NOTE: THIS DOCUMENT REFLECTS CHANGES MADE CONSISTENT WITH THE REVIEW CONDUCTED BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS OF THE OFFICE OF MANAGEMENT AND BUDGET.

[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2017-BT-STD-0062]

RIN 1904–AE84

Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards

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

ACTION: Final rule.

SUMMARY: The Department of Energy is amending its decision-making process for selecting energy conservation standards by specifying that it will conduct a comparative analysis of the relative benefits and burdens of potential energy conservation standard levels in determining whether a specific energy conservation standard level is economically justified.

DATES: The effective date of this rule is **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: The docket for this rulemaking, which includes *Federal Register* notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov*. All documents in the docket are listed in the *https://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: *https://www.regulations.gov/docket?D=EERE-2017-BT-STD-0062*. The docket webpage contains instructions on how to access all documents, including public comments, in the docket.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Summary of the Final Rule

With respect to the establishment of Federal energy conservation standards, Federal law requires that any new or amended energy conservation standard for covered products (and certain types of commercial and industrial equipment) 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) and 42 U.S.C. 6316(a)) In determining whether an energy conservation standard is economically justified, the United States Department of Energy ("DOE" or "the Department") determines whether the benefits of the standard exceed its burdens by considering the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i).[1] In this document, DOE is finalizing the requirement that determinations of economic justification for a specific Trial Standard Level ("TSL"), as assessed using the seven factors, must include a comparison of the benefits and

[1] The seven factors specified in 42 U.S.C. 6295(o)(2)(B)(i) are as follows:

(I) the economic impact of the standard on the manufacturers and on the consumers of the product subject to the standard;
(II) the savings in operating costs throughout the estimated average lifetime 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 imposition of the standard;
(III) the total projected amount of energy, or as applicable, water, savings likely to result directly from 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.

burdens of that TSL against the benefits and burdens of the baseline case ("no new standards" case) and across all other TSLs. DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified in a "walk-down" process. In conducting this analysis, DOE may determine that some TSLs are not economically justified based on comparisons to the baseline, while DOE may determine other TSLs are not economically justified based on comparisons to other TSLs. From the technologically feasible and economically justified TSLs, DOE will select as the energy conservation standard the TSL that represents the maximum improvement in energy efficiency. This process ensures that the selection of an energy conservation standard is made in consideration of the economic factors contained in EPCA.

II. Introduction

A. Authority

Title III, Parts B[2] and C[3] of the Energy Policy and Conservation Act, as amended, ("EPCA" or "the Act"), Pub. L. 94-163 (42 U.S.C. 6291-6317, as codified), established the Energy Conservation Program for consumer products and certain industrial equipment.[4] Under EPCA, DOE's energy conservation program for covered products consists essentially of four

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.
[3] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A-1.
[4] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

parts: (1) testing; (2) certification and enforcement procedures; (3) establishment of Federal energy conservation standards; and (4) labeling.

In determining whether a standard is economically justified, EPCA also 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 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, after consultation with the Department of Justice; (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))

B. Background

DOE had conducted a formal effort between 1995 and 1996 to improve the process used to develop energy conservation standards for covered appliance products. This effort involved many different stakeholders, including manufacturers, energy-efficiency advocates, trade associations, State agencies, utilities, and other interested parties. The result was the publication of a final rule in the *Federal Register* on July 15, 1996, titled, "Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer

Products." 61 FR 36974. This document was codified at 10 CFR part 430, subpart C, appendix A, and became known colloquially as the "Process Rule."

On December 18, 2017, DOE issued a Request for Information ("RFI") to address potential improvements to the Process Rule, so as to achieve meaningful burden reduction while continuing to discharge the Department's statutory obligations in the development of energy conservation standards and test procedures. 82 FR 59992. Subsequently, on February 13, 2019, DOE published a Notice of Proposed Rulemaking ("NOPR") to update and modernize the Process Rule. 84 FR 3910 ("February 2019 NOPR"). Among other changes, DOE proposed that in making a determination of economic justification for a specific TSL, it would consider whether an economically rational consumer would choose a product meeting that TSL over products meeting the other TSLs after considering relevant factors, including but not limited to, energy savings, efficacy, product features, and life-cycle costs. *Id.* at 3938.

DOE received numerous comments asking for clarification on how this concept would be implemented and what effect it would have on DOE's "walk-down" process for selecting standard levels. In response, DOE did not finalize that aspect of the proposal when it issued a final Process Rule. *See* 85 FR 8626 (Feb. 14, 2020). ("2020 Process Final Rule") Instead, DOE proposed in a supplemental NOPR ("SNOPR") to separately revise section 7 of the Process Rule, *Policies on Selection of Standards*, to clarify its earlier proposal and explain how this approach would be incorporated into DOE's decision-making process for selecting energy conservation standards. *See* 85 FR 8483 (Feb. 14, 2020) ("February 2020 SNOPR"). More specifically, DOE clarified that its proposed revisions to section 7 would require the agency to conduct a

comparative analysis of the relative costs and benefits of all of the proposed TSLs in order to make a reliable determination that the chosen TSL is economically justified. This comparative analysis, DOE explained, would include assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. *Id.* at 8485. DOE also explained that the factors an economically rational consumer would consider in selecting a TSL (*e.g.*, energy savings, efficacy, product features, and life-cycle costs), arise out of EPCA's seven factors for determining economic justification. See 42 U.S.C. 6295(o)(2)(B)(i). As a result, DOE stated that it was not necessary to refer to the concept of an economically rational consumer in determining whether a TSL is economically justified. *Id.*

In response to the February 2020 SNOPR, DOE received written comments from the following parties:

Table of Entities Submitting Written Comment

Commenter	Affiliation
Joint Industry Commenters – Air Conditioning, Heating, & Refrigeration Institute, Association of Home Appliance Manufacturers, and the National Electrical Manufacturers Association	Industry
Earthjustice	Energy Efficiency Advocate
Spire	Utilities
American Public Gas Association ("APGA")	Utilities
Energy Efficiency Advocacy and State Joint Commenters ("Joint Efficiency") – Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance	State Government, Energy Efficiency Advocate

California Investor-Owned Utilities ("Cal-IOUs") – Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison	Utilities
Institute for Policy Integrity at New York University ("IPI")	Public Policy Advocate
Mercatus Center at George Mason University ("Mercatus")	Public Policy Advocate
Anonymous	Unaffiliated
Derek McLaughlin	Unaffiliated
North American Association of Food Equipment Manufacturers ("NAFEM")	Industry
Jim McMahon	Unaffiliated

III. Discussion of Revisions to DOE's Policies on Selecting Standard Levels

A. Use of Consumer Impacts in Determining Economic Justification

Following the SNOPR, DOE received several comments supporting DOE's efforts to account for the impacts of energy conservation standards on consumers through the seven factors in EPCA.[5] For example, APGA noted that DOE's revised approach will incorporate the economic aspects of consumer welfare impacts. (APGA, No. 166 at p. 5)[6] Similarly, NAFEM indicated that it believes that using a comparative approach would be a positive step towards evaluating how customers actually make decisions. (NAFEM, No. 168 at p. 3) Jim McMahon indicated that DOE would be wise to abandon the framework of an economically rational consumer as the seven factors specified in 42 U.S.C. 6295(o)(2)(B)(i) provide the legal and appropriate basis for evaluating economic justification when calibrated to actual markets and their behaviors. (Jim McMahon, No. 169 at p. 1)

[5] All comments can be found at www.regulations.gov in Docket No. EERE-2017-BT-STD-0062.
[6] This type of notation identifies the commenter, the docket document number assigned to the comment, and the relevant pages of that document.

B. Comparison of Benefits and Burdens Across all Proposed TSLs

In the February 2020 SNOPR, DOE proposed that determinations of economic justification must include a comparative analysis of the relative costs and benefits of all of the proposed TSLs to make a reliable determination that a specific TSL is economically justified. 85 FR at 8486. This analysis includes assessing the incremental changes for each TSL's benefits and burdens relative to other TSLs as part of a holistic analysis across all TSLs.[7] *Id.* Further, in order to show that this comparative analysis of benefits and burdens is consistent with past DOE practices, DOE provided an example of a rulemaking in which economic justification was based, at least in part, on comparisons between TSLs. *Id.* at 8487 (*noting* DOE's use of a comparative approach when examining TSLs during the dehumidifiers standards rulemaking to minimize disproportionate impacts to small, domestic manufacturers). Finally, DOE noted that it would still "walk-down" from the TSL with the highest energy savings when selecting the energy conservation standard level that represents the maximum energy savings that is technologically feasible and economically justified but would now also formalize for consistency and clarity its comparative approach as part of its consideration of economic justification.[8] *Id* .

[7] Consistent with prior determinations, there may be instances where a potential standard impacts a subset of factors so significantly as to preclude economic justification, irrespective of the other economic factors.

[8] DOE is required under 42 U.S.C. 6295(p)(1) to determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible when proposing a new or amended conservation standard and explain the reasons for any deviation in the proposed standard from the maximum technologically feasible improvement. DOE focuses its rulemaking analyses on energy savings as there may not always be a direct correlation between efficiency improvements and energy savings. For example, if the maximum improvement in energy efficiency significantly increases the cost of a covered product, many consumers may choose to repair, instead of replace, their less-efficient covered products. The standard ultimately promulgated by DOE continues to represent the maximum improvement in energy efficiency that is technologically feasible and economically justified. *See* 42 U.S.C. 6295(o)(2).

In response, DOE received comments both in support of and against the use of a comparative analysis that assesses each TSL's benefits and burdens relative to other TSLs. For example, with regard to support for the proposal, the Joint Industry Commenters indicated that the proposal did not present a new approach towards setting standards and it noted a number of examples from the past in which DOE had effectively applied the same holistic process in various rulemakings (Joint Industry Commenters, No. 167 at p. 2). They added that the proposal would build this holistic approach into DOE's routine rulemaking process, which would enable DOE to fully consider the seven factors already required under EPCA and to help ensure that DOE does not review its TSLs in isolation. *Id.* APGA also supported DOE's proposed approach. It noted that the proposal was responsive to APGA's past criticisms of DOE's process for developing energy conservation standards for covered appliance products, which, in APGA's view, did not always result in standards that were economically justified (APGA, No. 166 at pp. 4-5). APGA agreed that the most logical way to determine whether a particular consumer option is economically justified is to compare it to the full range of available consumer choices. As a result, APGA supported requiring determinations of economic justification to consider comparisons of economically relevant factors across TSLs. *Id.* at p. 5.

As for the commenters who opposed the proposal, several expressed concerns that using a comparative analysis for economic justification would not result in the selection of a TSL in accordance with EPCA. For example, the CA-IOUs stated that the purpose of EPCA's seven factors is to select the standard that achieves the maximum improvement in energy efficiency, but that the February 2020 SNOPR proposed to improperly substitute comparison of the relative burdens of each TSL in place of EPCA's expressed aim of approving the "highest TSL" for

which benefits exceed burdens. (CA-IOUs, No. 173 at pp. 3-4) The CA-IOUs added that if DOE chooses to compare economically justifiable TSLs against one another, this may not only prevent the maximum energy savings for a given standards cycle, but may also hinder cost-effective savings for future code cycles. *Id.* at p. 4. Similarly, the Joint Efficiency Commenters stated that the proposal could result in DOE choosing efficiency levels lower than the maximum levels that are technologically feasible and economically justified. (Joint Efficiency Commenters, No. 171 at p. 2) The Joint Efficiency Commenters added that, contrary to DOE's statement in the February 2020 SNOPR, DOE did not conduct a comparative analysis of economic justification in the dehumidifiers rulemaking. *Id.* at p. 3.

With respect to these concerns, DOE notes that a simple cost-savings determination fails to satisfy the more complex economic justification requirement in EPCA. DOE reiterates that, in accordance with EPCA, it will select the TSL that represents the maximum improvement in energy efficiency that is both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Contrary to the statement from the CA-IOUs, the purpose of EPCA's seven factors is not to select the standard that achieves the maximum improvement in energy efficiency, no matter how minute an estimated cost savings; it is to aid in assessing economic justification when selecting the standard that represents the maximum improvement in energy efficiency that is technologically feasible and also economically justified. EPCA states that, in determining whether a standard is economically justified, the Secretary must determine whether the "benefits of the standard exceed its burdens". (42 U.S.C. 6295(o)(2)(B)(i)) Further, as evidenced by the seven factors listed for consideration, determining whether the benefits of a standard exceed its burdens is not simply a calculation exercise. Rather, EPCA recognizes that

economic impacts are broader than those that occur in isolation as may be depicted in an average life-cycle cost analysis or manufacturer impact analysis.

The enumeration of the seven factors in the statutory text recognizes the complex and broad assessment necessary in evaluating benefits and burdens of TSLs. As further context, these statutory factors can be framed in a more general economic construct that would shed light on how DOE's analyses in support of energy conservation standards mesh with standard tools for analyzing market impacts associated with regulation. The first of the seven factors states that economic justification should take into consideration the "economic impact of the standard on the manufacturers and on the consumers of the product subject to such standard." In evaluating such effects, comparison of relative burden is necessary to meaningfully evaluate the economic impacts to both manufacturers and consumers. From the economic construct perspective, the most comprehensive measures for evaluating economic impacts on manufacturers and consumers are producer surplus and consumer surplus.[9] Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit. Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit. It is measured by the area between the price and the demand curve for that unit. These measures or their

[9] Discussions of producer and consumer surplus are provided in economics texts extensively such as Mas-Colell, Andreu & Whinston, Michael D. & Green, Jerry R., 1995. "Microeconomic Theory," OUP Catalogue, Oxford University Press, number 9780195102680; and Kreps, David M., 1990. "A Course in Microeconomic Theory." Princeton University Press. See also OMB's Circular A-4 on conducting regulatory impact analyses, at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.

approximations are often used to illustrate the economic impact of regulations on both manufacturers and consumers.

The next three statutory factors spell out more specific economic effects consumers would experience, such as operating cost savings of covered products, any price increase of the covered products, any increase in maintenance expense of the covered products, the energy and water savings that would accrue to consumers, and any lessening of the utility of the covered product. From an economic construct perspective, these factors can also be viewed as components of consumer surplus. In application, depending on the quantity and quality of data, these factors may be analyzed separately or inter-relatedly as components of consumer surplus, with appropriate weight given in decision-making, as permitted by the statute. Choosing a standard that simply maximizes improvement in energy efficiency, without regard to technological feasibility and economic justification, would not be consistent with the requirements of 42 U.S.C. 6295(o)(2). To holistically evaluate the economic impact on consumers, DOE must simultaneously evaluate and balance these interrelated factors.

The fifth statutory factor recognizes that greater energy savings could be at the expense of consumer choice, and that anti-competitive effects should also be considered. The sixth factor accounts for changes over time in the need for national energy and water conservation. Finally, the seventh factor recognizes that an exclusive list of factors for assessing economic justification could not anticipate (for example) product-specific market conditions, and authorizes the Secretary to consider any other factor that at the time may be relevant to assess the economic justification of a TSL.

Assessing such impacts, for purposes of the statutory determination of economic justification, requires the exercise of agency judgment and discretion, informed by the aforementioned analysis. For instance, not all life-cycle cost savings are directly comparable. From a more holistic analytic perspective, the benefits of life-cycle cost savings that impose net costs to 20% of consumers may on net need to be considered differently than the benefits of life-cycle cost savings that impose net costs to 10% of consumers because the TSL that imposes net cost to 20% of consumers might have better product utility than the TSL that imposes net cost to 10% of consumers. Similarly, not all manufacturer impacts are directly comparable. Manufacturer impacts that disproportionately affect small businesses need to be weighed differently than those that do not. DOE is seeking to resolve this issue by using a comparison across multiple TSLs, which will enable DOE to consider incrementally both some of the distinctive benefits and burdens that are not immediately apparent from simply looking at a single TSL's numbers (*e.g.*, life-cycle costs or changes in industry net present value), as well as those relative changes in numbers in moving from one TSL to another. Thus, DOE is not proposing to unilaterally select an economically justified, technically feasible TSL with less energy savings over another economically justified, technically feasible TSL. Instead, as stated previously, DOE is requiring a comparative analysis of the relative costs and benefits of all proposed TSLs in order to make a reliable determination that a specific TSL is economically justified. This comparative analysis brings into sharper and more transparent focus the balancing contemplated by the statute in assessing economic justification. DOE is clarifying its regulatory text consistent with this approach.

With regard to the comment from the Joint Efficiency Advocates that DOE has not compared the benefits and burdens of TSLs in the past, DOE disagrees. In the dehumidifier example cited in the February 2020 SNOPR, DOE, in discussing why TSL 2 is economically justified, stated that "TSL 2 will minimize disproportionate impacts to small, domestic dehumidifier manufacturers *relative* to TSL 3 and TSL 4." 81 FR 38338, 38388 (June 13, 2016) (emphasis added). This is an explicit, and appropriate, comparison of the burdens (i.e., impacts on small manufacturers) between three TSLs.

Similarly, the Joint Efficiency Advocates' characterization of DOE's reference in the February 2020 SNOPR to a 2015 final rule amending standards for general service fluorescent lamps ("GSFLs") is mistaken. In that rule, DOE determined that a TSL with positive net benefits was not economically justified because it would have net costs for 22 percent of consumers and would decrease industry net present value by 24 percent. 85 FR at 8487. The Joint Efficiency Advocates interpreted this reference to mean that DOE was claiming that it had not selected the maximum energy efficiency level that was economically justified. (Joint Efficiency Advocates, No. 171 at p. 3) That is incorrect. DOE cited this rulemaking to address concerns that a comparative analysis will result in DOE selecting standards that are the most economically justified instead of standards that result in the maximum improvement in energy savings that is technologically feasible and economically justified. 85 FR at 8487. DOE explained that it would not just use one criterion (*e.g.*, maximum net benefits) in determining economic justification. *Id*. Using only one criterion would be contrary to the statutory mandate to consider multiple factors for purposes of determining whether a given standard is economically justified. DOE will continue, as it has in the past, to look at the full range of

benefits and burdens encompassed by the seven factors listed in 42 U.S.C. 6295(o)(2)(B)(i). DOE cited the GSFL rule as an example of its consideration of industry net present value and the proportion of consumers who bear net costs in determining whether a TSL was economically justified.

Commenters also expressed concerns that a comparative analysis would improperly affect DOE's consideration of the seven factors laid out in 42 U.S.C. 6295(o)(2)(B)(i). For example, IPI stated that the proposed change would allow the Department to irrationally and inconsistently give preference to whichever subset of economic impacts the Department wants to focus on in order to conclude that standards that otherwise achieve net benefits are not economically justified. (IPI, No. 170 at p. 1) Earthjustice stated that the seven factors repeatedly direct DOE to compare a standard level only to the baseline case, by requiring DOE to analyze impacts likely to result from the imposition of the standard. As a result, in Earthjustice's view, EPCA does not authorize the proposed comparative analysis approach to determining economic justification. (Earthjustice, No. 174 at p. 2) The Joint Efficiency Advocates stated that a comparative analysis of the seven factors would not be a simple task and would make it more difficult for DOE to fulfill its obligation to review standards. (Joint Efficiency Advocates, No. 171 at p. 4)

In response, DOE first notes that use of a comparative analysis does not fundamentally change DOE's consideration of the seven factors in 42 U.S.C. 6295(o)(2)(B)(i). DOE will, in accordance with EPCA, continue to determine whether the benefits of a standard exceed its burdens by, to the greatest extent practicable, considering the seven factors in 42 U.S.C.

6295(o)(2)(B)(i). DOE will then use the results of this analysis in determining whether a standard is economically justified. This process, as noted in the GSFL example, has previously resulted in the conclusion that TSLs with positive net benefits fail to satisfy the economically justified criterion. As for IPI's characterization of such a result as "irrational," DOE does not agree that it is "irrational" to determine that a TSL that causes a significant number of consumers to experience net costs is not economically justified.

Earthjustice's argument that EPCA precludes a comparative analysis in determining economic justification is based on the assumption that DOE only has two options: (1) select the TSL under analysis as the new energy conservation standard; or (2) decline to adopt a new energy conservation standard (baseline case). This assumption ignores the fact that DOE evaluates several proposed TSLs in each of its rulemakings before selecting one (or none) as the new energy conservation standard. Thus, a TSL not only has impacts relative to the baseline case, but it also has impacts relative to each of the other proposed TSLs. EPCA does not prohibit DOE from considering relative impacts, and a comparative analysis that assesses the incremental changes in the benefits and burdens of each TSL relative to the other TSLs is essential in determining whether a specific TSL is economically justified.

With regard to the Joint Efficiency Advocates' comment that a comparative analysis of the seven factors will increase DOE's analytical workload and make it more difficult to review standards, DOE appreciates the concern, but finds it unwarranted. The vast majority of DOE's analytical work involves evaluating the seven factors for each TSL (*e.g.*, life-cycle costs,

manufacturer impacts, total energy savings). The additional step of comparing these values across TSLs is unlikely to pose a significant incremental burden to DOE's analytical workload.

C. Other Issues Raised by Commenters

Commenters raised a number of other issues not directly related to DOE's proposal. Some of these comments concerned issues that were already finalized in the 2020 Process Final Rule and, as a result, are not addressed in this document. Several commenters submitted recommendations for improving DOE's rulemaking analysis. For example, Mercatus offered four broad recommendations for improving DOE's analysis: (1) base the analysis on revealed preferences unless compelling evidence exists to support alternative assumptions; (2) carefully distinguish between individual and social discount rates; (3) properly account for the opportunity cost of capital; and (4) distinguish between consumption and investment. (Mercatus, No. 172 at pp. 1-6) DOE notes that it has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a peer review of the assumptions, models, and methodologies used by DOE in establishing energy efficiency regulations. *See https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards*. The review committee is aware of this rulemaking and DOE will send them a copy of the final rule so it may be accounted for in their report. DOE encourages the public to submit written comments related to DOE's assumptions, models, and methodologies via email to these National Academies at *bice@nas.edu*. For further information regarding this process, interested persons should contact the National Academies directly at *bice@nas.edu*. For information regarding access to materials docketed by the National Academies related to this review, interested persons

should contact the Public Access Records Office using the fillable on-line form found at *https://www8.nationalacademies.org/pa/managerequest.aspx?key=DEPS-BICE-19-02.*

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This regulatory action is a significant regulatory action under section 3(f) 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).

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, "Reducing Regulation and Controlling Regulatory Costs." 82 FR 9339 (Jan. 30, 2017). More specifically, the Order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued E.O. 13777, "Enforcing the Regulatory Reform Agenda." 82 FR 12285 (March 1, 2017). The Order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the

agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

To implement these Executive Orders, the Department, among other actions, issued a request for information (RFI) seeking public comment on how best to achieve meaningful burden reduction while continuing to achieve the Department's regulatory objectives. 82 FR 24582 (May 30, 2017). In response to this RFI, the Department received numerous and extensive comments pertaining to DOE's Process Rule.

This final rule is an amendment of DOE's February 14, 2020, final rule (2020 Process Rule) that revised and updated the Department's "Process Rule." For purposes of Executive Order 13771, the February 14, 2020 final rule was a de-regulatory action for which DOE anticipates that the changes rule will reduce total administrative burdens by between $53.5 million and $59.7 million (undiscounted) for annualized cost savings of between $0.5 million to $0.6 million, discounted at 7%. The important, but incremental, change to the 2020 Process Rule amendments are difficult to quantify beyond the benefits achieved by the Process Rule as a whole. As such, for purposes of Executive Order 13771, this final rule constitutes an "other" action.

C. 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 *http://energy.gov/gc/office-general-counsel*.

Because this rule does not directly regulate small entities but only imposes procedural requirements on DOE itself, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. Mid-Tex Elec. Co-Op, Inc. v. FERC, 773 F.2d 327, 341-42 (D.C. Cir. 1985).

D. Review Under the Paperwork Reduction Act of 1995

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 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 certifications 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, addressing clarifications to the Process Rule itself, does not contain any collection of information requirement that would trigger the PRA.

E. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE is revising a portion of its Process Rule, which outlines the procedures that DOE follows in conducting rulemakings for new or amended energy conservation standards and test procedures for covered consumer products and commercial/industrial equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*.) and DOE's implementing of regulations at 10 CFR part 1021. Specifically, this rule is strictly procedural and is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, paragraph A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. 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.

G. 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) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) 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 that Executive agencies review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met, or whether 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, the rule meets the relevant standards of Executive Order 12988.

H. 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 proposed

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 *http://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.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. 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 will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. 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 rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

L. 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 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 either (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 rule.

M. 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: *https://www.energy.gov/eere/buildings/peer-review*. Because available data, models, and technological understanding have changed since 2007, DOE has engaged the National Academies of Sciences, Engineering, and Medicine to undertake a new peer review of its analytical methodologies, as noted above.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(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, Incorporation by reference, Intergovernmental relations, Small businesses, Test procedures.

Signed in Washington, DC, on [INSERT DATE]

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Daniel R Simmons
Assistant Secretary
Energy Efficiency and Renewable Energy

For the reasons stated in the preamble, DOE is amending 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. In appendix A to subpart C of part 430, revise section 7(e) 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 for Consumer Products

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7. Policies on Selection of Standards

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(e)(1) *Selection of proposed standard.* Based on the results of the analysis of impacts, DOE will select a standard level to be proposed for public comment in the NOPR. As required under 42 U.S.C. 6295(o)(2)(A), any new or revised standard must be designed to achieve the maximum improvement in energy efficiency that is determined to be both technologically feasible and economically justified.

(2) *Statutory policies.* The fundamental policies concerning the selection of standards include:

(i) A trial standard level will not be proposed or promulgated if the Department determines that it is not both technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. (o)(3)(B)) For a trial standard level to be economically justified, the Secretary must determine that the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the factors listed in 42 U.S.C. 6295(o)(2)(B)(i). In making such a determination, the Secretary shall compare the benefits and burdens of the standard against the benefits and burdens of the baseline case ("no new standards" case) and all other trial standard levels under consideration. This comparative analysis includes assessing the incremental changes in costs and benefits for each TSL's benefits and burdens relative to other TSLs and as part of a holistic analysis across all TSLs. 42 U.S.C. 6295(o)(2)(B). The Secretary will also consider, consistent with the statute, other economic measures such as life-cycle cost analysis, manufacturer impact analysis, and other relevant measures. A standard level is subject to a rebuttable presumption that it is economically justified if the payback period is three years or less. (42 U.S.C. 6295(o)(2)(B)(iii))

(ii) If the Department determines that interested persons have established by a preponderance of the evidence that a standard level is likely to result in the unavailability in the United States of any covered product/equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the U.S. at the time of the determination, then that standard level will not be proposed. (42 U.S.C. 6295(o)(4))

(iii) If the Department determines that a standard level would not result in significant conservation of energy, that standard level will not be proposed. (42 U.S.C. 6295(o)(3)(B))

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