**DEPARTMENT OF ENERGY**

**Office of Energy Efficiency and Renewable Energy**

**10 CFR Part 430**

**[Docket Number EE–RM–98–440]**

**RIN 1904–AA77**

## Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Supplemental proposed rule; proposed withdrawal of final rule.

**SUMMARY:** In response to a petition for reconsideration, and as a result of review under President Bush's Regulatory Review Plan, the Department of Energy (DOE) is proposing to withdraw its January 22, 2001 final rule setting forth energy conservation standards for residential central air conditioners and central air conditioning heat pumps that are not yet effective and not enforceable until January 23, 2006. As a substitute, DOE proposes to amend the currently enforceable standards by raising the minimum energy efficiency levels by 20 percent. DOE also invites public comment on proposed regulatory amendments to define and implement statutory limitations on its authority to prescribe amended energy conservation standards.

**DATES:** Comments must be received on or before October 9, 2001. DOE is requesting a signed original, a computer diskette (WordPerfect 8) and 10 copies of the written comments. DOE will also accept e-mailed comments, but you must send a signed original. Oral views, data, and arguments may be presented at the public hearing in Washington, DC., beginning at 9 a.m. on September 13, 2001.

DOE must receive requests to speak at the public hearing and a copy of your statements no later than 4 p.m., September 10, 2001, and we request that you provide a computer diskette (WordPerfect 8) of each statement at that time.

**ADDRESSES:** Please submit written comments, oral statements, and requests to speak at the public hearing to: Brenda Edwards-Jones, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps, Docket No. EE–RM/STD–98–440, 1000 Independence Avenue, SW., Washington, DC 20585–0121. You may send emails to: brenda.edwards-jones@ee.doe.gov.

The hearing will begin at 9:00 a.m., in Room 1E–245 at the U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue, SW., Washington DC. You can find more information concerning public participation in this rulemaking proceeding in Section VII, ''Public Comment,'' of this notice of proposed rulemaking (NOPR).

You may read copies of the public comments, the Technical Support Document for Energy Efficiency Standards for Consumer Products: Central Air Conditioners and Heat Pumps (TSD), the transcript of the public hearing, workshop transcripts in this proceeding, the petition for reconsideration submitted by the Air-Conditioning and Refrigeration Institute, and other post-promulgation submissions at the DOE Freedom of Information (FOI) Reading Room, U.S. Department of Energy, Forrestal Building, Room 1E–190, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–3142, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. You may obtain copies of the TSD and analysis spreadsheets from the Office of Energy Efficiency and Renewable Energy's (EERE) web site at: http://www.eren.doe.gov/buildings/codes_standards/applbrf/central_air_conditioner.html.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael E. McCabe, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, EE–41, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586-0854, e-mail: ME.mccabe@ee.doe.gov, or Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: eugene.margolis@hq.doe.gov.

**SUPPLEMENTARY INFORMATION:**

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## I. Introduction

Pursuant to section 325 of the Energy Policy and Conservation Act (EPCA) (42 U.S.C. 6295) and the Administrative

Procedure Act (APA) (5 U.S.C. 553), DOE today publishes a three part proposal with regard to energy conservation standards for central air conditioners and central air conditioning heat pumps. First, DOE proposes regulatory provisions to clarify that section 325(o)(1), which qualifies DOE's rulemaking authority to prescribe amended energy conservation standards, applies as of an effective date for modifying the Code of Federal Regulations (CFR) set forth in the notice of final rulemaking and established consistent with the Congressional Review Act (5 U.S.C. 801–804). Second, in order to correct arguable legal errors and policy shortcomings, DOE proposes to withdraw the final rule entitled ''Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pump Energy Conservation Standards' which was published in the **Federal Register** (FR) on January 22, 2001 (61 FR 7170). Third, based on: (1) Previous determinations regarding the significance of potential energy savings, technological feasibility, and other factors; and (2) factual information already in the record, DOE proposes to determine that elevation of the currently enforceable central air conditioner and central air conditioning heat pump energy conservation standards by 20 percent is the maximum increase that is economically justified. Consistent with that proposed determination and except for through-the-wall product classes, DOE proposes a Seasonal Energy Efficiency Rating (SEER) of 12 with a corresponding Heating System Performance Factor (HSPF) of 7.4 which would apply to manufacturers in 2006. With respect to space-constrained, through-the-wall product classes, DOE is today proposing more modest increases in the existing standards, which is discussed later in this **SUPPLEMENTARY INFORMATION.**

Today's action partly is a result of DOE activities under President Bush's Regulatory Review Plan. Pursuant to that plan, DOE conducted an internal review of the three final rules issued under section 325 of EPCA that DOE published at the end of the Clinton Administration, including final rules concerning energy conservation standards for clothes washers, water heaters, and central air conditioners and central air conditioning heat pumps. Consistent with the EPCA criteria for determining whether a standard level is economically justified under section 325 (42 U.S.C. 6295(o)(2)(B)), DOE examined each of these rules to determine, among other things, whether the rulemaking record was complete and whether the affirmative determination of economic justification was based on adequate findings with regard to the statutorily required considerations that make up the test of economic justification.

While DOE examined the three appliance energy conservation standards rulemakings under the President's Regulatory Review Plan, DOE received petitions for reconsideration for each final rule. In addition, DOE received notice that the Gas Appliance Manufacturers Association (with regard to the water heater rule) and the Air-Conditioning and Refrigeration Institute (ARI) (with regard to the central air conditioner rule) filed petitions for review in the United States Court of Appeals for the Fourth Circuit.

While DOE did not seek public comment as part of the internal review conducted under the President's Regulatory Review Plan or with regard to the petitions for reconsideration, DOE received written statements in opposition to reconsideration of each of the three final rules. DOE also had an informal meeting with representatives of various environmental advocacy groups who had already filed statements opposing reconsideration of the water heater and the central air conditioner final rules.

Ultimately, DOE decided that neither the clothes washer rule nor the water heater rule warranted further rulemaking action and denied the related petitions for reconsideration. See 66 FR 19714 (April 17, 2001). With regard to central air conditioners and central air conditioning heat pumps, DOE concluded that ARI had raised substantial questions as to the legal sufficiency of the January 22, 2001 final rule and that the interests of justice therefore dictated that DOE further postpone the rule's effective date in light of the pendency of ARI's petition for judicial review in the Fourth Circuit and its related petition for reconsideration. 66 FR 20191 (April 20, 2001). At that time DOE indicated that it would likely resolve these issues through supplemental rulemaking that would be forthcoming shortly.

For the reasons discussed in section III of this notice, DOE has now concluded that the January 22, 2001 final rule should be reconsidered and therefore grants ARI's petition. In particular, DOE is of the view that: (1) DOE should have invited the Department of Justice to submit a supplemental determination on the potential anti-competitive impact; (2) the statement of basis for the final rule did not sufficiently explain DOE's consideration of cumulative burden attributable to other Federal agencies' and State regulatory actions, which was necessary to DOE's conclusion regarding the potential impact of the final rule on manufacturers; and (3) DOE gave inadequate weight to the potential impact of higher installation and equipment costs on some types of consumers and to potential burdens on manufacturers.

DOE recognizes that its conclusion that the January 22, 2001 final rule was questionable on legal and policy grounds and the initiation of litigation in the Fourth Circuit has left less than ideal options for a rulemaking that, had it been concluded on time, would have been final on January 1, 1994 (42 U.S.C. 6295(d)). If DOE were to allow the January 22, 2001 final rule to become effective, there is a significant possibility of a court ordered remand for further consideration. The length of time it would take to deal with consequences of a court ordered remand would be substantial. It was just this sort of consideration that motivated Congress to enact the 1987 amendments to EPCA that require this rulemaking. As the legislative history of those amendments makes clear, an underlying legislative purpose was to cure the problem of indefinite delay that followed the decision in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355 (D.C. Cir. 1985) which vacated and remanded an appliance energy conservation standards rulemaking. *See* S. Rep. No. 100–6, 100th Cong, 1st Sess., 4 (1987) and H.R. Rep. No. 100–11, 100th Cong., 1st Sess., 28 (1987). DOE also recognizes that, given the opposition to reconsideration, there is a near certainty of a lawsuit challenging DOE's further rulemaking actions. However, since litigation appears to be inevitable regardless of what option DOE chooses, DOE has concluded that the better course is to reopen the rulemaking record on issues regarding economic justification with the objective of publishing, after considering public comments, a final rule, as soon as possible in 2001.

## II. Authority and Policy Regarding Reconsideration of Final Rules Under Section 325(o)(1) of EPCA

In reviewing the January 22, 2001 final rule under the President's Regulatory Review Plan, and in considering ARI's petition for reconsideration and the statement in opposition to it, DOE has had the occasion to construe and apply the provisions of section 325(o)(1) of EPCA for the first time since they were added

to EPCA by the National Appliance Energy Conservation Act of 1987 (NAECA) (Pub. L. 100–12). In relevant part, section 325(o)(1) of EPCA provides as follows:

> 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)(1).

In its petition for reconsideration, ARI said the following about section 325(o)(1):

> We note that the provision in EPCA that prohibits decreasing the minimum required energy efficiency of covered products, 42 U.S.C. 562(o)(1)[*sic*], is inapplicable here. 10 SEER is the minimum required energy efficiency. New efficiency minimum would not be required under the rule until several years from now (the rule provides for such minimums in 2006). Moreover, the effective date of the rule has been suspended, and there is pending litigation challenging the validity of the rule. Thus, there has been no final result related to the rulemaking.

ARI Petition, p. 3, n. 2.

Referring to the 1987 amendments to EPCA, the environmental advocacy organizations argued that ''it is clear that, under NAECA, DOE may not amend the rule to weaken its energy efficiency standards.'' After quoting from section 325(o)(1), they went on to say:

> Thus DOE is statutorily precluded from amending the Final Rule to weaken its energy efficiency standards, as ARI requests in its petition. ARI's argument (Petition at footnote 2) that this provision is ''inapplicable'' because the rule phases in tighter energy efficiency standards over time, is incorrect. * * * The timing of the phase-in of these standards is irrelevant.

Statement in Opposition, p. 5.

Although the diametrically opposed conclusions reached by ARI and the environmental advocacy organizations' response are clear enough, those conclusions are based on arguments that are too summary to evaluate. DOE's interpretation of the statute is set forth below, and DOE invites ARI and the environmental advocacy organizations to reexamine their respective positions and to comment on DOE's analysis and the resulting proposed amendments to 10 CFR Part 430.

The starting point for analysis is the text of the statute. The critical term in section 325(o)(1) is ''minimum required energy efficiency.'' EPCA does not define this term. However, in context, it is clear that a SEER and an HSPF are benchmarks of ''minimum required energy efficiency'' for central air conditioners and central air conditioning heat pumps. See 42 U.S.C. 6295(d)(1) and (d)(2). The key question, however, is which SEER and HSPF represent the ''minimum required energy efficiency'' for central air conditioners and central air conditioning heat pumps that may not be decreased by an amended standard.

Had the new SEER and HSPF set out in the January 22, 2001 final rule been allowed to take effect, but (as the rule set forth) been made applicable only to appliances manufactured on or after January 23, 2006, we think this would be a close question. A reasonable argument could be made that the new SEER and HSPF became ''required'' immediately as to such appliances provided they were manufactured on or after January 23, 2006. A reasonable argument could also be made that the new SEER and HSPF would not be ''required'' until January 23, 2006, when appliances manufactured after that date would have had to comply with them. We address this question, and other considerations bearing on the answer to it, at greater length below.

In fact, however, the January 22, 2001 final rule expressly stated that the amendments it set out to existing standards in the Code of Federal Regulations would not take effect until 30 days after publication in the **Federal Register**. Well before that date arrived, on February 2, 2001, DOE postponed that effective date for an additional 60 days. Before that 60-day period had passed, on April 18, 2001, DOE further postponed the amendments' effective date pending the outcome of petitions by ARI for reconsideration and for judicial review.

As a result, the new SEER and HSPF, though set out in a final rule, never in any sense achieved the status of being the ''required'' ''minimum energy efficiency'' benchmarks. There has never been a single moment under any understanding of the word ''required'' at which any central air conditioner or central air conditioning heat pump, including one manufactured after January 23, 2006, could even arguably have been legally required to be manufactured in conformity with them. Hence, whatever might have been the case had the January 22 final rule been allowed to take effect, we do not see how the publication of a final rule that would have changed those standards, but was prevented by later agency action from doing so, could possibly establish ''minimum required energy efficiency'' benchmarks.

This interpretation of ''minimum required energy efficiency'' is reinforced by the rest of the sentence in section 325(o)(1) of which the phrase is a part. That sentence establishes a limitation on the ''amended standards'' the Secretary may prescribe. That wording strongly suggests that the ''minimum required energy efficiency'' levels below which the Secretary may not go are the ones established by the standards being amended. Because of the various actions postponing the effective date of the amendments to the standards it proposed, the January 22, 2001 rule never actually effectuated any amendment to the prior standards. Therefore, the standards that we now propose to amend are not the ones that would have been in place had the amendments set out in the January 22 rule actually been made. Rather, they are the standards prescribed by EPCA (SEER of 10.0 and HSPF of 6.8 for split systems manufactured after January 1, 1992, SEER of 9.7 and HSPF of 6.6 for single package systems manufactured after January 1, 1993), unamended until now by anything, including the never-made-effective amendments set out in the January 22, 2001 rule.

In our view, the foregoing analysis establishes that EPCA is unambiguous on the question of whether standards that are published in the **Federal Register**, but not yet effective, represent the ''minimum required energy efficiency'' for central air conditioners and central air conditioning heat pumps. Clearly, the standards set out in the January 22, 2001 notice of final rulemaking cannot be the ''minimum required energy efficiency'' benchmarks for purposes of section 325(o)(1).[1] The question remains whether DOE should construe the term ''minimum required energy efficiency'' to mean (A) energy efficiency standards that are not yet enforceable against the manufacturers, but that have been prescribed in a final rule amending prior standards, which amendments have been made to the CFR pursuant to an effective date that has passed; or (B) energy efficiency standards that are currently enforceable against the manufacturers if they manufacture and sell a non-compliant product.

DOE believes that alternative (A) is the preferable construction of the term, but only if the effective date selected for the final rule is consistent with other applicable laws and regulations and allows the Secretary an opportunity promptly to correct legal and policy errors that may have been contained in the final rule. If that precondition is satisfied, DOE believes alternative (A) will better advance the relevant

[1] We also believe that even if the statute were found to be ambiguous, for the reasons set out in the discussion that follows, that would not be the interpretation that we should select as a matter of policy.

statutory and policy considerations underlying section 325(o)(1): to promote greater energy efficiency while providing greater certainty to manufacturers who must plan and make the expenditures necessary to comply with an amended energy conservation standard—which is often a multi-year endeavor with substantial costs. We note that the relative certainty the interpretation set out in alternative (A) produces for manufacturers, which is a key comparative advantage of this interpretation over the competing one, is intimately tied to a proper effective date choice that facilitates prompt error correction, thereby potentially avoiding litigation that would seriously undermine the certainty sought to be achieved.

DOE believes that this resolution of the ambiguities in the statute is consistent with the statute's text, structure, legislative history, and the fundamental policy choices it makes. We believe that on balance this approach better accomplishes the statute's objectives than either adopting alternative (A) without the qualification set out above, thereby establishing a set of procedures that could have the effect of preventing the Secretary, within a short period after publication of a final rule that would modify such standards, from correcting defects in them that subsequently come to his attention; or adopting alternative (B), thereby reading the phrase ''minimum required energy efficiency'' to encompass only energy efficiency standards as of the date upon which manufacturers have to comply with those standards. Although at least the latter approach may well be a permissible interpretation of section 325(o)(1), DOE believes that the view set out in our proposed rule is the better one. DOE invites members of the public to comment on this proposed policy.

The latter view—that a standard is only covered by section 325(o)(1) after manufacturers are required to comply with it—does at first blush appear to be the most natural reading of the phrase. This view, however, is in tension with the rest of the sentence, which, as explained above, suggests that the relevant point of comparison is the standard being amended, regardless of whether manufacturers actually have to comply with it. Moreover, if adopted, this view would allow the Secretary to change the energy efficiency standards right up to the minute before the compliance date. This seems to slight important reliance interests given significant weight in other respects by EPCA's provisions on central air conditioner standards. For example, section 325(d) provides that with respect to central air conditioners, any amended standard contained in a final rule published on January 1, 1994 can apply only to products manufactured on or after January 1, 1999. It similarly provides that any amended standard contained in a final rule published between January 1, 1994 and January 1, 2001 can apply only to products manufactured on or after January 1, 2006. The purpose of these delays is plainly to give manufacturers a significant amount of time to develop and manufacture new products after a new standard is adopted but before it becomes enforceable, thereby greatly diminishing the costs imposed by new standards. These delays also suggest that a change of standard on the eve of the manufacture of a product would be quite disruptive—which stands to reason given the lead-time necessary to be in a position to manufacture a compliant product. Thus, to allow a standard to be blocked at the last minute before the compliance deadline would potentially leave a rather large residual uncertainty difficult to reconcile with the central purpose of establishing a climate of regulatory stability served by these closely related portions of EPCA.

The legislative history of section 325(o)(1), although sparse, also suggests that this interpretation may not be the one best suited to accomplish the statute's objectives. That history suggests that section 325(o)(1) itself was in fact also intended in significant measure to promote regulatory certainty—a goal it would not achieve very effectively, given the importance of such certainty not only at the time of manufacture but well before manufacture has begun, if the provision is interpreted to apply to a standard only after the compliance date for that standard has passed.

The only significant information in section 325(o)(1)'s history appears in the committee reports which comment on identical bill language that was ultimately enacted without change. In the Senate bill, the language that became section 325(o)(1) was denominated new section 325(j). The Senate report says the following about that new section:

> New section 325(j) establishes the criteria by which the Secretary may prescribe new or amended standards. The Secretary may not increase the maximum allowable energy use or decrease the minimum required energy efficiency of a covered product.

Senate Report No.100–6 at p.8. That statement paraphrases the bill language without shedding any light on what the language was supposed to mean.

By contrast, the House report does add to our understanding by identifying at least what the House committee thought the purpose of the bill language was. In describing that language, which appears in new section 325(l)(1) of the House bill, the House report states:

> DOE may not prescribe an amended standard that increases the 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 covered 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 * * *

House Report No. 100–11 at p. 22. Since the Senate report differs from the House report and no conference committee report exists, the House report language does not represent the views of the Congress as a whole. Therefore, that language should be used cautiously as a contributory factor in construing section 325(o)(1) and framing implementing regulations.

The House report language indicates that the term ''minimum required energy efficiency'' includes both the legislated standards established by Congress in 1987 and amended standards ''subsequently adopted.'' However, the word ''adopted'' is not a term that is used in EPCA or the APA. As applied to the sequence of steps that make up the rulemaking process, it is unclear which step is deemed to be the moment that an amended standard is ''adopted.''

More instructive is the sentence from the House report that states with regard to the underlying purpose of section 325(o)(1): ''This serves to maintain a climate of relative stability with respect to future planning by all interested parties * * *'' This suggests, as noted above, that section 325(o)(1) was specifically expected, at least in the view of the House Committee, to act harmoniously with the other provisions of EPCA discussed above in facilitating regulatory certainty. The latter purpose is better accomplished by construing the provision to become applicable at a point well before the compliance date.

On the other hand, the reliance interests at stake also are not best served in the long run by taking the opposite course and adopting the view that section 325(o)(1) becomes applicable at the earliest possible moment. Let us imagine, for example, that DOE were routinely to make final rules containing standards potentially subject to section 325(o)(1) effective as soon as possible after publication. This would likely result in its making such rules effective

30 days after publication.[2] DOE also could refuse to reconsider any aspect of such a rule relevant to the standard (unless it could complete its consideration and correct any errors within that 30-day time period), no matter how serious or legitimate a question might be raised, since to do so effectively, it would have to prevent the standard from going into effect.

This approach, however, would not be the best way for DOE to promote regulatory certainty either. It is common for agencies to entertain petitions for reconsideration at least for a short period after issuance of a final rule as well as to correct errors on their own motion during that time. Moreover, there is good reason why agencies follow this course, since otherwise such errors would have to await the completion of judicial review before they could be corrected, thereby creating substantial delay and uncertainty. Accordingly, this approach too, in addition to running counter to ordinary administrative practices that there is no reason to believe section 325(o)(1) was intended to abrogate, is not the best way to advance the regulatory stability sought by section 325(o)(1) and the other related EPCA provisions discussed above.

This approach also would create unnecessary tension between section 325(o)(1) and the Congressional Review Act (CRA) (5 U.S.C. 801–804) enacted in 1996. Under CRA, before a final rule can become ''effective,'' DOE must send a report to Congress (5 U.S.C. 801(a)(1)(A) and (B)). With respect to a ''major rule'' within the meaning of 5 U.S.C. 804(2), CRA provides for the passing of a 60-calendar-day-lie-before-the-Congress period, after submission of the agency report, at the end of which a final rule could become effective in the absence of a Congressional resolution of disapproval (5 U.S.C. 801(a)(3)). CRA allows for an exception to the 60-day-lie-before requirement only if the President determines that a major rule should take effect before the end of that period because of an imminent health or safety threat or other emergency; because it is necessary to the enforcement of criminal laws or national security; or if it is issued pursuant to a statute implementing an international trade agreement (5 U.S.C. 801(c)).

In DOE's view, this last set of considerations also points the way to the answer to the question of at what time amendments to an energy-efficiency-setting-standard should best be viewed as having set ''minimum required energy efficiency'' benchmarks. For the reasons explained at the beginning of this section, that time must be after the final rule making the amendments to the standard is in effect. But, consistent with the objective of section 325(o)(1) and the other closely related EPCA provisions of promoting regulatory certainty, and to harmonize section 325(o)(1) with common administrative practice and the CRA, such final rules should ordinarily be made effective only after a reasonable hiatus after the date of publication has elapsed, allowing for prompt use of ordinary administrative error correction procedures and completion of congressional review under CRA. This is the earliest that manufacturer planning in reliance on a final major rule to amend appliance energy conservation standards can realistically be expected to begin. The certainty of the regulatory regime sought to be achieved therefore cannot occur until that time.

Accordingly, 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. It also believes, however, that it should take care to select effective dates for final rules containing such standards that are consistent with the CRA and any other applicable law. This approach will best promote the regulatory certainty sought by section 325(o)(1) and its companion provisions and also comports well with the ordinary understanding of when a rule containing such standards has established ''require[ments].''

We note that DOE's own past practice on the selection of such effective dates has not been consistent with this approach. But it also has not been internally consistent even very recently, potentially creating wide variations regarding when section 325(o)(1) would become applicable as well as running afoul of the various considerations outlined above.

Typically, DOE has not made amendments to EPCA standards contained in final rules effective until the date on which manufacturers have had to comply with them. See 10 CFR 430.32. That is the approach we followed even very recently in the case of the rules setting out the amendments to standards for water heaters (66 FR 4474, 4497, Jan. 17, 2001, effective Jan. 20, 2004) and clothes washers (66 FR 3314, 3331, Jan. 12, 2001, effective Jan. 1, 2004). We departed from that practice in the case of the central air conditioner rule at issue here. We did so, however, not because we had considered the potential ramifications of our prior approach and of the approach we were taking to this rule for purposes of the applicability of section 325(o)(1), but rather in an effort to follow the current guidance of the Office of the Federal Register, which distinguishes between the date on which a final rule is effective for purposes of modifying the Code of Federal Regulations and the date on which a final rule is effective for purposes of requiring compliance with its requirements. *See* National Archives and Records Administration, Office of the Federal Register, *Document Drafting Handbook,* Chapter 2, p. 2–12 (October 1998). Consistent with the recent guidance in the *Document Drafting Handbook,* but without taking into account either the CRA or potential section 325(o)(1) ramifications, DOE specified a 30-day-after-publication effective date consistent with the APA and a compliance date of January 23, 2006, consistent with EPCA.

Having now considered these issues more carefully, DOE believes it should adopt the approach outlined above which is specifically designed to accomplish the relevant EPCA policy objectives. Accordingly, it proposes to adopt a series of amendments to the EPCA rules intended to address these general issues. First, it proposes to define by rule the terms ''maximum allowable energy use'' and ''minimum required energy efficiency'' as energy conservation standards established by a final rule that has become effective in the sense that it has modified the Code of Federal Regulations. It further proposes to include in its definition that to qualify, the final rule has to have made that modification on a date selected consistent with the CRA and other applicable law. Finally, in order to avoid confusion, it proposes a technical amendment adding a definition of the EPCA term ''effective date,'' which EPCA, inconsistently with the Office of Federal Register guidance, treats as synonymous with ''compliance date.''

To that end, DOE proposes to add a new § 430.34 which tracks the language of section 325(o)(1). It also proposes to add to the definitions section, § 430.2, new definitions for ''maximum allowable energy use'' and ''minimum required energy efficiency.'' These definitions would treat amendments to a standard contained in a final rule as establishing ''maximum allowable energy use'' and ''minimum required energy efficiency'' benchmarks for purposes of section 325(o)(1) on the date such a rule made those amendments effective as to the Code of Federal

[2] Under the APA in most cases it could not make them effective before them.

Regulations, provided that DOE sets out in the **EFFECTIVE DATE** line of a notice of final rulemaking under section 325 a date on which the Code of Federal Regulations will be modified that is selected consistent with the CRA and any other applicable law. In most instances, the date selected will be 60 to 80 days after the date of publication.

Consistent with the proposed definitions to be added to § 430.34, DOE intends to make the final rule based on today's proposal effective 75 days from the date of publication.

Finally, to make the technical change referenced above, DOE proposes also to add to § 430.2 a definition of the term ''effective date'' as used in EPCA and 10 CFR 430.32. This definition clarifies that for purposes of construing the term under EPCA (but not for purposes of determining the point at which amendments to a standard qualify for protection under section 325(o)(1)), the ''effective date'' is the date on which an amended energy conservation standard becomes enforceable.

## III. Proposal To Withdraw Final Rule

In this portion of the **SUPPLEMENTARY INFORMATION**, DOE sets forth its conclusions with regard to the legal and policy issues that DOE considered in deciding whether to propose withdrawal of the January 22, 2001 final rule. Included among these issues are certain issues raised by ARI in its petition for reconsideration.

### *A. Legal Issues*

1. Failure To Obtain the Views of the Department of Justice on the Potential Anti-Competitive Impact of 13 SEER Standards

In its petition, ARI contends that DOE should have invited the Department of Justice to submit a supplemental statement of its views on the potential anti-competitive impact of DOE's final rule establishing a 13 SEER standard for central air conditioners and heat pumps (ARI Petition Discussion, paragraph d). Although EPCA does not provide that DOE must seek supplemental determinations from the Department of Justice on final rules, DOE concludes, for reasons set forth below, that it should have requested supplemental views from the Department of Justice on the effect of a uniform 13 SEER standard on competition, particularly on the question of potential consolidation in the central air conditioning and heat pump industry.

Section 325(o)(2)(B)(i) of EPCA requires DOE to determine whether the benefits of a new or amended energy conservation standard exceed its burdens by considering ''to the greatest extent practicable'' seven factors, including: ''(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'' (42 U.S.C. 6295(o)(2)(B)(i)). Section 325(o) also provides that:

> 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**.

42 U.S.C. 6295(o)(2)(B)(ii).

In context, it is clear that the term ''the standard'' in section 325(o)(2)(B)(i) refers to any new or amended energy conservation standard prescribed by DOE under section 325(o) of EPCA. Because the Department of Justice must transmit its determination to DOE within 60 days after the publication of a proposed rule, EPCA contemplates that the Department of Justice's determination on the anti-competitive effects of a proposed rule will enable DOE to fulfill its substantive obligation to consider the Department's expert opinion on the anti-competitive impact of a final standard.

DOE submitted the October 5, 2000 NOPR to the Attorney General for review pursuant to the foregoing provisions. The NOPR described the range of potential trial standards considered by DOE, and proposed adoption of Trial Standard Level 3, *i.e.,* a minimum SEER of 12 for central air conditioner product classes and a SEER of 13 for central air conditioning heat pumps, with a corresponding HSPF of 7.7. The Department of Justice, consistent with its past practice, confined its response to the proposed standards, corresponding to Trial Standard Level 3.

The Department of Justice conveyed to DOE three concerns about the proposed rule's potential impact on competition (*see* December 4, 2000, letter in the Appendix to this notice). First, the Department of Justice was concerned the proposed rule would have a disproportionate impact on small manufacturers. Second, it was concerned that the proposed standard for heat pumps, and in some instances the standard for air conditioners, would have an adverse impact on some manufacturers of equipment to be used to retrofit existing housing and used in manufactured housing. Third, it was concerned that the proposed 13 SEER for central air conditioning heat pumps could cause consumers to shift from heat pumps to other systems that include resistance heat systems, reducing the competition that presently exists between manufacturers of air conditioning heat pumps and manufacturers of those other heating systems. The Department of Justice urged DOE to take these concerns into account and consider ''setting a lower SEER standard for heat pumps, such as the standard included in Trial Standard Level 2, and a lower SEER standard for air conditioners for retrofit markets where there are space constraints and for manufactured housing.'' 66 FR 7200.

DOE published a final rule on January 22, 2001 adopting standards that corresponded to Trial Standard Level 4 (the next higher level) and prescribed a minimum SEER of 13 for all the product classes, except for niche products, with a corresponding 7.7 HSPF. The preamble to the final rule addressed the Department of Justice's specific concerns about the October 5 proposed rule (66 FR 7192–93). It also addressed the potential anti-competitive impact of the final rule's uniform 13 SEER standard, in general terms:

> We recognize that the standard levels we are adopting could accelerate the consolidation trend among major manufacturers. However, as discussed in the manufacturer impact analysis, 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. (*See* TSD, Chapter 8). 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 FR 7176. The TSD referenced chapter also concluded that, under Trial Standard Level 4, several major companies would likely consider selling their production assets rather than make the investment required to meet the new standard or face the loss of profits caused by the absence of premium products in the marketplace (*see,* TSD 8.7.4, p. 8–64).

Thus, DOE simply relied on the manufacturer impact analysis in the TSD to support its conclusion with respect to the potential impact on competition of the final rule's Trial Standard Level 4 (13 SEER) standards. DOE did not have the benefit of the Department of Justice's views on the potential anti-competitive impact of the

final 13 SEER standards for both air conditioners and heat pumps.

As the TSD shows, the central issue regarding the January 22 final rule is the potential effect of 13 SEER standards on consolidation in the central air conditioning and heat pump industry. DOE adverted to this in the preamble to the final rule with the statement ''that the standard levels we are adopting could accelerate the consolidation trend among major manufacturers.'' 66 FR 7176. Arguably, to comply with section 325(o)(2)(B)(i), DOE should have requested supplemental views from the Department of Justice on this issue.

2. Failure of the Statement of Basis for the Final Rule to Adequately Address Cumulative Regulatory Burdens on Manufacturers

To determine whether a standard is economically justified, DOE must assess the economic impact of the standard on the manufacturers and consumers of the products subject to such standard (42 U.S.C. 6295(o)(2)(B)(i)(I)). One aspect of manufacturer burden is 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.

In its petition for reconsideration, ARI criticized DOE for not discussing information in the TSD on the cumulative regulatory burden on the central air conditioning and heat pump industry (ARI Petition Discussion, paragraph m). The preamble to the final rule addressed the issue of cumulative regulatory burden in conclusory terms in two brief sentences, as follows: ''The Department has considered the manufacturer burdens as described in the manufacturer impact analysis of the TSD in adopting the new standard. These include cumulative burdens.'' 66 FR 7174. The statement of basis and purpose required by the APA (5 U.S.C. 553(c)) to accompany a final rule must establish a rational connection between the facts the agency found and the choices it made. In light of the evidence of cumulative regulatory burdens on manufacturers documented in the TSD, it is doubtful whether the mere assertion by DOE that it considered the cumulative burdens on manufacturers is adequate to establish a rational basis for DOE's determination on manufacturer impact resulting from a 13 SEER standard.

DOE's discussion and conclusions regarding the weight that should be given to cumulative regulatory burden in this rulemaking are set forth in the ''Policy Issues'' discussion immediately following this section, and in the preamble to today's proposed rule (*see* Section V.B.2. of this **SUPPLEMENTARY INFORMATION**).

*B. Policy Issues*

DOE reviewed the basis and rationale for the January 22, 2001 final rule pursuant to the President's Regulatory Review Plan, and it considered carefully numerous claims by ARI of error or insufficiency in DOE's analyses and its weighing of the benefits and burdens of the final rule. As a result of this review, DOE has decided to accord more weight to certain factors, and those changes, which reflect the current Administration's policies, support DOE's decisions to propose withdrawal of the January 22 final rule and to publish today's proposed rule.

1. Burdens on Consumers

During its review of the January 22 final rule, DOE reassessed its weighing of burdens and benefits of the standards, giving particular attention to the question of whether burdens on consumers received adequate consideration and weight.

DOE currently is particularly concerned that new standards be designed to distribute their burdens and benefits as fairly as practical. Although some disparity is expected in any national standard, the disparity in impacts between low-income and typical consumers is of more concern at more stringent efficiency standards because increases in first cost are felt more sharply by lower income consumers. The potential disparities would be diminished under the 12 SEER standard that DOE is proposing today.

DOE also has considered that the fraction of consumers who are negatively impacted by a 13 SEER standard, in terms of life-cycle cost savings versus the existing standards, is substantially higher than the fraction who are negatively impacted in other recent DOE efficiency rules. To illustrate, the efficiency standard for clothes washers, published in the **Federal Register** on January 12, 2001 (66 FR 3314), will negatively impact 19 percent of all consumers and 19 percent of low income consumers, and the efficiency standard for gas-fired residential water heaters, published in the **Federal Register** on January 17, 2001 (66 FR 4474), will result in negative life-cycle cost impacts for 12 percent of all consumers.[3] By contrast, under a 13 SEER standard for split air conditioners, 39 percent and 50 percent of average and low income consumers, respectively, would be negatively impacted. A 12 SEER standard would result in a lower fraction of consumers who are negatively impacted: 25 percent and 34 percent of average and low income consumers, respectively.

In summary, DOE has decided that, in issuing the January 22 final rule, inadequate discussion and weight was given to the fraction of all and low income consumers who incur negative life-cycle cost impacts as a result of the new standard.

2. Burdens on Manufacturers

*a. Cumulative Regulatory Burden.* In the preceding section, DOE concluded that the statement of basis and purpose for the January 22 final rule did not adequately address the issue of cumulative regulatory burden, which DOE recognizes is a key component of the assessment of manufacturer impact (*see* Process Improvement Rule, section 10(g), codified at 10 CFR Part 430, Subpart C, Appendix A). DOE's decision to propose withdrawal of the January 22 final rule is based in part on DOE's current view that the preamble to the final rule contained insufficient discussion of cumulative regulatory burdens and gave insufficient weight to cumulative regulatory burdens.

As mentioned by ARI, DOE did have information, which was included in the TSD, of cumulative regulatory burdens. The TSD for the final rule shows that the most significant regulation facing the central air conditioning industry is the Environmental Protection Agency's (EPA's) ban on new equipment utilizing a particular hydrofluorocarbon (HCFC), HCFC–22, as a refrigerant, scheduled to take effect in January 2010. In addition, an EPA ban on use of HCFC–141b as a foam blowing agent (used in water heaters, refrigerators and freezers) takes effect on January 1, 2003. The TSD reports that companies must develop a wealth of new knowledge and experience to replace the refrigerant HCFC–22, and it estimates the cost of converting equipment to a substitute refrigerant to be on the order of $50 million per company. Additional regulatory burdens on manufacturers of residential central air conditioner and heat pump products are new DOE efficiency standards for refrigerators and freezers (effective July 1, 2001) and

[3] For split air conditions and gas water heaters, the fraction provided represents those consumers who incur an increase in life-cycle costs that exceeds 2 percent of the total life-cycle cost, with low-income data available only for split air conditioners. For clothes washers, the fraction represents those consumers who incur any life-cycle cost increase at all. For direct comparison with clothes washers, the fraction of all consumers incurring any increase in life-cycle costs for gas water heaters in 22 percent and for split air conditioners is 55 percent.

water heaters (effective January 20, 2004); a Consumer Product Safety Commission voluntary standard for flammable vapor ignitions on water heaters (under development); and EPA standards under section 112(d) of the Clean Air Act on emissions of hazardous air pollutants from the coating of large appliances (expected to apply in 2004). While acknowledging that the uncertainty surrounding DOE's estimates is high, the TSD estimates the total investment required by manufacturers of central air conditioner and heat pumps to meet these cumulative regulatory burdens will exceed $479 million. This estimate excludes the cost of manufacturer compliance with DOE's amended efficiency standard for air conditioners and heat pumps, which the TSD estimates is comparable the cost of the HCFC–22 phase-out (TSD, Section 8.6.).

b. *Financial Burdens Associated with New Standards.* The TSD demonstrated that the more stringent 13 SEER standards adopted in the January 22 final rule would likely cause the industry's net cash flow to drop below zero (Section 8.4.6). It also noted that one segment of the industry (denominated ''lower operating cost manufacturers'' in the analysis) would likely benefit from more stringent standards, and that another segment of the industry (denominated ''higher operating cost manufacturers'') would bear nearly the total financial burden (Section 8.5). According to the TSD, the potential outcomes of these impacts could include accelerated consolidation and stifling of innovation. As a matter of policy, DOE considers these outcomes to be potentially serious, and certainly material, consequences that should be discussed when adopting new standards. DOE is proposing to withdraw the January 22 final rule, in part, to give greater weight to the negative cash flow and maldistribution of burdens on industry of 13 SEER standards. DOE explicitly addresses these issues in the preamble to today's proposed rule in Section V.B.2. of this **SUPPLEMENTARY INFORMATION.**

## IV. Proposed Rule

### *A. Background*

#### 1. Statutory Authority

Part B of Title III of the Energy Policy and Conservation Act provides for the Energy Conservation Program for Consumer Products other than Automobiles (42 U.S.C. 6291 *et seq.*). The consumer products subject to this program (often referred to hereafter as ''covered products'') include central air conditioners and heat pumps. Under the Act, the program consists essentially of three parts: testing, labeling, and Federal energy conservation standards.

As discussed in the Introduction in Section I of this **SUPPLEMENTARY INFORMATION**, NAECA prescribed initial Federal energy conservation standards for central air conditioners and heat pumps (42 U.S.C. 6295(d)). NAECA further amended EPCA by specifying that DOE is to review and publish amended standards by January 1, 1994 (42 U.S.C. 6295(d)(3)(A)). Under EPCA, any new or amended standard must be designed so as to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified (42 U.S.C. 6295(o)(2)(A)).

Section 325(o)(2)(B)(i) provides that before DOE determines whether a standard is economically justified, it must first solicit comments on a proposed standard (42 U.S.C. 6295(o)(2)(B)(i)). That section further provides that, after reviewing the comments, DOE must determine whether the benefits of the standard exceed its burdens, based, to the greatest extent practicable, on a weighing of the following seven factors:

(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.

In addition, section 325(o)(2)(B)(iii) establishes a rebuttable presumption of economic justification in instances where the Secretary determines 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 * * *.'' (42 U.S.C. 6295(o)(2)(B)(iii)). The rebuttable presumption test is an alternative path to establishing economic justification.

#### 2. Rulemaking History

The existing standards for residential central air conditioners and heat pumps have been in effect since 1992. As described in the Introduction to this **SUPPLEMENTARY INFORMATION**, the efficiency descriptor for air conditioner and heat pump cooling efficiency is SEER (or Seasonal Energy Efficiency Ratio), and the descriptor for heat pump heating efficiency is HSPF (or Heating Seasonal Performance Factor). SEER is DOE's measure of energy efficiency for the seasonal cooling performance of central air conditioners and heat pumps. HSPF is DOE's measure of energy efficiency for the seasonal heating performance of heat pumps. The current central air conditioner and heat pump efficiency standards are as follows:

—Split system air conditioners and heat pumps—10 SEER/6.8 HSPF
—Single package air conditioners and heat pumps—9.7 SEER/6.6 HSPF

On September 8, 1993, DOE published an Advance Notice of Proposed Rulemaking (ANOPR) announcing DOE's intention to revise the existing central air conditioner and heat pump efficiency standard. 58 FR 47326. During a workshop on June 30, 1998, DOE presented for comment an analytical framework for the central air conditioner and heat pump standards rulemaking. The analytical framework described the different analyses to be conducted, the methods for conducting them, the use of new spreadsheets, and the relationship of the various analyses. On November 24, 1999, DOE published a Supplemental ANOPR and invited additional comment on issues raised following publication of the original ANOPR. 64 FR 66306.

On October 5, 2000, DOE published a notice of proposed rulemaking (October 5, 2000, NOPR). 65 FR 59590. The energy efficiency standards that DOE proposed for residential central air conditioners and central air conditioning heat pumps (heat pumps) were as follows:

—Split-system and single-package air conditioners—12 SEER
—Split-system and single package heat pumps—13 SEER/7.7 HSPF
—Through-the-wall air conditioners and heat pumps—11 SEER/7.1 HSPF.

In addition to the increase proposed in SEER and HSPF, DOE requested comments on a proposal to adopt a

standard for steady-state cooling efficiency, denominated EER (or Energy Efficiency Ratio).[4] The proposal of an EER was designed to ensure more efficient operation at high outdoor temperature, during periods when electricity use by air conditioners is at its peak. A public hearing was held in Washington, D.C. on November 16, 2000 to hear oral views, data and arguments on the proposed rule.

As explained in the Introduction to this **SUPPLEMENTARY INFORMATION**, DOE published a final rule on January 22, 2001 that would have required a SEER of 13 for product classes covered by the rule with a corresponding HSPF of 7.7 for heat pumps. Subsequent events, including notices delaying the final rule's effective date pursuant to the President's Regulatory Review Plan, petitions for judicial review, and ARI's petition for reconsideration of the final rule, are also discussed in the Introduction.

*B. Overview of the Proposed Standards*

DOE, through today's proposed rule, would amend the almost ten-year old minimum efficiency standards for new central air conditioners and heat pumps. These amended standards would take into account a decade of technological advancements and would save consumers and the nation money, significant amounts of energy, and have substantial environmental and economic benefits.

If today's proposed standards go into effect, they would essentially raise the energy efficiency standards to 12 SEER for new central air conditioners and to12 SEER/7.4 HSPF for new central air conditioning heat pumps. In its petition for reconsideration, ARI argued that if a 12 SEER standard is adopted for central air conditioning heat pumps, the HSPF should be no higher than 7.3 (Petition Discussion, paragraph n). ARI, and other persons who commented on the October 5 proposed rule, urged DOE to revise the HSPF levels to reflect differences among the SEER–HSPF relationships across equipment of varying capacity ratings. As DOE explained in the preamble to the January 22, 2001 final rule, DOE established the SEER–HSPF parings in order to maintain the offset between the minimum SEER and the minimum HSPF in the current standards. Because heating energy is a large fraction of total heat pump energy consumption, DOE stated it would not relax the HSPF level in the absence of sound evidence regarding the burdens that would be mitigated (66 FR 7184). DOE continues to think an HSPF of 7.4 is the appropriate level for 12 SEER. Data discussed in the TSD (Section 4.6.2.1) show that most models of equipment below 3-tons meet or exceed an HSPF of 7.4, and almost a third of models available below 20,000 BTU/hr. meet or exceed an HSPF of 7.4.

The proposed standards would apply to products manufactured for sale in the United States, as of July 25, 2006. The proposed standard for split-system air conditioners, the most common type of residential air conditioning equipment, represents a 20 percent improvement in energy efficiency. For split-system heat pumps, the new standard would represent a 20 percent improvement in cooling efficiency and a 9 percent improvement in heating efficiency. The standard would also increase the cooling efficiency of single-package air conditioners and single-package heat pumps by 24 percent and the heating efficiency of single-package heat pumps by 12 percent. Finally, DOE is proposing to adopt new standards for some products to ensure that more efficient versions remain available for certain niche applications. DOE proposes to determine that the new standards are the highest efficiency levels that are technologically feasible and economically justified as required by law. Several aspects of today's proposed standards warrant highlighting here, as follows:

1. Central Air Conditioner and Heat Pump Features

The proposed efficiency levels can be met by central air conditioner and heat pump designs that are already available in the market. DOE fully expects variations of these models to exist under the new standards, offering all the features and utility that are found in currently available products.

2. Consumer Benefits

Table 1 summarizes the ''characteristics'' of today's typical central air conditioners and heat pumps. Table 2 presents the implications for the average consumer of the standards becoming effective in 2006.

TABLE 1.—CHARACTERISTICS OF TODAY'S TYPICAL CENTRAL AIR CONDITIONERS AND HEAT PUMPS [1]

| | Split system air conditioner | Split system heat pump | Single package air conditioner | Single package heat pump |
|---|---|---|---|---|
| Average Installed Price | $2,236 | $3,668 | $2,607 | $3,599. |
| Annual Utility Bill [2] | $189 | $453 | $189 | $453. |
| Life Expectancy | 18.4 years | 18.4 years | 18.4 years | 18.4 years. |
| Energy Consumption per year | 2,305 kWh | 6,549 kWh | 2,305 kWh | 6,549 kWh. |

[1] ''Typical'' equipment have cooling and heating efficiencies of 10 SEER and 6.8 HSPF, respectively.
[2] Utility bill pertains to the energy cost of operating the air conditioner or heat pump.

TABLE 2.—IMPLICATIONS OF NEW STANDARDS FOR THE AVERAGE CONSUMER

| | Split system air conditioner | Split system heat pump | Single package air conditioner | Single package heat pump |
|---|---|---|---|---|
| Year Standard Comes into Effect | 2006 | 2006 | 2006 | 2006. |
| New Average Installed Price | $2,449 | $3,812 | $2,765 | $3,748. |
| Estimated Price Increase | $213 | $144 | $158 | $149. |
| Annual Utility Bill Savings | $31 | $50 | $31 | $50. |
| Average Net Saving over Equipment Life | $113 | $365 | $163 | $421. |
| Energy Savings per Year | 384 kWh | 768 kWh | 384 kWh | 768 kWh. |

[4] EER is a steady-state measure of energy efficiency which measures efficiency at a prescribed outdoor temperature (95° F), and is one of the test conditions in DOE's test procedure used to develop the SEER.

The most typical air conditioner (*i.e.*, split system air conditioner whichcomprises approximately 65 percent of today's central air conditioning and heat pump market) has an installed price of $2,236 and an annual utility costs of $189. In order to meet the 2006 proposed standard, DOE estimates that the installed price of a typical air conditioner would be $2,449, an increase of $213.[5] This price increase would be offset by an annual energy savings of about $31 on the utility bills. The most typical heat pump (*i.e.*, split system heat pump) currently has an installed price of $3,668 and annual utility costs of $453. In order to meet the 2006 proposed standard, DOE estimates that the installed price of a typical heat pump would be $3,812, an increase of $144.[6] This price increase would be offset by an annual energy savings of about $50 on the utility bills.

DOE recognizes that most consumers pay energy prices that are higher or lower than the ''typical'' consumer and operate their equipment more or less often. Consequently, DOE has investigated the effects of the different energy prices across the nation and different air-conditioning usage patterns. DOE estimates that 75 percent of all consumers purchasing a new typical air conditioner would either save money or would be negligibly impacted as a result of the 2006 proposed standard.[7] In the case of a new typical heat pump, all consumers either would save money or be negligibly impacted.[8]

DOE also investigated how these standards might affect low income consumers. On average, DOE estimates that it is likely that low income air conditioner and heat pump consumers would also save money over the life of the equipment as a result of the standard.

3. National Benefits

The proposed standards would provide benefits to the nation. DOE estimates the standards would save approximately 3 quads of energy over 25 years (2006 through 2030). This is equivalent to all the energy consumed by nearly 17 million American households in a single year. In 2020, the proposed standards would avoid the construction of three 400 megawatt coal-fired plants and twenty-seven 400 megawatt gas-fired plants. These energy savings would result in cumulative greenhouse gas emission reductions of approximately 24 million metric tons (Mt) of carbon, or an amount equal to that produced by approximately 2 million cars every year. Additionally, air pollution would be reduced by the elimination of approximately 70 thousand metric tons of nitrous oxides ( $NO_X$) from 2006 through 2030. In total, DOE estimates this proposed standard would have a net benefit to the nation's consumers of $2 billion over the period 2006 through 2030.[9]

*C. Technological Feasibility*

There are central air conditioners and heat pumps in the market at the efficiency levels that would be prescribed by today's proposed rule. DOE, therefore, believes all of the proposed efficiency levels are technologically feasible.

Pursuant to section 325(p)(2) of EPCA, and as discussed in the October 5, 2000 NOPR, DOE determined that 18 SEER is the maximum technologically feasible level (Max Tech Level) for cooling efficiency for all product classes and capacities covered by this rulemaking. 65 FR 59593. The Max Tech Level for heating efficiency is 9.4 HSPF, which is the highest HSPF rating currently available in residential heat pumps.

*D. General Discussion of Economic Justification Factors*

As noted earlier, section 325(o)(2)(B)(i) of EPCA requires DOE to consider seven factors in determining whether a conservation standard is economically justified.

1. Economic Impact on Manufacturers and Consumers

DOE considered the economic impact on manufacturers and consumers as discussed in the October 5, 2000, NOPR (65 FR 59590, 59593) and the January 22, 2001 final rule (66 FR 7174–78, 7185–7191). As explained in Section III and Section V.B. of this **SUPPLEMENTARY INFORMATION**, today's proposal is based in part on changes in emphasis or weight that DOE, as a result of its reconsideration of the rulemaking record, now gives to certain aspects of its analysis of manufacturer and consumer impact.

2. Life-Cycle costs and Rebuttable Presumption

DOE considered life-cycle costs (LCC), as discussed in the January 22, 2001 final rule. 66 FR 7173, 7175, 7187–90. DOE calculated the installed price and operation and maintenance costs for a range of consumers around the nation to estimate the range in life-cycle cost benefits that consumers would expect to achieve due to new standards. DOE has made no change in its assumptions and analysis of life-cycle costs in proposing today's rule.

As previously mentioned, NAECA established new criteria for determining whether a standard level is economically justified. Section 325(o)(2)(B)(iii) of EPCA provides that if, according to the applicable test procedure, the increase in initial price of an appliance due to a conservation standard would repay itself to the consumer in energy savings in less than three years, then DOE is to presume that such standard is economically justified. This presumption of economic justification can be rebutted upon a proper showing.

Using the reverse engineering manufacturing costs, the standards DOE proposes today for split heat pumps and packaged heat pumps can be shown to have satisfied the rebuttable presumption requirements in section 325(o)(2)(B)(iii). To avoid confusion, DOE points out that the statute requires DOE to use ''the applicable test procedure'' to calculate the payback periods for purposes of the rebuttable presumption. As explained in the October 5, 2000 NOPR, the annual cooling and heating energy consumption calculations based on DOE's test procedure are significantly greater than the weighted-average values from DOE's life-cycle cost analyses based on the 1997 Residential Energy Consumption Survey, used in other DOE analyses, including evaluation of consumer impacts. 65 FR 59596. For this reason, the payback periods presented in Section V of this portion of the preamble, entitled ''Analytical Results and Conclusions,'' are significantly longer than those calculated to determine whether the rebuttable presumption applies to these products.

While the analysis requires DOE to presume that the standards adopted for split system and single package heat pumps are economically justified, it shows that split system air conditioners and single package air conditioners do not meet the standard for use of the rebuttable presumption of economic justification. Therefore, DOE does not

[5] Based on estimates supplied by the industry trade association, the Air-Conditioning and Refrigeration Institute (ARI), the installed price is estimated to be $2,510, an increase of $274.

[6] Based on estimates supplied by ARI, the installed price is estimated to be $3,933, an increase of $265.

[7] Based on estimates supplied by ARI, 61 percent of all consumers purchasing a new typical air conditioner will either save money or will be negligibly impacted as a result of the 2006 standard.

[8] Based on estimates supplied by ARI, 97 percent of all consumers purchasing a new typical heat pump will either save money or will be negligibly impacted as a result of the 2006 standard.

[9] Net benefit assumes NAECA efficiency scenario. Net benefit would be $3 billion for Roll-up efficiency scenario.

presume them to be economically justified. If the rebuttable presumption does not apply, DOE must perform additional analysis to determine economic justification. DOE has performed an analysis for all classes of central air conditioner and heat pump products that shows the standards proposed today are indeed economically justified.

3. Energy Savings

EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from revised standards. DOE forecasted energy savings through the use of a national energy savings (NES) spreadsheet, as discussed in the October 5, 2000 NOPR. 65 FR 59590, 59593. DOE relies on the same spreadsheets and assumptions for its estimate of the NES that would result from implementation of today's proposed standards.

As discussed in the October 5, 2000 NOPR, section 325(o)(3)(B) of EPCA prohibits DOE from adopting a standard for a product if that standard would not result in ''significant'' energy savings. The energy savings for the standard levels DOE is proposing today are non-trivial—indeed they are substantial—and therefore we consider them ''significant'' within the meaning of section 325 of the Act.

4. Lessening of Utility or Performance of Products

This factor cannot be quantified. In establishing classes of products, DOE has attempted to eliminate any degradation of utility or performance in the products covered by today's proposed rule. Attributes that affect utility include the product's ability to cool and dehumidify. In some applications, noise levels may also be an aspect of utility. Product size or configuration can also be considered utility if a change in size would cause the consumer to install the product in a location or in a manner inconsistent with the consumer's preferences.

5. Impact of Lessening of Competition

This economic justification factor has two aspects: 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.

In order to assist the Attorney General in making such a determination, DOE provided the Attorney General with copies of the October 5, 2000, NOPR and the TSD for review. The Attorney General's determination, in a letter dated December 4, 2000, was discussed in the preamble to the January 22 final rule. 66 FR 7176, 7199–200. The Attorney General's December 4, 2000, determination is included in the Appendix to this Supplemental Notice of Proposed Rulemaking.

Pursuant to the President's Regulatory Review Plan, DOE invited the Attorney General to submit supplemental views on the January 22 final rule. The Department of Justice, in a letter dated April 5, 2001, provided brief written comments as to whether the final rule effectively removed their concerns regarding possible lessening of competition that could result from the October 5 proposed standards. The Department of Justice's April 5, 2001, letter is also included in the Appendix to this notice.

The Department of Justice concluded that the 13 SEER standards for heat pumps and air conditioners in the January 22 final rule still presented anti-competitive concerns. More specifically, the Department of Justice concluded that while the final rule's exclusion of niche products might alleviate competitive problems for manufacturers of those products, the Department of Justice remained concerned about the impact of the final rule on manufacturers of standard equipment who could not make 13 SEER equipment that would fit into space-constrained sites. The Department of Justice also concluded the final rule would have a disproportionate impact on smaller manufacturers of heat pumps. Finally, the Department of Justice was of the view that the 13 SEER standard for air conditioners presents the same kinds of anti-competitive problems as the 13 SEER standard for heat pumps, and urged DOE to adopt a 12 SEER standard for all products covered by the rule.

As explained in Section III. of this **SUPPLEMENTARY INFORMATION**, DOE's decision today to propose a 12 SEER standard for most central air conditioners, with a corresponding 7.4 HSPF for central air conditioning heat pumps, is based primarily on its re-weighting of the burdens and benefits to manufacturers and consumers, rather than on the Department of Justice's views regarding the anti-competitive effect of the January 22 final rule. The Department of Justice's April 5 letter raises questions about the January 22 final rule's treatment of space-constrained or niche products, but those questions do not require resolution given DOE's decision to propose a 12 SEER standard for all product classes except the through-the-wall product classes that DOE proposes today.

DOE will submit this proposed rule to the Department of Justice for comment. DOE also invites the public to submit views and information regarding the potential anti-competitive impact of today's proposed rule.

6. Need of the Nation To Conserve Energy

DOE recognizes that energy conservation benefits the nation in several important ways. Enhanced energy efficiency improves the nation's energy security, strengthens the economy, and reduces the environmental impacts of energy production. As part of the analysis supporting today's proposed rule, DOE estimated energy savings and the national consumer benefits and estimated reduction in emissions of pollutants and greenhouse gases resulting from those energy savings. See the October 5, 2000 NOPR for a discussion of how these standards affect energy savings and those benefits. 65 FR 59622–3. The amount of energy savings ultimately associated with a particular standard level is also affected by the effect of a given standard on competition and consumer cost. Selecting a standard level should take into account manufacturer—and therefore inevitably consumer—costs, in order to encourage robust competition and heightened introduction of newer, more efficient units into the inventory of units available for purchase and use by consumers.

7. Other Factors

Section 325(o) of EPCA allows the Secretary of Energy, in determining whether a standard is economically justified, to consider any other factors that the Secretary deems to be relevant (42 U.S.C. 6295(o)(2)(B)(i)(VI)). Under this provision, DOE considered the potential improvement to the reliability of the electrical system and health effects caused by foregone air conditioner purchases. These issues are discussed in Sections IV.B.3. above, as well as in the October 5, 2000 NOPR (65 FR 59605) and the January 22 final rule (66 FR 7195). The Utility Impacts Analysis in Chapter 11 of the TSD also provides the technical analysis estimating the effects of adopting new efficiency standards on installed generation capacity.

*E. Methodology Used in DOE Analyses*

For this proposed rule, the methodologies used to evaluate the seven factors described above are unchanged from those used in the

analyses that DOE relied on for the October 5 proposed rule and the January 22 final rule. DOE's methodology is discussed in the October 5, 2000 NOPR (65 FR 59594–97) and the January 22 final rule (66 FR 7173–74). Additionally, the TSD that accompanies this rulemaking provides a detailed description of every aspect of the various analytical methodologies used.

## V. Analytical Results and Conclusions

### *A. Overview of Analytical Results*

#### 1. General

Although DOE has accorded different weight to certain factors in proposing this rule, the underlying analyses, and the results derived from those analyses, are unchanged from those presented in the January 22 final rule except for additional analysis of through-the-wall product classes. Briefly, DOE examined five standard levels. Table 3 presents the trial standards levels analyzed and the corresponding efficiency level for each class of product. Trial Standard Level 5 is the Max Tech Level for each class of product. Trial Standard Level 4 was the one DOE adopted for the standards set forth in the January 22 final rule. Trial Standard Level 2 is the one DOE is now proposing.

TABLE 3.—TRIAL STANDARDS LEVELS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS (SEER)

| Trial standard level | Split air conditioners | Packaged air conditioners | Split heat pumps | Packaged heat pumps |
|---|---|---|---|---|
| 1 | 11 | 11 | 11 | 11 |
| 2 | 12 | 12 | 12 | 12 |
| 3 | 12 | 12 | 13 | 13 |
| 4 | 13 | 13 | 13 | 13 |
| 5 | 18 | 18 | 18 | 18 |

For each trial standard examined, several different scenarios were analyzed consisting of variations on: (1) Electricity price and housing projections; (2) equipment efficiency distributions; (3) manufacturer cost estimates; and (4) societal discount rate. Electricity price and housing projections were based on three different forecasts from the Energy Information Agency's 2000 Annual Energy Outlook (AEO): (1) Reference Case, (2) High Growth Case, and (3) Low Growth Case. DOE analyzed three efficiency scenarios, each of which assumed a different efficiency distribution after new standards would take effect: (1) NAECA scenario, (2) Roll-up scenario, and (3) Shift scenario. See October 5, 2000, NOPR for an explanation of the three scenarios. 65 FR 59596 (footnotes 10 through 12 and accompanying text). Under the standard levels in today's proposed rule, DOE believes that the NAECA scenario most closely represents the likeliest impact of the new standards, as explained in Chapter 8 of the TSD. DOE analyzed two manufacturer cost scenarios: (1) Based on reverse engineering estimates, and (2) based on ARI-provided mean cost estimates. For the reasons expressed in the preamble to the January 22 final rule, DOE expects manufacturer costs under the proposed standards will lie closer to the estimates produced through DOE's reverse engineering analysis, which lie between ARI's minimum and ARI's mean cost values. 66 FR 7177–78. DOE assumed a societal discount rate of 7 percent for calculating net present value (NPV). However, a 3 percent value was investigated as an alternative scenario in accordance with the Office of Management and Budget's (OMB) *Guidelines to Standardize Measures of Costs and Benefits and the Format of Accounting Statements.*

#### 2. Through-the-Wall Products

In the October 5 proposed rule, DOE proposed to establish a separate product class for through-the-wall (TTW) products with a minimum 11 SEER for air conditioners and 7.1 HSPF for heat pumps, noting that they face particularly acute size constraints that make increasing their efficiency more difficult compared to conventional products, or even other space-constrained products. In comments received responding to the proposed standards, Carrier suggested that such a differential could open a loophole and cause TTW products to be broadly applied in traditionally non-TTW applications. (Carrier #92 at p. 9). National Comfort Products suggested that they did not believe that their product could attain even the proposed 11 SEER standard and that the DOE did not conduct sufficient analysis to support the proposed level. (NCP #77 at p.3, 4). However, Armstrong commented that they did believe their TTW products could attain 11 SEER, although they had concerns about their larger capacity products. (Armstrong #86 at p. 3).

In response to the comments, DOE conducted additional analysis on the cost and technical issues related to TTW products. The analysis is described in detail in Appendix L of the TSD and is summarized here.

DOE performed a design assessment on two split TTW systems and one packaged TTW system. All systems are designed primarily for the replacement market and fit the physical definition of TTW equipment proposed in the October 5 proposed rule. The design assessment sought to identify the cost and efficiency impacts of employing commonly applied techniques to improve efficiency including reduction of air leakage and improvement in airflow, utilizing more efficient compression and fan motors, and increasing heat exchanger surface area. Emerging technologies and modulating technologies were not considered since they are not likely to be applied in conventional baseline equipment.

The cost estimation for the analysis was based on a modified version of the reverse engineering cost models developed as part of this rulemaking for conventional products. The performance impacts of employing various design options were estimated utilizing a spreadsheet model populated with actual performance data and engineering guidelines.

The analysis concluded that utilizing commonly applied technologies and designs, the most constrained TTW split-system analysis could increase its SEER rating from 10.0 SEER to as high as 11.4 SEER, and the packaged system analysis could increase its SEER rating from 9.7 SEER to 10.6 SEER. Employing all improvements would add $106 and $129 to the retail price of the equipment, respectively, comparable to the increases expected in conventional equipment moving to a 12 SEER standard.

To explore the effects that more stringent standards for TTW products would have on consumers, DOE performed a life-cycle cost (LCC) analysis. The LCC analysis for TTW consumers used a subset of consumers identified as living in multi-family

dwellings, which are the predominate application for TTW products.

3. Other Space-Constrained Products

Some products, other than through-the-wall products, face space-constraints. However, as discussed in the October 5 NOPR, DOE proposed to conclude that it is economically justified and technologically feasible for all of those products to comply with the same efficiency requirements as conventional products. Comments received in response to that proposal focused mainly on the 13 SEER heat pump requirement. After reviewing the comments, DOE again proposes to conclude that a 12 SEER requirement is the maximum technologically feasible and economically justified level for all space-constrained products except through-the-wall products. DOE is interested in receiving further comment on this issue.

*B. Re-Weighting of Factors*

1. Re-Weighting of Burdens on Consumers

The record associated with this rulemaking includes numerous examples of discussions of the distributions, extent, and type of burdens on the typical consumer as well as on low-income consumers. 65 FR 59623–59624 and 66 FR 7189–7190. In the January 22 notice of final rulemaking, DOE determined that most consumers, including low-income consumers, would likely benefit financially over the life of the equipment, but that all consumers would bear higher initial costs, and low-income consumers would not benefit financially as much as would the average consumer. DOE also recognized that the payback periods associated with the January 22 final rule are long, and that many consumers, though not the majority, would never recover the higher first costs in the form of savings in their utility bills. However, the previous Administration concluded that the national energy savings and the slight financial benefit to the typical consumer overrode any negative and maldistributed consumer impacts.

Energy conservation is an important part of the Bush Administration's energy policy, but this Administration is particularly sensitive to burdens, and potential burdens, on consumers. The benefits of the standards adopted in the January 22 final rule would accrue to a much smaller fraction of consumers than is the case for recent standards for other products, particularly low income consumers. Today's proposed rule attempts to mitigate those burdens by reducing the increase in equipment cost compared to the 13 SEER requirements issued on January 22. Overall, the proposed standards would reduce the burdens on consumers while still providing substantial benefit to the nation in the form of energy savings.

2. Re-Weighting of Burdens on Manufacturers

a. *Cumulative Regulatory Burden.* Although DOE included information on the cumulative burden of Federal and State regulations on air conditioner manufacturers in the TSD, DOE did not fully explain how it considered the results of its study in the preamble statement of basis for the January 22 final rule. See discussion in Section III of this **SUPPLEMENTARY INFORMATION.** DOE considers that a proposed standard is not economically justified if it contributes to an unacceptable cumulative regulatory burden. Section III.B.2.a. above provides a summary of the cumulative regulatory burden analysis contained in Section 8.6 of the TSD. DOE concluded that the burden on manufacturers due to all other recent or imminent federal regulations exceeds $479 million. Revising the standard for air conditioner and heat pump efficiency would contribute up to an additional $300 million, bringing the total cumulative regulatory burden to as high as $779 million. In light of that heavy burden, DOE today is proposing standards that would 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.

*b. Financial Burdens Associated with New Efficiency Standards.* In addition to cumulative regulatory burden, both the TSD and public comments warn that too stringent efficiency standards would result in unacceptable financial burdens for some major manufacturers and could accelerate consolidation in the central air conditioning and heat pump industry. As explained in Section III.B.2.b. of this **SUPPLEMENTARY INFORMATION,** the 13 SEER standards in the January 22 final rule are projected by the TSD to result in a negative cash flow for the industry in the year preceding the new standards' enforcement. However, the standards would impose far greater financial burdens on manufacturers whose operating costs exceed the industry average. Those manufacturers typically engage in more research and development or provide additional sales or service support than do their lower operating cost competitors. The 12 SEER standard that DOE proposes today would reduce the maldistribution of financial impacts on manufacturers and would allow manufacturers to maintain a positive cash flow.

c. *Conclusions Regarding Conventional Products.* EPCA specifies that any new or amended energy conservation standard 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 (42 U.S.C. 6295(o)(2)(A)). In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens (42 U.S.C. 6295(o)(2)(B)(i)). The amended standard must ''result in significant conservation of energy'' (42 U.S.C. 6295(o)(3)(B)).

In conducting its analysis, DOE considers the impacts of standards beginning with the Max Tech Level, *i.e.,* Trial Standard Level 5 in this rulemaking. DOE then considers less efficient levels until it reaches the level which is technologically feasible and economically justified.

To aid the reader in the discussion of the benefits and burdens of the trial standard levels, DOE includes a summary of the analysis results for all of the levels in Table 4.[10] Table 4 presents a summary of quantitative analysis results for each trial standard level based on the assumptions DOE considers most plausible. These include manufacturing cost estimates from the reverse engineering, an 18.4-year equipment lifetime with one compressor replacement at 14 years, and electricity prices based on the AEO2000 Reference Case.

[10] All cumulative effects that are not monetary are not discounted. Monetary effects are discounted to 1998 dollars.

TABLE 4.—SUMMARY OF QUANTITATIVE RESULTS [1]

| | Trial std 1 | Trial std 2 | Trial std 3 | Trial std 4 | Trial std 5 |
|---|---|---|---|---|---|
| Primary Energy Saved (quads) | 1.7 | 3.0 | 3.5 | 4.2 | 8.8 |
| Generation Capacity Offset (GW) [2] | 6.5 | 10.6 | 12.4 | 15.5 | 28.8 |
| NPV ($billion): | | | | | |
| 7% Discount Rate | 2 | 2 | 1 | 1 | (10) |
| Industry Impacts (million $): [3] [5] | | | | | |
| Cumulative Change in Industry NPV | (62) | (179) | (199) | (300) | |
| Differential impact between Industry Sub-groups [4] | 75 | 238 | 261 | 429 | |
| Cumulative Regulatory Burden on Industry | (>541) | (>658) | (>678) | (>779) | |
| Minimum net cash flow | 62 | 31 | 18 | (3) | |
| Life-Cycle Cost Savings ($): [5] | | | | | |
| Split AC | 75 | 113 | 113 | 113 | (137) |
| Packaged AC | 78 | 163 | 163 | 29 | (276) |
| Split HP | 209 | 365 | 372 | 372 | (41) |
| Packaged HP | 207 | 421 | 353 | 353 | 166 |
| Equipment Price Increase ($): | | | | | |
| Split AC | 91 | 213 | 213 | 335 | 754 |
| Packaged AC | 89 | 158 | 158 | 425 | 859 |
| Split HP | 55 | 144 | 332 | 332 | 1039 |
| Packaged Heat Pump | 92 | 149 | 435 | 435 | 985 |
| Fraction of all Consumers with Net LCC Losses >2% (%): | | | | | |
| Split AC | 2 | 25 | 25 | 39 | 68 |
| Packaged AC | 1 | 9 | 9 | 52 | 73 |
| Split HP | 0 | 0 | 6 | 6 | 57 |
| Packaged Heat Pump | 0 | 0 | 12 | 12 | 48 |
| Fraction of Low Income Consumers with Net LCC Losses >2% (%): | | | | | |
| Split AC | 5 | 34 | 34 | 50 | 77 |
| Packaged AC | 2 | 14 | 14 | 61 | 80 |
| Split HP | 0 | 0 | 12 | 12 | 75 |
| Packaged Heat Pump | 0 | 0 | 20 | 20 | 66 |

[1] Parentheses indicate negative (−) values. Unless otherwise noted, Trial Standard Levels 1–3 refer to the NAECA efficiency scenario, and Trial Standard Levels 4 and 5 refer to the Roll-up efficiency scenario.
[2] Values based on NAECA efficiency scenario.
[3] Not calculated at Trial Standard Level 5.
[4] The benefit accruing to the Higher Operating Cost subgroup compared to the Lower Operating Cost subgroup.
[5] Negative values indicate LCC increases.

In addition to the quantitative results, DOE also considers other burdens and benefits that affect economic justification. The potential to improve the reliability of the electricity system is the major benefit DOE has not quantified explicitly. In areas where the occurrence of blackouts (and brownouts) can be reduced through expansion of system capacity, the economic value of avoided blackouts associated with reductions in peak load cannot exceed the value of the avoided capacity expansion. That value is already captured in DOE's analysis as savings in consumer utility bills. However, in areas that do not expect to be able to maintain adequate capacity reserves, the value of avoided blackouts associated with reductions in peak demand can far exceed the normal costs of capacity expansion.[11]

DOE also recognizes that the adopted standards could result in additional unquantifiable burdens. These include a possible increase in health problems caused by consumers foregoing air conditioner purchases, a possible reduction in the ability of the product to dehumidify, a possible lessening of competition, and possible difficulty in installing the new baseline products into replacement applications. Section IV of the preamble to the January 22 final rule discusses DOE's response to comments regarding benefits and burdens.

First DOE considered Trial Standard Level 5, the Max Tech Level for each of four classes of products, representing uniform 18 SEER requirements. The manufacturing cost DOE assumes for Trial Standard Level 5 is equal to 15 SEER equipment, although DOE would expect that assumption to understate the cost and price of the product. Trial Standard Level 5 would likely save 8.6 quads of energy between 2006 and 2030 which DOE considers significant. The energy savings through 2020 would result in the avoidance of approximately 29 gigawatts (GW) of installed generation capacity in 2020. For comparison, the generating capacity is equivalent to roughly 73 large, 400 megawatt, power plants, and reduced emissions would range up to 63 Mt of carbon equivalent and up to 184 thousand metric tons (kt) of $NO_X$.[12]

At Trial Standard Level 5, the average consumer would experience an increase in life-cycle cost. Compared to today's standards, purchasers of split central air-conditioners, the predominate class of central air conditioner with 65 percent of the sales of central air conditioners and heat pumps, would most likely lose in excess of $137 over the life of the appliance. Purchasers of split heat pumps, the predominate class of heat pump, would most likely lose in excess of $41. These life-cycle cost estimates represent lower bounds to the actual costs because they do not include the additional price the consumer would pay over the price of a 15 SEER product, which would increase the life-cycle cost considerably. Furthermore,

[11] For instance, if capacity-related blackouts cost a region $1 billion, society would be willing to pay up to $1 billion to prevent them. If those blackouts can be prevented through either a capacity expansion or a reduction in peak demand, and the new capacity would cost $100 million, the value of the reduction in peak demand can be no more than $100 million. If the region is short on capacity and cannot add new capacity quickly, however, the same reduction in peak demand then can equal the value of the avoided blackout ($1 billion) since there is no feasible alternative.

[12] Generating capacity, carbon and $NO_X$ reductions are based on NAECA efficiency scenario.

for the nation as a whole, Trial Standard Level 5 would result in a net cost in excess of $10 billion in NPV. DOE did not calculate manufacturer impacts at this trial standard level, determining based on preliminary evaluation that they would be severe and unacceptable.

DOE proposes to conclude that at Trial Standard Level 5, the benefits of energy savings, generating capacity reductions and emission reductions would be outweighed by the negative economic impacts to the nation, to the vast majority of consumers and to the manufacturers. Consequently, DOE proposes to determine that Trial Standard Level 5, the Max Tech Level, is not economically justified.

Next, DOE considered Trial Standard Level 4. This level specifies 13 SEER equipment for all product classes. In considering Trial Standard Level 4, DOE assumed the Roll-up efficiency scenario and reverse engineering cost estimates to be the most probable. (*See* Section 8.4.8 of the TSD for the reasons DOE considers the Roll-up efficiency scenario most probable above Trial Standard Level 3 and the NAECA efficiency scenario most probable at Trial Standard Levels 1, 2, and 3. *See* Section 7.2.2.5 of the TSD for the current efficiency distribution for each product class and for the assumed efficiency distributions after new standards.) Primary energy savings between 2006 and 2030 would likely be 4.2 quads, which DOE considers significant. The estimated energy savings through 2020 would result in avoidance of approximately 15.5 GW in installed generating capacity in 2020. For comparison, the generating capacity is equivalent to avoiding the need for 39 large 400 megawatt power plants, and reduced emissions would range up to 33 Mt of carbon equivalent and up to 85 kt of $NO_X$.[13]

At this standard level, the average purchaser of a split system air conditioner, the predominate class with 65 percent of all shipments, would see the installed price of $2236 rise to $2571, an increase of $335. Lower utility bills from the energy savings would repay this increase in 11.3 years and produce a total saving with a net present value of $113 over the 18.4 year life of the product. The average purchaser of a single package air conditioner, which represents 10 percent of all shipments, would see the average installed price of $2607 rise to $3032, an increase of $425. Lower utility bills from the energy savings would repay this increase in 14.5 years and produce a total saving with a net present value of $29 over the 18.4 year life of the product.

The average purchaser of a split system heat pump, which represents 22 percent of all shipments, would see the average installed price of $3668 rise to $4000, an increase of $332. Lower utility bills from the energy savings would repay this increase in 6.4 years and produce a total saving with a net present value of $372 over the 18.4 year life of the product. The average purchaser of a single package heat pump, which represents 4 percent of all shipments, would see the average installed price of $3599 rise to $4034, an increase of $435. Lower utility bills from the energy savings would repay this increase in 8.4 years and produce a total saving with a net present value of $353 over the 18.4 year life of the product. Trial Standard Level 4 would lower peak electricity demand compared to the base case. That would allow utility service areas to either avoid new capacity or, to the extent that peak loads contribute to reliability problems, improve system reliability.

A measure of an efficiency standard's economic benefit to the nation is the increase in net present value, which is the difference in total cost, both initial cost and discounted operating cost, between the base case (without a new standard) and the case with a new standard. For Trial Standard Level 4, the increase in national net present value would be $1 billion.[14]

Since DOE expects the Roll-up efficiency scenario to result from standards adopted at Trial Standard Level 4, the burdens of Trial Standard Level 4 on manufacturers are likely to be severe. Not only does DOE expect the average loss in industry NPV to be around 20 percent, but impacts on most manufacturers would reach almost 30 percent. Their long term drop in return on investment and short term drop in cash flow suggest that standards adopted at Trial Standard Level 4 could accelerate the consolidation trend, possibly resulting in fewer choices for consumers and in a slowing of the pace of innovation well into the future. Furthermore, the cumulative impact on the industry of all new Federal and State regulations would exceed $779 million.

While the average consumer purchasing a 13 SEER air conditioner or heat pump would experience a net saving over the lifetime of the product, some households would experience net costs exceeding 2 percent of the total life-cycle cost of today's baseline units. Thus, 39 percent of the households with split system air conditioners, 52 percent with single package air conditioners, 6 percent with split system heat pumps and 12 percent with single package heat pumps would experience a net cost. The percentage of low-income consumers who would experience net costs exceeding 2 percent of the total life-cycle cost of today's baseline units is greater than that of the average household. Thus, 50 percent of low-income households with split system air conditioners, 61 percent with single package air conditioners, 12 percent with split system heat pumps and 20 percent with single package heat pumps would experience a net cost. Also, the possibility that consumers would incur substantial installation costs is great because 13 SEER equipment is not likely to fit in the same space as current 10 SEER equipment. In light of the higher purchase cost increase experienced by all consumers and the percentage of households, which experience life-cycle cost increases, consumer burdens, in particular those for low-income households, are especially acute under Trial Standard Level 4.

DOE proposes to conclude that at Trial Standard Level 4, the benefits of energy savings, generating capacity and emission avoidance, possible improvements in electric system reliability, and net benefit to the nation's consumers would be outweighed by the maldistribution of consumer benefits, the potential increase in installation costs for some consumers related to installing potentially larger equipment, and the cost to manufacturers taking into account the cumulative regulatory burden. Trial Standard Level 4 introduces the serious concern that prospective owners of air conditioning heat pump systems would instead purchase less costly air conditioner resistance heater combinations because of the substantial purchase price differential between heat pumps and air conditioners. As discussed in the January 22 notice of final rulemaking (66 FR 7196), the energy savings from the more efficient heat pumps would be eliminated if only a small fraction of heat pump owners (4 percent) switched to resistance heating. Those households residing in manufactured housing, which is often shipped from the factory without an air conditioning system but with a resistance furnace, might be inclined to simply add a lower cost air conditioner and retain the resistance

[13] Generating capacity, carbon, and $NO_X$ reductions are based on NAECA efficiency scenario.

[14] Under the NAECA efficiency scenario, the increase in national net present value would be zero.

furnace instead of replacing the resistance furnace with a heat pump. In short, the large financial burdens of Trial Standard Level 4 are not outweighed by the expected financial benefits. Other potential burdens include possible health effects caused indirectly by foregone air conditioning purchases and possible lessening of competition. Consequently, DOE proposes to determine that Trial Standard Level 4 is not economically justified.

Next, DOE considered Trial Standard Level 3. This level specifies 12 SEER equipment for air conditioners and 13 SEER equipment for heat pumps. In considering Trial Standard Level 3, DOE assumed the NAECA efficiency scenario and reverse engineering cost estimates to be the most probable. (*See* Section 8.4.8 of the TSD for the reasons DOE considers the Roll-up efficiency scenario most probable at Trial Standard Levels 4 and 5 and the NAECA efficiency scenario most probable at Trial Standard Levels 1, 2, and 3.) Primary energy savings between 2006 and 2030 would likely be 3.5 quads, which DOE considers significant. The energy savings through 2020 would result in avoidance of approximately 12.4 GW in installed generating capacity in 2020. For comparison, the generating capacity is equivalent to avoiding the need for 31 large 400 megawatt power plants, and reduced emissions would range up to 28 Mt of carbon equivalent and up to 84 kt of $NO_X$.[15]

At this standard level, the average purchaser of a split system air conditioner, the predominate class with 65 percent of all shipments, would see the installed price of $2236 rise to $2449, an increase of $213. Lower utility bills from the energy savings would repay this increase in 9.8 years and produce a total saving with a net present value of $113 over the 18.4 year life of the product. The average purchaser of a single package air conditioner, which represents 10 percent of all shipments, would see the average installed price of $2607 rise to $2765, an increase of $158. Lower utility bills from the energy savings would repay this increase in 7.5 years and produce a total saving with a net present value of $163 over the 18.4 year life of the product.

The average purchaser of a split system heat pump, which represents 22 percent of all shipments, would see the average installed price of $3668 rise to $4000, an increase of $332. Lower utility bills from the energy savings would repay this increase in 6.4 years and produce a total saving with a net present value of $372 over the 18.4 year life of the product. The average purchaser of a single package heat pump, which represents 4 percent of all shipments, would see the average installed price of $3599 rise to $4034, an increase of $435. Lower utility bills from the energy savings would repay this increase in 8.4 years and produce a total saving with a net present value of $353 over the 18.4 year life of the product. Trial Standard Level 3 would lower peak electricity demand compared to the base case. That would allow utility service areas to either avoid new capacity or, to the extent that peak loads contribute to reliability problems, improve system reliability. The increase in national net present value would be $1 billion.[16]

Since DOE expects the NAECA efficiency scenario to result from standards adopted at Trial Standard Level 3, the burdens of Trial Standard Level 3 on manufacturers are likely to be less severe than at Trial Standard Level 4. DOE expects the average loss in industry NPV to be around 11 percent, but impacts on most manufacturers would be around 17 percent. Their long term drop in return on investment and short term drop in cash flow suggest that standards adopted at Trial Standard Level 3 could accelerate the consolidation trend, possibly resulting in fewer choices for consumers and in a slowing of the pace of innovation well into the future. Furthermore, the cumulative impact on the industry of all new Federal and State regulations would exceed $678 million.

Similar to the concern over Trial Standard Level 4, Trial Standard Level 3 raises the serious concern that prospective owners of air conditioning heat pump systems would purchase less costly air conditioner resistance heater combinations. In this case there is a potential loss of energy savings because of the lower standards for air conditioners compared to heat pumps. which could eliminate all energy savings from the more efficient heat pumps if only a small fraction of heat pump owners (4 percent) switched to resistance heating. Trial Standard Level 3 poses a serious concern regarding potential anti-competitive effects because the size and cost of the higher efficiency heat pumps could reduce competition between manufacturers of heat pumps and manufacturers of resistance heating and other lower cost heating systems.

DOE proposes to conclude that, at Trial Standard Level 3, the benefits of energy savings, generating capacity and emission avoidance, possible improvements in electric system reliability, and net benefit to the nation's consumers would be outweighed by the maldistribution of consumer benefits and manufacturer costs, the likelihood of higher installation costs resulting from potentially larger equipment, and the net impact on the industry in light of the cumulative regulatory burden. The most serious concern is the possibility of equipment switching that would likely substantially reduce the calculated energy savings, drastically reducing the potential benefits. Other possible burdens include lessening of competition and health effects caused by forgone air conditioner purchases. Consequently, DOE proposes to determine that Trial Standard Level 3 is not economically justified.

Next, DOE considered Trial Standard Level 2. This level specifies 12 SEER equipment for all product classes. In considering Trial Standard Level 2, DOE assumed the NAECA efficiency scenario and reverse engineering cost estimates to be the most probable. Primary energy savings between 2006 and 2030 would likely be 3 quads, which DOE considers significant. The energy savings through 2020 would result in avoidance of approximately 10.6 GW in installed generating capacity in 2020. For comparison, the generating capacity is equivalent to avoiding the need for 27 large 400 megawatt power plants, and reduced emissions would range up to 24 Mt of carbon equivalent and up to 73 kt of $NO_X$.[17]

At this standard level, the average purchaser of a split system air conditioner, the predominate class with 65 percent of all shipments, would see the installed price of $2236 rise to $2449, an increase of $213. Lower utility bills from the energy savings would repay this increase in 9.8 years and produce a total saving with a net present value of $113 over the 18.4 year life of the product. The average purchaser of a single package air conditioner, which represents 10 percent of all shipments, would see the average installed price of $2607 rise to $2765, an increase of $158. Lower utility bills from the energy savings would repay this increase in 7.5 years and produce a total saving with a net

[15] Generating capacity, carbon, and $NO_X$ reductions are based on NAECA efficiency scenario.

[16] Under the Roll-up efficiency scenario, the increase in national net present value would be $2 billion.

[17] Generating capacity, carbon, and $NO_X$ reductions are based on NAECA efficiency scenario.

present value of $163 over the 18.4 year life of the product.

The average purchaser of a split system heat pump, which represents 22 percent of all shipments, would see the average installed price of $3668 rise to $3812, an increase of $144. Lower utility bills from the energy savings would repay this increase in 3.9 years and produce a total saving with a net present value of $365 over the 18.4 year life of the product. The average purchaser of a single package heat pump, which represents 4 percent of all shipments, would see the average installed price of $3599 rise to $3748, an increase of $149. Lower utility bills from the energy savings would repay this increase in 4 years and produce a total saving with a net present value of $421 over the 18.4 year life of the product. Trial Standard Level 2 would lower peak electricity demand compared to the base case. That would allow utility service areas to either avoid new capacity or, to the extent that peak loads contribute to reliability problems, improve system reliability. The increase in national net present value would be $2 billion, which represents the highest level for all the standard levels considered.[18]

Since DOE expects the NAECA efficiency scenario to result from standards adopted at Trial Standard Level 2, the burdens of Trial Standard Level 2 on manufacturers are likely to be moderate. DOE expects the average loss in industry NPV to be around 10 percent, with impacts on most manufacturers around 16 percent. Their long term drop in return on investment and short term drop in cash flow are moderate, suggesting that standards adopted at Trial Standard Level 2 would not accelerate the consolidation trend, and could result in more choices for consumers and raise the pace of innovation. The cumulative impact on the industry of all new Federal and State regulations would exceed $658 million.

While the average consumer purchasing a 12 SEER air conditioner or heat pump would experience a net saving over the lifetime of the product, some households would experience net costs exceeding 2 percent of the total life-cycle cost of today's baseline units. Thus, 25 percent of the households with split system air conditioners and 9 percent with single package air conditioners would experience a net cost. No households with heat pumps would experience a net cost. The percentage of low-income consumers who would experience net costs exceeding 2 percent of the total life-cycle cost of today's baseline units is greater than that for an average household. Thus, 34 percent of low-income households with split system air conditioners and 14 percent with single package air conditioners would experience a net cost. No low-income households with heat pumps would experience a net cost. Also, the possibility that consumers would incur substantial installation costs is less than that with a 13 SEER standard because 12 SEER equipment is more likely to fit in the same space as current 10 SEER equipment. In light of the moderate purchase cost increase experienced by all consumers, the percentage of households, in particular low-income households, which experience life-cycle cost increases, consumer burdens are less severe under Trial Standard Level 2.

After carefully reconsidering the analyses and comments, and adjusting the weight given to consumer impacts and cumulative regulatory burden in the assessment of the benefits and burdens, DOE is proposing to amend the energy conservation standards for central air conditioners and central air conditioning heat pumps at Trial Standard Level 2. DOE proposes to conclude this standard saves a significant amount of energy and is technologically feasible and economically justified. In determining economic justification, DOE proposes to conclude that 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 emission reductions resulting from the standards outweigh the burdens. The burdens include the loss of manufacturer net present value, taking into account the cumulative regulatory burden and annual cash flow, increases in life-cycle cost for some users of products covered by today's proposed rule, any possible increase in health problems caused by consumers foregoing air conditioner purchases, any possible reduction in the ability of the product to dehumidify, any possible lessening of competition, and any possible difficulty in installing the new baseline products into replacement applications.

*D. Conclusions Regarding Space-Constrained Products*

If a 12 SEER minimum requirement for air conditioners and heat pumps is implemented, as proposed, DOE's analysis suggests that of all potential space-constrained products, only those with through-the-wall condensers need special consideration. The TSD contains a new appendix (Appendix L) describing the results of our recent re-evaluation of those products. The results of that analysis are summarized in Section V.A.2 above. They demonstrate that split TTW equipment can attain 10.9 SEER using designs and technologies that are commonly applied or available, with price impacts similar to those that conventional equipment would experience in meeting the proposed 12 SEER standard. The packaged equipment analyzed was demonstrated to be capable of attaining only a 10.6 SEER rating, although comments received indicate that one manufacturer of packaged TTW equipment, Armstrong, expects their equipment to be capable of attaining 11 SEER. (Armstrong No. 86 at p.3).

Based on this evaluation, DOE is proposing to establish new product classes for products that have through-the-wall condensers and are intended for replacement applications. The new classes would be required to meet minimum efficiencies lower than those of the other classes: 10.9 SEER and 7.1 HSPF for through-the-wall air conditioner and heat pump split-systems, and 10.6 SEER and 7.0 HSPF for through-the-wall air conditioner single-package systems. DOE's analysis suggests those products can attain these levels without substantial redesign or price increases that would result in a loss of market share to conventional products. Also, the life-cycle cost analysis confirms that, on average, consumers of split TTW equipment would not incur an increase in life-cycle cost, and that consumers of packaged TTW equipment would incur an increase of $52 over the life of the equipment. In no case would any consumer of split TTW products be expected to incur life-cycle costs greater than 2 percent of the total life-cycle cost, and only 17 percent of consumers of packaged TTW equipment would be expected to incur cost increases greater than 2 percent of the total life-cycle cost.

DOE proposes to conclude that standard levels higher than 10.9 SEER (split TTW) and 10.6 SEER (packaged TTW) are not technologically feasible. DOE's analysis on three TTW models suggests that those products could attain efficiencies as high as 11.4 SEER using design options that would likely be economically justified. However, the results are not conclusive and cannot be confidently applied to all TTW

[18] Under the Roll-up efficiency scenario, the increase in national net present value would be $3 billion.

products. DOE's analysis does not provide enough evidence to convince us that levels higher than 10.9 SEER (10.6 SEER for packaged TTW) will be technologically feasible during the five year period during which manufacturers would prepare to meet the new requirements. DOE's analysis does indicate that opportunities for efficiency improvement do exist, and that manufacturers of those products should continue to investigate those opportunities.

A serious concern that DOE has considered is that the lower TTW standards could encourage purchasers of conventional equipment to shift to TTW products, undermining the benefits of the 12 SEER standard for conventional products. DOE is therefore proposing that the new through-the-wall classes would consist only of products manufactured before July 26, 2010. *See* proposed definition of ''through-the-wall air conditioner and heat pump.'' Thus, the classes would exist only for a period of four years following the establishment of the new standards. During that time, the availability of suitable high-efficiency components will likely increase and the manufacturers of through-the-wall products would be able to investigate options for meeting the more stringent 12 SEER level. Both will make it easier for through-the-wall products to attain the 12 SEER minimum efficiency required of other products, thereby making 12 SEER a technologically feasible and economically justified level. The sunset provision will help to ensure that other manufacturers will not make the investment required to market through-the-wall products heavily for conventional applications during the four year period. It will also limit the time during which lower efficiency TTW equipment is installed, ensuring that additional energy savings associated with the 12 SEER level are realized in a certain time period.

To further limit the application of the through-the-wall class, products in these classes may not exceed 30,000 BTU/hr in cooling capacity, may not contain special weatherization features that would allow them to be installed totally outdoors, and must be marked for installation only through an exterior wall. DOE also proposes limiting the size of the area used for condenser air exchange to attempt to limit these classes to those products intended primarily for replacement applications.

No other new product classes are proposed since all other products types of which we are aware have demonstrated the ability to compete in the market at the 12 SEER level.

## VI. Procedural Issues and Regulatory Review

### *A. Review Under the National Environmental Policy Act*

DOE prepared an Environmental Assessment (EA) (DOE/EA–1352) available from: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–1, 1000 Independence Avenue, SW, Washington, DC 20585–0121, (202) 586–0854. DOE found the environmental effects associated with various standard efficiency levels for central air conditioners and heat pumps to be not significant, and therefore DOE published in the **Federal Register** (66 FR 7201), A Finding of No Significant Impact (FONSI) pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council of Environmental Quality (40 CFR Parts 1500–1508), and DOE's regulations for compliance with NEPA (10 CFR Part 1021).

### *B. Review Under Executive Order 12866*

Today's regulatory action has been determined to be an ''economically significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (October 4, 1993). Accordingly, today's action was subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

The draft submitted to OIRA and other documents submitted to OIRA for review have been made a part of the rulemaking record and are available for public review in DOE's Freedom of Information Reading Room, 1000 Independence Avenue, SW, Washington, DC 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, telephone (202) 586–3142.

The October 5, 2000, NOPR contained a summary of the Regulatory Analysis which focused on the major alternatives considered in arriving at the approach to improving the energy efficiency of consumer products. 65 FR 59627–29. The alternatives considered in DOE's analysis are consumer product labeling, consumer education, prescriptive standards, consumer tax credits, consumer rebates, manufacturer tax credits, voluntary efficiency targets, low income subsidy, mass government purchases, and performance standards. The reader is referred to the complete draft ''Regulatory Impact Analysis,'' which is contained in the TSD, available as indicated at the beginning of this notice or from the contact person named at the beginning of this notice. The TSD provides: (1) A statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) the national economic impacts of the proposed standard.

### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires that a Federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of proposed rulemaking. Such an assessment of the impact of regulations on small businesses is not required if the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). To be categorized as a ''small'' air conditioning and warm air heating equipment manufacturer, a firm must employ no more than 750 employees.

In the October 5, 2000 NOPR, DOE discussed the potential impacts on small businesses of the October 5 proposed rule (corresponding to Trial Standard Level 3), and certified that the proposed standard levels would not have a significant economic impact on a substantial number of small entities. 65 FR 59629–30. DOE reported that nearly all small businesses engaged in the manufacture of central air conditioners and heat pumps produce products that DOE has called ''niche'' products. To avoid adversely impacting manufacturers of niche products, DOE proposed a separate product class for through-the-wall equipment, much of which is manufactured by small manufacturers. *See* 65 FR 59609–11. In the preamble to the January 22 final rule, DOE addressed comments regarding the impacts more stringent standards might have on the availability of niche products, and although the final rule adopted the higher Trial Standard Level 4 standards, DOE deferred setting an amended standard for niche products. 66 FR 7175, 7196–97. Because the final rule excluded most products made by small manufacturers, DOE affirmed its certification.

Today DOE is proposing energy conservation standards for central air conditioners and heat pumps that correspond to Trial Standard Level 2. Because of severe size constraints, DOE is again proposing a separate product class for through-the-wall equipment,

with a lower SEER. No other provisions for niche products are being proposed.

DOE certifies, based on its analysis and public comments, that today's proposed rule would not have a significant impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis. This certification is based on an assessment of the impact the proposed standards would have on small entities that would be directly affected by their implementation, which is all the Regulatory Flexibility Act requires. The assertion by ARI, in its petition for consideration, that DOE is required to assess the indirect effects of proposed standards is contrary to established case law interpreting the Act.

*D. Review Under the Paperwork Reduction Act*

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.*

*E. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE reviewed today's proposed rule under the standards of section 3 of the Executive Order and determined that, to the extent permitted by law, this proposed rule meets the relevant standards.

*F. Review Under Executive Order 12630*

DOE has determined pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 52 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution.

*G. Review Under Executive Order 13132*

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. Agencies also must have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. DOE published its intergovernmental consultation policy on March 14, 2000. 65 FR 13735. DOE has examined today's proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. State regulations that may have existed on the products that are the subject of today's proposed rule were preempted by the Federal standards established in NAECA. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA.

*H. Review Under the Unfunded Mandates Reform Act of 1995*

With respect to a proposed regulatory action that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector of $100 million or more, section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires a Federal agency to publish estimates of the resulting costs, benefits and other effects on the national economy. 2 U.S.C. 1532(a), (b). UMRA also requires each Federal agency to develop an effective process to permit timely input by state, local, and tribal governments on a proposed significant intergovernmental mandate. DOE's consultation process is described in a notice published in the **Federal Register** on March 18, 1997. 62 FR 12820. Today's proposed rule may impose expenditures of $100 million or more on the private sector. It does not contain a Federal intergovernmental mandate.

Section 202 of UMRA authorizes an agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. 2 U.S.C. 1532(c). The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the January 22, 2001, notice of final rulemaking and ''Regulatory Impact Analysis'' section of the TSD for this proposed rule responds to those requirements.

Under section 205 of UMRA, DOE is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise or the selection of such an alternative is inconsistent with law. As required by section 325(o) of the Energy Policy and Conservation Act (42 U.S.C. 6295(o)), today's proposed rule would establish energy conservation standards for central air conditioners and heat pumps that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in the ''Regulatory Impact Analysis'' section of the TSD for today's proposed rule.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to

prepare a Family Policymaking Assessment.

*J. Review Under Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposed action be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's proposal would not have any adverse effects on the supply, distribution, or use of energy in the near term because neither the January 22, 2001 final rule nor any final rule resulting from this action would have any effect on the manufacture of central air conditioners and heat pumps until 2006. In the longer term, beginning in 2006, the proposed rule, if implemented, would have a positive impact on the reliability of electricity supply in the United States. The standards that DOE is proposing would represent a 20 percent improvement in the energy efficiency of split-system central air conditioners, and a 9 percent improvement in heating efficiency for heat pumps. The proposed standards would improve the cooling efficiency of single-package heat pumps by 24 percent and the heating efficiency of single-package heat pumps by 12 percent. As explained in Section IV.B.3. of this **SUPPLEMENTARY INFORMATION,** DOE estimates the standards would save approximately 3 quads of energy over 25 years (2006 through 2030). Also, in determining whether the proposed standards are economically justified, DOE considered as a benefit the potential of the proposed standards to improve the reliability of the electric generation and distribution system. *See* Section IV.D.7 (''Other Factors'') and the preamble to the January 22 final rule. 66 FR 7181–82, 7194. DOE's analysis shows the proposed standards would result in an estimated reduction in installed generation capacity in the year 2020 of approximately 11 gigawatts. This would be the equivalent of three 400 megawatt coal-fired plants and twenty-three 400 megawatt gas-fired plants.

DOE acknowledges that projections indicate that the standard levels set out in the January 22, 2001 rulemaking would avoid electricity consumption to an even greater extent than under the standard level proposed in today's supplemental notice of proposed rulemaking. However, section 325 of EPCA requires DOE to weigh all of the significant costs and benefits associated with standard levels that are being considered and not just avoided electricity costs. DOE has set forth its evaluation of costs and benefits elsewhere in this notice (see Section V.C.). DOE has also considered various regulatory and non-regulatory alternatives to today's proposed standard (*see* Section VI.B., ''Review Under Executive Order 12866,'' and the Regulatory Impact Analysis portion of the TSD). DOE has concluded that the costs associated with elevating the current standard to the standard level set forth in the January 22, 2001, final rule exceed the associated benefits, including the benefit of avoided electricity consumption.

## VII. Public Comment

*A. Written Comment Procedures*

DOE invites interested persons to participate in the proposed rulemaking by submitting data, comments, or information with respect to the proposed issues set forth in today's proposed rule to Ms. Brenda Edwards-Jones, at the address indicated at the beginning of this notice. We will consider all submittals received by the date specified at the beginning of this notice in developing the final rule.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit one complete copy of the document and ten (10) copies, if possible, from which the information believed to be confidential has been deleted. DOE will make its own determination with regard to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat as confidential information that has been submitted include: (1) A description of the items; (2) an indication as to whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) an indication as to when such information might lose its confidential character due to the passage of time; and (7) whether disclosure of the information would be contrary to the public interest.

*B. Public Workshop/Hearing*

1. Procedure for Submitting Requests To Speak

You will find the time and place of the public hearing listed at the beginning of this notice. We invite any person who has an interest in today's notice, or who is a representative of a group or class of persons that has an interest in these issues, to request an opportunity to make an oral presentation. If you would like to attend the public hearing, please notify Ms. Brenda Edwards-Jones at (202) 586–2945. You may hand deliver requests to speak to the address indicated at the beginning of this notice between the hours of 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. You may also send them by mail or E-mail to brenda.edwards-jones@ee.doe.gov.

The person making the request should state why he or she, either individually or as a representative of a group or class of persons, is an appropriate spokesperson, briefly describe the nature of the interest in the rulemaking, and provide a telephone number for contact. We request each person selected to be heard to submit an advance copy of his or her statement at least two weeks prior to the date of this hearing as indicated at the beginning of this notice. At our discretion, we may permit any person who cannot do this to participate if that person has made alternative arrangements with the Office of Building Research and Standards in advance. The request to give an oral presentation should ask for such alternative arrangements.

2. Conduct of Hearing

DOE will designate a DOE official to preside at the workshop and we may also use a professional facilitator to facilitate discussion. The workshop will

not be a judicial or evidentiary-type hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and Section 336 of the Act and a court reporter will be present to record the transcript of the workshop. We reserve the right to schedule the presentations by workshop participants, and to establish the procedures governing the conduct of the workshop.

DOE will permit each participant to make a prepared general statement, limited to five (5) minutes, prior to the discussion of specific topics. DOE will permit other participants to briefly comment on any general statements.

DOE will introduce each topic with a brief summary of the relevant parts of our analysis and of the proposed rule, and the significant issues involved. We will then permit participants in the hearing to make a prepared statement limited to five (5) minutes on that topic. At the end of all prepared statements on a topic, DOE will permit each participant to briefly clarify his or her statement and comment on statements made by others. Participants should be prepared to answer questions by us and by other participants concerning these issues. Our representatives may also ask questions of participants concerning other matters relevant to the hearing. The total cumulative amount of time allowed for each participant to make prepared statements will be 20 minutes.

The official conducting the hearing will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules, or modification of the above procedures, needed for the proper conduct of the hearing.

We will make the entire record of this rulemaking, including the transcript, available for inspection in DOE's Freedom of Information Reading Room. Any person may purchase a copy of the transcript from the transcribing reporter.

**List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Energy conservation, Household appliances.

Issued in Washington, D.C., on July 18, 2001.

**David K. Garman,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

For the reasons set forth in the preamble, Part 430 of Chapter II of Title 10, Code of Federal Regulations is proposed to be amended, as set forth below.

## PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for Part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

2. Section 430.2 is amended by adding definitions for ''effective date,'' ''maximum allowable energy use,'' ''minimum required energy efficiency,'' and ''through-the-wall air conditioner and heat pump'' in alphabetical order to read as follows:

### § 430.2 Definitions.

* * * * *

*Effective date* for purpose of the part, means the date on and after which a manufacturer must comply with an energy conservation standard in the manufacture of a covered product.

* * * * *

*Maximum allowable energy use* means an energy conservation standard for a covered product, expressed in terms of a maximum amount of energy that may be consumed, which is established by statute or by a final rule that has modified this part pursuant to a date DOE has selected consistent with the Congressional Review Act (5 U.S.C. 801–804) and any other applicable law.

* * * * *

*Minimum required energy efficiency* means an energy conservation standard for a covered product, expressed in terms of a minimum efficiency quotient, which is established by statute or by a final rule that has modified this part pursuant to a date DOE has selected consistent with the Congressional Review Act (5 U.S.C. 801–804) and any other applicable law.

* * * * *

*Through-the-wall air conditioner and heat pump* means a central air conditioner or heat pump that is designed to be installed totally or partially within a fixed-size opening in an exterior wall, and:

(1) Is manufactured prior to July 26, 2010;

(2) Is not weatherized;

(3) Is clearly and permanently marked for installation only through an exterior wall;

(4) Has a rated cooling capacity no greater than 30,000 Btu/hr;

(5) Exchanges all of its outdoor air across a single surface of the equipment cabinet; and

(6) Has a combined outdoor air exchange area of less than 800 square inches (split systems) or less than 1,210 square inches (single packaged systems) as measured on the surface described in (5).

* * * * *

3. Section 430.32 of Subpart C is amended by revising paragraph (c) to read as follows:

### § 430.32 Energy and water conservation standards and effective dates.

(c) *Central air conditioners and central air conditioning heat pumps.* (1) Split system central air conditioners and central air conditioning heat pumps manufactured after January 1, 1992, and before July 25, 2006, and single package central air conditioners and central air conditioning heat pumps manufactured after January 1, 1993, and before July 25, 2006, shall have Seasonal Energy Efficiency Ratio and Heating Seasonal Performance Factor no less than:

| Product class | Seasonal energy efficiency ratio | Heating seasonal performance factor |
|---|---|---|
| 1. Split systems | 10.0 | 6.8 |
| 2. Single package systems | 9.7 | 6.6 |

(2) Central air conditioners and central air conditioning heat pumps manufactured on or after July 25, 2006, shall have Seasonal Energy Efficiency Ratio and Heating Seasonal Performance Factor no less than:

| Product class | Seasonal energy efficiency ratio (SEER) | Heating seasonal performance factor (HSPF) |
|---|---|---|
| 1. Split system air conditioners | 12 | ..... |
| 2. Split system heat pumps | 12 | 7.4 |
| 3. Single package air conditioners | 12 | ..... |
| 4. Single package heat pumps | 12 | 7.4 |

| Product class | Seasonal energy efficiency ratio (SEER) | Heating seasonal performance factor (HSPF) |
|---|---|---|
| 5.A. Through-the-wall air conditioners and heat pumps—split system | 10.9 | 7.1 |
| 5.B. Through-the-wall air conditioners and heat pumps—single package | 10.6 | 7.0 |

* * * * *

4. Section 430.34 is added to Subpart C to read as follows:

**§ 430.34 Energy and water conservation standards amendments**

The Department of Energy 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 which decreases the minimum required energy efficiency of a covered product.

## Appendix

(The following letters from Department of Justice will not appear in the Code of Federal Regulations.)

**DEPARTMENT OF JUSTICE—Antitrust Division**

A. DOUGLAS MELAMED—Acting Assistant Attorney Genera1

Main Justice Building, 950 Pennsylvania Avenue. NW., Washington, DC 20530–0001, (202) 514–2401/ (202) 616–2645 (f), antitrust@justice.usdoj.gov (internet), http://www.usdoj.gov (World Wide Web)

December 4, 2000

Mary Anne Sullivan, General Counsel, Department of Energy, Washington, D.C. 20585

Dear General Counsel Sullivan: I am responding to your October 16, 2000 letter seeking the views of the Attorney General about the potential impact on competition of two proposed energy efficiency standards: one for clothes washers and the other for residential central air conditioners and heat pumps. Your request was submitted pursuant to Section 325(o)(2)(B)(i) of the Energy Policy and Conservation Act, 42 U.S.C. § 6291, 6295 (''EPCA''), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy efficiency standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR § 0.40(g).

We have reviewed the proposed standards and the supplementary information published in the **Federal Register** notices and submitted to the Attorney General, which include information provided to DOE of Energy by manufacturers. We have additionally conducted interviews with members of the industries.

We have concluded that the proposed clothes washer standard would not adversely affect competition. In reaching this conclusion, we note that the proposed standard is based on a joint recommendation submitted to DOE of Energy by manufacturers and energy conservation advocates. That recommendation states that virtually all manufacturers of clothes washers who sell in the United States participated in arriving at the recommendation through their trade association, that the recommendation was developed in consultation with small manufacturers, and that the manufacturers believe the new standard would not likely reduce competition. We note further that, as the industry recommended, the proposed standard will be phased in over six years, which will allow companies that do not already have products that meet the proposed standard sufficient time to redesign their product lines.

With respect to the proposed residential central air conditioner and heat pump standard, we have concluded that there could be an adverse impact on competition. The proposed standard, Trial Standard Level 3, is expressed in terms of two industry measurements: SEER (Seasonal Energy Efficiency Ratio) and HSPF (Heating Seasonal Performance Factor).[1] These standards would change from the current central air conditioner and heat pump efficiency standards of 10 SEER/6.8 HSPF for split system air conditioners and heat pumps and 9.7 SEER/6.6 HPSF for single package air conditioners and heat pumps to 12 SEER for air conditioners and 13 SEER/7.7 HPSF for heat pumps.

We have identified three possible competitive problems presented by the proposed standards. First, the proposed 13 SEER heat pump standard would have a disproportionate impact on smaller manufacturers. Currently less than 20% of the total current product lines meet the proposed standards, but for some small manufacturers, 100% of their product lines fail to satisfy the proposed standard.

Second, the proposed standard for heat pumps, and in some instances for air conditioners, would have an adverse impact on some manufacturers of these products (including those products referred to in the **Federal Register** notice as ''niche products'') used to retrofit existing housing and used in manufactured housing. These manufacturers could not make units that comply with the rule and fit into the available space.

Third, the proposed heat pump standard of 13 SEER could make heat pumps less competitive with alternative heating and cooling systems. Because the standard will result in increases in the size and cost of heat pumps, it is possible that purchasers will shift away from heat pumps to other systems that inc1ude electric resistance heat, reducing the competition that presently exists between heat pumps and those other systems.

Department of Justice urges DOE of Energy to take into account these possible impacts on competition in determining its final energy efficiency standard for air conditioners and heat pumps. DOE of Energy should consider setting a lower SEER standard for heat pumps, such as the standard included in Trial Standard Level 2, and a lower SEER standard for air conditioners for retrofit markets where there are space constraints (such as markets served by niche products) and for manufactured housing.

Sincerely,

A. Douglas Melamed.

**DEPARTMENT OF JUSTICE—Antitrust Division–Antitrust Division**

JOHN M. NANNES–Acting Assistant Attorney General

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April 5, 2001

Eric J. Fygi, Acting General Counsel, Department of Energy, Washington, DC 20585

Dear Acting General Counsel Fygi: I am responding to your letter dated March 20, 2001, seeking the views of the Attorney General about the potential effect on competition of the final rule published on January 22, 2001, setting forth new energy efficiency standards for central air conditioners and heat pumps. You specifically asked for our views about the impact on competition of the rule's prescription of a 13 SEER (Seasonal Energy Efficiency Rating) standard for all product classes, except for niche products, and the desirability of reducing the standard to a 12 SEER level for all subcategories. Your letter requested our views by March 30, but your staff agreed to extend the response date to Apri1 6.

As you noted in your letter to the Attorney General, the Antitrust Division had earlier expressed its views on the proposed rule, which provided for a 12 SEER standard for air conditioners and a 13 SEER standard for heat pumps. The Division had concluded that the 13 SEER standard for heat pumps

[1] The **Federal Register** notice also requested comments on a proposal to adopt a standard for steady-state cooling efficiency (EER) and discussed several options DOE of Energy is considering. The proposed rule set forth in the notice does not, however, include a provision regarding an EER standard, and the views of Department of Justice expressed in this letter are limited to the impact of any lessening of competition * * * that is likely to result from the imposition of the [proposed] standard,'' as required by EPCA. If DOE of Energy proposes a rule in the future incorporating an EER standard, DOE will then evaluate that proposed rule and express its views about the competitive impact of that standard.

could have an adverse effect on competition and urged the Department of Energy to adopt a 12 SEER standard for heat pumps. We noted only minor concerns about the proposed 12 SEER standard for air conditioners.

We have reviewed the final rule and determined that the 13 SEER heat pump standard still raises competitive problems. We have further determined that the 13 SEER standard for air conditioners also raises competitive concerns.

In our earlier letter, we identified and described three competitive problems resulting from the proposed 13 SEER standard for heat pumps, including a disproportionate impact on smaller manufacturers [2] and an adverse effect on manufacturers of specialized equipment (the niche product manufacturers) and manufacturers of equipment for space-constrained installation sites (such as manufactured housing, which accounts for a significant percentage of the country's housing starts). The exception made in the final rule for niche product manufacturers may alleviate competitive problems for their products, but the exception does not eliminate the difficulties for manufacturers of standard equipment who could not make equipment that complied with the 13 SEER standard and still fit into space-constrained sites. The final rule also continues to have a disproportionate impact on smaller manufacturers of heat pumps. The 13 SEER standard for air conditioners raises the same kinds of competitive problems as the 13 SEER standard does for heat pumps.

We urge the Department of Energy to consider the impact on competition and to adopt a 12 SEER standard for all products covered by the rule.

Sincerely,

John M. Nannes.

[FR Doc. 01–18429 Filed 7–24–01; 8:45 am]

**BILLING CODE 6450–01–P**

[2] We noted in our previous letter that less than 20% of the total current heat pump product lines meet the new standard, but for some small manufacturers, 100% of their product lines failed to satisfy the standard. The same is true for air conditioner manufacturers when the standard is 13 SEER.