01-4102(L)

01-4103(CON), 02-4160(CON), 02-4189(CON), 02-6139(CON)

United States Court of Appeals

for the

Second Circuit

NATURAL RESOURCES DEFENSE COUNCIL, PUBLIC UTILITY LAW PROJECT, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF MAINE, STATE OF NEW JERSEY, STATE OF NEVADA,
STATE OF CALIFORNIA,
CONSUMER FEDERATION OF AMERICA & STATE OF NEW YORK,

Petitioners,

(For Continuation of Caption See Inside Cover)

PETITIONS FOR REVIEW OF UNITED STATES DEPARTMENT OF ENERGY RULES

BRIEF FOR PETITIONERS NATURAL RESOURES DEFENSE COUNCIL, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF MAINE, STATE OF NEW JERSEY, STATE OF NEVADA, CONSUMER FEDERATION OF AMERICA, PUBLIC UTILITY LAW PROJECT AND INTERVENORS STATE OF NEW HAMPSHIRE, STATE OF RHODE ISLAND, COMMONWEALTH OF MASSACHUSETTS

KATHERINE KENNEDY, ESQ.
NATURAL RESOURCES DEFENSE COUNCIL
Attorney for Petitioners Natural Resources Defense Council, Public Utility Law Project and Consumer Federation of America
40 West 20th Street
New York, New York 10011
(212) 727-4463

ELIOT SPITZER
ATTORNEY GENERAL
STATE OF NEW YORK
PETER H. LEHNER
D. SCOTT BASSINSON
ASSISTANT ATTORNEYS GENERAL
NEW YORK STATE DEPARTMENT OF LAW
Attorneys for Petitioner State of New York
The Capitol
Albany, New York 12224
(518) 473-5843

(For Further Appearances See Inside Cover)

– against –

SPENCER ABRAHAM, As Secretary of the United States Department of Energy & UNITED STATES DEPARTMENT OF ENERGY,

Respondents,

– and –

AIR-CONDITIONING & REFRIGERATION INSTITUTE, STATE OF NEW HAMPSHIRE, TEXAS RATEPAYERS' ORGANIZATION TO SAVE ENERGY, MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS, COMMONWEALTH OF MASSACHUSETTS, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, & STATE OF RHODE ISLAND,

Intervenors.

BILL LOCKYER
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA
RICHARD M. FRANK
CHIEF ASSISTANT ATTORNEY GENERAL
PUBLIC RIGHTS DIVISION
CALIFORNIA ATTORNEY GENERAL'S OFFICE
Attorneys for Petitioner State of California
1300 "I" Street
P.O. Box 944255
Sacramento, California 94244
(916) 445-9555

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT
MARK KINDALL
KELLY FLINT
ASSISTANT ATTORNEYS GENERAL
Attorneys for Petitioner State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06141
(860) 808-5250

WILLIAM H. SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
ERICK TITRUD
S. MARK SCIARROTTA
ASSISTANT ATTORNEYS GENERAL
OFFICE OF THE ATTORNEY GENERAL
Attorneys for Petitioner State of Vermont
109 State Street
Montpelier, Vermont 05609
(802) 828-3185

G. STEVEN ROWE
ATTORNEY GENERAL
STATE OF MAINE
PAUL STERN
DEPUTY ATTORNEY GENERAL
GERALD D. REID
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF
THE ATTORNEY GENERAL
Attorneys for Petitioner State of Maine
State House Station #6
Augusta, Maine 04333
(207) 626-8800

DAVID SAMSON
ATTORNEY GENERAL
STATE OF NEW JERSEY
HOWARD GEDULDIG
DEPUTY ATTORNEY GENERAL
Attorneys for Petitioner
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
(609) 633-8109

THOMAS F. REILLY
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS
FREDERICK AUGENSTERN
WILLIAM L. PARDEE
ASSISTANT ATTORNEYS GENERAL
Attorneys for Intervenor
Commonwealth of Massachusetts
200 Portland Street
Boston, Massachusetts 02114
(617) 727-2200

SHELDON WHITEHOUSE
ATTORNEY GENERAL OF RHODE ISLAND
TRICIA K. JEDELE, SPECIAL ASSISTANT
ATTORNEY GENERAL
Attorneys for Intervenor
State of Rhode Island
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL OF THE
STATE OF NEVADA
TIMOTHY HAY
CHIEF DEPUTY ATTORNEY GENERAL
Attorneys for Petitioner
State of Nevada
Bureau of Consumer Protection
1000 E. William Street, Suite 200
Carson City, Nevada 89701
(775) 687-6300

PHILIP T. MCLAUGHLIN
ATTORNEY GENERAL OF THE STATE
OF NEW HAMPSHIRE
AMY B. MILLS, ATTORNEY
Attorneys for Intervenor
State of New Hampshire
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the nongovernmental Petitioners/Plaintiffs-Appellants Natural Resources Defense Council ("NRDC"), Inc., Public Utility Law Project ("PULP") and Consumer Federation of America ("CFA") state as follows:

NRDC is a national non-profit environmental advocacy organization incorporated under the laws of the State of New York. PULP is a non-profit low-income energy efficiency organization incorporated under the laws of the State of New York that represents low-income and rural consumers in utility, telecommunications and energy-related matters. CFA is a national non-profit consumer advocacy organization incorporated under the laws of the State of New York.

NRDC, PULP and CFA have not issued any public or private stock nor do they have any parent corporations.

Dated: September 27, 2002

Katherine Kennedy
Natural Resources Defense Council, Inc.
40 W. 20th Street
New York, New York 10011
(212) 727-4463

Attorney for Petitioners/Plaintiffs-Appellants NRDC, PULP and CFA

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PRELIMINARY STATEMENT

On January 22, 2001, seven years after the statutory deadline, the United States Department of Energy ("DOE") issued in final form an important new rule (the "Final SEER 13 Rule") increasing a ten-year-old efficiency standard for air conditioners that would provide energy savings at a time of power shortages, savings to consumers, reductions of acid rain, smog and other public health and environmental problems; and improved electric system reliability. The Final SEER 13 Rule was supported by an unusually large and diverse group of stakeholders, including state regulators, utilities, environmental groups, consumers and several manufacturers.

Petitioners/Plaintiffs-Appellants and several Intervenors[1] (collectively "State and Citizen Petitioners") here challenge four separate rulemakings by Respondents/Defendants-Appellees DOE and its Secretary, Spencer Abraham (collectively "DOE"). Starting days after the new administration took office, DOE through these four rules, delayed and then withdrew the strong efficiency standard

[1]This brief is submitted on behalf of the following parties and intervenors in these consolidated cases: the States of New York, California, Connecticut, Vermont, Maine, New Jersey, Nevada, Massachusetts, New Hampshire, and Rhode Island; the Natural Resources Defense Council, Inc. ("NRDC"); Consumer Federation of America ("CFA"); and Public Utility Law Project ("PULP").

and replaced it with a weaker one.[2] State and Citizen Petitioners show below that DOE's ultimate promulgation of the weaker standard on May 23, 2002 is illegal because (1) DOE's withdrawal of the Final SEER 13 Rule and promulgation of a weaker standard violated the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6291-6309, as amended by the National Appliance Energy Conservation Act ("NAECA"), Pub. L. 100-12, 101 Stat. 103 (1987), which prohibits DOE from decreasing an energy efficiency standard that it has already prescribed through the regulatory process, see 42 U.S.C. § 6295(o)(1); (2) DOE's February 2, 2001 and April 20, 2001 rules delaying the effective date of the Final SEER 13 Rule violated the notice, comment, and publication provisions of the Administrative Procedure Act ("APA"), and otherwise lacked legal basis; (3) DOE's withdrawal of the Final SEER 13 Rule and promulgation of the weaker efficiency rule violated EPCA because it lacks substantial evidence and does not prescribe the greatest energy efficiency standard that is "economically justified," 42 U.S.C. § 6295(o)(2)(A); and (4) DOE violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4332 et seq., when it issued a Finding of No

[2]The Federal Register citations to these rules are as follows: 66 Fed. Reg. 8745 (Feb. 2, 2001), SPA-176; 66 Fed. Reg. 20191 (April 20, 2001), SPA-177; 66 Fed. Reg. 38822 (July 25, 2001), SPA-178; and 67 Fed. Reg. 36368 (May 23, 2002), SPA-204.

Significant Impact ("FONSI") for its decision to withdraw the Final SEER 13 Rule and issue a lower energy efficiency standard. If State and Citizen Petitioners prevail on just one of these claims, the weaker efficiency standard must be vacated and the Final SEER 13 Rule reinstated.[3]

STATEMENT OF JURISDICTION

A. Petitions for Review of DOE's May 23,2002 Rulemaking (Docket Nos. 02-4160 and 02-4189)

The States of New York, Connecticut and Vermont filed petitions for review in this Court on May 23, 2002 (No. 02-4160), and NRDC and PULP filed petitions on May 29, 2002 (No. 02-4189), to challenge a final rule issued by DOE on May 23, 2002.[4] This Court has jurisdiction over these petitions pursuant to 42 U.S.C. § 6306(b). DOE issued the rule pursuant to 42 U.S.C. § 6295.

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[3]In addition, State and Citizen Petitioners' appeal from a judgment entered in the U.S. District Court, Southern District of New York, following a decision dismissing the case for lack of subject matter jurisdiction. New York v. Abraham, 199 F. Supp. 2d 145 (S.D.N.Y. 2002) (Swain, J.), SPA-1-15.

[4]The State and Citizen Petitioners are persons "adversely affected" by DOE's May 23, 2002 rulemaking, 42 U.S.C. § 6306(b)(1), and by the other rulemaking actions challenged herein. See generally Declarations of State and Citizen Petitioners submitted herewith. See also JA-118-538 (standing declarations submitted to the district court).

B. Appeal From District Court Decision Dated April 25, 2002
(Docket No. 02-6139)

Petitioners/Plaintiffs New York, California, Connecticut, Vermont, Maine, New Jersey, Nevada, NRDC, PULP and CFA also appeal from the district court decision dated April 25, 2002 which dismissed, for lack of subject matter jurisdiction, a complaint asserting claims under the APA and EPCA, challenging as illegal two rules issued by DOE, on February 2, 2001 and April 20, 2001, which delayed the effective date of the Final SEER 13 Rule ("Delay Rules"). New York v. Abraham, 199 F. Supp. 2d 145 (S.D.N.Y. 2002). State and Citizen Petitioners contend that the district court had jurisdiction over the claims presented below pursuant to 28 U.S.C. § 1331, 5 U.S.C. § 706 and 28 U.S.C. § 2201. State and Citizen Petitioners timely filed a Notice of Appeal on May 21, 2002. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

C. Petitions for Review Challenging DOE's February 2, 2001
And April 20, 2001 Rules (Docket Nos. 01-4102 and 01-4013)

NRDC and PULP filed petitions for review on June 18, 2001 (No. 01-4102), and the States of New York and Connecticut filed petitions for review on the same date (No. 01-4103), challenging as illegal the Delay Rules issued by DOE, on February 2, 2001 and April 20, 2001. These were purely "protective" petitions, and were filed at the same time as the district court action challenging the same

rules, to ensure that State and Citizen Petitioners would not lose their rights to challenge the DOE rules in the event that the district court found that it lacked jurisdiction. This Court has jurisdiction over these petitions pursuant to 42 U.S.C. § 6306(b).

ISSUES PRESENTED FOR REVIEW

1. Whether DOE's May 23, 2002 "rule" withdrawing the Final SEER 13 Rule, and replacing it with a decreased energy efficiency standard, violates the "anti-backsliding" provision of EPCA, 42 U.S.C. § 6295(o)(1)?

2. Whether the February 2, 2001 and April 20, 2001 Delay Rules delaying the effective date of the Final SEER 13 Rule violate the APA so that, even under DOE's interpretation of EPCA's anti-backsliding provision, the SEER 13 Rule was effective and thus prohibited the promulgation of the weaker standard?

3. Whether DOE's withdrawal of the Final SEER 13 Rule, its reversal of its earlier determination that a SEER 13 standard was "economically justified," and its promulgation of the weaker SEER 12 standard as set forth in DOE's May 23, 2002 rule, are arbitrary and capricious under the APA or lacking substantial evidence as required by 42 U.S.C. § 6306(b)?

4. Whether the May 23, 2002 rule and the accompanying FONSI with respect to that rule violated NEPA?

5. Whether the district court erred in finding that it lacked subject matter jurisdiction over the State and Citizen Plaintiffs' claims challenging the Delay Rules?

STATEMENT OF THE CASE

On June 19, 2001, the States of New York, California, and Connecticut filed an action in the U.S. District Court, Southern District of New York challenging the Delay Rules. 01 CV-5499. On the same date, NRDC, CFA and PULP filed a complaint in the same court challenging the same DOE Delay Rules. NRDC et al. v. Abraham, No 01 CV-5500. Pursuant to stipulation of the parties and Order of the district court, the States of Vermont, Maine, New Jersey and Nevada were added as plaintiffs. These cases were consolidated. On April 25, 2002, Judge Laura Taylor Swain issued a decision dismissing the consolidated actions for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), finding that jurisdiction over plaintiffs' claims lay in this Court. New York v. Abraham, 199 F. Supp. 2d at 152. Final Judgment was entered on April 30, 2002. Plaintiffs in the consolidated actions filed a Notice of Appeal to this Court on May 21, 2002. (Docket No. 02-6139)

On June 18, 2001, NRDC and PULP filed a protective petition for review in this Court seeking review of the Delay Rules. (Docket No. 01-4102). On the same

date, the States of New York and Connecticut filed a similar protective petition for review in this Court. (Docket No. 01-4103). In both petitions, State and Citizen Petitioners explained that they had simultaneously filed complaints with respect to these claims in the U.S. District Court, that they believed that jurisdiction over these claims properly lay in the district court, and that the petitions for review were filed protectively in the event that the district court concluded that jurisdiction lay in the United States Court of Appeals. By Order of this Court dated July 24, 2001, this Court granted the motion to intervene of the State of California, filed on July 17, 2001. By Order of this Court, upon joint stipulation by all parties, entered on August 3, 2001 (No. 01-4102) and August 14, 2001 (No. 01-4103), these protective petitions for review were suspended from this Court's active consideration pending determination of plaintiffs' claims in the district court, subject to reinstatement "within thirty (30) days after issuance of a final judgment by the District Court." Following the entry of final judgment in the district court, State and Citizen Petitioners sought and obtained from this Court an order reinstating these petitions for review to active consideration.

On May 23, 2002, the States of New York, Vermont and Connecticut filed a Petition for Review in this Court challenging the three actions comprising DOE's May 23, 2002 rule, as published in the May 23, 2002 Federal Register. (Docket

No. 02-4160). On May 29, 2002, NRDC and PULP also filed a Petition for Review in this Court challenging the same DOE actions. (Docket No. 02-4189). Several states and other entities have intervened. By Order of this Court filed July 19, 2002, the appeal and the four petitions for review were consolidated.

STATEMENT OF FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

A. The Energy Policy and Conservation Act

Congress enacted EPCA in 1975 as part of a "comprehensive national energy policy," S. Rep. No. 95-516, at 116 (1975) (conference report), "to conserve energy supplies through energy conservation programs" and "to provide for improved energy efficiency of . . . major appliances." 42 U.S.C. § 6201(4),(5). Congress found making appliances more energy efficient "can result in major reductions in net energy consumption . . . ." H. Rep. No. 94-340, at 94 (1975), reprinted in 1975 U.S.C.C.A.N. 1762, 1856. Initially, EPCA authorized, but did not require, DOE to establish appliance energy efficiency standards, relying instead on a voluntary target system for appliance manufacturers. See NRDC v. Herrington, 768 F.2d 1355, 1362 (D.C. Cir. 1985).

Just three years later, however, Congress amended EPCA, recognizing "the serious energy crisis then at hand." Herrington, 768 F.2d at 1362, 1433. In

enacting these amendments, Congress chose to "eliminate[] the target approach and improve[] the procedures for establishing standards to ensure that efficiency improvements will be made expeditiously." Id. at 1362 (citing H.R. Rep. No. 496, at 46 (1977), reprinted in 1977 U.S.C.C.A.N. 7659, 8493) (alterations in original). The amended version of EPCA required the Secretary of Energy to prescribe energy efficiency standards for thirteen covered products. Id. at 1362-63. The Secretary was given discretion, however, to determine that no standard was warranted for a particular appliance. Id.

Five years after the 1978 amendments to EPCA, DOE determined that mandatory efficiency standards should not be issued for eight categories of appliances, including central air conditioners. NRDC and others challenged these "no-standard" standards, and DOE's determination was struck down and set aside by the United States Court of Appeals for the District of Columbia Circuit. Herrington, 768 F.2d at 1433.

After the Herrington decision, NRDC and others negotiated an agreement with appliance manufacturers that established initial standards for central air conditions and other appliances, and a structure for revising them to increase energy efficiency over time. In 1987, Congress adopted this agreement by enacting the National Appliance Energy Conservation Act, Pub. L. 100-12 (1987)

("NAECA"). Congress's goal was "to reduce the Nation's consumption of energy and to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances." S. Rep. No. 100-6, at 2 (1987), reprinted in 1987 U.S.C.C.A.N. 52, 52.

To ensure that efficiency standards keep pace with developing technology, EPCA, as amended by NAECA (hereinafter "EPCA" or "the Act"), 42 U.S.C. §§ 6291-6309, issued three specific commands. First, Congress established initial energy efficiency standards for, inter alia, central air conditioners and heat pumps manufactured after January 1, 1993, enacting a 10 SEER standard for central air conditioners and for the cooling performance of heat pumps, and 6.8 HSPF for the heating performance of heat pumps.[5] See 42 U.S.C. § 6295(d).

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[5]DOE uses a Seasonal Energy Efficiency Ratio ("SEER") to measure the energy efficiency for the seasonal cooling performance of central air conditioners and heat pumps. (A heat pump is a unit that can provide both cooling in the summer and heating in the winter.) SEER is a measurement that describes the ratio of the useful output of an appliance to the total energy input. 42 U.S.C. § 6291(22); 10 C.F.R. pt. 430, subpt. B, app. M, § 1.19. The Heating Seasonal Performance Factor ("HSPF") is DOE's measure of energy efficiency for the seasonal heating performance of heat pumps. HSPF is a measurement that describes the total annual heating output of a heat pump relative to annual electric power input during the same period. Id. at § 1.15. With respect to both SEER and HSPF, the higher the number, the more efficient the appliance.

Second, Congress required DOE to determine whether these initial efficiency standards should be amended for products manufactured after January 1, 1999 and, if amendment were warranted, to publish the amended rule by January 1, 1994. 42 U.S.C. § 6295(d)(3)(A). The Act similarly required DOE to determine by January 1, 2001 whether certain of the standards should be further amended for products manufactured after January 1, 2006. 42 U.S.C. § 6295(d)(3)(B). Critical to this case, EPCA requires that any amended standard "shall be designed to achieve the maximum improvement in energy efficiency .... which the Secretary determines is technologically feasible and economically justified." Id. § 6295(o)(2)(A) (emphasis added).

Third, Congress explicitly removed from DOE the discretion to "roll back" an energy efficiency standard once it had been prescribed: "The Secretary may not prescribe any amended standard which increases the maximum allowable energy use ... or decreases the minimum required energy efficiency, of a covered product." 42 U.S.C. § 6295(o)(l) (emphasis added).[6] (This is known as the "anti-backsliding" provision.)

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[6]"Covered products" include "central air conditions and central air conditioning heat pumps." 42 U.S.C. § 6292(a)(3).

Thus, given both the command to repeatedly examine whether efficiency standards can be made more stringent and the "anti-backsliding" provision, Congress clearly intended that energy conservation standards should advance and become only more stringent over time.

B. DOE's Promulgation of the Final SEER 13 Rule

DOE's rulemaking process for establishing amended air conditioner and heat pump efficiency standards commenced in September 1993. More than seven years later, on October 5, 2000, DOE published a Notice of Proposed Rulemaking proposing a standard of SEER 12 for air conditioners and SEER 13/HSPF 7.7 for heat pumps, 65 Fed. Reg. 59590 (Oct. 5, 2000), JA-3816-3859, and thereafter held a public hearing on November 16, 2000. JA-4113. DOE adopted the Final SEER 13 Rule on January 22, 2001, publishing it in the Federal Register.[7] 66 Fed. Reg. at 7170-7200, SPA-143-74.[8] The Final SEER 13 Rule increased the appliance energy efficiency standards established from 10 SEER/6.8 HSPF, as established in

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[7] See Energy Conservation Program for Consumer Products: Advance Notice of Proposed Rulemaking Regarding Conservation Standards for Three Types of Consumer Products, identifying the administrative "Action" as "Advanced Notice of Proposed Rulemaking." 58 Fed. Reg. 47326-47338 (September 8, 1993), Administrative Record ("AR") JA-631-44.

[8]The citation "SPA-143-174" refers to the Joint Appendix prepared by the parties and filed with this Court herewith.

EPCA, to SEER 13 for central air conditioners and SEER 13/7.7 HSPF for heat pumps, applicable to products manufactured for sale in the United States as of January 23, 2006. Id., 66 Fed. Reg. at 7170, 7170-71, SPA-143, 143-45.

DOE's decision to adopt a higher standard than it had proposed in October 2000 "was influenced by the comments [DOE] received during the intervening period," SPA-170, including comments regarding the methodologies for determining manufacturer costs, prices, and markups. See, e.g., 66 Fed. Reg. at 7196, SPA-170. Of the approximately 800 comments received during the rulemaking,

> the vast majority were from individuals and organizations who made similar claims regarding the benefits that would be associated with a 13 SEER standard .... These benefits included savings for consumers, avoided emissions and electrical capacity, and the reduced occurrence of brownouts and blackouts.

66 Fed. Reg. at 7176, SPA-150. DOE found that the Final SEER 13 Rule would "have a net benefit to the nation's consumers of $1 billion" over the next 25 years, and that the rule

> will result in cumulative greenhouse gas emission reductions of approximately 33 million metric tons (Mt) of carbon, or an amount equal to that produced by approximately 3 million cars every year. Additionally, air pollution will be reduced by the elimination of

> approximately 94 thousand metric tons of nitrous oxides (NOx) from 2006 through 2020.

66 Fed. Reg. at 7171, SPA-145. In adopting a SEER 13 standard, DOE considered not only the reduction in emissions, but also the positive effects the standard would have on electric power system reliability. 66 Fed. Reg. at 7177, 7194, SPA-151, 168.[9]

In accordance with EPCA, DOE expressly found that the Final SEER 13 Rule standard, increasing efficiency by 30%, was technologically feasible and economically justified. 66 Fed. Reg. at 7171, SPA-145. In its submission of the Final SEER 13 Rule to the Office of Information and Regulatory Affairs ("OIRA") in advance of its publication, DOE stated that the Final SEER 13 Rule was promulgated pursuant to the statutory deadline of January 1, 1994 set forth in 42 U.S.C. § 6295(d)(3)(A). See JA-5396, at ¶ 5. The January 22, 2001 notice stated that the "effective date of this rule is February 21, 2001." Id. at 7170, SPA-145.

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[9]DOE also relied upon the energy efficiency recommendations contained in a report issued by a team of experts that DOE had convened. These recommendations formed part of the basis for putting the rulemaking on a "fast track" after the October 2000 Notice of Proposed Rulemaking. 66 Fed. Reg. at 7173, SPA-147. See Report of the U.S. Department of Energy's Power Outage Study Team: Findings and Recommendations to Enhance Reliability from the Summer of 1999," March 2000.

C. DOE's About-Face

Just days after publishing the Final SEER 13 Rule, however, the new administration embarked on a series of steps designed to undo even this tardy rulemaking, and to replace the finally prescribed SEER 13 Rule with a decreased energy efficiency standard. On January 24, 2001, four days after the inauguration of the new President, a memorandum from Assistant to the President and Chief of Staff Andrew H. Card, Jr. ("the Card Memo"), dated January 20, 2001, was published in the Federal Register. 66 Fed. Reg. 7702, SPA-175. The Card Memo requested, inter alia, that federal agencies "temporarily postpone the effective date ... for 60 days" of "regulations that have been published in the OFR [Office of Federal Register] but have not taken effect." 66 Fed. Reg. at 7702, ¶ 3, SPA-175. Explicitly excluded from this directive, however, were "any regulations promulgated pursuant to statutory ... deadlines." Id. ¶ 4 (emphasis added).

As noted above, the Final SEER 13 Rule was promulgated pursuant to a statutory deadline, albeit late. Notwithstanding this fact, DOE published in the Federal Register, less than two weeks later, a rule that amended the Final SEER 13 Rule by "temporarily delay[ing]" the effective date of that Rule for 60 days, from February 21, 2001 until April 23, 2001. 66 Fed. Reg. 8745 (Feb. 2, 2001), SPA-176 (the "February 2 Delay Rule"). DOE's action was referred to as "Final Rule;

delay of effective date." Id. DOE cited no legal authority for its action, merely stating that the delay was "[i]n accordance with" and "consistent with" the Card Memo:

> In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled "Regulatory Review Plan," ... this action temporarily delays for 60 days the effective date of the [Final SEER 13 Rule].
>
> * * *
>
> The temporary 60-day delay in effective date is necessary to give DOE officials the opportunity for further review and consideration of new regulations, consistent with [the Card Memo].

Id. The February 2 Delay Rule was issued without prior notice and comment, and was effective immediately.

On March 19, 2001, the Air Conditioning and Refrigeration Institute ("ARI"), a trade association that represents a number of manufacturers of air conditioners (and an intervenor in the cases before this Court), filed a Petition for Review of the Final SEER 13 Rule in the United States Court of Appeals for the Fourth Circuit. ARI, et al. v. United States Department of Energy, et al., No. 01-1370 (4th Cir.). JA -5744-5801. On March 23, 2001, ARI also sent a letter to DOE styled a "Petition for Reconsideration," asking DOE to "reconsider" the

Final SEER 13 Rule and to issue a new rule with weaker energy efficiency standards for central air conditioners and heat pumps. JA-5812-39. Neither EPCA, nor any applicable DOE regulation, provides for petitions for reconsideration of appliance efficiency standards.

On April 6, 2001, at the joint request of ARI and the U.S. Department of Justice ("DOJ"), see JA-5888, the Fourth Circuit suspended briefing on ARI's petition for judicial review "pending resolution of [ARI's] petition for reconsideration pending before the DOE." JA-5888. Since the April 6, 2001 stay, there has been no ongoing judicial review of the Final SEER 13 Rule in the Fourth Circuit.

On April 13, 2001, DOE issued a press release announcing "its intention to propose a new . . . standard for central air conditioners and heat pumps" of 12 SEER. JA-5907-08. Despite the fact that the Final SEER 13 Rule had been published in the Federal Register almost three months earlier as a "final rule," DOE stated that "[t]oday's announcement marks the completion of a 60-day review of a rule proposed in the last days of the Clinton Administration, which proposed a 13/13 SEER standard." Id. (emphasis added).

Two weeks after the Fourth Circuit stayed judicial review of the Final SEER 13 Rule, DOE published a second final rule in the Federal Register purporting to

delay its effective date indefinitely, "pending the outcome of petitions by [ARI] for reconsideration by DOE and for judicial review by the United States Court of Appeals for the Fourth Circuit." 66 Fed. Reg. 20191 (April 20, 2001), SPA-177 (the "April 20 Delay Rule"). DOE stated:

> Under the informal rulemaking provisions of the [APA], an agency by rule may alter the "effective date" of a previously published final rule (5 U.S.C. 551(4), 551(5), 553). The judicial review provisions of the APA also provide for a change of "effective date" as follows: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. . . ." (5 U.S.C. 705).

Id. (emphasis added). DOE also stated that it

> intends within the next 60 days to issue a further notice of proposed rulemaking to revise the standard levels set out in the January 22, 2001, final rule and examine the extent to which current minimum required energy efficiency levels are to be increased in 2006. In that notice, DOE intends to propose a 12 SEER with a corresponding 7.4 HSPF.

Id. DOE concluded that:

> During the pendency of ARI's petition for judicial review and the related petition for administrative reconsideration, justice requires that DOE postpone the effective date of the January 22, 2001, final rule, in order to avoid imposing on manufacturers an obligation to undertake planning and capital expenditures to come into compliance by January 23, 2006, with a rule DOE is reconsidering.

Id. (emphasis added).

As with the February 2 Delay Rule, DOE provided no notice or opportunity for public comment with respect to the April 20 Delay Rule, and made the stay effective immediately.

On July 25, 2001, DOE officially announced that it was "proposing to withdraw its January 22, 2001 final rule . . . ." 66 Fed. Reg. at 38822-38844 (July 25, 2001), SPA-179-201 (emphasis added). DOE proposed the lower 12 SEER energy efficiency standard "[a]s a substitute" for the Final SEER 13 Rule. Id., 66 Fed. Reg. at 38823, SPA-180. In addition, DOE announced that it had "now concluded that the January 22, 2001 final rule should be reconsidered and therefore grants ARI's petition [for reconsideration]." Id.

DOE's plan to withdraw the Final SEER 13 Rule and decrease the standard to SEER 12 was decried by thousands of interested parties, as reflected by comments contained in more than 10,000 e-mails from members of the public, JA-7188, and, most notably, in written comments submitted by the administration's own U.S. Environmental Protection Agency ("EPA"). JA-6990-7004.

Notwithstanding the broad opposition to DOE's planned rollback, DOE eventually promulgated a "final" SEER 12 standard on May 23, 2002 ("SEER 12

Rule"). 67 Fed. Reg. at 36368-36408 (May 23, 2002), SPA-204-45.[10] The issuance of the SEER 12 Rule involved several rulemaking determinations. First, DOE purported to "withdraw" the Final SEER 13 Rule. To support its claimed authority to "withdraw" a final adopted rule, DOE stated that "EPCA is unambiguous" that rules that have been finally published but are not yet effective "do not represent the benchmarks for 'minimum required energy efficiency,'" and thus cannot trigger EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1). 67 Fed. Reg. at 36371, SPA-208. In addition, DOE attempted to bolster its claim of authority to reconsider – without any citation to its own precedent or any other legal authority – by stating that "[i]t is common for agencies to entertain petitions for reconsideration at least for a short period after issuance of a final rule . . . ." 67 Fed. Reg. at 36372, SPA-209. DOE admitted that its "withdrawal" of the Final SEER 13 Rule was in reality rescission and/or repeal of that Rule:

> By proposing to withdraw the January 22 final rule and proposing a 12 SEER standard, DOE was proposing actions that, if adopted and implemented in a future final rule, would rescind or repeal the January 22 final rule.

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[10]DOE not only decreased the SEER standard in this rule from 13 to 12, but also reduced the heat pump standard to SEER 12/7.4 HSPF. Thus, it is a weaker standard than the SEER 12 air conditioner and SEER 13/ 7.7 HSPF heat pump standard that DOE had proposed in its October 5, 2000 proposed rule. See 67 Fed. Reg. at 36369, SPA-206.

67 Fed. Reg. at 36373, SPA-210. Thus, according to DOE, even though the Final SEER 13 Rule was a "final rule," had been published in the Federal Register, and required DOE to "rescind or repeal" it in order to issue the SEER 12 Rule, the Final SEER 13 Rule had no status whatsoever with respect to EPCA's anti-backsliding provision.

As the second part of the SEER 12 Rule package – and clearly in response to this pending litigation – DOE issued regulations that purport to interpret EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), defining "effective date" and "minimum required efficiency" in a manner consistent with DOE's claimed right to "withdraw" the Final SEER 13 Rule. SPA-243. DOE did not state, however, that these definitions were to be applied retroactively.

Third, DOE adopted a SEER 12 standard, claiming that the Final SEER 13 Rule was the result of "legal and policy errors," including (1) a failure to submit the SEER 13 standard to the DOJ for a determination of effects on competition, (2) an allegedly improper weighing of benefits and burdens that had resulted in the Final SEER 13 Rule, and (3) a failure to comply with the Congressional Review Act, 5 U.S.C. § 801. DOE further found that SEER 12 was the maximum improvement in energy efficiency that was economically justified, directly contradicting its own conclusion as set forth in the Final SEER 13 Rule.

Finally, DOE issued a Finding of No Significant Impact ("FONSI") under NEPA, determining, inter alia, that no environmental impact statement was required because the correct baseline to which the SEER 12 Rule should be compared was the SEER 10 standard established by statute in 1992, not the Final SEER 13 Rule. 67 Fed. Reg. 36409 (May 23, 2002), JA-246. DOE made no NEPA finding whatsoever regarding its determination to withdraw the Final SEER 13 Rule or, for that matter, its regulations interpreting the EPCA's anti-backsliding provision.

These petitions for review followed.

SUMMARY OF ARGUMENT

While new administrations may change policy, they must follow existing law to do so. In this case, in its desperate rush to decrease the air conditioner efficiency standard it issued seven years after the statutory deadline and with overwhelming public support, DOE committed at least five violations of law in four separate rulemakings. This Court can vacate the SEER 12 Rule on the basis of any one of these legal violations.

In Point I, State and Citizen Petitioners demonstrate that DOE's suspension and withdrawal of the Final SEER 13 Rule, effected through the February 2 and April 20 Delay Rules, and ultimately the May 23, 2002 12 SEER Rule, violated

EPCA's anti-backsliding provision. The plain, unambiguous meaning of EPCA's anti-backsliding provision, which is supported by EPCA's structure and history, renders DOE's actions illegal because its prohibition applies upon publication of a final rule – on January 22, 2001. Even under DOE's interpretation of EPCA, however, which would have the anti-backsliding provision apply only after a rule is effective, the promulgation of the SEER 12 rule violated EPCA because the two Delay Rules were invalid so that even DOE's trigger date passed. DOE's Delay Rules (1) were arbitrary and capricious because the February 2 Delay Rule lacked any legal basis whatsoever, and the April 20 Delay Rule was issued in violation of the APA, 5 U.S.C. § 705; (2) were not published at least 30 days before their effective date; and (3) were issued without prior notice and an opportunity to comment, in violation of the procedural requirements of the APA, 5 U.S.C. § 553.

In Point II, State and Citizen Petitioners show that DOE's determination that the SEER 12 standard is the maximum level of energy efficiency that is "economically justified" under the relevant EPCA factors is not supported by substantial evidence. First, DOE's claim that the Final SEER 13 Rule was withdrawn because "legal and policy" errors rendered it not "economically justified" is nothing more than a *post hoc* rationalization prompted by this litigation. Second, an examination of EPCA's statutory factors demonstrates that

DOE had it right the first time and that SEER 12 is not the most stringent standard that is economically justified.

In Point III, State and Citizen Petitioners demonstrate that DOE violated NEPA by failing to (1) determine whether its rulemaking determination to withdraw the Final SEER 13 Rule, in conjunction with issuing the SEER 12 Rule, would have a significant impact on the environment, and (2) prepare an Environmental Impact Statement in conjunction with DOE's withdrawal of the Final SEER 13 Rule and its replacement with a SEER 12 standard.

In Point IV, State and Citizen Petitioners argue that the district court erred in dismissing, for lack of subject matter jurisdiction, the complaint challenging the Delay Rules. The Delay Rules were not "elements of a rule under EPCA" but were independent rulemakings subject to the requirements of the APA. Thus, the claims asserted were properly brought in that court.

Should the Court find for State and Citizen Petitioners on any one of the issues here presented in Points I-III, State and Citizen Petitioners will be entitled to all of the relief they seek. If the Court finds that EPCA's anti-backsliding provision applied as soon as the Final SEER 13 Rule was published in the Federal Register, all of DOE's subsequent attempts to delay and ultimately withdraw that Rule were invalid. If the Court finds that either the February 2 Delay Rule or the

April 20 Delay Rule was invalid, then the effective date of the Final SEER 13 Rule was not postponed and that Rule became effective on February 21, 2001. Moreover, DOE's withdrawal of the Final SEER 13 Rule should be invalidated if the Court finds that DOE's rationale for such withdrawal is merely a *post hoc* rationalization, or if the Court finds that such withdrawal was made in violation of NEPA. Finally, the State and Citizen Petitioners will prevail if this Court finds that the SEER 12 standard is not supported by substantial evidence, or that DOE violated NEPA by not preparing an Environmental Impact Statement in conjunction with its issuance of the SEER 12 rule.

ARGUMENT

STANDARD OF REVIEW

In reviewing State and Citizen Petitioners' challenges to DOE's rulemaking actions delaying and withdrawing the Final SEER 13 Rule and issuing the Final SEER 12 Rule, this Court should be guided by the following four principles.

First, EPCA provides that "[n]o rule under section . . . 6295 [appliance efficiency standards] may be affirmed unless supported by substantial evidence." 42 U.S.C. § 6306(b)(2). As the Herrington court found, in the only decision to have construed this language:

> Although DOE developed the rules under review through informal rulemaking, EPCA expressly provides that the substantial evidence standard guides our review of factual findings. . . . "When reviewing the policy judgments made by the Secretary, including those predictive and difficult judgment calls the Secretary is called upon to make, we will subject them to searching scrutiny to ensure that they are neither arbitrary nor irrational . . . ."

Herrington, 768 F.2d at 1396. The standard for adoption of a rule also applies to an agency's rescission of a rule. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) ("State Farm").

Second, while "an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances,'" the Supreme Court has found that "[i]f Congress established a presumption from which judicial review should start, that presumption . . . is not against safety regulation, but against changes in current policy that are not justified by the rulemaking record." State Farm, 463 U.S. at 42 (1983)(emphasis in original). A new administration "may not refuse to enforce the laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." Id. at 59 n * (Rehnquist, J., concurring in part and dissenting in part). As this Court has held, an agency "flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule." New York Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir. 1985) (internal

citation omitted). See also Herrington, 768 F.2d at 1383 (invalidating DOE appliance rules issued by DOE under a new administration that reversed policies established by the former administration because, while an agency under a new administration may change its policy, "a reviewing court must intervene to enforce the policy decisions made by Congress").

Third, under Section 706(2)(A) of the APA, "challenged agency action must be set aside if found to be `arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Sierra Club v. U.S. Army Corps of Eng'rs., 772 F.2d 1043, 1050 (2d Cir. 1985) (quoting 5 U.S.C. § 706(2)(A)). Although the scope of review is "narrow, appellate review of an administrative record must nonetheless be careful, thorough and probing." Ward v. Brown, 22 F.3d 516, 521 (2d Cir. 1994). Moreover, heightened scrutiny of agency action is appropriate when "'the interests at stake are not merely economic interests . . . but personal interest in life and health.'" Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1156 (D.C. Cir. 1983) (internal quotation omitted).

With respect to DOE's procedural compliance with the APA in issuing the Delay Rules, this Court's review "is an exacting one." Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 814, 817 (D.C. Cir. 1983) (citation omitted) (applying "strict scrutiny" to EPA's postponement of a rule). Where, as here, the

agency's actions constitute a reversal of course, the Court must "scrutinize that action all the more closely to insure that the APA was not violated." NRDC, 683 F.2d at 760-61.

Fourth, with respect to DOE's interpretation of EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(2)(A), questions of statutory interpretation are reviewed de novo. Auburn Housing Auth. v. Martinez, 277 F.3d 138, 143 (2d Cir. 2002). This Court need not accord deference to DOE's interpretation under Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) because: 1) the language of the statute is plain, Chevron, 467 U.S. at 842-43; 2) DOE's interpretation is newly minted in response to litigation, Callaway v. Commissioner, 231 F.3d 106, 132 (2d Cir. 2000); Catskill Mountains v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001); and 3) DOE's interpretation conflicts with the statute and would have absurd results, United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000).

POINT I

DOE'S WITHDRAWAL OF THE FINAL SEER 13 RULE AND ISSUANCE OF A SEER 12 RULE VIOLATED EPCA'S ANTI-BACKSLIDING PROVISION, 42 U.S.C. § 6295(o)(1).

DOE's protracted path to delay and ultimately withdraw the Final SEER 13 Rule is replete with internal inconsistency and legal error. Because EPCA's anti-backsliding provision applied as soon as the Final SEER 13 Rule was published in

the Federal Register, DOE was prohibited from taking any steps to prescribe an amended standard that decreased the minimum required efficiency level set forth in the Final SEER 13 Rule. DOE contends in response – without any citation – that the anti-backsliding provision does not become operative until a rule reaches its effective date; hence its attempts to delay the effective date of the Rule.[11] However, DOE's Delay Rules were issued without legal authority, and violated APA's procedural requirements, so that even under DOE's interpretation of EPCA, the withdrawal of the Final SEER 13 Rule and its replacement by the SEER 12 Rule violated EPCA's anti-backsliding provision.

A. EPCA's Anti-Backsliding Provision Applies When An Appliance Efficiency Rule is Published in the Federal Register.

EPCA Section 325(o)(1), added by Congress in 1987 through the NAECA amendments, states that:

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[11]Indeed, DOE was specifically warned that it needed to delay the Rule's effective date quickly to avoid this situation. See JA-5720-21, Letter from U.S. Senator Trent Lott to Respondent Spencer Abraham dated January 29, 2001, JA-5721("Because of language contained in the National Appliance Energy Conservation Act, it is vital that a meeting between you and the industry be held as soon as possible"). Moreover, DOE has itself characterized its actions as "reducing" the standard to SEER 12. See JA-5802-04, Letter of Eric J. Fygi, DOE Acting General Counsel, to Attorney General John D. Ashcroft, dated March 20, 2001, at 1 and 2, JA-5802, 5803 ("The Department is currently reviewing this regulation to decide whether the 13 SEER is economically justifiable, and if not, whether reduction to a 12 SEER would be lawful in light of section 325(o)(1) of EPCA ....") (emphasis added).

> The Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.

42 U.S.C. § 6295(o)(1) (emphasis added). The plain meaning of EPCA and its overall statutory framework and legislative history make clear that this anti-backsliding provision became operative upon DOE's issuance of the Final SEER 13 Rule and its publication in the Federal Register.

DOE claims that EPCA Section 325(o)(1) does not apply to the Final SEER 13 Rule because the Rule was "not allowed to take effect" due to DOE's Delay Rules. 67 Fed. Reg. at 36370, SPA-207. DOE is plainly wrong.

Under relevant precedent, there are two steps for a question of statutory interpretation. First, if the statutory provision is unambiguous, the Court must follow the plain meaning of the statute. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43; see also United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000). Second, if the provision is ambiguous, the court should examine factors such as the statutory structure, Dauray, 215 F.2d at 262-63, and legislative history, id. at 264. Although

typically courts defer to agency interpretation when a statute is ambiguous, Chevron, 467 U.S. at 843, such deference is not appropriate here.

1. Plain Meaning of the Statute

EPCA Section 325(o)(1) reads: "the Secretary may not prescribe any amended standard which . . . decreases the minimum required energy efficiency of a covered product." 42 U.S.C. § 6295(o)(1)(emphasis added). Using the "ordinary, common-sense meaning of the words," Dauray, 215 F.3d at 260, the meaning of this provision is clear on its face. To "prescribe" means to "to lay down a rule." Merriam Webster's Collegiate Dictionary (Tenth Edition, 1995); see also American Heritage Dictionary (Second College Edition, 1985) (to "prescribe" means to "set down as a rule or guide"); Manka v. U.S., 1993 WL 268386, 4 (D. Colo. April 6, 1993) ("The verb prescribe means 'to lay down a rule.'"). To "amend" means to "[a]lter formally . . . by adding, deleting or rephrasing." American Heritage Dictionary (Second College Edition, 1985).

By issuing the Final SEER 13 Rule and publishing it in the Federal Register on January 22, 2001, DOE clearly "lay down a rule" and prescribed the SEER 13 standard. DOE also made clear that it was amending the appliance efficiency standards for central air conditioners and heat pumps as of that day, although the standards would only apply to units manufactured after January 2006. 66 Fed.

Reg. at 7170, SPA-144 ("the Department is today amending the existing energy conservation standards for central air conditioners and heat pumps") (emphasis added); see also id. ("Today's final rule adopts . . .") (emphasis added); ("The Department is amending . . .") (emphasis added); id. at 7171, SPA-145 ("the Department is amending the energy conservation standards . . .") (emphasis added).

Accordingly, as of January 22, 2001, DOE amended the initial standards for air conditioners and heat pumps established in EPCA Section 325(d) by increasing them to SEER 13, applicable to products manufactured after January 2006. Under the plain language of the statute, DOE is prohibited from issuing a rule that amends the standards required in the Final SEER 13 Rule to decrease these standards. But that is exactly what DOE did. By withdrawing the Final SEER 13 Rule and issuing the SEER 12 Rule instead, DOE amended – by "formally altering" -- the SEER 13 standard by decreasing the standard to SEER 12. DOE's actions violated EPCA Section 325(o)(1), 42 U.S.C. § 6295(o)(1), and were "not in accordance with law," 5 U.S.C. § 706(2)(A).

2. Statutory Framework

If the Court finds the language of EPCA Section 325(o)(1) to be ambiguous, it should turn next to an examination of EPCA's statutory framework. Dauray,

215 F.3d at 262-63. Such an examination supports Citizen and State Petitioners' interpretation in two ways. First, EPCA's statutory framework as a whole was carefully constructed by Congress to ensure that appliance efficiency standards could only become more stringent over time. This is clear not only from the anti-backsliding provision but also from those sections of EPCA that require DOE periodically to revise energy efficiency standards for household appliances, see, e.g., 42 U.S.C. § 6295(b), (k). DOE's crabbed interpretation of Section 325(o)(1), which would allow DOE to decrease duly promulgated energy efficiency standards, is at odds with EPCA's action-forcing, forward-looking structure.

Second, the overall structure of EPCA confirms that publication of a final rule, rather than the final rule's effective date, is the key event in determining the applicability of EPCA. For instance, under Section 325(p), 42 U.S.C. § 6295(p), the "[p]rocedure for prescribing new or amended standards" ends with publication of a final rule in the Federal Register, making clear that publication of a final rule in the Federal Register concludes the process of prescribing an amended standard. See, e.g., Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (agencies may "correct mistakes and even . . . withdraw regulations until virtually the last minute before public release" but not after publication in the Federal Register). Similarly, many of the deadline requirements

for DOE issuance of amended appliance standards in EPCA focus on lead times after publication, not after the "effective date," of the previous rule in the Federal Register. See, e.g., 42 U.S.C. § 6295(b)(3)(B) (for refrigerators, "the Secretary shall publish a final rule no later than five years after the date of publication of the previous final rule"). In short, DOE's attempt to create a window of time during which it can ignore the clear mandate of § 6295(o)(1) finds no support in and is at odds with EPCA's structure.

3. Legislative History

EPCA's legislative history, see generally Dauray, 215 F.3d at 264, further shows that Citizen and State Petitioners' reading of EPCA Section 325(o)(1) is the only reading that is consistent with Congress's intent. First, Congress repeatedly emphasized its consistent understanding of the need for increasingly strong appliance energy efficiency standards and notes its increasing frustration with DOE for failing to produce such standards. See, e.g., H. Rep. No. 100-11 at 20 ("The Secretary is required to engage in at least two future rulemakings at specified dates to determine whether to revise the standards. In such future

[illegible]

to remain at its current level; he may not decrease the standard.") (emphasis

added).[12] Congress determined that it had to force DOE to develop and implement effective appliance standards. DOE's narrow reading of the applicability of Section 325(o)(1)'s anti-backsliding provision is contrary to this extended legislative history and just one further effort to avoid Congress's mandate.

Second, the legislative history of NAECA uses terminology consistent with the Petitioners' interpretation:

> The purpose of this requirement [Section 325(o)(1)] is to prevent the Secretary from weakening any energy conservation standard for a product, whether established in this Act or subsequently adopted. This serves to maintain a climate of relative stability with respect to future planning by all interested parties.

H.REP.NO. 100-11 at 22 (emphasis added). The use of the word "adopted" in the House Report confirms that it is the act of adoption – i.e., publication in the Federal Register as a Final Rule – that qualifies a standard for coverage by Section 325(o)(1)'s anti-backsliding provision. DOE used this term when it published the Final SEER 13 Rule. See 66 Fed. Reg. at 7170, SPA-144 ("Today's final rule adopts standards . . .") (emphasis added).

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[12]Because this House Report is not published in the United States Code Congressional and Administrative News and is not available electronically on the Internet, State and Citizen Petitioners have included it as an Addendum to this Brief.

Third, DOE's position on EPCA Section 325(o)(1) stands in the way of the stated goal of "maintain[ing] a climate of relative stability with respect to future planning," which was Congress's clearly stated intent. H.REP.NO. 100-11 at 22. Clearly, Congress intended that, once DOE has adopted an amended energy efficiency standard, EPCA's anti-backsliding provision prohibits the Secretary from thereafter reducing the standard – whether directly by instituting a new rulemaking proceeding, or incrementally through a series of delays of the effective date of a finally adopted rule followed by a purported "continuing" rulemaking culminating in the "withdrawal' of the rule.

In sum, the text of the EPCA statute, bolstered by the statute's purpose, structure, and legislative history, makes clear that the anti-backsliding provision applies upon DOE's "adoption" – or "prescription" – of the rule, which is final upon publication in the Federal Register. That should end the matter for, under this reading, all of DOE's subsequent actions therefore violated EPCA and must be vacated and the Final SEER 13 Rule reinstated.

4. DOE's Inconsistent and Strained Rewriting of EPCA's Anti-backsliding Provision Deserves No Deference.

In an effort to avoid the strictures of EPCA's anti-backsliding provision, DOE has attempted to rewrite Congress's explicit command. In July 2001, a

month after State and Citizen Petitioners first initiated their legal challenges to DOE's delay rules, DOE proposed for the first time that EPCA Section 325(o)(1) only prevents a decrease in efficiency standards from a rule that has "been allowed to take effect." 66 Fed. Reg. at 38824, SPA-181. See also 66 Fed. Reg. at 38826, SPA-183 ("DOE believes it should construe section 325(o)(1) as applying to standards designed to set 'minimum required energy efficiency' benchmarks at the point in time a final rule containing such a standard becomes effective.") (emphasis added); 67 Fed. Reg. at 36370, SPA-207.

In May 2002, almost a year-and-a-half after issuing the Final SEER 13 Rule, DOE also issued a rule purporting to interpret EPCA Section 325(o)(1) – although DOE also continues to claims that its language is "unambiguous." 67 Fed. Reg. at 36371, SPA-208. Under this new interpretation, which could not logically apply to a Rule issued a year-and-a-half earlier,[13] DOE claims that it may decrease efficiency standards established by a final rule until the rule has "modified [the Code of Federal Regulations] pursuant to a date DOE has selected consistent with the Congressional Review Act . . . and any other applicable law, or the date on

[13]DOE has never stated or given notice in any way that it intends this newest interpretation to have retroactive effect. As the Supreme Court has noted, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

which DOE completes action on any timely-initiated administrative reconsideration, whichever is later." 67 Fed. Reg. at 36406, SPA-243. This latest interpretation relies on concepts such as "petition for reconsideration" that are never provided for or mentioned in the relevant provisions of EPCA. It is a patent attempt to tailor-make a defense to these petitions for review.

DOE's shifting interpretation of EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), is not entitled to any deference under Chevron, 467 U.S. at 843. Agency "expertness" is irrelevant here, because interpretation of Section 325(o)(1) is purely a legal issue concerning the bounds of DOE's statutory authority that does not involve technical energy issues on which the Court should refer to DOE's expertise. Id. at 865. See also United States v. Mead Corp., 553 U.S. 218 (2001) (deference depends on agency's "consistency, formality and relative expertness"). There is no reason to defer to an agency's interpretation of the explicit bounds that Congress has placed on its discretion.

In addition to running contrary to unambiguous statutory language, DOE's interpretation of EPCA Section 325(o)(1) is clearly motivated by its desire to reverse course with respect to the Final SEER 13 Rule and to revoke it. That alone is sufficient reason to withhold Chevron deference. See State Farm, 463 U.S. at 42 ("an agency changing its course . . . is obligated to supply a reasoned

analysis for the change beyond that which may be required when an agency does not act in the first instance").

Moreover, as this Court has held, "a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify Chevron deference." Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001). DOE's "proposal"and ultimate "adoption" of this interpretation were clearly in response to the filing of this litigation.

DOE has issued almost ten Final Rules amending EPCA appliance efficiency standards since Section 325(o)(1) was adopted as part of NAECA in 1997, several of which specifically cite EPCA Section 325(o)(1). See, e.g., 62 Fed. Reg. 50122 (Sept. 24, 1997); 63 Fed. Reg. 48038 (Sept. 8, 1998). DOE has offered no evidence, however, that DOE has ever before indicated any concerns about this provision's purported ambiguity or expressed any need to issue regulations to "interpret" it as part of its duty to administer EPCA. Under these circumstances, DOE's interpretation is clearly a made-for-litigation defense rather than a thoughtful decision "reflect[ing] the agency's fair and considered judgment on the matter in question," Auer v. Robbins, 519 U.S. 452, at 462 (1997); see also

General Signal Corp. v. Commissioner of Internal Revenue, 142 F.3d 546, 548 n.1 (2d Cir. 1998) (following Auer). Thus, Chevron deference should not be applied.

Finally, DOE's interpretation is inconsistent with the structure of EPCA and its legislative history. Rather than "maintain[ing] a climate of relative stability with respect to future planning," which was Congress's clearly stated intent in enacting EPCA Section 325(o)(1), H. Rep. No. 100-11 at 22, DOE's interpretation results in prolonged instability, as demonstrated by the fact that today, almost two years after the Final SEER 13 Rule was issued, there is still no certainty as to which standard applies to air conditioners and heat pumps produced after January 2006. Because DOE's interpretation is contradicted by EPCA and its legislative history, and produces "absurd results," the Court should not defer to it. See generally Dauray, 215 F.3d at 262-65.

B. DOE's Action Violated the Anti-Backsliding Provision Even Under DOE's Interpretation of EPCA Because DOE's Delay Rules Violated the APA.

As is discussed above, DOE has argued that EPCA Section 325(o)(1) does not apply to the Final SEER 13 Rule because the Rule was "not allowed to take effect" due to DOE's Delay Rules. 67 Fed. Reg. at 36370, SPA-207. As is discussed above, this strained interpretation is contrary to the plain language of the statute. However, even if this interpretation were correct, DOE's actions violated

EPCA because the February 2, 2001 and April 20, 2001 Delay Rules were issued in violation of the substantive and procedural requirements of the APA, so the effective date of the Final SEER 13 Rule was not legally delayed. DOE issued the February 2 Delay Rule without any legal authority at all and then issued the April 20 Delay Rule in violation of APA § 705. In addition, DOE issued both without notice and comment and without either having been published at least 30 days in advance of its effective date in violation of APA § 553.

1. The February 2 and April 20 Delay Rules Violated APA §706(2).

Both of the Delay Rules were "not otherwise in accordance with law," 5 U.S.C. § 706(2), because DOE provided no legal authority for issuing the February 2 Delay Rule, and inappropriately attempted to rely on APA § 705 for issuing the April 20 Delay Rule.

a. The Card Memo Did Not, and Could Not, Authorize DOE to Issue the February 2 Delay Rule.

In issuing the February 2 Delay Rule, DOE cited only the Card Memo:

> In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled "Regulatory Review Plan" ... this action temporarily delays for 60 days the effective date of the [Final SEER 13 Rule].

66 Fed. Reg. 7702 (Jan. 24, 2001), SPA-175.

DOE'S reliance upon the Card Memo as legal authority for the February 2 Delay Rule is fatally flawed for at least two reasons. First, a memorandum from the President's Chief of Staff cannot authorize DOE or any other agency to deviate from the APA's strict procedural requirements. See Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986) ("In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress") (quoting U.S. DOJ Office of Legal Counsel Opinion on Executive Order 12291, February 13, 1981).

Second, the Card Memo, by its own terms, did not authorize the delay of the Final SEER 13 Rule. The Card Memo specifically excluded from its directive "any regulations promulgated pursuant to statutory ... deadlines." Id. ¶ 4 (emphasis added). The Final SEER 13 Rule, however, was promulgated pursuant to statutory deadline. See, e.g., 42 U.S.C. § 6295(d)(3)(A) (setting January 1, 1994 deadline for promulgating air conditioner energy efficiency standard); see also DOE's Executive Order 12866 Submission to the Office of Information and Regulatory Affairs accompanying the Final SEER 13 Rule, dated December 15, 2000, JA-5396, at ¶ 5 (stating that there was a "Legal Deadline" of January 1, 1994, and that the deadline was "Statutory"); 66 Fed. Reg. at 38823, SPA-180 (DOE statement that the Final SEER 13 Rule, "had it been concluded on time,

would have been final on January 1, 1994").[14] For these reasons, the February 2 Delay Rule was not authorized by, was not "in accordance with," and was not even "consistent with" the Card Memo.[15] DOE cited no other putative legal authority for the rule. Lacking any authority, the February 2 Delay Rule violated the APA, 5 U.S.C. § 706(2)(A).

b. APA Section 705 Provided No Basis For DOE to Issue The April 20 Delay Rule.

In the April 20, 2001 Delay Rule, DOE further "postpone[d]" the effective date of the Final SEER 13 Rule "[d]uring the pendency of ARI's petition for judicial review and the related petition for administrative reconsideration," solely on the basis of 5 U.S.C. § 705. See 66 Fed. Reg. 20191, SPA-177. DOE wholly failed, however, to satisfy the requirements of section 705.

Section 705 provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5

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[14]DOE's failure to prescribe the Final SEER 13 Rule by January 1, 1994 does not alter its character as a rule prescribed pursuant to statutory deadline. A "deadline" does not stop being a "deadline" simply because DOE failed to meet it.

[15]Fifteen months after it issued the February 2 Delay Rule, DOE continued to revise its characterization of the relationship between the Card Memo and that Rule, stating that the Rule was issued "in conjunction with" the Card Memo. SPA-211. DOE has never provided any legal authority for the February 2 Delay Rule. The best it can do is state that it "thinks the . . .delays . . .were lawful." Id. (emphasis added).

U.S.C. § 705, (emphasis added).[16] By its own terms, Section 705 does not allow an agency to postpone the effective date of a rule pending administrative "reconsideration"of the rule, rendering that portion of DOE's explanation invalid. See P. Holmes, Paradise Postponed: Suspension of Agency Rules, 65 N.C. L. Rev. 645, 679 (1987) ("Section 705 of the APA authorizes an agency to postpone the effective date of its action 'when justice so requires,' but only pending judicial review. . . . [It] does not similarly imply a desire to allow an agency to suspend a rule without notice and comment pending further internal agency review of that rule.")

Moreover, there was no "pending" judicial review. On April 3, 2001, shortly after ARI's Petition for Review was filed, ARI and DOE filed a Joint Motion to Suspend Briefing Schedule Pending Reconsideration of Rule. See JA-5846-5850. ARI and DOE asked that court "to suspend the briefing schedule set by the Court in this case until DOE can consider and act upon the Petition for

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[16]Section 705 does not allow an agency to indefinitely suspend a rule that has already gone into effect. See EPA's Suspension of the Used Oil Mixture Rule: When May Agencies Avoid Notice-and-Comment?, No. 42 Toxics Law Reporter 1246, 1247 (March 27, 1996) (discussing unpublished decision Safety-Kleen Corp. v. EPA, No. 92-1629, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996) rejecting EPA's invocation of section 705 with respect to a previously promulgated regulation). Thus, if this Court finds that the February 2 Delay Rule was illegal, the Final SEER 13 Rule reached its effective date long before DOE's April 20 Delay Rule so that Section 705 was unavailable.

Reconsideration now pending before DOE of the rulemaking sought to be reviewed in this action." Id. at JA-5846. The Fourth Circuit granted this motion on April 6, 2001. JA-5888. Thus, there was no judicial review of the Final SEER 13 Rule "pending" at the time DOE issued the April 20 Delay Rule, rendering the second half of DOE's explanation invalid.

In addition to these failings, DOE did not – and could not have – found that "justice so requires" a delay. 5 U.S.C. § 705. The legislative history of APA § 705 stresses that the purpose of the section is to allow agencies and courts to act to prevent irreparable harm – harm not present in this case. Both the Senate and House Reports state: "The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy." S. Rep. No. 752, 79th Cong. 1st Sess. (1945) at 27, reprinted in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2nd Sess. (1946) at 213 ("Legislative History"); H.R. Rep. No. 1980, 79th Cong. 2nd Sess. (1946) at 43, reprinted in Legislative History at 277.

In accordance with Congress's intent, administrative agencies considering requests for stays under § 705 uniformly apply an injunctive relief type of analysis. See, e.g., Fees Applicable to Natural Gas Pipelines; Texas Gas Transmission Corp., 51 Fed. Reg. 43599 (Federal Energy Regulatory Commission

("FERC") December 3, 1986); Matter of California Dental Ass'n, Docket No. 9259, 1996 FTC LEXIS 277, at *2-*3 n.1 (Federal Trade Comm'n May 22, 1996); Matter of Robert D. Rapaport, OTS Order No. AP 94-08 (Office of Thrift Supervision February 18, 1994); Special Counsel v. Starrett, 28 M.S.P.R. 425 (Merit Systems Protections Bd. July 24, 1985); see also Matter of Applications of William Timpinaro, et al., File Nos. SR-NASD-90-59, and 91-17 1991 SEC LEXIS 2544 (Securities and Exchange Comm'n November 12, 1991) (applying same analysis to stay request when interpreting "justice so requires" language in the SEC Act of 1934).

DOE, however, made no injunction-like finding that ARI would likely succeed on the merits of its judicial challenge, that ARI might suffer irreparable harm,[17] or that a stay was in the "public interest." Therefore, it could not have found that "justice requires" a further delay of the Final SEER 13 Rule.

2. The February 2 and April 20 Delay Rules Violated APA § 553.

In addition to violating the substantive APA standards governing agency action, DOE violated the procedural requirements of the APA that require agencies to (1) provide notice and an opportunity to comment prior to

[17] Indeed, the record does not reflect that ARI or any other manufacturer even requested a stay. See JA-5812-5839.

promulgating rules, 5 U.S.C. § 553(b); and (2) publish rules in the Federal Register at least 30 days prior to their effective date. 5 U.S.C. § 553(d).

a. The APA Requires Prior Notice And An Opportunity to Comment, And Publication 30 Days In Advance of Effective Date.

The APA "is a comprehensive charter of private liberty and a solemn undertaking of official fairness," S. Doc. No. 79-248 at III (Foreword) (1946) (hereinafter "S. Doc. No. 248"), designed to ensure that the public is made aware of, and can participate in, the activities of federal administrative agencies.

As such, the APA contains only limited exceptions to the notice and comment requirements, stating that they do not apply

> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or
>
> (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. §§ 553(b)(A) & (B). These exceptions are to be narrowly construed. "The exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made

and published." S. Doc. No. 248, at 200; see also Attorney General's Manual on the Administrative Procedure Act 26-28 (1947) (hereinafter "Attorney General's Manual"). See also American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (exemptions for "limited situations where substantive rights are not at stake.") [18]

The APA also requires that rules be published at least 30 days in advance of their effective date, 5 U.S.C. § 553(d), a requirement is wholly independent of the APA notice and comment requirements. Congress intended that, even in the rare circumstance in which notice and comment is properly dispensed with, agencies should publish the rule at least 30 days in advance of its effective date. See S. Doc. No. 248 at 201 ("Where public procedures are omitted as authorized in certain cases [this section] does not thereby become inoperative"); see also id. at 259-260.

As with the "good cause" exception to notice and comment in § 553(b)(B), Congress made clear that the "good cause" exception to the 30-day advance publication requirement, 5 U.S.C. § 553(d)(3), "is not an 'escape clause' which

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[18]See also Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 754 (D.C. Cir. 2001) ("good cause" exception); Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995) ("exceptions to § 553 should be 'narrowly construed and only reluctantly countenanced'") (quoting Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994) (further citation omitted).

may be arbitrarily exercised . . . ." S. Doc. No. 248, at 201; see also id. at 260. Rather, invoking the exception "requires legitimate grounds supported in law and fact by the required finding." Id. at 201; see also id. at 260.

Despite these clear procedural mandates, with which DOE indisputably did not comply, DOE argues that the Delay Rules are not invalid because it had "good cause" to skip these steps and because the February 2 Delay Rule was merely a "rule of procedure" to which section 553 does not apply. These excuses for DOE's non-compliance are unavailing.

b. DOE Improperly Invoked the "Good Cause" Exceptions.

The "good cause" exception to the APA's notice and comment requirements mandates that the agency find good cause and "incorporate[] the finding and a brief statement of reasons therefor in the rules issued." 5 U.S.C. § 553(b)(B). In the February 2 Delay Rule, however, DOE merely cited § 553(b)(B), summarily concluding that "[g]iven the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations." 66 Fed. Reg. 8745, SPA-176. Similarly, in the April 20 Delay Rule, DOE asserted:

> Postponement of the imminent effective date of April 23, 2001 avoids confusion among manufacturers as to whether to begin the process of coming into compliance. It avoids expenditures by manufacturers in reliance on a rule with respect to which there is a significant likelihood of modification. It also facilitates reconsideration of a final rule that, if allowed to take effect, might well result in a court order remanding the rule under instructions for further action thereby producing delay in realizing the anticipated energy and cost savings.

66 Fed. Reg. at 20191, SPA-177. These proffered excuses fall far short of the "'satisfactory explanation for its action'" required of an agency where, as here, it is changing course. Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1145-46 (D.C. Cir. 1992) (rejecting agency's claim of "good cause") (citing State Farm, 463 U.S. at 43).

The legislative history provides clear guidance concerning when an agency may properly invoke the "good cause" exception of § 553(b)(B) on the grounds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

> "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary as far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved.

> "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures should not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.

S. Doc. No. 248 at 200 (emphasis added); see also Attorney General's Manual at 30-31. DOE's asserted reasons do not meet these standards.

As discussed below, the Delay Rules aimed to have the effect of allowing DOE to decrease the standard from SEER 13 to SEER 12, leading to very significant economic, health, and environmental impacts – hardly a "minor" amendment. In addition, the hundreds of comments and extensive controversy belies any "lack of public interest." Moreover, DOE's asserted need to avoid "confusion among manufacturers" – when the final compliance date was five years away – hardly rises to the level of an emergency. 66 Fed. Reg. at 20191, SPA-177. DOE's stated desire to "facilitate reconsideration" of the Final SEER 13 Rule to avoid a court remand that could result in "delay in realizing the anticipated energy and cost savings" of the Rule is fatuous. It is DOE itself that has caused the indefinite delay and effective repeal of the Final SEER 13 Rule and has made every effort to reduce "the anticipated energy and cost savings" of the Rule by reducing the efficiency standard to SEER 12. Nor does DOE's apparent

decision that its own Rule may be ill-considered or invalid justify invocation of the "good cause" exception. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 447-48 (D.C. Cir. 1982), aff'd sub nom. Process Gas Consumers Group v. CECA, 463 U.S. 1216 (1983).[19]

In sum, this Court should reject DOE's conclusory – and ironic – statement that seeking public comment prior to issuing the Delay Rules would have been "contrary to the public interest in the orderly promulgation and implementation of regulations." 66 Fed. Reg. 8745, SPA-176. The only interference with the "orderly promulgation and implementation of regulations" occurred when DOE attempted to derail the passing of the effective date of the Final SEER 13 Rule.[20]

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[19]This is not a case where an agency dispensed with notice and comment because of a congressional mandate to act in an expedited manner, see, e.g., Sepulveda v. Block, 782 F.2d 363, 366 (2d Cir. 1986); Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1237 (D.C. Cir. 1994). Nor does this case involve special circumstances such as those present in Council of Southern Mountains, 653 F.2d 573, 581-82(D.C. Cir. 1981), in which the court found "good cause," in what it nevertheless found to be an "extremely close case," for a seven month deferral of the compliance date for coal miner safety equipment regulations because the facts presented a "special, probably unique case" involving human safety, and the agency had intended to implement the regulations on schedule but was unable to through no fault of its own.

[20]The July 25, 2001 Supplemental Notice did not somehow "cure" any failure to provide notice and comment prior to the February 2 Delay Rule. See NRDC v. EPA, 683 F.2d at 768 ("To allow the APA procedures in connection with further postponement to substitute for APA procedures in connection with an

(continued...)

Similarly, DOE lacked "good cause" to forego advance publication. "Good cause" must be "found and published with the rule" to avoid the requirement that a rule be published at least 30 days before its effective date. 5 U.S.C. § 553(d)(3). Here, DOE simply stated that "[t]he imminence of the effective date is also good cause for making this action effective immediately upon publication." 66 Fed. Reg. 8745, SPA-176. In reality, however, DOE was simply attempting to carry out the directive of the Card Memo – notwithstanding its inapplicability and utter lack of legal basis with respect to the Final SEER 13 Rule – without conducting any analysis of, or publishing a "finding" with respect to, the potential impacts of its action upon the public. DOE's reliance on this exception should be rejected. Council of the Southern Mountains, 653 F.2d at 581; see also NRDC, 683 F.2d at 765, n.25.

c. The February 2 Delay Rule Was Not a "Rule of Procedure Excepted From the Requirements of APA Section 553(b).

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[20](...continued)
initial postponement would allow EPA to substitute post-promulgation notice and comment procedures for pre-promulgation notice and comment procedures at any time[,]" a result which the court could not countenance.); see also United States Steel Corp. v. EPA, 595 F.2d 207, 214-15 (5th Cir. 1979) (allowing parties to submit comments after the promulgation of a rule does not cure violation of APA Section 553); New Jersey v. EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (same).

In addition to claiming "good cause" to violate the APA, DOE asserts that the February 2 Delay Rule was exempt because it is "a rule of procedure." 66 Fed. Reg. at 8745, SPA-176. This excuse fails for several reasons.

First, caselaw refutes DOE.[21] "The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA §553." Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983); see also Gorsuch, 713 F.2d at 816 ("agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements"); NRDC, 683 F.2d at 760-61. This is because, as the Court of Appeals for the Third Circuit discussed in the NRDC case, a ruling to the contrary

> would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures. 5 U.S.C. § 551(5). Thus, a holding that EPA's action here was not a rule subject to the rulemaking procedure of the APA would create a contradiction in the statute where there need be no

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[21]DOE's categorization of the February 2 Delay Rule is not dispositive. This Court is "not bound by such pronouncements: 'the label that a particular agency puts upon its given exercise of administrative power is not ... conclusive; rather, it is what the agency does in fact.'" Zhang, 55 F.3d at 746 (quoting Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972)); Gorsuch, 713 F.2d at 816 (finding that EPA's labeling of a statement as policy did not make it so).

> contradiction: the statute would provide that the repeal of a rule requires a rulemaking proceeding, but the agency could (albeit indirectly) repeal a rule simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the statute requires a rulemaking proceeding. By treating the indefinite postponement of the effective date as a rule for APA purposes, it is possible to avoid such an anomalous result.

683 F.2d at 762; see also Public Citizen and Center for Auto Safety v. Steed, 733 F.2d 93, 98 (D.C. Cir. 1984) ("an 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension").

In NRDC, which involved facts strikingly similar to those in the case at bar, the Third Circuit found that the effective date of a rule "is an essential part of any rule: without an effective date, the 'agency statement' could have no 'future effect,' and could not serve to 'implement, interpret, or prescribe law or policy.' In short, without an effective date a rule would be a nullity because it would never require adherence." NRDC, 683 F.2d at 762 (quoting 5 U.S.C. § 551(4)) (emphasis added). In NRDC, the court held that EPA violated the APA when – relying solely on a directive of an incoming administration – it postponed, without providing prior notice or an opportunity to comment, or pre-effective date publication, the effective date of certain regulations that had been published as

final rules in the Federal Register but whose effective date had not yet passed. NRDC, 683 F.2d at 768.[22]

DOE cannot dispute that the Delay Rules here had a substantive effect. Indeed, DOE's very intent in issuing the Delay Rules was to avoid the operation of EPCA's anti-backsliding provision, and thereby withdraw the Final SEER 13 Rule and replace it with a SEER 12 standard. Under DOE's own interpretation of EPCA, but for the Delay Rules, the Final SEER 13 Rule would be the existing energy efficiency standard. The Delay Rules were therefore intended to have the substantive effect of preventing the Final SEER 13 Rule from being the existing energy efficiency standard, to which the anti-backsliding provision would have attached.

In addition, the postponement of the effective date of the Final SEER 13 Rule in this case had a "palpable effect" upon the industry and the general public, altering the substantive obligations of air conditioner manufacturers and delaying the benefits that would flow from the Final SEER 13 Rule. See NRDC, 683 F.2d at 763 (quoting Council of Southern Mountains, Inc. v. Donovan, 653 F.2d 573,

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[22]DOE's issuance of the Delay Rules reflects its own determination that the effective date was "an essential part" of the Final SEER 13 Rule. The Delay Rules did nothing more than change the effective date, but were each characterized by DOE as a "Final rule."

580 n.28 (D.C..Cir. 1986)). The Delay Rules immediately relieved manufacturers of any obligation or incentive to begin to prepare for the January 23, 2006 compliance date by beginning the process of manufacturing and selling compliant equipment. "[T]he process of coming into compliance . . . involves both planning and capital expenditures . . . ." 66 Fed. Reg. at 20191, SPA-177. Indeed, in the April 20 Delay Rule, DOE explicitly sought to excuse manufacturers from such preparations and capital expenditures. Id. In addition, the Delay Rules directly postponed all of the benefits of greater energy efficiency, including reduced demand for (and, hence, the cost of) electricity and reduced pollution resulting from the generation of that electricity, and hampered the orderly transition to SEER 13. They also indirectly would delay, perhaps for many years, the incremental benefits of the Final SEER 13 Rule over a SEER 12 rule if DOE's rollback strategy is successful.

Despite these clear indicia of substantive effect, DOE asserts the February 2 Delay Rule was only one "of procedure." The "rule of procedure" exception, however, is inapplicable. It was intended "to ensure 'that agencies retain latitude in organizing their internal operations.'" American Hosp. Ass'n, 834 F.2d at 1047 (quoting Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)); see also id. at 1045 ("internal house-keeping measures organizing agency activities"); Attorney

General's Manual, at 30 and 113 (characterizing this exception as applying to non-substantive rules described in "section 3(a)(1) and (2)" of the APA, now found at 5 U.S.C. § 552(a)(1)(A)-(C)); Final Report of the Attorney General's Committee on Administrative Procedure 26-28 (1941) (hereinafter "Attorney General's Final Report") (describing "seven forms of vital administrative information," including "agency organization," and "practice and procedure"). A "rule of procedure" does not "alter the rights or interests of parties." JEM Broadcasting Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994) (quoting Batterton, 648 F.2d at 707); see also James V. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 280 (D.C. Cir. 2000); Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295, 328 (D.C. Cir. 1983) (public comment required when agency rule "'jeopardizes the rights and interests of parties'") (quoting Batterton 648 F.2d at 708).

DOE argues that the February 2 Delay Rule was a "rule of procedure" because it was temporary, preserved the status quo and did not affect any substantive rights. However, viewed in its actual context, the February 2 Delay Rule was in no sense "temporary," since it was the first step in DOE's planned reversal of the Final SEER 13 Rule. It was a necessary step in a chain of events leading to the May 23, 2002 promulgation of a weaker standard. Nor did the February 2 Delay Rule "preserve the status quo." The "status quo" at the time of

the February 2 Delay Rule was the Final SEER 13 Rule. By delaying the effective date of the Final SEER 13 Rule, DOE intended to alter rather than preserve the status quo.

Finally, as noted above, DOE's actions were intended to, and did affect, substantive rights. Delaying the effective date of the Final SEER 13 Rule, when coupled with DOE's other illegal actions, have changed manufacturers' obligations, and concomitant public benefits, in a very substantive way.

In sum, because the Delay Rules lacked a legal basis, were subject to but did not comply with the APA's notice and comment and advance publication requirements, and were not within the scope of any exception, they were issued without observance of procedure required by law, in violation of APA Section 706, 5 U.S.C. § 706(2)(D). As a result, they could not legally delay the effective date of the Final SEER 13 Rule. As a further result, even under DOE's interpretation of EPCA, DOE's withdrawal of the Final SEER 13 violated the anti-backsliding provision and must be vacated.

If this Court agrees with Petitioners' reading of the anti-backsliding provision or with Petitioners' analysis of the Delay Rule, it need go no further. The Final SEER 13 would be effective and EPCA would flatly prohibit the reduction of the standard.

POINT II

DOE'S WITHDRAWAL OF THE SEER 13 RULE, ITS REVERSAL OF ITS EARLIER DETERMINATION THAT SEER 13 IS ECONOMICALLY JUSTIFIED AND ITS ISSUANCE OF THE SEER 12 RULE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

If this Court agrees that DOE could not withdraw the SEER 13 Rule once published, or that either of the Delay Rules were invalid, it need not address the substance of DOE's actions. However, a review of DOE's intertwined final actions – its withdrawal of the Final SEER 13 Rule and its determination that SEER 12 was the maximum "economically justified" energy efficiency standard – lead to the same result. The Final SEER 12 Rule must be vacated and the Final SEER 13 Rule reinstated because DOE's actions are based only on pretextual legal claims, stale data and unsupported speculation. Particularly given the State Farm presumption against agency reversals of policy, State Farm, 463 U.S. at 42, DOE's actions cannot withstand scrutiny.

A. EPCA's Economic Justification Factors

EPCA requires that any:

> new or amended energy conservation standard prescribed by the Secretary under this section for [covered appliances] shall be designed to achieve the maximum improvement in energy efficiency . . . which the Secretary determines is technologically feasible and economically justified.

42 U.S.C. § 6295(o)(2)(A). As the Herrington court explained:

> The statute thus establishes a clear decisionmaking procedure. DOE must first identify, for all product types or classes, the maximum improvement in energy efficiency that is technologically feasible. If a standard at that level would be economically justified, DOE must set the standard there. If a standard requiring the maximum technologically feasible level would not be economically justified, DOE must set the standard at the highest level that is both technologically feasible and economically justified. . . . In that event, EPCA requires DOE to explain specifically why a standard achieving the maximum technologically feasible improvement in efficiency was rejected.

Herrington, 768 F.2d at 1391-92.

Under Section 6295(o)(2)(B)(i), in determining whether an appliance energy efficiency standard is economically justified, the Secretary must consider "to the greatest extent practicable" seven factors to "determine whether the benefits of the standard exceed its burdens": 1) economic impacts of the standard on manufacturers and consumers; 2) reductions in operating costs as a result of the standard as compared to an increase in the price of the product; 3) the energy savings from the standard; 4) any lessening of the utility or performance of covered products; 5) impact of the standard on lessening of competition; 6) the need for national energy conservation; and 7) "other factors the Secretary considers relevant." 42 U.S.C. § 6295(o)(2)(B)(i)(I)-(VII).

In issuing the Final SEER 13 Rule, DOE determined that SEER 13 standard was "the highest efficiency level[ ] that [is] technically feasible and economically justified as required by law." 66 Fed. Reg. at 7171, SPA-145.[23] DOE carefully examined all seven of the EPCA economic justification factors and concluded that the SEER 13 Standard was "economically justified" because:

> the benefits of energy savings, the projected amount of avoided power plant capacity or improvement in system reliability that accompanies expected reduction in peak demand, consumer life cycle cost savings, national net present value increase and emissions reductions resulting from the standards outweigh the burdens.

66 Fed. Reg. at 7196, SPA-170. In May 2002, however, DOE reversed itself, concluding instead that SEER 13 was not economically justified, determining instead that the "large financial burdens of [SEER 13] are not outweighed by the expected financial benefits." 67 Fed. Reg. at 36400, SPA-237.

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[23]DOE concedes that the SEER 13 standard is "technologically feasible." Indeed, DOE has determined that the maximum technologically feasible efficiency level for residential central air conditioners is SEER 18, with a corresponding maximum HSPF of 9.4 for residential heat pumps. 67 Fed. Reg. at 36378, SPA-215. SEER 13 technology has been available to manufacturers for approximately fifteen years and virtually all manufacturers (47 total), including both large and small companies, can and do sell SEER 13 models today. JA-6491, 6494 (Comments of Goodman Manufacturing Co., L.P.) Over 14,000 central air conditioner model combinations currently meet or exceed the SEER 13 standard today. JA-6996 (EPA Comments).

In issuing the Final SEER 12 Rule and reversing its previous determination that SEER 13 is economically justified, DOE did not rely on changed circumstances or examine new evidence. To the contrary, DOE refused to take into account recent real-world evidence demonstrating electricity price increases and increasing problems with reliability of the United States electricity system that have taken place since the Final SEER 13 Rule was first published and that strongly support the economic justification of the SEER 13 standard.

Instead, DOE attacks the legality of its own Final SEER 13 Rule to support its withdrawal, using procedural arguments that are clearly pretextual. Next, it "reweighs" the evidence in the existing record underlying the Final SEER 13 Rule, and, by dint of a set of contradictory and unsupported assumptions, attempts to justify its reversal of its previous determination.

B. DOE's "Legal and Policy" Excuses for Withdrawing the Final SEER 13 Rule and Decreasing its Standards Fail to Support Its Reversal.

In an effort to disguise the fact that DOE is amending the Final SEER 13 Rule by reducing its standards from SEER 13 to SEER 12 in violation of EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), DOE insists instead that it is "withdrawing" the Final SEER 13 Rule in order to "correct" certain "legal and policy errors" that DOE, under the former Administration, purportedly committed

in issuing that Rule. 66 Fed. Reg. at 36375, SPA-212. If the Court agrees with State and Citizen Petitioners that these alleged errors do not justify DOE's withdrawal of the Final SEER 13 Rule, then it should reinstate the Final SEER 13 Rule and need not consider the arguments set forth below in Point II.C.

DOE claims that it committed three legal errors in issuing the SEER 13 Rule: 1) it failed to elicit from the Attorney General a sufficient determination about the competitive impacts of the SEER 13 Rule; 2) it did not discuss the cumulative regulatory burden on manufacturers in sufficient detail; and 3) it chose an effective date that conflicted with the Congressional Review Act, 5 U.S.C. §§ 801-808. 67 Fed. Reg. at 36375-76, SPA-212-213. But these alleged "legal errors" wholly lack merit and are merely an attempt to avoid application of EPCA's anti-backsliding provision. DOE also claims that it must withdraw the Final SEER 13 Rule based on "policy concerns" that it had given "inadequate consideration" to "the fraction of consumers, and especially low-income consumers, who would incur significant increases in life-cycle cost" and "the potential regulatory burden and financial impacts on manufacturers." 67 Fed. Reg. at 36376, SPA-213.

1. DOE's Consideration of the Competitive Impacts of SEER 13.

In issuing the Final SEER 13 Rule, after considering "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," 42 U.S.C. § 6295(o)(2)(B)(i)(V), DOE concluded that:

> We recognize that the standard levels that we are adopting could accelerate the consolidation trend among major manufacturers. However, . . . we do not expect that any manufacturer or group of manufacturers will be able to use the standards as an opportunity to consolidate their market power. . . . Therefore, we believe that competition will remain vigorous under the adopted standard, and any lessening of competition that does occur will not result in price increases or loss of choice and utility for consumers.

66 Fed. Reg. at 7176, SPA-150. A year-and-a-half later, DOE reversed this determination, arguing that it had both violated procedural requirements to consult with the Attorney General and reached an incorrect conclusion. DOE is wrong on both points.

a. The Attorney General's Determination on Competition

DOE claims that under the prior administration, it committed legal error by failing to obtain "the Department of Justice's views on the potential of the standards in the January 22 final rule to accelerate consolidation" in the air

conditioning manufacturer industry. 67 Fed. Reg. at 36375, SPA-212 (emphasis added). Because EPCA requires only an analysis by the Attorney General on "any lessening of competition," and because DOE did request and review such an analysis, neither EPCA nor the record supports this claim.

In requiring DOE to consider "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," 42 U.S.C. § 6295(o)(2)(B)(i)(V), EPCA provides that:

> the Attorney General shall make a determination of the impact, if any, of any lessening of competition likely to result from such standard and shall transmit such determination, not later than 60 days after the publication of a proposed rule prescribing or amending an energy conservation standard, in writing to the Secretary, together with an analysis of the nature and extent of such impact. Any such determination and analysis shall be published by the Secretary in the Federal Register.

Id. § 6295(o)(2)(B)(ii).

There are two parts to this economic justification factor: "On the one hand, it assumes that there could be some lessening of competition as a result of standards; on the other hand, it directs the Attorney General to gauge the impact, if any, of that effect." 66 Fed. Reg. at 7173, SPA-147; 67 Fed. Reg. at 36379, SPA-

216. The record demonstrates that DOE met its responsibilities under this provision.

After publishing its notice of proposed rulemaking ("NOPR") on October 5, 2000, 66 Fed. Reg. 59590 (Oct. 5, 2000), JA-3817, and prior to publishing the Final SEER 13 Rule in January 2001, DOE provided the Attorney General with the NOPR and the accompanying Technical Support Document ("TSD"). JA-3860-61. As DOE concedes, both the NOPR and the TSD discussed "the range of potential trial standards considered by DOE," 67 Fed. Reg. at 36375, SPA-212, including the across-the-board SEER 13 standard eventually adopted by DOE in January 2001, as well as the proposed standard of 12 SEER for central air conditioners and SEER 13/HSPF 7.7 for heat pumps. Thus, the Attorney General was on notice that DOE's Final Rule, despite its initial proposal, might include any of these standards, including SEER 13.

The Attorney General provided DOE with its determination. JA-512-15. The Attorney General commented only on the proposed standards. SPA-200. The Attorney General briefly identified "three possible competitive problems presented by the proposed standards": 1) that the proposed SEER 13 heat pump standard would have a disproportionate impact on small manufacturers; 2) that "the proposed standard for heat pumps, and in some instances for air conditioners,

would have an adverse impact" on small manufacturers who produce so-called "niche products" such as those air conditioning and heat pump products used to retrofit existing homes and those used in manufactured housing; and 3) that the proposed heat pump standard could make heat pumps less competitive with alternative heating and cooling systems. JA-5114-15. The Attorney General concluded by urging DOE "to take into account these possible impacts on competition in determining its final energy efficiency standard for air conditioners and heat pumps." JA-5115.

In response, DOE did exactly that. Noting that "nearly all small manufacturers produce only niche products," 66 Fed. Reg. at 7192, SPA-166, DOE addressed the Attorney General's first two concerns about the impact of the standards on small manufacturers and especially manufacturers of niche products by exempting "niche" products from the SEER 13 standard,[24] announcing instead

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[24] As DOE acknowledges, "[m]ost small manufacturers produce only indoor coils," whose capital requirements will be unaffected by a new standard, "or niche product lines." 67 Fed. Reg. at 36388, SPA-225. Significantly, three small air conditioner manufacturers who participated in the rulemaking process strongly supported the SEER 13 standard. JA-5921-22 (May 1, 2001 letter from the president of Goettl Air Conditioning, Inc.) (stating that "as a small manufacturer in this industry, I do not believe a higher efficiency standard at a level of 13 SEER would have a disproportionate impact on small manufacturers. Economies of scale and the past trend toward consolidation do effect small companies, but 13 SEER technology is well established."); JA-5929-50 (May 23, 2001 letter from

(continued...)

that they would be addressed in a separate rulemaking.[25] Id. at 7192-93, 7196-97, SPA-166-67, 170-71. DOE addressed the Attorney General's third concern "regarding possible shifting in the market from heat pumps to resistance heaters," by adopting "the same minimum SEER requirement for heat pumps as we have for air conditioners," which "substantially reduces the incentive for consumers to switch, thereby addressing that concern." Id. at 7193, SPA-167. DOE concluded that:

> In summary, the standards we are adopting should effectively eliminate most of [the Attorney General's] concerns regarding the lessening of competition, even under [SEER 13]. To the extent that we have not fully eliminated their concerns, however, we have considered the remaining possibility for lessening of competition as we weighed the burdens of today's adopted standards.

Id.

DOE now attempts to construct an argument that EPCA imposes a

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[24](...continued)
president of FHP Manufacturing)(same); JA-7217 (May 18, 2001 letter from president of Addison Products Company)(same).

[25]In May 2002, DOE established a separate standard for other products and creating a special standard for these products. EPCA provides for the establishment of different standards for appliance product types which "have a capacity or other performance-related feature " which distinguishes them from other classes of the same appliance and which "justifies a higher or lower standard from that which applies . . . to other products." 42 U.S.C. § 6295(q). State and Citizen Petitioners do not oppose the standard established by the current DOE for niche products.

further requirement on DOE to re-consult with the Attorney General if DOE determines to publish a final appliance efficiency rule that differs from a proposed rule. 67 Fed. Reg. at 36375, SPA-212. EPCA simply does not require such a burdensome, delaying procedure.[26]

Procedurally, EPCA does not impose any specific requirement on DOE to obtain the Attorney General's views at any point in the process, let alone twice: it simply imposes on the Attorney General a duty to make a determination and provide it in writing to DOE. See 42 U.S.C. § 6295(o)(2)(B)(ii) ("the Attorney General shall make a determination of the impact, if any, of any lessening of competition . . . and shall transmit such determination . . . in writing to the Secretary") (emphasis added). By requesting, reviewing and responding to the Attorney General's views after publishing the NOPR and before publishing the

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[26]In the SEER 12 Rule, DOE stated that "none of the comments disputed DOE's view that it should have obtained the Department of Justice's views on 13 SEER standards for both central air conditioners and heat pumps." 67 Fed. Reg. at 36375, SPA-212. This is incorrect. NRDC and other commenters made exactly this point to DOE in April 2001. JA-5867 (April 6, 2001 comments of NRDC and ten other commenters). More importantly, EPCA Section 6306(b)(1) "does not require that a petitioner have participated in the rulemaking proceeding in order to challenge the agency's standards in court"; thus, State and Citizen Petitioners "cannot reasonably be held to a strict requirement that they or other commenters have raised all their objections before the agency." Herrington, 768 F.2d at 1420 n. 63. DOE "remains obliged to produce substantial evidence for its major assumptions in a rulemaking even in the absence of critical comments." Id.

Final SEER 13 Rule, DOE more than fulfilled its role with respect to this EPCA factor. The Attorney General's decision to comment only on the standard actually proposed in DOE's NOPR cannot be imputed to a failure by DOE to comply with EPCA's requirements or form a basis for withdrawal of the Final SEER 13 Rule.[27]

Substantively, the Attorney General's identification of possible concerns about the SEER 13 heat pump standard also served the purpose of effectively providing identification of possible concerns about the SEER 13 air conditioner standard, since "[t]he 13 SEER standard for air conditioners raises the same kinds of competitive problems as the 13 SEER standard does for heat pumps." 67 Fed. Reg. at 36407, SPA-244. The Attorney General has never identified any different or additional competitive concerns with respect to the SEER 13 air conditioner standard than the SEER 13 heat pump standard; it has simply reiterated that the SEER 13 standard for air conditioners raised the same potential competitive concerns for small manufacturers as did the SEER 13 standard for heat pumps. Thus, the actions that DOE took in considering the Attorney General's written determination on lessening of competition and in crafting the Final SEER 13 Rule to carve out an exemption for niche products addressed both the Attorney

[27]In other portions of EPCA, in contrast, Congress imposed on the Secretary a specific procedural duty that requires "obtaining the written views of the Attorney General." 42 U.S.C. § 6295(t)(2).

General's concerns about the SEER 13 standard for both heat pumps and air conditioners.

b. DOE's Reversal on Competitive Impact Does Not Justify Withdrawal of the Final SEER 13 Rule.

In January 2001, DOE found that under SEER 13 "competition will remain vigorous." 66 Fed. Reg. at 7176, SPA-150. DOE now reverses itself, claiming that "[i]n arriving at today's decision to adopt a 12 SEER standard, DOE relied on [the Attorney General's] expert opinion that a 13 SEER air conditioner and heat pump standard raises competitive concerns. . . and that a 12 SEER standard would not adversely affect competition." 67 Fed. Reg. at 36390, SPA-227. But, aside from the Attorney General's general concern about small manufacturers, which DOE had already addressed, the Attorney General's "expert opinion" on SEER 13 consists of a few paragraphs, unsupported by any analysis or data.

The Attorney General briefly expressed concern that the 13 SEER for heat pumps might impact small manufacturers and manufacturers of niche products, which DOE addressed, and that a 13 SEER heat pump might cause consumers to switch heating equipment, "reducing the competition that presently exists between heat pumps and those other systems." Id. This concern is groundless for the reasons discussed below. The Attorney General's letter of April 5, 2001, merely

reiterates its concern about SEER 13 heat pumps and adds a single sentence on air conditioners: "The 13 SEER standard for air conditioners raises the same kinds of competitive problems as the 13 SEER standard does for heat pumps." Id.

These summary and unsupported expressions of possible concerns do not constitute a reliable "expert opinion." See Herrington, 768 F.2d at 1413 (DOE's reliance on an Office of Management and Budget order directing government agencies to use a particular discount rate does not meet substantial evidence standard because "DOE may not rely without further explanation on an unelaborated order from another agency. Neither we as a reviewing court nor participants in the rulemaking can possibly discover the substantive basis of OMB's edict.")

In sum, DOE, in issuing the Final SEER 13 Rule, fully and correctly complied with EPCA's direction to consider "the impact of any lessening of competition." 42 U.S.C. § 6295(o)(2)(B)(i)(IV). DOE's claim to the contrary provides no support for DOE's current decision to withdraw the Final SEER 13 Rule.

2. DOE's Discussion of Cumulative Regulatory Burdens

DOE also now claims that its discussion of the cumulative regulatory burdens of the SEER 13 standard in the Final SEER 13 Rule was inadequate,

necessitating withdrawal of the Rule. This purported justification must be rejected for four reasons.

First, this is a *post hoc* justification for withdrawal of the Final SEER 13 Rule. Cumulative impact issues were raised only briefly and in passing by industry commenters. See, e.g., JA-5189-90 (ARI comments); JA-5008 (comments of Carrier Corporation). Even ARI's so-called Petition for Reconsideration included only two brief references to cumulative impact. JA-5830, 5833.

Second, EPCA never mentions "cumulative burden" as an economic justification factor. Although DOE asserts that "the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacture of a covered product" is "[o]ne aspect of the assessment of manufacturer burden required by EPCA," 67 Fed. Reg. at 36376, SPA-213, and that "a standard level is not economically justified if it contributes to an unacceptable cumulative regulatory burden," 67 Fed. Reg. at 36386, SPA-223, that reading is invented entirely by DOE. Indeed, EPCA requires DOE to issue the standard that will "achieve the maximum improvement in energy efficiency . . .

that is economically justified," 42 U.S.C. § 6295(o)(2)(A), without regard to the cost of manufacturers' obligations under other statutes.[28]

Third, regardless of the legal basis, DOE in fact did address cumulative burden in the Final SEER 13 Rule. Contrary to DOE's current claim that the Final SEER 13 Rule included only "the mere assertion that DOE considered the cumulative burdens on manufacturers," 67 Fed. Reg. at 36376, SPA-213, DOE responded to and discussed the cumulative impact issues that were raised in passing in comments by ARI and the air conditioner manufacturer Carrier Company. 66 Fed. Reg. at 7182, SPA-156 (noting that despite required phase-out of an ozone-depleting refrigerant, there are "options available for manufacturers to improve equipment efficiency without increasing equipment size or charge").

Finally, DOE's current position that its earlier analysis of cumulative impacts was inadequate is itself flawed. DOE's May 2002 rulemaking asserts that:

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[28]DOE may argue that consideration of cumulative economic impact on manufacturers is contemplated by Appendix A to Subpart C of 10 C.F.R. Part 430, adopted by DOE in 1996, which DOE sometimes refers to as its "Process Improvement Rule." This Appendix, however, merely provides "guidelines" for selecting a proposed standard. 10 C.F.R. Part 430, Subpart C, Appendix A at Section 1(h). Its policies "are intended to provide guidance for making the determinations required by EPCA." Id. at Section 5(h). Moreover, the Appendix specifically states that "[t]he procedures, interpretations and policies stated in this Appendix are not intended to establish any new cause of action or right to judicial review." Id. at Section 14(c).

> the burden on manufacturers due to all other recent or imminent Federal regulations exceeds $479 million. DOE estimates that the 13 SEER amendments to the standards for central air conditioner and heat pumps would contribute up to an additional $303 million in manufacturer costs, bringing the total cumulative regulatory burden to as high as $782 million. In light of that heavy burden, [DOE] proposed 12 SEER standards that DOE estimates will reduce the expected financial burden on manufacturers from all new Federal and State regulations by $144 million compared to the 13 SEER final rule of January 22.

67 Fed. Reg. at 36386, SPA-223.

The key basis for DOE's estimate of total cumulative regulatory burden "as high as $782 million" is the cost imposed by EPA regulations requiring that air conditioners phase out their use of a coolant called HCFC-22, which is an ozone-depleting substance. Id. EPA regulates the phase-out of chlorofluorocarbons ("CFCs") and hydrochlorofluorocarbons ("HCFCs") pursuant to Title VI of the Clean Air Act, 42 U.S.C. §§ 7671-7671g. Pursuant to this authority, EPA has issued regulations that determine the timing and other aspects of the phase out of the production of HCFC-22 and other ozone depleters and has considered the costs and benefits of doing so. See, e.g, 58 Fed. Reg. 65018, 65059 (Dec. 10, 1993); 40 C.F.R. Part 82. But EPA, in detailed comments submitted to DOE in October

2001 in support of SEER 13, determined that DOE's estimate of the cost of the HCFC-22 phase-out was "at least twice as high as warranted":

> EPA analysis indicates that the Department of Energy's (DOE) projected cost for manufacturers to transition from HCFC-22 to a substitute for residential central air conditioners and heat pumps is likely to be a significant overestimate. Both EPA's own analyses, and estimates from at least one large manufacturer indicate that the DOE estimates in their Technical Support Document (TSD) are at least twice as high as warranted based on prior industry transitions and more recent trends.

JA-6993. EPA explains that its analysis "suggests a more reasonable estimate of the cost to be around $20 to $30 million per company, rather than the $50 million estimated by DOE." Id. Noting that "[t]he TSD states '[t]o the extent that manufacturers can introduce new products utilizing the new refrigerant and meeting the new efficiency standard, the cumulative burden will be reduced," EPA concluded that "there is ample opportunity to meet both a 13 SEER efficiency standard and a ban on HCFC-22 in new equipment with limited regulatory burden." Id. at JA-6995.

EPA also pointed out that Goodman Manufacturing Company, the second-largest U.S. manufacturer of air conditioning equipment, agreed with EPA that DOE's estimates of the cost of the HCF phase out were significantly overstated:

> Goodman has analyzed the costs associated with switching refrigerants and meeting a 13 SEER standard and expects the *combined* cost for both will be on the order of half of DOE's $50 million estimate for just the refrigerant transition. They feel that this $25 million per company is representative of the vast majority of the industry.

JA-6994 (emphasis in original). Goodman's support for SEER 13, and its rejection of DOE's cumulative regulatory burden cost estimate, is particularly significant because the TSD identifies Goodman as one of the two companies which "face the greatest cumulative burdens" from EPA's HCFC phase-out regulations combined with appliance efficiency standards. JA-3491.

Although DOE responded to EPA's comments, it failed to acknowledge EPA's expertise on the financial impact of EPA's own regulations, treating EPA as if it were any other public commenter. It did not address the fact that Goodman's analysis agreed with EPA's. Nor did DOE attempt to resolve the discrepancy between EPA's views on the cost of its own regulations and DOE's views by performing any new study or collecting any further information on the topic of HCFC phase-out. DOE's determination of the cumulative regulatory impact of the SEER 13 standard thus fell short of the APA's requirements. See Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011, 1030-31 (2d Cir. 1983) (agency violated its APA responsibilities when it received "critical

comments" from sister federal agencies, including EPA but "no new studies were performed, no additional information was collected, [and] no further inquiry was made").

For all these reasons, DOE's assertion that its earlier analysis of cumulative burdens in the Final SEER 13 Rule provides no legal basis for DOE now to withdraw that Rule and substitute the Final SEER 12 Standard.

3. DOE's Compliance With the Congressional Review Act.

DOE's third asserted "legal error" justifying withdrawal of the Final SEER 13 Rule is that the Rule's effective date of February 21, 2001 conflicts with the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801-802. Again, this argument fails for three reasons.

First, once more, this is an argument created by DOE, after the fact, to justify its actions. ARI did not even raise any issue with respect to the CRA in its Petition for Reconsideration. JA-5811-39, nor was this issue raised in either of the Delay Rules.

Second, DOE complied with the CRA. The CRA does not support DOE's withdrawal of the Final SEER 13 Rule, or, as is discussed above at pp. 36-40, its interpretation of EPCA Section 6295(o)(1), 42 U.S.C. § 6295(o)(1). Indeed, the CRA has no relevance to this action. The CRA provides that federal agencies

must submit rules to Congress, and that Congress may issue a joint resolution disapproving a "major rule" within a 60-day lie-in period. 5 U.S.C. §§ 801-802. As required pursuant to Section 801(a)(1) of the CRA, DOE forwarded the Final SEER 13 Rule to Congress for its review and submitted the required analyses to the Comptroller General. 66 Fed. Reg. at 7199, SPA-173. Congress did not issue a joint resolution of disapproval of the Final SEER 13 Rule. Very simply, DOE complied with Section 801(a)(1) of the CRA and even now DOE does not allege otherwise.

Third, DOE's argument that the Final SEER 13 Rule's effective date is "in direct conflict" with the CRA has no basis in law. The CRA provides that Congress may, by joint resolution of disapproval, nullify a rule that has already gone into effect. See 5 U.S.C. § 801(b)(1) (providing that a rule "shall not take effect (or continue)" if Congress enacts a joint resolution of disapproval); id. at § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.") Thus, Congress was free to nullify the Final SEER 13 Rule after its effective date but chose not to. In sum, the Final SEER 13 Rule's effective date does not conflict with the CRA and does not support DOE's

withdrawal of the Final SEER 13 Rule and its substitution of the Final SEER 12 Standard.[29]

4. DOE's "Policy" Rationale on Consumer and Manufacturer Impact

In addition to these purported legal errors, DOE claims that it is withdrawing the Final SEER 13 Rule and substituting a SEER 12 standard because DOE earlier: 1) gave "inadequate consideration to the fraction of consumers, and especially low-income consumers, who would incur significant increases in life-cycle cost as a result of the 13 SEER standard"; and 2) "had not adequately assessed the potential regulatory burden and financial impacts on manufacturers." 67 Fed. Reg. at 36376, SPA-213. This new "policy" position is based on an unsupported reversal of its earlier explicit findings. DOE relies on parallel reasoning to justify its issuance of the SEER 12 rule as the maximum efficiency standard that is "economically justified." Therefore, State and Citizen Petitioners address DOE's policy rationale for the withdrawal of the Final SEER 13 Rule together with its substantive rational for the issuance of the SEER 12 standard below. As was shown above and will be demonstrated below, neither the

[29]Significantly, the CRA provides that "[n]o determination, finding, action or omission under this chapter shall be subject to judicial review," 5 U.S.C. § 805, indicating that any alleged noncompliance with the CRA by DOE in issuing the Final SEER 13 Rule could not provide the basis for withdrawal or invalidation of the Rule.

"legal" nor the "policy" "errors" asserted by DOE provide substantiated basis for DOE's rule withdrawing the Final SEER 13 Rule.

C. DOE's Substantive Basis for Withdrawing the Final SEER 13 Rule and Issuing the SEER 12 Rule, Directly Reversing Its Earlier Factual Findings, Lacks Basis in Substantial Evidence.

EPCA requires DOE to examine seven factors in setting appliance efficiency standards. 42 U.S.C. § 6295(o)(2)(B)(i). In issuing the Final SEER 13 Rule and determining that it was economically justified, DOE carefully examined and discussed each of the EPCA factors for economic justification of an appliance efficiency standard and made specific findings with respect to SEER 13 for each factor. 66 Fed. Reg. at 7174-77, 7196, SPA-148-51, 170. In issuing the Final SEER 12 Rule, DOE both drew new, unsupported conclusions concerning the impact of SEER 13 on manufacturers, 42 U.S.C.§ 6295(o)(2)(B)(i)(I), and directly reversed its own factual findings with respect to the following EPCA economic justification factors: (1) economic impact of the standard on consumers, id.; (2) life cycle costs, 42 U.S.C.§ 6295(o)(2)(B)(i)(II); (3) energy savings, 42 U.S.C.§ 6295(o)(2)(B)(i)(III); and (4) electric reliability, which DOE considered as one of "other factors the Secretary considers relevant," 42 U.S.C.§ 6295(o)(2)(B)(i)(VII) .

With respect to each of these factors, DOE's reversal is unsupported by substantial evidence.[30]

1. Economic Impact on Manufacturers and Consumers

a. Manufacturer Impacts

DOE's primary criterion for evaluating the burdens on manufacturers is "industry net present value" ("INPV").[31] In rejecting SEER 13 as not economically justified, DOE now states that it expects "the average loss in industry INPV to be around 20 percent, but impacts on most manufacturers would reach almost 30 percent." 67 Fed. Reg. at 36400, SPA-237.

DOE implies that harm to industry net present value is significantly greater at SEER 13 than they are at SEER 12. But this conclusion is based on a sleight of hand. DOE's analysis, included in both the Final SEER 13 Rule and the TSD that underlies both the Final Rules, demonstrates that, under most of the relevant market scenarios, the impact on INPV is actually worse at SEER 12 (which DOE refers to as "Trial Standard 2") than at SEER 13 (which DOE refers to as "Trial

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[30]DOE also directly reversed itself on the EPCA factor of "lessening of competition," 42 U.S.C.§ 6295(o)(2)(B)(i)(V), discussed above.

[31]INPV is calculated as the sum of all discounted net cash flows between 2000 and 2016 plus the discounted terminal value of the industry in 2016. JA3457.

Standard 4").[32] For example, in one market scenario ("Roll-Up Efficiency Mix"), the negative industry net value impact is $303 million under SEER 13 and $313 million under SEER 12. 66 Fed. Reg. at 7186, SPA-160, Table V-5. Under a second market scenario ("Shift Efficiency Mix"), there is a positive industry net value impact which is greater for SEER 13 ($285 million) than for SEER 12 ($233 million). Id. at Table V.6. Under a third market scenario ("NAECA Efficiency Mix"), the negative industry net value impact is slightly greater at SEER 13 than at SEER 12, but only by a trivial amount ($10 million compared to a base case of $1.5 billion – or less than 2/3 of 1%. Id. at Table V.4.[33]

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[32]When appliance standards are under consideration, DOE constructs market scenarios to examine what will happen to the appliance market after the compliance date for the standard and to determine what the distribution of models above the new minimum efficiency standard would be. DOE developed three scenarios: 1) the "NAECA" scenario, which reproduces the impact on the industry caused by compliance with the appliance standards adopted through enactment of NAECA; 2) the "shift" scenario, which assumes a continuing demand for products that are more efficient than the standard; and 3) the "Roll-Up" scenario, which assumes that "demand for a high efficiency product is a function of its price without regard for the standard level." JA-3445-46. DOE analyzed the effect of standards in Chapter 8.4.4 of the TSD, showing the impacts on industry INPV for each possible scenario at each different efficiency standard. JA-3457-3466.

[33]Tables V.4-V.6 are the most relevant estimates of INPV because they are based on the "reverse engineering" cost estimate system that DOE has consistently approved. See, e.g., 67 Fed. Reg. at 36389, SPA 226.

But the parallel Table in the Final SEER 12 Rule, which is based on the same numbers from the same TSD, shows a negative impact on INPV that is almost twice as high for SEER 13 than for SEER 12. Table 4, 67 Fed. Reg. at 36398, SPA-235. DOE accomplishes this sleight of hand by newly assuming that a different scenario applies at SEER 13 than applies at SEER 12. 67 Fed. Reg. at 36388, 36399, SPA-225, 236. As support for applying different market scenarios to SEER 13, DOE points to Section 8.4.8 of the TSD. JA-3466-3472. That section of the TSD, however, nowhere states that the NAECA scenario is most likely for SEER 12 and the Roll-up Scenario is most likely for SEER 13. Thus, it provides no basis for DOE assumption that "the Roll-up efficiency scenario" is "most probable for 13 SEER standard levels and the NAECA efficiency scenario most probable at 12 SEER standards level." 67 Fed. Reg. at 36388, SPA-225.

Furthermore, "most probable," of course, is not the same as 100% probability. But what DOE did, for the purpose of framing its decision, was assume a 100% probability of the most unfavorable scenario for SEER 13 and assume a 100% chance of the most favorable scenario for the SEER 12 case. By "cooking the books" this way, DOE shows a relatively large difference between the two scenarios, when, in fact, there is no adequate analytic foundation for this assumption.

Finally, DOE suggests that INPV impacts that it attributes to SEER 13 are uniquely large. This is incorrect. In fact, a comparison of the Final SEER 13 Rule with DOE's three other most recent appliance efficiency rules issued under the former administration indicates that, overall, the range of INPV impacts for all four rules is negative 5% to 36% of total INPV. In the ballast efficiency rule, DOE estimated negative INPV impacts ranging from 29% to 36% for different groups of manufacturers. 65 Fed. Reg. 14128, 14144-45 (Sept. 17, 2002), 65 Fed. Reg. 56740 (Sept. 19, 2000). In the clothes washer efficiency rule, DOE estimated negative INPV impacts between 29.2% and 36.7%, with the impact on two small manufacturers so large that "it is likely that one or both of the two smaller companies would cease to produce washers covered by the standard and might also cease to market them." 65 Fed. Reg. 59550, 59575, 59576 (Oct. 5, 2000); 66 Fed. Reg. 3314, 3319 (Jan. 12, 2001). In the water heater efficiency rule, DOE estimated negative INPV impacts of 5%. 66 Fed. Reg. 25042, 25043 (April 28, 2000); 66 Fed. Reg. 4474 (Jan. 17, 2001). Yet DOE has not attempted to rollback any of these rules and, indeed, denied a "petition for reconsideration" claiming that the clothes washer standard was not economically justified. 66 Fed. Reg. 19714 (April 17, 2001). With SEER 13, DOE's prediction is that the most likely

average INPV impact will be 20%, 66 Fed. Reg. at 7186 (Tables V.4-V.6), SPA-160, which falls in the middle of this range.

In sum, DOE has not established that the INPV impact of SEER 13 is likely to be any more severe than that of SEER 12. Because EPCA requires that DOE select the standard that is the "maximum improvement in energy efficiency" which is economically justified, 42 U.S.C. § 6295(o)(2)(A), consideration of INPV provides no basis, and indeed contradicts, DOE's decision to withdraw the Final SEER 13 Rule and decrease the standard to SEER 12.

In addition to its flawed analysis of INPV, DOE overestimated the incremental cost of producing SEER 13 units by ignoring evidence that its method of calculating manufacturer cost has consistently resulted in overestimations in the past. DOE estimates that the incremental cost of a SEER 13 unit will be $335, 66 Fed. Reg. at 7171, SPA-145, which is just $122 more than the $213 incremental cost to the consumer of a SEER 12 unit. 66 Fed. Reg. at 38831, SPA-188. However, Goodman Manufacturing Co. and ACEEE pointed out that DOE's incremental cost estimate for SEER 13 units did not take into account real-world actual data demonstrating that earlier efficiency standard increases for central air conditioners did not result in cost increases. Indeed, the cost and price data instead show a steady decline in prices, despite DOE's earlier estimates of cost

increases. JA-6962 (Goodman); JA-7062 (ACEEE). When NAECA was enacted in 1987 and raised the efficiency standard for central air conditioners to SEER 10, effective in 1992, DOE estimated that this increase in efficiency would result in a cost increase of $349 per unit. However, undisputed evidence shows that the actual price increase was $0. JA-7062.

This continuing decline in prices after adoption of a major increase in efficiency is due to standards-induced productivity improvements on the part of manufacturers:

> Pre-1992, SEER 10 equipment was a premium, speciality, line. It was assembled in relatively small numbers. When SEER 10 became the norm, the equipment, components (such as compressors and heat exchangers), and the manufacturing processes had to be redesigned to minimize cost impact. In relatively slow-growing markets in which market share is a key to profitability, firms could not afford not to respond by reducing costs of the now-mainstream product.

JA-7063 (ACEEE). Goodman, speaking from its own experience with manufacturing air conditioners, agreed: "Once the standard is set, more sales of that type will occur and more volume is manufactured, thereby allowing the manufacturers to run their plant more efficiently and pass the savings on to the consumer." JA-6962.[34] After 1994, U.S. Census Bureau data show a continuing

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[34]ACEEE commented to DOE that experience with other appliance

(continued...)

steady decline in air conditioner costs at a rate of 1.7% annually over the period from 1994-1998. JA-7065. This shows that the imposition of efficiency standards caused an increase in productivity that cancelled out any increase in costs due to the standard.

DOE, however, while not contesting the historical experience that appliance efficiency standard increases have not led to price increases, and that the trend has been for appliance price declines, and while not refuting the phenomenon of productivity improvements, refused to lower its cost estimates. DOE's refusal to take into account actual evidence showing that increases in appliance standards do not result in cost increases because of productivity improvement was in error.

b. Consumer Impacts

In issuing the Final SEER 13 Rule, DOE determined that consumers, including low-income consumers, would benefit from a SEER 13 standard. DOE under both administrations has consistently determined that, on average, the

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[34](...continued)
efficiency standards has also shown that appliance efficiency improvements do not increase costs. JA-7064 at n. 11. In a study cited by ACEEE, an examination of the effect of increases in refrigerator efficiency standards in 1990 and 1993 showed that real refrigerator prices did not increase and "quality-adjusted" real prices declined during the period of analysis. Lorna A.Greening, Alan H. Sanstad, James E. McMahon, Effect of Appliance Standards on Product Price and Attributes: An Hedonic Pricing Model, Journal of Regulatory Economics, 11: 181-194 (1997).

SEER 13 standard would allow consumers to save $113 dollars over the life of the equipment. 66 Fed. Reg. at 7171, SPA-145; 66 Fed. Reg. at 38836, SPA-193. As is discussed below in Point II.C.2 (Life-Cycle Costs), DOE has also consistently stated, across both administrations, that the SEER 13 standard would have "a net benefit to the nation's consumers of $1 billion" over the period from 2006 to 2030. 66 Fed. Reg. at 7171, 7191 (Table V.19), SPA-145, 165; 67 Fed. Reg. at 36398, SPA-235. However, in issuing the Final SEER 12 Rule in May 2002, DOE reversed itself on the benefits of SEER 13, determining that because "the benefits of the [SEER 13] standards would accrue to a much smaller fraction of consumers . . . than is the case for recent standards for other products," it must "mitigate those burdens" by adopting a SEER 12 standard. 67 Fed. Reg. at 36379, SPA-216.

DOE's conclusions fly in the face of the strong statements in support of SEER 13 from: 1) a host of government regulators, including the U.S. EPA, JA-6990; the Oregon Energy Office, JA-6984; the Texas Natural Resources Conservation Commission, JA-7166; and the National Association of Regulatory Utility Commissioners ("NARUC"), which is the association of state public utility regulators, JA-6469; 2) private and public electric utilities that have responsibilities to protect low-income consumers such as National Grid, JA-6422; Pacific Gas & Electric, JA-6980; and Austin Energy, JA-6769; 3) distinguished

organizations that represent the interests of consumers and low-income consumers and ratepayers, including the National Consumer Law Center, JA-6844; Texas ROSE, JA-6858; and Consumer Federation of America, JA-6783; and 4) over 10,000 comments from individual consumers, which is well more than DOE has ever received on an appliance rulemaking. JA-7188; see e.g. JA-7220-7230.[35]

In contrast, the primary entities commenting that SEER 13 hurt consumers and low-income consumers were industry representatives, chiefly air conditioning manufacturers, and an academic think-tank that opposes appliance standards across the board on ideological grounds, none of which are charged with responsibilities for protecting consumers or the poor. 67 Fed. Reg. at 36380, SPA-217.

For the three reasons discussed below, DOE's reversal of its original determination that the SEER 13 standard benefits consumers is not supported by substantial evidence.[36]

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[35]In a regrettable display of indifference to public input, DOE blocked its email system in the face of a flood of public comment in opposition to the rollback of the Final SEER 13 Rule, preventing many additional citizens from presenting their views to the agency.

[36]State and Citizen Petitioners also refer the Court to the Brief of Intervenors Massachusetts Union of Public Housing Tenants and Texas Ratepayers' Organization to Save Energy, written by the National Consumer Law (continued...)

i. Low-Income Consumers

DOE originally concluded "that it is likely that low income air conditioner and heat pump consumers will also save money as a result of the standard." 66 Fed. Reg. at 7171, SPA-145. SEER 13 would benefit low-income consumers in particular by reducing their energy bills. The small percentage of low-income people who have central air conditioning systems almost never buy new air conditioner systems because they tend to rent, not own, their homes. Instead, their landlords purchase these systems for them. This gives rise to the classic "split incentive" problem: the best interests of the tenant, who has to pay electricity bills, is served by a more efficient air conditioner, but, in the absence of strong minimum appliance standards, the landlord who purchases the system but does not pay the electric bills has an incentive to buy a lower-cost, less-efficient appliance. JA-6417-19.

Now, however, DOE reverses itself by concluding that SEER 13 will harm low-income consumers "because increases in first cost and increases in life cycle costs are felt more sharply by lower income consumers." 67 Fed. Reg. at 36380, SPA-217. DOE argues, based on economic studies that it includes for the first

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[36](...continued)
Center, which addresses in greater detail DOE's failure to support its reversal on the consumer and low-income consumer benefits of SEER 13.

time in the record in the Final Rule, that landlords will pass on a fraction of any additional cost for a SEER 13 appliance in the form of rent increases.[37]

This argument, however, is illogical and unsupported. The studies that DOE cites show that the fractions of costs that will be passed through to tenants varies from 23% to 121%, and is generally significantly lower than 100%. 67 Fed. Reg. at 36380, SPA-217. Yet DOE does nothing to adjust the assumption that it has built into its Life-Cycle Cost models that 100% of air conditioner costs will be passed through to tenants. 65 Fed. Reg. at 59605, JA-3832 ("Regardless of whether a household is occupied by an owner or a renter, we implicitly assume that the occupant incurs all costs of ownership, either directly or through rent payments. Therefore, we believe that our consideration of low income households generally applies to renters as well as owners."). Not only do the cited studies not support this assumption, but it is also contrary to evidence in the record that DOE has not rebutted or responded to. The Massachusetts Union of Public Housing Tenants showed that "rents in almost every area of the country are set by market

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[37]DOE's failure to point to these studies in the proposed rule and to allow comment on their accuracy and significance was error, warranting without more invalidation of the SEER 12 Rule. See National Black Media Coalition v. FCC, 791 F.2d 1016, 1018 (2d Cir. 1986); United States v. Nova Scotia Food Products Corp, 568 F.2d 240, 241 (2d Cir. 1977).

conditions of supply and demand, not by the changes in the cost of one housing cost component." JA-3418.

In any event, even using DOE's own inflated numbers, the price of a SEER 13 system will be just $122 more than a SEER 12 system. Even assuming a 100% pass through, a landlord could recoup this additional cost, amortized over the 18 year life of an air conditioner, through a rent increase of about one dollar per month. DOE wholly failed to discuss the likely size of any rent increase from a landlord passthrough or the extent to which energy savings from a SEER 13 unit would offset any such rent increase.

ii. Underestimation of Electricity Prices

DOE further underestimated the consumer benefits of SEER 13 by underestimating electricity prices and thus the energy bill savings that would result from SEER 13. In the May 2002 Final SEER 12 Rule, DOE continued to base its electricity price forecasts on 1996-1997 electricity prices, adjusted downward based on projections by the U.S. Department of Energy-Energy Information Administration ("EIA") of future annual prices, 67 Fed. Reg. at 36381, SPA-218, despite the actual significant increases in electricity prices in many regions of the United States that have occurred since 1996, and in particular, since January 2001,

when the Final SEER 13 Rule was issued. Ignoring reality cannot constitute substantial evidence.

The record demonstrates that after January 2001, when the Final SEER 13 Rule was issued, "rates for large residential electricity users in California increased 40%; throughout the four states of the Pacific Northwest, rates went up typically by 31%; Massachusetts and Pennsylvania have also experienced hikes in electricity prices far beyond those consistent with what was projected by DOE." JA-6820. Under these circumstances, DOE' reliance on 1996-1997 price data was "patently unreasonable," particularly given that DOE had reopened the rulemaking. Herrington, 768 F.2d at 1408, 1410 (questioning whether agency may "decline to consider new evidence, while simultaneously conducting a fresh proceeding in which large amounts of new evidence on closely related questions

must be considered").[38] See also Detsel v. Sullivan, 895 F.2d 58, 64 (2d Cir. 1990).

In response, DOE states that "[r]ather than speculate on how current volatility in energy markets will impact future electricity prices, DOE has consistently relied on EIA energy price forecasts . . . ." 67 Fed. Reg. at 36381, SPA-218. But taking into account actual energy price increases is not speculation. EIA price forecasts failed to predict the staggering electricity price increases that took place in 2001: DOE cannot reasonably rely on EIA to predict the future, given that they failed to predict the past.

DOE's price forecasts also substantially underestimate the consumer benefits of the SEER 13 standard by wholly failing to take into account uncontroverted evidence of summertime marginal electricity price increases in regions of the United States where the electric utility industry has moved from

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[38]In Herrington, although not specifically determining whether "DOE's reliance on arguably obsolete information, were it the only potential difficulty in this rulemaking, would justify overturning the rules under review," 768 F.2d at 1410, the Court criticized DOE's use of 1980 data in a 1982-83 rulemaking and directed it to consider more recent data on remand, stating that "[w]hether or not DOE acted reasonably in issuing rules in 1982 and 1983 based on 1980 information, we think it would be patently unreasonable for DOE to begin further proceedings in the last half of 1985 based on data half a decade old," and noting that "the text and legislative history of [EPCA] show that Congress would not have approved reliance on such outdated data." Id. at 1408.

regulation to competition. The Appliance Standards Awareness Project presented DOE with an expert economic report ("the Synapse Energy Report") that established that in regions of the country that have recently moved to a competitive electricity market, such as California, New England, New York, and the Pennsylvania-New Jersey-Maryland region, wholesale electricity costs during summer months were significantly greater than annual average wholesale costs. Thus, marginal electricity costs will significantly exceed average costs during summertime and other periods when air conditioners are operating.

In response, DOE states that it "does recognize" that "wholesale summertime electricity prices are on average 2½ ¢/kWh greater than average wholesale rates," as stated by the Synapse Report. 67 Fed. Reg. at 36381; SPA-218. DOE, however, refused to take the Synapse Report's uncontroverted evidence on summer electricity prices into account in determining the consumer benefits of SEER 13, stating that it:

> cannot speculate as to how wholesale prices will be translated into retail prices to residential consumers. It is possible that this difference in wholesale rates will ultimately result in higher marginal energy prices for the operation of central air conditioners. However, several other assumptions about future electricity prices are equally reasonable. It is possible that increased competition will result in higher fixed charges for utility service and higher fixed charges would lower marginal

> rates. . . . It is also possible that higher peak load prices for electricity would cause consumers to significantly alter the times at which they use air conditioning, thus reducing projected electricity costs (and cost savings).

Id.

DOE's refusal to acknowledge the impact on consumers of summertime marginal electricity price increases, and the resulting additional benefits of the SEER 13 standard, is unsupported. Commenters – including utilities – provided evidence that wholesale price increases currently do translate into retail consumer prices increases in many regions of the United States. JA-6980; JA-6820. DOE wholly failed to take this reality into account. Moreover, DOE's claims that "increased competition will result in higher fixed charges"or that consumers will "alter the times at which they use air conditioning," are themselves sheer speculation or just illogical. DOE fails to identify a single state or jurisdiction where utilities have moved, or have even sought leave to move, to a system where a significantly higher portion of the consumer's electric bill would based on a fixed charge, rather than a variable per kilowatt-hour charge that depends on the consumer's use of electricity. Indeed, the Massachusetts Union of Public Housing Tenants provided evidence that the regulatory trend instead is toward peak load pricing, which is the antithesis of fixed charge pricing. JA-6844-47.

The latter claim flies in the face of logic, given that consumers cannot be expected to use their air conditioners except during periods of hot weather.[39]

iii. Installation Prices

In yet another reversal of position, DOE now asserts that the possibility that SEER 13 units will lead to higher installation costs justifies its reversal on the Final SEER 13 Rule.

In January 2001, DOE concluded that:

> Throughout the analysis we have assumed that installation costs would remain constant as efficiency increased. We remain unconvinced based on the comments we have received that our assumption is necessarily incorrect. Even if installation costs do generally rise as the size and weight of equipment increases, manufacturers will have the incentive under new standards to reduce the size of 13 SEER equipment using various approaches at their disposal.

66 Fed. Reg. at 7180, SPA-154. Now, however, DOE cites "the potential increase in installation costs associated with 13 SEER equipment" as "one of the reasons

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[39]DOE states that "[w]ithin approximately five years of the current rulemaking, DOE expects to complete another review of the efficiency standards for air conditioners," by which time "[i]f available, DOE expects to use [marginal rates for residential electricity users] to support modified standards." 67 Fed. Reg. at 36382, SPA-219. State and Citizen Petitioners can only take cold comfort from this vague promise, particularly since EPCA required DOE to undertake this second air conditioner rulemaking "no later than January 1, 2001." 42 U.S.C. § 6295(d)(3)(B).

for not proposing a 13 SEER standard in its July 25th NOPR." 67 Fed. Reg. at 36382; SPA-219. But, as Goodman Manufacturing Company, which manufacturers both SEER 12 and SEER 13 units, pointed out: "the only difference between a 10 SEER unit, a 12 SEER unit and a 13 SEER unit is a little more copper and aluminum used in manufacturing different sized coils." JA-6961. Goodman explained that "[t]he difference between our 13 SEER and 12 SEER external equipment is only 3-5 inches in height. The internal equipment size for 12 and 13 are similar, and there is almost no difference in the installation costs associated with a 13 SEER and a 12 SEER unit." Id.

DOE's analysis on this issue in the Final SEER 12 Rule is both self-contradictory and unsupport. DOE notes that "[t]hroughout the analysis DOE has assumed that installation costs would remain constant as efficiency increased," and that "DOE believes that even if installation costs do generally rise as the size and weight of equipment increases, manufacturers will have the incentive under new standards to reduce the size of 13 SEER equipment using various approaches . . . ." 67 Fed. Reg. at 36382, SPA-219. Then, however, while conceding that higher installation costs under SEER 13 are "unlikely to increase," DOE – without citing any factual support – concludes that "the possibility of increased installation

costs is a factor that supports adopting the less costly 12 SEER standard." Id. This contradictory conclusion is on its face arbitrary and unreasonable.

In sum, DOE's analysis of the SEER 13 standard's economic impact on manufacturers and consumers is thoroughly flawed. The manufacturer cost analysis ignores actual data and relies on sleight of hand. The consumer price increase analysis ignores the realities of the rental market, electricity prices and unit sizes. This flawed analysis cannot justify any agency action, let alone a new administration's about-face.

2. Life Cycle Costs

DOE originally found that the SEER 13 standard was economically justified because "consumers on average will have lower life-cycle costs." 66 Fed. Reg. at 7175, SPA-149. Rejecting arguments that the percent of consumers realizing life-cycle cost savings at both SEER 12 and SEER 13 was too low and that some consumers in cooler regions that do not use as much air conditioning might experience net life-cycle costs, DOE noted that:

> EPCA, in requiring DOE to set national standards that maximize energy savings for appliances where there will obviously be regional differences in usage and energy costs, contemplated that the level of life cycle cost savings would vary among consumers.

66 Fed. Reg. at 7175, SPA-149.

DOE, now, however, while still agreeing that "[t]he average consumer purchasing a 13 SEER air conditioner or heat pump would experience a net saving over the lifetime of the product," 67 Fed. Reg. at 36400, SPA-237 (emphasis added), and that the net present value of positive consumer benefits from SEER 13 is one billion dollars, Table 4, 67 Fed. Reg. at 36398, SPA-235, determines that withdrawal of the SEER 13 Rule is required because "the previous Administration had given inadequate consideration to the fraction of consumers . . . who would incur significant increases in life-cycle cost as a result of the 13 SEER standard." 67 Fed. Reg. at 36376, SPA-213. Thus, DOE reverses itself once again, concluding that "consumer burdens are particularly acute" under SEER 13. Id.

DOE's reversal on this important point violates EPCA, which, as DOE itself pointed out in issuing the Final SEER 13 Rule, sets uniform national, not regional, standards for the whole United States. By ignoring the national positive net value benefits of SEER 13, and focusing on certain consumers in certain regions who may incur net costs, DOE violates the underlying premise and the underlying bargain struck by the stakeholders who negotiated a resolution on appliance standards following the Herrington decision that became the basis for enactment of NAECA. As NAECA's legislative history demonstrates:

> During the 1970's some States began enacting appliance efficiency standards on their own... While DOE adopted its policy of the 'no-standard' standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards has begun to emerge and the trend is growing. Because of this trend, appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed. In an effort to resolve this problem the major appliance manufacturer associations began negotiations with the Natural Resources Defense Council in early 1986. At the end of July an agreement was reached and it was embodied in legislation. . . .

S. Rep. No. 100-6 (1987), *reprinted in* 1987 U.S.C.C.A.N. 52, 54-55. In short, through the enactment of NAECA, Congress accommodated those who supported strong efficiency standards by establishing a framework under which deadlines were set for the establishment of strong unified appliance efficiency standards that could not be decreased, and yet accommodated the needs of manufacturers by ensuring that, except under carefully defined circumstances, states would be preempted from issuing their own state appliance standards.[40]

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[40]EPCA generally preempts states from issuing their own appliance standards when DOE issues a national appliance standard under 42 U.S.C. § 6295, see 42 U.S.C. § 6297, although it provides for a process for states to apply for a (continued...)

It is obvious that there will be more consumers with net life cycle savings from a strong air conditioner efficiency standard in the South and more consumers with net life cycle costs in the North. If Congress had felt this was a serious problem, it would have authorized DOE to set standards for individual regions, rather than nationally. Regional standards would come much closer to economic optimum and would completely solve the problem of large numbers of calculated losers. Congress intentionally rejected this option, knowing full well that it would produce regional variations in consumer gains and losses because this was an acceptable sacrifice to make in the interest of national uniformity for manufacturers. By arguing now that consumer costs in certain regions require setting a decreased standard for the entire nation, DOE and ARI turn the statute on its head.

3. National Energy Savings

In determining "the total projected amount of energy . . .likely to result directly from the imposition of the standard," 42 U.S.C. § 6295(o)(2)(B)(i)(III), DOE examined whether establishment of a new appliance standard for heat pumps might negate some of the energy savings from the standard overall because the

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[40](...continued)
waiver of preemption if "needed to meet unusual and compelling State . . . interests." 42 U.S.C. § 6297(d)(1)(B).

higher initial cost of heat pumps might cause consumers currently using heat pumps for heating to switch to other, more electricity-intensive forms of heating such as electric baseboard resistance heating. In issuing the Final SEER 13 Rule, DOE determined that likelihood of equipment switching would be minimized by requiring both air conditioners and heat pumps to meet the same minimum efficiency standard of SEER 13. 66 Fed. Reg. at 7181, SPA-155.

In May 2002, however, DOE reversed this determination, finding that "the possibility" that the adoption of a SEER 13 standard for both air conditioners and heat pumps would cause some consumers to switch from heat pumps to resistance heating was "real enough to warrant its inclusion as a factor supporting a 12 SEER/7.4 HSPF standard." 67 Fed. Reg. 36386, SPA-223. DOE conceded, however, that it "has not attempted to estimate the number of consumers that might actually switch from heat pumps to resistance heating." Id.

DOE's conclusion on this point is sheer speculation without any analytic support. The real choice that heat pump consumers hypothetically face under a SEER 13 standard is whether to purchase a SEER 13 heat pump that can both cool and warm their home or a SEER 13 air conditioner and a less-efficient electric resistance heating system. Given that in either case the consumer is already paying the incremental cost associated with a SEER 13 cooling unit, the issue is

only whether the incremental cost of the SEER 13 heat pump alone would encourage fuel switching. However, DOE's own numbers demonstrate that the incremental cost of a SEER 13 heat pump over a SEER 12 heat pump is $188, while the incremental cost of a SEER 13 air conditioner over a SEER 12 air conditioner is $122. Table 4, 67 Fed. Reg. at 36398, SPA-235 (split system equipment price increases). Thus, the incremental cost of the SEER 13 heat pump alone is only $66 ($188 minus $122) for a product whose base cost is $3,668. SPA-214. It strains credulity to argue that this would have any effect on the balance between resistance heating and heat pump heating, particularly given that consumers who move from heat pumps to electric resistance heating will nearly double their heating bills. JA-7103.

4. System Reliability Benefits of SEER 13.

In issuing the Final SEER 13 Rule, DOE examined "the potential improvement to the reliability of the electrical system" as one of "other factors the Secretary considers relevant" with respect to the economic justification of SEER 13. 42 U.S.C. § 6295(o)(2)(B)(i)(VII). DOE concluded that:

> Recent summertime electric power outages in various regions of our country resulted in disruption of many people's lives and businesses. . . . While central air conditioning accounts for about 10 percent of residential electricity consumption, it can account for several times this amount during peak hours on hot summer days, when electricity

> is most strained. A 30 percent improvement in air conditioner efficiency would reduce the Nation's total annual electricity use by approximately 2 percent after it was fully phased in. However, the same efficiency improvement would provide a greater percentage reduction in peak loads, reducing the prospect of brownouts and price spikes. These peak load reductions are critical given that the conditions leading to grid instability can occur well before peak demand even equals supply.

66 Fed. Reg. at 7173, SPA-147.

DOE cited to a March 2000 Power Outage Report assembled by a team of DOE experts, who found that "[t]he increased adoption of energy efficiency measures can enhance electric system reliability by reducing demand growth in areas experiencing shortages in electric generation or constraints in electric transmission or distribution. . . . Technologies and practices that reduce loads . . . . lighting equipment, are especially valuable." JA-2211(emphasis added). Based on this evidence, and pointing to the series of power outages that occurred in many regions of the United States in the summer of 1999 and 2000, DOE concluded that "[o]utages such as these can cost millions of dollars per hour depending on which and how many customers are affected. . . .[T]he Department is convinced . . . that system reliability is an important issue which can be addressed, to some degree, by

increased air conditioner and heat pump standards. . . ."66 Fed. Reg. at 7177, SPA-151.

In the year and a half that passed between DOE's issuance of the Final SEER 13 Rule and the current DOE's issuance of the SEER 12, electric reliability system problems in the United States worsened dramatically. In the winter and spring of 2001, after the Final SEER 13 rule was issued, California and the Northwest experienced the now infamous series of electricity rolling blackouts that cost consumers and the State of California billions of dollars. JA-6823. In New York State, in the summer of 2001, electricity use peaked at close to the States's generating capacity. JA-7022. Many commenters, including power companies, NARUC, consumer groups and environmentalists brought these intervening events and related concerns about the system reliability advantages of SEER 13 over SEER 12 to DOE's attention in the comment period that preceded DOE's issuance of the SEER 12 Rule.

Despite these increasingly serious electric reliability problems, in issuing the Final SEER 13 Rule, DOE reversed itself again and wholly dismissed the connection between SEER 13 and increased system reliability. Rather than agreeing with the conclusions and recommendations of the DOE Power Outage Team, DOE instead "agrees with the assertion of the Southern Company that the primary effects of the proposed efficiency standards are so long term (more than

10 years in the future) that they are very unlikely to have any significant effect on electric system reliability." 67 Fed. Reg. at 36392, SPA-228.

DOE states that while it "still believes that near-term improvements in energy efficiency can help improve the reliability of systems that now have inadequate generating or transmission capacity (e.g. California), the primary effect of energy efficiency standards is likely beyond the long-term planning horizon of most electric systems." Id. DOE also suggests that the "approximately 4 gigawatts between the estimated effects on capacity requirements of a SEER 12 standard and those of a SEER 13 standard" are unimportant, given that EIA's forecasts of "the cumulative requirements for additional electricity generating capacity by 2020" range from 350 to 500 gigawatts.[41] 67 Fed. Reg. at 36392, SPA-229.

DOE's newly cavalier attitude toward electric reliability problems in the United States is inexplicable. In rejecting the linkage between appliance standards

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[41]The 4 gigawatts of additional generation capacity savings that DOE now estimates that SEER 13 would achieve over SEER 12 would avoid the need for construction of an additional ten 400 megawatt power plants. Compare 67 Fed. Reg. at 36400, SPA-237, with 67 Fed. Reg. at 36401, SPA-238. ACEEE, in contrast, estimates that the difference between SEER 13 and SEER 12 is 14.5 more gigawatts of electric capacity, or the equivalent of thirty-six 400 MW power plants, by 2020, JA-7076-77 (Peak Load Reductions Chart). But whatever the exact level of additional capacity savings provided by SEER 13, EPCA does not support DOE's dismissal of SEER 13's ability to avoid the need to build additional capacity as insignificant to system reliability.

and system reliability, DOE was rejecting the recommendations of its own experts, as well as those of a large number of commentators with responsibility for maintaining the electric generation and transmission system in the United States, Utilities such as Pacific Gas & Electric, JA-6980; National Grid, JA-6422; the Sacramento Municipal Utility District, JA-5927; and regulators, including the National Association of Regulatory Utility Commissioners, JA-6914; and the Texas Public Utility Commission, JA-4662, who supported the SEER 13 standard because of its electric reliability benefits.

DOE's acknowledgment that "near-term improvements in energy efficiency can help improve the reliability of systems that now have inadequate generating or transmission capacity," 67 Fed. Reg. at 36392, SPA-229, is an acknowledgment that it should have factored in the greater system reliability benefits of SEER 13. Although the "primary effects" of SEER 13 in a cumulative sense might not be experienced for another ten years, the standard would take effect in 2006 and would immediately begin to reduce peak loads to some degree, assisting the many areas of the United States that are currently experiencing electric generation and transmission constraints.

Moreover, DOE's conclusion here also ignored the reality that relatively small differences in peak demand can have huge consequences for system

reliability. DOE's suggestion that the four gigawatt difference between SEER 12 and SEER 13 is negligible again repeats a mistake it has made in the past: ignoring the fact that under EPCA, "[n]o single program was expected to be decisive in achieving Congress' ultimate goal, let alone a single standard within the appliance program." Herrington, 768 F.2d at 1378. Instead, the legislative history demonstrates that Congress thought that "conservation must be approached on a nickel and dime basis," and that "the cumulative impact of a series of conservation initiatives, which in themselves might appear insignificant, could be enormous." Id. at 1377 (citing legislative history).

In sum, the substantive factual basis for DOE's determination to withdraw the Final SEER 13 Rule and to issue the Final SEER 12 Rule lacks basis on legal, technical, logical and evidentiary basis. At best, DOE's reversal was unsupported; more often, it flew in the face of real-world data as to cost, price, market response, and electricity system operation. This record of self-serving conclusory assertions cannot constitute substantial evidence. This Court should vacate DOE's withdrawal of the Final SEER 13 Rule and its issuance of the Final SEER 12 Rule and thereby reinstate the Final SEER 13 Rule.

POINT III

DOE'S MAY 23, 2002 RULEMAKING DETERMINATIONS VIOLATED NEPA

DOE's May 23, 2002 Federal Register notice reflected three separate DOE actions: (1) the withdrawal of the Final SEER 13 Rule, (2) the interpretation of the EPCA's anti-backsliding provision, and (3) the issuance of a SEER 12 Rule. 67 Fed. reg. 36368. Together, they effectively lowered the applicable efficiency standard from SEER 13 to SEER 12. DOE also issued a Finding of No Significant Impact ("FONSI") under NEPA that day, in which DOE addressed only the last of these three actions. Id. at 36409.

DOE violated NEPA, however, regardless of whether the May 23, 2002 rulemaking is considered as three separate actions or as one collective action. Considered separately, the withdrawal of the Final SEER 13 Rule was itself an "action" under NEPA and DOE's own regulations, and DOE failed to determine whether such withdrawal would have a significant environmental impact. Instead, DOE ignored the withdrawal completely and improperly compared the impacts of the SEER 12 standard to the SEER 10 standard set by statute in 1992. Had DOE considered the May 23 rulemaking determinations collectively, moreover, a proper NEPA analysis would have required DOE to compare the environmental impacts

of the action withdrawing the Final SEER 13 Rule with the impacts of the SEER 12 standard.

A. NEPA's Broad Mandate

Generally, NEPA requires federal agencies, including DOE, to determine whether their actions will have a significant impact on the environment. If so, the agency must prepare a "detailed statement," known as an Environmental Impact Statement ("EIS"), discussing, inter alia, the environmental impacts, unavoidable adverse environmental effects, and alternatives to the proposed action. See 42 U.S.C. § 4332; 40 C.F.R. § 1508.11 (NEPA regulations of the Council on Environmental Quality ("CEQ"), which are applicable to all federal agencies).

Agency "actions" that may require the preparation of an EIS include, inter alia, "new or revised agency rules, regulations, plans, policies or procedures," 40 C.F.R. § 1508.18(a) and the "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the [APA]." Id. at §1508.18(b); see also 10 C.F.R. § 1021.104 (DOE regulation incorporating the CEQ definition of "action").

CEQ regulations further provides that an agency may prepare an "environmental assessment" ("EA") to assist in determining whether an EIS is necessary. See 40 C.F.R. §§ 1508.9(a)(1)-(3). DOE regulations generally require

DOE to prepare an EA unless the action under consideration has either been categorically excluded from needing an EIS or categorically required to have an EIS. See 10 C.F.R. Part 1021 Appendices A-D, SPA - 117-142 (categorical exclusions and EIS requirements); id. § 1021.400(d) (requirement to prepare an EA on actions not listed in appendices). Rulemaking, such as at issue here, is not categorically listed as requiring an EIS or not requiring an EA; therefore NEPA requires preparation of at least an EA for DOE proposed rules (as DOE did when issuing the Final SEER 13 Rule).

B. DOE Wholly Failed to Make Any NEPA Determination With Respect to its "Rulemaking Determination" to Withdraw the Final SEER 13 Rule

DOE has admitted that the withdrawal of the Final SEER 13 Rule was a "rulemaking determination." See 67 Fed. Reg. at 36368, SPA-205 ("DOE today publishes three final rulemaking determinations .... First, ... DOE hereby withdraws the January 22, 2001 final rule ....") (emphasis added). This rule was an "action" subject to NEPA. See 40 C.F.R. § 1508.18(a); 10 C.F.R. §1021.213 . Moreover, because "withdrawal of a rule" is not identified in any of the appendices of the DOE NEPA regulations as categorically excluded from the EA requirement, DOE was required to prepare at least an EA. Id. § 1021.400(d).

DOE did no independent NEPA review whatsoever with respect to its own "rulemaking determination" to withdraw the Final SEER 13 Rule. Instead, it relied on an EA that it prepared in December 2000 in the wholly different context of examining the environmental impacts of increasing the SEER 10 standard. 67 Fed. Reg. at 36403, SPA-240; JA-3653-3686 (December 2000 Environmental Assessment). DOE's "rulemaking determination" to withdraw the Final SEER 13 Rule was thus a clear violation of NEPA, CEQ regulations and DOE's own regulations, and should be invalidated.

C. DOE's Withdrawal of SEER 13, And Replacement With SEER 12, Required the Preparation of an EIS

In addition to not performing any analysis of the environmental impacts of withdrawing the Final SEER 13 Rule, DOE then determined that issuing a SEER 12 standard did not require the preparation of an EIS.[42] 67 Fed. Reg. 36403, SPA-

[42]DOE did reanalyze its estimates of avoided power plant emissions from the SEER 12 and SEER 13 standards, concluding that there would be "somewhat greater power plant emissions impacts . . . from increased central air conditioner and heat pump standards." 67 Fed. Reg. at 36403, SPA-240. DOE's reanalysis shows even greater avoided nitrogen oxide emissions savings from the SEER 13 standard than DOE had previously estimated. JA-7535-7536. Thus, DOE's reanalysis actually demonstrates an even greater avoided pollution impact delta between the benefits of the SEER 13 and SEER 12 standards, and, thus, greater environmental and public health harm resulting from a decrease to SEER12.

240; see also id. at 36409, SPA-246 (Finding of No Significant Impact). To reach this "determination" that SEER 12 would not have a significant impact on the environment, however, DOE erroneously compared the impact of SEER 12 to what it referred to as a "no action alternative," which was the SEER 10 standard set by statute in 1992.[43] Rather, the comparison should have been to the status quo -- SEER 13. By comparing to SEER 10, DOE ignored the reality of its rulemaking in order to avoid addressing the negative environmental impacts resulting from the net reduction in the efficiency standard.

Had DOE done any NEPA review of its withdrawal of SEER 13 and replacement with SEER 12, an EIS would have been required. DOE's own analysis demonstrates that, as compared to the Final SEER 13 Rule, a SEER 12 standard will result in significant increases in air pollution from the many additional power plants that will need to be built. DOE concludes that cumulatively, from the period 2006-2030, SEER 13 would save 1.2 quads[44] more energy than SEER 12 and would, by 2020, avoid the need to build a further 3.9 gigawatts of electric capacity than would SEER 12. 67 Fed. Reg. at 36398 (Table

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[43]Of course, the "no action" alternative was not really an alternative at all; failure by DOE to issue a new standard would have violated EPCA, as DOE itself admitted. JA-3659. See 42 U.S.C. §§ 6295(d)(3), 6295(o)(2)(A).

[44]A quad is a quadrillion British Thermal Units or BTUs.

4), SPA-235. This is the equivalent of avoiding the need to build ten more large 400 megawatt power plants. Compare 67 Fed. Reg. at 36400, SPA-237, with 67 Fed. Reg. at 36401, SPA-238. SEER 13 would thus produce substantially further emissions reductions than SEER 12: DOE estimates that over the period from 2006 to 2020, SEER 13 would cumulatively avoid nine million more tons of carbon and 28 thousand more tons of nitrogen oxides than would the SEER 12 standard. 67 Fed. Reg. at 36399-36400, 36401, SPA-236-37, 238.[45]

In addition, although DOE acknowledged comments of Petitioners New York and Massachusetts that power plants are dominant sources of mercury and particulate emissions, see id. at 36394, SPA-231, DOE did not include any analysis of the impacts of these emissions either in the EA that it issued in January 2001 or before issuing the Final SEER 12 Rule.

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[45]ACEEE, using more realistic methodologies than DOE's with respect to discount rate and conservation load factor and other assumptions, estimates that the difference between SEER 13 and SEER 12 is far greater than DOE estimates. ACEEE's analysis indicates that, compared to the SEER 12 standard, the SEER 13 standard would: cumulatively save 2.4 more quads of energy from 2006-2030, JA-7076, (Energy Source Savings Chart); avoid the need to build 14.5 more gigawatts of electric capacity, or the equivalent of thirty-six 400 MW power plants, by 2020, JA-7076-77, (Peak Load Reductions Chart); and would cumulatively avoid 19.8 million metric tons of carbon emissions over the period 2006-2020, JA-7077 (Carbon Reductions Chart). Whichever figures are used, however, it is clear, and DOE acknowledges, that SEER 13 would avoid substantially more pollution emissions than SEER 12.

Given the increased air pollution that DOE admits will occur with a decrease to a SEER 12 standard it is clear that DOE should have prepared an EIS. Its failure to do any NEPA review of the withdrawal of the Final SEER 13 Rule was unlawful, and the withdrawal should on that basis be vacated.

POINT IV

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT BELOW FOR LACK OF SUBJECT MATTER JURISDICTION.

The chief purpose of this appeal is to preserve jurisdiction in the district court in the event that this Court independently determines that it does not have jurisdiction over DOE's Delay Rules. Substantively, it is a basic rule that jurisdiction over challenges to federal agency action lies in district court pursuant to 28 U.S.C. § 1331 unless Congress has by statute specifically placed jurisdiction over challenges to a particular action in the Courts of Appeals. Central Hudson Gas & Electric v. EPA, 587 F.2d 549, 555 (2d Cir. 1978).

EPCA provides for judicial review in a court of appeals of "a rule prescribed under section . . . 6295." 42 U.S.C. § 6306(b)(1). In dismissing the complaint for lack of subject matter jurisdiction, the district court found that the Delay Rules

were "elements of a rule prescribed under [EPCA] section 6295," JA- 575, and therefore jurisdiction to challenge them was limited to the court of appeals.

The Delay Rules contain no statement claiming to have been "rule[s] prescribed under section . . . 6295." Indeed, the only statutory authority cited in either Delay Rule was the APA – DOE claimed that both were subject to APA exceptions, and that the April 20 Delay Rule was based, not on EPCA, but on APA § 705. See pp. 40-46 above.

The Delay Rules did not prescribe an energy efficiency standard, or even purport to interpret any provision of EPCA. Rather, they simply delayed the effective date of the Final SEER 13 Rule, reflecting an agency action having no special relationship to the EPCA statutory scheme or any particular provision therein. EPCA contains no provision regarding the delay and ultimate withdrawal of a rule "prescribed under" its provisions. The Delay Rules were thus independent substantive rulemaking actions subject to APA review in district court pursuant to 28 U.S.C. § 1331.

The State and Citizen Petitioners urge this Court to find that the district court could have exercised jurisdiction over the claims challenging the Delay Rules. However, because the Final SEER 12 Rule is properly before this Court, and to conserve judicial resources that might be expended in a remand, we believe

that this Court can and should address the substance of these claims, as well as the petitions for review of DOE's withdrawal of the Final SEER 13 Rule and the issuance of the SEER 12 Rule.

CONCLUSION

In light of the foregoing, and upon all of the papers submitted herewith, State and Citizen Petitioners respectfully urge this Court to (1) vacate the withdrawal of the Final SEER 13 Rule, (2) vacate the SEER 12 Rule, (3) reinstate the Final SEER 13 Rule, and (4) order such other and further relief as this Court deems just and proper.

Dated: September 27, 2002

NATURAL RESOURCES DEFENSE COUNCIL INC., PUBLIC UTILITY LAW PROJECT, CONSUMER FEDERATION OF AMERICA, INC.

By: _____

KATHERINE KENNEDY
NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th Street
New York, New York 10011

ELIOT SPITZER
ATTORNEY GENERAL
STATE OF NEW YORK

By: _____

PETER H. LEHNER
D. SCOTT BASSINSON
Assistant Attorneys General
New York State Department of Law
The Capitol
Albany, New York 12224
(518) 473-5843

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT

By: Mark Kindall (by dsh)

MARK KINDALL
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel: 860-808-5250
Fax: 860-808-5386

WILLIAM H. SORRELL
ATTORNEY GENERAL
STATE OF VERMONT

By: Erick Titrud (by dsh)

ERICK TITRUD
S. MARK SCIARROTTA
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
(802) 828-5518

BILL LOCKYER
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA

By: Richard M. Frank (by drh)

RICHARD M. FRANK
Chief Assistant Attorney General,
Public Rights Division
California Attorney General's Office
1300 "I" Street
P. O. Box 944255
Sacramento, California 94244-2550
(916) 445-9555

G. STEVEN ROWE
ATTORNEY GENERAL
STATE OF MAINE

By: Paul Stern (by drh)

PAUL STERN
Deputy Attorney General
GERALD D. REID
Assistant Attorney General
Department of the Attorney General
State House Station #6
Augusta, ME 04333-0006
Tel: 207-626-8800
Fax: 207-626-8812

DAVID SAMSON
ATTORNEY GENERAL
STATE OF NEW JERSEY

By: Howard Geduldig (by dlh)
HOWARD GEDULDIG
Deputy Attorney General
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625-0093
(609) 633-8109

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL OF THE STATE
OF NEVADA

By: Timothy Hay (by dlh)
TIMOTHY HAY
Chief Deputy Attorney General
Bureau of Consumer Protection
1000 E. William St., Ste. 200
Carson City, NV 89701
(775) 687-6300

THOMAS F. REILLY
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS

By: William Pardee (by dlh)
WILLIAM PARDEE
FREDERICK D. AUGENSTERN
Assistant Attorney General
Environmental Protection Division
200 Portland Street, Third Floor
Boston, Massachusetts 02114
(617) 727-2200, ext. 3355

PHILIP T. McLAUGHLIN
ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE

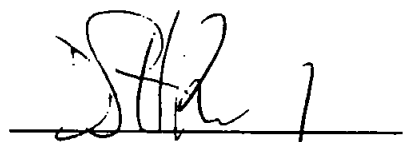
By: Maureen D. Smith (by dsb)
MAUREEN D. SMITH
Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3679

SHELDON WHITEHOUSE
ATTORNEY GENERAL
STATE OF RHODE ISLAND

By: Tricia K. Jedele (by dsb)
TRICIA K. JEDELE
Special Assistant Attorney General
Department of the Attorney General
150 South Main Street
Providence, Rhode Island 02903
(410) 274-4400

CERTIFICATE OF COMPLIANCE

I, D. Scott Bassinson, attorney of record for Petitioner/Plaintiff-Appellant State of New York, do hereby certify that the foregoing brief complies with the type-volume limitations as set forth in Fed. R. App. P. 32(a)(7)(B). The brief has a typeface of 14 points or more and contains 27,705 words, relying on the word count of WordPerfect 10.



D. Scott Bassinson

ADDENDUM

HOUSE REPORT NO. 100-11
NATIONAL APPLIANCE ENERGY CONSERVATION ACT
MARCH 3, 1987

100TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 100-11

NATIONAL APPLIANCE ENERGY CONSERVATION ACT

MARCH 3, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. DINGELL, from the Committee on Energy and Commerce, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 87]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 87) to amend the Energy Policy and Conservation Act with respect to energy conservation standards for appliances, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

91-006

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Appliance Energy Conservation Act of 1987".

SEC. 2. DEFINITIONS.

(a) ENERGY CONSERVATION STANDARD.—Section 321(a)(6) of the Energy Policy and Conservation Act (42 U.S.C. 6291(a)(6)) is amended to read as follows:

"(6) The term 'energy conservation standard' means—

"(A) a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use for a covered product, determined in accordance with test procedures prescribed under section 323; or

"(B) a design requirement for the products specified in paragraphs (6), (7), (8), (10), and (13) of section 322(a); and

includes any other requirements which the Secretary may prescribe under section 325(o)."

(b) NEW DEFINITIONS.—Section 321(a) of the Energy Policy and Conservation Act (42 U.S.C. 6291(a)) is amended by adding at the end the following paragraphs:

"(19) The term 'AV' is the adjusted volume for refrigerators, refrigerator-freezers, and freezers, as defined in the applicable test procedure prescribed under section 323.

"(20) The term 'annual fuel utilization efficiency' means the efficiency descriptor for furnaces and boilers, determined using test procedures prescribed under section 323 and based on the assumption that all—

"(A) weatherized warm air furnaces or boilers are located out-of-doors;

"(B) warm air furnaces which are not weatherized are located indoors and all combustion and ventilation air is admitted through grills or ducts from the outdoors and does not communicate with air in the conditioned space; and

"(C) boilers which are not weatherized are located within the heated space.

"(21) The term 'central air conditioner' means a product, other than a packaged terminal air conditioner, which—

"(A) is powered by single phase electric current;

"(B) is air-cooled;

"(C) is rated below 65,000 Btu per hour;

"(D) is not contained within the same cabinet as a furnace the rated capacity of which is above 225,000 Btu per hour; and

"(E) is a heat pump or a cooling only unit.

"(22) The term 'efficiency descriptor' means the ratio of the useful output to the total energy input, determined using the test procedures prescribed under section 323 and expressed for the following products in the following terms:

"(A) For furnaces and direct heating equipment, annual fuel utilization efficiency.

"(B) For room air conditioners, energy efficiency ratio.

"(C) For central air conditioning and central air conditioning heat pumps, seasonal energy efficiency ratio.

"(D) For water heaters, energy factor.

"(E) For pool heaters, thermal efficiency.

"(23) The term 'furnace' means a product which utilizes only single-phase electric current, or single-phase electric current or DC current in conjunction with natural gas, propane, or home heating oil, and which—

"(A) is designed to be the principal heating source for the living space of a residence;

"(B) is not contained within the same cabinet with a central air conditioner whose rated cooling capacity is above 65,000 Btu per hour;

"(C) is an electric central furnace, electric boiler, forced-air central furnace, gravity central furnace, or low pressure steam or hot water boiler; and

"(D) has a heat input rate of less than 300,000 Btu per hour for electric boilers and low pressure steam or hot water boilers and less than 225,000 Btu per hour for forced-air central furnaces, gravity central furnaces, and electric central furnaces.

"(24) The terms 'heat pump' or 'reverse cycle' mean a product, other than a packaged terminal heat pump, which—

"(A) consists of one or more assemblies;

"(B) is powered by single phase electric current;

"(C) is rated below 65,000 Btu per hour;

"(D) utilizes an indoor conditioning coil, compressors, and refrigerant-to-outdoor-air heat exchanger to provide air heating; and

"(E) may also provide air cooling, dehumidifying, humidifying circulating, and air cleaning.

"(25) The term 'pool heater' means an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications.

"(26) The term 'thermal efficiency of pool heaters' means a measure of the heat in the water delivered at the heater outlet divided by the heat input of the pool heater as measured under test conditions specified in section 2.8.1 of the American National Standard for Gas Fired Pool Heaters, Z21.56–1986, or as may be prescribed by the Secretary.

"(27) The term 'water heater' means a product which utilizes oil, gas, or electricity to heat potable water for use outside the heater upon demand, including—

"(A) storage type units which heat and store water at a thermostatically controlled temperature, including gas storage water heaters with an input of 75,000 Btu per hour or less, oil storage water heaters with an input of 105,000 Btu per hour or less, and electric storage water heaters with an input of 12 kilowatts or less;

"(B) instantaneous type units which heat water but contain no more than one gallon of water per 4,000 Btu per hour of input, including gas instantaneous water heaters with an input of 200,000 Btu per hour or less, oil instantaneous water heaters with an input of 210,000 Btu per hour or less, and electric instantaneous water heaters with an input of 12 kilowatts or less; and

"(C) heat pump type units, with a maximum current rating of 24 amperes at a voltage no greater than 250 volts, which are products designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls necessary for the device to perform its function.

"(28) The term 'weatherized warm air furnace or boiler' means a furnace or boiler designed for installation outdoors, approved for resistance to wind, rain, and snow, and supplied with its own venting system."

SEC. 3. COVERAGE.

Section 322(a) of the Energy Policy and Conservation Act (42 U.S.C. 6292(a)) is amended to read as follows:

"COVERAGE

"SEC. 322. (a) IN GENERAL.—The following consumer products, excluding those consumer products designed solely for use in recreational vehicles and other mobile equipment, are covered products:

"(1) Refrigerators, refrigerator-freezers, and freezers which can be operated by alternating current electricity, excluding—

"(A) any type designed to be used without doors; and

"(B) any type which does not include a compressor and condenser unit as an integral part of the cabinet assembly.

"(2) Room air conditioners.

"(3) Central air conditioners and central air conditioning heat pumps.

"(4) Water heaters.

"(5) Furnaces.

"(6) Dishwashers.

"(7) Clothes washers.

"(8) Clothes dryers.

"(9) Direct heating equipment.

"(10) Kitchen ranges and ovens.

"(11) Pool heaters.

"(12) Television sets.

"(13) Any other type of consumer product which the Secretary classifies as a covered product under subsection (b)."

SEC. 4. TEST PROCEDURES.

Section 323 of the Energy Policy and Conservation Act (42 U.S.C. 6293) is amended to read as follows:

"TEST PROCEDURES

"SEC. 323. (a) GENERAL RULE.—All test procedures and related determinations prescribed or made by the Secretary with respect to any covered product (or class thereof) which are in effect on the date of enactment of the National Appliance Energy Conservation Act of 1987 shall remain in effect until the Secretary amends such test procedures and related determinations under subsection (b).

"(b) AMENDED AND NEW PROCEDURES.—(1)(A) The Secretary may amend test procedures with respect to any covered product if the Secretary determines that amended test procedures would more accurately or fully comply with the requirements of paragraph (3).

"(B) The Secretary may, in accordance with the requirements of this subsection, prescribe test procedures for any consumer product classified as a covered product under section 322(b).

"(C) The Secretary shall direct the National Bureau of Standards to assist in developing new or amended test procedures.

"(2) If the Secretary determines, on his own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the Federal Register proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period shall not be less than 60 days and may be extended for good cause shown to not more than 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved.

"(3) Any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary, and shall not be unduly burdensome to conduct.

"(4) If the test procedure is a procedure for determining estimated annual operating costs, such procedure shall provide that such costs shall be calculated from measurements of energy use in a representative average use cycle or period of use, as determined by the Secretary, and from representative average unit costs of the energy needed to operate such product during such cycle. The Secretary shall provide information to manufacturers with respect to representative average unit costs of energy.

"(c) RESTRICTION ON CERTAIN REPRESENTATIONS.—(1) No manufacturer, distributor, retailer, or private labeler may make any representation—

"(A) in writing (including a representation on a label); or

"(B) in any broadcast advertisement,

with respect to the energy use or efficiency of a covered product to which a test procedure is applicable under subsection (a) or the cost of energy consumed by such product, unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing.

"(2) Effective 180 days after an amended or new test procedure applicable to a covered product is prescribed under subsection (b), no manufacturer, distributor, retailer, or private labeler may make any representation—

"(A) in writing (including a representation on a label); or

"(B) in any broadcast advertisement,

with respect to energy use or efficiency of such product or cost of energy consumed by such product, unless such product has been tested in accordance with such amended or new test procedures and such representation fairly discloses the results of such testing.

"(3) On the petition of any manufacturer, distributor, retailer, or private labeler, filed not later than the 60th day before the expiration of the period involved, the 180-day period referred to in paragraph (2) may be extended by the Secretary with respect to the petitioner (but in no event for more than an additional 180 days) if the Secretary determines that the requirements of paragraph (2) would impose an undue hardship on such petitioner.

"(d) CASE IN WHICH TEST PROCEDURE IS NOT REQUIRED.—(1) The Secretary is not required to publish and prescribe test procedures for a covered product (or class thereof) if the Secretary determines, by rule, that test procedures cannot be developed which meet the requirements of subsection (b)(3) and publishes such determination in the Federal Register, together with the reasons therefor.

"(2) For purposes of section 327, a determination under paragraph (1) with respect to any covered product or class shall have the same effect as would a standard prescribed for a covered product (or class).

"(e) AMENDMENT OF STANDARD.—(1) In the case of any amended test procedure which is prescribed pursuant to this section, the Secretary shall determine, in the rulemaking carried out with respect to prescribing such procedure, to what extent, if any, the proposed test procedure would alter the measured energy efficiency or measured energy use of any covered product as determined under the existing test procedure.

"(2) If the Secretary determines that the amended test procedure will alter the measured efficiency or measured use, the Secretary shall amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency or energy use of a representative sample of covered products that minimally comply with the existing standard. The average of such energy efficiency or energy use levels determined under the amended test procedure shall constitute the amended energy conservation standard for the applicable covered products.

"(3) Models of covered products in use before the date on which the amended energy conservation standard becomes effective (or revisions of such models that come into use after such date and have the same energy efficiency or energy use characteristics) that comply with the energy conservation standard applicable to such covered products on the day before such date shall be deemed to comply with the amended energy conservation standard.

"(4) The Secretary's authority to amend energy conservation standards under this subsection shall not affect the Secretary's obligation to issue final rules as described in section 325."

SEC. 5. ENERGY CONSERVATION STANDARDS.

Section 325 of the Energy Policy and Conservation Act (42 U.S.C. 6295) is amended to read as follows:

"ENERGY CONSERVATION STANDARDS

"SEC. 325. (a) PURPOSES.—The purposes of this section are to—

"(1) provide Federal energy conservation standards applicable to covered products; and

"(2) authorize the Secretary to prescribe amended or new energy conservation standards for each type (or class) of covered product.

"(b) STANDARDS FOR REFRIGERATORS, REFRIGERATOR-FREEZERS, AND FREEZERS.—(1) The following is the maximum energy use allowed in kilowatt hours per year for the following products (other than those described in paragraph (2)) manufactured on or after January 1, 1990:

	Energy Standards Equations
"Refrigerators and Refrigerator-Freezers with manual defrost	16.3 AV+316
Refrigerator-Freezers—partial automatic defrost	21.8 AV+429
Refrigerator-Freezers—automatic defrost with:	
Top mounted freezer without ice	23.5 AV+471
Side mounted freezer without ice	27.7 AV+488
Bottom mounted freezer without ice	27.7 AV+488
Top mounted freezer with through the door ice service	26.4 AV+535
Side mounted freezer with through the door ice	30.9 AV+547
Upright Freezers with:	
Manual defrost	10.9 AV+422
Automatic defrost	16.0 AV+623
Chest Freezers and all other freezers	14.8 AV+223

"(2) The standards described in paragraph (1) do not apply to refrigerators and refrigerator-freezers with total refrigerated volume exceeding 39 cubic feet or freezers with total refrigerated volume exceeding 30 cubic feet.

"(3)(A)(i) The Secretary shall publish a proposed rule, no later than July 1, 1988, to determine if the standards established by paragraph (1) should be amended. The Secretary shall publish a final rule no later than July 1, 1989, which shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1993. If such a final rule is not published before January 1, 1990, any amendment of such standards shall apply to products manufactured on or after January 1, 1995. Nothing in this subsection provides any

justification or defense for a failure by the Secretary to comply with the nondiscretionary duty to publish final rules by the dates stated in this paragraph.

"(ii)(I) If the Secretary does not publish a final rule before January 1, 1990, relating to the revision of the energy conservation standards for refrigerators, refrigerator-freezers and freezers, the regulations which established standards for such products and were promulgated by the California Energy Commission on December 14, 1984, to be effective January 1, 1992 (or any amendments to such standards that are not more stringent than the standards in the original regulations), shall apply in California to such products, effective beginning January 1, 1993, and shall not be preempted after such effective date by any energy conservation standard established in this section or prescribed, on or after January 1, 1990, under this section.

"(II) If the Secretary does not publish a final rule before January 1, 1992, relating to the revision of the energy conservation standards for refrigerators, refrigerator-freezers and freezers, State regulations which apply to such products manufactured on or after January 1, 1995, shall apply to such products until the effective date of a rule issued under this section with respect to such products.

"(B) After the publication of a final rule under subparagraph (A), the Secretary shall publish a final rule no later than five years after the date of publication of the previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for the products described in paragraph (1).

"(C) Any amendment prescribed under subparagraph (B) shall apply to products manufactured after a date which is five years after—

"(i) the effective date of the previous amendment; or

"(ii) if the previous final rule did not amend the standards, the earliest date by which the previous amendment could have been effective;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard.

"(c) STANDARDS FOR ROOM AIR CONDITIONERS.—(1) The energy efficiency ratio of room air conditioners shall be not less than the following for products manufactured on or after January 1, 1990:

"Product Class	Ratio
Without Reverse Cycle and With Louvered Sides:	
Less than 6,000 Btu	8.0
6,000 to 7,999 Btu	8.5
8,000 to 13,999 Btu	9.0
14,000 to 19,999 Btu	8.8
20,000 and more Btu	8.2
Without Reverse Cycle and Without Louvered Sides:	
Less than 6,000 Btu	8.0
6,000 to 7,999 Btu	8.5
8,000 to 13,999 Btu	8.5
14,000 to 19,999 Btu	8.5
20,000 and more Btu	8.2
With Reverse Cycle and With Louvered Sides	8.5
With Reverse Cycle, Without Louvered Sides	8.0

"(2)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine if the standards established under paragraph (1) should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1995.

"(B) After January 1, 1992, the Secretary shall publish a final rule no later than five years after the date of publication of a previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for room air conditioners.

"(C) Any amendment prescribed under subparagraph (B) shall apply to products manufactured after a data which is five years after—

"(i) the effective date of the previous amendment; or

"(ii) if the previous final rule did not amend the standards, the earliest date by which a previous amendment could have been effective;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard.

"(d) STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS.—(1) The seasonal energy efficiency ratio of central air conditioners and central air conditioning heat pumps shall be not less than the following:

"(A) Split Systems: 10.0 for products manufactured on or after January 1, 1992.

"(B) Single Package Systems: 9.7 for products manufactured on or after January 1, 1993.

"(2) The heating seasonal performance factor of central air conditioning heat pumps shall be not less than the following:

"(A) Split Systems: 6.8 for products manufactured on or after January 1, 1992.

"(B) Single Package Systems: 6.6 for products manufactured on or after January 1, 1993.

"(3)(A) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (1) should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1999. The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (2) shall be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 2002.

"(B) The Secretary shall publish a final rule after January 1, 1994, and no later than January 1, 2001, to determine whether the standards in effect for central air conditioners and central air conditioning heat pumps should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2006.

"(e) STANDARDS FOR WATER HEATERS; POOL HEATERS; DIRECT HEATING EQUIPMENT.—(1) The energy factor of water heaters shall be not less than the following for products manufactured on or after January 1, 1990:

"(A) Gas Water Heater: .62 — (.0019 x Rated Storage Volume in Gallons)

"(B) Oil Water Heater: .59 — (.0019 x Rated Storage Volume in Gallons)

"(C) Electric Water Heater: .95 — (.00132 x Rated Storage Volume in Gallons)

"(2) The thermal efficiency of pool heaters manufactured on or after January 1, 1990, shall not be less than 78 percent.

"(3) The efficiencies of gas direct heating equipment manufactured on or after January 1, 1990, shall be not less than the following:

"Wall	
Fan type	
Up to 42,000 Btu/hour	73% AFUE
Over 42,000 Btu/hour	74% AFUE
Gravity type	
Up to 10,000 Btu/hour	59% AFUE
Over 10,000 Btu/hour up to 12,000 Btu/hour	60% AFUE
Over 12,000 Btu/hour up to 15,000 Btu/hour	61% AFUE
Over 15,000 Btu/hour up to 19,000 Btu/hour	62% AFUE
Over 19,000 Btu/hour up to 27,000 Btu/hour	63% AFUE
Over 27,000 Btu/hour up to 46,000 Btu/hour	64% AFUE
Over 46,000 Btu/hour	65% AFUE
"Floor	
Up to 37,000 Btu/hour	56% AFUE
Over 37,000 Btu/hour	57% AFUE
"Room	
Up to 18,000 Btu/hour	57% AFUE
Over 18,000 Btu/hour up to 20,000 Btu/hour	58% AFUE
Over 20,000 Btu/hour up to 27,000 Btu/hour	63% AFUE
Over 27,000 Btu/hour up to 46,000 Btu/hour	64% AFUE
Over 46,000 Btu/hour	65% AFUE

"(4)(A) The Secretary shall publish final rules no later than January 1, 1992, to determine whether the standards established by paragraph (1), (2), or (3) for water heaters, pool heaters, and direct heating equipment should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 1995.

"(B) The Secretary shall publish a final rule no later than January 1, 2000, to determine whether standards in effect for such products should be amended. Such rule shall provide that any such amendment shall apply to products manufactured on or after January 1, 2005.

"(f) STANDARDS FOR FURNACES.—(1) Furnaces (other than furnaces designed solely for installation in mobile homes) manufactured on or after January 1, 1992, shall have an annual fuel utilization efficiency of not less than 78 percent, except that—

"(A) boilers (other than gas steam boilers) shall have an annual fuel utilization efficiency of not less than 80 percent and gas steam boilers shall have an annual fuel utilization efficiency of not less than 75 percent; and

"(B) the Secretary shall prescribe a final rule not latar than January 1, 1989, establishing an energy conservation standard—

"(i) which is for furnaces (other than furnaces designed solely for installation in mobile homes) having an input of less than 45,000 Btu per hour and manufactured on or after January 1, 1992;

"(ii) which provides that the annual fuel utilization efficiency of such furnaces shall be a specific percent which is not less than 71 percent and not more than 78 percent; and

"(iii) which the Secretary determines is not likely to result in a significant shift from gas heating to electric resistance heating with respect to either residential construction or furnace replacement.

"(2) Furnaces which are designed solely for installation in mobile homes and which are manufactured on or after September 1, 1990, shall have an annual fuel utilization efficiency of not less than 75 percent.

"(3)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine whether the standards established by paragraph (2) for mobile home furnaces should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 1994.

"(B) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established by this subsection for furnaces (including mobile home furnaces) should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2002.

"(C) After January 1, 1997, and before January 1, 2007, the Secretary shall publish a final rule to determine whether standards in effect for such products should be amended. Such rule shall contain such amendment, if any, and provide that any amendment shall apply to products manufactured on or after January 1, 2012.

"(g) STANDARDS FOR DISHWASHERS; CLOTHES WASHERS; CLOTHES DRYERS.—(1) Dishwashers manufactured on or after January 1, 1988, shall be equipped with an option to dry without heat.

"(2) All rinse cycles of clothes washers shall include an unheated water option, but may have a heated water rinse option, for products manufactured on or after January 1, 1988.

"(3) Gas clothes dryers shall not be equipped with a constant burning pilot for products manufactured on or after January 1, 1988.

"(4)(A) The Secretary shall publish final rules no later than January 1, 1990, to determine if the standards established under this subsection for products described in paragraphs (1), (2), and (3) should be amended. Such rules shall provide that any amendment shall apply to products the manufacture of which is completed on or after January 1, 1993.

"(B) After January 1, 1990, the Secretary shall publish a final rule no later than five years after the date of publication of the previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for such products.

"(C) Any such amendment shall apply to products manufactured after a date which is five years after—

"(i) the effective date of the previous amendment; or

"(ii) if the previous final rule did not amend the standard, the earliest date by which a previous amendment could have been in effect;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such standard.

"(h) STANDARDS FOR KITCHEN RANGES AND OVENS.—(1) Gas kitchen ranges and ovens having an electrical supply cord shall not be equipped with a constant burning pilot for products manufactured on or after January 1, 1990.

"(2)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine if the standards established for kitchen ranges and ovens in this subsection should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1995.

"(B) The Secretary shall publish a final rule no later than January 1, 1997, to determine whether standards in effect for such products should be amended. Such rule shall apply to products manufactured on or after January 1, 2000.

"(i) STANDARDS FOR OTHER COVERED PRODUCTS.—(1) The Secretary may prescribe an energy conservation standard for any type (or class) of covered products of a type specified in paragraph (13) of section 322(a) if the requirements of subsections (l) and (m) are met and the Secretary determines that—

"(A) the average per household energy use within the United States by products of such type (or class) exceeded 150 kilowatt-hours (or its Btu equivalent) for any 12-month period ending before such determination;

"(B) the aggregate household energy use within the United States by products of such type (or class) exceeded 4,200,000,000 kilowatt-hours (or its Btu equivalent) for any such 12-month period;

"(C) substantial improvement in the energy efficiency of products of such type (or class) is technologically feasible; and

"(D) the application of a labeling rule under section 324 to such type (or class) is not likely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) which achieve the maximum energy efficiency which is technologically feasible and economically justified.

"(2) Any new or amended standard for covered products of a type specified in paragraph (13) of section 322(a) shall not apply to products manufactured within five years after the publication of a final rule establishing such standard.

"(3) The Secretary may, in accordance with subsections (l) and (m), prescribe an energy conservation standard for television sets. Any such standard may not become effective with respect to products manufactured before January 1, 1992.

"(j) FURTHER RULEMAKING.—After issuance of the last final rules required under subsections (b) through (h) of this section, the Secretary may publish final rules to determine whether standards for a covered product should be amended. An amendment prescribed under this subsection shall apply to products manufactured after a data which is five years after—

"(1) the effective date of the previous amendment made pursuant to this part; or

"(2) if the previous final rule published under this part did not amend the standard, the earliest date by which a previous amendment could have been in effect,

except that in no case may an amended standard apply to products manufactured within three years (in the case of refrigerators, refrigerator-freezers, and freezers, room air-conditioners, dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens) or five years (in the case of central air-conditioners and heat pumps, water heaters, pool heaters, direct heating equipment, and furnaces) after publication of the final rule establishing a standard.

"(k) PETITION FOR AN AMENDED STANDARD.—(1) With respect to each covered product described in paragraphs (1) through (11) of section 322(a), any person may petition the Secretary to conduct a rulemaking to determine for any such covered product if the standards contained either in the last final rule required for such product under subsections (b) through (h), as the case may be, of this section or in a final rule published for such product under subsection (j) or this subsection should be amended.

"(2)(A) The Secretary shall grant a petition if he finds that it contains evidence which, assuming no other evidence were considered, provides an adequate basis for amending the standards under the following criteria—

"(i) amended standards will result in significant conservation of energy;

"(ii) amended standards are technologically feasible; and

"(iii) amended standards are cost effective as described in subsection (l)(2)(B)(i)(II).

"(B) The grant of a petition by the Secretary under this subsection creates no presumption with respect to the Secretary's determination of any of the criteria in a rulemaking under this section.

"(3) An amendment prescribed under this subsection shall apply to products manufactured after a data which is five years after—

"(A) the effective date of the previous amendment pursuant to this part; or

"(B) if the previous final rule published under this part did not amend the standard, the earliest date by which a previous amendment could have been in effect;

except that in no case may an amended standard apply to products manufactured within three years (in the case of refrigerators, refrigerator-freezers, and freezers, room air-conditioners, dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens) or five years (in the case of central air-conditioners and heat

pumps, water heaters, pool heaters, direct heating equipment, and furnaces) after publication of the final rule establishing a standard.".

"(l) CRITERIA FOR PRESCRIBING NEW OR AMENDED STANDARDS.—(1) The Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or decreases the minimum required energy efficiency, of a covered product.

"(2)(A) Any new or amended energy conservation standard prescribed by the Secretary under this section for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.

"(B)(i) In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering—

"(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;

"(II) the savings in operating costs throughout the estimated average life 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 the imposition of the standard;

"(III) the total projected amount of energy savings likely to result directly from the 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 conservation; and

"(VII) other factors the Secretary considers relevant.

"(ii) For purposes of clause (i)(V), the Attorney General shall make a determination of the impact, if any, of any lessening of competition likely to result from such standard and shall transmit such determination, not later than 60 days after the publication of a proposed rule prescribing or amending an energy conservation standard, in writing to the Secretary, together with an analysis of the nature and extent of such impact. Any such determination and analysis shall be published by the Secretary in the Federal Register.

"(iii) If the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure, there shall be a rebuttable presumption that such standard level is economically justified. A determination by the Secretary that such criterion is not met shall not be taken into consideration in the Secretary's determination of whether a standard is economically justified.

"(3) The Secretary may not prescribe an amended or new standard under this section for a type (or class) of covered product if—

"(A) for products other than dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens, a test procedure has not been prescribed pursuant to section 323 with respect to that type (or class) of product; or

"(B) the Secretary determines, by rule, that the establishment of such standard will not result in significant conservation of energy or that the establishment of such standard is not technologically feasible or economically justified.

For purposes of section 327, a determination under subparagraph (B) with respect to any type (or class) of covered products shall have the same effect as would a standard prescribed for such type (or class).

"(4) The Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. The failure of some types (or classes) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a standard for other types (or classes).

"(m) PROCEDURE FOR PRESCRIBING NEW OR AMENDED STANDARDS:—Any new or amended energy conservation standard shall be prescribed in accordance with the following procedure:

"(1) The Secretary—

"(A) shall publish an advance notice of proposed rulemaking which specifies the type (or class) of covered products to which the rule may apply;

"(B) shall invite interested persons to submit, within 60 days after the date of publication of such advance notice, written presentations of data, views, and arguments in response to such notice; and

"(C) may identify proposed or amended standards that may be prescribed.

"(2) A proposed rule which prescribes an amended or new energy conservation standard or prescribes no amendment or no new standard for a type (or class) of covered products shall be published in the Federal Register. In prescribing any such proposed rule with respect to a standard, the Secretary shall determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered products. If such standard is not designed to achieve such efficiency or use, the Secretary shall stata in the proposed rule the reasons therefor.

"(3) After the publication of such proposed rulemaking, the Secretary shall, in accordance with section 336, afford interested persons an opportunity, during a period of not less than 60 days, to present oral and written comments (including an opportunity to question those who make such presentations, as provided in such section) on matters relating to such proposed rule, including—

"(A) whether the standard to be prescribed is economically justified (taking into account those factors which the Secretary must consider under subsection (l)(2)) or will result in the effects described in subsection (l)(4);

"(B) whether the standard will achieve the maximum improvement in energy efficiency which is technologically feasible;

"(C) if the standard will not achieve such improvement, whether the reasons for not achieving such improvement are adequate; and

"(D) whether such rule should prescribe a level of energy use or efficiency which is higher or lower than that which would otherwise apply in the case of any group of products within the type (or class) that will be subject to such standard.

"(4) A final rule prescribing an amended or new energy conservation standard or prescribing no amended or new standard for a type (or class) of covered products shall be published as soon as is practicable, but not less than 90 days, after publication of the proposed rule in the Federal Register.

"(n) SPECIAL RULE FOR CERTAIN TYPES OR CLASSES OF PRODUCTS.—(1) A rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group—

"(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or

"(B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class).

In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.

"(2) Any rule prescribing a higher or lower level of energy use or efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established.

"(o) INCLUSION IN STANDARDS OF TEST PROCEDURES AND OTHER REQUIREMENTS.—Any new or amended energy conservation standard prescribed under this section shall include, where applicable, test procedures prescribed in accordance with section 323 and may include any requirement which the Secretary determines is necessary to assure that each covered product to which such standard applies meets the required minimum level of energy efficiency or maximum quantity of energy use specified in such standard.

"(p) DETERMINATION OF COMPLIANCE WITH STANDARDS.—Compliance with, and performance under, the energy conservation standards (except for design standards authorized by this part) established in, or prescribed under, this section shall be determined using the test procedures and corresponding compliance criteria prescribed under section 323.

"(q) SMALL MANUFACTURER EXEMPTION.—(1) Subject to paragraph (2), the Secretary may, on application of any manufacturer, exempt such manufacturer from all or part of the requirements of any energy conservation standard established in or prescribed under this section for any period not longer than the 24-month period beginning on the date such rule becomes effective, if the Secretary finds that the annual gross revenues of such manufacturer from all its operations (including the manufacture and sale of covered products) does not exceed $8,000,000 for the 12-month period preceding the date of the application. In making such finding with respect to any manufacturer, the Secretary shall take into account the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer.

"(2) The Secretary may not exercise the authority granted under paragraph (1) with respect to any type (or class) of covered product subject to an energy conservation standard under this section unless the Secretary makes a finding, after obtaining the written views of the Attorney General, that a failure to allow an exemption under paragraph (1) would likely result in a lessening of competition.".

SEC. 6. REQUIREMENTS OF MANUFACTURERS.

Section 326(d) of the Energy Policy and Conservation Act (42 U.S.C. 6296(d)) is amended to read as follows:

"(d) INFORMATION REQUIREMENTS.—(1) For purposes of carrying out this part, the Secretary may require, under this part or other provision of law administered by the Secretary, each manufacturer of a covered product to submit information or reports to the Secretary with respect to energy efficiency or energy use of such covered product and the economic impact of any proposed energy conservation standard, as the Secretary determines may be necessary to establish and revise test procedures, labeling rules, and energy conservation standards for such product and to insure compliance with the requirements of this part. In making any determination under this paragraph, the Secretary shall consider existing public sources of information, including nationally recognized certification programs of trade associations.

"(2) The Secretary shall exercise authority under this section in a manner designed to minimize unnecessary burdens on manufacturers of covered products.

"(3) The provisions of section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 shall apply with respect to information obtained under this subsection to the same extent and in the same manner as they apply with respect to energy information obtained under section 11 of such Act."

SEC. 7. EFFECT ON OTHER LAW.

Section 327 of the Energy Policy and Conservation Act (42 U.S.C. 6297) is amended to read as follows:

"EFFECT ON OTHER LAW

"SEC. 327. (a) PREEMPTION OF TESTING AND LABELING REQUIREMENTS.—(1) Effective on the date of enactment of the National Appliance Energy Conservation Act of 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption of any covered product if—

"(A) such State regulation requires testing or the use of any measure of energy consumption or energy descriptor in any manner other than that provided under section 323; or

"(B) such State regulation requires disclosure of information with respect to the energy use or energy efficiency of any covered product other than information required under section 324.

"(2) For purposes of this section, the term 'State regulation' means a law, regulation, or other requirement of a State or its political subdivisions.

"(b) GENERAL RULE OF PREEMPTION FOR ENERGY CONSERVATION STANDARDS BEFORE FEDERAL STANDARD BECOMES EFFECTIVE FOR A PRODUCT.—Effective on the date of enactment of the National Appliance Energy Conservation Act of 1987 and ending on the effective date of an energy conservation standard established under section 325 for any covered product, no State regulation, or revision thereof, concerning the energy efficiency or energy use of the covered product shall be effective with respect to such covered product, unless the State regulation or revision—

"(1) was prescribed or enacted before January 8, 1987, and is applicable to products before January 3, 1988;

"(2) is a State procurement regulation described in subsection (e);

"(3) is a regulation described in subsection (f)(1) or is prescribed or enacted in a building code for new construction described in subsection (f)(2);

"(4) is a regulation prohibiting the use in pool heaters of a constant burning pilot;

"(5) is a regulation described in subsection (d)(5)(B) for which a waiver has been granted under subsection (d); or

"(6) is a regulation effective on or after January 1, 1992, concerning the energy efficiency or energy use of television sets.

"(c) GENERAL RULE OF PREEMPTION FOR ENERGY CONSERVATION STANDARDS WHEN FEDERAL STANDARD BECOMES EFFECTIVE FOR A PRODUCT.—Except as provided in section 325(b)(3)(A)(ii) and effective on the effective date of an energy conservation standard established in or prescribed under section 325 for any covered product, no State regulation concerning the energy efficiency or energy use of such covered product shall be effective with respect to such product unless the regulation—

"(1) is a regulation described in paragraph (2) or (4) of subsection (b);

"(2) is a regulation which has been granted a waiver under subsection (d); or

"(3) is in a building code for new construction described in subsection (f)(3).

"(d) WAIVER OF FEDERAL PREEMPTION.—(1)(A) Any State with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use or energy efficiency for any type (or class) of covered product for which there is a Federal energy conservation standard under section 325 may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.

"(B) Subject to paragraphs (2) through (5), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy interests.

"(C) For purposes of this subsection, the term 'unusual and compelling State or local energy interests' means interests which—

"(i) are substantially different in nature or magnitude than those prevailing in the United States generally; and

"(ii) ara such that the costs, benefits, burdens, and reliability of energy savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

The factors described in clause (ii) shall be evaluated within the context of the State's energy plan and forecast.

"(2) The Secretary shall give notice of any petition filed under paragraph (1)(A) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the 6-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after the date on which the petition was filed. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of, and the reasons for, such denial.

"(3) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including—

"(A) the extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;

"(B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;

"(C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction—

"(i) in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or

"(ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States; and

"(D) the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

"(4) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding, except that the failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).

"(5) No final rule prescribed by the Secretary under this subsection may—

"(A) permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation; or

"(B) become effective with respect to a covered product manufactured before the earliest possible effective date specified in section 325 for the initial amendment of the energy conservation standard established in such section for the covered product; except that such rule may become effective before such date if the Secretary finds (and publishes such finding) that, in addition to the other requirements of this subsection the State has established, by a preponderance of the evidence, that—

"(i) an energy emergency condition exists within the State which—

"(I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy to its residents at less than prohibitive costs; and

"(II) cannot be substantially alleviated by the importation of energy or the use of interconnection agreements; and

"(ii) the State regulation is necessary to alleviate substantially such condition.

"(6) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended pursuant to section 325, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraph (1) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), and (4), except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraph (1) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it.

"(e) EXCEPTION FOR CERTAIN STATE PROCUREMENT STANDARDS.—Any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such standards are more stringent than the corresponding Federal energy conservation standards.

"(f) EXCEPTION FOR CERTAIN BUILDING CODE REQUIREMENTS.—(1) A regulation or other requirement enacted or prescribed before January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 325 for such covered product.

"(2) A regulation or other requirement, or revision thereof, enacted or prescribed on or after January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 325 for such covered product if the code does not require that the energy efficiency of such covered product exceed—

"(A) the applicable minimum efficiency requirement in a national voluntary consensus standard; or

"(B) the minimum energy efficiency level in a regulation or other requirement of the State meeting the requirements of subsection (b)(1) or (b)(5), whichever is higher.

"(3) Effective on the effective date of an energy conservation standard for a covered product established in or prescribed under section 325, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

"(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

"(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 325, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

"(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 325 or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

"(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 325, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

"(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds by more than 5 percent either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

"(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

"(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 323, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 323 or other technically accurate documented procedure.

"(4)(A) Subject to subparagraph (B), a State or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code or to establish that the code meets the conditions set forth in this subsection.

"(B) If a building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard established in or prescribed under section 325 and the applicable standard of such State, if any, that has been granted a waiver under subsection (d), such requirement of the building code shall not be applicable unless the Secretary has granted a waiver for such requirement under subsection (d).

"(g) NO WARRANTY.—Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost which is required to be made under the provisions of this part shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved or that such energy use or estimated annual operating cost will not be exceeded under conditions of actual use.".

SEC. 8. CITIZEN SUITS.

Section 335(a) of the Energy Policy and Conservation Act (42 U.S.C. 6305) is amended—

(1) by striking out "or" at the end of paragraph (1);
(2) by striking out the period at the end of paragraph (2) and inserting in lieu thereof "; or";
(3) by inserting after paragraph (2) the following new paragraph:
"(3) the Secretary in any case in which there is an alleged failure of the Secretary to comply with a nondiscretionary duty to issue a proposed or final rule according to the schedules set forth in section 325."; and
(4) by adding after the last sentence the following:
he courts shall advance on the docket, and expedite the disposition of, all causes ed therein pursuant to paragraph (3) of this subsection. If the court finds that the cretary has failed to comply with a deadline established in section 325, the court all have jurisdiction to order appropriate relief, including relief that will ensure e Secretary's compliance with future deadlines for the same covered product.".

C. 9. ADMINISTRATIVE REVIEW AND JUDICIAL REVIEW.

Section 336 of the Energy Policy and Conservation Act (42 U.S.C. 6306) is amend- l to read as follows:

"ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

"SEC. 336. (a)(1) In addition to the requirements of section 553 of title 5, United ates Code, rules prescribed under section 323, 324, 325, 327, or 328 of this part all afford interested persons an opportunity to present written and oral data, ews, and arguments with respect to any proposed rule.
"(2) In the case of a rule prescribed under section 325, the Secretary shall, by eans of conferences or other informal procedures, afford any interested person an portunity to question—
"(A) other interested persons who have made oral presentations; and
"(B) employees of the United States who have made written or oral presentations with respect to disputed issues of material fact.
ch opportunity shall be afforded to the extent the Secretary determines that questoning pursuant to such procedures is likely to result in a more timely and effective solution of such issues.
"(3) A transcript shall be kept of any oral presentations made under this subsecon.
"(b)(1) Any person who will be adversely affected by a rule prescribed under secon 323, 324, or 325 may, at any time within 60 days after the date on which such le is prescribed, file a petition with the United States court of appeals for the cirit in which such person resides or has his principal place of business, for judicial view of such rule. A copy of the petition shall be transmitted by the clerk of the urt to the agency which prescribed the rule. Such agency shall file in the court e written submissions to, and transcript of, the proceedings on which the rule was used, as provided in section 2112 of title 28, United States Code.
"(2) Upon the filing of the petition referred to in paragraph (1), the court shall ve jurisdiction to review the rule in accordance with chapter 7 of title 5, United ates Code, and to grant appropriate relief as provided in such chapter. No rule der section 323, 324, or 325 may be affirmed unless supported by substantial evince.
"(3) The judgment of the court affirming or setting aside, in whole or in part, any ch rule shall be final, subject to review by the Supreme Court of the United ates upon certiorari or certification as provided in section 1254 of title 28, United ates Code.
"(4) The remedies provided for in this subsection shall be in addition to, and not substitution for, any other remedies provided by law.
"(5) The procedures applicable under this part shall not—
"(A) be considered to be modified or affected by any other provision of law unless such other provision specifically amends this part (or provisions of law cited herein); or
"(B) be considered to be superseded by any other provision of law unless such other provision does so in specific terms by referring to this part and declaring that such provision supersedes, in whole or in part, the procedures of this part.
"(c) Jurisdiction is vested in the Federal district courts of the United States over ctions brought by—
"(1) any adversely affected person to determine whether a State or local government is complying with the requirements of this part; and
"(2) any person who files a petition under section 325(k) which is denied by the Secretary.".

SEC. 10. ANNUAL REPORT.

Section 338 of the Energy Policy and Conservation Act (42 U.S.C. 6308) is amended by adding at the end the following: "Nothing in this section provides a defense or justification for a failure by the Secretary to comply with a nondiscretionary duty as provided for in this part."

SEC. 11. CONFORMING AMENDMENTS.

(a) IN GENERAL.—Part B of title III of the Energy Policy and Conservation Act is amended as follows:
(1) Section 324 is amended—
(A) in subsection (a)(1), by striking out "paragraphs (1) through (9)" and inserting in lieu thereof "paragraphs (1), (2), (4), (6), and (8) through (12)";
(B) in subsection (a)(2), by striking out "paragraphs (10) through (13)" and inserting in lieu thereof "paragraphs (3), (5), and (7)"; and
(C) in subsection (a)(3)—
(i) by striking out "paragraph (14)" and inserting in lieu thereof "paragraph (13)";
(ii) by striking out subparagraph (A) and inserting in lieu thereof the following:
"(A) the Commission or the Secretary has made a determination with respect to such type (or class thereof) that labeling in accordance with this section will assist purchasers in making purchasing decisions,"; and
(iii) by striking out "section 323(a)(5)" in subparagraph (B) and inserting in lieu thereof "section 323(b)(1)(B)";
(D) by striking out subsection (b)(1) and inserting in lieu thereof the following:
"(b) RULES IN EFFECT; NEW RULES.—(1)(A) Any labeling rule in effect on the date of the enactment of the National Appliance Energy Conservation Act of 1987 shall remain in effect until amended, by rule, by the Commission.
"(B) After the date of the enactment of the National Appliance Energy Conservation Act of 1987 and not later than 30 days after the date on which a proposed test procedure applicable to a covered product of any of the types specified in paragraphs (1) through (13) of section 322(a) (or class thereof) is prescribed under section 323(b), the Commission shall publish a proposed labeling rule applicable to such type (or class thereof).";
(E) in subsection (b)(3)—
(i) by striking out "section 323" both places in which it appears and inserting in lieu thereof "section 323(b)";
(ii) by striking out "(13)" and inserting in lieu thereof "(12)"; and
(iii) by striking out "(14)" and inserting in lieu thereof "(13)";
(F) in subsection (b)(5)—
(i) by striking out "(10) through (13)" and inserting in lieu thereof "(3), (5), and (7)"; and
(ii) by striking out "(14)" and inserting in lieu thereof "(13)"; and
(G) in subsection (f), by striking out "or (2)" in the second sentence.
(2) Section 326(b)(3)(A) is amended by inserting "established in or" before "prescribed under".
(3) Section 332(a)(5) is amended by striking out "energy efficiency standard prescribed under" and inserting in lieu thereof "energy conservation standard established in or prescribed under".
(b) STYLISTIC CONFORMING AMENDMENTS.—Part B of title III of the Energy Policy and Conservation Act is amended as follows:
(1) Section 322(b)(1) is amended by striking out "(b)(1)" and inserting in lieu thereof "(b) SPECIAL CLASSIFICATION OF CONSUMER PRODUCT.—(1)".
(2) Section 324 is amended—
(A) by striking out "SEC. 324. (a)(1)" and inserting in lieu thereof "SEC. 324. (a) IN GENERAL.—(1)";
(B) in subsection (c)(1), by striking out "(c)(1)" and inserting in lieu thereof "(c) CONTENT OF LABEL.—(1)";
(C) in subsection (d), by striking out "(d)" and inserting in lieu thereof "(d) EFFECTIVE DATE.—";
(D) in subsection (e), by striking out "(e)" and inserting in lieu thereof "(e) STUDY OF CERTAIN PRODUCTS.—";
(E) in subsection (f), by striking out "(f)" and inserting in lieu thereof "(f) CONSULTATION.—"; and
(F) in subsection (g), by striking out "(g)" and inserting in lieu thereof "(g) OTHER AUTHORITY OF THE COMMISSION.—".

(3) Section 326 is amended—
(A) in subsection (a), by striking out "(a)" and inserting in lieu thereof "(a) IN GENERAL.—";
(B) in subsection (b)(1), by striking out "(b)(1)" and inserting in lieu thereof "(b) NOTIFICATION.—(1)"; and
(C) in subsection (c), by striking out "(c) Each" and inserting in lieu thereof "(c) DEADLINE.—Each".
(4) Section 329 is amended—
(A) in subsection (a), by striking out "(a)" and inserting in lieu thereof "(a) IN GENERAL.—"; and
(B) in subsection (b), by striking out "(b)" and inserting in lieu thereof "(b) CONFIDENTIALITY.—".
(5) Section 332 is amended—
(A) in subsection (a), by striking out "SEC. 332. (a)" and inserting in lieu thereof "SEC. 332. (a) IN GENERAL.—"; and
(B) in subsection (b), by striking out "(b)" and inserting in lieu thereof "(b) DEFINITION.—".
(6) Section 333 is amended—
(A) in subsection (a), by striking out "SEC. 333. (a)" and inserting in lieu thereof "SEC. 333. (a) IN GENERAL.—";
(B) in subsection (b), by striking out "(b)" and inserting in lieu thereof "(b) DEFINITION.—";
(C) in subsection (c), by striking out "(c) It" and inserting in lieu thereof "(c) SPECIAL RULE.—It"; and
(D) in subsection (d)(1), by striking out "(d)(1)" and inserting in lieu thereof "(d) PROCEDURE FOR ASSESSING PENALTY.—(1)".
(7) Section 335 is amended—
(A) in subsection (b), by striking out "(b)" and inserting in lieu thereof "(b) LIMITATION.—";
(B) in subsection (c), by striking out "(c)" and inserting in lieu thereof "(c) RIGHT TO INTERVENE.—";
(C) in subsection (d), by striking out "(d)" and inserting in lieu thereof "(d) AWARD OF COSTS OF LITIGATION.—";
(D) in subsection (e), by striking out "(e)" and inserting in lieu thereof "(e) PRESERVATION OF OTHER RELIEF.—"; and
(E) in subsection (f), by striking out "(f)" and inserting in lieu thereof "(f) COMPLIANCE IN GOOD FAITH.—".
(8) Section 339 is amended—
(A) in subsection (a), by striking out "(a)" and inserting in lieu thereof "(a) AUTHORIZATIONS FOR THE SECRETARY.—";
(B) in subsection (b), by striking out "(b)" and inserting in lieu thereof "(b) AUTHORIZATIONS FOR THE COMMISSION.—"; and
(C) in subsection (c), by striking out "(c)" and inserting in lieu thereof "(c) OTHER AUTHORIZATIONS.—".

PURPOSE AND SUMMARY

Residential buildings account for 16.5 Quads of energy consumption in the United States, or 23% of the national total. Of that figure, approximately 80% is attributable to major home appliances, including central systems (central air conditioning units, furnaces, etc.) and individual units (refrigerators, freezers, washers and dryers, room air conditioners, etc.). The central tenet of this or any appliance standards bill is simple: the more efficient the appliance, the less energy is consumed.

Appliance efficiency standards are design requirements or minimum efficiency requirements for appliances. Unlike energy efficiency ratings, which are informational only, appliance efficiency standards establish actual baseline, minimum requirements for each covered product. The result is that the least energy efficient products are eliminated, resulting in greater average efficiency, decreased energy consumption by ratepayers, and decreased demand requirements on utilities.

There are two central tenets to the National Appliance Energy Conservation Act of 1987, H.R. 87. First, the bill legislates express energy conservation standards for eleven consumer products: (1) refrigerators and freezers; (2) room air conditioners; (3) central air conditioners and heat pumps; (4) water heaters; (5) furnaces; (6) dishwashers; (7) clothes washers; (8) clothes dryers; (9) direct heating equipment; (10) kitchen ranges and ovens; and (11) pool heaters. DOE is responsible for amending the standards in the future. Second, the bill preempts state law under most circumstances.

DISCUSSION OF KEY PROVISIONS

Section 4. Test Procedures

New Section 323(e) is intended to eliminate the impact that a change in test procedure might otherwise have on existing standard levels. The standard levels established in Section 5 of the Act are based on current test procedures. The Secretary has authority to amend test procedures at any time. If test procedures are changed, however, the measured efficiency or measured energy consumption of covered products is also likely to change. For example, a group of appliances that would consume the identical amount of energy under the use assumptions contained in the existing test procedure might consume different amounts of energy under new use assumptions contained in an amended test procedure. One purpose of new section 323(e) is to require that all models that comply with the standard under the old test procedure be deemed to comply with the standard under an amended test procedure, even if the measured energy consumption of such models is changed as a result of the new test procedure.

New Section 323(e) is also intended to eliminate any other impact that a revised test procedure might have on the energy conservation standard. An amended test procedure might alter the measured energy consumption of different models in various ways. For example, five models that are all measured to consume 10 units of energy under the existing test procedure might (in an extreme case) be measured to consume 4, 5, 6, 8, and 12 units of energy under the amended test procedure. The purpose of new section 323(e) is to require DOE to establish an amended standard that accounts for the measured change in energy consumption under the new test procedure. The new standard would be established by computing the average energy consumption (or efficiency) under the amended test procedure of a representative sample of units that barely complied with the standard as measured under the old test procedure. Thus, assusming that the existing standard in the prior example was 10 units, the new standard would be the average energy consumption under the new test procedure of a representative sample of units that consume 10 units of energy—in this case, 7 units [(4+5+6+8+12)/5=7].

Section 323(e) also makes clear that the Secretary's authority to amend test procedures does not affect the Secretary's duty to issue final rules regarding energy conservation standards under Section 325.

Section 5. Energy Conservation Standards

Overview.—Section 5 of the Act amends current Section 325 of EPCA by setting explicit standard level for most of the major energy-consuming appliances. The Secretary is required to engage in at least two future rulemakings at specified dates to determine whether to revise the standards. In such future rulemakings, the Secretary may either increase the rigor of the standard, or allow it to remain at its current level; he may not decrease the standard.

This section requires that DOE standards for covered products remain effective for a specified duration ("lock-in" periods) during which manufacturers can obtain returns on their capital investments before being required to make further investments and other expenditures in order to meet more stringent requirements. Furthermore, the schedule gives industry a three- or five-year "lead-in" period, depending upon the product, between the announcement of a new standard level (issuance of final rule) and its effective date in order to make whatever product changes revised standards require.

The energy conservation standards specified in the Act apply to the principal function of an appliance, such as heating, cooling or water heating. Some appliances perform more than one function, such as furnaces, air conditioners or heat pumps that also heat potable water, and water heaters that also provide space heating. These appliances are sometimes referred to as combination appliances. Furnaces, air conditioners or heat pumps that also heat potable water must comply with the appropriate furnace or air conditioning standard and not with the water heater standard. Water heaters that also provide space heating must comply with the water heater standard and not with the furnace standard. The reason for this is that DOE test procedures are based on the average use cycle for the principle function of the appliance and do not specify a use cycle that would occur if that appliance were also performing another function.

If DOE establishes test procedures for both functions of combination appliances, energy conservation standards for both functions of such appliances may be established.

Special Rule for Refrigerators, Refrigerator/Freezers, and Freezers Standards.—New Section 325(b) of EPCA contains the initial standards and future rulemaking schedules for refrigerators, refrigerator-freezers, and freezers ("refrigerator/freezers"). The initial standard levels applicable to these products manufactured on or after January 1, 1990 are stronger than the most stringent existing State standards for these products, which are the standards promulgated by the California Energy Commission ("CEC") in 1984 to take effect in 1987. The initial Federal standards for these products are not as stringent as California standards, also enacted in 1984, that would be effective in 1992 in California, although the bill provides that these State standards may become effective in 1993 in California under certain circumstances.

Whether the rulemaking schedule provided in this subsection is met will determine the status of the 1992 CEC standards and other future State standards for refrigerator/freezers. The special provisions relating to the CEC 1992 standards for refrigerator/freezers

are justified because they are the only State standards substantially more stringent that those in the Act that have been promulgated at this time. The California 1992 standards for refrigerator/freezers will not take effect in California if the Secretary, as required, timely publishes a final rule which determines whether to amend the initial Federal standards. Under such circumstances, California may still petition DOE for a waiver from preemption. Although DOE's duty to publish rules by specified deadlines is nondiscretionary, DOE's failure to meet such deadlines with respect to refrigerator/freezers would allow other States to implement refrigerator/freezer standards without supersession or the need to utilize the waiver process until the Secretary determines whether to revise the Federal standards.

The Secretary must publish a proposed rule by July 1, 1988, to determine if the Federal refrigerator/freezer standards should be amended. A final rule must be published no later than July 1, 1989. If the Secretary determines to amend the standards, those revisions shall apply to products manufactured on or after January 1, 1993. However, if the final rule is not published by January 1, 1990, any revisions to the standards shall not apply to products manufactured before January 1, 1995, and there must be at least a three-year lead time between issuance of the final rule and the effective date of the amendments.

If the Secretary does not publish a final rule by July 1, 1989, then adversely affected parties may seek judicial relief through the provisions of new Section 335(a)(3) (Section 8 of the Act). This provision would allow manufacturers to sue to compel DOE to issue a final rule before January 1, 1990. If DOE does not publish a final rule by January 1, 1990, then the 1992 CEC standards (and any amendments to these standards which are not more stringent than the original regulations) would apply in California effective January 1, 1993. Thereafter, such standards would not preempted by subsequent Federal rules.

If the Secretary does not publish a final relating to the revision of the refrigerator/freezer standards by January 1, 1992, then any State requirements which might apply to such products manufactured on or after January 1, 1995, are not superseded until the effective date of a subsequent rule issued by DOE, unless DOE grants a waiver from preemption.

Further Rulemaking.—New EPCA section 325(j) sets forth the timetable for further rulemaking on covered products. For each covered product, two subsequent rulemakings are mandated, at specified times, in which the Secretary must determine whether the extent standard for such product should be amended. Thereafter, rulemakings to determine whether to amend a standard are discretionary. Such subsequent rulemakings may be initiated either by the Secretary of his own accord, or pursuant to a petition (new section 325(k)). The Secretary is required to grant a petition to initiate a rulemaking where the petition contains evidence which, assuming no other evidence were considered, provides an adequate basis for amending the standards under the following criteria: (1) amended standards would result in significant conservation of energy; (2) amended standards are technologically feasible;

and (3) amended standards are cost effective. A petitioner may appeal the denial of a petition in Federal District Court.

The intention of these amendments is to eliminate DOE's duty to conduct rulemakings pursuant to a rigid schedule dictated 15 or more years in advance. It is not intended to create any presumption that the need for revised standards will be diminished in the future. The Committee expects DOE to evaluate on a continuing basis whether further revisions in the standards are justified.

Criteria for New or Amended Standards.—Section 5 of the Act (new EPCA section 325(1)) also provides the criteria for prescribing new or amended Federal standards. The basic criterion for prescribing the standards is the same as that in current EPCA, *i.e.*, that any energy conservation standard shall be designed to achieve the maximum improvement in energy efficiency that is "technologically feasible" and "economically justified." H.R. 87 incorporates these requirements of existing law, and in addition establishes three additional criteria or factors to be considered by DOE in prescribing new standards or in reviewing standards for possible revision. These new provisions are:

1. New Section 325(1)(l).—DOE may not prescribe an amended standard that increases maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. The purpose of this requirement is to prevent the Secretary from weakening any energy conservation standard for a product, whether established in this Act or subsequently adopted. This serves to maintain a climate of relative stability with respect to future planning by all interested parties. The Secretary may find in a particular case that no revision of a standard is required.

2. New Section 325(1)(B)(iii).—If the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard would be less than three times the value of the energy savings that the consumer will receive as a result of the standard during the first year, a rebuttable presumption is created that the standard is economically justified. In other words, standard levels with a simple payback period of three years or less are entitled to a presumption of economic justification. The fact that this payback level cannot be achieved by a standard level shall not be considered in the Secretary's determination whether a standard level is economically justified. In other words, the Secretary shall not presume that a standard level is not economically justified just because the simple payback period exceeds three years. Instead, the Secretary shall analyze savings in operating costs as required by Section 325(l)(2)(B)(i)(II).

3. New Section 325(l)(4).—In addition to the technical feasibility and economic justification criteria, this new section ensures that energy savings are not achieved through the loss of significant consumer features. The provision states that even if a standard is "technologically feasible" and "economically justified," the Secretary may not prescribe an amended or new standard if he finds that interested persons have established by a preponderance of the evidence that the standard is likely to result in the "unavailability in a covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the

United States at the time of the Secretary's finding." This term precludes DOE from promulgating a standard that manufacturers are only able to meet by adopting engineering changes that eliminate performance characteristics. A manufacturer's decision to eliminate such characteristics rather than to implement other technologically feasible changes does not render the product type "unavailable." A standard would result in the "unavailability" of characteristics, etc., if, as a result of the standard, a product containing such characteristic would become prohibitively expensive, *i.e.* if there would be minimal demand for the product having such characteristic. Nor does the inability of a particular manufacturer to meet a standard necessarily make the product type "unavailable."

The purpose of this provision is to ensure that an amended standard does not deprive consumers of product choices and characteristics, features, sizes, etc. Significant achievements in energy conservation can be made without sacrificing the utility or covenience of applicances to cosumers. A valid standard may entail some minor loss of characteristics, features, sizes, etc.; for this reason, the Act requires that "substantially the same," though not necessarily identical, characteristics or features should continue to be available. This provision also does not apply to trivial effects in which a standard might result. If a standard level for a given product type or class fails to meet the statutory criterion, the Secretary should determine the most stringent standard level that would satisfy the criterion for that product type or class and adopt a standard for it that meets the statutory criteria. In addition, the Secretary may make adjustments to the standard levels for certain product types or classes to meet this requirement (*e.g.*, setting a lower standard level for certain types or classes), and the failure of particular product types or classes to meet this requirement shall not affect the Secretary's determination with respect to other product types or classes.

The burden of producing evidence and proving that a standard level will result in the unavailability of certain characteristics, etc., rests on interested persons asserting the claim of unavailability.

Product types or classes are those defined by the Act or by the Secretary. Examples of "performance characteristics" of particular products are: safety; cooling; refrigeration and heating; dehumidification; ability to clean or dry without adverse effects; serviceability; and incidence and cost or repair. Examples of "features" are: automatic defrost, through the door ice, size of room air conditioners, and noise levels. Assessment of standard sizes (*i.e.*, the availability of sizes that fit in standard building spaces), capacities and volumes should be based on a review of products available in the marketplace.

Section 7. Effect on Other Law

Overview.—Section 7 provides for preemption of certain State and local regulations that address the energy consumption of covered products. In overall form, the section follows substantially the preemption requirements in current EPCA. Thus, the section continues the current rules for preemption with respect to certain State testing and labeling requirements applicable to covered prod-

cts that are inconsistent with Federal law. It also continues the asic concept of preempting State energy efficiency standards and llowing waivers of preemption under certain circumstances.

Preemption applies to an entire product type as listed in the coverage section of the Act. For example, State standards for electric nd gas kitchen ranges and ovens are preempted.

H.R. 87 significantly changes the criteria to be applied by the ecretary in determining whether to grant State petitions for waivrs of preemption. The waiver provisions in Section 7 are intended) give DOE clearer direction and to give the States and other inerested persons clearer notice of what the provisions entail. The ombination of the new preemption provisions and the Federal andards mandated by Section 5 provide an appropriate solution) the problems caused by the absence of Federal standards and ie adoption of numerous and inconsistent State standards. Section makes appropriate allowance for the interests of the States irough such features as "grandfathering" rules for exising State equirements, special rules for energy requirements relating to covred products in building codes and State procurement standards, nd waivers from preemption.

Under the new waiver provisions, a State may petition for a aiver of preemption where a State regulation is necessary to meet unusual and compelling State or local energy interests." As a genral rule, a State may not receive a waiver for a standard that ikes effect prior to the effective date of a Federal standard, except i the case of "unusual and compelling State or local energy interits" (discussed below) that also qualify as an energy emergency. In ddition, a "grandfather" provision applies with respect to this eriod.

Special rules also permit State and local building codes to contine to regulate the energy consumption of covered products both efore and after the effective date of Federal standards so long as ie codes meet certain requirements. Provisions relating to State nd local building codes recognize the increasingly important role f these codes in a State's management of energy resources. H.R. 87 oes not affect a State's authority to adopt provisions in building odes that do not affect the energy efficiency or energy use of covered roducts, such as insulation, structure, fire, heating or safety standrds.

Section 7 is designed to protect the appliance industry from aving to comply with a patchwork of numerous conflicting State equirements. It is also designed to ensure that States are able to espond with their own appliance regulations to substantial and nusual energy problems, such as high electricity, gas, or heating il prices, high dependence on oil (or fuels whose price is tied to oil) or electricity generation or on out-of-State energy sources, unusual limatic conditions, or adverse environmental or health and safety onditions that can be alleviated by energy conservation in applinces. Congress anticipates that States that have such energy probems, and that have met the burden of proof set forth in Section 27, will be granted waivers.

Period prior to the effective date of a Federal standard.—For the eriod from the date of enactment of the Act until a Federal standrd becomes effective, State energy requirements for covered prodicts are permitted to remain in effect if they were prescribed or

enacted before January 8, 1987, and are applicable to products before January 3, 1988. Otherwise, State energy efficiency requirements for covered products generally are preempted during this period. The primary exception to this general rule is that DOE may grant waivers from preemption for "unusual and compelling State or local energy interests" that qualify as an "energy emergency condition." This narrow exception is to be utilized by DOE on a case-by-case basis in conformity with the statutory criteria.

Period when a Federal standard becomes effective.—In general, effective on the date of a Federal standard for a covered product, the Federal standard preempts all State standards that may be applicable to that product. DOE may grant a waiver from preemption if the State establishes that a State regulation is needed to meet "unusual and compelling State or local energy interest," unless interested persons demonstrate that the waiver should not be granted. These provisions are not intended to impose an absolute bar on State regulation; it is anticipated that States satisfying the statutory criteria will be granted waivers from preemption.

To meet the criterion of "unusual and compelling State or local energy interests," a State must show that its interests are substantially different in nature or magnitude from those prevailing in the United States generally. In addition, the State must show that it has evaluated appliance standards as part of an energy plan and forecast which shows that the costs, benefits, burdens and reliability of energy savings resulting from the regulation make it preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings and production, including reliance on reasonably predictable market-induced improvements in efficiency of the product subject to the regulations. This provision does not constitute a Federal requirement for State energy planning or forecasting and does not require the State to use any specific methodology. It does require the State to show that it has engaged in a rational planning process in which the State has reviewed the cost-effectiveness of various alternatives to State appliance standards.

The Secretary may not, however, issue a waiver if he finds that interested persons have demonstrated, by a preponderance of the evidence, that the waiver would significantly burden manufacturing, marketing, distribution, sale or servicing of affected products on a national basis. H.R. 87 specifies several relevant factors that the Secretary should consider in making this determination.

Finally, the Secretary may not issue a waiver if he finds that interested persons have demonstrated that the State regulation is likely to result in the unavailability of product types, performance characteristics, features, etc. This final criterion is identical to the criterion for the establishment of a Federal standard set forth in new Section 325(1)(4), discussed above, except that the examination under Section 327 is limited to the effect in the State rather than on a national basis.

State building codes.—Section 7 contains new provisions relating to State building codes. These provisions are warranted because of the significant growth of State building codes as a tool for State energy management since the 1978 amendments to EPCA. These provisions generally apply only to appliances regulated directly by

a building code, such as heating and cooling equipment and water heaters, and not to appliances like refrigerators.

As a general rule, Section 7 prevents State building codes from being used as a means of setting mandatory State appliance standards in excess of the Federal standards. Subject to this restriction, Section 7 permits regulations or other requirements concerning the energy efficiency or energy use of covered products in building codes both before and after the effective date of a Federal standard under specified criteria.

The Act contains three basic provisions with respect to building codes. First, a "grandfather" provision covers energy efficiency requirements in building codes enacted or prescribed before January 8, 1987, permitting them to operate without preemption until the effective date of a Federal energy standard for a covered product.

Second, such a requirement enacted or prescribed on or after January 8, 1987 in a code for new construction is not preempted until the date of a Federal standard if the code does not require that the energy efficiency of the covered product exceed the applicable minimum efficiency requirement in national voluntary consensus standards (such as those of the American Society of Heating, Refrigeration, and Air-Conditioning Engineers) or certain other specified levels.

Third, on the effective date of a Federal standard for any covered product, such a State regulation or other requirement for a covered product in a code for new construction is not preempted if it does not require that the covered product have an energy efficiency exceeding the Federal standard or the level permitted in a waiver of preemption, and if it meets certain other criteria. The provisions give the State flexibility in implementing performance-based building code approaches. Such approaches authorize builders to adjust or trade off the efficiencies of the various building components, including certain covered products, so long as an overall energy objective is met. The section's limited restrictions are designed to ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed either the applicable Federal standard or a State standard for which a waiver from preemption has been granted.

Generally, H.R. 87 does not require a State or local government to submit a petition to DOE in order to enforce or apply its building code for new construction. However, if the code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard and any applicable State standard that has been granted a waiver of preemption, that requirement in the building code shall not apply unless DOE has granted a waiver for the requirement.

Background and Need for Legislation

Appliance efficiency has been a subject of national interest since at least the initial energy price jolts of the early 1970's. In 1975, Congress passed the Energy Policy and Conservation Act (EPCA), which required the U.S. Department of Energy (DOE) to mandate energy labeling of appliances and to prescribe voluntary, industry-wide appliance efficiency improvements. In addition, ECPA authorized, but did not require, DOE to set mandatory efficiency standards if the labeling and voluntary approaches proved ineffective.

In 1978, Congress enacted the National Energy Conservation Policy Act (NECPA), 42 U.S.C. 6291 *et seq.* NECPA, among other things, amended EPCA to require DOE to promulgate expeditiously mandatory Federal efficiency standards for 13 covered products (refrigerators, freezers, water heaters, room air conditioners, central air conditioners, furnaces, dishwashers, clothes washers, clothes dryers, home heating equipment, kitchen ranges/ovens, television sets, and humidifiers/dehumidifers). DOE proceeded with the rulemaking and, on June 30, 1980, issued proposed standards for 8 of the 13 covered appliances.

In 1982 and 1983, DOE embarked upon a new rulemaking procedure. In December 1982 and August 1983, DOE issued final "no-standard" standards for most of the covered appliances. These standards constituted DOE's determination that, applying the statutory criteria of "technological feasibility" and "economic justification," the most appropriate Federal appliance standards were no standards at all.

The "no-standard" standards resulted in litigation. The Natural Resources Defense Council, joined by Congressman Richard Ottinger and the States of California, Minnesota and New York, sued DOE to overturn the standards as a wholesale misapplication of the Congressional directive to promulgate Federal standards. On July 16, 1985, the D.C. Circuit Court of Appeals struck the "no-standard" standards and directed the Department to initiate a new rulemaking procedure in accordance with the statutory intent. *NRDC* v. *Herrington*, 768 F.2d 1355 (D.C. Cir. 1985). That rulemaking is still in progress.

While Congress was enacting the first Federal appliance standards legislation in the 1970s, some states begin enacting their own appliance standards legislation. First California, and later New York, Wisconsin, Minnesota and Oregon, passed legislation or promulgated regulations establishing standards for appliances covered under Federal law. Although NECPA provides that Federal appliance standards preempt state standards, the law also allows DOE to grant waivers to states able to demonstrate a "significant State or local interest" justifying the State's standards in lieu of the Federal standard.

At the same time that DOE promulgated the "no-standard" standards it began a practice of granting waiver petitions filed by the states. As a result, the major activity in appliance standards over the past decade has been at the state level. At present, more than a half-dozen states have appliance standards legislation of one kind or another on the books, and another ten states are moving in that direction. In addition, many States and localities regulate the efficiency of certain products by adopting requirements in their building codes, which govern overall energy consumption in new buildings.

In December 1985, DOE and the Solicitor General's Office decided not to appeal the Court's decision in *NRDC* v. *Herrington*. Appliance manufacturers, accordingly, were confronted with the absence

of Federal appliance standards for the immediate future, and a growing plethora of differing state regulations, complicating industry's long-term planning. Environmental groups, for their part, were put to the task of fighting a series of legislative battles at the state level, with litigation ensuing in some cases. In early 1986, the major appliance manufacturer associations and the Natural Resources Defense Council began a negotiation to resolve their long-standing differences in the area of appliance standards. That negotiation continued for close to six months and resulted in a comprehensive agreement which is the foundation of the National Appliance Energy conservation Act.

A version of the appliance standards bill substantially identical to H.R. 87 passed both Houses of Congress by unanimous consent in the last days of the 99th Congress. The bill was pocket vetoed by President Reagan on November 1, 1986. The President's vote message stated that "[t]he bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase lower-cost appliances, and constitutes a substantial intrusion into traditional State responsibilities and prerogatives."

Need For and Benefits of Legislation

As indicated, H.R. 87 represents a breakthrough in a decade-long battle between appliance manufacturers and environmental groups on the subject of appliance standards.

For manufacturers, H.R. 87 establishes explicit and uniform standards in the near term, and a detailed schedule for future standards in the long term. These provisions bring a degree of regulatory and certainty to the business planning of the appliance manfuacturing industry, which has had to grapple in recent years with a growing number of differing State appliance laws and regulations.

For environmentalists, H.R. 87 realizes a long-term objective of a rigorous, uniform standard effective in all 50 States. It also represents the close of a long era of costly, piecemeal battles in State legislatures and administrative rulemaking procedures to establish State and local appliance standards.

According to estimates prepared by the American Council for an Energy Efficient Economy (ACEEE), appliance standards will result in substantial energy cost savings to consumers and businesses. This legislation is designed to achieve these goals by establishing initial energy conservation standards for eleven major home appliances. These appliances account for approximately 24 percent of electricity consumption in the United States. In addition, this legislation requires DOE periodically to review the standards according to the schedule and criteria set forth in the new Act to determine whether to make the standards more stringent.

Table I, which was prepared by NRDC, compares the initial standards set forth in the Act with the most stringent existing or proposed State standards and with typical products currently on the market. The table also calculates the percentage difference in energy consumption of appliances meeting the initial standards set forth in the Act compared to typical current products.

Table II, also prepared by NRDC, shows the percentage of current models that do not meet the initial standards set forth in the Act.

Table III sets forth forecasts prepared by ACEEE. These forecasts project future energy consumption by appliances in the absence of standards and subtract from these values projected energy consumption with the standards.

TABLE 1.—NATIONAL APPLIANCE ENERGY CONSERVATION ACT OF STANDARDS

Appliance type	1984 average efficiency	Act efficiency	Resulting efficiency	State efficiency	Percent [1]
Refrigerators	1140 kWh/yr	976 kWh/yr	903 kWh/yr	1023 kWh/yr (CA'87) 722 kWh/yr (CA'92)	21
Freezers	799 kWh/yr	671 kWh/yr	621 kWh/yr	737/yr (CA'87) 511 kWh/yr (CA'92)	22
Room air conditioners	7.5 EER	8.6 EER	9.3 EER	8.4 EER (CA'79) 8.45 EER (NY'88-prop.) 8.7 EER (NY'92-prop.)	19
Central air conditioners	8.8 SEER	10.0 SEER	10.3 SEER	9.5 SEER (NY'85) 9.9 SEER (CA'93)	17
Water heaters:					
Gas	.484 EF	.544 EF	.554 EF	.524 EF (ASHRAE/CA)	13
Electric	.807 EF	.884 EF	.894 EF	.864 EF (ASHRAE/CA)	10
Furnaces	70% AFUE	78% AFUE	84% AFUE	71% AFUE (CA'78)	20%

[1] Percent change 1984 efficiency vs. resulting efficiency.
Revised September 12, 1986.

TABLE 2.—*Redesign requirements of appliance standards in the National Appliance Energy Conservation Act*

Appliance and product category	*Percent Redesign*
Refrigerators [1] (includes models with through-the-door ice): [2]	89
Top-freezer, auto defrost [2]	92
Side-freezer, auto defrost [2]	42
Manual defrost	
Freezers: [1]	83
Chest	87
Upright manual	
Room air conditioners: [3]	
No reverse cycle—with side louvers:	78
Less than 6,000 Btu/hr	49
6,000 to 7,999 Btu/hr	56
8,000 to 13,999 Btu/hr	81
14,000 to 19,999 Btu/hr	60
20,000 Btu/hr and over	17
Reverse cycle—with side louvers	
No reserve cycle—without side louvers:	0
Less than 6,000 Btu/hr	45
6,000 to 7,999 Btu/hr	76
8,000 to 13,999 Btu/hr	100
14,000 to 19,999 Btu/hr	(2)
20,000 Btu/hr and over	0
Reverse cycle—without side louvers	
Central air conditioners: [4]	[5] 90
Split system	[5] 89
Package system	

Appliance and product category	Percent Redesign
Furnaces:[6]	
Oil boiler	57
Oil furnace	58
Gas boiler	79
Gas furnace	79

[1] NRDC sort of AHAM 1986 Directory of Certified Refrigerators and Freezers, Edition No. 2, June, 1986.
[2] No models offered.
[3] NRDC sort of AHAM 1986 Consumer Selection Guide For Room Air Conditioners. The earlier version of this table contained an error which omitted the redesign percentages for air conditioners over 20,000 BTU/hr and substituted the percent redesign for the Reverse Cycle with Side Louvers category, which in turn was left blank. Other small variations in the redesign numbers reflect differences with the AHAM sort which includes Special Application Models and other unique classes which were not considered in the original NRDC sort.
[4] ARI 3rd Quarter 1985 Efficiency Statistics of Nationally-shipped units Figure 4 of ARI Submission to Massachusetts Executive Office of Energy Resources, March,1986.
[5] These figures refer to shipments, not models.
[6] Sort of GAMA Consumers' Directory of Certified Furnace and Boiler Efficiency Ratings, May 1986, done by Glenn Reed, Massachusetts Executive Office of Energy Resources. These numbers differ from the previous version of this table because they were based on an AFUE of 78% according to GAMA's indoor air/indoor furnace test. Since the bill specifies 78% AFUE using outdoor air, the rule-of-thumb adjustment to the indoor test is 2% AFUE upward. Thus the sort is computed at the 80% AFUE level in this version, not the 78% AFUE level.
Revised September 12, 1986.

TABLE 3.—FORECAST OF FUTURE ENERGY CONSUMPTION OF APPLIANCES

Product	Electricity savings by 2000			Energy savings by 2000		Cost savings by 2000
	Annual (Twh/yr)	Lifetime (Twh)	Peak MW	Annual (Tbtu/yr)	Lifetime (quads)	Net lifetime $\$ \times 10^9$
Refrigerators	13.86	263	1,851	159.39	3.02	$5,696
Freezers	2.59	54	340	29.79	0.62	1,358
Electric water heaters	20.87	271	2,573	240.01	3.12	8,798
Room air conditioners	4.59	69	4,890	52.79	0.79	854
Central air conditioners	11.62	139	12,385	133.63	1.60	829
Furnaces				121.78	2.80	3,010
Gas water heaters				190.19	4.37	6,280
Gas ranges				31.83	0.73	1,325
Total	53.53	796	22,039	959.40	17.05	28,150

[1] Net lifetime, dollars $\times 10^9$.

Source: American Council for an Energy Efficient Economy, "Energy and Economic Savings Potential From National Appliance Efficiency Standards" (August 1986).

These calculations forecast energy savings up to the year 2000, and assume that DOE maintains the Federal standards at the initial levels set forth in the bill. ACEEE estimates a reduction in energy consumption of 17 quads by the year 2000 by virtue of the standards in H.R. 87. Based on their assumptions, peak demand for electrical capacity would be reduced by 22,000 megawatts. Based on the same assumptions, ACEEE estimates that the present value of cost savings to consumers, based on national average utility rates, would be $28 billion.

Although not all members of the environmentalist-industry coalition agree with these projected energy and cost savings, all do agree that the standards will enhance the certainty and reliability of future energy demand projections. Specifically, these standards would end an era of confusion and uncertainty. The issue of standards has remained unsettled for many years; in the absence of this legislation, this situation could continue for the indefinite future. The D.C. Circuit's decision in *NRDC V. Herrington* requires DOE to conduct a new rulemaking proceeding for appliance standards. This

proceeding will continue for a substantial time, and its outcome is uncertain. Litigation over DOE's determination would cause further delay and uncertainty. Such delay and uncertainty does not serve the public interest, including the interests of energy conservation and of rational planning by utilities, businesses, and other public and private entities. In the meantime, the States may be expected to fill the void—leading to a patchwork of unpredictable and inconsistent requirements. For these reasons, H.R. 87 is an important step in the Congressional initiative on appliance standards that began in 1975.

Hearings

No legislative hearings were held in the 100th Congress. In the 99th Congress, the Subcommittee on Energy Conservation and Power held one day of hearings on the National Appliance Energy Conservation Act on September 10, 1986. Testimony was received from 6 witnesses, representing 6 organizations, with additional material submitted by numerous other individuals and organizations. The witnesses testifying at the hearing were: Peter A. A. Berle, President and C.E.O., National Audubon Society; Charles A. Dowd, President, Admiral, A Division of Maytag Company, representing the Association of Home Appliance Manufacturers; David Goldstein, Senior Staff Scientist, Natural Resources Defense Council; Robert J. Bauer, President and C.E.O., Empire Comfort Systems, Inc., representing the Gas Appliance Manufacturers Association; Howard Geller, Associate Director, American Council For An Energy-Efficient Economy; and John W. Norris, Jr., President and C.E.O., Lennox Industries, Inc., representing the AirConditioning and Refrigeration Institute.

Committee Consideration

On February 24, 1987, the Subcommittee on Energy and Power met in open session and ordered reported the bill H.R. 87, as amended, by voice vote, a quorum being present. On February 26, 1987, the Committee met in open session and ordered reported the bill H.R. 87 with amendments by voice vote, a quorum being present.

Committee Oversight Findings

Pursuant to clause 2(1)(3)(A) of Rule XI of the Rules of the House of Representatives, no oversight findings or recommendations have been made by the Committee.

Committee on Government Operations

Pursuant to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

Committee Cost Estimate

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no significant impact on spending for fiscal years 1988 through 1992.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 26, 1987.

Hon. JOHN D. DINGELL,
Chairman, Committee on Energy and Commerce, House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 87, the National Appliance Energy Conservation Act of 1987, as ordered reported by the House Committee on Energy and Commerce, February 26, 1987.

H.R. 87 establishes energy conservation standards for categories of covered appliances. It provides a schedule for the Secretary of Energy to evaluate these standards to ensure that the maximum energy efficiency that is technologically feasible and economically justified is being achieved. This bill also provides for the preemption of state energy conservation appliance standards after the federal standards are in effect.

CBO estimates that H.R. 87 will have no significant impact on government spending for fiscal years 1988 through 1992. The Department of Energy currently plans to conduct technical and economic valuations of appliances on essentially the same schedule described in H.R. 87.

Enactment of this bill would not directly affect the budgets of state or local governments.

On January 29, 1987, the Congressional Budget Office prepared a cost estimate for S. 83, a similar bill ordered reported by the Senate Committee on Energy and Natural Resources. The estimated budget impact of those two bills is the same.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER,
Director.

INFLATIONARY IMPACT STATEMENT

Pursuant to cause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee makes the following statement with regard to the inflationary impact of the reported bill: The legislation is not expected to have any inflationary impact.

SECTION-BY-SECTION ANALYSIS

Section 1 entitles the "National Appliance Energy Conservation Act" (the "Act").

Section 2 (Definitions) amends Section 321(a) of the Energy Policy and Conservation Act ("EPCA") by adding definitions which are required to implement the specific standards provisions and other provisions added to EPCA by the Act. Section 2(a) defines "energy conservation standard" to include the standards set forth in the Act and future standards that the Secretary of the Department of Energy ("the Secretary" or "DOE") may promulgate. Section 2(b) defines the technical terms that are used in the standards.

Section 3 (Coverage) amends Section 322(a) of EPCA, listing the products that are covered by the Act. These products are: refrigerators; refrigerator-freezers; freezers; room air conditioners; central air conditioners and central air conditioning heat pumps; water heaters; pool heaters; direct heating equipment; furnaces; dishwashers; clothes washers; clothes dryers; and kitchen ranges and ovens. Other consumer products may be regulated by the Secretary under existing Section 322(b) of EPCA. Consumer products designed solely for use in recreational vehicles and other mobile equipment are not covered by the Act.

Section 4 (Test Procedures) Section 323 of EPCA is amended so as to conform with the establishment of specific standard levels in the Act. New Section 323(a) states that all test procedures and related determinations prescribed or made by the Secretary with respect to any covered product which are in effect on the date of enactment of the Act remain in effect unless and until the Secretary amends the test procedures or related determinations.

New Section 323(b) authorizes the Secretary, in cooperation with the National Bureau of Standards, to amend existing test procedures, or to prescribe new test procedures for any covered product for which there are no test procedures. If the Secretary determines that a test procedure should be prescribed or amended, he shall promptly publish in the Federal Register proposed test procedures and afford interested parties an opportunity for comment. The Act extends the comment period to a minimum of 60 days (compared to 45 days under current law), and allows the Secretary to extend this comment period to up to 270 days for good cause shown.

New Section 323(c) states that until the Secretary has amended a test procedure applicable to a covered product, the existing proscriptions in EPCA—that no manufacturer, distributor, retailer or private labeler may make a representation respecting the energy use or efficiency of such product or the cost of energy consumed by such product unless the product has been tested in accordance with the test procedures—remain in effect.

New Section 323(d) restates existing law regarding cases in which test procedures are not required.

New Section 323(e) addresses the effect of amendment of a test procedure on a Federal appliance standard. The Secretary must determine in the rulemaking for the amended test procedure whether and to what extent the proposed test procedure would alter the measured energy efficiency or measured energy use of the covered products. If the amended test procedure will have such an effect, then the applicable standard levels must be ammended during the same rulemaking. In determining the amended standard level, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency or energy use of a representative sample of covered products that minimally comply with the existing standard level. The average of such energy efficiency or use levels under the amended test procedure will constitute the amended standard level. All existing models that comply with the existing standard and all revised models that have the same energy efficiency or energy use characteristics as such existing models shall be deemed

to comply with the amended standard. This provision does not modify the Secretary's duty to issue final rules relating to amended standards levels as described in new Section 325.

The purpose of this provision is to assure that amendment of a test procedure, which may occur at any time, will neither strengthen nor weaken the energy conservation standards, which may be amended only at certain specified times. The provision is needed in those cases where the measured energy efficiency or measured use of a product changes as the result of a revised test procedure. The Section also ensures that any products that comply with an energy conservation standard under an existing test procedure will still be deemed to comply with that standard even if an amended test procedure affects the measured energy efficiency or measured use of the product changes as the result of a revised test procedure.

Section 5 (Energy Conservation Standards). This section significantly amends existing Section 325 of EPCA by establishing the specific initial energy conservation standards for the covered products, and by requiring future rulemakings under mandatory schedules and revised criteria.

Each subsection sets forth deadlines for two mandatory DOE revisions of each standard. Under each subsection, DOE must issue, by specified dates, proposed and final rules relating to amendments of the standards. Thereafter, DOE's duty to issue rules determining whether to amend the standards is discretionary. Subsequent rulemakings may also be initiated by petition.

For each standard, a minimum duration period (*i.e.*, the period between the effective date of a standard and the earliest possible effective date of a revision of that standard) is prescribed for each initial and revised standard. Manufacturers are also given specified lead times (*i.e.*, the time between final publication of a revised standard by DOE and the effective date of the revised standard) within which to redesign their products to comply with new standards. This minimum lead time is either three years or five years, depending on the products.

New Section 325(a) states that this Section provides for specific Federal energy conservation standards to be administered by DOE. The Secretary is also authorized to prescribe amended energy conservation standards for each type or class of covered product for which there is a legislated standard, and the Secretary may promulgate new standards for other consumer products.

New Section 325(b) contains the initial standard levels for refrigerators, refrigerator-freezers and freezers. This standard applies to all products manufactured on or after January 1, 1990. The initial standards do not apply to refrigerator-freezers with total refrigerated volume exceeding 39 cubic feet or freezers with total refrigerated volume exceeding 30 cubic feet.

Section 325(b)(3)(A)(i) also provides a specific date (July 1, 1988) by which a proposed rule regarding possible revisions to the standards must be published and states that a final rule shall be published no later than July 1, 1989. If a final rule is not published by January 1, 1990, then any amendment of the standards shall not apply to products manufactured before January 1, 1995.

Section 325(b)(3)(A)(ii) relates to California Energy Commission refrigerator-freezer standards. These State standards are to take

effect in 1992 under California law. If DOE fails to issue a final rule by January 1, 1990 relating to revision of the existing Federal standards, then the California 1992 standards go into effect in California on January 1, 1993. If DOE fails to issue a final rule by January 1, 1992 relating to revision of the existing Federal standards, then any State regulations which apply to products manufactured on or after January 1, 1995 apply in those States until a subsequent Federal refrigerator-freezer rule is put into effect.

New Sections 325(c) through 325(h) contain the initial standard levels and applicable dates for, respectively: room air conditioners (Section 325(c)); central air conditioners and central air conditioning heat pumps (Section 325(d)); water heaters, pool heaters, and direct heating equipment (Section 325(e)); furnaces (Section 325(f)); dishwashers, clothes washers and clothes dryers (Section 325(g)); and kitchen ranges and ovens (Section 325(h)).

The Committee modified the language of the bill amending Section 325(f)(1)(B) of EPCA to include an additional clause (iii). The purpose of the new clause is to clarify that, in setting an energy conservation standard for small gas furnaces (those having an input of less than 45,000 Btu's per hour), the Secretary of Energy shall, in a manner which is otherwise consistent with the Act, establish the standard at a level between 71 percent and 78 percent AFUE "which the Secretary determines is not likely to result in a significant shift from gas heating to electric resistance heating with respect to either residential construction or furnace replacement." The phrase "electric resistance heating" does not include "heat pump" as defined in section 2(b)(24), and does not include supplemental backup electric resistance heating included in many heat pump configurations. The phrase "gas heating" means "natural gas heating."

Nationwide, the use of electric resistance heating in single family dwellings has declined over the last ten years. Over this same time period, the use of gas furnaces and electric heat pumps has increased. The most recent DOE data show that in areas of the country where natural gas is available, 88 percent of all housing units are heated by natural gas. (Natural gas is available in all parts of the country except some rural areas.) As the technology and efficiency of heat pumps have improved, their use has also increased, but clearly the great majority of homes throughout the country rely on natural gas heat. Section 325(f)(1)(B)(iii) should be implemented in a manner that recognizes that the selection of climate control equipment for new homes and for replacements in existing homes is a marketplace decision. The Secretary, in establishing the small gas furnace standard, must take into account the criteria set forth in Section 325(l).

New Section 325(i), which essentially restates existing law, allows the Secretary, in his discretion, to promulgate standards for additional products, and specifies that a five-year lead time is required between the publication of a final rule and the effective date of the standards.

New Section 325(j) requires the Secretary to undergo two subsequent rulemakings, at specified times, to determine whether the extant standard for a covered product should be amended. Thereaf-

r, rulemakings to determine whether to amend a standard are scretionary.

New Section 325(k) provides that the discretionary rulemakings escribed in Section 325(j) may be initiated pursuant to a properly ated petition. The Secretary is required to grant a petition to ini-ate a rulemaking where the petition contains evidence which, as-uming no other evidence were considered, provides an adequate asis for amending the standards under the following criteria: (1) nended standards would result in significant conservation of nergy; (2) amended standards are technologically feasible; and (3) nended standards are cost effective. Section 9 of H.R. 87, *see elow,* permits the petitioner to appeal the denial of a petition in ederal District Court.

New Section 325(l) establishes the criteria under which the Sec-tary may prescribe new or amended standards. The Secretary ay not increase the maximum allowable energy use or decrease ie minimum required energy efficiency of a covered product nder the standards prescribed in the Act or subsequently adopted, lthough the Secretary may determine that the standards should emain the same.

This Section retains the requirement of existing law that energy nservation standards, including new or amended standards, shall e designed to achieve the maximum improvement in energy effi-ency which the Secretary determines is "technologically feasible" nd "economically justified." This Section also essentially restates ie requirements of existing law regarding the Secretary's evalua-on of the technological feasibility and economic justification crite-a. In addition, the Section creates a statutory presumption that a ew or amended standard level is economically justified if the Sec-etary finds that the additional first cost to the consumer of pur-hasing a product complying with a given standard level will be ss than three times the energy savings during the first year that ie consumer will receive as a result of the standard. Although is presumption is rebuttable, it provides specific guidance to DOE iat standard levels with a simple payback period of three years or ss are presumptively economically justified. However, a determi-ation that this criterion is not met shall not be taken into consid-ration in the Secretary's determination of whether a standard is conomically justified. The Secretary shall consider, among other hings, the statutory factor set forth in existing law requiring anal-sis of life-cycle costs.

New Section 325 also provides that the Secretary may not pro-ulgate a new or amended standard if he finds that interested per-ons have established by a preponderance of the evidence that the tandard is likely to result in the unavailability in the United tates in any covered product type or class of performance charac-eristics (including reliability), features, sizes, capacities, and vol-mes that are substantially the same as those generally available n the United States at the time of the Secretary's finding. The fail-re of some classes or types to meet this criterion at a given stand-rd level shall not affect the Secretary's authority to promulgate a tandard for such classes or types at a level that does meet the cri-erion. Similarly, the failure of some classes or types to meet this equirement shall not affect the Secretary's authority to prescribe

a standard for other classes or types. This requirement is designed to ensure that manufacturers will not have to eliminate various performance characteristics in order to meet standards.

New subsection 325(m) contains the procedures for prescribing new or amended standards. This section increases to 60 days (versus 45 days in current law) the public comment period on an advance notice of proposed rulemaking and on proposed rules. It also provides that an amended or new rule shall be published as soon as practicable after the close of the comment period but not less than 90 days after the publication of the proposed rule in the Federal Register. In all other respects, this subsection essentially retains the requirements of current law.

Subsections (n), (o) and (q) are essentially identical to subsections (f), (j) and (e), respectively, of current law.

Subsection (p) states that compliance with the performance standards either set forth in or required by the Act shall be determined using the test procedures and compliance criteria of Section 323.

Section 6 (Requirements of Manufacturers) Section 326(d) of EPCA is amended to add a requirement that in administering the Act the Secretary shall give due consideration to existing public sources of information including, but not limited to, nationally-recognized certification programs of trade associations. The Secretary is also required to exercise his authority in such a manner as to minimize unnecessary burdens on manufacturers of covered products. This language has been added in order to minimize to the extent possible the reporting and testing requirements of the standards program.

Section 7 (Effect on Other Law) Section 327 of EPCA is amended significantly to create new preemption provisions, including criteria under which States can receive waivers from preemption.

Section 327(a), which restates existing law, provides that the Act supersedes State regulations which provide for the disclosure of information with respect to any measure of energy consumption of any covered product if: (1) the State regulation requires testing or use of any measure of energy consumption or any energy descriptor in any manner other than that prescribed under the Act's test procedures; or (2) such State regulation requires disclosure of information with respect to the energy use or efficiency of any covered product other than information prescribed under the labeling provisions of EPCA.

New Section 327(b) relates to the period between the date of enactment of the Act and the effective dates of each Federal energy conservation standard. This section states as a general principle that no State appliance efficiency regulations or requirements shall be applicable unless such regulations or requirements are prescribed or enacted before January 8, 1987 and are applicable to products before January 3, 1988. The section also lists other exceptions to preemption.

New Section 327(c) states that on the effective date for each Federal energy conservation standard, that standard supersedes any State regulation, as provided under current EPCA. This supersession is subject to the special provisions for building codes in new Section 327(f), the special provision for the California 1992 refriger-

or-freezer standard, any waiver from preemption granted by DOE ›on State petition, or other specified exceptions.

New Section 327(d) allows States to file petitions seeking waiver Federal preemption. This subsection provides new and more de-iled criteria that a State must establish by a preponderance of e evidence in order to receive an exemption. The State is re-ıired to show that its regulation is needed to meet "unusual and mpelling State or local interests," which are defined as interests bstantially different in nature or magnitude from those prevail-g in the United States generally. In addition, these interests ust be such that the costs, benefits, burdens and reliability of ıergy savings resulting from the State regulation make it prefera-e or necessary when measured against the costs, benefits, bur-ıns and reliability of alternative approaches to energy savings or oduction, including reliance on reasonably predictable, market-duced improvements in efficiency of all products subject to the ate regulation. These factors are to be evaluated as part of the ate's energy plan and forecast. This subsection required the State show that it has determined through a rational planning process at State regulations are preferable when compared to other alter-ıtives.

New subsection (d) also provides that even if the State has made showing of an unusual and compelling interest, the Secretary ay not grant the requested waiver if interested persons have es-blished by a prepdonerance of the evidence that such State regu-tion will significantly burden marketing, manufacturing, distri-ıtion, sale or servicing of affected products on a national basis. In aluating this factor, the Secretary shall evaluate: the extent to hich the State regulation will increase manufacturing and distri-ıtion costs; the extent to which the State regulation will disad-ıntage smaller manufacturers, distributors or dealers or lessen ıpetition in the State; the extent to which the State regulation ould cause a burden on manufacturers to redesign and produce ıe products, taking into account the reduction in current or pro-cted models which would result from the regulation; and the :tent to which the State regulation is likely to contribute signifi-ıntly to a proliferation of State appliance efficiency requirements. hese specific factors are non-exclusive.

New Section 327(d) also prohibits the Secretary from granting a :ate waiver petition if interested persons establish by a prepon-:rance of the evidence that the State regulation is likely to result the unavailability in the State of any covered product type of ass of performance characteristics (including reliability), features, zes, capacities and volumes that are substantially the same as ıose generally available in the State at the time of the Secretary's nding. This subsection also sets forth the procedure under which ıe Secretary shall give notice of any petition filed and afford per-ıns a reasonable opportunity to comment.

New subsection 327(d) further provides that any State regulation :anted an exemption shall apply to products manufactured three :ars after the rule granting such exemption is published in the ederal Register; however, the Secretary may lengthen the time to ve years if he finds that additional time is necessary due to the

substantial burdens of retooling, redesign or distribution needed to comply with the State regulation.

In general, no State regulation, except as specified in subsection (b), may go into effect prior to the earliest possible effective date established by the Act for a revision of the energy conservation standards. However, a State may implement its regulation before that date if it can show by a preponderance of the evidence that an "energy emergency condition" exists within the State which imperils the health, safety and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of energy to its residents at less than prohibitive costs. The State must also show that this emergency cannot be alleviated substantially by the importation of energy or the use of interconnection agreements, and that the regulation is necessary to alleviate the condition.

This Section further provides that any interested person may file a petition requesting supersession of a State regulation which has been granted a waiver from preemption, but only if a Federal energy conservation standard for the same product has been amended since the waiver was granted. The burden of proof for superseding the State rule is on the petitioner.

Section 327(e) provides that State procurement standards more stringent than the Federal energy conservation standards are not superseded. This provision is substantially the same as Section 327(c) of current law.

New Section 327(f) describes Federal preemption with regard to energy efficiency or energy use requirements regarding covered products contained in State and local building codes. State and local building codes governing new construction typically regulate the energy efficiency of central heating and cooling equipment and water heaters. This section states that energy efficiency or use requirements contained in a State or local building code enacted or prescribed on or before January 8, 1987 are not preempted until the effective date of the Federal energy conservation standard. Such requirements adopted after January 8, 1987 are not preempted if they do not require the energy efficiency of a covered product to exceed the standard set forth in a "national voluntary consensus standard" or in an applicable State standard, whichever is higher. National voluntary consensus standards include those adopted by the Association of Air Conditioning, Heating and Refrigeration Engineers (ASHRAE), which sets energy efficiency standards using procedures sanctioned by the American National Standards Institute. ASHRAE standards are adopted by most State and local building codes.

Section 327(f) also describes the preemption applicable after the effective date of the initial Federal standard for a covered product. This section prohibits a State from expressly prescribing an efficiency standard for a covered product that exceeds the Federal standard, unless the State has obtained a waiver from preemption, but allows States flexibility to implement performance-based building code approaches. Such approaches authorize builders to adjust or trade off the efficiencies of the various building components so long as an energy goal is met. Section 327(f)(3) sets forth limited restrictions designed to ensure that performance-based building

codes cannot effectively require the installation of covered products whose efficiencies exceed either the applicable Federal standards or State standards for which a waiver from preemption has been obtained. Finally, the Section states that a State or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code, unless the building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard and any applicable State standard that has been granted a waiver from preemption.

Section 8 (Citizen Suits) Section 335(a) of EPCA is amended by adding a Federal cause of action against the Secretary for failing to comply with the schedule in new Section 325 of EPCA. The courts are required to advance any such cases on the docket and to expedite the disposition of such cases. Jurisdiction is provided for the court to order appropriate relief, including relief that ensures the Secretary's compliance with future deadlines.

Section 9 (Administrative Review and Judicial Review) Section 336 of EPCA remains essentially the same except for technical amendments. In addition, new subsection (c) states that jurisdiction is vested in Federal district courts over actions brought by any adversely affected person to determine whether a State or local government is complying with Section 327 of this Act and over actions brought by any person who files a petition under new Section 325(k) which is denied by the Secretary. This subsection, among other things, allows persons to seek declaratory judgments that State building codes do not comply with the criteria set forth in the Act. The provision is necessary because the Act does not require States to petition DOE to show that their building codes comply with Section 327(f).

Section 10 (Annual Report) Section 338 of EPCA is amended by adding at the end a statement that nothing in the Section provides a defense or justification for a failure by the Secretary to comply with a nondiscretionary duty.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Energy Policy and Conservation Act

TITLE III—IMPROVING ENERGY EFFICIENCY

* * * * * * *

Part B—Energy Conservation Program for Consumer Products Other Than Automobiles

DEFINITIONS

SEC. 321. (a) For purposes of this part:

(1) * * *

* * * * * * *

[(6) The term "energy efficiency standard" means a performance standard—

[(A) which prescribes a minimum level of energy efficiency for a covered product, determined in accordance with test procedures prescribed under section 323, and

[(B) which includes any other requirements which the Secretary may prescribe under section 325(c).]

(6) The term "energy conservation standard" means—

(A) a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use for a covered product, determined in accordance with test procedures prescribed under section 323; or

(B) a design requirement for the products specified in paragraphs (6), (7), (8), (10), and (13) of section 322(a); and

includes any other requirements which the Secretary may prescribe under section 325(o).

* * * * * * *

(19) The term "AV" is the adjusted volume for refrigerators, refrigerator-freezers, and freezers, as defined in the applicable test procedure prescribed under section 323.

(20) The term "annual fuel utilization efficiency" means the efficiency descriptor for furnances and boilers, determined using test procedures prescribed under section 323 and based on the assumption that all—

(A) weatherized warm air furnaces or boilers are located out-of-doors;

(B) warm air furnaces which are not weatherized are located indoors and all combustion and ventilation air is admitted through grills or ducts from the outdoors and does not communicate with air in the conditioned space; and

(C) boilers which are not weatherized are located within the heated space.

(21) The term "central air conditioner" means a product, other than a packaged terminal air conditioner, which—

(A) is powered by single phase electric current;

(B) is air-cooled;

(C) is rated below 65,000 Btu per hour;

(D) is not contained within the same cabinet as a furnace the rated capacity of which is above 225,000 Btu per hour; and

(E) is a heat pump or a cooling only unit.

(22) The term "efficiency descriptor" means the ratio of the useful output to the total energy input, determined using the test procedures prescribed under section 323 and expressed for the following products in the following terms:

(A) For furnaces and direct heating equipment, annual fuel utilization efficiency.

(B) For room air conditioners, energy efficiency ratio.

(C) For central air conditioning and central air conditioning heat pumps, seasonal energy efficiency ratio.

(D) For water heaters, energy factor.
(E) For pool heaters, thermal efficiency.

(23) The term "furnace" means a product which utilizes only single-phase electric current, or single-phase electric current or DC current in conjunction with natural gas, propane, or home heating oil, and which—

(A) is designed to be the principal heating source for the living space of a residence;

(B) is not contained within the same cabinet with a central air conditioner whose rated cooling capacity is above 65,000 Btu per hour;

(C) is an electric central furnace, electric boiler, forced-air central furnace, gravity central furnace, or low pressure steam or hot water boiler; and

(D) has a heat input rate of less than 300,000 Btu per hour for electric boilers and low pressure steam or hot water boilers and less than 225,000 Btu per hour for forced-air central furnaces, gravity central furnaces, and electric central furnaces.

(24) The terms "heat pump" or "reverse cycle" mean a product, other than a packaged terminal heat pump, which—

(A) consists of one or more assemblies;

(B) is powered by single phase electric current;

(C) is rated below 65,000 Btu per hour;

(D) utilizes an indoor conditioning coil, compressors, and refrigerant-to-outdoor-air heat exchanger to provide air heating; and

(E) may also provide air cooling, dehumidifying, humidifying circulating, and air cleaning.

(25) The term "pool heater" means an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications.

(26) The term "thermal efficiency of pool heaters" means a measure of the heat in the water delivered at the heater outlet divided by the heat input of the pool heater as measured under test conditions specified in section 2.8.1 of the American National Standard for Gas Fired Pool Heaters, Z21.56-1986, or as may be prescribed by the Secretary.

(27) The term "water heater" means a product which utilizes oil, gas, or electricity to heat potable water for use outside the heater upon demand, including—

(A) storage type units which heat and store water at a thermostatically controlled temperature, including gas storage water heaters with an input of 75,000 Btu per hour or less, oil storage water heaters with an input of 105,000 Btu per hour or less, and electric storage water heaters with an input of 12 kilowatts or less;

(B) instantaneous type units which heat water but contain no more than one gallon of water per 4,000 Btu per hour of input, including gas instantaneous water heaters with an input of 200,000 Btu per hour or less, oil instantaneous water heaters which an input of 210,000 Btu per hour or less, and electric instantaneous water heaters with an input of 12 kilowatts or less; of

(C) heat pump type units, with a maximum current rating of 24 amperes at a voltage no greater then 250 volts, which are products designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls necessary for the device to perform its function.

(28) The term "weatherized warm air furnace or boiler" means a furnace or boiler designed for installation outdoors, approved for resistance to wind, rain, and snow, and supplied with its own venting system.

[COVERAGE

[SEC. 322. (a) A consumer product is a covered product if it is one of the following types (or is designed to perform a function which is the principal function of any of the following types):

[(1) Refrigerators and refrigerator-freezers.
[(2) Freezers.
[(3) Dishwashers.
[(4) Clothes dryers.
[(5) Water heaters.
[(6) Room air conditioners.
[(7) Home heating equipment, not including furnaces.
[(8) Television sets.
[(9) Kitchen ranges and ovens.
[(10) Clothes washers.
[(11) Humidifiers and dehumidifiers.
[(12) Central air conditioners.
[(13) Furnaces.
[(14) Any other type of consumer product which the Secretary classifies as a covered product under subsection (b).]

COVERAGE

SEC. 322. (a) IN GENERAL.—The following consumer products, excluding those consumer products designed solely for use in recreational vehicles and other mobile equipment, are covered products

(1) Refrigerators, refrigerator-freezers, and freezers which can be operated by alternating current electricity, excluding—

(A) any type designed to be used without doors; and

(B) any type which does not include a compressor and condenser unit as an integral part of the cabinet assembly

(2) Room air conditioners.

(3) Central air conditioners and central air conditioning heat pumps.

(4) Water heaters.

(5) Furnaces.

(6) Dishwashers.

(7) Clothes washers.

(8) Clothes dryers.

(9) Direct heating equipment.

(10) Kitchen ranges and ovens.

(11) Pool heaters.
(12) Television sets.
(13) Any other type of consumer product which the Secretary classifies as a covered product under subsection (b).

[(b)(1)] *(b) SPECIAL CLASSIFICATION OF CONSUMER PRODUCT.*—(1) The Administrator may classify a type of consumer product as a covered product if he determines that—

(A) classifying products of such type as covered products is necessary or appropriate to carry out the purposes of this Act, and

(B) average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (or its Btu equivalent) per year.

* * * * * * *

[TEST PROCEDURES

[SEC. 323. (a)(1) The Secretary shall, during the 30-day period which begins on the date of enactment of this Act, afford interested persons an opportunity to present written data, views, and arguments with respect to test procedures to be developed for covered products of each of the types specified in paragraphs (1) through (13) of section 322(a).

[(2) The Secretary shall direct the National Bureau of Standards to develop test procedures for the determination of (A) estimated annual operating costs of covered products of the types specified in paragraphs (1) through (13) of section 322(a), and (B) at least one other useful measure of energy consumption of such products which the Secretary determines is likely to assist consumers in making purchasing decisions.

[(3) The Secretary shall publish proposed test procedures with respect to all covered products of each of the types specified in paragraphs (1) through (13) of section 322(a), and shall afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such proposed test procedures. Such comment period shall not be less than 45 days.

[(4) The Secretary shall prescribe test procedures for the determination of (i) estimated annual operating costs of all covered products of each of the types specified in paragraphs (1) through (13) of section 322(a), and (ii) at least one other measure of energy consumption of such products which the Secretary determines is likely to assist consumers in making such purchasing decisions. Except as provided in paragraph (6), such test procedures shall be prescribed not later than January 31, 1978.

[(5) If the Secretary has classified a type of product as a covered product under section 322(b), the Secretary may, after affording interested persons an opportunity to comment, direct the National Bureau of Standards to develop, and may publish proposed test procedures for such type of covered product (or class thereof). The Secretary shall afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such proposed test procedures. Such comment period shall not be less than 45 days. The Secretary may thereafter prescribe test procedures in accordance with subsection (b) of this section with respect

to such type or class of product, if the Secretary or the Commission determines that—

[(A) the application of subsection (c) to such type of covered product (or class thereof) will assist consumers in making purchasing decisions, or

[(B) labeling in accordance with section 324 will assist purchasing in making decisions.

[(6)(A) The Secretary may delay the prescription of test procedures under paragraph (4) for a type of covered product (or class thereof) if he determines that he cannot, within applicable time period, prescribe test procedures applicable to such type (or class) which meet the requirements of subsection (b), and he submits to the Congress a report of such determination together with the reasons therefor, and also publishes such determination (and reasons) in the Federal Register. In any such case, he shall prescribe such test procedures as soon as practicable, but in no event later than 90 days after the date specified in paragraph (4).

[(B) The Secretary is not required to publish and prescribe test procedures under paragraphs (3) and (4) for a type of covered product (or class thereof) if he determines, by rule that test procedures cannot be developed which meet the requirements of subsection (b) and publishes such determination in the Federal Register, together with the reasons therefor. For purposes of section 327, a determination under this subparagraph with respect to any type (or class) of covered product, while effective, shall have the same effect as would a standard prescribed for such type (or class) under section 325.

[(7)(A) In the case of—

[(i) any test procedure prescribed under this subsection; or

[(ii) any determination under paragraphs (6) that a test procedure cannot be developed which meets the requirements of subsection (b);

the Secretary shall, not later than 3 years after the date of the enactment of this paragraph (and from time to time thereafter), conduct a reevaluation and, on the basis of such reevaluation, shall determine if such test procedure should be amended or such determination should be rescinded. In conducting such reevaluation, the Secretary shall take into account such information as he deems relevant, including technological developments relating to the energy efficiency of the type (or class) of covered products involved.

[(B) If the Secretary determines under subparagraph (A) that—

[(i) a test procedure should be amended, he shall promptly publish in the Federal Register proposed test procedures incorporating such amendments, or

[(ii) a determination under paragraph (6) should be rescinded, he shall promptly publish notice thereof in the Federal Register,

and afford interested persons an opportunity to present oral and written data, views, and arguments. Such comment period shall not be less than 45 days.

[(b)(1) Any test procedures prescribed under this section shall be reasonably designed to produce test results which reflect energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle (as deter-

mined by the Secretary), and shall not be unduly burdensome to conduct.

[(2) If the test procedure is a procedure for determining estimated annual operating costs, such procedure shall provide that such costs shall be calculated from measurements of energy use in a representative average-use cycle (as determined by the Secretary), and from representative average unit costs of the energy needed to operate such product during such cycle. The Secretary shall provide information to manufacturers respecting representative average unit costs of energy.

[(c)(1) Effective 180 days after a test procedure rule applicable to a covered product is prescribed under this section, no manufacturer, distributor, retailer, or private labeler may make any representation—

[(A) in writing (including a representation on a label), or

[(B) in any broadcast advertisement,

respecting the energy consumption of such product or cost of energy consumed by such product, unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing.

(2) On the petition of any manufacturer, distributor, retailer or private labeler, filed not later than the 60th day before the expiration of the period involved, the 180-day period referred to in paragraph (1) may be extended by the Commission with respect to the petitioner (but in no event for more than an additional 180 days) if he finds that the requirements of paragraph (1) would impose on such petitioner an undue hardship (as determined by the Commission).]

TEST PROCEDURES

SEC. 323. (a) GENERAL RULE.—All test procedures and related determinations prescribed or made by the Secretary with respect to any covered product (or class thereof) which are in effect on the date of enactment of the National Appliance Energy Conservation Act of 1987 shall remain in effect until the Secretary amends such test procedures and related determinations under subsection (b).

(b) AMENDED AND NEW PROCEDURES.—(1)(A) The Secretary may amend test procedures with respect to any covered product if the Secretary determines that amended test procedures would not accurately or fully comply with the requirements of paragraph (3).

(B) The Secretary may, in accordance with the requirements of this subsection, prescribe test procedures for any consumer product classified as a covered product under section 322(b).

(C) The Secretary shall direct the National Bureau of Standards to assist in developing new or amended test procedures.

(2) If the Secretary determines, on his own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the Federal Register proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period shall not be less than 60 days and may be extended for good cause shown to not more than 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved.

(3) Any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a repreesentative average use cycle or period of use, as determined by the Secretary, and shall not be unduly burdensome to conduct.

(4) If the test procedure is a procedure for determining estimated annual operating costs, such procedure shall provide that such costs shall be calculated from measurements of energy use in a representative average use cycle or period of use, as determined by the Secretary, and from representative average unit costs of the energy needed to operate such product during such cycle. The Secretary shall provide information to manufacturers with respect to representative average unit costs of energy.

(c) RESTRICTION ON CERTAIN REPRESENTATIONS.—(1) No manufacturer, distributor, retailer, or private labeler may make any representation—

(A) in writing (including a representation on a label); or

(B) in any broadcast advertisement,

with respect to the energy use or efficiency of a covered product to which a test procedure is applicable under subsection (a) or the cost of energy consumed by such product, unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing.

(2) Effective 180 days after an amended or new test procedure applicable to a covered product is prescribed under subsection (b), no manufacturer, distributor, retailer, or private labeler may make any representation—

(A) in writing (including a representation on a label); or

(B) in any broadcast advertisement,

with respect to the energy use or efficiency of such product or cost of energy consumed by such product, unless such product has been tested in accordance with such amended or new test procedures and such representation fairly discloses the results of such testing.

(3) On the petition of any manufacturer, distributor, retailer, or private labeler, filed not later than the 60th day before the expiration of the period involved, the 180-day period referred to in paragraph (2) may be extended by the Secretary with respect to the petitioner (but in no event for more than an additional 180 days) if the Secretary determines that the requirements of paragraph (2) would impose an undue hardship on such petitioner.

(d) CASE IN WHICH TEST PROCEDURE IS NOT REQUIRED.—(1) The Secretary is not required to publish and prescribe test procedures for a covered product (or class thereof) if the Secretary determines, by rule, that test procedures cannot be developed which meet the requirements of subsection (b)(3) and publishes such determination in the Federal Register, together with the reasons therefor.

(2) For purposes of section 327, a determination under paragraph (1) with respect to any covered product or class shall have the same

effect as would a standard prescribed for a covered product (or class).

(e) AMENDMENT OF STANDARD.—(1) In the case of any amended test procedure which is prescribed pursuant to this section, the Secretary shall determine, in the rulemaking carried out with respect to prescribing such procedure, to what extent, if any, the proposed test procedure would alter the measured energy efficiency or measured energy use of any covered product as determined under the existing test procedure.

(2) If the Secretary determines that the amended test procedure will alter the measured efficiency or measured use, the Secretary shall amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency or energy use of a representative sample of covered products that minimally comply with the existing standard. The average of such energy efficiency or energy use levels determined under the amended test procedure shall constitute the amended energy conservation standard for the applicable covered products.

(3) Models of covered products in use before the date on which the amended energy conservation standard becomes effective (or revisions of such models that come into use after such date and have the same energy efficiency or energy use characteristics) that comply with the energy conservation standard applicable to such covered products on the day before such date shall be deemed to comply with the amended energy conservation standard.

(4) The Secretary's authority to amend energy conservation standards under this subsection shall not affect the Secretary's obligation to issue final rules as described in section 325.

LABELING

SEC. 324. [(a)(1)] *(a) IN GENERAL.—(1)* The Commission shall prescribe labeling rules under this section applicable to all covered products of each of the types specified in paragraphs [(1) through (9)] *(2), (4), (6), and (8) through (12)* of section 322(a), except to the extent that, with respect to any such type (or class thereof), the Commission determines under the second sentence of subsection (b)(5) that labeling in accordance with their section is not technologically or economically feasible.

(2) The Commission shall prescribe labeling rules under this section applicable to all covered products of each of the types specified in paragraphs [(10) through (13)] *(3), (5), and (7)* of section 322(a), except to the extent that, with respect to any such type (or class thereof), the Commission determines under the second sentence of subsection (b)(5) that labeling in accordance with their section is not technologically or economically feasible or is not likely to assist consumers in making purchasing decisions.

(3) The Commission may prescribe a labeling rule under this section applicable to covered products of a type specified in paragraph [(14)] *(13)* of section 322(a) (or a class thereof) if—

[(A) the Commission or the Secretary has made a determination with respect to such type (or a class thereof) under section 323(a)(5)(B),]

(A) the Commission or the Secretary has made a determination with respect to such type (or class thereof) that labeling in accordance with this section will assist purchasers in making purchasing decisions,

(B) the Secretary has prescribed test procedures under section [323(a)(5)] *323(b)(1)(B)* for such type (or class thereof) and

(C) the Commission determines with respect to such type (or class thereof) that application of labeling rules under this section to such type (or class thereof) is economically and technologically feasible.

* * * * * * *

[(b)(1) Not later than 30 days after the date on which a proposed test procedure applicable to a covered product of any of the types specified in paragraphs (1) through (14) of section 323(a), the Commission shall publish a proposed labeling rule applicable to such type (or class thereof).]

(b) RULES IN EFFECT; NEW RULES.—(1)(A) Any labeling rule in effect on the date of the enactment of the National Appliance Energy Conservation Act of 1987 shall remain in effect until amended, by rule, by the Commission.

(B) After the date of the enactment of the National Appliance Energy Conservation Act of 1987 and not later than 30 days after the date on which a proposed test procedure applicable to a covered product of any of the types specified in paragraphs (1) through (13) of section 322(a) (or class thereof) is prescribed under section 323(b), the Commission shall publish a proposed labeling rule applicable to such type (or class thereof).

* * * * * * *

(3) Not earlier than 45 days nor later than 60 days after the date on which test procedures are prescribed under section 323*(b)* with respect to covered products of any type (or class thereof) specified in paragraphs (1) through [(13)] *(12)* of section 322(a), the Commission shall prescribe labeling rules with respect to covered products of such type (or class thereof). Not earlier than 45 days after the date on which test procedures are prescribed under section 323*(b)* with respect to covered products of a type specified in paragraph [(14)] *(13)* of section 322(a), the Commission may prescribe labeling rules with respect to covered products of such type (or class thereof).

* * * * * * *

(5) The Commission may delay the publication of a proposed labeling rule, or the prescription of a labeling rule, beyond the dates specified in paragraph (1) or (3), if it determines that it cannot publish proposed labeling rules or prescribe labeling rules which meet the requirements of this section on or prior to the date specified in the applicable paragraph and publishes such determination in the Federal Register, together with the reasons therefor. In any such case, it shall publish proposed labeling rules or prescribe labeling rules for covered products of such type (or class thereof) as soon as

practicable unless it determines (A) that labeling in accordance with the section is not economically or technically feasible, or (B) in the case of a type specified in paragraphs [(10) through (13)] *(3), (5), and (7)* of section 322(a), that labeling in accordance with this section is not likely to assist consumers in purchasing decisions. Any such determination shall be published in the Federal Register, together with the reasons therefor. This paragraph shall not apply to the prescription of a labeling rule with respect to covered products of a type specified in paragraph [(14)] *(13)* of section 322(a).

[(c)(1)] *(c) CONTENT OF LABEL.—(1)* Subject to paragraph (6), a rule prescribed under this section shall require that each covered product in the type or class of covered products to which the rule applies bear a label which discloses—

(A) the estimated annual operating cost of such product (determined in accordance with test procedures prescribed under section 323), except that if—

(i) the Secretary determines that disclosure of estimated annual operating cost is not technologically feasible, or

(ii) the Commission determines that such disclosure is not likely to assist consumers in making purchasing decisions or is not economically feasible,

the Commission shall require disclosure of a different useful measure of energy consumption (determined in accordance with test procedures prescribed under section 323); and

(B) information respecting the range of estimated annual operating costs for covered products to which the rule applies; except that if the Commission requires disclosure under subparagraph (A) of a measure of energy consumption different from estimated annual operating cost, then the label shall disclose the range of such measure of energy consumption of covered products to which such rule applies.

* * * * * * *

[(d)] *(d) EFFECTIVE DATE.*—A rule under this section (or an amendment thereto) shall not apply to any covered product the manufacture of which was completed prior to the effective date of such rule or amendment, as the case may be.

[(e)] *(e) STUDY OF CERTAIN PRODUCTS.*—The Secretary, in consultation with the Commission, shall study consumer products for which labeling rules under this section have not been proposed, in order to determine (1) the aggregate energy consumption of such products, and (2) whether the imposition of labeling requirements under this section would be feasible and useful to consumers in making purchasing decisions. The Secretary shall include the results of such study in the annual report under section 338.

(f) *CONSULTATION.*—The Secretary and the Commission shall consult with each other on a continuing basis as may be necessary or appropriate to carry out their respective responsibilities under this part. Before the Commission makes any determination under subsection (a)(1) [or (2)], it shall obtain the views of the Secretary and shall take such views into account in making such determination.

(g) *OTHER AUTHORITY OF THE COMMISSION.*—Until such time as labeling rules under this section take effect with respect to a type or class of covered product, this section shall not affect any authority of the Commission under the Federal Trade Commission Act to require labeling with respect to energy consumption of such type or class of covered product.

[ENERGY EFFICIENCY STANDARDS

SEC. 325. (a)(1) The Secretary shall, by rule prescribe an energy efficiency standard for each type (or class) of covered products specified in paragraphs (1) through (13) of section 322(a).

[(2) The Secretary may, by rule, prescribe an energy efficiency standard for any type (or class) of covered products of a type specified in paragraph (14) of section 322(a), if he determines, for the purposes of this section, that—

[(A) the average per household energy use within the United States by products of such type (or class) exceeded 150 kilowatt-hours (or its Btu equivalent) for any 12-calendar-month period ending before such determination;

[(B) the aggregate household energy use within the United States by products of such type (or class) exceeded 4,200,000,000 kilowatt-hours (or its Btu equivalent) for any such 12-calendar-month period;

[(C) substantial improvement in the energy efficiency of products of such type (or class) is technologically feasible; and

[(D) the application of a labeling rule under section 324 to such type (or class) is not likely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) which achieve the maximum energy efficiency which is technologically feasible to attain and is economically justified.

Not later than 2 years after the date of the enactment of this paragraph, the Secretary shall publish in the Federal Register a list of those types (and classes) of covered products which he considers may be subject to standards authorized to be prescribed under this paragraph. The Secretary may revise such list from time to time thereafter.

[(b) No standard for a type (or class) of covered products shall be prescribed pursuant to subsection (a) if—

[(1) a test procedure has not been prescribed pursuant to section 323 with respect to that type (or class) of products, or

[(2) the Secretary determines, by rule, that the establishment of such standard will not result in significant conservation of energy or that the establishment of such standard is not technologically feasible or economically justified.

For purposes of section 327, a determination under paragraph (2) with respect to any type (or class) of covered products shall have the same effect as would a standard prescribed for such type (or class) under this section.

[(c) Energy efficiency standards for each type (or class) of covered products prescribed under this section shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified. Such standards may be phased in, over a period not in

excess of 5 years, through the establishment of intermediate standards, as determined by the Secretary.

[(d) Before determining whether a standard is economically justified under subsection (c), the Secretary, after receiving any views and comments furnished with respect to the proposed standard under section 336, shall determine that the benefits of the standard exceed its burdens based, to the greatest extent practicable, on a weighing of the following factors:

[(1) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard,

[(2) the savings in operating costs throughout the estimated average life of the covered products 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 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 covered products likely to result from the imposition of the standard,

[(5) the impact of any lessening of competition determined in writing by the Attorney General that is likely to result from the imposition of the standard,

[(6) the need of the Nation to conserve energy, and

[(7) any other factors the Secretary considers relevant.

For purposes of paragraph (5), the Attorney General shall, not later than 60 days after the publication of a proposed rule prescribing an energy efficiency standard, make a determination of the impact, if any, from any lessening of competition likely to result from such standard and transmit such determination in writing to the Secretary, together with an analysis of the nature and extent of such impact. Any such determination and analysis shall be published by the Secretary in the Federal Register.

[(e)(1) Subject to paragraph (2), the Secretary may, on application of any manufacturer, exempt such manufacturer from all or part of the requirements of any rule prescribing an energy efficiency standard under this section for any period which does not extend beyond the date which is 24 months after the date such rule is prescribed, if the Secretary finds that the annual gross revenues to such manufacturer for the preceding 12-month period from all its operations (including the manufacture and sale of covered products) does not exceed $8,000,000. In making such finding in the case of any manufacturer, the Secretary shall take into account the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer.

[(2) The Secretary may not exercise the authority granted under paragraph (1) with respect to any type (or class) of covered product subject to an energy efficiency standard established under this section unless he makes a finding, after obtaining the written views of the Attorney General, that a failure to allow an exemption under paragraph (1) would likely result in a lessening of competition.

[(f)(1) A rule prescribing an energy efficiency standard for a type (or class) of covered products shall specify a level of energy efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary, in his discretion, determines that covered products within such group—

[(A) consume a different kind of energy from that consumed by other covered products within such type (or class), or

[(B) have a capacity or other performance-related feature which other products within such type (or class) do not have, justifying a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In determining under this paragraph whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as he deems appropriate.

[(2) Any rule prescribing a higher or lower level of energy efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established.

[(g) In prescribing energy efficiency standards under this section, the Secretary shall give priority to the establishment of energy efficiency standards for types of products (or classes thereof) specified in paragraphs (1), (2), (4), (5), (6), (7), (9), (12), and (13) of section 322(a).

[(h)(1) Not later than 5 years after prescribing an energy efficiency standard under this section (and from time to time thereafter), the Secretary shall—

[(A) conduct a reevaluation in order to determine whether such standard should be amended in any manner, and

[(B) make, and publish in the Federal Register, such determination.

In conducting such reevaluation, the Secretary shall take into account such information as he deems relevant, including technological developments with respect to the type (or class) of covered products involved, and the economic impact of the standard.

[(2) If the Secretary determines under paragraph (1) that a standard should be amended, he shall promptly publish a proposed rule incorporating such amendments and afford interested persons an opportunity to present oral and written data, views, and arguments. Such comment period shall not be less than 45 days.

[(i) Any energy efficiency standard shall be prescribed in accordance with the following procedure:

[(1) The Secretary shall (A) publish an advance notice of proposed rulemaking which specifies the type (or class) of covered products to which the rule is likely to apply, and (B) invite interested persons to submit, within 45 days after the date of publication of such advance notice, written presentations of data, views, and arguments relevant to establishing such an energy efficiency standard.

[(2) An advance notice of proposed rulemaking under paragraph (1) shall be published by the Secretary—

[(A) in the case of types of covered products (or classes thereof) of the types specified in paragraphs (1), (2), (4), (5), (6), (7), (9), (12), and (13) of section 322(a), not later than 30 days after a test procedure with respect to that type of covered products (or class thereof) has been prescribed, or 45 days after

the date of the enactment of this subparagraph, whichever is later; and

[(B) in the case of types of covered products (or classes thereof) specified in paragraph (3), (8), (10), and (11), of section 322(a), not later than 30 days after a test procedure with respect to that type (or class) of covered products has been prescribed, or one year after the date of the enactment of this subparagraph, whichever is later.

[(3) A proposed rule which prescribes an energy efficiency standard for a type (or class) of covered products may not be published earlier than 60 days after the date of publication of advance notice of proposed rulemaking for such type (or class). The Secretary shall determine the maximum improvement in energy efficiency that is technologically feasible for each type (or class) of covered products in prescribing such standard and if such standard is not designed to achieve such efficiency, the Secretary shall state in the proposed rule the reasons therefor. After the publication of such proposed rulemaking, the Secretary shall afford interested persons, in accordance with section 336, an opportunity to present oral and written comments (including an opportunity to question those who make such presentations, as provided in such section) on matters relating to such proposed rule, including—

[(A) whether the standard to be prescribed is economically justified (taking into account those factors which the Secretary must consider under subsection (d)),

[(B) whether the standard will achieve the maximum improvement in energy efficiency which is technologically feasible,

[(C) if the standard will not achieve such improvement, whether the reasons for not achieving such improvement are adequate, and

[(D) whether such rule should prescribe a level of energy efficiency which is higher or lower than that which would otherwise apply in the case of any group of products within the type (or class) to be subject to such standard.

[(4) A rule prescribing an energy efficiency standard for a type (or class) of covered products may not be published earlier than 60 days after the date of publication of the proposed rule under this section for such type (or class). Such rule shall be published as soon as practicable after such 60-day period, but in no event later than 2 years after publication of the advance notice. Such rule shall take effect not earlier than 180 days after the date of its publication in the Federal Register. Such rule (or any amendment thereto) shall not apply to any covered products the manufacture of which was completed before the effective date of the rule or amendment as the case may be.

[(j) An energy efficiency standard prescribed under this section shall include test procedures prescribed in accordance with section 323, and may include any requirement which the Secretary determines is necessary to assure that each covered product to which such standard applies meets the required minimum level of energy efficiency specified in such standard.]

ENERGY CONSERVATION STANDARDS

SEC. 325. (a) PURPOSES.—The purposes of this section are to—

(1) provide Federal energy conservation standards applicable to covered products; and

(2) authorize the Secretary to prescribe amended or new energy conservation standards for each type (or class) of covered product.

(b) STANDARDS FOR REFRIGERATORS, REFRIGERATOR-FREEZERS, AND FREEZERS.—(1) The following is the maximum energy use allowed in kilowatt hours per year for the following products (other than those described in paragraph (2)) manufactured on or after January 1, 1990:

	Energy Standards Equations
Refrigerators and Refrigerator-Freezers with manual defrost	*16.3 AV+316*
Refrigerator-Freezers-partial automatic defrost	*21.8 AV+429*
Refrigerator-Freezers-automatic defrost with:	
Top mounted freezer without ice	*23.5 AV+471*
Side mounted freezer without ice	*27.7 AV+488*
Bottom mounted freezer without ice	*27.7 AV+488*
Top mounted freezer with through the door ice service	*26.4 AV+535*
Side mounted freezer with through the door ice	*30.9 AV+547*
Upright Freezers with:	
Manual defrost	*10.9 AV+422*
Automatic defrost	*16.0 AV+623*
Chest Freezers and all other freezers	*14.8 AV+223*

(2) The standards described in paragraph (1) do not apply to refrigerators and refrigerator-freezers with total refrigerated volume exceeding 39 cubic feet or freezers with total refrigerated volume exceeding 30 cubic feet.

(3)(A)(i) The Secretary shall publish a proposed rule, no later than July 1, 1988, to determine if the standards established by paragraph (1) should be amended. The Secretary shall publish a final rule no later than July 1, 1989, which shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1993. If such a final rule is not published before January 1, 1990, any amendment of such standards shall apply to products manufactured on or after January 1, 1995. Nothing in this subsection provides any justification or defense for a failure by the Secretary to comply with the nondiscretionary duty to publish final rules by the dates stated in this paragraph.

(ii)(I) If the Secretary does not publish a final rule before January 1, 1990, relating to the revision of the energy conservation standards for refrigerators, refrigerator-freezers and freezers, the regulations which established standards for such products and were promulgated by the California Energy Commission on December 14, 1984, to be effective January 1, 1992 (or any amendments to such standards that are not more stringent than the standards in the original regulations), shall apply in California to such products, effective beginning January 1, 1993, and shall not be preempted after such effective date by any energy conservation standard established in this section or prescribed, on or after January 1, 1990, under this section.

(II) If the Secretary does not publish a final rule before January 1, 1992, relating to the revision of the energy conservation standards

for refrigerators, refrigerator-freezers and freezers, State regulations which apply to such products manufactured on or after January 1, 1995, shall apply to such products until the effective date or a rule issued under this section with respect to such products.

(B) After the publication of a final rule under subparagraph (A), the Secretary shall publish a final rule no later than five years after the date of publication of the previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for the products described in paragraph (1).

(C) Any amendment prescribed under subparagraph (B) shall apply to products manufactured after a date which is five years after—

(i) the effective date of the previous amendment; or

(ii) if the previous final rule did not amend the standards, the earliest date by which the previous amendment could have been effective;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard.

(c) STANDARDS FOR ROOM AIR CONDITIONERS.—(1) The energy efficiency ratio of room air conditioners shall be not less than the following for products manufactured on or after January 1, 1990:

Product class	Ratio
Without Reverse Cycle and With Louvered Sides:	
Less than 6,000 Btu	8.0
6,000 to 7,999 Btu	8.5
8,000 to 13,999 Btu	9.0
14,000 to 19,999 Btu	8.8
20,000 and more Btu	8.2
Without Reverse Cycle and Without Louvered Sides:	
Less than 6,000 Btu	8.0
6,000 to 7,999 Btu	8.5
8,000 to 13,999 Btu	8.5
14,000 to 19,999 Btu	8.5
20,000 and more Btu	8.2
With Reverse Cycle and With Louvered Sides	8.5
With Reverse Cycle, Without Louvered Sides	8.0

(2)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine if the standards established under paragraph (1) should be ameded. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1995.

(B) After January 1, 1992, the Secretary shall publish a final rule no later than five years after the date of publication of a previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for room air conditioners.

(C) Any amendment prescribed under subparagraph (B) shall apply to products manufactured after a date which is five years later—

(i) the effective date of the previous amendment; or

(ii) if the previous final rule did not amend the standards, the earliest date by which a previous amendment could have been effective;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such amended standard.

(d) STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS.—(1) The seasonal energy efficiency ratio of central air conditioners and central air conditioning heat pumps shall be not less than the following:

(A) Split Systems: 10.0 for products manufactured on or after January 1, 1992.

(B) Single Package Systems: 9.7 for products manufactured on or after January 1, 1993.

(2) The heating seasonal performance factor of central air conditioning heat pumps shall be not less than the following:

(A) Split Systems: 6.8 for products manufactured on or after January 1, 1992.

(B) Single Package Systems: 6.6 for products manufactured on or after January 1, 1993.

(3) (A) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (1) should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1999. The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established under paragraph (2) shall be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 2002.

(B) The Secretary shall publish a final rule after January 1, 1994, and no later than January 1, 2001, to determine whether the standards in effect for central air conditioners and central air conditioning heat pumps should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2006.

(e) STANDARDS FOR WATER HEATERS; POOL HEATERS; DIRECT HEATING EQUIPMENT.—(1) The energy factor of water heaters shall be not less than the following for products manufactured on or after January 1, 1990:

(A) Gas Water Heater: .62 – (.0019 x Rated Storage Volume in Gallons).
(B) Oil Water Heater: .59 – (.0019 x Rated Storage Volume in Gallons).
(C) Electric Water Heater: .95 – (.00132 x Rated Storage Volume in Gallons).

(2) The thermal efficiency of pool heaters manufactured on or after January 1, 1990, shall not be less than 78 percent.

(3) The efficiencies of gas direct heating equipment manufactured on or after January 1, 1990, shall be not less than the following:

	Percent AFUE
Wall:	
Fan type:	
Up to 42,000 Btu/hour	73
Over 42,000 Btu/hour	74
Gravity type:	
Up to 10,000 Btu/hour	59
Over 10,000 Btu/hour up to 12,000 Btu/hour	60
Over 12,000 Btu/hour up to 15,000 Btu/hour	61
Over 15,000 Btu/hour up to 19,000 Btu/hour	62
Over 19,000 Btu/hour up to 27,000 Btu/hour	63
Over 27,000 Btu/hour up to 46,000 Btu/hour	64
Over 46,000 Btu/hour	65
Floor:	
Up to 37,000 Btu/hour	56
Over 37,000 Btu/hour	57

Room:	Percent
Up to 18,000 Btu/hour	57
Over 18,000 Btu/hour up to 20,000 Btu/hour	58
Over 20,000 Btu/hour up to 27,000 Btu/hour	63
Over 27,000 Btu/hour up to 46,000 Btu/hour	64
Over 46,000 Btu/hour	65

(4)(A) The Secretary shall publish final rules no later than January 1, 1992, to determine whether the standards established by paragraph (1), (2), or (3) for water heaters, pool heaters, and direct heating equipment should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 1995.

(B) The Secretary shall publish a final rule no later than January 1, 2000, to determine whether standards in effect for such products should be amended. Such rule shall provide that any such amendment shall apply to products manufactured on or after January 1, 2005.

(f) STANDARDS FOR FURNACES.—(1) Furnances (other than furnaces designed solely for installation in mobile homes) manufactured on or after January 1, 1992, shall have an annual fuel utilization efficiency of not less than 78 percent, except that—

(A) boilers (other than gas steam boilers) shall have an annual fuel utilization efficiency of not less than 80 percent and gas steam boilers shall have an annual fuel utilization efficiency of not less than 75 percent; and

(B) the Secretary shall prescribe a final rule not later than January 1, 1989, establishing an energy conservation standard—

(i) which is for furnaces (other than furnaces designed solely for installation in mobile homes) having an input of less than 45,000 Btu per hour and manufactured on or after January 1, 1992;

(ii) which provides that the annual fuel utilization efficiency of such furnaces shall be a specific percent which is not less than 71 percent and not more than 78 percent; and

(iii) which the Secretary determines is not likely to result in a significant shift from gas heating to electric resistance heating which respect to either residential construction or furnace replacement.

(2) Furnaces which are designed solely for installation in mobile homes and which are manufactured on or after September 1, 1990, shall have an annual fuel utilization efficiency of not less than 75 percent.

(3)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine whether the standards established by paragraph (2) for mobile home furnaces should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 1994.

(B) The Secretary shall publish a final rule no later than January 1, 1994, to determine whether the standards established by this subsection for furnaces (including mobile home furnaces) should be amended. Such rule shall provide that any amendment shall apply to products manufactured on or after January 1, 2002.

(C) After January 1, 1997, and before January 1, 2007, the Secretary shall publish a final rule to determine whether standards in effect for such products should be amended. Such rule shall contain such amendment, if any, and provide that any amendment shall apply to products manufactured on or after January 1, 2012.

(g) STANDARDS FOR DISHWASHERS; CLOTHES WASHERS; CLOTHES DRYERS.—(1) Dishwashers manufactured on or after January 1, 1988, shall be equipped with an option to dry without heat.

(2) All rinse cycles of clothes washers shall include an unheated water option, but may have a heated water rinse option, for products manufactured on or after January 1, 1988.

(3) Gas clothes dryers shall not be equipped with a constant burning pilot for products manufactured on or after January 1, 1988.

(4)(A) The Secretary shall publish final rules no later than January 1, 1990, to determine if the standards established under this subsection for products described in paragraphs (1), (2), and (3) should be amended. Such rules shall provide that any amendment shall apply to products the manufacture of which is completed on or after January 1, 1993.

(B) After January 1, 1990, the Secretary shall publish a final rule no later than five years after the date of publication of the previous final rule. The Secretary shall determine in such rule whether to amend the standards in effect for such products.

(C) Any such amendment shall apply to products manufactured after a date which is five years after—

(i) the effective date of the previous amendment; or

(ii) if the previous final rule did not amend the standard, the earliest date by which a previous amendment could have been in effect;

except that in no case may any amended standard apply to products manufactured within three years after publication of the final rule establishing such standard.

(h) STANDARDS FOR KITCHEN RANGES AND OVENS.—(1) Gas kitchen ranges and ovens having an electrical supply cord shall not be equipped with a constant burning pilot for products manufactured on or after January 1, 1990.

(2)(A) The Secretary shall publish a final rule no later than January 1, 1992, to determine if the standards established for kitchen ranges and ovens in this subsection should be amended. Such rule shall contain such amendment, if any, and provide that the amendment shall apply to products manufactured on or after January 1, 1995.

(B) The Secretary shall publish a final rule no later than January 1, 1997, to determine whether standards in effect for such products should be amended. Such rule shall apply to products manufactured on or after January 1, 2000.

(i) STANDARDS FOR OTHER COVERED PRODUCTS.—(1) The Secretary may prescribe an energy conservation standard for any type (or class) of covered products of a type specified in paragraph (13) of section 322(a) if the requirements of subsections (l) and (m) are met and the Secretary determines that—

(A) the average per household energy use within the United States by products of such type (or class) exceeded 150 kilowatt-

hours (or its Btu equivalent) for any 12-month period ending before such determination;

(B) the aggregate household energy use within the United States by products of such type (or class) exceeded 4,200,000,000 kilowatt-hours (or its Btu equivalent) for any such 12-month period;

(C) substantial improvement in the energy efficiency of products of such type (or class) is technologically feasible; and

(D) the application of a labeling rule under section 324 to such type (or class) is not likely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) which achieve the maximum energy efficiency which is technologically feasible and economically justified.

(2) Any new or amended standard for covered products of a type specified in paragraph (13) of section 322(a) shall not apply to products manufactured within five years after the publication of a final rule establishing such standard.

(3) The Secretary may, in accordance with subsections (1) and (m), prescribe an energy conservation standard for television sets. Any such standard may not become effective with respect to products manufactured before January 1, 1992.

(j) FURTHER RULEMAKING.—After issuance of the last final rules required under subsections (b) through (h) of this section, the Secretary may publish final rules to determine whether standards for a covered product should be amended. An amendment prescribed under this subsection shall apply to products manufactured after a date which is five years after—

(1) the effective date of the previous amendment made pursuant to this part; or

(2) if the previous final rule published under this part did not amend the standard, the earliest date by which a previous amendment could have been in effect,

except that in no case may an amended standard apply to products manufactured within three years (in the case of refrigerators, refrigerator-freezers, and freezers, room air-conditioners, dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens) or five years (in the case of central air-conditioners and heat pumps, water heaters, pool heaters, direct heating equipment, and furnaces) after publication of the final rule establishing a standard.

(k) PETITION FOR AN AMENDED STANDARD.—(1) With respect to each covered product describ ed in paragraphs (1) through (11) of section 322(a), any person may petition the Secretary to conduct a rulemaking to determine for any such covered product if the standards contained either in the last final rule required for such product under subsections (b) through (h), as the case may be, of this section or in a final rule published for such product under subsection (j) or this subsection should be amended.

(2)(A) The Secretary shall grant a petition if he finds that it contains evidence which, assuming no other evidence were considered, provides an adequate basis for amending the standards under the following criteria—

(i) amended standards will result in significant conservation of energy;

(ii) amended standards are technologically feasible; and

(iii) amended standards are cost effective as described in subsection (1)(2)(B)(i)(II).

(B) The grant of a petition by the Secretary under this subsection creates no presumption with respect to the Secretary's determination of any of the criteria in a rulemaking under this section.

(3) An amendment prescribed under this subsection shall apply to products manufactured after a date which is five years after—

(A) the effective date of the previous amendment pursuant to this part; or

(B) if the previous final rule published under this part did not amend the standard, the earliest date by which a previous amendment could have been in effect;

except that in no case may an amended standard apply to products manufactured within three years (in the case of refrigerators, refrigerator-freezers, and freezers, room air-conditioners, dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens) or five years (in the case of central air-conditioners and heat pumps, water heaters, pool heaters, direct heating equipment, and furnaces) after publication of the final rule establishing a standard.".

(l) CRITERIA FOR PRESCRIBING NEW OR AMENDED STANDARDS.—(1) The Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or decreases the minimum required energy efficiency, of a covered product.

(2)(A) Any new or amended energy conservation standard prescribed by the Secretary under this section for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.

(B)(i) In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering—

(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;

(II) the savings in operating costs throughout the estimated average life 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 the imposition of the standard;

(III) the total projected amount of energy savings likely to result directly from the 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 conservation; and

(VII) other factors the Secretary considers relevant.

(ii) For purposes of clause (i)(V), the Attorney General shall make a determination of the impact, if any, of any lessening of competition likely to result from such standard and shall transmit such de-

termination, not later than 60 days after the publication of a proposed rule prescribing or amending an energy conservation standard, in writing to the Secretary, together with an analysis of the nature and extent of such impact. Any such determination and analysis shall be published by the Secretary in the Federal Register.

(iii) If the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure, there shall be a rebuttal presumption that such standard level is economically justified. A determination by the Secretary that such criterion is not met shall not be taken into consideration in the Secretary's determination of whether a standard is economically justified.

(3) The Secretary may not prescribe an amended or new standard under this section for a type (or class) of covered product if—

(A) for products other than dishwashers, clothes washers, clothes dryers, and kitchen ranges and ovens, a test procedure has not been prescribed pursuant to section 323 with respect to that type (or class) of product; or

(B) the Secretary determines, by rule, that the establishment of such standard will not result in significant conservation of energy or that the establishment of such standard is not technologically feasible or economicaly justified.

For purposes of section 327, a determination under subparagraph (B) with respect to any type (or class) of covered products shall have the same effect as would a standard prescribed for such type (or class).

(4) The Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. The failure of some type (or classes) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a standard for other types (or classes).

(m) PROCEDURE FOR PRESCRIBING NEW OR AMENDED STANDARDS.—Any new or amended energy conservation standard shall be prescribed in accordance with the following procedure:

(1) The Secretary—

(A) shall publish an advance notice of proposed rulemaking which specifies the type (or class) of covered products to which the rule may apply;

(B) shall invite interested persons to submit, within 60 days after the date of publication of such advance notice, written presentations of data, views, and arguments in response to such notice; and

(C) may identify proposed or amended standards that may be prescribed.

(2) A proposed rule which prescribes an amended or new energy conservation standard or prescribes no amendment or no new standard for a type (or class) of covered products shall be published in the Federal Register. In prescribing any such proposed rule with respect to a standard, the Secretary shall determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered products. If such standard is not designed to achieve such efficiency or use, the Secretary shall state in the proposed rule the reasons therefor.

(3) After the publication of such proposed rulemaking, the Secretary shall, in accordance with section 336, afford interested persons an opportunity, during a period of not less than 60 days, to present oral and written comments (including an opportunity to question those who make such presentations, as provided in such section) on matters relating to such proposed rule, including—

(A) whether the standard to be prescribed is economically justified (taking into account those factors which the Secretary must consider under subsection (1)(2)) or will result in the effects described in subsection (1)(4);

(B) whether the standard will achieve the maximum improvement in energy efficiency which is technologically feasible;

(C) if the standard will not achieve such improvement, whether the reasons for not achieving such improvement are adequate; and

(D) whether such rule should prescribe a level of energy use or efficiency which is higher or lower than that which would otherwise apply in the case of any group of products within the type (or class) that will be subject to such standard.

(4) A final rule prescribing an amended or new energy conservation standard or prescribing no amended or new standard for a type (or class) of covered products shall be published as soon as is practicable, but not less than 90 days, after publication of the proposed rule in the Federal Register.

(n) SPECIAL RULE FOR CERTAIN TYPES OR CLASSES OF PRODUCTS.—(1) A rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use of efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group—

(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or

(B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class).

In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors

as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.

(2) Any rule prescribing a higher or lower level of energy use or efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established.

(o) INCLUSION IN STANDARDS OF TEST PROCEDURES AND OTHER REQUIREMENTS.—Any new or amended energy conservation standard prescribed under this section shall include, where applicable, test procedures prescribed in accordance with section 323 and may include any requirement which the Secretary determines is necessary to assure that each covered product to which such standard applies meets the required minimum level of energy efficiency or maximum quantity of energy use specified in such standard.

(p) DETERMINATION OF COMPLIANCE WITH STANDARDS.—Compliance with, and performance under, the energy conservation standards (except for design standards authorized by this part) established in, or prescribed under, this section shall be determined using the test procedures and corresponding compliance criteria prescribed under section 323.

(q) SMALL MANUFACTURER EXEMPTION.—(1) Subject to paragraph (2), the Secretary may, on application of any manufacturer, exempt such manufacturer from all or part of the requirements of any energy conservation standard established in or prescribed under this section for any period not longer than the 24-month period beginning on the date such rule becomes effective, if the Secretary finds that the annual gross revenues of such manufacturer from all its operations (including the manufacture and sale of covered products) does not exceed $8,000,000 for the 12-month period preceding the date of the application. In making such finding with respect to any manufacturer, the Secretary shall take into account the annual gross revenues of any other person who controls, is controlled by, or is under common control with, such manufacturer.

(2) The Secretary may not exercise the authority granted under paragraph (1) with respect to any type (or class) of covered product subject to an energy conservation standard under this section unless the Secretary makes a finding, after obtaining the written views of the Attorney General, that a failure to allow an exemption under paragraph (1) would likely result in a lessening of competition.

REQUIREMENTS OF MANUFACTURERS

SEC. 326. [(a)] *(a) IN GENERAL.*—Each manufacturer of a covered product to which a rule under section 324 applies shall provide a label which meets, and is displayed in accordance with, the requirements of such rule. If such manufacturer or any distributor, retailer, or private labeler of such product advertises such product in a catalog from which it may be purchased, such catalog shall contain all information required to be displayed on the label, except as otherwise provided by rule of the Commission. The preceding sentence shall not require that a catalog contain information respecting a covered product if the distribution of such catalog commenced before the effective date of the labeling rule under section 324 applicable to such product.

[(b)(1)] *(b) NOTIFICATION.—(1)* Each manufacturer of a covered product to which a rule under section 324 applies shall notify the Secretary or the Commission—

(A) not later than 60 days after the date such rule takes effect, of the models in current production (and starting serial numbers of those models) to which such rule apples; and

(B) prior to commencement of production, of all models subsequently produced (and starting serial numbers of those models) to which such rule applies.

* * * * * * *

(3) When requested—

(A) by the Secretary for purposes of ascertaining whether a product subject to a standard *established in or* prescribed under section 325 is in compliance with that standard, or

* * * * * * *

[(c) Each] *(c) DEADLINE.—Each* manufacturer shall use labels reflecting the range data required to be disclosed under section 324(c)(1)(B) after the expiration of 60 days following the date of publication of any revised table of ranges unless the rule under section 324 provides for a later date. The Commission may not require labels be changed to reflect revised tables of ranges more often than annually.

[(d) For purposes of carrying out this part, the Secretary may require, under authority available to him under this part or other provisions of law administered by him, each manufacturer of covered products to submit such information or reports of any kind or nature directly to the Secretary with respect to energy efficiency of such covered products, and with respect to the economic impact of any proposed energy efficiency standard, as the Secretary determines may be necessary to establish and revise test procedures, labeling rules, and energy efficiency standards for such products and to insure compliance with the requirements of this part. The provisions of section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 shall apply with respect to information obtained under this subsection to the same extent and in the same manner as it applies with respect to energy information obtained under section 11 of such Act.]

(d) INFORMATION REQUIREMENTS.—(1) For purposes of carrying out this part, the Secretary may require, under this part or other provision of law administered by the Secretary, each manufacturer of a covered product to submit information or reports to the Secretary with respect to energy efficiency or energy use of such covered product and the economic impact of any proposed energy conservation standard, as the Secretary determines may be necessary to establish and revise test procedures, labeling rules, and energy conservation standards for such product and to insure compliance with the requirements of this part. In making any determination under this paragraph, the Secretary shall consider existing public sources of information, including nationally recognized certification programs of trade associations.

(2) The Secretary shall exercise authority under this section in a manner designed to minimize unnecessary burdens on manufacturers of covered products.

(3) The provisions of section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 shall apply with respect to information obtained under this subsection to the same extent and in the same mannner as they apply with respect to energy information obtained under section 11 of such Act.

[EFFECT ON OTHER LAW

[SEC. 327. (a) This part supersedes any State regulation insofar as such State regulation may now or hereafter provide for—

[(1) the disclosure of information with respect to any measure of energy consumption of any covered product—

[(A) if there is any rule under section 323 applicable to such covered product, and such State regulation requires testing in any manner other than that prescribed in such rule under section 323, or

[(B) if there is a rule under section 324 applicable to such covered product and such State regulation requires disclosure of information other than information disclosed in accordance with such rule under section 324; or

[(2) any energy efficiency standard or other requirement with respect to energy efficiency or energy use of a covered product—

[(A) if there is a standard under section 325 applicable to such product, and such State regulation is not identical to such standard, or

[(B) if there is a rule under section 323 or 324 applicable to such product and such State regulation requires testing in accordance with test procedures which are not identical to the test procedures specified in such rule.

[(b)(1) If a State regulation is prescribed which establishes an energy efficiency standard or other requirement respecting energy use or energy efficiency of a type (or class) of covered products and which is not superseded by subsection (a)(2) or (b)(2), then any person subject to such regulation may file a petition with the Secretary requesting that the Secretary prescribe a rule under this subsection which supersedes such State regulation in whole or in part. The Secretary, after consideration of the petition, the views of the affected State and the comments of any interested person, shall issue such requested rule only if the Secretary finds (and publishes such finding) that—

[(A) there is no significant State or local interest sufficient to justify such State regulation; and

[(B) such State regulation unduly burdens interstate commerce.

[(2) If a State regulation is prescribed after January 1, 1978, which establishes an energy efficiency standard or other requirement respecting energy use or energy efficiency of a type (or class) of covered products and which is not superseded by subsection (a)(2), then such State regulation is superseded. Notwithstanding the requirement of the preceding sentence, such State may file a

petition with the Secretary requesting a rule that such State regulation is not superseded pursuant to this paragraph. The Secretary, after consideration of the petition and the comments of interested persons, shall prescribe such rule only if he finds there is a significant State or local interest to justify such State regulations; except that the Secretary may not prescribe such State regulations; except that the Secretary may not prescribe such rule if he finds that such State regulation would unduly burden interstate commerce.

[(3) Notwithstanding subsection (a)(2), any State prescribing a State regulation which provides an energy efficiency standard or other requirement respecting energy use or energy efficiency for any type (or class) of covered products for which a Federal energy efficiency standard is applicable may file a petititon with the Secretary requesting a rule that such regulation not be superseded. The Secretary, after consideration of the petition and the comments of interested persons, shall prescribe such rule only if he finds (and publishes such finding) that—

[(A) there is a significant State or local interest to justify such State regulation; and

[(B) such State regulation contains a more stringent energy efficiency standard than such Federal standard;

except that the Secretary may not prescribe such rule if he finds that such State regulation would unduly burden interstate commerce.

[(4) The Secretary shall give notice of any petition filed under this subsection and afford interested persons a reasonable opportunity to make written comments thereon. The Secretary, within 6 months after the date any petition is filed, shall deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of such denial and the reasons for such denial.

[(5) The requirement of paragraph (2) shall not continue in effect after July 1, 1980, in the case of any type (or class) of covered products specified in paragraphs (1) through (13) of section 322(a).

[(c) Notwithstanding the provisions of subsection (a), any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such State standards are more stringent than the corresponding Federal standards.

[(d) For purposes of this section, the term "State regulation" means a law or regulation of a State or political subdivision thereof.

[(e) Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost, which is required to be made under the provisions of this part, shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved, or that such energy use or estimated annual oprating cost will not be exceeded, under conditions of actual use.]

EFFECT ON OTHER LAW

SEC. 327. (a) PREEMPTION OF TESTING AND LABELING REQUIREMENTS.—(1) Effective on the date of enactment of the National Appliance Energy Conservation Act of 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption of any covered product if—

(A) such State regulation requires testing or the use of any measure of energy consumption or energy descriptor in any manner other than that provided under section 323; or

(B) such State regulation requires disclosure of information with respect to the energy use or energy efficiency of any covered product other than information required under section 324.

(2) For purposes of this section, the term "State regulation" means a law, regulation, or other requirement of a State or its political subdivisions.

(b) GENERAL RULE OF PREEMPTION FOR ENERGY CONSERVATION STANDARDS BEFORE FEDERAL STANDARD BECOMES EFFECTIVE FOR A PRODUCT.—Effective on the date of enactment of the National Appliance Energy Conservation Act of 1987 and ending on the effective date of an energy conservation standard established under section 325 for any covered product, no State regulation, or revision thereof, concerning the energy efficiency or energy use of the covered product shall be effective with respect to such covered product, unless the State regulation or revision—

(1) was prescribed or enacted before January 8, 1987, and is applicable to products before January 3, 1988;

(2) is a State procurement regulation described in subsection (e);

(3) is a regulation described in subsection (f)(1) or is prescribed or enacted in a building code for new construction described in subsection (f)(2);

(4) is a regulation prohibiting the use in pool heaters of a constant burning pilot;

(5) is a regulation described in subsection (d)(5)(B) for which a waiver has been granted under subsection (d); or

(6) is a regulation effective on or after January 1, 1992, concerning the energy efficiency or energy use of television sets.

(c) GENERAL RULE OF PREEMPTION FOR ENERGY CONSERVATION STANDARDS WHEN FEDERAL STANDARD BECOMES EFFECTIVE FOR A PRODUCT.—Except as provided in section 325(b)(3)(A)(ii) and effective on the effective date of an energy conservation standard established in or prescribed under section 325 for any covered product, no State regulation concerning the energy efficiency or energy use of such covered product shall be effective with respect to such product unless the regulation—

(1) is a regulation described in paragraph (2) or (4) of subsection (b);

(2) is a regulation which has been granted a waiver under subsection (d); or

(3) is in a building code for new construction described in subsection (f)(3).

(d) WAIVER OF FEDERAL PREEMPTION.—(1)(A) Any State with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use or energy efficiency for any type (or class) of covered product for which there is a Federal energy conservation standard under section 325 may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.

(B) Subject to paragraphs (2) through (5), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy interests.

(C) For purposes of this subsection, the term unusual and compelling State or local energy interests" means interests which—

(i) are substantially different in nature or magnitude than those prevailing in the United States generally; and

(ii) are such that the costs, benefits, burdens, and reliability of energy savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production, including reliance on reasonable predictable market-induced improvements in efficiency of all products subject to the State regulation.

The factors described in clause (ii) shall be evaluated within the context of the State's energy plan and forecast.

(2) The Secretary shall give notice of any petition filed under paragraph (1)(A) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the 6-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after the date on which the petition was filed. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of, and the reasons for, such denial.

(3) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including—

(A) the extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;

(B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;

(C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered

product type (or class), taking into consideration the extent to which the regulation would result in a reduction—

(i) in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or

(ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States; and

(D) the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

(4) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding, except that the failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).

(5) No final rule prescribed by the Secretary under this subsection may—

(A) permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation; or

(B) become effective with respect to a covered product manufactured before the earliest possible effective date specified in section 325 for the initial amendment of the energy conservation standard established in such section for the covered product; except that such rule may become effective before such date if the Secretary finds (and publishes such finding) that, in addition to the other requirements of this subsection the State has established, by a preponderance of the evidence, that—

(i) an energy emergency condition exists within the State which—

(I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy to its residents at less than prohibitive costs; and

(II) cannot be substantially alleviated by the importation of energy or the use of interconnection agreements; and

(ii) the State regulation is necessary to alleviate substantially such condition.

(6) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended

pursuant to section 325, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraph (1) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), and (4), except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraph (1) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it.

(e) EXCEPTION FOR CERTAIN STATE PROCUREMENT STANDARDS.—Any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such standards are more stringent than the corresponding Federal energy conservation standards.

(f) EXCEPTION FOR CERTAIN BUILDING CODE REQUIREMENTS.—(1) A regulation or other requirement enacted or prescribed before January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 325 for such covered product.

(2) A regulation or other requirement, or revision thereof, enacted or prescribed on or after January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 325 for such covered product if the code does not require that the energy efficiency of such covered product exceed—

(A) the applicable minimum efficiency requirement in a national voluntary consensus standard; or

(B) the minimum energy efficiency level in a regulation or other requirement of the State meeting the requirements of subsection (b)(1) or (b)(5),

whichever is higher.

(3) Effective on the effective date of an energy conservation standard for a covered product established in or prescribed under section 325, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 325, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under sub-section (d).

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 325 or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 325, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds by more than 5 percent either standard of level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 323, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 323 or other technically accurate documented procedure.

(4)(A) Subject to subparagraph (B), a State or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code or to establish that the code meets the conditions set forth in this subsection.

(B) If a building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard established in or prescribed under section 325 and the applicable standard of such State, if any, that has been granted a waiver under subsection (d), such requirement of the building code shall not be applicable unless the Secretary has granted a waiver for such requirement under subsection (d).

(g) NO WARRANTY.—Any disclosure with respect to energy use, [illegible] which is re-

an express or implied warranty under State or Federal law that such energy efficiency will be achieved or that such energy use or estimated annual operating cost will not be exceeded under conditions of actual use.

AUTHORITY TO OBTAIN INFORMATION

Sec. 329. (a) *IN GENERAL.*—For purposes of carrying out this part the Commission and the Secretary may each sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant books, records, papers, and other documents, and may each administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of contumacy by, or refusal to obey a subpena served, upon any persons subject to this part, the Commission and the Secretary may each seek an order from the district court of the United States for any district in which such person is found or resides or transacts business requiring such person to appear and give testimony, or to appear and produce documents. Failure to obey any such order is punishable by such court as a contempt thereof.

(b) *CONFIDENTIALITY.*—Any information submitted by any person to the Secretary or the Commission under this part shall not be considered energy information as defined by section 11(e)(1) of the Energy Supply and Environmental Coordination Act of 1974 for purposes of any verification examination authorized to be conducted by the Comptroller General under section 501 of this Act.

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PROHIBITED ACTS

Sec. 332. (a) *IN GENERAL.* —It shall be unlawful—

(1) * * *

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(5) for any manufacturer or private labeler to distribute in commerce any new covered product which is not in conformity with an applicable [energy efficiency standard prescribed under] *energy conservation standard established in or prescribed under* this part.

(b) *DEFINITION.*—For purposes of this section, the term "new covered product" means a covered product the title of which has not passed to a purchaser who buys such product for purposes other than (1) reselling such product, or (2) leasing such product for a period in excess of one year.

ENFORCEMENT

Sec. 333. (a) *IN GENERAL.*—Except as provided in subsection (c), any person who knowingly violates any provision of section 332 shall be subject to a civil penalty of not more than $100 for each violation. Such penalties shall be assessed by the Commission, except that penalties for violations of section 332(a)(3) which relate to requirements prescribed by the Secretary, violations of section 332(a)(4) which relate to requests of the Secretary under section 326(b)(2), or violations of section 332(a)(5) shall be asserted by the

Secretary. Civil penalties assessed under this part may be compromised by the agency or officer authorized to assess the penalty, taking into account the nature and degree of the violation and the impact of the penalty upon a particular respondent. Each violation of paragraph (1), (2), or (5) of section 332(a) shall constitute a separate violation with respect to each covered product, and each day of violation of section 332(a) (3) or (4) shall constitute a separate violation.

(b) *DEFINITION.*—As used in subsection (a), the term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care.

[(c) It] *(c) SPECIAL RULE.—It* shall be an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1) of the Federal Trade Commission Act) for any person to violate section 323(c), except to the extent that such violation is prohibited under the provisions of section 332(a)(1), in which case such provisions shall apply.

[(d)(1)] *(d) PROCEDURES FOR ASSESSING PENALTY.—(1)* Before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty. Such notice shall inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

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CITIZEN SUITS

SEC. 335. (a) Except as otherwise provided in subsection (b), any person may commence a civil action against—

(1) any manufacturer or private labeler who is alleged to be in violation of any provision of this part or any rule under this part; [or]

(2) any Federal agency which has a responsibility under this part where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary[.]; *or*

(3) the Secretary in any case in which there is an alleged failure of the Secretary to comply with a nondiscretionary duty to issue a proposed or final rule according to the schedules set forth in section 325.

The United States district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such provision or rule, or order such Federal agency to perform such act or duty, as the case may be. *The courts shall advance on the docket, and expedite the disposition of, all causes filed therein pursuant to paragraph (3) of this subsection. If the court finds that the Secretary has failed to comply with a deadline established in section 325, the court shall have jurisdiction to order appropriate relief, including relief that will ensure the Secretary's compliance with future deadlines for the same covered product.*

(b) *LIMITATION.*—No action may be commenced—

(1) under subsection (a)(1)—

(A) prior to 60 days after the date on which the plaintiff has given notice of the violation (i) to the Secretary, (ii) to the Commission, and (iii) to any alleged violator of such provision or rule, or

(B) if the Commission has commenced and is diligently prosecuting a civil action to require compliance with such provision or rule, but, in any such action, any person may intervene as a matter of right.

(2) under subsection (a)(2) prior to 60 days after the date on which the plaintiff has given notice of such action to the Secretary and Commission.

Notice under this subsection shall be given in such manner as the Commission shall prescribe by rule.

(c) *RIGHT TO INTERVENE.*—In such action under this section, the Secretary or the Commission (or both), if not a party, may intervene as a matter of right.

(d) *AWARD OF COSTS OF LITIGATION.*—The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(e) *PRESERVATION OF OTHER RELIEF.*—Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this part or any rule thereunder, or to seek any other relief (including relief against the Secretary or the Commission).

(f) *COMPLIANCE IN GOOD FAITH.*—For purposes of this section, if a manufacturer or private labeler complied in good faith with a rule under this part, then he shall not be deemed to have violated any provision of this part by reason of the alleged invalidity of such rule.

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[ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

[SEC. 336. (a) Rules under sections 323, 324, 325(a), 327(b), or 328 shall be prescribed in accordance with section 553 of title 5, United States Code, except that—

[(1) interested persons shall be afforded an opportunity to present written and oral data, views, and arguments with respect to any proposed rule, and

[(2) in the case of a rule under section 325(a), the Secretary shall, by means of conferences or other informal procedures, afford any interested person an opportunity to question—

[(A) other interested persons who have made oral presentations under paragraph (1), and

[(B) employees of the United States who have made written or oral presentations,

with respect to disputed issues of material fact. Such opportunity shall be afforded to the extent the Secretary determines that questioning pursuant to such procedures is likely to result in a more timely and effective resolution of such issues.

A transcript shall be kept of any oral presentations made under this subsection.

[(2) Subsections (c) and (d) of section 18 of the Federal Trade Commission Act shall apply to rules under section 325 (other than subsections (a)(1), (2), and (3)) to the same extent that such subsections apply to rules under section 18(a)(1)(B) of such Act.

[(b)(1) Any person who will be adversely affected by a rule prescribed under section 323, 324, or 325 when it is effective may, at any time prior to the sixtieth day after the date of such rule is prescribed, file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review thereof. A copy of the petition shall be forthwith transmitted by the clerk of the court to the agency which prescribed the rule. Such agency thereupon shall file in the court the written submissions to, and transcript of, the proceedings on which the rule was based as provided in section 2112 of title 28, United States Code.

[(2) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief as provided in such chapter. No rule under section 323, 324, or 325 may be affirmed unless supported by substantial evidence.

[(3) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

[(4) The remedies provided for in this subsection shall be in addition to, and not in substitution for, any other remedies provided by law.

[(c)(1) Titles IV and V of the Department of Energy Organization Act (42 U.S.C. 7191 et seq.) shall not apply with respect to the procedures under this part.

[(2) The procedures applicable under this part shall not—

[(A) be considered to be modified or affected by any other provision of law unless such other provision specifically amends this part (or provisions of law cited herein), or

[(B) be considered to be superseded by any other provision of law unless such other provision does so in specific terms, referring to this part, and declaring that such provision supersedes, in whole or in part, the procedures of this part.]

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

SEC. 336. (a)(1) In addition to the requirements of section 553 of title 5, United States Code, rules prescribed under sections 323, 324, 325, 327, or 328 of this part shall afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule.

(2) In the case of a rule prescribed under section 325, the Secretary shall, by means of conferences or other informal procedures, afford any interested person an opportunity to question—

(A) other interested persons who have made oral presentations; and

(B) employees of the United States who have made written or oral presentations with respect to disputed issues of material fact.

Such opportunity shall be afforded to the extent the Secretary determines that questioning pursuant to such procedures is likely to result in a more timely and effective resolution of such issues.

(3) A transcript shall be kept of any oral presentations made under this subsection.

(b)(1) Any person who will be adversely affected by a rule prescribed under sections 323, 324, or 325 may, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. A copy of the petition shall be transmitted by the clerk of the court to the agency which prescribed the rule. Such agency shall file in the court the written submissions to, and transcript of, the proceedings on which the rule was based, as provided in section 2112 of title 28, United States Code.

(2) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief as provided in such chapter. No rule under sections 323, 324, or 325 may be affirmed unless supported by substantial evidence.

(3) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as privided in section 1254 of title 28, United States Code.

(4) The remedies provided for in this subsection shall be in addition to, and not in substitution for, any other remedies provided by law.

(5) The procedures applicable under this part shall not—

(A) be considered to be modified or affected by any other provision of law unless such other provision specifically amends this part (or provisions of law cited herein); or

(B) be considered to be superseded by any other provision of law unless such other provision does so in specific terms by referring to this part and declaring that such provision supersedes, in whole or in part, the procedures of this part.

(c) Jurisdiction is vested in the Federal district courts of the United States over actions brought by—

(1) any adversely affected person to determine whether a State or local government is complying with the requirements of this part; and

(2) any person who files a petition under section 325(k) which is denied by the Secretary.

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ANNUAL REPORT

SEC. 338. The Secretary shall report to the Congress and the President either (1) as part of his annual report, or (2) in a separate report submitted annually, on the progress of the program undertaken pursuant to this part and on the energy savings impact of this part. Each such report shall specify the actions undertaken by

the Secretary in carrying out this part during the period covered by such report, and those actions which the Secretary was required to take under this part during such period but which were not taken, together with the reasons therefor. *Nothing in this section provides a defense or justification for a failure by the Secretary to comply with a nondiscretionary duty as provided for in this part.*

AUTHORIZATION OF APPROPRIATIONS

SEC. 339. (a) *AUTHORIZATIONS FOR THE SECRETARY.*—There are authorized to be appropriated to the Secretary not more than the folowing amounts to carry out his responsibilities under this part—
* * *

(b) *AUTHORIZATIONS FOR THE COMMISSION.*—There are authorized to be appropriated to the Commission not more than the following amounts to carry out its responsibilities under this part—
(1) * * *

* * * * * * *

(c) *OTHER AUTHORIZATIONS.*—There are authorized to be appropriated to the Secretary to be allocated not more than the following amounts—
(1) * * *

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DISSENTING VIEWS

I oppose the National Appliance Energy Conservation Act of 1987. My main reason for opposing the bill is that H.R. 87 short shrifts American consumers. This bill, which has not been the subject of a single day of hearings in this Congress and had only one day of hearings in the 99th Congress, imposes $14.2 billion in higher appliance costs on American consumers. It does not serve the public interest to rush to judgment on this vital consumer legislation.

Mandatory appliance efficiency standards will deprive American consumers of the fundamental right of choice by forcing them to choose among a shrinking selection of increasingly expensive appliances. The cost of products covered by this legislation will rise by $1.4 billion per year and entire categories of appliances will be banned from the marketplace. For example, 90 percent of heat pumps, 90 percent of central air conditioners, 90 percent of refrigerators and freezers, and 70 percent of the oil and gas furnaces now on the market will not meet the efficiency standards in H.R. 87. These products will be banned from the marketplace.

The "inefficient" products banned from the marketplace will be the least expensive products. The committee has issued legislation to divert the income of the elderly and poor toward conservation programs. I support energy conservation, but conservation should not be imposed on the American people irrespective of cost. If consumers want more efficient air conditioners and refrigerators, they should be permitted to purchase them. There are products in the market today that exceed the standards in H.R. 87. Consumers have the option to purchase more efficient appliances if they want them. However, those consumers who want to save their money in the near term should be free to do so.

I am sure U.S. manufacturers will be able to meet the ambitious standards in H.R. 87. However, the cost to American consumers of meeting these standards will be burdensome. In point of fact, the estimate that the appliance costs will rise by $1.4 billion per year comes from a group that actually supported the legislation and may be understated.

Proponents of H.R. 87 have minimized the trade impact of this legislation. They have argued that trade in appliances covered under H.R. 87 is minimal, and foreign penetration of domestic markets is insignificant. However, according to the Commerce Department, there is substantial trade in these appliances and the legislation will have a serious negative impact on the American trade deficit. A recent report, "1987 U.S. Industrial Outlook," indicates imports are growing in some appliance categories. According to this report, "Increasing imports, more than weather or consumer preference for central air conditioning systems, caused 1986 domestic

shipments of room air conditioners to fall more than 15 percent from their 1985 level of 3 million units." (Outlook, pp. 22-9).

H.R. 87 promises to aggravate the looming trade deficit in appliances. I researched recent trends in appliance exports and imports and found a serious problem. Exports of six major categories of appliances has declined by 8 percent since 1984 and imports of five major categories of appliances rose 46 percent over the same period. We face a serious problem in appliance trade and H.R. 87 will only lead to a further deterioration of the American position.

In a year when Congress is grappling with solutions to our massive trade deficit, I question the propriety of encouraging more appliance imports. A 15 percent decrease in domestic market share is a serious trade problem, one that is overlooked in H.R. 87. American manufacturers export refrigeration equipment and air conditioners to 130 countries. Mandatory efficiency standards raise the costs of American appliances, and is certain to make them less competitive in foreign markets where cost is a more important consideration than energy efficiency. I regret that the first major piece of legislation considered by the committee in 1987 will aggravate our trade problems.

One of the underlying assumptions in H.R. 87 is the mistaken belief that conservation can only be achieved by government fiat. However, our experience over the past ten years demonstrates that we do not need government standards in order to improve the energy efficiency of appliances. In recent years, the energy efficiency of refrigerators increased 48 percent and the efficiency of central air conditioners increased 27 percent. Moreover, these substantial improvements came in the absence of mandatory appliance standards. There are excellent laws on the books that require efficiency labels, giving the consumer the information necessary to make product choices. Experience shows that mandatory efficiency labels have successfully encouraged consumers to purchase efficient products. At the same time, labels have allowed consumers the freedom of choice. I do not share the belief that we "must protect the consumer from himself."

Another impetus of H.R. 87 is a projection that the legislation will lead to $28 billion in economic benefits by the year 2000. This estimate is fundamentally flawed and should be dramatically reduced. For one thing, the report uses present day dollars. Obviously, a 1987 dollar in the year 2000 will not have the same value it has in 1987. In addition, the report assumes there will be no change in use patterns after the consumer has been forced to purchase more efficient appliances. Lower operating costs will tend to result in higher usage and distinct changes in consumer behavior. The report also is based on unreasonable discount rates to exaggerate the benefits of H.R. 87. Recognizing these factors, the projected benefits of H.R. 87 shrink to somewhere in the range between $0 and $4 billion.

The establishment of national appliance efficiency standards also ignores sharp climatic variations in different regions of the country. To insist that air conditioners in Minnesota and Indiana have the same energy-efficiency ratings as air conditioners in Mississippi and Texas ignores the fact that an air conditioner may be operated four or five times as much in warmer climates. For example, a

comparison of hours of air conditioner operation in different cities demonstrates that annual usage in Detroit is 265 hours, while usage in New Orleans is 1,370 hours. Annual heating hours in these two cities is 2,533 hours and 1,099 hours, respectively. H.R. 87 makes no allowance for variation.

This lack of allowance for climatic variations imposes costs on the consumer. While consumers in New Orleans may be able to recapture the higher cost of their air conditioner through lower operating costs over a period of years, they will not be able to recapture the cost of their expensive heat pump. At the same time, Detroit consumers will not be able to recapture the higher cost of an air conditioner designed for the climate in New Orleans.

One of the "selling points" of H.R. 87 is "energy security". Proponents argue mandatory energy efficiency standards will reduce energy consumption. However, this legislation approaches energy security from exactly the wrong perspective. Instead of ordering the American people to use less energy, we should remove the government restrictions on domestic energy production. The removal of natural gas controls, repeal of the Fuel Use Act, and opening up our public lands in the West, Alaska, and Outer Continental Shelf [OCS] will go much further towards improving our energy security than government appliance efficiency standards.

It is somewhat ironic that this is the first piece of energy legislation considered by Congress since the collapse in world oil prices in January 1986. In the past fourteen months, Congress has done nothing about the most serious energy threat confronting our nation since 1979. Over this period, the United States has lost 800,000 barrels per day of domestic production, or 9 percent of total domestic production. At the same time, oil consumption rose by over 1 million barrels per day and oil imports rose by 22 percent. Congress has done nothing about this serious problem.

At best, H.R. 87 will reduce domestic energy consumption by 1 percent to 2 percent over a ten-year period. However, the rising dependency on foreign oil imports will erase any benefit from the legislation. In the end, we know government appliance standards will not be the foundation of our energy security. Energy security is best achieved through maintenance of American energy production. At the present time, the best way to maintain U.S. oil production is through an oil import fee or tax incentives for domestic exploration and development.

On November 1, 1986, President Reagan vetoed H.R. 5465 on the grounds that the legislation intruded unduly into the marketplace, limited the freedom of choice available to consumers, unintentionally harmed consumers, especially low income and elderly consumers, abridged traditional state responsibilities and perogatives, and mandated a long series of complicated future rulemakings. Only one of these objections has been addressed, the future rulemakings. An amendment authorized by the ranking Republican member of the Energy and Power Subcommittee and adopted by the subcommittee eliminated mandatory rulemakings in favor of discretionary rulemakings after the mandatory rulemakings. While this amendment is a distinct improvement to H.R. 87, most of the objectionable provisions cited by President Reagan in his veto message were not addressed by the committee and remain in the legislation.

The committee has the opportunity to come up with national appliance conservation standards that were reasonable. Instead, we adopted legislation that embraced appliance efficiency standards that were totally unreasonable. According to the Senate report on S. 83, the companion bill to H.R. 87, "The standards in most cases are as strong as, or stronger than, any State standards currently in effect." I can appreciate the fact that litigation over the 1978 statute has established the requirement for national appliance standards. However, it is not apparent to me they must be measured by the excesses of the few states that currently have standards. Those states that do not have standards will not only be forced to accept standards, but the strictest possible standards. H.R. 87 locks in these unreasonable standards, since the bill has no provision to lower standards if they prove unrealistic or burdensome. In fact, H.R. 87 specifically forbids any lowering of appliance standards. Since prices have no place to go but up, the legislation will have an inflationary impact.

The legislation also establishes conditional cost effectiveness tests for the implementation of appliance standards. A standard is deemed "economically justified" if the additional cost to consumers of appliances that comply with the standards is less than three times the value of the energy savings during the first year of use. However, a determination that a product does not meet this test cannot be taken into consideration when the Department of Energy makes an evaluation of economic justification. It is virtually impossible to fail the determination of economic justification under this criterion.

In effect, H.R. 87 creates Corporate Average Fuel Economy [CAFE] standards for appliances instead of automobiles. These CAFE standards have proven to be unworkable for automobiles and there is no reason to expect they will work any better for refrigerators, heat pumps, or central air conditioning units.

JOE BARTON.

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