



March 21, 2011

Mr. Daniel Cohen
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, SW
Room 6A245
Washington, DC 20585

RE: Regulatory Burden Request for Information

Dear Mr. Cohen,

This letter constitutes the comments of the Appliance Standards Awareness Project (ASAP) in response to the Department of Energy (DOE) request for information (RFI) on the notice regarding reducing regulatory burden published in the Federal Register on February 3, 2011. 76 FR 6123. ASAP is a coalition group dedicated to advancing cost-effective energy efficiency standards for appliances and equipment. ASAP works at both the state and federal levels and is led by a Steering Committee with representatives from consumer groups, utilities, state government, environmental groups, and energy-efficiency groups. We appreciate the opportunity to provide input to the Department. In our comments below we respond to four issues addressed in the President's Executive Order 13563, "Improving Regulation and Regulatory Review" and referenced in the RFI as they relate to rulemakings for energy conservation standards.

Retrospective Analysis of Regulations

DOE is soliciting comment on how best to conduct its retrospective review of existing regulatory and reporting requirements. 76 FR 6123, 6124. The memorandum issued by the Office of Management and Budget (OMB) providing guidance on the Executive Order states that in conducting a retrospective analysis of existing rules, "agencies may well find it useful to engage in a retrospective analysis of the costs and benefits (both quantitative and qualitative) of regulations chosen for review."¹ We urge the Department to conduct a retrospective analysis of appliance standards rulemakings to evaluate the real-world impacts of standards on product pricing and technology choices. We also made this request to DOE in the attached letter submitted on December 9, 2010.

The RFI notes that the Executive Order directs agencies to "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits." 76 FR 6123. Previous

¹ Sunstein, C. R. Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies. Re. Executive Order 13563, "Improving Regulation and Regulatory Review." February 2, 2011. <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

studies have found that engineering analyses tend to over-estimate the cost of improving product efficiency.² If the analyses conducted by the Department as part of the appliance standards rulemakings consistently over-estimate the cost to improve efficiency, it is not possible for DOE to accurately determine which standard level will maximize net benefits. A retrospective analysis of past rulemakings analyzing the actual costs and engineering changes to improve efficiency compared to predicted costs and least-cost compliance paths would help the Department identify market dynamics that are not currently incorporated in the engineering and economic analyses. Improved analyses that better reflect actual market dynamics could ultimately improve decision-making to maximize net benefits.

Regulatory Approaches that Maximize Net Benefits

As noted above, the Executive Order directs agencies to “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).” 76 FR 6123. Benefits of energy conservation standards include energy bill savings for consumers and businesses, national energy savings, reductions in greenhouse gas emissions and other air pollutants, reductions in necessary electricity generation capacity, marginal reductions in energy prices, and job creation. While the direct economic impacts of energy conservation standards are clearly important to consider, we urge the Department to give serious consideration and weight to the additional benefits of standards as well when determining the standard level for a given product that maximizes net benefits. Federal law requires DOE to consider factors beyond the direct economic impact of standards on the purchasers of the regulated product. 42 U.S.C. 6295(o). In addition, it is important to recognize that any projection of future costs and benefits is subject to uncertainty. Therefore, it is necessary for DOE to use discretion in determining the standard level that maximizes net benefits.

Flexible Approaches

The RFI notes that the Executive Order directs agencies to “consider low-cost approaches that reduce burdens and maintain flexibility.” 76 FR 6123. We urge the Department to give serious consideration to standard levels contained in consensus agreements negotiated between efficiency advocates and manufacturers as a mechanism to provide flexibility in the regulatory process. In 2010, efficiency advocates and manufacturers jointly submitted to DOE recommended standard levels for products including furnaces, central air conditioners, heat pumps, refrigerators and freezers, clothes washers, clothes dryers, room air conditioners, and dishwashers based on consensus agreements. The negotiation process involves stakeholders representing diverse interests and allows for a careful balancing of considerations including energy savings, consumer benefits, and manufacturer impacts. This process represents a more flexible approach than the traditional regulatory approach and can ultimately lead to better results by reflecting the knowledge and experience of stakeholders that cannot always be captured in the DOE analyses.

² See, for example: Dale, L., C. Antinori, M. McNeil, J.E. McMahon and K.S. Fujita. 2009. Retrospective evaluation of appliance price trends. *Energy Policy* 37, 597-605.

Integration and Innovation

The Executive Order directs agencies to seek “greater coordination across agencies,” to simplify regulations, and to identify “means to achieve regulatory goals that are designed to promote innovation.” 76 FR 3822. DOE’s recent final rule concerning certification, compliance, and enforcement (76 FR 12422) makes several important strides forward with respect to harmonization and simplification of DOE regulations. For example, DOE is harmonizing its compliance reporting schedule with that of the Federal Trade Commission (FTC) for consumer products. 76 FR 12424. DOE is also seeking to harmonize enforcement efforts with U.S. Customs and Border Protection (CBP). 76 FR 12440. That effort should be accelerated and expanded. DOE has significantly reduced reporting burdens by moving to an online compliance report submittal system. 76 FR 12428.

However, some important elements of DOE’s efforts to streamline and modernize its certification, compliance, and enforcement program have been deferred to a future rulemaking. These include plans for a verification testing program and some requirements for lab accreditation. 76 FR 12447, 12439. Verification testing and lab accreditation are crucial for ensuring that a level playing field exists for the regulated industries and that consumers and the nation gain the expected benefits from standards. We urge DOE to move expeditiously to initiate and complete this next phase of the certification, compliance, and enforcement improvements.

With respect to innovation, national appliance standards already have resulted in considerable innovation. New technologies that have been introduced and/or brought to scale to help comply with new standards include improved compressors, vacuum insulation panels, high-efficiency clothes washer and dishwasher designs, premium-efficiency motors and dry-type distribution transformers, general service halogen and halogen IR incandescent lamps, and many others. However, DOE’s policy has been to deliberately ignore innovation by limiting analysis to technologies that are commercially available or in working prototypes.³ While we understand that predicting innovation is very difficult, we believe that the retrospective analysis we recommend above would be a critical first step in understanding the historically dynamic relationship between innovation and standards. Understanding the past would inform better approaches for the future.

Innovation also affects the price at which improved efficiency is available. Learning curves are one way to capture declining costs of production over time, driven at least in part by innovations in manufacturing. We have argued for applying learning to DOE analyses in prior dockets (see, for example, 74 FR 1101). We are heartened that DOE is now formally considering the inclusion of learning curves in standards analyses. 76 FR 9696.

Thank you very much for considering these comments.

³ See, for example, the Framework Document for Residential Clothes Dryers and Room Air Conditioners, p. 19. http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/dryer_roomac_framework.pdf. All framework documents include this boilerplate language and approach.

Sincerely,

A handwritten signature in black ink that reads "Andrew deLaski". The signature is written in a cursive style with a large initial 'A' and a distinct 'de'.

Andrew deLaski
Executive Director

December 9, 2010

Roland Risser
U.S. Department of Energy
Building Technologies Program
Room 6070, MS EE-2J
1000 Independence Ave, SW
Washington, DC 20585

Dear Mr. Risser,

We are writing to request that the Department of Energy study the real-world impact of standards on product pricing and technology choices in order to enhance your efforts to continuously improve the standard-setting process and decision making. Specifically, we recommend that DOE: (A) conduct a one-time retrospective analysis of energy conservation standards rulemakings; and (B) conduct ongoing market and technology tracking for all covered products.

Previous studies have found that engineering analyses tend to over-estimate the cost of improving product efficiency. For example, a study by the Lawrence Berkeley National Laboratory (LBNL) found that the technical support documents (TSDs) for refrigerators, clothes washers, room air conditioners, and central air conditioners that were published between 1982 and 1990 consistently overestimated the price to increase efficiency.⁴

A retrospective analysis could help identify market dynamics that are not currently incorporated in the engineering and economic analyses for appliance standards rulemakings. We suggest that a retrospective analysis specifically address at least the following three questions:

- How do actual retail costs of products compare to predicted costs?
- How do the actual costs to increase efficiency compare to estimated costs?
- How do actual engineering changes to meet new standards compare to predicted least-cost compliance paths?

A focus on recent final rules which have been in effect for at least a couple of years would provide the most useful findings. Therefore, we suggest that a retrospective analysis examine the predicted and actual costs and engineering changes for the following rulemakings:

- 1997 Final Rule for Refrigerators, Refrigerator-Freezers, and Freezers
- 1997 Final Rule for Room Air Conditioners
- 2000 Final Rule for Fluorescent Lamp Ballasts
- 2001 Final Rule for Residential Water Heaters
- 2001 Final Rule for Central Air Conditioners & Heat Pumps
- 2007 Final Rule for Distribution Transformers

In addition, retrospective analysis of standards adopted by Congress in 2005 and 2007 may also be possible in those cases where DOE or other analysis was conducted. For example, DOE

⁴ Dale, L., C. Antinori, M. McNeil, J.E. McMahon and K.S. Fujita. 2009. Retrospective evaluation of appliance price trends. *Energy Policy* 37, 597-605.

conducted extensive analysis for commercial air conditioners and transformers prior to Congressional enactment of standards.

Secondly, we strongly encourage DOE to incorporate market tracking into the appliance standards program and the ongoing standards rulemaking process. Historically, DOE stops its evaluation of a product upon publication of a final rule. However, the statute now requires that DOE review all standards periodically. Therefore, rather than stopping and starting DOE information gathering and analysis with each rulemaking cycle, the agency should conduct market and technology tracking between rulemakings.

For this ongoing market and technology analysis, we recommend that DOE track retail prices, the cost to increase efficiency, and engineering changes as each new standard goes into effect and in the ensuing years. These data could then be used in subsequent rulemakings to improve the engineering and economic analyses in order to better reflect actual market dynamics. Furthermore, this ongoing analysis should help DOE to shorten the typical three-year rulemaking period since the analysis will not be starting from scratch.

We strongly believe that a one-time retrospective analysis coupled with a forward-looking process for ongoing market and technology tracking would provide valuable information for enhancing DOE's rulemaking process and would strengthen the basis for decision making. If at all possible, we urge you to initiate such a study within the next six months and commence implementing ongoing market and technology tracking functions for all products subject to current rulemakings.

Thank you very much for considering this request. We would be pleased to discuss these ideas in more detail with you and/or staff at your convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Andrew deLaski". The signature is written in a cursive, flowing style.

Andrew deLaski
Executive Director
Appliance Standards Awareness Project