby avoiding unnecessary delays while continuing to provide an opportunity for early stakeholder input. (Advocacy Groups, No. 70 at p. 4)

Several commenters also expressed their support for DOE's proposal to determine comment periods for pre-NOPR documents on a case-by-case basis and revise the minimum comment period for standard NOPRs to be consistent with EPCA. (*See* ASAP, No. 53 at p. 24; NEEA, No. 71 at pp. 2-3; Advocacy Groups, No. 70 at p. 3; NPCC, No. 52 at p. 2) The Advocacy Groups noted that the proposal would avoid unnecessary delays by allowing DOE to select appropriate comment periods for pre-NOPR documents, while continuing to provide an opportunity for early stakeholder input. (Advocacy Groups, No. 70 at p. 4) In expressing their support for the proposal, ASAP also noted that the requirements are for minimum comment periods and DOE is free to set longer comment periods where merited. (ASAP, No. 53 at p. 24)

Comments Opposing DOE's Proposal on Energy Conservation Standards Rulemakings

Several commenters opposed DOE's proposal to eliminate the requirement for an early assessment RFI and instead clarify that DOE will issue one or more pre-NOPR documents intended to gather information on key issues, including whether new or amended standards would satisfy the relevant statutory criteria. (*See, e.g.*, AHAM, No. 53 at p. 27; Lutron, No. 64 at p. 3; Mercatus, No. 48 (Attachment) at pp. 3-4; Lennox, No. 60 at p. 6; Joint Industry Commenters, No. 62 at p. 5; GEA, No. 72 at p. 3) In expressing their support for the early assessment process laid out in the February 2020 Final Rule, AHAM stated that the early assessment procedure could help DOE streamline its process by prioritizing rules that satisfy EPCA's requirements, thereby conserving DOE and stakeholder resources and allowing DOE to meet its deadlines more often. (AHAM, No. 53 at p. 27) Similarly, Lutron stated that the early assessment process will help prevent time and resources being invested in standards rulemakings that cannot meet the applicable statutory criteria. (Lutron, No. 64 at p. 3) Mercatus argued in favor of retaining the early assessment process as it would ensure that a wide variety of

viewpoints are considered by DOE prior to a regulation being formally proposed. In its view, once a regulation has been proposed, an agency has already made up its mind about what it wants to do, and public input comes too late to matter. (Mercatus, No. 48 (Attachment) at pp. 3-4)

In addition to opposing the elimination of the early assessment RFI, the Joint Industry Commenters offered their own proposal on what an early assessment process should entail. They first suggested that DOE issue a pre-rulemaking document of its choice aimed at obtaining comment on whether a standard should be amended using the criteria in 42 U.S.C. 6295(n)(2). They added that the pre-rulemaking document used by DOE should also: (1) present data and information DOE has gathered during informal, pre-rulemaking stakeholder engagement; (2) identify and seek comment on design options; (3) identify and seek comment on the existence of or opportunity for voluntary, nonregulatory action; (4) seek comment on cumulative regulatory burden; (5) identify significant subgroups of consumers and manufacturers that merit analysis; and (6) seek comment on whether, if DOE moves forward with rulemaking, DOE should pursue negotiated rulemaking. The Joint Industry Commenters remarked that their suggested approach did not differ dramatically from DOE's proposal but would include a NODA/Preliminary Analysis step after the initial pre-NOPR document. In their view, the inclusion of a pre-Technical Support Document ("TSD") as part of this process is important in initiating a vital exchange of information early in the rulemaking process. (Joint Industry Commenters, No. 62 at p. 6)

Several commenters also opposed DOE's proposal to determine comment periods for pre-NOPR documents on a case-by-case basis and revise the minimum comment period for standards NOPRs to be consistent with EPCA. (*See, e.g.*, Grundfos, No. 53 at pp. 25-26; Carrier, No. 54 at pp. 3, 4; BWC, No. 63 at p. 2; Joint Industry Commenters, No. 62 at pp. 7-8; Lennox, No. 60 at p. 3) For example, Lennox stated that at least 60

days should be provided for comment for pre-NOPR documents as DOE regulations are typically complex, often may involve significant market and manufacturing changes, and pre-NOPR documents by definition are early in the regulatory process, so the timing of their release is generally unpredictable and stakeholder personnel are not necessarily immediately available to assess them. (Lennox, No. 60 at p. 3) BWC opposed shortening the standards NOPR comment period from 75 days to 60 days, noting that manufacturers and all other stakeholders are expected to read, analyze, and investigate substantial documentation between a NOPR itself and an associated TSD. BWC argued that these documents take DOE and its consultants' months to prepare, and to expect a complete and thorough analysis by stakeholders in 60 calendar days is unreasonable, especially when considering the necessary effort in managing other regulatory activities that currently impact it. (BWC, No. 63 at p. 2)

DOE's Response to Comments

In response to these comments, DOE first notes that commenters raised several valid points about the benefits of the early assessment process and longer comment periods. For instance, DOE agrees that early stakeholder input is essential in the rulemaking process. It would also be beneficial, from an allocation of resources standpoint, to determine as early as possible whether a new or amended standard would satisfy the applicable statutory criteria. And that is why DOE did not propose to eliminate the early assessment process in the July 2021 NOPR. Instead, DOE proposed to eliminate the requirement that the Department solicit information on whether a new or amended standard would meet the applicable statutory criteria in a rulemaking document limited to only that topic, *i.e.*, the early assessment RFI. 86 FR 35668, 35673. DOE stated it would issue one or more pre-NOPR rulemaking documents and made it clear that the Department would welcome the same type of early assessment information in these documents, while at the same time asking other relevant questions. *Id.* With respect to

the early assessment proposal from the Joint Industry Commenters, DOE notes that the commenters remarked on the similarities with DOE's own proposal, with the only notable difference being the requirement to issue a NODA or preliminary analysis after the initial pre-NOPR document. While DOE acknowledges that many rulemakings may involve an RFI followed by a NODA or preliminary analysis, that certainly is not the case for all rulemakings. For example, if DOE is revisiting a decision not to amend standards within the 3-year period specified under 42 U.S.C. 6295(m)(3), a pre-NOPR RFI requesting any information relevant to the previous analysis may be sufficient to proceed with a proposed determination that standards do not need to be amended. As such, a requirement to issue a NODA or preliminary analysis would consume time and resources without providing an appreciable benefit to DOE or the public.

Finally, regarding the benefits of early stakeholder input, DOE strongly disagrees with the assertion from Mercatus that DOE does not properly consider stakeholder input received in response to NOPRs. DOE values stakeholder input at every stage of the rulemaking process and has made changes to proposed test procedures and standards in response to stakeholder comments. For example, in an energy conservation standards rulemaking for dishwashers in which DOE initially proposed more stringent standards, DOE determined, in part, based on comments received raising concerns with potential impacts on consumer utility that more stringent standards were not justified. 81 FR 90072, 90114 (Dec. 13, 2016). In the January 10, 2020, final rule establishing energy conservation standards for portable air conditioners DOE updated its equation for calculating the combined energy efficiency ratio from that presented in the proposed rule based on information and data submitted by stakeholders. 85 FR 1378, 1398.

DOE also recognizes that the standards rulemaking process is necessarily complex. And stakeholders need sufficient time to comment on rulemaking documents. But there are also instances where DOE issues rulemaking documents of limited scope

and a 30-day comment period, or even less, is more than sufficient. For example, as discussed previously, DOE is required to revisit a determination not to amend standards within three years. In such cases, DOE may issue an RFI on whether there have been any material changes to the market that would affect the analysis conducted in the previous determination not to amend standards. As the scope of the RFI is limited, a 30-day comment period may be more than sufficient to allow stakeholders a meaningful opportunity to comment. With respect to NOPRs, EPCA requires at least a 60-day comment period. (42 U.S.C. 6295(p)(2)) Similarly, Executive Order ("E.O.") 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), states that in most cases a comment period should not be less than 60 days. As stated previously, DOE's main purpose in revising appendix A is to minimize the inefficiencies and unnecessary delays that come with a one-size-fits-all rulemaking approach. DOE sees 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.

Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 6 of appendix A to specify that the Department will issue one or more pre-NOPR rulemaking documents and comment periods for standards rulemaking documents will be determined on a case-by-case basis with a minimum 60-day comment period for NOPRs.

C. Process for Developing Test Procedures

As part of the February 2020 Final Rule, DOE made a number of changes to its process for developing test procedures. The February 2020 Final Rule, among other changes: (1) required that DOE initiate a test procedure rulemaking with an early assessment RFI; and (2) required that DOE identify any necessary modifications to

established test procedures prior to initiating the standards development process. 85 FR 8626, 8653-8654, 8676-8682, 8707-8708.

As discussed throughout this rulemaking process, DOE has reconsidered whether the benefits of a one-size-fits-all rulemaking approach that lacks flexibility and includes extra procedural steps not required by EPCA outweigh the increased difficulty such an approach poses in meeting DOE's statutory deadlines and obligations under EPCA. As such, DOE proposed additional revisions to the process for developing test procedures in the July 2021 NOPR. First, DOE proposed to eliminate the requirement for an early assessment RFI. Because interested parties are free to raise the matter of the need for an amended test procedure at any preliminary stage of the rulemaking, DOE tentatively concluded that a separate rulemaking document limited to only that topic (*i.e.,* the early assessment RFI) unnecessarily delays the overall process without appreciable benefit. Consequently, DOE proposed to issue one or more pre-NOPR documents that would welcome the same type of early assessment information, while at the same time asking relevant questions and gathering information about other test procedure issues, such as the applicability of any industry test procedure. 86 FR 35668, 35674.

Second, for pre-NOPR documents for which there is no statutorily required comment period, DOE proposed to clarify that the Department would determine an appropriate comment period for pre-NOPR documents on a case-by-case basis. This would allow DOE to account for the nature and complexity of the test procedure rulemaking at issue. *Id.* at 86 FR 35675. DOE also proposed to clarify that it will provide a minimum 60-day public comment period with at least one public hearing or workshop for test procedure NOPR documents. *Id.* DOE has historically provided a 75-day comment period for test procedure NOPRs, consistent with the comment period requirement for technical regulations in the North American Free Trade Agreement, U.S.-Canada-Mexico ("NAFTA"), Dec. 17, 1992, 32 I.L.M. 289 (1993); the North American

Free Trade Agreement Implementation Act, Public Law 103-182, 107 Stat. 2057 (1993) (codified as amended at 10 U.S.C.A. 2576) (1993) ("NAFTA Implementation Act"); and Executive Order 12889, "Implementation of the North American Free Trade Agreement," 58 FR 69681 (Dec. 30, 1993). However, Congress repealed the NAFTA Implementation Act and has replaced NAFTA with the Agreement between the United States of America, the United Mexican States, and the United Canadian States ("USMCA"), Nov. 30, 2018, 134 Stat. 11, thereby rendering E.O. 12889 inoperable. Consequently, since USMCA is consistent with EPCA's public comment period requirements and normally requires a minimum comment period of 60 days for technical regulations, DOE proposed to provide a minimum 60-day public comment period for test procedure NOPRs. 86 FR 35668, 35675.

Finally, DOE proposed to eliminate the requirement that the Department identify any necessary test procedure modifications prior to initiating the standards development process. *Id.* As DOE recognized in the December 2021 Final Rule, it is important that test procedures be finalized prior to proposing standards so stakeholders can properly evaluate and provide comment on the proposed standards. 86 FR 70892, 70911. But this reasoning does not extend to requiring DOE to identify test procedure modifications prior to initiating a standards rulemaking. Conducting preliminary standards-related work and information gathering in concert with the test procedure proceeding can lead to a more-efficient rulemaking process without sacrificing the quality of DOE's analyses or the opportunity for public input.

Comments Supporting DOE's Proposal on Test Procedure Rulemakings

Several commenters expressed their support for DOE's proposal to eliminate the requirement for an early assessment RFI and instead clarify that DOE will issue one or more pre-NOPR documents intended to gather information on key issues, including whether a new or amended test procedure would satisfy the relevant statutory criteria.

(*See, e.g.*, NEEA, No. 71 at p. 2; Advocacy Groups, No. 70 at p. 4; State Commenters, No. 67 at p. 6; Grundfos, No. 53 at p. 33; CA IOUs, No. 69 at pp. 1-2) In expressing their support, the CA IOUs stated that the decision of whether a rulemaking should move forward can be made through a normal RFI, rather than through a formal, mandatory early assessment stage. (CA IOUs, No. 69 at pp. 1-2) The Advocacy Groups supported DOE's proposal because it would provide DOE with the flexibility to determine the specific rulemaking steps that are appropriate in individual cases, thereby avoiding unnecessary delays while continuing to provide an opportunity for early stakeholder input. (Advocacy Groups, No. 70 at p. 4) Similarly, the State Commenters noted that requiring DOE to commence test procedure rulemakings with an early assessment request for information unnecessarily imposes a one-size-fits-all approach on DOE's rulemaking course and constrains the agency's discretion to pursue rulemaking in the most expeditious manner possible. (State Commenters, No. 67 at p. 6)

Several commenters also supported DOE's proposal to determine comment periods for pre-NOPR documents on a case-by-case basis and revise the minimum commenter period for test procedure NOPRs to be consistent with EPCA and USMCA. (*See, e.g.*, NEEA, No. 71 at p. 3; CEC, No. 55 at p. 3; CA IOUs, No. 53 at p. 32) The Advocacy Groups noted that the proposal would avoid unnecessary delays by allowing DOE to select appropriate comment periods for pre-NOPR documents on a case-by-case basis, while continuing to provide an opportunity for early stakeholder input. (Advocacy Groups, No. 70 at p. 4)

Finally, DOE also received comments supporting its proposal to remove the requirement that the Department identify any necessary test procedure modifications prior to initiating the standards development process. For example, the Advocacy Groups supported DOE's proposal to clarify that it would not be precluded from issuing pre-rulemaking documents for standards prior to a test procedure final rule, asserting that this

clarification would help avoid unnecessary delays to DOE's rulemaking process. In their view, test procedure and standards rulemakings inform each other and providing DOE with the ability to conduct the initial stages of a standards rulemaking prior to finalizing a test procedure will allow issues identified in the early phases of the standards rulemaking related to the test procedure to be addressed in the test procedure rulemaking. (Advocacy Groups, No. 70 at p. 4) Similarly, the CA IOUs supported DOE's proposed clarification that preliminary work may begin on energy conservation standards prior to completion of a test procedure rulemaking. The CA IOUs reasoned that this refinement would help DOE to expedite its rulemaking process and reduce its backlog of rulemakings. (CA IOUs, No. 69 at pp. 2-3)

Comments Opposing DOE's Proposal on Test Procedure Rulemakings

Several commenters opposed DOE's proposal to eliminate the requirement for an early assessment RFI. For example, Lutron argued that eliminating the early assessment RFI would negatively impact DOE's analysis and reduce commenters' ability to provide meaningful input. (Lutron, No. 64 at p. 3) The Gas Industry Joint Commenters urged that DOE retain appendix A's current early opportunities for providing public comment and input on potential standards and test procedure rulemakings. In their view, it would be better for DOE to take additional time needed to produce a good regulation rather than to take less time to produce a poorer regulation. (Gas Industry Joint Commenters, No. 57 at pp. 4-5) Similarly, the Joint Industry Commenters stated that the early assessment process offers DOE streamlining opportunities by helping it to identify potential test procedure issues prior to the initiation of a standards rulemaking proposal. (Joint Industry Commenters, No. 62 at p. 9)

Several commenters also opposed DOE's proposal to determine comment periods for pre-NOPR documents on a case-by-case basis and revise the minimum comment period for test procedure NOPRs to be consistent with EPCA and USMCA. (*See, e.g.*,

Carrier, No. 54 at pp. 3, 4; AHAM, No. 53 at p. 5; Joint Industry Commenters, No. 62 at pp. 7-8; Lennox, No. 60 at p. 3) For example, Lennox stated that commenting on test procedures often involves testing personnel and lab time that typically do not have immediate availability and rulemaking activities compete with lab time and personnel for product development, regulatory and other demands for product testing and assessment. As such, Lennox opposed shortening the 75-day comment period for test procedure NOPRs and suggested a minimum 60-day comment period for pre-NOPR comment periods. (Lennox, No. 60 at p. 3) The Joint Industry Commenters made similar arguments regarding the complexity of issues involved in evaluating proposed test procedures. They stated that the evaluation process can – and often does – include conducting the proposed test procedure along with the collection and analysis of testing data to assist DOE in analyzing the proposed procedure's accuracy, repeatability, and reproducibility, all of which take time to complete. If DOE decides to shorten the comment period for test procedure proposals, the Joint Industry Commenters asked that DOE continue to freely grant reasonable requests for comment period extensions, which they expected to be more frequent with the shortening of the comment period. (Joint Industry Commenters, No. 62 at pp. 7-8) GEA stated that mandatory comment periods with sufficient time for in-depth analysis and commentary are necessary to provide predictability and fairness to stakeholders. (GEA, No. 72 at p. 3)

Finally, DOE also received comments opposing its proposal to remove the requirement that the Department identify any necessary test procedure modifications prior to initiating the standards development process. For example, the Joint Industry Commenters asserted that the test procedure process should be finalized before the standards rulemaking process begins. They stressed the relevance of the test procedure to the standards analysis, noting that responses on pre-NOPR energy conservation standards documents will often be highly dependent on the test procedure, particularly since

knowing what the test procedure will measure will affect how the stringency of potential standards will be assessed. (Joint Industry Commenters, No. 62 at p. 9) Similarly, Lutron stated that eliminating the required sequencing of test procedure and standards rulemakings would negatively impact DOE's analysis on both test procedures and standards and would reduce commenters' ability to provide meaningful input, especially during the early rulemaking phases for new or amended standards. (Lutron, No. 64 at p. 3)

DOE's Response to Comments

In response to these comments, DOE first notes that commenters raised several of the same issues about the benefits of an early assessment process and longer comment periods that were discussed in the preceding section on the process for developing energy conservation standards. And, as stated previously, DOE agrees that early stakeholder input is essential and that some rulemaking documents require a longer comment period in order to give stakeholders sufficient time to develop their comments. DOE again notes that it did not propose to eliminate the early assessment process in the July 2021 NOPR. Instead, DOE proposed to eliminate the requirement that the Department solicit information on whether an amended test procedure would meet the applicable statutory criteria in a rulemaking document limited to only that topic, *i.e.*, the early assessment RFI. 86 FR 35668, 35674. DOE proposed to issue one or more pre-NOPR rulemaking documents and made clear that the Department would welcome the same type of early assessment information in these documents, while at the same time asking other relevant questions. *Id.*

DOE also recognizes that test procedures are complex, and stakeholders need sufficient time to formulate comments. But, as noted previously, there are also instances where DOE issues rulemaking documents of limited scope and a 30-day comment period, or even less, is more than sufficient. For example, in evaluating the potential

establishment of test procedures for portable air conditioners, DOE issued an RFI to provide information on investigative testing of existing industry test procedures that could be used to measure cooling capacity and energy use for portable air conditioners. 79 FR 26639 (May 9, 2014). Given that DOE was requesting information regarding existing industry test procedures, DOE provided a 30-day comment period. *Id.* With respect to test procedure NOPRs, EPCA requires at least a 60-day comment period for covered products (42 U.S.C. 6293(b)(2)) and at least a 45-day comment period for covered equipment (42 U.S.C. 6314(b)), while USMCA normally requires a minimum comment period of 60 days for technical regulations.[10] As stated previously, DOE's main purpose in revising appendix A is to minimize the inefficiencies and unnecessary delays that come with a one-size-fits-all rulemaking approach. DOE sees no reason to establish a longer minimum comment period than required by EPCA or USMCA, which applies to other Federal agencies that issue technical regulations of comparable complexity.

With respect to eliminating the requirement that DOE identify any necessary modifications to the test procedure prior to initiating a standards rulemaking, DOE agrees with the Advocacy Groups that test procedure and standards rulemakings inform each other and providing DOE with the ability to conduct the initial stages of a standards rulemaking prior to finalizing a test procedure will allow issues identified in the early phases of the standards rulemaking related to the test procedure to be addressed in the test procedure rulemaking. DOE also agrees with the CA IOUs that eliminating this requirement would lead to a more efficient rulemaking process.

Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 8 of appendix A to specify that the Department will issue one or

[10] *See* USMCA, Chapter 11, Technical Barriers to Trade, available at *https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/11_Technical_Barriers_to_Trade.pdf*.

more pre-NOPR rulemaking documents and comment periods for test procedure rulemaking documents will be determined on a case-by-case basis with a minimum 60-day comment period for NOPRs. DOE is also eliminating the requirement in section 8 that the Department identify any necessary modifications to a test procedure prior to initiating a standards rulemaking.

D. ASHRAE Equipment

In EPCA, Congress established a separate and unique regulatory scheme pertaining to DOE rulemakings of certain covered equipment addressed by ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings*, including specific requirements for both energy conservation standards and test procedures. *See* 42 U.S.C. 6313(a)(6) *and* 42 U.S.C. 6314(a)(4), respectively. In the February 2020 Final Rule, DOE added a section to appendix A specifically addressing ASHRAE equipment for the first time. 85 FR 8626, 8708. While DOE sees value in setting forth the statutory requirements and the Department's regulatory process for covered ASHRAE equipment, a subsequent review suggested that DOE's initial efforts to explain the applicable ASHRAE requirements could be improved, both in terms of better delineating the rulemaking process for covered ASHRAE equipment and removing constraints that are neither compelled by the statute nor consistent with DOE's past practice.

First, with respect to the rulemaking process for ASHRAE equipment laid out in EPCA, DOE proposed to separate out the statutory requirements for energy conservation standards and test procedures, as the February 2020 Final Rule erroneously applied EPCA's timelines for energy conservation standards to test procedures as well. *Id.* at 86 FR 35675-35676. DOE also proposed to clarify what type of action on the part of ASHRAE would trigger a DOE review for amended energy conservation standards and

test procedures. With respect to amended energy conservation standards, DOE proposed to only consider ASHRAE to have acted in a manner triggering DOE review when an updated version of ASHRAE Standard 90.1 publishes (*i.e.*, not at the time that an addendum to ASHRAE Standard 90.1 is released or approved), and the updated version includes an increase in the stringency of standard levels or a new design requirement relative to the current Federal standards. With respect to test procedures, DOE proposed to only consider ASHRAE to have acted in a manner triggering DOE review when an updated version of ASHRAE Standard 90.1 publishes (*i.e.*, not at the time that an addendum to ASHRAE Standard 90.1 is released or approved), and that updated version adopts a new or amended test procedure that updates the technical methodology. This approach is consistent with the ASHRAE-specific provisions in EPCA and generally consistent with past DOE practice. *Id.* at 86 FR 35676. Finally, DOE also proposed to clarify that ASHRAE's review and reaffirmance (*i.e.*, not amending) of either a standard or test procedure does not trigger a DOE review or affect the timing of DOE's separate obligation under EPCA to periodically review standards and test procedures for each class of covered equipment. *Id.*

Additionally, DOE proposed to clarify that it has some flexibility in adopting an amended test procedure under ASHRAE Standard 90.1 as EPCA does not require DOE to adopt a test procedure identical to the industry test standard. *Id*. Instead, EPCA directs DOE to amend its test procedure "to be consistent with the amended industry test procedure…unless the Secretary determines, by rule, published in the *Federal Register* and supported by clear and convincing evidence" that the amended industry test standard would not be representative of the equipment's energy efficiency, energy use, or estimated operating cost during a representative average use cycle and not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(4)(B)) *Id*. DOE further clarified that in such cases, DOE may then develop its own test procedure which does meet these

statutory requirements related to representativeness and burden, even if the test procedure is not consistent with the amended industry test standard. *Id*. DOE also noted that the statutory language ''consistent with'' itself provides some flexibility in adopting the amended industry test procedure, and that as EPCA does not require DOE to adopt a test procedure identical to applicable industry test standard, DOE may make modifications that are consistent with the applicable industry test standard. *Id*.

In addition, DOE proposed to clarify that it is not required to adopt or align with sections of the industry test standard that are not necessary for the method of test for metrics included in the DOE test procedure (*e.g.*, sections of the industry test procedure regarding the selection of models for testing under an industry certification program, verification of represented values and the associated tolerances, and operational requirements). These proposals were consistent with the Department's longstanding historic practice. 86 FR 35668, 35676.

In the July 2021 NOPR, DOE also proposed to remove the statement that DOE will adopt the revised ASHRAE levels or the industry test procedure, except in very limited circumstances. The circumstances under which DOE will adopt a more-stringent standard than the ASHRAE standard or a different test procedure are laid out in the statute. DOE will issue a more-stringent standard than the ASHRAE standard if DOE determines, supported by clear and convincing evidence, that the more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II)) "Very limited circumstances" is an ambiguous description for a process that is delineated in EPCA. As a result, DOE proposed to remove this description of the circumstances under which DOE will not adopt the amended ASHRAE standard or industry test procedure. 86 FR 35668, 35676. Similarly, DOE proposed to remove the discussion of what constitutes clear and convincing evidence. *Id.* As DOE previously noted in the February 2020 Final

Rule, the clear and convincing evidence standard has a specific meaning that the courts have routinely addressed through case law. *See* 85 FR 8626, 8642 (discussing in detail the application of the "clear and convincing" evidentiary standard by courts and legal commentators); *see also Am. Pub. Gas Ass'n v. United States Dep't of Energy*, 22 F.4th 1018, 1025 (D.C. Cir. 2022) ("[C]lear and convincing evidence requires a factfinder (in this case 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."). DOE does not believe the discussion of clear and convincing evidence in appendix A adds anything to the already extensive case law pertaining to the clear and convincing evidence threshold.

DOE also proposed to remove the statement that DOE believes that ASHRAE not acting to amend Standard 90.1 is tantamount to a decision that the existing standard remain in place and clarify that ASHRAE reviewing and reaffirming a standard or test procedure does not have any effect on DOE's rulemaking obligations under EPCA. 86 FR 35668, 35676. As discussed previously, DOE initiates an ASHRAE rulemaking because: (1) Standard 90.1 is amended; or (2) it is required under the 6-year lookback review for standards or the 7-year lookback review for test procedures. Neither of these situations would be affected by a decision by ASHRAE to reaffirm an existing standard or test procedure.

Finally, DOE also proposed to make two clarifications regarding its ASHRAE review process consistent with longstanding DOE practice. First, DOE proposed to clarify that it assesses energy savings from amended ASHRAE Standard 90.1 levels as compared to the current Federal standard (or the market baseline in cases where ASHRAE adds new equipment classes or categories not previously subject to Federal standards) and will also assess energy savings from more-stringent standards as

compared to the ASHRAE Standard 90.1 levels. *Id.* And, second, DOE proposed to clarify that it may review all metrics for the equipment category at issue, even though ASHRAE only amended DOE's regulated metric(s), and the Department may also consider changing regulated metrics (while assessing equivalent stringency between metrics). DOE also proposed to clarify that it may also consider changing metrics during a 6-year-lookback or 7-year-lookback review. *Id.* DOE believes this is consistent with EPCA's requirement that test procedures (and metrics) be representative of an average use cycle.

Comments Supporting DOE's Proposals on ASHRAE Rulemakings

Several commenters expressed general support for all of DOE's proposed revisions to the ASHRAE provisions in appendix A. (*See, e.g.*, NPCC, No. 52 at p. 2; NEEA, No.71 at pp. 3-4) With respect to DOE's proposal to create separate provisions for energy conservation standards and test procedures rulemakings because of different statutory requirements, the Joint Industry Commenters agreed that energy conservation standards and test procedure rulemakings are subject to different timelines under the statute. (Joint Industry Commenters, No. 62 at p. 19).

Several commenters supported DOE's proposal to provide clarity tying the triggering event to when ASHRAE publishes an updated version of ASHRAE Standard 90.1. (*See, e.g.,* BWC, No. 63 at pp. 2-3; NEEA, No. 71 at pp. 3-4; ASHRAE, No. 59 at p. 3) ASHRAE stated that the proposal provides for a regular three-year cadence of reviews and provides clarity. (ASHRAE, No. 59 at p. 3) NEEA recommend that DOE clarify in the regulatory text that addendums to ASHRAE 90.1 or updates to an industry test procedure (TP) that ASHRAE 90.1 references do not trigger a DOE review of energy conservation standard (ECS) and TP. (NEEA, No. 71 at pp. 3-4) BWC also agrees with DOE not triggering a review simply when ASHRAE reviews or affirms a standard. (BWC, No. 63 at pp. 2-3)

Several commenters supported DOE's proposal to remove the language stating that DOE would adopt ASHRAE levels or the industry test procedure, except in very limited circumstances. (*See, e.g.,* ASAP, No. 53 at pp. 41-42; Advocacy Groups, No. 70 at p. 5; State Commenters, No. 67 at pp. 7-8; NEEA, No. 71 at pp. 3-4) In supporting DOE's proposal, ASAP stated that the "except in very limited circumstances" language was an additional constraint that was inconsistent with the statute and would impede DOE's ability to achieve EPCA's energy conservation purposes. (ASAP, No. 53 at pp. 41-42)

Similarly, several commenters also supported DOE's proposal to remove the discussion of what constitutes clear and convincing evidence from appendix A. (*See, e.g.,* ASAP, No. 53 at pp. 41-42; CEC, No. 55 at p. 3; Advocacy Groups, No. 70 at p. 5; State Commenters, No. 67 at pp. 7-8) State Commenters noted that further elaboration of the clear and convincing evidence standard either does not change the standard, in which case it is superfluous, or does change the standard, in which case it violates EPCA. (State Commenters, No. 67 at pp. 7-8) The California Energy Commission (CEC) stated that DOE's removal of the clear and convincing evidence discussion in light of the extensive case law covering this topic would ensure that an overly stringent interpretation of the evidentiary threshold does not inhibit the Department from adopting standards that would result in significant additional conservation of energy and are technologically feasible and economically justified. (CEC, No. 55 at p. 3)

Comments Opposing DOE's Proposals on ASHRAE Rulemakings

One commenter requested that DOE reconsider its proposal tying the triggering event to when ASHRAE publishes an updated version of ASHRAE Standard 90.1. Specifically, CA IOUs requested that DOE consider publication of an addendum to ASHRAE Standard 90.1 to trigger a review, noting that some valuable addenda miss the triannual update deadline but are published shortly afterward, and that DOE's proposed

interpretation would result in a delay in compliance state for standards. (CA IOUs, No. 69 at p. 3) CA IOUs also requested that DOE clarify what is meant by updates to ASHRAE 90.1 that modify the referenced industry test procedure; specifically what degree of change is required to trigger DOE. *Id.* CA IOUs noted that historically ASHRAE has adopted the latest published version of industry test procedures, even if they include only minor changes and clarifications from the previous version, and that DOE typically does not update its test procedure to match ASHRAE in those cases. *Id*.

With respect to DOE's proposal to clarify that ASHRAE's review and reaffirmance (*i.e.*, not amending) of either a standard or test procedure does not trigger a DOE review or affect the timing of DOE's separate obligation under EPCA, the Joint Industry Commenters stated that if ASHRAE 90.1 is amended just with respect to the energy conservation standard for an ASHRAE equipment, they would still expect DOE to conduct a "short test procedure rulemaking to simply acknowledge the continued applicability of the test procedure." (Joint Industry Commenters, No. 62 at p. 20)

Several commenters opposed DOE's proposal to remove the language stating that DOE would adopt ASHRAE levels or the industry test procedure, except in very limited circumstances. (*See, e.g.*, Carrier, No. 54 at pp. 3, 4; Lutron, No. 64 at pp. 4-5; Joint Industry Commenters, No. 62 at pp. 23-24; BWC, No. 63 at p. 3; ASHRAE, No. 59 at pp. 3-4) In urging DOE to retain this language, the Joint Industry Commenters stated that ASHRAE's open and collaborative process, which involves manufacturers, energy advocates, regulators, academia, and utilities, develops standards that are fair and representative of what are both economically and technologically feasible at the time of the revision. (Joint Industry Commenters, No. 62 at pp. 23-24) Similarly, Lutron stated that industry test procedures are developed by balanced committees and DOE should routinely adopt industry test procedures as a matter of best practice. (Lutron, No. 64 at pp. 4-5) GE Appliances stated that adopting consensus standards speeds up the test

procedure rulemaking process, prepares all stakeholders to address standards rulemakings sooner, and reduces the likelihood of litigation or other action regarding test procedures. (GE Appliances, No. 72 at p. 3) Lennox stated that DOE should rarely deviate from industry test procedures metrics given the "clear and convincing evidence" threshold set for deviating from industry test procedures. *Id.* Lennox stated that the test procedure lookback section indicates that DOE may amend a test procedure "in accordance with this section" (42 U.S.C. 6314(a)(1)(i)), which thereby references the entire section 42 U.S.C. 6314, which includes the ASHRAE "clear and convincing evidence" standard for amending a test procedure in 6314(a)(4)(B). *Id.*

DOE received several comments opposing the Department's proposal to remove the discussion of what constitutes clear and convincing evidence. (*See, e.g.,* Spire, No. 53 at p. 43; Carrier, No. 54 at pp. 3, 4; Joint Industry Commenters, No. 62 at p. 24; ASHRAE, No. 59 at pp. 3-4) The Joint Industry Commenters urged DOE to retain the current text regarding what constitutes "clear and convincing" evidence with respect to adopting energy conservation standards more stringent than those adopted in ASHRAE 90.1. In their view, the explanatory text adopted as part of the February 2020 Final Rule clarified the meaning of this phrase in this context, which is to discourage the adoption of higher energy efficiency standards above those set by ASHRAE. (Joint Industry Commenters, No. 62 at p. 24) Spire stated that eliminating the discussion of what constitutes clear and convincing evidence would forgo an opportunity to potentially resolve issues without the need for litigation. (Spire, No. 53 at p. 43)

DOE's Response to Comments

First, DOE did not receive any comments opposing separate provisions for energy conservation standards and test procedure rulemakings. As noted by the Joint Industry Commenters, energy conservation standards and test procedure rulemakings are subject to different statutory requirements under the ASHRAE provisions in EPCA.

Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 9 of appendix A to create separate provisions for energy conservation standards and test procedure rulemaking requirements.

With respect to DOE's proposal that the ASHRAE provisions are triggered when an updated version of ASHRAE Standard 90.1 is published, the CA IOUs commented that DOE should instead consider the publication of an addendum to ASHRAE Standard 90.1 as the triggering event. In response to the CA IOUs, DOE has determined that the benefit of a clear review cycle provides certainty to the public and does not impact DOE's separate obligation under EPCA to periodically review standards and test procedures, which should alleviate some of the CA IOUs concern over the possibility of extended compliance dates.

With respect to NEEA's request that DOE clarify in the regulatory text that addendums to ASHRAE 90.1 or updates to an industry TP that ASHRAE 90.1 references do not trigger a DOE review of ECS and TP, DOE notes that it was already articulated in the regulatory text with respect to standards, but DOE has included similar language in the regulatory text with respect to test procedures, consistent with the proposal in the NOPR preamble. With respect to the CA IOUs request that DOE clarify what degree of change to an industry test procedure would trigger DOE to act, DOE would only be triggered by ASHRAE updating its reference to an updated industry test procedure that contains modifications to sections of relevance to DOE metrics. Where the referenced industry test procedure makes minor modifications to a section of relevance to DOE metrics, DOE would only consider itself triggered if such modifications make a substantive change to the DOE test procedure.

With respect to DOE's proposal to clarify that ASHRAE's review and reaffirmance (*i.e.*, not amending) of either a standard or test procedure does not trigger a DOE review or affect the timing of DOE's separate obligation under EPCA, the Joint

Industry Commenters stated that if ASHRAE 90.1 is amended just with respect to the energy conservation standard for an ASHRAE equipment, they would still expect DOE to conduct a "short test procedure rulemaking to simply acknowledge the continued applicability of the test procedure." DOE disagrees with the Joint Industry Commenters. DOE's rulemaking obligations under the ASHRAE provisions in EPCA are very clear. Further, as clarified in this final rule, the requirements for test procedure and standards rulemakings are separate. Being required to initiate an energy conservation standards rulemaking for ASHRAE equipment under either an ASHRAE trigger or a 6-year lookback review, does not, on its own, require DOE to also conduct a test procedure rulemaking. As such, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 9 of appendix A to remove language that suggests that ASHRAE not acting to amend a standard is a decision affirming the current standard. However, DOE is not finalizing the language from the July 2021 NOPR that stated that DOE's obligations under the lookback provisions for standards and test procedures are not satisfied by any ASHRAE action, including reviewing, but not amending, a standard or test procedure. DOE believes the statute is already sufficiently clear on this point and the added text is unnecessary.

With respect to DOE's proposed elimination of the language characterizing the circumstances under which the Department would not adopt the ASHRAE levels or test procedure as being very limited, commenters, both in favor of and opposed to retaining this language, seem to think this language implies something more than what is written in the statute. EPCA specifies the circumstances under which DOE will adopt a more-stringent standard than the ASHRAE standard or a different test procedure. For example, DOE will issue a more-stringent standard than the ASHRAE standard if DOE determines, supported by clear and convincing evidence, that the more-stringent standard would result in significant additional conservation of energy and is technologically feasible and

economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II)) DOE agrees with commenters that adding a vague description to these circumstances only raises concerns that DOE may not be properly following a process that is clearly laid out in the statute.

Similarly, the discussion of what constitutes clear and convincing evidence that was added in the February 2020 Final Rule has led to some confusion over whether DOE is applying the clear and convincing evidence threshold required by EPCA or a modified version. Accordingly, for the reasons discussed in the July 2021 NOPR and this document, DOE is revising section 9 of appendix A to remove this language as proposed.

DOE disagrees with Lennox's assertion that DOE should rarely deviate from industry test procedure metrics due to their view that the 7-year lookback requires "clear and convincing evidence" to deviate from industry test procedure. Lennox asserts that a reference in 42 U.S.C. 6314(a)(1) – the 7-year lookback provision - to "in accordance with this section" references the entirety of section 42 U.S.C. 6314, including the clear and convincing provision in 42 U.S.C. 6314(4) – the ASHRAE trigger provision. However, a plain language reading does not include this requirement; paragraph (a)(4) of section 6314 is very specific to the ASHRAE trigger; had it been intended for this paragraph to apply to the 7 year lookback as well, it would have been cited specifically, just as the 6 year lookback provision for energy conservation standards in 42 U.S.C. 6313(6)(C) refer back specifically to the ASHRAE trigger provisions in 42 U.S.C. 6313(6)(A) and (B).

During its 7-year lookback review, DOE is directed by EPCA to evaluate whether an amended test procedure would more accurately or fully comply with the representativeness and burden requirements in 42 U.S.C. 6314(a)(2), and if DOE determines an amended test procedure would do so, then DOE is required to prescribe such test procedures for the equipment class. (42 U.S.C. 6314(a)(1)(A)) There is no

requirement that DOE's decision to amend a test procedure be supported by clear and convincing evidence. (*Id*.) DOE's 7-year-lookback review under EPCA ensures that DOE is not bound to an industry test procedure that has not been updated when more representative and/or less burdensome test methods are available.

DOE notes that in proposing modifications to the regulatory text for the ASHRAE Equipment section, DOE inadvertently introduced the "clear and convincing" language to the test procedure lookback rulemaking provision. Nowhere in the preamble did DOE state that it intended for this to be the requirement or that it was DOE's interpretation of EPCA. For the reasons discussed above, DOE has removed that clause in this final rule.

Finally, as noted in the July 2021 NOPR, application of the ASHRAE provisions in EPCA typically involve nuances that are not best addressed in appendix A, which contains generally applicable procedures, interpretations, and policies for energy conservation standard and test procedure rulemakings. 86 FR 35668, 35675. DOE received several comments in response to the July 2021 NOPR that further reinforce the need for additional, more-specific guidance on DOE's implementation of the ASHRAE provisions. DOE believes this is best accomplished outside the confines of appendix A in a separate process. As such, DOE is not finalizing proposed revisions from the July 2021 NOPR dealing with regulated metrics, the baseline for energy conservation standards analysis, adoption of industry test procedure sections not relevant to the DOE test procedure, and consistency with the industry TP in this final rule. DOE will further consider these proposals and other ASHRAE-related issues in a separate process.

E. Analytical Methodology

In late 2019, DOE contracted with the National Academy of Sciences ("NAS") to conduct a peer review of the Department's methods for setting building and equipment

performance standards.[11] As such, in the February 2020 Process Rule, DOE stated that it would consider changes to sections of the Process Rule involving its analytical methodologies in a subsequent proceeding after completion of a peer review. 85 FR 8686-8687. As such, these sections remained largely unchanged from the July 1996 Final Rule. However, when DOE began to consider revisions to appendix A in early 2021, the NAS peer review process was still ongoing without a definitive completion date. At that point, DOE decided that the benefits of updating the analytical methodology in the July 1996 Final Rule to reflect the Department's current practice, which incorporates lessons learned from an additional 25 years of rulemakings, outweighed the potential inefficiency of having to amend these methods again in a subsequent proceeding. As a result, in the July 2021 NOPR, DOE proposed to revise appendix A to reflect the current state of DOE's analytical methodologies. DOE also stated that if it makes any revisions to its analytical methods based on the NAS peer review, the Department will propose any necessary corresponding revisions to the Process Rule in a subsequent proceeding. 86 FR 35668, 35677.

DOE has since had cause to reconsider this position. First, in response to the July 2021 NOPR, DOE received numerous comments from stakeholders that the Department should wait to revise its analytical methodologies until the NAS has completed its peer review. (*See, e.g.,* Carrier, No. 54 at p. 4; Lutron, No. 64 at p. 4; GEA, No. 72 at p. 4; Joint Industry Commenters, No. 62 at pp. 10-11) Second, the NAS completed the peer review and published their report on January 7, 2022.[12] In light of these two factors, DOE has decided not to finalize any revisions to its analytical methodologies in this document. Instead, DOE will consider changes to its methodologies in a separate notice-

[11] More information on the NAS peer review, including the final report, is available at *https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards*.

[12] *Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards*. The National Academies Press (2021). Available at *www.nap.edu/catalog/25992/review-of-methods-used-by-the-us-department-of-energy-in-setting-appliance-and-equipment-standards*.

and-comment process that is informed by the results of the NAS Report.

F. Other Topics

In addition to the topics covered in this document, DOE also received a number of other comments on topics not covered in the July 2021 NOPR. For instance, DOE received a number of comments on issues discussed in the April 2021 NOPR, *e.g.*, whether appendix A should be binding. DOE is not addressing these comments in this document as those proposals were finalized in the December 2021 Final Rule.

DOE also received comment on its adherence to EPCA's directive that any new or amended energy conservation standard prescribed by the DOE must be designed to achieve the maximum improvement in energy efficiency, which the Secretary determines is technologically feasible and economically justified, and DOE's application of the associated statutory factors. (*See* 42 U.S.C. 6295(o)(2)(A) and (B)(i)(I)-(IV); 42 U.S.C. 6316(a))

The Joint Commenters urged DOE to retain its current practices of analyzing all relevant statutory factors when selecting a final standard rather than focusing sequentially on any one or any specific set of factors. They also suggested that when analyzing whether a potential standard level is economically justified, DOE should continue to use only the economic results to end consumers since, in their view, this is the clear intent of the relevant statutes and end consumer economics should be the sole criterion in determining economic justification. The commenters noted that DOE's national economic and related impact analyses are not measures of end consumer economics and should never be used as a substitute (or supersede) the end customer analysis. (Joint Industry Commenters, No. 62 at p. 13)

The Joint Industry Commenters stated that they would object to DOE's use of the Social Cost of Carbon and other calculations of the monetary value of avoided greenhouse gas emissions being included in DOE's analysis of the factors under EPCA.

The commenters asserted that such an approach would be inappropriate under EPCA since the scientific and economic knowledge continues to evolve rapidly as to the contribution of carbon dioxide and other greenhouse gases to changes in the future global climate. They argued that while it may be acceptable for DOE to examine these values as informational (so long as the underlying interagency analysis is transparent and vigorous), the emissions reductions analysis should not impact the trial standard level that DOE selects as a new or amended standard. (Joint Industry Commenters, No. 62 at pp. 13-14)

AHRI asserted that EPCA was intended to focus on energy efficiency, energy costs, and energy savings in the United States. It argued that none of the seven factors[13] that DOE must consider when evaluating whether a potential standard is economically justified focuses on the monetary value of the avoided emissions of greenhouse gases or other air pollutants. It added that Congress' inclusion of the first six factors individually was evidence of its view that these first six factors were significantly important and drive the energy standards analysis. AHRI further asserted that in spite of numerous amendments to EPCA, Congress never included greenhouse gas emissions as a pertinent factor for DOE to consider. AHRI stated that the monetary impacts of avoided greenhouse gas emissions should only be used for informational purposes rather than given any weight as part of DOE's cost-benefit analysis – and DOE should not use its

[13] EPCA states that in determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering- (I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard; (II) the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard; (III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard; (IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard; (V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (VI) the need for national energy and water conservation; and (VII) other factors the Secretary considers relevant. (42 U.S.C. 6295(o)(2(B)(i)(I)-(VII); 42 U.S.C. 6316(a))

limited resources to conduct an analysis of avoiding these emissions (or the social cost of carbon) when setting efficiency levels. (AHRI, No. 56 at 2-3)

Specifically with respect to ASHRAE equipment, ASHRAE cautioned DOE from going beyond the efficiency standards in Standard 90.1 by overly depending upon factors not explicitly named in the so-called "7 Factor Test", stating that ASHRAE supports greenhouse gas reductions but noting that almost any higher standard could be "economically justified" by using factors such as monetizing avoided emissions. ASHRAE stated that such monetization should be produced but not overly relied upon in its determination of whether a standard is economically justified. (ASHRAE, No. 59 at p. 5)

AHRI also argued that to the extent DOE calculates greenhouse gas emissions associated with potential standards for informational purposes, the emission increases from other social equity factors must also be considered. AHRI asserted that these other factors have significant impacts on greenhouse gas emissions because new standards that increase the cost of covered equipment result in underserved rural and urban households and small businesses to continue using old, inefficient, and leaky equipment – thereby allowing high global warming potential refrigerants to be released into the atmosphere. (AHRI, No. 56 at p. 3)

IPI commented that DOE should revise its rulemaking approach to ensure the consistent and meaningful consideration of all important effects to the environment, public health, consumers, and energy security, including indoor air quality and toxic air and water pollution. Such significant impacts, including both upstream and downstream emissions, should be considered during—not after—the evaluation of whether standards are economically justified. (IPI, No. 68 (Attachment at pp. 1 and 7-8))

As noted, under EPCA, any new or amended standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible

and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6316(a)) To ensure that DOE meets this statutory mandate, DOE employs a walk-down process to select energy conservation standard levels. As a first step in the process, DOE screens out technologies for improving energy efficiency that are not feasible. DOE then uses the remaining technologies to create a range of TSLs. Beginning with the max-tech TSL, DOE then determines whether a specific TSL is economically justified. In making that determination, DOE determines, after reviewing public comments and data, whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven factors described in 42 U.S.C. 6295(o)(2)(B)(i). (*See also* 42 U.S.C. 6313(a)(6)(B)(ii) (applying the seven factors to ASHRAE equipment); 42 U.S.C. 6316(a) (applying the seven factors to non-ASHRAE equipment))

If DOE determines that the max-tech TSL is economically justified, the analysis ends, and DOE adopts the max-tech TSL as the new or amended standard. However, if DOE determines that the max-tech TSL is not economically justified, DOE walks down to consider the next-most-stringent TSL. This walkdown process continues until DOE determines that a TSL is economically justified or that none of the TSLs are economically justified.

DOE maintains 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, which is one of the factors to consider under EPCA. (42 U.S.C. 6295(o)(2)(B)(i)(VI); *Zero Zone, Inc. v. United States* DOE, 832 F.3d 654, 677 (7th Cir. 2016) (holding that, under 42 U.S.C. (o)(2)(B)(i)(VI), DOE has "the authority under EPCA to consider the reduction in" the social cost of greenhouse gasses)).

The Advocacy Groups provided comment on certain apparent inconsistencies and inaccuracies in sections 6 and 7. The Advocacy Groups noted that the text of section 6(a)(4)(ii) indicates that DOE and its contractors will perform engineering and life-cycle

cost analyses of the design options and section 6(a)(4)(v) similarly refers to life-cycle cost analysis of design options. The Advocacy Groups commented that DOE does not perform life-cycle cost analyses of design option but of efficiency levels. Similarly, they also noted that section 7(c)(1) refers to the analysis of design options, which they emphasized DOE does not perform – rather, DOE's analysis is performed on efficiency levels. The Advocacy Group suggested that DOE make changes to reflect this practice. The Advocacy Groups also stated that the current text of section 7(b)(1), which notes that technologies not incorporated into commercial products or in commercially viable, existing prototypes will not be considered further, is inconsistent with DOE's practice of screening out design options which are not incorporated in commercial products or in working prototypes. They commented that DOE evaluates a "max-tech" level (maximum technologically feasible level) regardless of cost and that DOE cannot screen out a design option on the basis of cost, which are separately considered as part of the selection of standard levels. The Advocacy Groups further added that while section 7(c)(3) says that efficiency levels will be identified in pre-NOPR documents, DOE does not always identify efficiency levels in its pre-NOPR documents. (Advocacy Groups, No. 70 at pp. 5-6)

Regarding the Advocacy Groups' comments, DOE will address them as part of the separate notice-and-comment process addressing DOE's rulemaking methodology.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866,13563, and 14094

Executive Order ("E.O.") 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), as supplemented and reaffirmed by E.O. 13563, "Improving Regulation and Regulatory Review," 76 FR 3821 (Jan. 21, 2011) and E.O. 14094, "Modernizing Regulatory Review," 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to: (1) propose or adopt a regulation only upon a reasoned

determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB") has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in this preamble, this final regulatory action is consistent with these principles.

This regulatory action is a significant regulatory action under section 3(f)(4) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was subject to review under the Executive order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

The revisions contained in this regulatory action are procedural changes designed to improve DOE's ability to meet its rulemaking obligations and deadlines under EPCA. These revisions would not impose any regulatory costs or burdens on stakeholders, nor

would they limit public participation in DOE's rulemaking process. Instead, these revisions would allow DOE to tailor its rulemaking processes to fit the facts and circumstances of a particular rulemaking for a covered product or equipment.

DOE currently 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 (for both energy conservation standards and test procedures) at any one time. Further, these rulemakings are all subject to statutory or other deadlines. Typically, review cycles for energy conservation standards and test procedures for covered products are 6 and 7 years, respectively. (42 U.S.C. 6295(m)(1); 42 U.S.C 6293(b)(1)) Additionally, if DOE decides not to amend an energy conservation standard for a covered product, the subsequent review cycle is shortened to 3 years. (42 U.S.C. 6295(m)(3)(B)) It is challenging to meet these cyclical deadlines for more than 60 categories of covered products and equipment. In fact, as previously discussed, DOE is faced two lawsuits that allege DOE has failed to meet rulemaking deadlines for 25 different consumer products and commercial equipment.[14]

In order to meet these rulemaking deadlines, DOE cannot afford the inefficiencies that come with a one-size-fits-all rulemaking approach. For example, having to issue an early assessment RFI followed by an ANOPR to collect early stakeholder input when a NODA or other pre-rule document would accomplish the same purpose unnecessarily lengthens the rulemaking process and wastes limited DOE resources. Similarly, having to identify any necessary modifications to a test procedure prior to initiating an energy conservation standard rulemaking makes it more difficult for DOE to meet rulemaking deadlines, while offering little to no benefit to stakeholders.

[14] Consent Decree, *NRDC v. DOE*, No.: 20-cv-9127 (S.D.N.Y. Sept. 20, 2022).

The revisions in this document would allow DOE to eliminate these types of inefficiencies that lengthen the rulemaking process and waste DOE resources, while not affecting the ability of the public to participate in the rulemaking process. Eliminating inefficiencies that lengthen the rulemaking process allows DOE to more quickly develop energy conservation standards that deliver the environmental benefits, including reductions in greenhouse gas emissions, that DOE is directed to pursue under E.O. 13990. Further, the sooner new or amended energy conservation standards eliminate less-efficient covered products and equipment from the market, the greater the resulting energy savings and environmental benefits.

Finally, the revisions in this document would not dictate any particular rulemaking outcome in an energy conservation standard or test procedure rulemaking. DOE will continue to calculate the regulatory costs and benefits of new and amended energy conservation standards and test procedures issued under EPCA in future, individual rulemakings.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq*., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered

during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website at: *www.energy.gov/gc/office-general-counsel*.

This final rule details generally applicable guidance that may guide, but not bind, the Department's rulemaking process. The revisions in this rule are intended to improve DOE's ability to meet the obligations and deadlines outlined in EPCA by allowing DOE to tailor its rulemaking procedures to fit the specific facts and circumstances of a particular covered product or equipment, while not affecting the ability of any interested person, including small entities, to participate in DOE's rulemaking process. Because this rule imposes no regulatory obligations on the public, including small entities, and does not affect the ability of any interested person, including small entities, to participate in DOE's rulemaking process, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no final regulatory flexibility analysis is required. *Mid-Tex Elec. Cooperative, Inc. v. F.E.R.C.*, 773 F.2d 327 (D.C. Cir. 1985).

C. Review Under the Paperwork Reduction Act of 1995

DOE is not amending its existing information collections through this rule. Under existing provisions, manufacturers of covered products/equipment must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This

requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Specifically, this rule, in addressing clarifications to DOE's guidance regarding its process for amending and establishing energy conservation standards and related test procedures set out in 10 CFR part 430, subpart C, appendix A, does not contain any collection of information requirement that would trigger the PRA.

D. Review Under the National Environmental Policy Act of 1969

DOE has analyzed this regulation in accordance with the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A, categorical exclusion A5. DOE's regulations include a categorical exclusion for rulemakings that are strictly procedural. 10 CFR part 1021, subpart D, appendix A, categorical exclusion A6. DOE has completed the necessary review under NEPA and has determined that this rulemaking qualifies for categorical exclusion A5 and A6 because it is amending a rule and because it is a procedural rulemaking, it does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It will primarily affect the procedure by which DOE develops proposed rules to revise energy conservation standards and test procedures. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a

general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531)) For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by

elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at *www.energy.gov/gc/office-general-counsel* under "Guidance & Opinions" (Rulemaking)) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. When developing a Family Policymaking Assessment, agencies must assess whether: (1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and whether (7) the action establishes an implicit or explicit policy concerning the relationship between the

behavior and personal responsibility of youth, and the norms of society. In evaluating the above factors, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment as none of the above factors are implicated. Further, this rule would not have any impact on the autonomy or integrity of the family as an institution.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply,

distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, which makes clarifications to the Process Rule that guides the Department in proposing energy conservation standards is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this final rule.

L. Review Consistent with OMB's Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." *Id.* at 70 FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared

a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The "Energy Conservation Standards Rulemaking Peer Review Report," dated February 2007, has been disseminated and is available at the following website: *www.energy.gov/eere/buildings/peer-review*. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. As discussed, DOE is in the process of evaluating the resulting report.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses, Test procedures.

Signing Authority

This document of the Department of Energy was signed on March 29, 2024, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That

document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on March 29, 2024.

Treena V. Garrett,
Federal Register Liaison Officer,
U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291-6309; 28 U.S.C. 2461 note.

2. Amend appendix A to subpart C of part 430 by revising sections 5, 6, 8, and 9 to read as follows:

Appendix A to Subpart C of Part 430—Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Certain Commercial/Industrial Equipment

* * * * *

5. Coverage Determination Rulemakings

DOE has discretion to conduct proceedings to determine whether additional consumer products and commercial/industrial equipment should be covered under EPCA if certain statutory criteria are met. (42 U.S.C. 6292(b) and 42 U.S.C. 6295(l) for

consumer products; 42 U.S.C. 6312(b) for commercial/industrial equipment). This section describes the process to be used in establishing coverage for consumer products and commercial/industrial equipment.

(a) *Pre-notice of proposed rulemaking ("NOPR") stage.* In determining whether to consider establishing coverage for a consumer product or commercial/industrial equipment, DOE may publish one or more preliminary documents in the *Federal Register* intended to gather information on key issues. Such document(s) will be published in the *Federal Register*, with accompanying documents referenced and posted in the appropriate docket.

(b) *NOPR stage*. If DOE determines to proceed with a coverage determination process, the Department will publish a notice of proposed determination, providing an opportunity for public comment of not less than 60 days, in which DOE will explain how such products/equipment that it seeks to designate as "covered" meet the statutory criteria for coverage and why such coverage is "necessary or appropriate" to carry out the purposes of EPCA. In the case of commercial equipment, DOE will follow the same process, except that the Department must demonstrate that coverage of the equipment type is "necessary" to carry out the purposes of EPCA.

(c) *Final rule*. DOE will publish a final rule in the *Federal Register* that establishes the scope of coverage for the product/equipment, responds to public comments received on the NOPR, and explains how inclusion of the newly covered product/equipment meets the statutory criteria for coverage and why such coverage is necessary or appropriate to carry out the purposes of EPCA. DOE will finalize coverage for a product/equipment prior to publication of a proposed rule to establish a test procedure.

(d) *Scope of coverage revisions*. If, during the substantive rulemaking proceedings to establish test procedures or energy conservation standards after

completing a coverage determination, DOE finds it necessary and appropriate to amend the scope of coverage, DOE will propose an amended coverage determination and finalize coverage prior to moving forward with the test procedure or standards rulemaking.

6. Process for Developing Energy Conservation Standards

This section describes the process to be used in developing energy conservation standards for covered products and equipment other than those covered equipment subject to ASHRAE/IES Standard 90.1.

(a) *Pre-NOPR stage*—(1) *General*. In determining whether to consider establishing or amending any energy conservation standard, DOE will publish one or more preliminary, pre-NOPR documents in the *Federal Register* intended to gather information on key issues. Such document(s) could take several forms depending upon the specific proceeding, including a framework document, request for information (RFI), notice of data availability (NODA), preliminary analysis, or advance notice of proposed rulemaking (ANOPR). Such document(s) will be published in the *Federal Register*, with any accompanying documents referenced and posted in the appropriate docket.

(2) *Satisfaction of statutory criteria*. As part of such pre-NOPR-stage document(s), DOE will solicit submission of comments, data, and information on whether DOE should proceed with the rulemaking, including whether any new or amended rule would satisfy the relevant statutory criteria to be cost-effective, economically justified, technologically feasible, and result in a significant savings of energy. Based on the information received in response to such request and its own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended energy conservation standard. If DOE determines at any point in the pre-NOPR stage that no candidate standard level for a new or amended standard is likely to satisfy all of the applicable statutory criteria (*i.e.*, to be technologically feasible and

economically justified and result in significant energy savings), DOE will announce that conclusion in the *Federal Register* and proceed with notice-and-comment rulemaking that proposes a determination not to adopt new or amended standards. DOE notes that it will, consistent with its statutory obligations, consider both cost effectiveness and economic justification when issuing a determination not to amend a standard. If DOE receives sufficient information suggesting it could justify a new or amended standard or the information received is inconclusive with regard to the statutory criteria, DOE will move forward with the rulemaking to issue or amend an energy conservation standard. In those instances where the available information either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, and DOE undertakes a rulemaking to establish or amend an energy conservation standard, DOE may still ultimately determine that such a standard is not economically justified, technologically feasible or would not result in a significant savings of energy at a later stage of the rulemaking.

(3) *Design options*—(i) *General.* Once the Department has initiated a rulemaking for a specific product/equipment but before publishing a proposed rule to establish or amend standards, DOE will typically identify the product/equipment categories and design options to be analyzed in detail, as well as those design options to be eliminated from further consideration. During the pre-NOPR stage of the rulemaking, interested parties may be consulted to provide information on key issues, including potential design options, through a variety of rulemaking documents.

(ii) *Identification and screening of design options.* During the pre-NOPR phase of the rulemaking process, the Department will typically develop a list of design options for consideration. Initially, the candidate design options will encompass all those technologies considered to be technologically feasible. Following the development of this initial list of design options, DOE will review each design option based on the factors

described in paragraph (a)(3)(iii) of this section and the policies stated in section 7 of this appendix (*i.e.,* Policies on Selection of Standards). The reasons for eliminating or retaining any design option at this stage of the process will be fully documented and published as part of the NOPR and as appropriate for a given rule, in the pre-NOPR document(s). The technologically feasible design options that are not eliminated in this screening analysis will be considered further in the Engineering Analysis described in paragraph (a)(4) of this section.

(iii) *Factors for screening of design options.* The factors for screening design options include:

(A) *Technological feasibility.* Technologies incorporated in commercial products (or equipment) or in working prototypes will be considered technologically feasible.

(B) *Practicability to manufacture, install and service*. If mass production of a technology under consideration for use in commercially-available products (or equipment) and reliable installation and servicing of the technology could be achieved on the scale necessary to serve the relevant market at the time of the effective date of the standard, then that technology will be considered practicable to manufacture, install, and service.

(C) Adverse impacts on product utility or product availability.

(D) Adverse impacts on health or safety.

(E) *Unique-pathway proprietary technologies.* If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further.

(4) *Engineering analysis of design options and selection of candidate standard levels.* 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. The results of the analyses will be published in a Technical Support Document (TSD) to accompany the appropriate rulemaking documents.

(i) *Identification of engineering analytical methods and tools.* DOE will select the specific engineering analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the design options identified as a result of the screening analysis.

(ii) *Engineering and life-cycle cost analysis of design options.* DOE and its contractors will perform engineering and life-cycle cost analyses of the design options.

(iii) *Review by stakeholders.* Interested parties will have the opportunity to review the results of the engineering and life-cycle cost analyses. If appropriate, a public workshop will be conducted to review these results. The analyses will be revised as appropriate on the basis of this input.

(iv) *New information relating to the factors used for screening design options.* If further information or analysis leads to a determination that a design option, or a combination of design options, has unacceptable impacts, that design option or combination of design options will not be included in a candidate standard level.

(v) *Selection of candidate standard levels.* 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.

(5) *Analysis of impacts and selection of proposed standard level.* If DOE has determined preliminarily that a candidate standard level is likely to produce the maximum improvement in energy efficiency that is both technologically feasible and economically justified and constitutes significant energy savings, economic analyses of the impacts of the candidate standard levels will be conducted. The Department will

propose new or amended standards in a subsequent NOPR based on the results of the impact analysis.

(i) *Identification of issues for analysis.* The Department, in consideration of comments received, will identify issues that will be examined in the impacts analysis.

(ii) *Identification of analytical methods and tools.* DOE will select the specific economic analysis tools (or multiple tools, if necessary, to address uncertainty) to be used in the analysis of the candidate standard levels.

(iii) *Analysis of impacts.* DOE will conduct the analysis of the impacts of candidate standard levels.

(iv) *Factors to be considered in selecting a proposed standard.* The factors to be considered in selection of a proposed standard include:

(A) *Impacts on manufacturers.* The analysis of manufacturer impacts will include: Estimated impacts on cash flow; assessment of impacts on manufacturers of specific categories of products/equipment and small manufacturers; assessment of impacts on manufacturers of multiple product-specific Federal regulatory requirements, including efficiency standards for other products and regulations of other agencies; and impacts on manufacturing capacity, employment, and capital investment.

(B) *Private impacts on consumers.* The analysis of consumer impacts will include: Estimated private energy savings impacts on consumers based on regional average energy prices and energy usage; assessments of the variability of impacts on subgroups of consumers based on major regional differences in usage or energy prices and significant variations in installation costs or performance; consideration of changes to product utility, changes to purchase rate and/or costs of products, and other impacts of likely concern to all or some consumers, based to the extent practicable on direct input from consumers; estimated life-cycle cost with sensitivity analysis; and consideration of

the increased first cost to consumers and the time required for energy cost savings to pay back these first costs.

(C) Impacts on competition, including industry concentration analysis.

(D) *Impacts on utilities.* The analysis of utility impacts will include estimated marginal impacts on electric and gas utility generation and capacity.

(E) *National energy, economic, and employment impacts.* The analysis of national energy, economic, and employment impacts will include: estimated energy savings by fuel type; estimated net present value of benefits to all consumers; sensitivity analyses using high and low discount rates reflecting both private transactions and social discount rates and high and low energy price forecasts; and estimates of the direct and indirect impacts on employment by appliance manufacturers, relevant service industries, energy suppliers, suppliers of complementary and substitution products, and the economy in general.

(F) *Impacts on the environment.* The analysis of environmental impacts will include estimated impacts on emissions of carbon and relevant criteria pollutants.

(G) *Impacts of non-regulatory approaches.* The analysis of energy savings and consumer impacts will incorporate an assessment of the impacts of market forces and existing voluntary programs in promoting product/equipment efficiency, usage, and related characteristics in the absence of updated efficiency standards.

(H) New information relating to the factors used for screening design options.

(6) *Public comment and hearing.* The length of the public comment period for pre-NOPR rulemaking documents will be determined on a case-by-case basis and may vary depending upon the circumstances of the particular rulemaking. For pre-NOPR documents, DOE will determine whether a public hearing is appropriate.

(7) *Revisions based on comments.* Based on consideration of the comments received, any necessary changes to the engineering analysis, life-cycle cost analysis, or the candidate standard levels will be made.

(b) *NOPR stage*—(1) *Documentation of decisions on proposed standard selection.* The Department will publish a NOPR in the *Federal Register* that proposes standard levels and explains the basis for the selection of those proposed levels, and DOE will post on its website a draft TSD documenting the analysis of impacts. The draft TSD will also be posted in the appropriate docket at *www.regulations.gov.* As required by 42 U.S.C. 6295(p)(1) of EPCA, the NOPR also will describe the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards.

(2) *Public comment and hearing.* There will be not less than 60 days for public comment on the NOPR, with at least one public hearing or workshop. (42 U.S.C. 6295(p)(2) and 42 U.S.C. 6306)

(3) *Revisions to impact analyses and selection of final standard.* Based on the public comments received, DOE will review the proposed standard and impact analyses, and make modifications as necessary. If major changes to the analyses are required at this stage, DOE will publish a supplemental notice of proposed rulemaking (SNOPR), when required. DOE may also publish a NODA or RFI, where appropriate.

(c) *Final rule stage.* The Department will publish a final rule in the *Federal Register* that promulgates standard levels, responds to public comments received on the NOPR (and SNOPR if applicable), and explains how the selection of those standards meets the statutory requirement that any new or amended energy conservation standard produces the maximum improvement in energy efficiency that is both technologically

feasible and economically justified and constitutes significant energy savings, accompanied by a final TSD.

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8. Test Procedures

(a) *Pre-NOPR stage*—(1) *General*. In determining whether to consider establishing or amending any test procedure, DOE will publish one or more preliminary documents in the *Federal Register* (*e.g.*, an RFI or NODA) intended to gather information on key issues.

(2) *Satisfaction of statutory criteria*. As part of such document(s), DOE will solicit submission of comments, data, and information on whether DOE should proceed with the rulemaking, including whether: a new test procedure would satisfy the relevant statutory criteria that test procedures be reasonably designed to produce test results which measure energy efficiency, energy use, water use (in the case of showerheads, faucets, water closets and urinals), or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary, and shall not be unduly burdensome to conduct; or an amended test procedure would more fully or accurately comply with the aforementioned statutory criteria. Based on the information received in response to such request and its own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended test procedure.

(3) If DOE determines that a new or amended test procedure would not satisfy the applicable statutory criteria, DOE will engage in notice-and-comment rulemaking to issue a determination that a new or amended test procedure is not warranted.

(4) If DOE receives sufficient information suggesting a new or amended test procedure may satisfy the applicable statutory criteria or the information received is

inconclusive with regard to the statutory criteria, DOE will move forward with the rulemaking to issue or amend a test procedure.

(5) In those instances where the available information either suggested that a new or amended test procedure might be warranted or in which the information was inconclusive on this point, and DOE undertakes a rulemaking to establish or amend a test procedure, DOE may still ultimately determine that such a test procedure does not satisfy the applicable statutory criteria at a later stage of the rulemaking.

(6) *Public comment and hearing.* The length of the public comment period for pre-NOPR rulemaking documents will be determined on a case-by-case basis and may vary depending upon the circumstances of the particular rulemaking. For pre-NOPR documents, DOE will determine whether a public hearing is appropriate.

(b) *NOPR stage*—(1) *Documentation of decisions on proposed test procedure.* The Department will publish a NOPR in the *Federal Register* that proposes a new or amended test procedure and explains how the test procedure satisfies the applicable statutory criteria.

(2) *Public comment and hearing.* There will be not less than 60 days for public comment on the NOPR, with at least one public hearing or workshop. (42 U.S.C. 6293(b)(2) and 42 U.S.C. 6306)

(3) *Revisions to the analyses and establishment of a final test procedure.* Based on the public comments received, DOE will review the proposed test procedure, and make modifications as necessary. As part of this process, DOE may issue an RFI, NODA, SNOPR, or other rulemaking document, as appropriate.

(c) *Final rule stage.* The Department will publish a final rule in the *Federal Register* that establishes or amends a test procedure, responds to public comments received on the NOPR (and any subsequent rulemaking documents), and explains how the new or amended test procedure meets the applicable statutory requirements.

(d) *Adoption of industry test methods*. DOE will adopt industry test procedure standards as DOE test procedures for covered products and equipment, but only if DOE determines that such procedures would not be unduly burdensome to conduct and would produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that equipment during a representative average use cycle. DOE may also 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.

(e) *Issuing final test procedure*—(1) *Process*. Test procedure rulemakings establishing methodologies used to evaluate proposed energy conservation standards will be finalized prior to publication of a NOPR proposing new or amended energy conservation standards. Except as provided in paragraph (e)(2) of this section, new test procedures and amended test procedures that impact measured energy use or efficiency will be finalized at least 180 days prior to the close of the comment period for:

(i) A NOPR proposing new or amended energy conservation standards; or

(ii) A notice of proposed determination that standards do not need to be amended.

With regards to amended test procedures, DOE will state in the test procedure final rule whether the amendments impact measured energy use or efficiency.

(2) *Exceptions.* The 180-day period for new test procedures and amended test procedures that impact measured energy use or efficiency specified in paragraph (e)(1) of this section is not applicable to:

(i) Test procedures developed in accordance with the Negotiated Rulemaking Act or by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary; or

(ii) Test procedure amendments limited to calculation changes (*e.g.*, use factor or adder). Parties submitting a consensus recommendation in accordance with paragraph (e)(2)(i) of this section may specify a time period between finalization of the test procedure and the close of the comment for a NOPR proposing new or amended energy conservation standards or a notice of proposed determination that standards do not need to be amended.

(f) *Effective date of test procedures*. If required only for the evaluation and issuance of updated efficiency standards, use of the modified test procedures typically will not be required until the implementation date of updated standards.

9. ASHRAE Equipment

EPCA provides unique statutory requirements and a specific set of timelines for certain enumerated types of commercial and industrial equipment (generally, commercial water heaters, commercial packaged boilers, commercial air-conditioning and heating equipment, and packaged terminal air conditioners and heat pumps (*i.e.,* "ASHRAE equipment")).

(a) *ASHRAE trigger rulemakings for energy conservation standards.* Pursuant to EPCA's statutory scheme for covered ASHRAE equipment, DOE is required to consider amending the existing Federal energy conservation standards for ASHRAE equipment when ASHRAE Standard 90.1 is amended with respect to standards or design requirements applicable to such equipment.

(1) Not later than 180 days after the amendment of ASHRAE Standard 90.1, DOE will publish in the *Federal Register* for public comment an analysis of the energy savings potential of amended energy efficiency standards for the affected equipment.

(2) Not later than 18 months after the amendment of ASHRAE Standard 90.1, DOE must adopt amended energy conservation standards at the new efficiency level in ASHRAE Standard 90.1 as the uniform national standard for the affected equipment,

unless DOE determines by rule, and supported by clear and convincing evidence, that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. In such case, DOE must adopt the more-stringent standard for the affected equipment not later than 30 months after amendment of ASHRAE Standard 90.1.

(3) Regarding amendments to ASHRAE Standard 90.1 involving energy conservation standards, DOE considers an amendment of a standard level to occur when an updated version of ASHRAE Standard 90.1 publishes (*i.e.,* not at the time that an addendum to ASHRAE Standard 90.1 is released or approved). In addition, DOE considers an amendment of standard levels in ASHRAE Standard 90.1 to be only those changes resulting in an increase in stringency of standard levels relative to the current Federal standards or the adoption of a design requirement.

(b) *ASHRAE trigger rulemakings for test procedures.* Pursuant to EPCA's statutory scheme for covered ASHRAE equipment, DOE is required to consider amending the existing Federal test procedures for such equipment when ASHRAE Standard 90.1 is amended with respect to test procedures applicable to such equipment.

(1) DOE shall amend the test procedure for ASHRAE equipment, as necessary, to be consistent with the amended ASHRAE Standard 90.1, unless DOE determines by rule, and supported by clear and convincing evidence, that to do so would not meet the requirements in 42 U.S.C. 6314(a)(2)-(3), which generally provide that the test procedure must produce results which reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle and not be unduly burdensome to conduct. If DOE makes such a determination, DOE may establish an amended test procedure for such equipment that meets the requirements in 42 U.S.C. 6314(a)(2)-(3).

(2) With regard to test procedures for ASHRAE equipment, EPCA requires DOE to adopt test procedures consistent with applicable industry test standards.

(c) *ASHRAE lookback rulemakings for standards.* EPCA also requires that DOE periodically consider amending energy conservation standards for ASHRAE equipment.

(1) Every 6 years, DOE shall conduct an evaluation of each class of covered equipment. DOE shall publish either a notice of determination that standards do not need to be amended (because they would not result in significant additional conservation of energy and/or would not be technologically feasible and/or economically justified) or a notice of proposed rulemaking including new proposed standards (based on the criteria and procedures in 42 U.S.C. 6313(a)(6)(B) and supported by clear and convincing evidence).

(2) If DOE issues a notice of proposed rulemaking, it shall publish a final rule no more than 2 years later.

(3) If DOE determines that a standard does not need to be amended, not later than 3 years after such a determination, DOE must publish either a notice of determination that standards do not need to be amended (because they would not result in significant additional conservation of energy and/or would not be technologically feasible and/or economically justified) or a notice of proposed rulemaking including new proposed standards (based on the criteria and procedures in 42 U.S.C. 6313(a)(6)(B) and supported by clear and convincing evidence).

(d) *ASHRAE lookback rulemakings for test procedures.* EPCA also requires that DOE periodically consider amending test procedures for ASHRAE equipment. At least once every 7 years, DOE shall conduct an evaluation, and if DOE determines, that amended test procedures would more accurately or fully comply with the requirements in 42 U.S.C. 6314(a)(2)-(3), it shall prescribe test procedures for the applicable equipment. Otherwise, DOE shall publish a notice of determination not to amend a test procedure.

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