

**COMMENTS OF ATTORNEYS GENERAL OF CALIFORNIA, CONNECTICUT,
ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY,
NEW YORK, OREGON, VERMONT, WASHINGTON, AND THE DISTRICT OF
COLUMBIA, AND THE CITY OF NEW YORK**

October 16, 2019

Comments submitted via Regulations.gov and e-mail:
Dishwasher2018STD0005@ee.doe.gov
U.S. Department of Energy
Appliance and Equipment Standards Program

**Re: EERE-2018-BT-STD-0005
RIN 1904-AE35
Energy Conservation Program for Appliance Standards: Energy
Conservation Standards for Dishwashers, Grant of Petition for Rulemaking**

The undersigned Attorneys General and local government entities respectfully submit these comments in response to the Department of Energy's (DOE) Grant of Petition and Notice of Proposed Rulemaking for Energy Conservation Standards for Dishwashers. 84 Fed. Reg. 33,869 (July 16, 2019) (Proposal). As explained below, the Proposal would violate the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291, *et seq.*, and fails to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.* Therefore, the undersigned urge DOE to withdraw the Proposal.

DOE's energy efficiency program has resulted in substantial economic and environmental benefits: by 2030, DOE projects the program will have resulted in more than \$2 trillion dollars in cumulative utility bill savings for consumers and 2.6 billion tons in avoided carbon dioxide emissions.¹ Unfortunately, under the current Administration, DOE has acted contrary to the interests of American consumers and at odds with EPCA's energy conservation requirement, leaving at least a dozen statutorily mandated appliance rulemakings and their consumer and environmental benefits to languish while pursuing legally and technologically unsound

¹See DOE Fact Sheet, "Saving Energy and Money with Appliance Equipment Standards in the United States" (Jan. 2017), *available at*:

https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf. See also DOE Fact Sheet, "Saving Energy and Money with Appliance and Equipment Standards in the United States" (Feb. 2016), *available at*:

<https://www.energy.gov/sites/prod/files/2016/02/f29/Appliance%20Standards%20Fact%20Sheet%20-%202017-2016.pdf>. Further, recent reports from the federal government and leading international bodies confirm that greenhouse gas emissions are already harming our nation's environment, public health and economy, and that substantial reductions are needed in the next decade to avoid far worse consequences. Climate Science Special Report: Fourth National Climate Assessment, Vol. II., U.S. Global Change Research Program, Washington, D.C., USA (USGCRP), doi: 10.7930/JIM32SZG; Intergovernmental Panel on Climate Change (IPCC), 1.5°C Report, an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global GHG emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty, Summary for Policymakers.

discretionary actions that undermine the energy efficiency program. The Proposal is the latest example of DOE's dereliction of its duties.

The Proposal is fundamentally flawed. First, it violates EPCA's anti-backsliding provision and misapplies the statute's product class provision. Second, the Proposal is not supported by the record and is arbitrary and capricious, in violation of both EPCA and the APA. Finally, it invokes an inapplicable categorical exclusion and therefore fails to comply with NEPA. Accordingly, DOE should withdraw the Proposal and instead turn its attention to the public interest and the agency's many overdue statutorily mandated energy efficiency rulemakings.

I. Overview of EPCA and the Dishwasher Rulemaking

A. Relevant EPCA Statutory Provisions

EPCA directs DOE to establish energy conservation standards covering most major household appliances and many types of commercial equipment. DOE's energy conservation program includes testing, labeling, and enacting energy conservation standards, plus product certification and compliance enforcement. As to energy efficiency standards, EPCA allows DOE to specify a higher or lower standard for a type or class of covered product when DOE determines that the product type or class has a "capacity or other performance-related feature" that justifies a higher or lower standard from that which applies to other products within that product group. 42 U.S.C. § 6295(q)(1)(B).

B. The CEI Petition

On March 21, 2018, the Competitive Enterprise Institute (CEI) submitted the predicate rulemaking petition to DOE,² requesting that the agency "begin a rulemaking process to define a new product class under 42 U.S.C. § 6295(q) for residential dishwashers . . . with a cycle time of less than one hour from washing through drying." 83 Fed. Reg. at 17,771. The petition did not "propos[e] specific energy and water requirements for this new product class," stating that those details "can be determined during the course of the rulemaking." *Id.*

The petition contended that "cycle time is one of the four biggest sources of consumer dissatisfaction" for dishwasher consumers, citing an industry appliances survey, and stated that according to Consumer Reports average current dishwasher cycle time is two hours and 20 minutes, up from approximately 69 minutes in 1983. *Id.* at 17,772-3. The petition further asserted that the rise in dishwasher cycle times is due to DOE's energy and water efficiency regulations for dishwashers, citing a graph tracking increased cycle times from the 1980s to present day and DOE's promulgation of regulations pursuant to EPCA. *Id.* at 17,774-77. As discussed below, the petition's purported correlation is contradicted by evidence demonstrating that longer wash cycles are driven by other factors.

DOE published the Notification of Petition for Rulemaking on April 24, 2018, seeking comment on the petition. *Id.* at 17,771. Various entities commented on the Petition Notice, with most

² Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking, 83 Fed. Reg. 17,768 (April 24, 2018) (Petition Notice).

asserting that a separate product class was neither consistent with EPCA nor justified by the petition. *Id.* at 33,870-71.

C. DOE's Dishwasher Proposal

On July 16, 2019, DOE published the Proposal, “grant[ing] the petition for rulemaking and propos[ing] a dishwasher product class with a cycle time for the normal cycle of less than one hour.” 84 Fed. Reg. at 33,869. The Proposal states that “DOE has determined that under 42 U.S.C. § 6295(q)(1)(B), dishwashers with a ‘normal cycle’ time of less than one hour as described by CEI have a performance-related feature that other dishwashers do not have and that justifies a separate product class subject to a higher or lower standard than that currently applicable to dishwashers.” *Id.* at 33,871. Although the Proposal does not set forth new efficiency standards for one-hour-cycle dishwashers, it proposes to amend the regulatory text to exclude this new proposed product class from the requirements of any energy efficiency standards. The Proposal further asserts that any new energy and water use standard that DOE may eventually adopt for the new product class would *not* be subject to EPCA’s anti-backsliding provision, strongly suggesting DOE’s ultimate aim is the promulgation of lower standards. 42 U.S.C. § 6295(o)(1); 84 Fed. Reg. at 33,873.

II. **The Proposal Violates EPCA’s Anti-Backsliding and Product Class Provisions**

A. The Proposal Violates EPCA’s Anti-Backsliding Provision

EPCA’s anti-backsliding provision prohibits DOE from “prescrib[ing] any amended standard which increases the maximum allowable energy use . . . of a covered product.” 42 U.S.C. § 6295(o)(1). Under current DOE regulations, a dishwasher is defined as “a cabinet-like appliance which with the aid of water and detergent, washes, rinses, and dries (when a drying process is included) dishware, glassware, eating utensils, and most cooking utensils by chemical, mechanical and/or electrical means and discharges to the plumbing drainage system,” and are divided into standard and compact energy efficiency product classes. 10 C.F.R. § 430.2, 430.32(f). The dishwasher definition is not limited by cycle time or other bases. Standard dishwashers are currently subject to energy efficiency standards requiring them to “not exceed 307 kWh/year and 5.0 gallons per cycle.” *Id.* at 430.32(f)(i). Thus, all standard size dishwashers, regardless of cycle time, are subject to the existing standards in 10 C.F.R. § 432.2(f)(i).

The Proposal would amend 10 C.F.R. § 432.2(f) to add a third product class delineated as “[s]tandard size dishwashers with a ‘normal cycle’ . . . of 60 minutes or less” and provides that the proposed new product class would be “not currently subject to energy or water conservation standards.” 84 Fed. Reg. at 33,873, 33,880. By creating a subclass of standard-size dishwashers subject to no energy efficiency standards, DOE is allowing such dishwashers to consume unlimited amounts of energy, thereby “increas[ing] the maximum allowable energy use” applicable to those dishwashers in violation of the anti-backsliding provision. 42 U.S.C. § 6295(o)(1).³

³ It should also be noted that, were the Proposal finalized, manufacturers could contend that their existing dishwashers are exempt from any standards by labeling an existing 60-minute cycle as ‘normal,’ or adding a 60-minute cycle, in an attempt to qualify them for the proposed class.

DOE argues that the anti-backsliding prohibition of subsection 6295(o)(1) is conditioned by subsection 6295(q) because the latter subsection uses the present and future tense: DOE “shall specify a level of energy use or efficiency higher or lower than that *which applies (or will apply)* for such type (or class) for any group of covered products which have the same function or intended use.” 42 U.S.C. § 6295(q) (emphasis added); *see* 84 Fed. Reg. at 33,872-73. According to DOE, subsection 6295(q)’s reference in the alternative to a standard “which applies” and a standard that “will apply” “authorizes DOE to reduce the stringency of the standard currently applicable to the products covered under the newly established separate product class.” 84 Fed. Reg. at 33,872. However, DOE misconstrues the meaning of that section. Section 6295(q)’s reference to standards not yet applicable is intended to account for situations where a basic product class and standard have not been established or have yet to go into effect. This reading of the plain language of subsection 6295(q) avoids an interpretation that effectively repeals section 6295(o)(1)’s anti-backsliding provision in product class designations. Thus, while section 6295(q) acknowledges that differences in energy consumption, capacity or other performance-related features among products within a product group may justify the application of different standards, that provision cannot be construed to allow DOE to prospectively establish product classes as an end-run around EPCA’s prohibition against backsliding.

DOE’s reading of these provisions is also erroneous because it does not give full meaning to all statutory provisions, as required by the canon of statutory interpretation. The Proposal effectively negates the prohibition of subsection 6295(o)(1) even though that is unnecessary to give full effect to subsection 6295(q). *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (“We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.”). Instead, EPCA allows the exercise of subsection 6295(q)’s authority within the bounds of subsection 6295(o)(1): DOE may designate separate product classes when justified under subsection 6295(q) but must do so within the constraints of subsection 6295(o)(1) by not weakening existing standards.⁴

This harmonizing interpretation is in turn consistent with subsection 6295(o)(4) of EPCA, which prohibits the promulgation of energy efficiency standards that are “likely to result in the unavailability . . . in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available . . . at the time of the Secretary's finding.” 42 U.S.C. § 6295(o)(4). Thus, under subsection 6295(o)(4) DOE may not prescribe standards that result in the elimination of “performance characteristics” or “features” and may designate and prescribe different standards for classes of a covered product if necessary to maintain a “performance-related feature” under subsection 6295(q). Had DOE endeavored to properly determine that dishwasher quick cycle times constituted a “performance characteristic,” the limitations of subsection 6295(o)(4) would have applied to prior DOE rulemakings on dishwasher standards. However, DOE has never determined dishwasher cycle time to be a performance characteristic,

⁴ DOE provides no reasoning or supporting citations to justify its interpretation that subsection 6295(q) allows it to set standards for “features that are no longer available in the market.” 84 Fed. Reg. at 33,873. Indeed, because subsection 6295(q) allows DOE to set different standards for products that “have a . . . performance-related feature,” and not products that *would* have the performance-related feature, DOE’s interpretation is not consistent with the statute.

nor are the undersigned of any party that has advocated for such a determination in any of the past rulemakings going back to 1989. *See* 54 Fed. Reg. 32,744, 32,751-52 (Aug. 9, 1989) and 56 Fed. Reg. 22,250, 22,251 (May 14, 1991) (proposing and enacting standard and compact dishwasher product classes, along with now-defunct classes based on voltage used and water heating capabilities). EPCA’s prohibition against backsliding now bars DOE from retroactively asserting that cycle time is a protected feature under section 6295(o)(4). Tellingly, CEI’s petition makes only a passing reference to the provision. *See* 84 Fed. Reg. at 33,870. Because subsection 6295(o)(4) guards against the elimination of legitimately determined product features, subsection 6295(q) is neither intended nor necessary to avoid such a result.

Further militating against DOE’s assertion that EPCA’s anti-backsliding provision is somehow conditioned by the statute’s product class provision is the respective order of their enactment. Subsection 6295(o)(1) was enacted in 1992, subsequent to subsection 6295(q)’s enactment in 1987. *See* Pub. L. No. 100-12, 101 Stat. 103 (1987) (adding current subsection 6295(q)); Pub. L. No. 102-486, 106 Stat. 2776 (1992) (adding subsection 6295(o)(1)’s anti-backsliding provision). Even were the two provisions in conflict, the more recently enacted provision governs, meaning (o)(1) should govern. *Watt*, 451 U.S. at 267; *Hines, Inc. v. United States*, 551 F.2d 717, 725 (6th Cir. 1977) (“As a general rule of law when the purposes of two statutes appear to be in conflict with each other, and there is no statutory language which makes any cross-reference, and, as here, the legislative history is silent as to the possible conflict, it is generally assumed that the later statute constitutes an amendment of the earlier one.”). Here, therefore, subsection 6295(o)(1)’s prohibition against backsliding to less stringent standards limits the exercise of subsection 6295(q)’s product class provision.

This interpretation of EPCA also accords with the Second Circuit’s reasoning and interpretation of the statute’s anti-backsliding provision in *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004). Reviewing EPCA’s legislative history, the court noted that the anti-backsliding provision’s purpose was to effectuate “the appliance program’s goal of steadily increasing the energy efficiency of covered products.” *Id.* at 197. The court found that DOE’s interpretation that the anti-backsliding provision did not bar the unilateral delay of energy efficiency standards’ compliance dates “would completely undermine any sense of certainty on the part of manufacturers” and “effectively render [the anti-backsliding provision] inoperative, or a nullity.” *Id.* Similarly, DOE here may not effectively render inoperative the statute’s anti-backsliding provision.

In its Proposal, DOE further asserts that subsection 6295(q) “cannot be read to prohibit DOE from establishing standards that allow for technological advances or product features that could yield significant consumer benefits while providing additional functionality . . . to the consumer” and references its 2011 ventless clothes dryer product class determination and prospective rulemaking regarding network-connected products. 84 Fed. Reg. at 33,873. While DOE is correct that subsection 6295(q) does not prohibit standards that account for technological advances, subsection 6295(o)(1) nonetheless prohibits the lowering of duly prescribed energy efficiency standards for covered products. DOE must therefore accommodate technological innovation within those bounds. DOE’s prospective rulemaking on network-connected products will need to proceed within these constraints and cannot validate DOE’s present analysis in support of the Proposal. DOE’s reference to the ventless clothes dryer product class, which the

agency created in recognition of the unique utility afforded by those products, does not contradict this: energy efficiency standards were not lowered in the creation of that product class as ventless clothes dryers were not previously subject to standards. 76 Fed. Reg. 22,454, 22,485 (Apr. 11, 2011). In contrast, dishwashers with hour or less cycle times are currently subject to standards and the proposed new class would thus result in lowered standards.

B. The Proposal is Not Consistent with 42 U.S.C. § 6295(q) or its Legislative History

As discussed above, 42 U.S.C. § 6295(q) permits DOE to create separate product classes subject to higher or lower efficiency standards within a type of covered product when certain criteria are met. The Proposal invokes subsection 6295(q)(1)(B), which allows the creation of separate product classes if a product subset has “a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or would apply) to other products within such type (or class).” To justify the creation of a separate product type under this provision, DOE must conclude (1) that the products in the potential separate class have a “capacity or other performance-related feature” that other products of its type do not have, and (2) that the feature justifies a different standard than the standard for other products of that type in order to maintain the feature. The Proposal fails to fulfill either of these requirements and is therefore unlawful.

The Proposal does not demonstrate that dishwasher cycle time qualifies as a “performance-related feature” under subsection 6295(q). The consumer utility of dishwashers is to clean dishes and other cookware. While shorter cycles may provide clean dishes in less time, they do not provide additional distinct dishwasher utility beyond their purpose of washing and drying dishes. The fundamental utility of a dishwasher, regardless of cycle length, is to clean dishes. Thus, reduced cycle time simply is not a “performance-related feature” that would justify the creation of its own separate class of product.

Although the plain text of subsection 6295(q)(1)(B) does not further define the term “performance-related feature,” its legislative history provides guidance for DOE’s authority under the provision. That legislative history instructs DOE to “use [its] discretion carefully, and establish separate standards only if the feature justifies a separate standard, based upon the utility to the consumer and other appropriate criteria” because “if [DOE] established a separate standard for every appliance having a detectable difference in features, no matter how slight, . . . then hundreds of standards might result.” H.R. Rep. 95-1751, at 115 (1978). As an example of a performance-related feature, the legislative history refers to potential product classes for frost-free and non-frost-free refrigerators, and between conventional and microwave ovens. *Id.* The difference between these products is substantial, providing either substantial additional utility, as with frost-free refrigerators, or distinct utility, as for conventional or microwave ovens. In both cases, the different classes are based on the product classes’ capacity for consumer utility that the corresponding basic class cannot provide. However, the short cycle dishwasher class proposed by DOE provides precisely the same utility as the normal cycle dishwasher class—that is, clean

dishes. Thus, while a difference in cycle time is “a detectable difference,” it does not suffice to justify a separate energy efficiency class and standard.⁵

Furthermore, the Proposal is not consistent with the purpose of EPCA “to provide for improved energy efficiency of . . . major appliances.” 42 U.S.C. § 6201(5). Instead, the Proposal would allow for reduced dishwasher efficiency, undermining the statute’s purpose and its intended benefits. The Proposal is thus illegal under EPCA.

C. The Proposal is Not Consistent with Past DOE Product Class Rulemakings

While the Proposal references previous DOE product class rulemakings, it does not adhere to the interpretation of subsection 6295(q) in those prior agency rulemakings, which only created product classes when a product type offered a substantial distinct consumer utility. In those rulemakings, DOE has stated that it “generally divides covered products into classes by the type of energy used or by capacity or other performance-related feature. . . . In deciding whether a feature justifies a different standard, DOE must consider factors such as the utility of the feature to users.” 74 Fed. Reg. 65,852, 65,868 (Dec. 11, 2009) (citation omitted). Comparing the Proposal with those prior rulemakings shows that the proposed product class is not an appropriate interpretation of subsection 6295(q).

The previous water heater and cooking products rulemakings cited by DOE provide clear boundaries for DOE’s exercise of its authority under subsection 6295(q). 84 Fed. Reg. at 33,872. In the water heater rulemaking, DOE determined that the differences between heat pump and electric resistance storage water heaters did not justify separate product classes because they ultimately provided the same customer utility: hot water. 74 Fed. Reg. 65,853, 65,871 (Dec. 11, 2009). Conversely, in the cooking products rulemaking, DOE determined that self-cleaning ovens justified a distinct product class from standard ovens because the self-cleaning function was a distinct feature that standard ovens did not provide. 73 Fed. Reg. 62,034, 62,047 (Oct. 17, 2008). Unlike the cooking products rulemaking, which created a product class based on a consumer utility that the standard model could fundamentally not provide, the Proposal seeks to create a product class distinction in the same situation where the water heater rulemaking refrained: normal dishwashers and quick cycle dishwashers both provide the same consumer utility of clean dishes, like heat pump and electric resistance water heaters provide the same utility of hot water. The Proposal thus is inconsistent even with the prior agency rulemaking it cites.

DOE also cites the commercial and residential clothes washer rulemakings, which do consider cycle time in their product class analyses, to support its conclusion that dishwasher cycle times are a product feature, saying its conclusion in this rulemaking is “similar” to its conclusions in those rulemakings. 84 Fed. Reg. at 33,872; *see* 77 Fed. Reg. 32,308 (May 31, 2012); 79 Fed.

⁵ The legislative history for the related provision 42 U.S.C. § 6295(o)(4) further illuminates the treatment of product features under EPCA. H. Rep. 100-11 (1987). While CEI and DOE cite subsection 6295(o)(4) to assert that prior dishwasher standards should have maintained purportedly shorter cycle times (84 Fed. Reg. at 33,873), the legislative history shows Congress’ recognition that appropriate energy efficiency standards could result in the “minor loss of . . . features,” such as quick cycle time. H. Rep. 100-1, at 23. Thus, to the extent that dishwasher standards have had any effect on cycle times, that should be viewed as an acceptable and reasonably anticipated “minor loss of features” consistent with legislative intent.

Reg. 74,492 (Dec. 15, 2014). However, those rulemakings only considered cycle time to the extent that differential cycle times between front-loading and top-loading clothes washers, and clothes washers and clothes dryers, would impact the utility of front-loading clothes dryers by putting those models out of sync with clothes dryer cycles and thereby reduce laundry throughput. *See* 77 Fed. Reg. at 32,319 (noting that consumer utility is provided “in the context of residential clothes washers . . . for purposes of 42 U.S.C. 6295(o)(4)”), 79 Fed. Reg. at 74,498 (“longer average cycle time is significant in a laundromat or multi-family laundry setting”). This is further justified in the clothes washer context because front-loading clothes washers are stackable and top-loading clothes washers allow mid-cycle load additions. 79 Fed. Reg. at 74,499. DOE determined that the “method of loading” was a feature, not cycle time itself. *Id.* These concerns are not relevant for dishwashers. Thus, while these previous rulemakings did consider cycle times, it was due only to its subsidiary relevance to the utility provided by clothes washer loading configuration. Those rulemakings do not support DOE’s determination of dishwasher cycle time as a performance-related feature.

Further, certain rulemakings cited by DOE do not reach the conclusions the agency ascribes to them, and thereby do not support DOE’s apparent intention to equate a “performance-related feature” with mere “consumer preference.” 84 Fed. Reg. at 33,872. The electric cooking products rulemaking did not make an affirmative determination that oven windows are a feature justifying a product class, but instead that windowless oven doors should not be considered as a potential design option because the windows provide consumer utility and in fact increase efficiency by reducing oven door openings. 63 Fed. Reg. 48038, 48040 (Sept. 8, 1998). And previous refrigerator-freezer classes based on freezer placement (i.e., top, side, or bottom) were justified by the unique utility provided by the different configurations and the different efficiency capabilities inherent therein. 53 Fed. Reg. 48,798, 48,807 (Dec. 2, 1988) (initial class setting for refrigerator-freezers); Pub. L. No. 100-12, 101 Stat. 103 (1987) (enacting energy efficiency standards for refrigerator-freezers with classes divided based on top-, side-, and bottom-mounted freezers and other variables). In contrast to the current Proposal, these rulemakings show the type of substantial consumer utility differences that necessitate a separate energy efficiency standard to maintain that utility, and thereby justify a separate product class.

Taken together, these rulemakings show that a “performance-related feature” must be more substantial and qualitatively different than dishwasher cycle time. Most commonly, separate product classes are created for product subsets which offer a distinct consumer utility that other products of their type cannot provide. Short dishwasher cycle times are insubstantial by comparison and do not qualify.

D. The Proposal Fails to Properly Complete a Product Class Rulemaking

The Proposal further violates subsection 6295(q) because it does not promulgate energy efficiency standards for the newly created class of quick cycle dishwashers. The provision states that DOE “shall specify a level of energy use or efficiency higher or lower than that which applies” to the product type for the product class. Therefore, when exercising its authority under subsection 6295(q), DOE is required to promulgate actual energy efficiency standards for any class created thereunder, in accordance with the other requirements of 42 U.S.C. § 6295, including the anti-backsliding provision and the economic justification and technological

feasibility analyses. The Proposal instead misuses DOE’s authority under subsection 6295(q) by creating the new class without corresponding energy efficiency standards, subjecting the class to “no standards.” 84 Fed. Reg. at 33,880. DOE may not simply divide an existing covered product into classes, some of which are not covered by standards. The Proposal thus improperly bifurcates the product class rulemaking by separating the creation of the class from the promulgation of applicable standards. The Proposal consequently does not comply with the requirements of subsection 6295(q) and constitutes a violation of EPCA.

III. The Proposal is Not Supported by DOE’s Reasoning or the Rulemaking Record

As explained above, to justify the creation of a new product class for quick cycle dishwashers under 42 U.S.C. § 6295(q), DOE must demonstrate (1) that the quick cycle function is a “performance-related feature” as that term is understood under EPCA, and (2) that the quick cycle function necessitates different energy standards than other classes of that product type. Moreover, to comply with the APA, DOE is required to provide a “satisfactory explanation” and a “rational connection between the facts found and the choice made” supporting those conclusions. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). Where it has changed its position, DOE must meet a higher standard to justify its actions. *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009) (“*Fox*”). Because the Proposal fails to provide sufficient justification on either point, DOE is in violation of both EPCA and the APA.

A. The Proposal Does Not Show That Separate Standards Are Necessary to Maintain Quick Cycle Function

DOE’s Proposal does not support the agency’s conclusion that different energy efficiency standards are necessary to maintain quick cycle function in standard size dishwashers. This proposition by DOE is vitiated most clearly by the existence of dishwashers that meet the current energy efficiency standards applicable to dishwashers while also offering quick cycles for normal loads.⁶ DOE relies on CEI’s assertion, based on that organization’s review of a few dishwasher models, that the quick cycles in existing models are intended to wash less soiled loads. 84 Fed. Reg. at 33,875. However, this assertion is contradicted by the more comprehensive review of 400 dishwasher models cited by the Association of Home Appliance Manufacturers (AHAM), which found that 48% of the surveyed models did not limit their quick cycle to less soiled loads and that models offering a quick cycle completed the cycle in “just over one hour.”⁷ The Proposal cannot satisfy subsection 6295(q)’s requirement that different energy efficiency standards be necessary to maintain a performance-related feature when that performance-related feature continues to exist under the current standards.

⁶ In attempting to compensate for the fact that quick cycle dishwashers already exist, DOE contends that “the utility of the dishwasher is not just the ability to have dishes cleaned in a short period of time, but that operation of the dishwasher as recommended by the manufacturer would provide that function.” 84 Fed. Reg. at 33,875. In this framing, the consumer utility is effectively the avoidance of pressing a button to change to a non-default quick normal load wash setting, as multiple models now allow. This cannot reasonably be deemed a “performance-related feature” justifying a new product class under subsection 6295(q), both because it represents such negligible utility and because it does not necessitate a different energy efficiency standard.

⁷ AHAM Comment, Docket ID EERE-2018-BT-STD-0005-2233, p. 2.

DOE's proposition is also undermined by the agency's cursory conclusions as to cause and effect. DOE assumes that increased dishwasher cycle times are correlated with the promulgation of dishwasher energy efficiency standards, and further assumes that any such correlation demonstrates that the promulgation of standards caused longer cycle times. Neither assumption is supportable and, indeed, both are contradicted by evidence that DOE ignores. In fact, the purported correlation is weak, and other factors explain most or all of the reasons for longer cycle time averages. DOE accepts without question CEI's assertion that energy efficiency standards have caused increased cycle times. But the data cited by CEI does not show this to be true: the graph⁸ submitted by CEI as its purported proof shows that dishwasher times have risen and fallen over the years irrespective of the promulgation of efficiency standards, including substantial increases not correlated with the introduction of new standards.⁹ Rather, as comments submitted in response to the Petition Notice explained, changes in detergent formulations¹⁰ and consumer preference for quieter machines¹¹ have contributed substantially to the increase in cycle times. DOE fails to address these comments or explain why CEI's chart suffices to demonstrate causation. If longer cycle times are not caused by energy efficiency standards, there is no necessity for laxer standards and the threshold under subsection 6295(q) is not met.

The prevalence of ENERGY STAR-rated dishwasher models further confirms that different energy efficiency standards are not necessary to maintain quicker cycle times. According to the AHAM survey cited above, 96.5% of the quick cycle models identified by the AHAM survey are ENERGY STAR-rated,¹² indicating that they have latent capability within the existing standards to offer quicker cycles. The existence of unadopted technological options that could allow for faster cycle times further supports this understanding.¹³ The barrier to quicker cycles, were it to exist, would come from the decisions of manufacturers responding to consumer demand in a free market, not energy efficiency standards. DOE fails to address either of these points in the Proposal.

For these reasons, lower standards are not necessary to maintain normal load quick cycles for dishwashers, and the creation of a product class on that basis is not supported by the record.

B. The Record Does Not Show Quick Cycle Function to be a Performance-Related Feature

To justify the Proposal, DOE must show that quick cycle function is a "performance-related feature" under subsection 6295(q)(1)(B). However, DOE's claim that the quick cycle function is

⁸ CEI does not explain why it includes data points from only 17 years of the 35 years covered by the graph. Petition for Rulemaking on a New Product Class of Dishwashers, Attachment (Dishwashers Average Cycle Times), Docket ID EERE-2018-BT-STD-0005-0006.

⁹ It should also be noted that the one-hour-or-less dividing line for the proposed product class was not met by the average dishwasher even before any standards were imposed. *Id.*

¹⁰ California Investor-Owned Utilities (CA IOUs) Comment, Docket ID EERE-2018-BT-STD-0005-1800, p. 1 (citing Reviewed.com, "Is Your Dishwasher Quiet Enough?" <https://www.reviewed.com/dishwashers/features/is-your-dishwasher-quiet-enough>).

¹¹ *Id.* (citing Reviewed.com, "Why is My Dishwasher So Slow?" <https://www.reviewed.com/dishwashers/features/why-is-my-dishwasher-so-slow>).

¹² AHAM Comment, p. 3.

¹³ Earthjustice & Sierra Club Comment, Docket ID EERE-2018-BT-STD-0005-2245, p. 4.

a performance-related feature is contradicted by the record and inadequately supported by DOE's reasoning.

Consumer data in the record demonstrates the relatively limited importance of cycle times to consumers. Specifically, the data shows that consumers generally use their dishwasher less than once a day, on average, and most frequently run it after breakfast or dinner, when daily life patterns dictate they would not immediately use the cleaned dishes.¹⁴ Other data shows the typical consumer generally runs their dishwasher after dinner and waits eight hours to unload it, and that back-to-back dishwasher cycles are rare.¹⁵ DOE argues the data does not preclude that consumers *would* use their dishwashers differently if they had quicker cycles: “a different interpretation would be that consumers already know that their dishwasher will take a long time to run and therefore decide to wait and run it before bed and empty it in the morning, regardless of whether they would prefer to run it at a different time.”¹⁶ 84 Fed. Reg. at 33,874. DOE does not cite any consumer survey, industry or academic study, or other reliable evidence to support this interpretation.¹⁷ DOE bears the affirmative burden of demonstrating that quick cycle function is a performance-related feature. Its speculation does not meet this burden, as necessary under EPCA.

The ENERGY STAR data also indicates that cycle time does not provide sufficient consumer utility to justify a separate product class. The widespread qualification of dishwashers on the market today for the ENERGY STAR program indicates that consumers are seeking more energy efficient dishwashers, instead of energy intensive dishwashers purportedly offering quicker cycle times. The data regarding consumer behavior simply does not justify a quick cycle product class.

Even if quicker dishwasher cycle times were an appropriate performance-related feature under subsection 6295(q), the Proposal's selection of one hour as the apparently determinative dividing line is not supported by any specific finding or reasoning by DOE. The Proposal provides no analysis as to why a one-hour cycle is better or worse than a 50-minute or 70-minute cycle. DOE must provide a “satisfactory explanation” of that conclusion to justify the Proposal, which it has failed to do. *State Farm*, 463 U.S. at 43.

C. DOE's Failure to Properly Justify its Changed Position Violates the APA

When changing positions, an agency must “display awareness that it is changing position,” show that “there are good reasons” for the reversal, and demonstrate that its new policy is “permissible under the statute.” *Fox*, 556 U.S. at 515. An “unexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The Proposal

¹⁴ ASAP et al. Comment, Docket ID EERE-2018-BT-STD-0005-2237, p. 2.

¹⁵ CA IOUs Comment, p. 5.

¹⁶ DOE does not explain the consumer utility of being able to unload a dishwasher immediately before going to bed instead of upon waking.

¹⁷ DOE also relies on the anecdotal evidence of individual comments in its response to this data, but does not explain why individual comments are more reliable than data from more comprehensive and regimented consumer surveys. This reliance is further undermined by the fact that two-thirds of commenters did not reference cycle times in commenting on a rulemaking considering cycle times. 84 Fed. Reg. at 33,874.

represents a departure from DOE's previous determination that only standard and compact dishwasher classes were appropriate. 81 Fed. Reg. 90,072, 90,075 (Dec. 13, 2016). Therefore, DOE was required to meet this higher burden and address the inconsistency to justify the Proposal. For the reasons discussed above, DOE has failed to meet that burden, making the Proposal arbitrary and capricious.

IV. DOE Has Not Evaluated the Environmental Impacts of its Proposed Action Under NEPA

In its Proposal, DOE has determined that its proposed action is categorically excluded from review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, pursuant to Categorical Exclusion A5 under 10 C.F.R. part 1021, subpart D. In so doing, DOE has violated NEPA, has failed to follow the applicable regulations, and has acted in contravention of controlling case law. For the reasons discussed below, DOE's decision to apply, without any reasoning, Categorical Exclusion A5 to its Proposal – rather than engage in a formal NEPA review – is arbitrary and capricious. *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1432-33 (D.C. Cir. 1985) (rejecting, as arbitrary and capricious, DOE's refusal to conduct an environmental assessment because DOE was required, and failed, to produce convincing reasons not to undertake NEPA review).

DOE should undertake the appropriate and required NEPA review, including preparation of an environmental impact statement (EIS). In performing this review, DOE must consider the effect of a future rulemaking that would set a standard for the new class of short cycle dishwashers,¹⁸ and its review should consider as an alternative DOE adoption of a standard less stringent than the current dishwasher standards. DOE must also consider all direct, indirect, and cumulative impacts resulting from this rulemaking, as well as its future standard-setting rulemaking. 40 C.F.R. § 1508.25.

A. DOE's Proposed Action is a Major Federal Action Affecting the Environment

Under NEPA, DOE is required to prepare a detailed statement on the environmental impacts of a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C)(i). If there is a substantial question whether an action may have a significant effect on the environment, then DOE must prepare an EIS. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1185 (9th Cir. 2008). DOE may choose, as a preliminary step, to prepare an environmental assessment (EA) to determine whether a proposed action may significantly affect the environment. *Id.*

This rulemaking is a major federal action because the applicable NEPA regulations consider agency rules to be major federal actions. 40 C.F.R. § 1508.18(a) (“Actions include . . . new or revised agency rules, regulations, plans, policies, or procedures”); 10 C.F.R. § 1021.103 (DOE NEPA regulation adopting the Council on Environmental Quality (CEQ) regulations at 40 C.F.R. parts 1500 through 1508); 10 C.F.R. § 1021.213(b) (“DOE shall begin its NEPA review of a proposed rule . . . while drafting the proposed regulation”); *Sierra Club v. Bosworth*, 510

¹⁸ In its Proposal, DOE states that it “will consider energy conservation standards in a separate rulemaking” and applies “no standards” to the new class. 84 Fed. Reg. at 33,873, 33,880.

F.3d 1016, 1025 (9th Cir. 2007) (“Rules are federal actions under the regulations published by the CEQ.”) (*citing* 40 C.F.R. § 1508.18(a)). Moreover, the Proposal specifically accomplishes two things, both of which are major federal actions in and of themselves: (1) it creates a new class of dishwashers that, according to DOE, is not subject to any energy or water conservation standards;¹⁹ and (2) it serves as a predicate to a future rulemaking that will establish a lower energy conservation standard than is currently in place for existing classes of dishwashers.

Finally, the Proposal would have a significant effect on the environment by increasing the use of energy and water, and, in turn, increasing the amount of emissions released.²⁰ Accordingly, DOE must undertake the necessary NEPA review of its rulemaking, and its failure to do so is arbitrary and capricious. *New York v. Nuclear Regulatory Commission*, 681 F.3d 471, 476-78 (2d Cir. 2012) (vacating agency’s rulemaking, which the court considered to be a major federal action, because of deficient NEPA review).

B. DOE Has Failed to Undertake Necessary NEPA Review in Violation of the Applicable Regulations

In the Proposal, DOE erroneously determined that its rulemaking is covered by Categorical Exclusion A5.²¹ DOE’s decision to apply this categorical exclusion, rather than undertake the necessary level of NEPA review required for this major federal action, is arbitrary and capricious for the following reasons.

1. This rulemaking changes the environmental effects of the rule being amended.

Relying on Categorical Exclusion A5 is inappropriate in these circumstances because this amendment will “change the environmental effect of the rule . . . being amended.” 10 C.F.R. part 1021, subpart D, App. A. 10 C.F.R. § 430.32 establishes energy and water conservation standards for two classes of dishwashers. However, the Proposal seeks to amend this rule by adding a new class of dishwasher that is “not currently subject to energy or water conservation standards.”²² Amending this rule by creating a new product class that is not subject to any conservation standards, or lower standards, would undoubtedly change the environmental effects of this rule.

Current energy and water conservation standards for standard size and compact size dishwashers are not to exceed 307 kWh/year and 5 gallons/cycle, and 222 kWh/year and 3.5 gallons/cycle, respectively. 10 C.F.R. § 430.32(f). These standards, set in 2012, were determined to save an

¹⁹ In DOE’s proposed regulatory text contained in the Proposal, it states the following, “3. Section 430.32 is amended by revising paragraph (f) to read as follows: (f) Dishwashers. (1) All dishwashers manufactured on or after May 30, 2013, shall meet the following standard . . . (iii) Standard size dishwashers with a ‘normal cycle’, as defined in section 1.12 of appendix C1 in subpart B of this part, of 60 minutes or less are not currently subject to energy or water conservation standards.” 84 Fed. Reg. at 33,879-880.

²⁰ See *infra*, discussion at Section IV.B.1.

²¹ The undersigned were unable to find any rulemaking in the past 20 years where DOE promulgated a new product class that resulted in lower energy conservation standards or no energy conservation standards – as is the case with this rulemaking – let alone a rulemaking that created a new product class and relied on Categorical Exclusion A5.

²² See *supra* note 19; 84 Fed. Reg. 33,880.

estimated 0.07 quads of energy and 0.14 trillion gallons of water.²³ In addition, the energy savings would result in cumulative greenhouse gas (GHG) emission reductions of approximately 4.06 million metric tons of carbon dioxide, as well as significant emissions reductions of nitrogen oxides, from 2013 through 2047.²⁴

Under DOE's proposed rulemaking, a new class of dishwasher based on cycle time would not be subject to any standards, until further rulemaking, if any, is pursued and completed. Although DOE asserts that it intends to undertake a subsequent rulemaking to set the standards for this proposed new class of dishwasher, any such future rulemaking is likely years off at the pace DOE is proceeding and will, with near certainty, result in lower energy and water conservation standards.²⁵ A new class of dishwasher that is subject to no standards or lower standards for an undetermined period would increase the amount of electricity dishwashers in this new class would use.²⁶ Rather than conserving resources or promoting energy and water efficiency, as the 2012 Standards for Residential Dishwashers sought to do, this Proposal will increase the amount of GHG emissions. Thus, it would have a significantly detrimental effect on the environment and the Categorical Exclusion does not apply.

2. *DOE failed to consider the extraordinary circumstances related to this rulemaking that may affect the significance of the environmental effects of this rulemaking.*

DOE's failure to conduct a proper NEPA review is arbitrary and capricious because it did not determine that there are "no extraordinary circumstances related to the [Proposal] that may affect the environmental effects of the [Proposal]" in violation of DOE's own NEPA regulations. 10 C.F.R. § 1021.410(b)(2). To find that a proposal is subject to a categorical exclusion, section 1021.410(b)(2) requires DOE to make a determination that there are no "extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal." Section 1021.410(b)(2) explains that "[e]xtraordinary circumstances are unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources." In this case, not only did DOE fail to make this requisite determination, but there are, in fact, extraordinary circumstances that may affect the significance of the environmental effects from the Proposal.

²³ Energy Conservation Standards for Residential Dishwashers, Docket ID EERE-2011-BT-STD-0060, 77 Fed. Reg. 31,918, 31,919 (May 30, 2012).

²⁴ *Id.* at 31,920.

²⁵ CA IOUs Comment, p. 3; AHAM Comment, p. 5.

²⁶ Energy consumption within the residential sector is 21% of total energy consumption in the United States. U.S. ENERGY INFORMATION ADMINISTRATION, "Use of energy explained" Web page (based on U.S. EIA Monthly Energy Review, Table 2.1, April 2019), last updated August 28, 2019. Within the residential sector, 21% of home energy use was for appliances, such as dishwashers. U.S. ENERGY INFORMATION ADMINISTRATION, "Use of energy explained, Energy use in homes" Web page, last updated April 8, 2019. Specifically, total electricity consumption by residential dishwashers in 2018 was 7 billion kWh, not including energy required to heat water. U.S. ENERGY INFORMATION ADMINISTRATION, "Frequently Asked Questions: How is electricity used in U.S. homes?" Web page, last updated January 28, 2019.

As explained above, this proposed rulemaking would result in a new class of dishwasher being subject to no or lower conservation standards, which, in turn, would result in greater use of electricity and water, as well as increased GHG emissions. In addition, comments on DOE's Petition Notice provide that the creation of this proposed new product class would undermine the current energy efficiency standard, negatively affect energy conservation objectives, and create greater uncertainty in utility resource planning for states.²⁷ Finally, a large number of commenters have resoundingly rebutted the alleged correlation between increased conservation standards and increased dishwasher cycle times proffered by CEI in its petition.²⁸ Yet, this erroneous correlation remains one of the main reasons for the Proposal.²⁹ DOE's reliance on this false correlation for its creation of this new product class – in the face of substantial contrary evidence in the record – plainly illustrates the existence of uncertain effects or effects involving unique risks posed by DOE's proposal.

Given the evidence in the record, DOE was required to, *at the very least*, fully explain its determination that a categorical exclusion applied. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (“Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.”); *Reed v. Salazar*, 744 F. Supp. 2d 98, 116-18 (D.D.C. 2010) (“[W]here there is substantial evidence in the record that an extraordinary circumstance might apply, an agency may act arbitrarily and capriciously by failing to explain its determination that a categorical exclusion is applicable.”). DOE instead summarily concluded, without any explanation, that “this proposed rule would only establish a new product class for dishwashers, and, therefore, would not result in any environmental impact.” 84 Fed. Reg. 33,878.

3. DOE failed to consider reasonably foreseeable connected and cumulative actions.

Finally, DOE violated NEPA and the agency's NEPA regulations by improperly segmenting the creation of a new product class from the future rulemaking to set standards for that class. To find that a proposal is subject to a categorical exclusion, 10 C.F.R. § 1021.410(b)(3) requires DOE to determine that its “proposal has not been segmented to meet the definition of a categorical exclusion.” Further, section 1021.410(b)(3) requires DOE to consider, in the scope of its NEPA review, connected and cumulative actions. DOE's refusal to consider connected and cumulative actions in this rulemaking was arbitrary and capricious. *Bosworth*, 510 F.3d at 1026-27.

Actions are connected if they “(i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on

²⁷ 84 Fed. Reg. at 33,871; Consumers Union Comment, Docket ID EERE-2018-BT-STD-0005-2250, pp. 1, 3; NPCC Comment, Docket ID EERE-2018-BT-STD-0005-2232, p. 2.

²⁸ 83 Fed. Reg. at 17,768; ASAP et al. Comment, pp. 3-6; CA IOUs Comment, pp. 1-3; California Energy Commission Comment, Docket ID EERE-2018-BT-STD-0005-2247, pp. 4-5; Earthjustice & Sierra Club Comment, Docket ID EERE-2018-BT-STD-0005-2245; NPCC Comment, pp. 4-5.

²⁹ 84 Fed. Reg. at 33,873 (“CEI makes the point that despite [the prohibition within 42 U.S.C. 6295(o)(4)], it appears that dishwasher cycle times have been impaired by the DOE standards and that many machines with shorter cycle times are no longer available. Section 6295(q) . . . authorizes DOE to set standards that recognize new technologies and product features, or in this case, features that are no longer available in the market.”).

the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). Cumulative actions are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2).

DOE has stated it will undertake a separate rulemaking to consider energy conservation standards for this new product class. However, this future rulemaking is both a connected and cumulative action that DOE should have considered within its NEPA analysis for the Proposal. Separating out NEPA analysis for these two connected and cumulative actions was improper segmentation and was, therefore, arbitrary and capricious. *See Delaware Riverkeeper v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (agency violated NEPA in impermissibly segmenting connected actions and failing to meaningfully assess cumulative impacts of related actions).

In *Sierra Club v. United States*, the plaintiffs challenged DOE’s decision to grant a road easement, arguing that DOE violated NEPA by failing to perform an EA or EIS and instead relying on a categorical exclusion. 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002). The court concluded that the easement was connected to an off-site gravel mining project, the environmental impacts of which DOE failed to consider and evaluate in its NEPA analysis for the easement. *Id.* at 1184-85. The court also concluded that the mining project was a cumulative impact that should have been considered because the mine was a reasonably foreseeable future action. *Id.* at 1185. The court held that DOE’s failure to properly consider this connected action and cumulative impact was arbitrary and capricious. *Id.* at 1186.

For purposes of NEPA, the future standard-setting rulemaking is connected to the Proposal because, but for the creation of this new product class, a new conservation standard for this class would have been unnecessary. 40 C.F.R. § 1508.25(a)(1). This future rulemaking depends on the creation of this new class for its justification and a future standard-setting rulemaking would have no independent utility. *Id.*; *Sierra Club*, 255 F. Supp. 2d at 1184 (actions are not connected when the subject federal action has independent utility).

Furthermore, this future rulemaking is a cumulative action that needed to be considered as part of DOE’s NEPA analysis for the Proposal. The future rulemaking is a reasonably foreseeable future action that would determine the energy conservation standard for this proposed new product class. Such a rulemaking would almost certainly result in a lower standard than is currently in place. Regardless of whether the future standard-setting rulemaking would result in higher or lower standards, the purpose of NEPA is “to ensure that federal agencies take a hard look at the environmental consequences of their actions early enough so that it can serve as an important contribution to the decision making process.” *California*, 311 F.3d at 1175 (internal quotations omitted). DOE has failed to do so for the Proposal and, therefore, the action does not comply with NEPA.

V. Conclusion

For the reasons set forth above, the undersigned Attorneys General and local government entities urge DOE to withdraw the Proposal and comply with EPCA, the APA, and NEPA.

Respectfully submitted,

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