



December 23, 2019

To: Office of Energy Efficiency and Renewable Energy, Dept. of Energy

Subject: Comments on Energy Conservation Program: Energy Conservation Standards for Fluorescent Lamp Ballasts (84 Fed. Reg. 56,540, Oct. 22, 2019)

Docket: EERE-2015-BT-STD-0006

The Institute for Policy Integrity at New York University School of Law¹ respectfully submits these comments on the Department of Energy's proposed determination not to increase the efficiency of fluorescent lamp ballasts.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Department of Energy's proposed determination fails to analyze the forgone emissions reductions of not increasing the efficiency standards for fluorescent lamp ballasts. Though the proposed determination mentions that the Department typically uses a full-fuel-cycle approach to "measure . . . greenhouse gas and other emissions in the NIA [national impact analysis] and emissions analyses,"³ no such analysis appears here. The proposed determination's national impact analysis does not list emissions as one of the factors considered,⁴ there is no separate emissions analysis,⁵ and the calculation of costs and benefits excludes any discussion of quantified emissions, let alone the social cost of greenhouse gases.⁶ The technical support document make the same omissions.⁷

The failure to discuss the possible emissions reductions of increasing the efficiency standards violates the 2015 *Framework Document for Fluorescent Lamp Ballasts*, which said "In the emissions analysis, DOE will estimate the reduction in power sector emissions of carbon dioxide (CO₂), nitrogen oxides (NO_x), sulfur dioxide (SO₂), and mercury (Hg) from potential energy conservation standards for the considered product,"⁸ and also promised to monetize both carbon dioxide and nitrogen oxide emissions.⁹ It also violates past practices, as the Department has routinely analyzed emissions for its energy conservation standards, and in particular has considered the social cost of greenhouse gases when assessing the "national benefits and costs."¹⁰ Most importantly, the failure to consider emissions consequences violates statutory requirements.

¹ This document does not purport to present New York University School of Law's views, if any.

² 84 Fed. Reg. 56,540 (Oct. 22, 2019).

³ *Id.* at 56,576.

⁴ *Id.* at 56,574, table IV.13.

⁵ *Id.* at 56,544 (listing for "other analyses" only a manufacturing impact analysis, and no emissions analysis).

⁶ *Id.* at 56,580.

⁷ For example, the TSD says "The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the TSD," DOE, *Notice of Proposed Determination Technical Support Document Energy Conservation Program for Consumer Productions and Certain Commercial and Industrial Equipment: Fluorescent Lamp Ballasts 2-7* (Oct. 2019), but appendix 10B does not actually contain any such emissions calculations.

⁸ DOE, *Energy Conservation Standards Rulemaking Framework Document for Fluorescent Lamp Ballasts*, EERE-2015-BT-STD-0006, at 44 (2015).

⁹ *Id.* at 46.

¹⁰ See, e.g., Energy Conservation Program: Energy Conservation Standards for Walk-In Cooler and Freezer Refrigeration Systems, 82 Fed. Reg. 31,808, 31,811 (July 10, 2017).

The Department claims that its determination that amended standards are not needed can be based solely on three criteria: significance of the energy conservation, technological feasibility, and cost-effectiveness for consumers.¹¹ Even assuming these are the sole criteria for the Department's determination, emissions reductions are directly relevant to the "significance" of the energy savings. As the Department acknowledges, its very recent attempt to define "significance" through changes to the Process Rule "have not yet been finalized."¹² And as the proposed changes to the Process Rule admitted, neither the Energy Policy and Conservation Act (EPCA) nor prior departmental regulation have defined "significant conservation of energy."¹³ Yet the U.S. Court of Appeals for the District of Columbia Circuit has found that "significance" can be evaluated by comparing whether the "value" of energy savings "outweighed" the "cost."¹⁴ More broadly, "significant" is a relative term, a comparator that implicitly calls for the balancing of factors. As the U.S. Supreme Court has indicated, comparative terms that "admit[] of degree" like "significant," "minimize," or "reasonable" typically should be assessed by comparing costs and benefits, because "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits."¹⁵ Under such an interpretation, environmental benefits should be a central factor in weighing the significance of energy savings. Finally, while "significant conservation of energy" has not been defined by EPCA, the statute does provide other analogous factors, like "the need for national energy . . . conservation" prong of the test for "economically justified,"¹⁶ and, as explored more below, those factors have been interpreted by courts specifically to include consideration of environmental effects.

Indeed, the proposed determination that amended standards are not needed never explains why the Department can ignore the factors for determining whether amended standards would be "economically justified," including the key reference to "the need for national energy . . . conservation." As the Department explains, it must review its standards every six years under 42 U.S.C. § 6295(m)(1) and then either, under subpart (m)(1)(A), issue a determination that standards do not need to be amended based on the criteria under subsection (n)(2), or else, under subpart (m)(1)(B), issue a notice of proposed rulemaking based on the criteria under subsection (o). In this proposed determination on fluorescent lamp ballasts, the Department seeks to focus entirely on subpart (A) of § 6295(m)(1) and the three criteria cross-referenced in subsection (n)(2) (namely, significance of the energy conservation, technological feasibility, and cost-effectiveness for consumers). The Department thus seeks to ignore the criteria for whether an amendment is "economically justified" under § 6295(m)(1)(B) and § 6295(o). However, the Department fails to explain why it is entitled to ignore these criteria.

To begin, the Department summarizes its review of the standards for fluorescent lamp ballasts as fulfilling the statutory requirement "to periodically determine whether more-stringent, amended

¹¹ 84 Fed. Reg. at 56,542 (citing 42 U.S.C. § 6295(m)(1)(A)'s reference to § 6295(n)(2), which then cites to § 6295(o)(2)(B)(i)(II)).

¹² *Id.* at 56,544.

¹³ Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 84 Fed. Reg. 3910, 3922 (Feb. 13, 2019).

¹⁴ *NRDC v. Herrington*, 768 F.2d 1355, 1374 n.19 (D.C. Cir. 1985) (discussing administrative costs and other costs, and concluding that "If . . . the value of saving small amounts of energy was outweighed by the cost and trouble of undertaking any appliance program at all, DOE might be justified in determining that those small savings were not significant."); *see also id.* at 1374 ("We think it unlikely that the Congress that enacted NECPA and its four related energy statutes intended DOE to throw away a cost-free chance to save energy unless the amount of energy saved was genuinely trivial.").

¹⁵ *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1506, 1510 (2009).

¹⁶ 42 U.S.C. § 6295(o)(2)(B)(i)(VI).

standards would be technologically feasible *and economically justified*.¹⁷ Yet the only statutory criteria for “economically justified” appear in 42 U.S.C. § 6295(o), and include “the need for national energy . . . conservation.” By its own framing of this review, therefore, the Department should have considered the factors for economic justification, including the national need for energy conservation. Additionally, the two subparts of 42 U.S.C. § 6295(m)(1) identify the two possible outcomes of a single review process: either the Department determines upon review that the standards do not need to be amended, or else the Department proposes new amended standards. It logically follows that the criteria for crafting the amended standards should be relevant to determining whether amended standards are appropriate or not. Indeed, as already mentioned, the review of “the need for national energy . . . conservation” under § 6295(o) is analogous and relevant to the review of whether energy savings are “significant” under § 6295(n).

For all these reasons, to assess the significance of the energy conservation and to review whether an amendment would be economically justified, the Department should have considered “the need for national energy and water conservation.”¹⁸ And as the Department has recently acknowledged, in assessing the “need for national energy conservation” factor, the Department normally would analyze environmental benefits, including reduced greenhouse gas emissions and air pollution associated with fossil-fuel based energy production, as well as benefits to the reliability of the nation’s energy system and to national security that come from reduced overall energy demand.¹⁹

In 2016, the U.S. Court of Appeals for the Seventh Circuit concluded that: “To determinate whether an energy conservation measure is appropriate under a cost-benefit analysis, the expected reduction in environmental costs *needs to be taken into account*.”²⁰ Interpreting nearly identical statutory language that EPCA applies to the Department of Transportation’s setting of vehicle efficiency standards (“the need of the United States to conserve energy”²¹), the U.S. Court of Appeals for the D.C. Circuit observed in 1988 that the Department of Transportation has interpreted that language as “*requir[ing]* consideration of . . . environmental . . . implications,”²² and the U.S. Court of Appeals for the Ninth Circuit held that the Department of Transportation’s failure to monetize climate benefits explicitly in its economic assessment of vehicle efficiency standards was arbitrary and capricious.²³

From among the earliest energy conservation standards that the Department of Energy issued following EPCA’s 1987 amendments—and consistently since then, under administrations of both political parties—the Department has considered the economic and other effects of avoided carbon emissions when assessing the national need for energy conservation. Under President George H.W. Bush’s administration in 1989, the Department of Energy agreed with public commenters that “environmental effects,” including the “national security” implications of “mitigating global warming and pollution,” counted toward the “economic justification” for efficiency standards, under the “need of the nation to

¹⁷ 84 Fed. Reg. at 56,540 (emphasis added).

¹⁸ 42 U.S.C. § 6295(o)(2)(B)(i)(VI).

¹⁹ Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, 84 Fed. Reg. 46,830, 46,835 (Sept. 5, 2019).

²⁰ *Zero Zone Inc. v. Dept. of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (emphasis added). *See also id.* at n.24 (further concluding that the agency also likely had the authority, if not the requirement, to consider environment effects under the first statutory factor on economic impacts, because “[e]nvironmental benefits have an economic impact”).

²¹ 49 U.S.C. § 32,902(f).

²² *Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 848 F.2d 256, 263 n.27 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (quoting 42 Fed. Reg. 63,184, 63,188 (Dec. 15, 1977) and adding emphasis to the word *requires*).

²³ *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1203 (9th Cir. 2008); *see also id.* at 1197-98 (indicating that, due to advancements in “scientific knowledge of climate change,” “[t]he need of the nation to conserve energy is even more pressing today than it was at the time of EPCA’s enactment”).

conserve energy” prong.²⁴ Less than two years later, again at the behest of commenters, the Department not only “quantified” the “social benefits” of environmental effects like “global warming” to help justify the selected standards, but further noted that environmental effects “have also been considered in the development of the selected standard levels.”²⁵ These practices continued through subsequent presidential administrations.²⁶ Yet suddenly, in this proposed determination, the Department abandons over 30 years of regulatory and judicial precedents under administrations of both parties; instead, the Department fails to consider an important aspect of the rulemaking, in violation of both the EPCA and the Administrative Procedure Act.

The Department should first clarify that an emissions analysis is statutorily required, is typically conducted together with the national impact analysis, and is also relevant to the review of the significance of the energy conservation. The Department should then specifically conduct such an analysis for all the technologically-feasible efficiency levels under evaluation, both quantifying the full-fuel-cycle emissions of important pollutants and also monetizing the environmental effects using any available metrics, such as the social cost of greenhouse gases.

Sincerely,

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²⁴ 54 Fed. Reg. 47,916, 47,924, 47,937, 47,940 (Nov. 17, 1989).

²⁵ 56 Fed. Reg. 22,250, 22,259 (May 14, 1991).

²⁶ *E.g.*, 62 Fed. Reg. 50,122, 50,143 (Sept. 24, 1997); 73 Fed. Reg. 58,772, 58,814 (Oct. 7, 2008); 79 Fed. Reg. 17,726, 17,738 (Mar. 28, 2014).