

**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF ENERGY**

**Energy Conservation Program for )  
Appliance Standards: Proposed )  
Procedures for Use in New or Revised )  
Energy Conservation Standards and Test )  
Procedures for Consumer Products and )  
Commercial/Industrial Equipment )**

**EERE-2017-BT-STD-0062  
RIN 1904-AD38**

**COMMENTS OF THE  
AMERICAN GAS ASSOCIATION**

**Dated: May 6, 2019**

## TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. IDENTITY AND INTERESTS.....	5
III. BACKGROUND.....	5
IV. COMMENTS .....	7
A. THE PROCESS RULE SHOULD BE BINDING ON THE DEPARTMENT .....	7
B. THE PROCESS RULE SHOULD BE CLARIFIED TO APPLY TO BOTH CONSUMER PRODUCTS AND INDUSTRIAL/COMMERCIAL EQUIPMENT .....	8
C. APPLICATION OF THE PROCESS RULE TO ASHRAE EQUIPMENT .....	9
D. THE DEPARTMENT SHOULD CONTINUE TO USE THE TEN FACTORS IN ITS PRIORITY SETTING MECHANISM.....	10
E. COVERAGE DETERMINATIONS .....	12
F. AGA SUPPORTS EARLY STAKEHOLDER PARTICIPATION AND THE VARIOUS METHODS THAT THE DEPARTMENT HAS PROPOSED TO PROVIDE EARLY ASSESSMENT OF PROPOSED STANDARDS AND TEST PROCEDURES AND TO DETERMINE THE NEED FOR RULEMAKINGS .....	14
G. DOE SHOULD UTILIZE SIGNIFICANT SAVINGS OF ENERGY THRESHOLDS ..	19
H. AGA SUPPORTS FINALIZATION OF TEST PROCEDURES PRIOR TO ISSUANCE OF A NOTICE PROPOSING NEW OR AMENDED STANDARDS .....	20
I. INDUSTRY STANDARDS SHOULD BE CONSIDERED AND ADOPTED BY DOE WHEN APPROPRIATE.....	21
J. AGA SUPPORTS THE PROPER USE OF DIRECT FINAL RULES WHEN APPROPRIATE.....	22
K. NEGOTIATED RULEMAKING PROVISIONS SHOULD BE INCLUDED IN THE REVISED PROCESS RULE.....	25
L. OTHER REVISIONS AND ISSUES IN THE NOPR.....	27
M. ADDITIONAL MATTERS THAT THE DEPARTMENT SHOULD ADDRESS IN THE REVISED PROCESS RULE.....	31
V. CONCLUSION .....	34

**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF ENERGY**

<b>Energy Conservation Program for )</b>	
<b>Appliance Standards: Proposed )</b>	
<b>Procedures for Use in New or Revised )</b>	<b>EERE-2017-BT-STD-0062</b>
<b>Energy Conservation Standards and Test )</b>	<b>RIN 1904-AD38</b>
<b>Procedures for Consumer Products and )</b>	
<b>Commercial/Industrial Equipment )</b>	

**COMMENTS OF THE  
AMERICAN GAS ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking and request for comments issued by the Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (“the Department” or “DOE”) in the above referenced proceeding and published in the Federal Register on February 13, 2019,<sup>1</sup> the American Gas Association (“AGA”) respectfully submits these comments. The NOPR seeks comment on the Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products (“Process Rule”). AGA appreciates the opportunity to provide the Department with feedback on the NOPR.<sup>2</sup>

---

<sup>1</sup> *Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 84 Fed. Reg. 3910 (February 13, 2019) (“NOPR”). See also, *Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment*, 84 Fed. Reg. 1257 (April 2, 2019) (extending the end of the comment period for the NOPR from April 15, 2019, to May 6, 2019).

<sup>2</sup> AGA also provided a statement at the public meeting held in this proceeding on March 21, 2019. See Prepared Statement of the American Gas Association, filed in EERE-2017-BT-STD-0062, available at: <https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0083>.

## I. INTRODUCTION

AGA generally supports the Department’s effort to revise and clarify the current Process Rule. AGA is supportive of energy efficiency standards that are established through a transparent collaborative process and justified by verifiable data and objective methodologies. AGA supports an administrative process that aids the Department in pursuing reasonable, fact-based efficiency standards and a process that evolves to reflect today’s economy. A revised and updated Process Rule is a step in the right direction towards establishing appropriate energy efficiency standards and test procedures. This is particularly important given the current delay of energy efficiency standards.<sup>3</sup>

The Energy Policy Conservation Act (“EPCA”) provides for a comprehensive federal regime regulating energy conservation standards for certain appliances and requires the Department to set minimum energy conservation standards for various covered products and review standards periodically.<sup>4</sup> In order to achieve the requirements of EPCA, the Department must have a transparent and open process in place to review new energy conservation standards and to amend current standards.

The process that the Department uses to evaluate its standards is of critical importance because of the anti-backsliding provision of EPCA, which precludes the Department from amending an existing energy conservation standard to permit greater energy use or a lesser amount of energy efficiency. Specifically, EPCA’s “anti-backsliding” provision provides that “[t]he Secretary may not prescribe any amended standard which increases the maximum allowable

---

<sup>3</sup> *Wasted Energy, DOE’s Inaction on Efficiency Standards & Its Impact on Consumers and the Climate: Hearing Before the Subcomm. on Energy of the H. Comm. on Energy and Commerce, 116th Cong. XX (2019)* (memorandum of Comm. on Energy and Commerce Staff), available at <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Briefing%20Memo%20ENE%2003.07.19%20DOE%20Efficiency%20Hearing.pdf>.

<sup>4</sup> See 42 U.S.C. § 6295, *et seq.*

energy use, . . . or decreases the minimum required energy efficiency, of a covered product.”<sup>5</sup> In other words, this is an “anti-backsliding” mechanism in EPCA whereby “efficiency standards for consumer appliances could be amended in one direction only, to make them more stringent.”<sup>6</sup> Therefore, the Department could, under Administrative Procedure Act (“APA”), reconsider a final rule, establishing energy efficiency standards for appliances, but EPCA’s anti-backsliding provision would prevent DOE from weakening established energy efficiency standards.<sup>7</sup> Since there are strict statutory provisions limiting changes after a standard is finalized, the process used to set any standards is of critical importance. As such, AGA applauds the Department’s endeavor to refine the process utilized to evaluate the merits of new efficiency standards before proceeding with pending or future rulemakings.

As discussed in detail below, regarding the proposed revisions to the Process Rule, AGA is supportive of the Department’s proposals, and it offers a few clarifications in order to further improve the revised Process Rule. Specifically, AGA supports making the Process Rule binding on the Department. AGA also supports the Process Rule being applied equally to consumer products and industrial and commercial equipment for energy conservation standards and test procedures. Furthermore, the Process Rule should be amended, as proposed by DOE, to define the process used to adopt the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (“ASHRAE”) Standard 90.1 equipment standards. Regarding setting priorities, AGA supports the Departments continued use of the ten factors when determining its priorities. Additionally, AGA supports the proposal to limit any expansion of covered products to specific narrow circumstances.

---

<sup>5</sup> 42 U.S.C. §6295(o)(1).

<sup>6</sup> *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 188 (2nd Cir. 2004).

<sup>7</sup> *Id.* at 203.

AGA strongly supports stakeholder participation in the early stages and throughout the rulemaking process and AGA supports the various methods that DOE has proposed for early assessment of potential standards and test procedures. AGA encourages the Department to establish thresholds that illustrate if a situation warrants a new or revised rule or regulation. AGA agrees with DOE that test procedures used to evaluate proposed standards for a covered product should be finalized at least 180 days prior to publication of a notice proposing a new or amended standards for the same covered product.

AGA requests that the Department, reconsider its proposal to require adoption of industry standards and revise the Process Rule to specify that DOE will consider industry standards, instead of mandating their use. AGA supports the use of direct final rules, negotiated rulemakings and advance notice of proposed rulemakings when appropriate. AGA also supports the Department conducting a peer review at least once every ten years of its assumptions, models, and methodologies. Furthermore, AGA supports making all analysis and models utilized in the standard setting process available to the public. As discussed in more detail below, AGA recommends that the Department not commence a new minimum energy efficiency standard process until the existing standard has been reviewed and that the Process Rule should state as such.<sup>8</sup> Finally, AGA supports the continued utilization of a source energy methodology for measuring energy consumption and efficiency when the Department contemplates critical energy policy decisions.

---

<sup>8</sup> See Section L. 2., *supra*. See also Joint Comments of the American Public Gas Association and the American Gas Association at p. 16, filed in EERE-2017-BT-STD-0062 on March 5, 2018 (“APGA-AGA Joint Comments”) (<https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0061>) (“No new minimum standard is needed if a review demonstrates that a substantial percentage of high efficiency appliances exceeding the current standard within the type (or class) already exists.”).

## **II. IDENTITY AND INTERESTS**

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 74 million residential, commercial and industrial natural gas customers in the United States, of which 95 percent — more than 71 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States' energy needs.<sup>9</sup>

AGA's members serve residential and commercial customers, the majority of which use natural gas furnaces, boilers and/or water heaters, and therefore have a direct and vital interest in both the minimum efficiency standards for these products and the procedures used by DOE to adopt these standards. The Process Rule is an integral procedure in DOE's rulemaking process, therefore reforms to the Process Rule can and will have meaningful impacts on DOE's rulemakings to establish new minimum efficiency standards. AGA encourages the adoption of efficiency standards only after consideration of all relevant points of view, including the distributors of natural gas, whose desire for the efficient use of natural gas is matched only by their commitment to ensure minimum standards do not distort consumers choices away from natural gas to other less efficient and more costly fuel sources.

## **III. BACKGROUND**

The Department's Process Rule was developed to guide implementation of the Appliance Standards Program, which is conducted pursuant to EPCA for consumer products, and for certain

---

<sup>9</sup> For more information, please visit [www.aga.org](http://www.aga.org).

industrial equipment.<sup>10</sup> Under EPCA, DOE’s energy conservation program for covered products consists essentially of four parts: (1) testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures.<sup>11</sup> Subject to certain criteria and conditions, the Department is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating costs of each covered product and covered equipment.<sup>12</sup> Manufacturers of covered products and covered equipment must use the prescribed DOE test procedure as the basis for certifying to DOE that products and equipment comply with the applicable energy conservation standards and when making representations to the public regarding the energy use or efficiency of products.<sup>13</sup> DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA.<sup>14</sup> Moreover, any new or amended energy conservation standards must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified;<sup>15</sup> and new or amended standards must result in a significant conservation of energy.<sup>16</sup>

In the mid-1990’s the Department conducted efforts to improve the process it follows to develop energy conservation standards and this effort involved various stakeholders. The result was a final rule published in 1996<sup>17</sup> and codified into the Department’s regulations.<sup>18</sup> In December 2017, the Department issued a Request for Inquiry (“RFI”) to address potential improvements to

---

<sup>10</sup> See Energy Policy and Conservation Act of 1975, Public Law 94–163 (42 U.S.C. 6291–6309, as codified), for consumer products, and for certain industrial equipment (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, § 441(a).

<sup>11</sup> NOPR at 3911.

<sup>12</sup> See 42 U.S.C. 6293 and 6314.

<sup>13</sup> See 42 U.S.C. 6293(c), 6295(s) 6314(a), and 6316(a).

<sup>14</sup> NOPR at 3911.

<sup>15</sup> 42 U.S.C. 6295(o)(2)(A) and 6316(a).

<sup>16</sup> 42 U.S.C. 6295(o)(3)(B), 6313(a)(6), and 6316(a).

<sup>17</sup> *Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 61 Fed. Reg. 36974 (July 15, 1996).

<sup>18</sup> 10 CFR Part 430, subpart C, Appendix A (2019).

the Process Rule.<sup>19</sup> Various entities filed comments in response to the RFI, including AGA, in conjunction with the American Public Gas Association.<sup>20</sup> On February 13, 2019, the NOPR was published in the Federal Register seeking comment on the proposed revisions to the Process Rule.<sup>21</sup>

#### **IV. COMMENTS**

##### **A. THE PROCESS RULE SHOULD BE BINDING ON THE DEPARTMENT**

In the NOPR, the Department proposes to amend the Process Rule to make clear that its provisions are binding on the agency.<sup>22</sup> Currently, the Department only considers the Process Rule to be guidance.<sup>23</sup> The Department asserts that requiring mandatory compliance on the part of DOE with its own Process Rule would promote a rulemaking environment that is both predictable and consistent.<sup>24</sup> The mandatory nature of a revised Process Rule, according to the Department, will promote greater transparency, consistency, and meaningful participation of stakeholders in the regulatory process.<sup>25</sup>

AGA supports the Department's efforts to make the Process Rule mandatory on the agency for the reasons discussed in the NOPR. It is important for the Department to be held accountable to its own procedures; moreover, it will promote a rulemaking environment that is both predictable and consistent. Furthermore, it is an important tenet of administrative law that a federal agency adheres to its own policies, rules and regulations. Ad hoc departures are not proper, for such activities disrupt orderly processes and harm predictability which are the hallmarks of lawful

---

<sup>19</sup> *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 82 Fed. Reg. 59992 (Dec. 18, 2017).

<sup>20</sup> See APGA-AGA Joint Comments and Statement of American Gas Association DOE Public Hearing: Process Rule RFI, dated January 9, 2018 (<https://www.regulations.gov/document?D=EERE-2017-BT-STD-0062-0013>).

<sup>21</sup> See n.1, *supra*.

<sup>22</sup> NOPR at 3912 – 3913, 3945.

<sup>23</sup> See NOPR at 3911, *see also Energy Conservation Program: Energy Conservation Standards for Ceiling Fans*, 82 Fed. Reg. 6826, 6833 (Jan. 19, 2017).

<sup>24</sup> NOPR at 3913.

<sup>25</sup> *Id.*

administrative action.<sup>26</sup> Therefore, the Department’s proposal to make the Process Rule binding on the agency is consistent with the overarching policy goal to have a transparent and predictable process, and is consistent with general administrative law precedent.<sup>27</sup>

**B. THE PROCESS RULE SHOULD BE CLARIFIED TO APPLY TO BOTH CONSUMER PRODUCTS AND INDUSTRIAL/COMMERCIAL EQUIPMENT**

The Department proposes to clarify in the NOPR that the Process Rule applies to both consumer products and industrial and commercial equipment.<sup>28</sup> The current Process Rule is applicable only to consumer products.<sup>29</sup> In the NOPR, the Department proposed to modernize and amend the Process Rule to apply to both consumer products and industrial and commercial equipment, and that the Process Rule contain language that clarifies this coverage.<sup>30</sup>

AGA supports the Department’s clarification that the Process Rule applies equally to consumer products and industrial and commercial equipment for energy conservation standards and test procedures, except for ASHRAE equipment, as discussed below. In the NOPR, the Department states that it has historically applied the Process Rule to both consumer and industrial and commercial rules.<sup>31</sup> AGA agrees that the proposed clarification would make clear that this practice continues. The Department’s proposed clarification will also promote a consistent

---

<sup>26</sup> See, e.g., *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (“[I]t is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.”); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986) (“It is axiomatic that an agency must adhere to its own regulations.”); *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994) (on its way to decision an agency must follow its own regulations).

<sup>27</sup> *Id.*

<sup>28</sup> NOPR at 3913.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 3914, 3945.

<sup>31</sup> *Id.* at 3914.

process, in that under the proposal the same procedures will apply to both consumer products and industrial and commercial equipment rulemakings.<sup>32</sup>

### C. APPLICATION OF THE PROCESS RULE TO ASHRAE EQUIPMENT

The Department proposes to add a new section in the modernized Process Rule providing separate procedural requirements and timelines for DOE to evaluate amendments to ASHRAE Standard 90.1 equipment.<sup>33</sup> Going forward, the Department is proposing, as its regular practice, to adopt the revised ASHRAE levels for standards as contemplated by EPCA, except in limited circumstances.<sup>34</sup> This approach, according to the Department, would reduce the regulatory burden on stakeholders and would promote consistency, simplicity, and efficiency when addressing ASHRAE equipment.<sup>35</sup> Under the proposal, the Department, would continue to follow the statutory timelines and procedural requirements in EPCA for ASHRAE equipment when adopting the ASHRAE Standard 90.1 levels, rather than those set forth in the Process Rule.<sup>36</sup> Similarly, when considering new test procedures or amending existing test procedures for ASHRAE equipment, DOE would adopt, without modification, industry standards as DOE test procedures as required by EPCA, except in limited circumstances.<sup>37</sup> DOE's review in adopting amendments based on action by ASHRAE is strictly limited to the specific standards for the specific equipment for which ASHRAE has made a change.<sup>38</sup>

In the NOPR, the Department explains that, for consideration of more-stringent standards than the ASHRAE levels, it would be required to meet a very high bar to meet the “clear and

---

<sup>32</sup> *Id.* at 3914 (except for ASHRAE equipment, as discussed elsewhere in the NOPR).

<sup>33</sup> *Id.* at 3915.

<sup>34</sup> *Id.* at 3915 and (42 U.S.C. 6313(a)(6)(A)(ii)(II)).

<sup>35</sup> *Id.* at 3915.

<sup>36</sup> *Id.*

<sup>37</sup> *See* NOPR at 3915, 3927; *see also*, 42 U.S.C. 6313(a)(4)).

<sup>38</sup> *Id.* at 3915.

convincing evidence” threshold and would seek public comment to assist it in making that determination.<sup>39</sup> To meet the “clear and convincing evidence” threshold, the Department would be required to determine that there is no substantial doubt that the more-stringent standard would result in significant additional conservation of energy, is technologically feasible and economically justified, or that the industry test procedures do not meet EPCA requirements.<sup>40</sup> In the event that DOE conducts a rulemaking to establish more-stringent standards for covered ASHRAE equipment, DOE would follow the procedures established in the Process Rule, while still complying with EPCA’s ASHRAE-specific deadlines.<sup>41</sup>

AGA agrees with the Department’s proposal in the NOPR to add a section into the Process Rule to clearly define the process used to adopt ASHRAE 90.1 equipment standards and also define a mechanism when a more-stringent equipment efficiency standard over the ASHRAE level can be pursued. AGA supports the Department’s proposal to meet the clear and convincing evidence threshold prior to proceeding with a rulemaking for more stringent standards. The proposal makes it clear that DOE will adopt the action taken by ASHRAE except in those circumstances where, the Department, pursuant to a defined process and parameters, determines a more-stringent standard is appropriate.

**D. THE DEPARTMENT SHOULD CONTINUE TO USE THE TEN FACTORS IN ITS PRIORITY SETTING MECHANISM**

The current Process Rule outlines DOE’s priority setting analysis, which considers ten factors.<sup>42</sup> In the NOPR, the Department states that it intends to continue considering the ten factors

---

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3915; 42 U.S.C. 6314(a)(2) and (3).

<sup>41</sup> *Id.* at 3915.

<sup>42</sup> *Id.* at 3916.

in its priority-setting, but proposes to revise the process to increase stakeholder input.<sup>43</sup> Specifically, the Department proposes that stakeholders have the opportunity to provide input on prioritization of rulemakings through a request for comment as DOE begins preparation of its Regulatory Agenda each spring.<sup>44</sup> As part of this process, the Department would refer interested parties to the Fall Regulatory Agenda and request input concerning which rulemaking proceedings should be in particular action categories for the Spring Regulatory Agenda and the timing of such rulemakings.<sup>45</sup> Through this revised process, DOE has tentatively concluded that increased stakeholder input early in the rulemaking process, combined with the public availability of the Regulatory Agenda, would meet the same objectives as DOE's previous priority-setting analysis.<sup>46</sup>

AGA supports the continued use of the ten factors used by the Department when considering setting priorities. Furthermore, AGA supports the Department's efforts to increase stakeholder input in the rulemaking process and with regard to setting priorities. Commenting on the Regulatory Agenda would provide stakeholders a chance to weigh in on the priorities. Certain of the ten factors, however, should receive extra attention as part of the priority setting process. Mainly, the Department should focus on the potential energy savings and the potential economic benefits as an initial screen for determining its priorities. The focus on these standards is important because if the Department determines the proposed regulatory activity does not provide sufficient energy savings or is not cost effective, there is no need to review the other factors.

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3916.

## E. COVERAGE DETERMINATIONS

In the NOPR, the Department explains that, in addition to specifying a list of covered residential and commercial products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products and industrial/commercial equipment as “covered” within the meaning of EPCA.<sup>47</sup> This authority allows DOE to consider regulating additional products/equipment that further the goals of EPCA.<sup>48</sup> DOE further states that if it determines to initiate the coverage determination process, it will first publish a notice of proposed determination, limited to the issue of coverage, in which the Department will explain how such products/equipment that it seeks to designate as “covered” meet the statutory criteria for coverage and why such coverage is “necessary or appropriate” to carry out the purposes of EPCA.<sup>49</sup> In the case of commercial/industrial equipment, DOE follows the same process, except that DOE need only show that the coverage determination is “necessary” to carry out the purposes of EPCA.<sup>50</sup> DOE states in the NOPR that it would exercise its authority to identify new “covered products” in a limited fashion; that is, any proposed new covered products/equipment should be narrowly defined with sufficient clarity so that the proposed coverage corresponds to that which is intended.<sup>51</sup> Specifically, DOE proposes to extend coverage only to: (1) consumer products for which EPCA regulation is “necessary or appropriate” to the achievement of the statutory purposes and meet consumption criterion; and (2) commercial and industrial equipment for which EPCA regulation is “necessary” to the achievement of the statutory purposes.<sup>52</sup>

---

<sup>47</sup> *Id.* at 3916; 42 U.S.C. §§6292(b), 6295(l), and 6312.

<sup>48</sup> *Id.* at 3916.

<sup>49</sup> NOPR at 3916; 42 U.S.C. 6292(b)(1).

<sup>50</sup> 42 U.S.C. 6312.

<sup>51</sup> NOPR at 3917.

<sup>52</sup> *Id.*

AGA supports the Department’s proposal to limit any expansion of coverage to those narrow circumstances which satisfy the statutory requirements and purpose of EPCA. A regulatory agency’s authority is only limited to those granted to it by statute;<sup>53</sup> therefore, in this case, EPCA must be the guardrail for any Department effort to have new “covered products.” Administrative agencies are free to give reasonable scope in terms of conferring their authority; however, agencies are not free to ignore the plain limitations of that authority.<sup>54</sup> The Department, when looking to expand the coverage of what is “covered” pursuant to EPCA, should do so in only a limited and targeted fashion consistent with the statutory parameters. The statutory provisions require that the Department expand the classification of covered products only when two criteria are met. The first criteria is when it is “necessary or appropriate” in accordance with EPCA’s purpose, which includes the conservation of energy supplies and the improvement of energy efficiency of major appliances and other consumer products.<sup>55</sup> The second criteria is when the products consume at least enough energy to satisfy a stated minimum energy consumption criterion.<sup>56</sup> The Department should not stray from these requirements when proposing to expanded the definition of covered products.

---

<sup>53</sup> *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291(2013); *Nat. Res. Def. Council v. EPA*, 824 F.2d 1146, 1152 (D.C. Cir. 1987).

<sup>54</sup> *See Peters v. Hobby*, 349 U.S. 331, 345 (1955).

<sup>55</sup> 42 U.S.C. § 6201.

<sup>56</sup> 42 U.S.C. § 6292(b)(1).

**F. AGA SUPPORTS EARLY STAKEHOLDER PARTICIPATION AND THE VARIOUS METHODS THAT THE DEPARTMENT HAS PROPOSED TO PROVIDE EARLY ASSESSMENT OF PROPOSED STANDARDS AND TEST PROCEDURES AND TO DETERMINE THE NEED FOR RULEMAKINGS**

**1. AGA SUPPORTS EARLY ASSESSMENT REVIEW**

The Department proposes to adopt provisions in the revised Process Rule that would provide for an early assessment review of the suitability of further rulemaking.<sup>57</sup> As a first step in this process, DOE proposes to publish a notice in the *Federal Register* announcing that it is considering the initiation of a standards proceeding and requesting submission of related comments, including data and information showing whether any new or amended standard is economically justified, technologically feasible or would result in a significant savings of energy.<sup>58</sup> If DOE receives sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, it would engage in notice and comment rulemaking to make that determination.<sup>59</sup> If the Department does not receive sufficient information or the information received is inconclusive with regard to the statutory criteria, it would undertake the preliminary stages of a rulemaking to issue or amend an energy conservation standard.<sup>60</sup> Beginning such a rulemaking, however, would not preclude DOE from later making a determination that a new or amended energy conservation standard is not economically justified, technologically feasible, or would not result in a significant savings of energy.<sup>61</sup>

AGA supports the Department's proposed provisions to incorporate early stakeholder input via the notice and comment process discussed above. The proposal is also consistent with the

---

<sup>57</sup> NOPR at 3917.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

general notice and comment provisions of the APA,<sup>62</sup> and it is imperative that notice to the stakeholders sufficiently apprise interested parties of issues pending before DOE, thereby affording interested persons reasonable and meaningful opportunity to participate in the process.<sup>63</sup> The notice process and the opportunity to comment serve to educate the agency and provide fair treatment to persons and entities affected by a proposed rule.<sup>64</sup> Early engagement with stakeholders can assist the Department's efforts and may also reduce the time it takes to finalize any new or revised standards. In addition to allowing DOE to meet its statutory obligations, the process could also be an effective screen for the Department to use so that it can effectively focus efforts on standards that would provide the most energy savings and are of most interest to the stakeholders. Further, the proposed early stakeholder process would provide ample opportunity for parties to provide input and data on whether any new or amended standard is economically justified, technologically feasible, or would result in significant savings of energy.

## **2. AGA SUPPORTS MULTIPLE AVENUES FOR EARLY STAKEHOLDER INPUT**

The Department proposes that after conducting the early assessment review process described above, if it does not receive sufficient information suggesting that it could justify a determination that no new or amended standard would meet the applicable statutory criteria, or the information received is inconclusive with regard to the statutory criteria, DOE would move to two options for the preliminary stages of a rulemaking to issue or amend an energy conservation standard.<sup>65</sup> The first option would be to undertake the framework document and preliminary

---

<sup>62</sup> See 5 U.S.C. § 553(b)(B).

<sup>63</sup> See e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

<sup>64</sup> *Id.*

<sup>65</sup> NOPR at 3918.

analysis, and the second is an advance notice of proposed rulemaking (“ANOPR”).<sup>66</sup> The Department also states that RFIs and Notices of Data Availability (“NODA”) could be issued, as appropriate.<sup>67</sup> In addition to these analytical documents, DOE plans to continue to rely on a variety of notices to ensure opportunities for public input in the rulemaking process.

AGA supports the Department’s overall effort to ensure early stakeholder input. While the revised Process Rule includes avenues for stakeholder participation such as ANOPRs, NOPRs, Supplemental Notice of Proposed Rulemaking (“SNOPR”), NODAs, and RFIs, AGA encourages the Department to explain in any such issuance why it determined that a particular type of publication and process was appropriate. For example, the Department should explain why it believed a NODA was more appropriate in a particular situation as compared to an ANOPR. DOE’s explanation of the factors that it considered when making the determination will increase transparency and permit stakeholders to better understand why a particular process was determined over another. If the Department does not provide an explanation of why a particular method was determined to be appropriate, DOE’s methodology may create confusion and reduce the transparency of the rulemaking process.

### **3. AGA SUPPORTS THE CONTINUED USE OF ANOPRS**

In the NOPR, the Department tentatively concluded that there are multiple procedures the agency could adopt as part of the revised Process Rule that achieve the aims of early information gathering in the rulemaking process, including an ANOPR.<sup>68</sup> In all cases, however, contrary to DOE’s November 2010 policy statement,<sup>69</sup> DOE states in the NOPR that it will provide some form

---

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> In November 2010, DOE also issued a statement intended to expedite its rulemaking process. The statement is currently available at [http://www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/changes\\_standards\\_process.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/changes_standards_process.pdf).

of preliminary data gathering and public comment process, including either an ANOPR or framework document and preliminary analysis, prior to issuing a proposed rule.<sup>70</sup>

AGA supports the continued utilization of the ANOPR process, or similar processes, as appropriate, to achieve the goal of early information gathering in the rulemaking process. There is utility in the ANOPR process and similar processes designed to obtain early stakeholder input on potential regulatory action. Any reduction in the use of early engagement mechanisms, such as ANOPRs, could reduce the transparency and the exchange of information early in the process which may be detrimental to stakeholders.

#### **4. DECISION-MAKING PROCESS FOR ISSUING A DETERMINATION NOT TO AMEND CURRENT STANDARDS**

In the NOPR, DOE tentatively decided that in instances where the early hard look either suggested that a new or amended energy conservation standard might be justified or in which the information was inconclusive on this point, it will develop a process by which it will examine the potential costs and benefits of a new standard that will enable it to more expeditiously review and determine whether to amend a given energy conservation standard.<sup>71</sup> The process would apply both to instances where DOE is establishing a new standard and in cases where DOE is weighing whether to amend an already-existing standard.<sup>72</sup> In both cases, the process would consider a variety of factors such as: (1) whether there are sufficiently developed, cost-effective, technological improvements that would allow a given product to achieve an enhanced level of efficiency; and (2) whether the level of improvement is consistent with the threshold for significant energy conservation.<sup>73</sup> DOE would compare the projected energy savings against the

---

<sup>70</sup> NOPR at 3918.

<sup>71</sup> NOPR at 3920.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 3920 - 3921.

technological feasibility and likely costs necessary to meet the potential amended standards to achieve those energy savings.<sup>74</sup>

AGA generally supports the Department's proposed process for evaluating new standards and evaluating whether to amend an already-existing standard. It is critical that DOE evaluate the cost-effectiveness of a standard versus its possible level of enhanced efficiency. Any process of evaluation must include a balancing of the potential energy saving with the cost of implementation. Furthermore, and as discussed in detail below, DOE should not commence a new efficiency standard proceeding until the existing standards have been reviewed.

## **5. TEST PROCEDURES**

The Department proposes, in the NOPR, to publish a notice in the *Federal Register* announcing whenever it is considering initiation of a rulemaking for new or revised test procedures.<sup>75</sup> DOE states that, when considering amended test procedures, it would follow an early assessment process similar to that proposed for consideration of new or amended energy conservation standards.<sup>76</sup> As part of such notice, DOE intends to request data and information substantively concerning whether an amended test procedure rule is not warranted.<sup>77</sup> DOE anticipates reviewing the comments and if it agrees that the test procedure is not justified at that time, DOE would not pursue the rulemaking and would publish a notice to that effect.<sup>78</sup>

AGA supports the Department's proposal to issue a notice when it seeks to implement new or revised test procedures. As noted above, AGA supports DOE's efforts throughout the NOPR to incorporate early stakeholder input. DOE's proposal appears to provide an opportunity for

---

<sup>74</sup> *Id.* at 3921.

<sup>75</sup> NOPR at 3921.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

stakeholder engagement on whether any new or amended test procedure is necessary at this time. However, as discussed below, the test procedures should be finalized before any related standards are proposed.

#### **G. DOE SHOULD UTILIZE SIGNIFICANT SAVINGS OF ENERGY THRESHOLDS**

As explained in the NOPR, the Department has reviewed how it applies the concept of “significant conservation of energy” in its rulemaking process, including how it has interpreted the court’s decision in *NRDC v. Herrington*,<sup>79</sup> which, according to DOE, provides it with some latitude with respect to determining whether a given level of energy savings constitutes “significant.”<sup>80</sup> In the NOPR, DOE proposes an approach that would examine energy savings through the twin lenses of the total amount of projected energy savings and the relative percentage increase in efficiency/decrease in energy usage that could be obtained from setting or amending standards for a given product/equipment.<sup>81</sup> If either of the desired thresholds is reached, DOE would then conduct analyses to ascertain whether a standard can be prescribed that produces the maximum improvement in energy efficiency that is both technologically feasible and economically justified. However, because technological feasibility is already determined in the first step, DOE would focus on performing an economic justification analysis under EPCA.<sup>82</sup>

AGA supports DOE’s efforts to establish thresholds for significant conservation of energy in its rulemaking process. AGA supports the premise, as summarized by DOE in the NOPR, that a significant conservation of energy threshold should be non-trivial and that each candidate

---

<sup>79</sup> *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

<sup>80</sup> NOPR at 3922.

<sup>81</sup> NOPR at 3922 and 3924. DOE is considering using a quad threshold value (over a 30-year period) of 0.5 quad and a percentage threshold value of 10 percent.

<sup>82</sup> 42 U.S.C. § 6295(o)(2)(B)(i).

standard considered results in significant energy savings.<sup>83</sup> There must be thresholds set that illustrate a problem is large enough to justify a regulation or rule. The NOPR establishes a mechanism to evaluate whether a new standard is appropriate based on the significance of the energy savings, the technological feasibility of a proposal and the economic effect of the new rule. AGA recommends that any final methodology in the revised Process Rule consider a combination of the anticipated percentage reduction of energy consumption for the covered product compared to the existing standard, along with the impact of overall energy consumption in the market sector. Reviewing a proposal from two angles or lenses should indicate if it is worth modifying a standard. For example, a new standard may not be needed if, for a residential covered product, it could achieve a 20% increase in efficiency, but only negligibly contribute to a reduction in overall residential energy consumption.<sup>84</sup>

#### **H. AGA SUPPORTS FINALIZATION OF TEST PROCEDURES PRIOR TO ISSUANCE OF A NOTICE PROPOSING NEW OR AMENDED STANDARDS**

DOE proposes, in the NOPR, that test procedures used to evaluate proposed standards be finalized at least 180 days prior to publication of a notice proposing new or amended standards.<sup>85</sup>

AGA agrees with this proposal, as it is critical that test procedures be finalized prior to the Department proposing any new or amended efficiency standard. DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product prior to the adoption of a new or amended energy conservation standard.<sup>86</sup> Finalized test procedures help ensure that: (i) the test procedures are technically correct and the

---

<sup>83</sup> NOPR at n.8.

<sup>84</sup> Alternatively, if a process for determining a significant savings of energy threshold is not part of the revised Process Rule, AGA recommends that DOE engage stakeholders in a further separate proceeding to ascertain an appropriate mechanism.

<sup>85</sup> *Id.* at 3926.

<sup>86</sup> 42 U.S.C. §§ 6295(o)(3)(A) and (r).

results demonstrate the impact on the current energy efficiency rating; (ii) the results from the test procedures are repeatable and can be performed with minimal burdens; and (iii) stakeholders have the opportunity to review and comment on the new or amended standards. If the test procedures are not final before a new or amended standard is proposed, then stakeholders cannot meaningfully comment on the proposal.

AGA believes that finalizing the test procedures at least 180 days prior to publication of a notice is the minimum amount of time needed for stakeholders (manufacturers) to evaluate new or amended test procedures. This will ensure that the Department complies with the statutory requirements to develop test procedures prior to the adoption of new or amended standards.<sup>87</sup> Furthermore, adopting this proposal will ensure that the test procedures are technically correct, can be repeated, and that the new or amended standards can be meaningfully reviewed.

#### **I. INDUSTRY STANDARDS SHOULD BE CONSIDERED AND ADOPTED BY DOE WHEN APPROPRIATE**

In the NOPR, the Department proposes to amend the Process Rule to require adoption, without modification, of industry standards as test procedures for covered products and equipment unless such industry standards would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, and estimated operating costs of that equipment during a representative average use cycle.<sup>88</sup>

While there are statutory requirements for the Department to adopt industry standards in certain cases,<sup>89</sup> AGA is wary of a rule mandating the use of industry standards for test procedures in instances not already addressed in the statute. AGA generally supports the adoption of industry

---

<sup>87</sup> *Id.*

<sup>88</sup> NOPR at 3927.

<sup>89</sup> See NOPR at 3926, *citing* 42 U.S.C. § 6314(a)(4)(A)).

standards as test procedures because, where reasonable, the use of industry standards can minimize regulatory burdens and improve transparency. However, there may be circumstances where adopting industry standards may not be supported by clear and convincing evidence. For example, there may be circumstances where, for certain appliances, the facts warrant the use of a non-industry standard procedure. Therefore, AGA requests that the Department *consider* industry standards, and permit comments on particular proposals, instead of mandating their use. In other words, when making a determination on test procedures, the Department should give consideration to the applicable industry standard and work with stakeholders before automatically mandating the use of a particular industry standard.

**J. AGA SUPPORTS THE PROPER USE OF DIRECT FINAL RULES WHEN APPROPRIATE**

A Direct Final Rule (“DFR”) is essentially a rulemaking process used when an agency deems a rule to be routine or noncontroversial, and it is done without prior notice and comment. In the NOPR, regarding the use of DFRs, the Department proposes to: (1) clarify its authority under the DFR relevant statutory provisions;<sup>90</sup> (2) provide guidance as to the interpretation of “fairly representative;” and (3) explain DOE’s obligations upon receipt of an adverse comment.<sup>91</sup>

In the NOPR, the Department explains that a DFR is a procedural mechanism separate from the negotiated rulemaking process, and that DOE may issue a DFR adopting energy conservation standards for a covered product if certain conditions are met.<sup>92</sup> First, DOE must receive a joint proposal from a group of “interested persons that are fairly representative of relevant points of view.”<sup>93</sup> To be “fairly representative of relevant points of view,” according to DOE, the

---

<sup>90</sup> 42 U.S.C. § 6295(p)(4).

<sup>91</sup> NOPR at 3928.

<sup>92</sup> *Id.* at 3949.

<sup>93</sup> 42 U.S.C. § 6295 (p)(4).

group submitting a joint statement must include large and small businesses in the regulated industry/multi-stakeholder community, energy advocates, energy utilities, as appropriate, consumers, and States.<sup>94</sup> However, it will be necessary to evaluate the meaning of “fairly representative” on a case-by-case basis, subject to the circumstances of a particular rulemaking. Second, DOE must follow certain procedural steps regarding the DFR, such as making required publications in the *Federal Register* seeking comments on whether the submitting group is fairly representative, among other things.

The DFR process, if used properly, can be an effective and efficient means of promulgating new energy conservation standards. However, any such process must be consistent with the notice and comment procedures in the APA and EPCA.<sup>95</sup> Furthermore, the Department must ensure notice and comment procedures are in place:

“(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”<sup>96</sup>

The DFR process was intended to shorten the timeline for a completed standard only in circumstances where there is consensus among stakeholders.<sup>97</sup> Therefore, while development of DFRs may allow for early stakeholder input and can support efforts to build consensus, which can save time and money, and may ultimately produce better standards; if used improperly, the DFR process could run afoul of the notice and comment requirements, leading to wasted time and effort and protracted litigation.

---

<sup>94</sup> NOPR at 3949.

<sup>95</sup> See 5 U.S.C. § 552(b); 42 U.S.C. §§ 6295(o)(2)(B)(i), 6295(p)(1)-(2), and 6306(a).

<sup>96</sup> *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C. Cir. 2005).

<sup>97</sup> See *Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 79 Fed. Reg. 64,705, 64,708 (Oct. 31, 2014) (citing Energy Efficiency Promotion Act of 2007: Hearing on S. 1115 Before S. Comm. On Energy and Nat’l Resources, 110th Cong. 4, 6 (2007) (John Mizroch, Principal Deputy Ass. Sec., DOE)).

AGA supports DOE's interpretation of the DFR provisions in EPCA. The proposed provisions in the revised Process Rule will help to ensure that the DFR process is used only when all of the statutory requirements are met. In particular, it includes steps for determining if a joint statement is submitted by "interested persons that are fairly representative of relevant points of view," *i.e.*, seeking comment if the group is "fairly representative," and when a DFR can be withdrawn, *i.e.*, when sufficient adverse comment(s) are received.

AGA appreciates DOE setting forth provisions that define what it means for a joint statement to be submitted by "interested persons that are fairly representative of relevant points of view." AGA agrees that the rulemaking process should be as inclusive as possible.<sup>98</sup> The legislative history of the DFR amendment indicates that the DFR process was intended to be used only in circumstances in which representatives of all relevant interests jointly submit a proposed energy conservation standard for a product, *i.e.*, when there is a clear consensus.<sup>99</sup> AGA maintains that DOE achieves this purpose by specifying that "fairly representative" must, at a minimum, "include larger concerns and small businesses in the regulated industry/manufacturer community, energy advocates, energy utilities, as appropriate, consumers, and States."<sup>100</sup>

AGA understands that DOE may evaluate the meaning of "fairly representative" on a case-by-case basis, subject to the rulemaking; however, AGA recommends that DOE consider specifying particular entity types or interest groups that are relevant to certain categories of

---

<sup>98</sup> NOPR at 3929.

<sup>99</sup> *See* Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 79 Fed. Reg. 64,705, 64,708 (Oct. 31, 2014) ("DOE's testimony before Congress on the scope of its requested DFR authority provides another important touchstone for regulations clarifying DOE's DFR process. For example, Assistant Secretary Alexander Karsner told Congress that DOE's DFR 'legislative proposal would allow the Department to move directly to a final rule for certain products when a clear consensus for standards exist among the manufacturers, efficiency advocates and other stakeholders.'"), *citing* Achieving-At Long Last-Appliance Efficiency Standards, Hearing Before H. Subcomm. On Energy and Air Quality, 110th Cong., 8, 16 (2007) (Alexander Karsner, Asst. Sec., DOE).

<sup>100</sup> NOPR at 3929.

proposed standards, such as electric or natural gas utilities, *i.e.*, energy utilities. From AGA’s perspective, a representative group, with respect to all proposed standards applicable to appliances that use natural gas, must include gas distribution utilities and their customers and DOE should deem such interests to be part of a “fairly representative” group with respect to the DFR process. Specifying relevant categories in advance through a rulemaking and the Process Rule would help to ensure that all relevant points of view are fairly represented, as mandated by EPCA.

Regarding the review of adverse comments, AGA supports DOE focusing on the substance, rather than the quantity, of the adverse comments submitted.<sup>101</sup> AGA emphasizes the importance of DOE evaluating substantive arguments presented in adverse comments that are reasonably backed by supporting data as a reasonable basis for the withdrawal of a DFR.<sup>102</sup> Speculative and unsupported assertions may not warrant the withdrawal of a DFR, but positions supported by the material submitted in the proceeding and precedent should be provided sufficient weight when balancing differing interests. Furthermore, DOE’s analysis must not arbitrarily dismiss substantive adverse comments because that would essentially result in an agreement among only a limited subset of stakeholders that could result in a DFR process that strips other stakeholders of their statutory rights.

**K. NEGOTIATED RULEMAKING PROVISIONS SHOULD BE INCLUDED IN THE REVISED PROCESS RULE**

In the NOPR, the Department proposes to include, in the updated Process Rule, a section on negotiated rulemaking, *i.e.*, a process by which it attempts to develop a consensus proposal for regulation, in consultation with interested parties, thereby addressing salient comments from

---

<sup>101</sup> NOPR at 3930.

<sup>102</sup> Unsupported speculative assertions not supported by the record.

stakeholders before issuing a proposed rule.<sup>103</sup> Specifically, the revised Process Rule would clarify that in appropriate cases, negotiated rulemakings may be considered on a case-by-case basis.<sup>104</sup> Further, DOE proposes to use a convener to determine, in consultation with relevant stakeholders, whether review for a given product or equipment type would be conducive to negotiated rulemaking, with the agency evaluating the convener's recommendation before reaching a decision on such matters. DOE notes that it plans to continue to use the Appliance Standards and Rulemaking Federal Advisory Committee ("ASRAC") process in appropriate cases and to reference that process in the revised Process Rule. To ensure that all interested parties retain the ability to play an active role in the rulemaking process, DOE also proposes to add provisions that, in addition to the current ASRAC process, would increase opportunities for non-members of the ASRAC working group to engage in the negotiated rulemaking process.<sup>105</sup> Finally, DOE proposes to separate DFRs from the negotiated rulemaking process in the revised Process Rule to be more fully consistent with the Negotiated Rulemaking Act.<sup>106</sup>

AGA supports DOE including a section on negotiated rulemaking in the Process Rule that provides for a convener and promotes full stakeholder participation throughout the rulemaking process. If used appropriately, negotiated rulemakings can be an effective and efficient means of promulgating new energy conservation standards. AGA agrees that the Process Rule should make clear that, prior to initiating a negotiated rulemaking, DOE will, pursuant to the APA,<sup>107</sup> appoint a convener to: (i) identify persons who will be significantly affected by a proposed rule; and (ii) conduct discussions with such persons to identify their issues of concern and to ascertain whether

---

<sup>103</sup> NOPR at 3930, 3931.

<sup>104</sup> *Id.*

<sup>105</sup> NOPR at 3932.

<sup>106</sup> NOPR at 3927, 31; 5 U.S.C. § 563.

<sup>107</sup> 5 U.S.C. § 563(b).

the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking. AGA also supports DOE incorporating provisions to ensure there is opportunity for public comment before the negotiated rulemaking committee. The use of a facilitator and the opportunity for comprehensive public input will ensure the participation of all relevant interests in the process.

AGA also supports DOE separating DFRs from negotiated rulemakings and requiring that the outcome of a negotiated rulemaking be a proposed rule, subject to a comment period.<sup>108</sup> As DOE recognizes, it is important to ensure that there is opportunity for public comment throughout the negotiated rulemaking process. The Process Rule should, therefore, be amended to include the provisions that DOE proposes to promote and require full participation.

#### **L. OTHER REVISIONS AND ISSUES IN THE NOPR**

##### **1. THE DEPARTMENT SHOULD UPDATE ITS ANALYTICAL METHODOLOGIES**

In the NOPR, the Department states that three discrete areas merit discussion with regard to its analytical methodologies: the peer review process, proprietary data, and DOE's analytical methodologies.<sup>109</sup> To assess what changes to the analytical methodologies may be needed, and, potentially, what changes to the Process Rule might be appropriate, DOE is committing to conduct a peer review of its assumptions, models, and methodologies to ensure that its approach is designed to provide reasonable accurate projections.<sup>110</sup> Additionally, DOE would undertake a recurring peer review of DOE's analytical methods at least once every ten years.

---

<sup>108</sup> NOPR at 3931.

<sup>109</sup> NOPR at 3936.

<sup>110</sup> *Id.*

AGA recommends that DOE conduct a peer review of its assumptions, models, and methodologies as soon as possible to ensure that its processes are current. AGA supports the Department conducting a peer review, at least once every ten years, of its assumptions, models, and methodologies to ensure that its approach is designed to provide reasonable accurate projections. By not conducting peer reviews in a timely manner, the Department is depriving the public of certain regulatory protections – such as standards based on current scientific information that has been tested impartially and deemed appropriate and reliable by a group of experts.<sup>111</sup> For example, the regulatory guidelines established by the Office of Management and Budget (“OMB”) require a peer review of any changes to scientific data and/or methodologies used in the development of rules or regulations. Specifically, the Final Information Quality Bulletin for Peer Review of OMB (“OMB Bulletin”) requires each federal agency to conduct a peer review of all influential scientific information that the agency intends to disseminate.<sup>112</sup> Technical Support Documents that the Department relies on when issuing a proposed and final standard contain influential scientific information that DOE has disseminated, therefore such information should be peer reviewed and up-to-date.

In the NOPR, the Department expressed interest in receiving input from stakeholders regarding DOE’s handling and use of proprietary data.<sup>113</sup> AGA supports making *all* analysis and models utilized in the standard setting process available to the *public*, to the extent permitted by

---

<sup>111</sup> 10 C.F.R. § Part 430, Subpart C, App. A.

<sup>112</sup> *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664 (Jan. 14, 2005) (The term “influential scientific information” means 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. The term “scientific information” means factual inputs, data, models, analyses, technical information, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences.”).

<sup>113</sup> NOPR at 3937.

law.<sup>114</sup> Public access and public review of the information used to establish standards is critical to the rulemaking process and notice and comment provisions of the APA; therefore, proprietary or confidential information should only be withheld from the public in limited circumstances, and only when absolutely necessary. AGA also supports making available the user manuals, instructions, and other tools, to enable the duplication of DOE's analysis and modeling efforts. This is essential to verifying DOE's results. AGA recommends that all DOE analysis and modeling tools be configured as open access to allow the user to input their own data to run alternative modeling runs. Furthermore, data and other modeling tools should be made available to the public at *no cost* and without limitations as to use. Additionally, there should be no undue burdensome hurdles established that restrict access to information, such as exorbitant costs or limitations on use. Access to the information used by the Department when it generates a proposed rule is essential to the notice and comment process. Moreover, access will help ensure fuller stakeholder participation and provide DOE with alternative outcomes that can be evaluated.

## **2. DOE SHOULD CONDUCT RETROSPECTIVE REVIEWS OF THE ENERGY SAVINGS AND COSTS OF ENERGY CONSERVATION STANDARDS**

In the NOPR, the Department acknowledges that a broad and comprehensive retrospective review of DOE's current and past energy conservation standards could provide significant data for DOE to consider as part of future standards rulemakings.<sup>115</sup> DOE explained, however, that while it recognizes the potential benefits of a retrospective review on a periodic basis, it faces limits on

---

<sup>114</sup> AGA recommends that the Department release information in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and related guidance. The Department, however, should strive to make as much information public as possible and avoid using information that is privileged or confidential, or would otherwise be protected by a FOIA exemption, whenever possible.

<sup>115</sup> NOPR at 3940.

its resources. Therefore, in the NOPR, DOE states that it will continue to evaluate the possibility of conducting these types of reviews, including on a longer-term (*e.g.*, 10-year) basis. The Department also states in the NOPR that it believes that the proposal for early assessment processes incorporates an element of retrospective review and that by initially asking if anything has changed since issuance of the last standard or test procedure, DOE would be seeking input in what effectively amounts to a retrospective review of the impact of the effectiveness of its most recent regulatory action for the product/equipment at issue.

AGA believes that DOE should not commence a new minimum energy efficiency standard process until the existing standard has been reviewed.<sup>116</sup> An effective retrospective review would include objective, verifiable quantification. If done right, this sort of retrospective review should enhance DOE's modeling and analyses and should avoid any material flaws in DOE's current modeling. If a retrospective review demonstrates that a substantial percentage of high efficiency appliances exceeding the current standard within the type (or class) already exists, no new minimum standard is needed.

AGA understands that DOE has limited resources to conduct a retrospective review and is still evaluating how to effectively proceed. In the meantime, AGA believes that the retrospective review can occur during the comment period of the applicable early stakeholder process. Parties can and should provide data demonstrating changes since the issuance of the last standard or test procedure, and the impact and effectiveness of its most recent regulatory action for the product at issue. The Department, however, as part of the Process Rule should commit to such retrospective reviews when data is submitted as part of the stakeholder process.

---

<sup>116</sup> See APGA-AGA Joint Comments at p. 16.

**M. ADDITIONAL MATTERS THAT THE DEPARTMENT SHOULD ADDRESS IN THE REVISED PROCESS RULE**

**1. DOE SHOULD ONLY HAVE LIMITED PARTICIPATION IN NATIONAL CODES AND STANDARDS ACTIVITIES**

National codes and standards activities conducted by organizations such as ASHRAE and the International Code Council, among others, are very important to the natural gas industry. In recent history, DOE has become more involved in these non-governmental organization, such as participating in standards and code body proceedings as advocates of requirements and generally becoming more active in these types of organization. While DOE’s governing statute permits the Department to be involved in such organizations,<sup>117</sup> such participation, however, should be limited to the presentation of peer reviewed research and analysis, and review of codes. For example, it is appropriate for DOE to evaluate and analyze codes, such as when the International Energy Conservation Code issues codes to improve energy efficiency in buildings.<sup>118</sup> Such evaluations and related determinations, however, may appear less than arm’s length if the Department has a role in creating the codes. In other words, in order to maintain the independent nature of DOE’s reviews of non-governmental codes and standards, it is prudent for the Department to step back and not be intimately involved in the creation of codes and standards that it may be called on to evaluate.

---

<sup>117</sup> 42 U.S.C. § 6836(b) (“The Secretary shall periodically review the technical and economic basis of voluntary building energy codes and, based upon ongoing research activities - ... otherwise participate in any industry process for review and modification of such codes.”).

<sup>118</sup> Determination Regarding Energy Efficiency Improvements in the 2015 International Energy Conservation Code (“IECC”), EERE–2014–BT–DET–0030, 80 Fed. Reg. 33250 (June 11, 2015).

## 2. PROPER ACCOUNTING OF SOURCE ENERGY VALUES IS ESSENTIAL TO DETERMINING REGULATORY COSTS AND BENEFITS

As AGA has previously discussed,<sup>119</sup> an essential component of the cost-benefit analysis is a proper accounting of the relative efficiencies of various energy sources. Therefore, energy efficiency must be viewed through the lens of a full-fuel-cycle analyses to ensure that regulators and consumers are accurately informed about the real consequences of the direct use of natural gas versus other sources of energy. The Department and other agencies should not send inaccurate signals to the public or the marketplace.

In measuring the impact of energy efficiency measures on total energy savings, the Department commonly converts site energy into source energy (primary energy), using a site-to-source ratio, which accounts for the useful energy lost in converting, transmitting and distributing. This approach results in a more equitable “apples-to-apples” comparison of energy use than viewing only site energy. Specifically, DOE uses a multiplicative factor called “site-to-source conversion factor” to convert site energy consumption, at the home or building, into primary or source energy consumption, the energy input at the energy generation station required to convert and deliver the energy required at the site of consumption.<sup>120</sup> These site-to-source conversion factors account for the energy used at power plants to generate electricity and for the losses in transmission and distribution, among other things.<sup>121</sup> Because of this effort, DOE should be commended for recognizing the benefits of utilizing source energy as it contemplates critical

---

<sup>119</sup> See APGA-AGA Joint Comments at p. 17.

<sup>120</sup> *Energy Conservation Program: Energy Conservation Standards for Automatic Commercial Ice Makers*, 80 Fed. Reg. 4646, 4705 (2015). See also, AGA Natural Gas Codes and Standards Research Consortium, *Full-Fuel-Cycle Energy and Emission Factors for Building Energy Consumption*, page 9, (2009), available at <https://www.aga.org/sites/default/files/legacy-assets/SiteCollectionDocuments/KnowledgeCenter/OpsEng/CodesStandards/0008ENERGYEMISSIONFACTORSRECONSUMPTION.pdf>.

<sup>121</sup> *Id.*

energy policy decisions. However, there are various methods that can be used to determine energy values, *e.g.*, thermodynamic, fossil fuel equivalency, marginal, captured energy, and “free” renewable energy, and each can produce very different outcomes. For example, the marginal approach values energy efficiency based on the marginal impact of end-use energy on the electric generation mix. Marginal efficiency is likely to be the most useful approach for design and investment decisions, including determining the value of direct use of gas for new and existing buildings.<sup>122</sup> By contrast, the captured-energy approach treats certain renewable resources as 100% efficient. This is useful because renewable generation is generally not considered marginal, which means end-use efficiency measures are more likely to displace fossil-fuel generation than renewables. On the other hand, captured energy and other average energy approaches may make sense for determining carbon footprint or greenhouse gas inventory or for benchmarking purposes.

It is important to link the method used to the purpose for which the analysis is undertaken so that there is not a mismatch and, therefore, skewed and unreliable outcomes. In other words, a one-size-fits-all approach to measuring source energy does not work. Therefore, AGA recommends that the Process Rule state that the Department will utilize source energy as it contemplates critical energy policy decisions, and that it will seek comment on the best method to use when evaluating energy efficiency measures.

---

<sup>122</sup> AGA, *Furnace Standard Analysis Discussion Document*, (Feb., 19, 2015), available at <https://www.aga.org/research/reports/condensing-furnace-standard-impact-analysis---2015/>.

## V. CONCLUSION

For the reasons stated above, the American Gas Association respectfully requests that the Department consider these comments in this proceeding.

Respectfully submitted,

/s/ Matthew J. Agen

Rick Murphy  
Managing Director, Energy Markets  
American Gas Association  
400 North Capitol Street, NW  
Washington, DC 20001  
(202) 824-7301  
rmurphy@aga.org

Matthew J. Agen  
Assistant General Counsel  
American Gas Association  
400 North Capitol Street, NW  
Washington, DC 20001  
(202) 824-7090  
magen@aga.org

Michaela Burroughs  
Senior Legal and Policy Analyst  
American Gas Association  
400 North Capitol Street, NW  
Washington, DC 20001  
(202) 824-7311  
mburroughs@aga.org

May 6, 2019