

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

Procedures, Interpretations, and Policies for)	
Consideration of New or Revised Energy)	EERE-2017-BT-STD-0062
Conservation Standards for Consumer Products)	
)	

**JOINT COMMENTS OF THE
AMERICAN PUBLIC GAS ASSOCIATION AND THE
AMERICAN GAS ASSOCIATION**

The American Public Gas Association (“APGA”) and the American Gas Association (“AGA”) (collectively, the “Associations”) submit these joint comments in response to the request for information (“RFI”) of the Department of Energy Office of Energy Efficiency and Renewable Energy (“DOE”) published in the Federal Register on December 18, 2017.¹ This RFI seeks input to assist DOE in identifying potential modifications to its Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, known as the “Process Rule.”² The Associations appreciate the opportunity to provide DOE with feedback on these items and, accordingly, submit these joint comments.

I. BACKGROUND

APGA is the national, non-profit association of publicly owned natural gas distribution systems with more than 735 members in 36 states. Overall, there are approximately 1,000 public gas systems in the United States. Public gas systems are not-for-profit retail distribution entities that are owned by, and accountable to, the citizens they serve. They include municipal gas

¹ *Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 82 Fed. Reg. 59,992 (Dec. 18, 2017).

² 10 C.F.R. Part 430, Subpart C, Appendix A.

distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

AGA, founded in 1918, represents more than 200 state regulated or municipal natural gas distribution companies. AGA members serve more than 70 million natural gas customers, who rely on natural gas for everyday necessities such as heating their home, heating their water or cooking their food.

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

II. COMMENTS

The Associations support DOE's efforts to make a Process Rule mandatory. Only then will DOE be held accountable to its own procedures and will the public have confidence in the transparency and fairness of the regulatory process. The Associations have raised concerns about the existing Process Rule in previous comments because it has been ignored and/or flouted in rulemakings routinely under DOE's Appliance and Equipment Standards Program

(“Program”). The Associations believe that reforming and improving the Process Rule can address the shortcomings that have been pervasive in rulemakings under the Program to establish minimum efficiency standards.

Originally established during a time of energy scarcity, and intended to encourage efficient energy use, DOE’s Appliance and Equipment Standards Program, now overseen by the Office of Energy Efficiency and Renewable Energy (“EERE”), was tasked with establishing minimum efficiency standards for certain appliances and equipment that are technologically feasible and economically justified. In the early years, the Program effectively advanced the development and availability of higher efficiency product offerings that enabled consumers to consider a range of options and purchase a product that best met their needs. But a product’s efficiency level is finite. Furthermore, many of today’s products are nearing their peak efficiency, but federal mandates require repeated reviews, forcing incremental changes in minimum efficiency standards that are neither cost effective nor technologically justified. This poses multiple concerns:

- Striving for higher efficiency standards when potential energy savings are minimal is costly to accomplish and ignores the economic justification requirement under the statute that governs the Program—leading to an attitude of “at all costs.”
- Furthermore, to achieve those higher standards, DOE requires costly changes to consumers’ homes and commercial buildings in which the product is utilized.³

³ For example, achieving efficiency levels that exceed 88% Annual Fuel Utilization Efficiency (fully condensing furnace) for residential natural gas furnaces requires venting systems and condensate removal equipment that furnaces below this level of efficiency do not require, resulting in increased costs in most instances.

That leads to fuel switching, which is contrary to the intent and requirements of the Program.

- Following an approach to increase standards when savings are minimal can result in overly aggressive analysis and modeling. As expressed by many stakeholders over the past several years, flawed methodologies currently used by DOE have led to conclusions that are erroneous and overstate the potential benefits associated with proposed standards and underestimate the costs, all to justify the DOE's desired new standard.

As discussed further in these comments, a flawed analysis has resulted in proposed standards that fail to meet the economic justification requirement under the Program's enabling statute. In some cases, such as the proposal regarding residential gas furnaces, the Associations submit that DOE's flawed proposal will lessen competition by removing the choice that natural-gas using consumers currently have, and will likely force many consumers to use alternatives that are demonstratively less efficient, and ultimately more costly. This example and others discussed in greater detail herein are relevant to this RFI, as they underscore that the Program is an important area within DOE in need of significant reform.

A. Proper Use of Direct Final Rules

If used properly, the direct final rule ("DFR") process can be an effective and efficient means of promulgating new energy conservation standards. As discussed in the RFI, the development of DFRs allows for early stakeholder input and can support efforts to build consensus.⁴ This not only can save time and money, but it may ultimately produce better standards. On the other hand, improper use of the DFR process – including the failure to comply

⁴ RFI at 59,994.

with the statutory mandates – can produce the opposite outcome: protracted litigation, wasted resources, and unlawful proposed minimum efficiency standards.

DOE should therefore promulgate a Process Rule that includes provisions addressing the use of DFRs. This will help to ensure that the DFR process is used only when all of the statutory requirements are met. In particular, the Process Rule should set forth provisions that (i) define what it means for a joint statement to be submitted by “interested persons that are fairly representative of relevant points of view” and (ii) define the criteria that DOE will consider when determining whether to withdraw a DFR as a result of comments received. Substantive recommendations with respect to both of these issues are set forth below.

1. The Meaning of “Fairly Representative of Relevant Points of View”

Under the Energy Policy and Conservation Act (“EPCA”), the DFR process is initiated by the submission of a joint statement by “interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary.”⁵ DOE seeks comment on the meaning of “interested persons that are fairly representative of relevant points of view.”⁶ In particular, DOE asks whether it should ensure that *all* relevant points of view have been taken into account before using its authority to issue a DFR under EPCA. The short answer is yes.

In a vacuum, the phrase “fairly representative” could be interpreted to mean “somewhat representative,” “moderately representative,” or something equally as vague. Similarly, without context, “relevant points of view” could mean *some* relevant points of view, *i.e.*, more than one but not necessarily all relevant points of view, or selective points of view.

⁵ 42 U.S.C. § 6295(p)(4)(A).

⁶ RFI at 59,994.

Statutory provisions, however, are not to be read in a vacuum. Rather, the statute’s text, legislative history, structure and purpose all must be examined.⁷ The legislative history of the DFR amendment indicates that the DFR process was intended to be used only in circumstances in which representatives of *all* relevant interests jointly submit a proposed energy conservation standard for a product – *i.e.*, when there is a *clear consensus*.⁸ In other words, all relevant points of view must be represented.

Even without this history, however, basic logic would mandate such a result. Interpreting “relevant points of view” to mean merely “some relevant points of view” would allow the DFR process to proceed if as few as two relevant points of view supported a proposal while all others opposed it. That of course would fly in the face of the basic purpose of the DFR to expedite *noncontroversial* proposed standards.

In this context, therefore, it is clear that “fairly representative” means “representative in a fair way.” Given the intent of the DFR process – to avoid a time-consuming notice-and-comment rulemaking when there is already a general consensus – the “fairly representative” qualifier was intended to ensure that no single entity has a veto over the general consensus. For example, assume that a proposal that is supported by appliance manufacturers generally (as perhaps evidenced by the support of the manufacturers’ trade association) is opposed by a single manufacturer or by several manufacturers. In that situation, the DOE Secretary would have the discretion to determine that the proposal was (or was not) fairly representative of the point of view of manufacturers. Similarly, if the proposal were supported by some manufacturers but opposed by the vast majority of manufacturers, the Secretary would likewise have discretion. In

⁷ *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

⁸ See *Energy Conservation Program: Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products*, 79 Fed. Reg. 64,705, 64,708 (Oct. 31, 2014) (discussing communications from DOE to Congress requesting DFR legislation).

other words, if there are varying views among the representatives within a particular point of view (e.g., manufacturers), then the Secretary should exercise discretion to determine whether the statutory standard is met. By contrast, if a relevant point of view is completely omitted from a proposal – or if it unanimously opposes the proposal – then the proposal is *not* fairly representative of relevant points of view.⁹

This approach would ensure that a single dissident or very small minority within a relevant point of view would not have veto power. At the same time, however, consistent with the statutory text and legislative history, it would make clear that DOE will not accept a joint statement that is supported by some relevant points of view but opposed by others.

Finally, the Process Rule should specify, or, at a minimum, provide the parameters for determining, which points of view are “relevant points of view.” EPCA parenthetically indicates that relevant persons include “representatives of manufacturers of covered products, States, and efficiency advocates.”¹⁰ This, however, leaves DOE with discretion to determine which other points of view, beyond the illustrative examples, are relevant with respect to proposed efficiency standards.¹¹ The Process Rule can help fill the void by specifying particular interests that are relevant to certain categories of proposed standards. For example, gas distribution utilities and their customers should be deemed to be relevant persons with respect to all proposed standards applicable to appliances that use gas. Specifying these categories in advance through a

⁹ If a relevant point of view is not represented, then DOE should know that before proceeding and should seek to determine whether that relevant point of view supports or does not oppose the joint statement. If it opposes, then the joint statement is not fairly representative of relevant points of view.

¹⁰ 42 U.S.C. § 6295(p)(4)(A).

¹¹ See, e.g. *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) (“In both legal and common usage, the word ‘including’ is ordinarily defined as a term of illustration, signifying that what follows is an example of the preceding principle.”).

rulemaking would help to ensure that all relevant points of view are fairly represented, as mandated by the statute.

2. *The “Withdrawal” Standard*

If the Secretary determines that the recommended minimum efficiency standard is in accordance with the criteria for prescribing a new or amended standard, the Secretary may issue a DFR reflecting the recommended standard and must solicit public comment for a period of 110 days. Within the ensuing 10 days following the end of the comment period, the Secretary must withdraw the DFR if (i) DOE receives “1 or more adverse public comments relating to the direct final rule” and (ii) “the Secretary determines that such adverse public comments or alternative joint recommendation may provide a reasonable basis for withdrawing the direct final rule under subsection (o), section 6313(a)(6)(B) of this title, or any other applicable law.”¹²

The bar for withdrawal – “*may provide a reasonable basis*” – is very low, and it is coupled with a very short review period for withdrawing the DFR. Clearly the statute was not intended to give the Secretary just 10 days to make a full, substantive ruling on objections. Nor was it intended to countenance the use of a balancing test to consider the substance of the objections and weigh them against the anticipated benefits of the consensus agreement. There is neither the time nor any statutory basis for such an analysis. Rather, the clear purpose of the 10-day window is to allow the Secretary to make an initial determination as to the facial validity of the objections and whether they provide a reasonable basis to withdraw the DFR and instead proceed to full notice-and-comment rulemaking, during which the comments can be fully analyzed.

¹² 42 U.S.C. § 6295(p)(4)(C)(i).

Accordingly, any serious and substantive objections to a DFR that are reasonably backed by argument – even if the Secretary disagrees with them – should be deemed to provide a reasonable basis for withdrawing the DFR. By contrast, objections that are clearly frivolous should not.¹³

B. Ensuring Full Participation in Negotiated Rulemaking

The Associations agree with DOE that negotiated rulemaking can yield better and more thoroughly vetted outcomes.¹⁴ In particular, by facilitating data sharing and real-time, face-to-face discussions early on, the process can minimize the potential for expensive litigation down the road.¹⁵ As DOE recognizes, however, it is important to ensure that the interests of all parties that will be significantly affected by a proposal are represented in the negotiations.¹⁶ The Process Rule should therefore be amended to include provisions that promote and require such full participation.

Specifically, the Process Rule should make clear that, prior to initiating a negotiated rulemaking, DOE will, pursuant to 5 U.S.C. § 563(b), appoint a convener to: (i) identify persons who will be significantly affected by a proposed rule; and (ii) conduct discussions with such persons to identify their issues of concern and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

Further, the Process Rule should specify that if, after considering the report of a convener, DOE decides to establish a negotiated rulemaking committee, it must publish in the Federal Register (and elsewhere, as appropriate) a notice containing all of the elements set forth

¹³ Such facially invalid comments could include, for example, objections that are not grounded in the statutory criteria for prescribing new standards.

¹⁴ RFI at 59,994.

¹⁵ *Id.* at 59,994-95.

¹⁶ *Id.*

in 5 U.S.C. § 564(a), including a solicitation for comments and an explanation of how a person may apply for membership on the committee.

The Associations acknowledge that the Negotiated Rulemaking Act is not intended to limit innovation and experimentation with the negotiated rulemaking process.¹⁷ Nonetheless, the Associations believe that the use of a facilitator and the issuance of a comprehensive public notice are key to ensuring the participation of all relevant interests in the process. Accordingly, the Process Rule should be amended to mandate both.

C. Elimination of Advance Notice of Proposed Rulemaking (ANOPR)

The ANOPR process should not be eliminated. The Associations believe that doing so could reduce the transparency and the exchange of information early in the process which may be detrimental to interested parties. In the RFI, DOE makes the case that early input in the process has value even if DOE is not obligated to use it as it once was. There is utility in the ANOPR process and similar processes designed to obtain early stakeholder input on further action.

Maintaining a mandatory ANOPR process in the Process Rule creates certainty and routine. Adding supplemental procedures early in the process may be warranted on a case-by-case basis. But substituting those various processes for an ANOPR on an ad hoc basis would only create confusion and reduce the transparency of the rulemaking process.

D. Use of Industry Standards in DOE Test Procedures

In situations where it is just and reasonable, the use of industry standards certainly can minimize regulatory burdens and improve transparency. DOE seeks comment on whether to amend the Process Rule to specify when an industry standard may be “considered” in lieu of a

¹⁷ 5 U.S.C. § 561.

DOE test procedure. DOE appears to favor that approach and cites an example of what such a requirement would look like.

The Associations are wary of a rule stating when industry standards *must* be used in test procedures. There may be circumstances for certain appliances that militate against using an industry standard that may not be captured in such a rule. Accordingly, the Associations believe that DOE should *consider* industry standards, but mandating their use would not be prudent.

E. Timing of the Issuance of DOE Test Procedures

As is evident in the RFI, a central and near universal complaint against EERE in recent years has been its practice of commencing new minimum efficiency standards before the test procedures for the product are developed and finalized. This has occurred despite the clear prohibition of the practice in the Process Rule.

Test procedures must be completed by EERE prior to DOE proposing any efficiency standard. DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product prior to the adoption of a new or amended energy conservation standard.¹⁸ If test procedures for a covered product require modifications, DOE should issue a final, modified test procedure before issuing a proposed rule for energy conservation standards for that product. But DOE does not always do so, instead moving ahead with standards NOPRs before test procedures are finalized. This occurred, for example, in the natural gas furnace NOPR and most recently in the NOPRs for commercial boilers and water heaters.¹⁹

¹⁸ 42 U.S.C. §§ 6295(o)(3)(A) and (r).

¹⁹ The “Energy and Natural Resources Act of 2017” (S.1460) would remedy this issue. Section 1207 of the Senate Bill would amend 42 U.S.C. § 6295(p) by requiring DOE to wait 180 days after a new test procedure is adopted to commence a comment period on a new energy efficiency standard.

Finalizing test procedures prior to proceeding with standards is vitally important for many reasons. Among the reasons the Associations have noted in prior comments submitted to DOE are that test procedure finalization prior to issuance of a new proposed minimum standard will help ensure that: (i) the test procedure is technically correct and the results from the final test procedure clearly demonstrate the impact on the current energy efficiency rating of the covered products; (ii) the results from the final test procedure are repeatable and can be performed without any excessive burden on the manufacturer or testing facility that performs the test; and (iii) stakeholders have the opportunity to meaningfully review and comment on the standards proposal when it is made. If stakeholders do not know the exact procedure for testing equipment to determine compliance with a proposed efficiency standard, they cannot meaningfully analyze and comment on the impact of the proposed standard.

A procedural revision indicating a “schedule” for the timing of such steps required could be helpful, as DOE suggests. For example the Associations recommend mandating that the test procedure be finalized 180 days prior to the issuance of a NOPR.

F. Improvements in DOE Analyses

Following comments received in the regulatory reform RFI, DOE now seeks more specificity on the ways in which the Process Rule could be amended to improve DOE’s analyses and models. DOE has glossed over a seminal point that the Associations have made in recent rulemakings: proprietary data that is not gathered by DOE under confidentiality agreements should not be used in a DOE rulemaking unless that data is made available to the public at no cost and without limitations as to its use, allowing stakeholders to more thoroughly analyze the data and provide valuable input early on. The concern here is not related to the means by which DOE has acquired the data but that the proprietary data has been kept hidden.

Further, EERE's energy efficiency modeling is too complex and burdensome. The Associations have advocated replacing the current complex life-cycle-cost ("LCC") analysis with a simple payback analysis based on "real numbers."

Significantly, over the past several years, the Associations and other stakeholders have expressed serious concerns regarding the materially flawed analysis DOE has been using to justify the proposed standard under review, which the Associations believe has led DOE to overstate the potential benefits associated with the proposed standard and understate the costs. The flawed analysis has resulted in a proposed standard that fails to meet the economic justification requirement under the statute that governs the Program.²⁰ In fact, in many cases, the market is working without a rule and the practical effect of a proposed rule's new minimum standards would be that consumers either are forced by the government to make an uneconomic choice (*i.e.*, they would incur a net cost to purchase a new appliance), or they would switch from natural gas to an alternative that, on a full-fuel-cycle basis, is less efficient. Notwithstanding documentation of the flaws which give rise to the need for a review as part of this reform effort, DOE has failed to address or explain adequately the basis for not making changes to the noted flaws that carry over from one rulemaking to another, and continue to be the subject of disagreement and unnecessary regulatory burdens on stakeholders in these proceedings.

Therefore, as part of this review, the Associations urge DOE to adhere to the Office of Management and Budget's ("OMB") requirement for a peer review of the Program's processes and analyses. DOE is not following the regulatory guidelines established by OMB, which require a peer review of any changes to scientific data and/or methodologies used in the

²⁰ In fact, technical analysis has been provided in several proceedings demonstrating that if DOE made reasonable and rationally based corrections to key methodological and data flaws, the proposed standard would result in an increase in the life-cycle cost on a national basis.

development of rules or regulations. Specifically, the Final Information Quality Bulletin for Peer Review of OMB (“OMB Bulletin”) requires each federal agency to conduct a peer review of all influential scientific information that the agency intends to disseminate.²¹ The term “influential scientific information” means scientific information that the agency reasonably can determine does or will have a clear and substantial impact on important public policies or private sector decisions.²² In turn, “scientific information” includes “factual inputs, data, models, analyses, technical information, or scientific assessments based on the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences.”²³ The information in the Technical Support Documents (“TSDs”), upon which DOE relies in its proposed and final appliance and equipment standards, is indisputably “influential scientific information” that DOE has disseminated, as determined by DOE itself.²⁴

Currently, DOE’s proposed and final appliance minimum efficiency standards contain the following boiler-plate assertions relating to the requirements set forth in the OMB Bulletin: “DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses.”²⁵ The report on which DOE relied in making that statement recently was dated February 2007. The actual peer review itself was conducted in 2005, and the vintage of the data that was peer-reviewed was 2004. DOE’s reliance

²¹ *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2675 (Jan. 14, 2005).

²² *Id.*

²³ *Id.*

²⁴ See Energy Conservation Standards Rulemaking Peer Review Report (“2007 Peer Review Report”), Feb. 2007, at 6 (available at <https://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0>).

²⁵ E.g., *Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces*, 81 Fed. Reg. 65,720 (Sept. 23, 2016).

on such a dated peer review is contrary to the Process Rule, because the scientific information currently used by DOE in its standards development process has changed. A full and transparent contemporary peer-reviewed report is necessary.

In the furnace NOPR it was clear from a review of that 2007 Peer Review Report, as well as the ensuing Energy Conservation Standards Rulemaking Peer Review Report – Supporting Documentation dated March 2007,²⁶ that the peer review culminating in the 2007 reports did *not* include critical components of the current LCC analysis underlying DOE’s proposed appliance standards used in recent years, including in the residential furnace proposed rule,²⁷ and the supplemental proposed rule.²⁸ For example, in the supplemental proposed rule, DOE included in the TSD a fuel-switching analysis, premised on proprietary data that has the counterintuitive result of materially increasing LCC savings and reducing payback periods. The fuel-switching analysis, which is not a required part of the economic justification, is inadequately explained in the TSD²⁹ and has not undergone peer review, and thus the use of this scientific information fails to meet the requirements of the OMB Bulletin.

The Associations submit that DOE is not following applicable regulations, or adhering to the Process Rule, in fulfilling its statutory requirement to set minimum natural gas appliance efficiency standards. In failing to do so, DOE is depriving the public of the protections written into the regulations – in this instance, of reliance on scientific information that is tested via an

²⁶ Available at <https://www.energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report>.

²⁷ *Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces*, 80 Fed. Reg. 13,119 (Mar. 12, 2015).

²⁸ *Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces*, 81 Fed. Reg. 65,720 (Sept. 23, 2016).

²⁹ See GTI Report dated July 7, 2015 (filed with APGA comments in response to furnace NOPR), at §2.4 and Appendix A, § A.2.2.

updated (*i.e.*, non-stale) impartial peer review that is deemed appropriate and reliable by a group of experts.

G. Other Issues

1. Retrospective Review Should Be a Routine

DOE needs to revise its process such that it can review the impacts of any new minimum standard(s) before proposing a new standard. To date, DOE has not interpreted its statutory mandate to conduct this common-sense review. Instead, it jumps to the question of whether a new standard is technically feasible and economically justified. In this process, consumer behavior must be analyzed accurately to determine the true impact of a standard. Further, inaccurate assumptions about energy cost variables and the impact of unintended consequences should be measured.

The Associations strongly believe that DOE should not commence a new minimum energy efficiency standard until the existing standard has been reviewed. An effective retrospective review would include objective, verifiable quantifications. Accordingly, an important criterion for evaluating the need for a new minimum standard should be an evaluation of the penetration rates of efficient products in the product class being evaluated. The Associations submit that no new minimum standard is needed if a review demonstrates that a substantial percentage of high efficiency appliances exceeding the current standard within the type (or class) already exists.

In addition to evaluating market share information, an effective retrospective review should ask and answer the basic question: *Did the existing standard produce the benefits forecasted by DOE's model?* If done right, this sort of retrospective review should enhance DOE's modeling and analyses and should avoid the material flaws in DOE's current modeling.

Obviously, to the extent that this common-sense approach does not fit within the statutory six-year review process for energy conservation standards, Congress will need to act.

2. Limit DOE Participation in National Codes and Standards Activities

National codes and standards activities conducted by the likes of ASHRAE, ICC, etc. are important to industry. DOE's participation, however, should be limited to presentation of peer reviewed research and analysis. In recent years, DOE has participated in standards and code body proceedings as advocates of requirements, chairs of committees and task groups, voting members of these organizations, and funding sources for advocacy organizations and interests participating in these proceedings. Such activity appears to be mission creep that is not consistent with the agency's statutory mandate (42 U.S.C. § 6836(b)). DOE's role should be re-evaluated and its participation limited.

3. Proper Accounting of Source Energy Values Is Key to Determining Regulatory Costs and Benefits

A crucial component of the cost-benefit analysis is a proper accounting of the relative efficiencies of various energy sources. The Associations have long supported viewing energy efficiency through the lens of full-fuel-cycle analyses so that regulators and consumers are accurately informed about the real consequences of the direct use of natural gas versus other sources of energy. It is critical that regulatory agencies such as DOE avoid sending inaccurate signals to the marketplace.

In measuring the impact of energy efficiency measures on total energy savings, DOE commonly converts site energy into source energy (primary energy), using a site-to-source ratio, which accounts for the useful energy lost in converting, transmitting and distributing. As DOE has explained, this results in a more equitable "apples-to-apples" comparison of energy use than viewing site energy alone.

DOE should be commended for recognizing the benefits of utilizing source energy as it contemplates critical energy policy decisions. As DOE is aware, there are various methods that can be used to determine energy values (*e.g.*, thermodynamic, fossil fuel equivalency, marginal, captured energy, and “free” renewable energy), and they can produce very different outcomes. It is important to link the method used to the purpose for which the analysis is undertaken so that there is not a mismatch and therefore skewed and unreliable outcomes. Stated another way, there is no one-size-fits-all approach to measuring source energy.

For example, the marginal approach values energy efficiency based on the marginal impact of end-use energy on the electric generation mix. As the Gas Technology Institute has explained, marginal efficiency is likely to be the most useful approach for design and investment decisions, including determining the value of direct use of gas for new and existing buildings. By contrast, the captured-energy approach, which treats certain renewable resources as 100% efficient, is not useful for this purpose. This is because renewable generation is generally not considered marginal, which means end-use efficiency measures are more likely to displace fossil-fuel generation than renewables. On the other hand, captured energy and other average-energy approaches may make sense for determining carbon footprint or GHG inventory or for benchmarking purposes.

In February 2016, EERE issued a request for information on the use of the captured-energy approach for calculating source energy from non-combustible renewable resources. In response, the Associations filed comments urging DOE to develop source-energy calculations that are tailored towards the specific applications under consideration. The Associations have cautioned that the captured-energy approach could be misused to promote “electrification,” by

distorting the relative efficiencies of the direct use of natural gas versus reliance on electric power.

In October 2016, however, EERE published a report setting forth guidelines that appear to favor the use of the captured-energy approach for several purposes, including calculating marginal site-to-source ratios to calculate source-energy savings. While acknowledging concerns expressed by the Associations, the report does not address them in substance other than to note the importance of matching methodological choice with the goals of a given policy or metric.

Further process is necessary. In order to analyze the costs and benefits of existing regulations – and promulgate new regulations and standards on a going-forward basis – DOE must utilize the correct source-energy calculations. Accordingly, the Associations urge DOE to rescind the 2016 EERE report on this issue and initiate a formal rulemaking proceeding that appropriately addresses stakeholder concerns in developing the proper metrics for specific purposes.

III. CONCLUSION

The Associations appreciate that DOE is proceeding with this RFI and respectfully request that it consider the above comments.

Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION

By: /s/ John P. Gregg
John P. Gregg
Jeffrey K. Janicke
McCarter & English, LLP
Twelfth Floor
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 753-3400
jgregg@mccarter.com
jjanicke@mccarter.com

Its Attorneys

AMERICAN GAS ASSOCIATION

By: /s/ Susan Bergles
Susan Bergles
Assistant General Counsel
400 N. Capitol St., NW
Washington, D.C. 20001
(202) 824-7090
sbergles@aga.org

March 5, 2018