UNITED STATES DEPARTMENT OF ENERGY

Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products	)	**Docket No. EERE-2014-BT-STD-0049**
		Via regulations.gov
		December 30, 2014

These comments are respectfully submitted on behalf of the Natural Resources Defense Council (NRDC), the Appliance Standards Awareness Project (ASAP), the Consumer Federation of America (CFA), and the National Consumer Law Center (NCLC), on behalf of its low income clients. These organizations have long supported strong cost-effective national energy efficiency standards and have a history of working together toward that goal, including through negotiation and consensus seeking processes. Our comments respond to DOE's request for information for Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 79 Fed. Reg. 64705 (Oct. 31, 2014).

The Natural Resources Defense Council is a national nonprofit environmental organization representing 1.4 million members and online activists. NRDC uses law, science, and the support of its members to ensure a safe and healthy environment for all living things. NRDC's top institutional priority is to curb global warming and build the clean energy future. One important way to achieve these goals is to secure the social, economic, and environmental benefits for stronger national energy efficiency standards.

The Appliance Standards Awareness Project is a coalition that includes representatives of efficiency, consumer and environmental groups, utility companies, state government agencies and others. Working together, the ASAP coalition seeks to advance cost-effective standards at the national and state levels through technical and policy advocacy and through outreach and education.

The Consumer Federation of America is an association of more than 250 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

The National Consumer Law Center is a non-profit organization with a broad mission of seeking economic justice in the marketplace for low-income households. NCLC has a particular focus on making sure that low-income consumers can obtain the essential amounts of energy they need, and that their homes and appliances are as efficient as reasonably possible.

As the cheapest, cleanest, and quickest-to-implement energy policy, energy efficiency is a critical component in our national effort to meet our energy demands and climate goals, now and in the future.[1] Efficiency standards for appliances and equipment already have cost-effectively saved the United States a considerable amount of energy, lowered emissions of greenhouse gases and other

[1] Natural Resources Defense Council, *Strong U.S. Energy Efficiency Standards: Decades of Using Energy Smarter* (Dec. 8, 2014), http://www.nrdc.org/energy/appliance-energy-efficiency-standards.asp.

pollutants, and saved consumers billions of dollars, and they will continue to do so.[2] As appliances evolve and improve, new opportunities to reduce energy waste through standards will continue to emerge, eliminating the need to build additional power plants and avoiding the associated pollution.[3]

Background

In the Energy Policy Conservation Act (EPCA) of 1975, Congress directed the U.S. Department of Energy (DOE) to establish and periodically strengthen minimum energy efficiency standards for household appliances in order to save energy and lower consumer energy bills. In 1987, Congress amended the EPCA to establish national efficiency standards for certain appliances and a schedule for DOE to conduct rulemakings to periodically review and update these standards.

DOE typically prescribes energy conservation standards by informal, notice-and-comment rulemaking proceedings, consistent with the Administrative Procedure Act (APA) and the EPCA. DOE codified this process through a final rule promulgated on July 15, 1996 ("Process Improvement Rule").[4]

In February 2007, then DOE Secretary Bodman requested that Congress allow the DOE to establish energy efficiency standards through an expedited rulemaking mechanism.[5] The DOE sought to "bypass[] needless delays, when manufacturer, stakeholder, and government consensus exists" and "ultimately bring more efficient products to market sooner."[6] According to former Secretary Bodman, the mechanism would "amount to real, more immediate energy savings for Americans" and "speed up the process to put into place mandatory standards that can really help raise the bar for efficiency standards."[7]

Recognizing the need to "protect consumers" and "increase the efficiency of products," Congress amended the EPCA in 2007 through the Energy Independence and Security Act (EISA).[8] In EISA, Congress granted DOE authority to issue a direct final rule (DFR) to establish energy conservation standards.[9] A DFR is a rulemaking proceeding in which an agency issues a final rule without an opportunity for public comment. DOE may issue a DFR upon receipt of a joint proposal from a group of "interested persons that are fairly representative of relevant points of view," provided DOE determines the energy conservation standards recommended in the joint proposal conform with the requirements of 42 U.S.C. 6295(o).[10]

Simultaneous with the issuance of a DFR, DOE must issue a notice of proposed rulemaking (NOPR) containing the same energy conservation standards as in the DFR. Following publication of the DFR, DOE must solicit public comment for a period of at least 110 days; then, not later than 120 days after issuance of the DFR, the Secretary must determine whether any adverse comments "may provide a

[2] *Id.*
[3] *Id.*
[4] 61 Fed. Reg. 36,974 (July 15, 1996).
[5] U.S. Dep't of Energy, *Department of Energy Requests Fast Track Rulemaking for Implementing Energy Efficiency Standards* (Feb. 26, 2007, 10:28AM), http://energy.gov/articles/department-energy-requests-fast-track-rulemaking-implementing-energy-efficiency-standards.
[6] *Id.*
[7] *Id.*
[8] Energy Independence and Security Act of 2007, Pub. L. 110-140, 121 Stat. 1492.
[9] *Id.*
[10] 42 U.S.C. § 6295(p)(4)(A).

reasonable basis for withdrawing the DFR," based on the administrative record and pertinent statutory provisions.[11] Upon withdrawal, the Secretary must proceed with the rulemaking process under the NOPR that was issued simultaneously with the DFR and publish the reasons the DFR was withdrawn.[12] If the Secretary determines not to withdraw the DFR, it becomes effective as specified in the original issuance of the DFR.

On October 13, 2009, organizations that support energy efficiency, including NRDC and ASAP, reached agreement on consensus efficiency standards for residential central air conditioners, heat pumps, and furnaces with manufacturers and industry groups.[13] Numerous interested parties, including consumer groups, expressed support for DOE adoption of the consensus agreement in both oral and written comments on the DOE's residential furnaces and central air conditioners rulemakings.[14] On January 15, 2010, the signatories to the consensus agreement submitted a joint comment to the DOE's residential furnaces and central air conditioners and heat pumps rulemakings recommending adoption of a package of minimum energy conservation standards, as well as associated compliance dates for such standards.[15] The signatories requested that the DOE issue a DFR adopting the consensus efficiency standards for residential central air conditioners, heat pumps, and furnaces.

On June 27, 2011, DOE exercised its authority in publishing a DFR that established energy conservation standards for residential furnaces, central air conditioners, and heat pumps, including regional standards for particular types of products in specified States ("2011 DFR)".[16] In response, the American Public Gas Association (APGA) filed a petition for review in the D.C. Circuit on December 23, 2011, challenging the validity of the rule.[17] Various groups – including NRDC, the American Council for an Energy-Efficient Economy, CFA, and low-income consumer clients represented by the National Consumer Law Center – intervened in support of the respondent Department of Energy.

Subsequently, on March 11, 2014, all parties filed a joint motion that presented final terms of settlement in the litigation.[18] In the joint motion, the DOE agreed to "commence a notice and comment rulemaking proceeding to clarify its process related to direct final rules (DFRs) by publishing a request for information (RFI) in the Federal Register on that topic within 180 days after a judgment by the D.C. Circuit implementing this agreement."[19] DOE further agreed to accept comment on the RFI for 60 days, after which DOE would "evaluate the comments received and undertake a further notice and comment process to *consider amending*" the Process Improvement Rule.[20] The D.C. Circuit granted the joint motion on April 24, 2014.[21]

[11] *Id.* § 6295(p)(4)(B), (C)(i).
[12] *Id.* § 6295(p)(4)(C)(ii).
[13] 76 Fed. Reg. 37,408, 37,422 (June 27, 2011).
[14] *Id.*
[15] *Id.*
[16] 76 Fed. Reg. 37,408 (June 27, 2011).
[17] Petition for Review, American Public Gas Ass'n v. U.S. Department of Energy, et al., No. 11–1485 (D.C. Cir. Dec. 23, 2011).
[18] Joint Motion, American Public Gas Ass'n v. U.S. Department of Energy, et al., No. 11–1485 (D.C. Cir. Mar. 11, 2014).
[19] *Id.*
[20] *Id.* (emphasis added).
[21] Order, American Public Gas Ass'n v. U.S. Department of Energy, et al., No. 11–1485 (D.C. Cir. Apr. 24, 2014).

To meet its obligations under the joint motion, DOE initiated a notice-and-comment rulemaking proceeding to clarify its process related to DFRs by publishing an RFI on October 31, 2014.[22] DOE stated that it would "evaluate the comments received and undertake a further notice-and-comment process to consider amending the Process Improvement Rule to explicitly address DFRs."[23] In the RFI, DOE invited public comment on three issues: (1) when a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by "interested persons that are fairly representative of relevant points of view," thereby permitting use of the DFR mechanism; (2) the nature and extent of "adverse comments" that may provide the Secretary a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR; and (3) what constitutes the "recommended standard contained in the statement," and the scope of any resulting DFR.[24]

1.0 Interested Persons

Under the EPCA, DOE may use the DFR mechanism "[o]n receipt of a statement that is submitted jointly 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, and contains recommendations with respect to an energy or water conservation standard."[25] In the 2011 DFR, DOE did not read the EPCA as requiring absolute agreement by all interested parties, since the Secretary has discretionary authority to determine if a joint agreement meets the requirement for representativeness.[26] DOE also concluded that no single party should be deemed to have a veto power over use of the DFR mechanism.[27] DOE considers consensus agreements on a case-by-case basis to determine if they meet the statutory requirements.[28]

In the RFI, DOE specifically requested comments on its DFR process.[29] DOE also requested general comments on factors supporting a determination that DOE has received a "joint statement" submitted by "interested persons that are fairly representative of relevant points of view."[30]

1.1 EPCA does not require absolute agreement by all interested parties

In the EPCA's direct final rule provision, Congress did not require that *all* relevant points of view be included in the signatories to a joint statement—simply that the viewpoints be "fairly representative."[31] The DFR provision vested the Secretary with authority to determine whether a joint statement included a sufficient range of stakeholders.[32] The Act provides that the stakeholders must include "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…."[33]

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[22] 79 Fed. Reg. 64,705 (Oct. 31, 2014).
[23] *Id.* at 64,706.
[24] *Id.*
[25] 42 U.S.C. § 6295(p)(4)(A).
[26] 76 Fed. Reg. 37,408, 37,422 (June 27, 2011).
[27] *Id.*
[28] *Id.*
[29] 79 Fed. Reg. at 64,706.
[30] *Id.*
[31] 42 U.S.C. § 6295(p)(4)(a).
[32] *Id.*
[33] *Id.* § 6295(p)(4) (emphasis added).

Nothing in the statute prevents the Secretary from proposing a direct final rule if an entity has indicated its opposition to the proposed standards. Rather than requiring unanimity, the EPCA only requires entities "fairly representative of relevant points of view . . . as determined by the Secretary."[34] Additionally, the EPCA's provisions concerning adverse comments further show that Congress did not intend to require unanimity, given that the Secretary has discretion to not withdraw a direct final rule even if adverse comments are submitted where those comments do not provide a "reasonable basis for withdrawing the direct final rule."[35] As the Secretary has indicated, the statute "does not require that 'all' relevant parties be parties to any Consensus Agreement, nor does it allow a small number of interested parties to exercise veto power over the [direct final rule] process."[36]

1.2 EPCA does not require that distributors, contractors, and energy suppliers participate in a joint statement for a DFR

In a letter included in Appendix A of the RFI, the Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) misinterpreted the EPCA when it asserted that a joint proposal for a DFR must represent the views of "all relevant stakeholder interests (which may include distributors, contractors, energy suppliers, utilities, consumers, and other market participants, depending on the substance of the proposed DFR)."[37]

There is simply no legal basis for HARDI's assertion that "*all* relevant stakeholder interests" be included in a joint proposal for a DFR.[38] The section of the EPCA providing for DFRs specifically empowers the Secretary to issue a direct final rule after receiving a joint statement "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…"[39] The EPCA does not require that a joint statement include *all* relevant points of view.

Moreover, there is no legal basis for HARDI's statement that "distributors, contractors, and energy suppliers…and other market participants, depending on the substance of the proposed DFR" must participate in a joint statement for a DFR.[40] The DFR provision of EPCA states the sort of interests that must be included as "fairly representative of relevant points of view," as determined by the Secretary.[41] The EPCA does not mention distributors, contractors, and energy suppliers as examples of interested persons to a joint proposal for a DFR. It is worth noting that the furnace standards that gave rise to this RFI were regional standards while the great majority of DOE standards are national standards applicable only to manufacturers. DOE should not establish general rules for use of DFR based on the concerns of distributors and contractors specific to the anomalous case of regional standards.

[34] *Id.* § 6295(p)(4)(A).
[35] *Id.* § 6295(p)(4)(C).
[36] 76 Fed. Reg. at 67,037, 67,040 (Oct. 31, 2011).
[37] *See* 79 Fed. Reg. at 64,709.
[38] *See generally* 42 U.S.C. § 6295.
[39] 42 U.S.C. § 6295(p)(4)(a) (emphasis added).
[40] *See* 79 Fed. Reg. at 64,709.
[41] 42 U.S.C. § 6295(p)(4)(a).

1.3 EPCA does not require that stakeholders who would typically be found interested in the results of a DOE Technical Support Document (TSD) be deemed "interested persons"

In another letter included in the RFI's Appendix A, the Air Conditioning Contractors of America (ACCA) stated that stakeholders who would be interested in the results found in the DOE Technical Support Document that accompanies the rulemaking should be assumed to be "interested persons."[42] Such a standard would be unworkable and is inconsistent with the statute.

The DFR provision of EPCA provides that "interested persons that are fairly representative of relevant points of view," including "representatives of manufacturers of covered products, States, and efficiency advocates."[43] Beyond the three enumerated points of view (manufacturers of the products, States, and efficiency advocates), the provision accords the Secretary discretion to determine which additional stakeholders may be "interested persons" necessary to begin the process of issuing a DFR.[44] EPCA does not *assume* that any stakeholder is an "interested person."[45] Rather, the Secretary *determines* whether a stakeholder is an "interested person… fairly representative of relevant points of view."[46]

2.0 Adverse Comments

Under the EPCA, the Secretary must withdraw a DFR no later than 120 days after publication (110 days for comment submittal, 10 days for comment review period) if (1) "the Secretary receives 1 or more adverse public comments relating to the direct final rule;" and (2) "based on the rulemaking record . . . the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule."[47]

To meet this requirement in the 2011 DFR, DOE created a balancing test.[48] DOE considered the substance of all adverse comments received and weighed them against the anticipated benefits of the consensus agreement and the likelihood that further consideration of the comments would change the results of the rulemaking.[49]

In the RFI, DOE requested comments on this balancing test approach to managing adverse comments.[50] DOE also requested comments on the nature and extent of such "adverse comments" that may provide the Secretary a reasonable basis for withdrawing the DFR.[51]

2.1 DOE's balancing test is a reasonable construction of 6295(p)(4)

DOE has elaborated on how it will evaluate comments pursuant to section 6295(p)(4)(C). First, "[t]ypical of other rulemakings, it is the substance rather than the quantity of comments" that matters.[52] Second,

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[42] *See* 79 Fed. Reg. at 64,711.
[43] 42 U.S.C. § 6295(p)(4)(a).
[44] *See id.*
[45] *See id.* § 6295(p)(4) (emphasis added).
[46] *See id.* (emphasis added).
[47] *Id.* § 6295(p)(4)(C)(i).
[48] 76 Fed. Reg. at 37,422.
[49] *Id.*
[50] 79 Fed. Reg. at 64,706.
[51] *Id.*
[52] 76 Fed. Reg. at 37,422.

the "substance of any adverse comment(s) received will be weighed against the anticipated benefits of the Consensus Agreement and the likelihood that further consideration of the comment(s) would change the results of the rulemaking."[53] Third, "to the extent an adverse comment had been previously raised and addressed in the rulemaking proceeding, such a submission will not typically provide a basis for withdrawal of a direct final rule."[54]

Congress did not intend that a DOE direct final rule should be derailed by any adverse comment relating to that rule.[55] Congress directed the Secretary to review the comments and "determine" whether a "reasonable basis for withdrawing the final rule" exists.[56] Nothing in DOE's articulation of how it would evaluate comments, or DOE's evaluation of those comments, is inconsistent with the statutory scheme. Accordingly, the Secretary's interpretation is a reasonable construction of section 6295(p)(4).

2.2 The Secretary must determine whether the adverse comments, on the whole, require the withdrawal of the DFR

In a letter included in Appendix A of the RFI, HARDI misconstrued the ECPA by asserting that "[a]ny one or more comments…that provide a plausible basis for disputing material facts, analyses, or conclusions in the petition or DFR, even if not accepted by the Department as valid or dispositive, but which, if accepted, could possibly affect the proposed standard in stringency or structure, will require the Secretary to withdraw the DFR."[57]

The EPCA gives the Secretary the discretion to determine "based on the rulemaking record" whether "adverse public comments…may provide a reasonable basis for withdrawing the direct final rule."[58] The Secretary therefore must decide based on the *entire* rulemaking record whether adverse public comments may provide a basis for withdrawing the DFR. One or more comments will not "require" the Secretary to withdraw the DFR.[59] The Secretary must always "determine," based on the substance of the comments, whether the adverse comments necessitate withdrawal of the DFR.[60] For instance, as with the furnace efficiency proceeding, the Secretary has discretion to reject comments that have been made in the past, considered and rejected and because of that would not affect the outcome were the DFR to be withdrawn and an ordinary notice and comment proceeding to go forward.

3.0 Recommended Standard

Under the EPCA, the Secretary must determine that a "recommended standard contained in the statement" satisfies the statutory requirements of 42 U.S.C. 6295(o).[61] Accordingly, in the 2011 DFR, DOE certified that the energy conservation standard adopted achieved the "maximum improvement in energy efficiency that is technologically feasible and economically justified and will result in significant conservation of energy."[62]

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[53] *Id.*; 76 Fed. Reg. at 67,038.
[54] *Id.*
[55] 42 U.S.C. § 6295(p)(4)(C)(i).
[56] *Id.*
[57] 79 Fed. Reg. at 64,706.
[58] 42 U.S.C. § 6295(p)(4)(C)(i).
[59] *See* 79 Fed. Reg. at 64,706.
[60] *See* 42 U.S.C. § 6295(p)(4)(C)(i).
[61] *Id.* § 6295(p)(4)(A)(i).
[62] *Id.* § 6295(o); 76 Fed. Reg. at 37,422.

In the RFI, DOE requested comments on what constitutes the "recommended standard contained in the statement," as well as the scope of any resulting DFR.[63]

3.1 A direct final rule may include minor additions not specifically spelled out in the recommended standard contained in the joint statement

In its letter contained in Appendix A of the RFI, HARDI argues that any DFR shall contain "only the recommended standard contained in the joint statement authorizing the Secretary to issue the DFR."[64]

The EPCA allows the Secretary to determine, upon receiving a joint statement by interested persons that contains "recommendations with respect to an energy or water conservation standard," to issue "a final rule that establishes an energy….standard," provided certain conditions are met.[65] DOE should be permitted, in the process of converting a joint recommendation for standards into a full regulatory standard, the discretion to fill in needed regulatory details that are consistent with the recommendation.

4.0 Conclusion

NRDC, ASAP, CFA, and NCLC are pleased to submit these comments in response to DOE's Request for Further Information. As described in these comments, the meaning of EPCA's Direct Final Rule provision is plain and clear; moreover, DOE's prior interpretation of this provision is reasonable and supported by the statutory structure. No amendment to the Process Improvement Rule is thus required or necessary. If DOE determines that it should proceed with a Notice of Proposed Rulemaking, or otherwise considers a possible amendment to the Process Improvement Rule, our organizations ask that you take into account these comments in crafting such a proposal. Please let us know if you have any questions or need any further information.

Respectfully Submitted,

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[63] 79 Fed. Reg. at 64,707.
[64] *See* 79 Fed. Reg. at 64,710.
[65] 42 U.S.C. § 6295(p)(4)(A).

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