

**Appliance Standards Awareness Project
American Council for an Energy-Efficient Economy
California Energy Commission
Consumer Federation of America
National Consumer Law Center
National Grid
Northeast Energy Efficiency Partnerships
Northwest Energy Efficiency Alliance**

May 15, 2020

Mr. John Cymbalsky
U.S. Department of Energy
Office of Energy Efficiency and Renewable Energy
Building Technologies Office, EE-5B
1000 Independence Avenue SW.,
Washington, DC 20585-0121

RE: Docket number EERE-2020-BT-STD-0004

Dear Mr. Cymbalsky:

This letter provides input from the Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, National Consumer Law Center (on behalf of its low-income clients), National Grid, Northeast Energy Efficiency Partnerships and Northwest Energy Efficiency Alliance on the Department of Energy's (DOE) request for comment concerning prioritization of rulemakings. 85 Federal Register 20886 (April 15, 2020). We appreciate the opportunity to comment.

In the request, DOE asks for input on which rulemaking proceedings should be categorized as "active" and which as "long-term" in DOE's upcoming Spring 2020 Regulatory Agenda. As the notice explains, "active" proceedings generally have one or more regulatory steps planned for during the next year; "long-term" actions do not. The notice points commenters to the Fall 2019 Regulatory Agenda as the most recent database of agency plans.

Below, we first address the Department's statutory obligations to review standards and test procedures, DOE's growing backlog and recent increases in regulatory work. We next address rulemakings which DOE must actively work on given statutory deadlines. In the final section, we comment on DOE's discretionary rulemaking activity. We identify several rulemakings that DOE should cease because they do not advance the statute's purposes and, if finalized, would take actions that could be challenged

legally and, finally, we describe other work that would further the energy conservation purposes of the law.

DOE's mandatory review schedule, growing backlog and recent activity

Amendments to the Energy Policy and Conservation Act (EPCA) enacted on a bipartisan basis in 2007 and signed into law by President George W. Bush determine the rulemaking schedule. Under those amendments, codified at 42 U.S. Code 6295(m), "Amendment of Standards" and 6293(b), "Amended and New Procedures," DOE must conduct periodic reviews of all energy and water conservation standards and test procedures. For standards, the Department must decide at least once every six years if an improved standard is warranted. If DOE decides an amendment may make sense, it proposes one and a final rule is due within another two years. If DOE determines no change is warranted, then the next review is due three years later. For test procedures, DOE must conduct a review at least once every seven years. For a handful of products (e.g., external power supplies; walk-in coolers), the statute provides product-specific deadlines in addition to the general review schedule.

DOE is behind on an unprecedented number of legal deadlines. As of May 2020, DOE has missed 26 deadlines for standards and 21 for test procedures.¹ Deadlines for many more products are coming up within the next few years. DOE has published only five new standards since 2016, all of which were completed under the prior administration.² Based on the status of active rulemakings, DOE is unlikely to complete any additional standards updates this year.

DOE's failure to adhere to statutory deadlines is costly for consumers and the environment. An ASAP report published in 2016 estimated that the next round of updated standards could reduce consumers' utility bills by \$2 trillion by 2050 while eliminating seven billion metric tons of climate-altering CO₂ emissions.³ Missed deadlines mean that some of these potential savings are now irrevocably lost. As compliance dates for future standards are delayed, millions of needlessly wasteful products are sold and installed, locking in higher energy use, utility bills and polluting emissions for the lifetimes of those products.

These delays also have consequences for manufacturers. Rather than the steady cadence of predictable reviews and updates provided for by the law, DOE now must work on updates for virtually all products under its jurisdiction at the same time.

DOE's leadership appears to recognize that it is behind. Responding to a question about the missed deadlines before a Senate committee in March, Secretary Dan Brouillette said, "I recognize we have

¹ As a point of reference, when the current administration took office, DOE had missed legal deadlines for three energy conservation standards and four test procedures.

² DOE published one (walk-in coolers) in July 2017 and the other four in January 2020, pursuant to a court order.

³ deLaski, A., J. Mauer et al. "Next Generation Standards: How the National Energy Efficiency Standards Program Can Continue to Drive Energy, Economic, and Environmental Benefits." Appliance Standards Awareness Project and American Council for an Energy-Efficient Economy. August 2016. <https://appliance-standards.org/document/report-overview-next-generation-standards>

work to do, there's no question about that."⁴ Around the same time, Assistant Secretary Daniel Simmons reported that DOE plans to issue 34 notices related to energy conservation standards and 29 related to test procedures, "over the next six months."⁵ In recent weeks, the Department has issued notices initiating or advancing reviews for nine standards and seven test procedures. The recent notices build on a similar number of reviews initiated or advanced in 2019. We appreciate this recent progress and urge DOE to maintain it.

DOE must advance all non-discretionary rulemakings

DOE does not possess the discretion to choose selectively the legal deadlines with which it complies. When DOE has missed or is at risk of missing a deadline, the agency must make every effort to come into compliance as soon as possible.

Based on our review of the Fall 2019 Regulatory Agenda, DOE has plans to actively work on 40 energy conservation standards and 45 test procedures that are subject to legal deadlines. We appreciate these plans. Active work on all the products subject to legal deadlines identified in the Fall 2019 Regulatory Agenda must continue.

In addition, DOE categorized some other products with past-due or upcoming deadlines as long-term actions in the Fall 2019 Regulatory Agenda or failed to include them at all. The list below identifies products missing from the active category along with the legal deadline for DOE action on the energy conservation standard. In general, we recommend that DOE initiate review of the test procedure before or concurrent with the standards review process (regardless of whether the legal deadline for the test procedure review is further off). DOE must initiate work for the standard and, if not already active, the test procedure for each of these products:

- Oil furnaces and weatherized gas furnaces (June 2017)
- Furnace fans (July 2020)
- General service lamps (January 2022)⁶
- Residential boilers (January 2022)
- Miscellaneous refrigeration equipment (October 2022)
- Central air conditioners and heat pumps (January 2023)

⁴ Response to question from Senator Jeanne Shaheen during Senate Energy and Water Appropriations Subcommittee hearing, March 5, 2020.

⁵ "Management and Spending Challenges Withing the Department of Energy's Office of Energy Efficiency and Renewable Energy." Hearing before the Subcommittee on Investigations and Oversight and Subcommittee on Energy of the House Science, Space and Technology Committee. February 5, 2020. While DOE leadership has provided oral testimony describing agency plans, DOE has repeatedly missed legal deadlines for a semi-annual report to Congress on appliance standards work required under Section 141 of the Energy Policy Act of 2005. The Winter 2020 report has not yet been provided to Congress.

⁶ 42 U.S. Code 6295(i)(6)(B) requires that DOE initiate a rulemaking for general service incandescent lamps (a type of general service lamp) that also considers other lamp types by January 1, 2020 and publish a final rule by January 1, 2022. Ongoing litigation over DOE's illegal withdrawal of the 2017 general service lamp definition and failure to implement the mandatory 45 lumen per watt backstop standard on January 1, 2020 does not eliminate this obligation.

- Ceiling fans (January 2023)
- Dedicated-purpose pool pumps (January 2023)

Discretionary rulemakings

Based on previous regulatory actions, the Fall 2019 Regulatory Agenda and notices pending review at the Office of Management and Budget (OMB), the Department has several rulemakings underway that do not serve the statutory purposes of EPCA and that, if finalized, would likely be challenged legally. We urge DOE to cease work on the following six rulemakings.

- Short-cycle product class for dishwashers – As detailed in comments filed to the docket by a range of stakeholders (including dishwasher manufacturers), this rule is not necessary since short-cycle dishwashers are available today. It is also illegal since DOE would exempt such products from current standards in violation of the statute’s anti-backsliding clause.
- Non-condensing product class interpretive rule – Many of us commented in opposition to the original petition filed by gas industry interests and the DOE proposed rule. This proposed rule is both contrary to the energy conservation purpose of EPCA and anticipates product classifications that could be legally challenged.
- Revision to the “walk-down” – Comments filed to the docket show how this proposal, which would alter DOE’s process for selecting new standards, violates EPCA’s requirement that DOE adopt standards that, “achieve the *maximum* improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.” (42 U.S. Code 6295(o)(2)(A)). (*emphasis added*)
- Automatic interim test procedure waivers – Many of us as well as representatives of manufacturing interests commented in opposition to or raised serious concerns about this proposal which would undermine the integrity of DOE test procedures by automatically granting waiver requests that DOE failed to respond to within 30 days.
- Short-cycle product classes for clothes washers and dryers – DOE did not include this proposed rule in the Fall 2019 Regulatory Agenda but has decided to dedicate resources to it anyway. It is now pending review at OMB. We expect that it will be like the short-cycle dishwasher rule; it should be ceased for the same reasons.
- Showerhead definition rule – DOE also did not plan for this rule in the Fall 2019 Regulatory Agenda, but it is now under review at OMB. We are not aware of any reason DOE should be amending the showerhead definition and we are concerned that the proposed rule would needlessly and potentially illegally undermine statutory standards in place since 1992.

By abandoning these proceedings DOE would free up resources to work on its overdue statutory obligations and to work on discretionary rulemakings that would save energy. We recommend that DOE advance work on the following three discretionary dockets in the next year.

- Circulator pumps – A working group convened by DOE’s Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) completed a negotiated rulemaking and submitted a term sheet to DOE in 2016, but DOE has not acted on this consensus. DOE’s failure to act undermines the negotiated rulemaking process and forgoes cost-effective energy efficiency improvements

that have broad support. DOE should initiate test procedures and standards rulemakings to propose the recommendations from the 2016 term sheet.

- Commercial and industrial fans – DOE initiated work on fans in 2011, but this work has been stalled. DOE recently sought comment on a petition for test procedure rulemaking from the Air Movement and Control Association. DOE should advance work to propose test procedures and standards for fans.
- Pool pump replacement motors – A diverse group of stakeholders submitted a joint recommendation for DOE action on this product category in fall 2018. DOE’s proposal is now under review at OMB. We urge DOE to rapidly advance this rule.

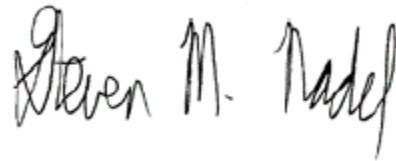
In summary, DOE must develop and implement a regulatory schedule that achieves compliance with all overdue and pending statutory deadlines. The Department should drop discretionary rulemakings that run contrary to the statutory purpose of energy conservation and that would be illegal if finalized. Finally, DOE should advance a few discretionary rulemakings that have broad consensus support.

Thank you for considering these comments.

Sincerely,



Andrew deLaski
Executive Director
Appliance Standards Awareness Project



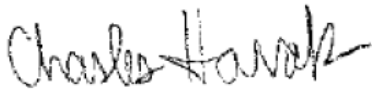
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