

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

October 12, 2021

Comments submitted via Regulations.gov and e-mail:  
ShortCycleProductClasses2021STD0002@ee.doe.gov  
U.S. Department of Energy  
Appliance and Equipment Standards Program

**Re: EERE-2021-BT-STD-0002  
RIN 1904-AF14  
Energy Conservation Program: Product Classes for Residential Dishwashers,  
Residential Clothes Washers, and Consumer Clothes Dryers**

The undersigned Attorneys General and local government entities (State Commenters)<sup>1</sup> respectfully submit these comments in response to the Department of Energy's (DOE) Notice of Proposed Rulemaking entitled *Energy Conservation Program: Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers* (Proposal).<sup>2</sup> As explained further below and asserted by the State Commenters' previous comments<sup>3</sup> on the original short-cycle proposals,<sup>4</sup> the Proposal would appropriately rescind the final rules creating the dishwasher and clothes washer and dryer product classes (the Short-Cycle Class Rules)<sup>5</sup> because they were promulgated in violation of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291, *et seq.* The Proposal identifies multiple defects in the Short-Cycle Class Rules

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<sup>1</sup> In these comments, State Commenters will be used to refer to the state and local government entities who are submitting comments now as well as the similar groups that submitted comments on the prior rulemakings, though those groups are not identical.

<sup>2</sup> 86 Fed. Reg. 43970 (Aug. 11, 2021).

<sup>3</sup> Exhibit A (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, *Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking*, EERE-2018-BT-STD-0005-3136 (Oct. 16, 2019), *available at*: <https://www.regulations.gov/comment/EERE-2018-BT-STD-0005-3136>) (Dishwasher Comments); Exhibit B (Comments of Attorneys General of Oregon, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Vermont, Washington, and the District of Columbia, and the Corporation Counsel of the City of New York, *Energy Conservation Standards for Clothes Washers and Clothes Dryers*, EERE-2020-BT-STD-0001-0035 (Oct. 13, 2020), *available at*: <https://www.regulations.gov/comment/EERE-2020-BT-STD-0001-0035>) (Clothes Products Comments).

<sup>4</sup> *Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking*, 84 Fed. Reg. 33869 (July 15, 2019) (Dishwasher Proposal); *Energy Conservation Standards for Clothes Washers and Clothes Dryers*, 85 Fed. Reg. 49297 (Aug. 13, 2020) (Clothes Products Proposal) (together, Short-Cycle Proposals).

<sup>5</sup> *Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers*, 85 Fed. Reg. 68723 (Oct. 30, 2020) (Dishwasher Class Rule); *Energy Conservation Program: Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers*, 85 Fed. Reg. 81359 (Dec. 16, 2020) (Clothes Products Class Rule) (together, Short-Cycle Class Rules).

which in and of themselves justify their rescission. Further, the State Commenters' prior comments identified additional aspects of DOE's promulgation of the Short-Cycle Class Rules, recounted below, that violated EPCA and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, and therefore independently justify their rescission. Thus, the State Commenters urge DOE to finalize the Proposal and rescind the Short-Cycle Class Rules.

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.<sup>6</sup> The Short-Cycle Class Rules have weakened the program by removing standards for important consumer products and creating unjustified product classes, which in turn opened the possibility of similar proposals in the future that could further undermine the program. The Proposal would rectify these improper actions and ensure appropriate implementation by DOE of EPCA's product class provision in the future. For these broader reasons as well, DOE should finalize the Proposal.

## **I. Background: EPCA's Product Class Provisions; the Short-Cycle Product Class Rulemakings; the Short-Cycle Class Rescission Proposal**

### **A. EPCA's Product Class Provisions**

EPCA directs DOE to establish energy conservation standards covering most major household appliances and many types of commercial and industrial equipment. DOE's energy conservation program includes testing, labeling, and enacting energy conservation standards, plus product certification and compliance enforcement. Energy conservation standards must be "designed to achieve the maximum improvement in energy efficiency [that] is technologically feasible and economically justified." 42 U.S.C. § 6295(o)(2)(A). EPCA allows DOE to specify a different standard for a subset class of a covered product when DOE determines that the product type or class has a "capacity or other performance-related feature" that requires a higher or lower standard from that which applies to other products within that product group in order to maintain that "performance-related feature." *Id.*, § 6295(q)(1)(B). Conversely, EPCA prohibits DOE from promulgating standards that would "result in the unavailability. . . of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as

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<sup>6</sup> See 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](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 and immediate action is necessary to combat climate change and protect our planet. Intergovernmental Panel on Climate Change, 2021; Summary for Policymakers; Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *available at*: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

those generally available in the United States at the time of” the promulgation of the standard. *Id.*, § 6295(o)(4).

### B. The Short-Cycle Product Class Rulemakings

The dishwasher short-cycle product class rulemaking was initiated in response to a petition submitted by the Competitive Enterprise Institute, requesting that DOE commence a rulemaking to create a new product class for dishwashers with a cycle time of less than one hour. DOE published the petition for comment,<sup>7</sup> and subsequently granted the petition’s request, proposing a new dishwasher product class for dishwashers whose normal cycle time was under one hour.<sup>8</sup> Following the Dishwasher Proposal, DOE published the Clothes Products Proposal, proposing similar short-cycle product classes for clothes washers and clothes dryers.<sup>9</sup>

As noted above, the State Commenters submitted comments opposing both proposals.<sup>10</sup> Neither rulemaking received substantial support from product manufacturers or efficiency advocates.<sup>11</sup> Nonetheless, DOE finalized both proposals and created short-cycle product classes for dishwashers, clothes washers, and clothes dryers which the Proposal now proposes to rescind.<sup>12</sup>

### C. The Short-Cycle Class Rescission Proposal

On January 20, 2021, President Biden signed Executive Order 13,990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.” 86 Fed. Reg. 7037 (Jan. 20, 2021) (Executive Order). The Executive Order directed federal agencies to identify and reconsider regulatory actions taken by the prior administration that undermined or weakened the federal government’s programs, actions, and regulations that address the proper use of science, the protection of public health and the environment, and specifically the response to climate change. Under the Executive Order, agency heads were directed to immediately review agency actions taken during the prior administration to identify regulatory actions constituting such

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<sup>7</sup> *Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking*, 83 Fed. Reg. 17,768 (April 24, 2018).

<sup>8</sup> Dishwasher Proposal, 84 Fed. Reg. 33869 (July 15, 2019).

<sup>9</sup> Clothes Products Proposal, 85 Fed. Reg. 49297 (Aug. 13, 2020).

<sup>10</sup> See Exhibit A, Dishwasher Comments, and Exhibit B, Clothes Products Comments.

<sup>11</sup> See, e.g., Comments of the Association of Home Appliance Manufacturers (AHAM), EERE-2018-BT-STD-0005-3188 (Oct. 16, 2019), *available at*: <https://www.regulations.gov/comment/EERE-2018-BT-STD-0005-3188>; Comments of the Appliance Standards Awareness Project, Consumer Federation of America, National Consumer Law Center (on behalf of its low-income clients), and Natural Resources Defense Council, EERE-2018-BT-STD-0005-3139 (Oct. 16, 2019), *available at*: <https://www.regulations.gov/comment/EERE-2018-BT-STD-0005-3139>; Comments of AHAM, EERE-2020-BT-STD-0001-0030 (Oct. 13, 2020), *available at*: <https://www.regulations.gov/comment/EERE-2020-BT-STD-0001-0030>; Comments of Appliance Standards Awareness Project, Alliance for Water Efficiency, Consumer Federal of America, National Consumer Law Center (on behalf its low-income clients), and Natural Resources Defense Council, EERE-2020-BT-STD-0001-0033 (Oct. 13, 2020), *available at*: <https://www.regulations.gov/comment/EERE-2020-BT-STD-0001-0033>; see also Petition of AHAM to DOE for Reconsideration of its Final Rule on the Establishment of a New Product Class for Residential Dishwashers, EERE-2018-BT-STD-0005-3224 (Mar. 1, 2021), *available at*: <https://www.regulations.gov/document/EERE-2018-BT-STD-0005-3224>.

<sup>12</sup> Dishwasher Class Rule, 85 Fed. Reg. 68723 (Oct. 30, 2020); Clothes Products Class Rule, 85 Fed. Reg. 81359 (Dec. 16, 2020).

negative actions and submit a preliminary list of those actions that would be subject to reconsideration. *Id.* at 7037-38. Pursuant to that directive, DOE issued a list of rules promulgated under the prior administration that were subject to reconsideration, which included the Dishwasher Class Rule and the Clothes Products Class Rule.<sup>13</sup> As a result of that reconsideration, DOE issued the Proposal, which proposed to rescind the Short-Cycle Class Rules.

The Proposal identifies multiple bases to justify the rescission of the Short-Cycle Class Rules. First, because the Short-Cycle Class Rules amended the energy conservation standards for the subject products, DOE was required to satisfy the requirements necessary under EPCA to amend energy conservation standards—including that the amended standards are designed to achieve the maximum improvement in energy efficiency while being technologically feasible and economically justified. 86 Fed. Reg. at 43973. In promulgating the Short-Cycle Class Rules, however, DOE failed to satisfy these requirements. *Ibid.* Second, DOE did not “adequately consider whether the amended standards violated EPCA’s [anti-backsliding provision].” *Ibid.* Third, contrary to DOE’s arguments in the Short-Cycle Proposals, the Short-Cycle Class Rules were not consistent with DOE’s past product class energy conservation standard rulemakings, as the rulemakings cited to support the Short-Cycle Class Rules did not in fact provide the support DOE then suggested. *Id.* at 43973-74. Independent of its bases for rescinding the Short-Cycle Class Rules, the Proposal also advanced a “policy judgment” that the express purposes of EPCA for energy and water conservation “would be thwarted” if the requirements of EPCA for amending standards could be circumvented by nominally characterizing an action that had the practical effect of changing standards as not an amendment. *Id.* at 43974. The Proposal therefore moved to rescind the Short-Cycle Class Rules, consistent with the Executive Order. *Ibid.*

## **II. The Proposal Would Properly Rescind the Unlawful Short-Cycle Class Rules**

The Proposal provides various grounds to justify the rescission of the Short-Cycle Class Rules, which were also identified in the State Commenters’ comments on the Short-Cycle Proposals. Those grounds fully and adequately justify the Proposal’s suggested rescission of the Short-Cycle Class Rules, and the State Commenters therefore urge DOE to finalize the Proposal on those bases.

### **A. The Short-Cycle Class Rules Violated EPCA’s Anti-Backsliding Provision**

As the State Commenters asserted in their respective comments on the Short-Cycle Proposals, the Short-Cycle Class Rules each violated EPCA’s anti-backsliding provision (42 U.S.C. § 6295(o)(1)) by eliminating standards for a subset of products that was already covered by energy conservation standards.<sup>14</sup> As the Proposal notes, this regulatory action “changed the status quo” and thereby required DOE to “satisfy the requirements in the EPCA for issuing an amended standard” (86 Fed. Reg. at 43974), including the anti-backsliding provision. While DOE had argued that the product class provision conditioned the anti-backsliding provision,<sup>15</sup> the contrary

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<sup>13</sup>*Review of Actions of the Prior Administration*, Kelly Speakes-Backman, Acting Assistant Secretary for Energy Efficiency and Renewable Energy (Feb. 19, 2021).

<sup>14</sup> Dishwasher Comments, pp. 3-6; Clothes Products Comments, pp. 4-5.

<sup>15</sup> Dishwasher Class Rule, 85 Fed. Reg. at 68734-38; Clothes Products Class Rule, 85 Fed. Reg. at 81368-70.

reading is more appropriate in light of the provisions themselves, the canon of statutory interpretation, and EPCA's legislative history, in which the anti-backsliding provision was adopted after the product class provision. Indeed, DOE notes that the agency "did not . . . adequately consider whether the amended standards [of the Short-Cycle Class Rules] violated EPCA's [anti-backsliding provision]." *Id.* at 43973. That failure of consideration resulted in DOE directly violating the anti-backsliding provision, by weakening existing energy conservation standards. This violation in itself fully justifies the rescission of the Short-Cycle Class Rules, as advanced by the Proposal.

B. The Promulgation of the Short-Cycle Class Rules Violated EPCA's Product Class and Standard Establishment Provisions

As discussed in the State Commenters' previous submissions,<sup>16</sup> the promulgation of the Short-Cycle Class Rules also failed to comply with the process required by EPCA's product class provision for the establishment of product class standards. 42 U.S.C. § 6295(q). The product class provision authorizes DOE to create product classes with different standards only in the course of establishing energy conservation standards, as the analysis for the establishment of standards is necessary to determine whether product classes are in fact necessary. Specifically, the provision states that "a rule *prescribing an energy conservation standard* . . . shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply)" for other products of the same type without the performance-related feature for the subset class of the product type that has the performance-related feature. *Id.* (emphasis added). The provision does not authorize DOE to create product classes except when they are setting energy conservation standards and, thus, product class standards may only be promulgated as part of a rule setting energy conservation standards.

In promulgating the Short-Cycle Class Rules, DOE failed to properly exercise its authority under the product class provision in two ways. First, it failed to undertake an energy conservation standards rulemaking. Indeed, DOE did not even attempt to establish energy conservation standards for the purported new product classes, instead deferring the establishment of standards for a later rulemaking.<sup>17</sup> Because product classes can only be created in the course of an energy conservation standards rulemaking, this deferral violated the product class provision, as the Proposal recognizes. See 86 Fed. Reg. at 43973 ("EPCA does not, however, allow DOE to simply defer the establishment of new energy conservation standards"). Second, and unavoidably given that deferral, DOE further failed to find that the standards for the new short-cycle product classes, which now allow unlimited energy use, satisfied EPCA's requirements for new or amended standards—i.e., that they are designed to achieve the maximum improvement in energy efficiency possible while being technologically feasible and economically justified. 42 U.S.C. § 6295(o)(2)(A). The Proposal similarly recognizes that this failure also violated EPCA. 86 Fed. Reg. at 49373 (Short-Cycle Class Rules "did not address any of EPCA'S requirements for amending an energy conservation standard"). In failing to establish standards or satisfy the requirements for their establishment, DOE's promulgation of the Short-Cycle Class Rules violated EPCA's product class provision and the statute's requirement for the promulgation of

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<sup>16</sup> Dishwasher Comments, pp. 6-8; Clothes Products Comments, pp. 5-9.

<sup>17</sup> Dishwasher Class Rule, 85 Fed. Reg. at 68724; Clothes Products Class Rule, 85 Fed. Reg. at 81361.

energy conservation standards. Based on these violations, the Proposal would appropriately rescind the Short-Cycle Class Rules and should be finalized.

C. The Short-Cycle Class Rules Are Not Consistent with Past DOE Product Class Rulemakings

The Proposal also recognizes that the short-cycle product class determination made in the Short-Cycle Class Rules was not consistent with the product class determinations of past DOE product class rulemakings, and distinguishes the prior rulemakings relied on by DOE in the Short-Cycle Class Rules to argue that those prior rulemakings created product classes on similar grounds. 86 Fed. Reg. at 43973-74. The Proposal notes specifically that the prior rulemakings where DOE set no standard for a certain product class involved instances where no standards had been previously set for that product class, unlike the Short-Cycle Class Rules where the products at issue were already subject to energy conservation standards. *Id.* at 43974. Beyond these distinctions, the State Commenters' comments identified other reasons why the Short-Cycle Class Rules would be inconsistent with DOE's prior product class rulemakings and those rulemakings' interpretation of "performance-related feature": to begin, short-cycle functionality did not provide consumer utility that would qualify as a "performance-related feature" consistent with those prior interpretations, and, where cycle duration was in fact considered in the past rulemakings, it was not in the product class context.<sup>18</sup> Together, these distinctions confirm that the Short-Cycle Class Rules were not consistent with past DOE product class rulemakings and thus not supported on that basis. That lack of support further justifies the revocation of the Short-Cycle Class Rules.

**III. The Rescission of the Short-Cycle Class Rules Is Further Justified by Their Other Violations of EPCA and the APA**

In addition to the grounds discussed above, additional grounds amply justify the rescission of the Short-Cycle Class Rules. If DOE determined that the stated justifications do not in fact support the Proposal, these additional grounds would nonetheless support the rescission of the Short-Cycle Class Rules. DOE therefore should finalize the Proposal independent of those identified in the Proposal.

A. The Short-Cycle Class Rules Violated the Congressionally Mandated Standards for Dishwashers and Clothes Washers

The Short-Cycle Class Rules should be rescinded because they contradict energy conservation standards established by Congress for two of the three products covered by the Rules. As discussed in the State Commenters' comments<sup>19</sup> on the Clothes Products Proposal, that rule contradicted the Congressionally mandated standards for clothes washers. See 42 U.S.C. § 6295(g)(9) (setting specific energy conservation standards for clothes washers). The Dishwasher Class Proposal violated EPCA in the same manner, by applying no standards to short-cycle dishwashers when Congress had already mandated minimum standards for all dishwashers. 42 U.S.C. § 6295(g)(10). Because Congress had already set a minimum standard for clothes

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<sup>18</sup> Dishwasher Comments, pp. 7-8; Clothes Products Comments, pp. 9-11.

<sup>19</sup> Clothes Products Comments, pp. 7-8.

washers and dishwashers, DOE could only strengthen those standards, consistent with the anti-backsliding provision, but the Short-Cycle Class Rules weakened those standards by applying no standards to short-cycle products. Congress did not provide for separate classes for short-cycle products, and the standards thus applied to all such products regardless of that feature. The Short-Cycle Class Rules thus directly violate EPCA's minimum energy conservation standards for those products, are consequently unlawful, and must be rescinded to comply with EPCA.

B. The Short-Cycle Class Rules' Administrative Records Did Not Support the Creation of Separate Classes for Short-Cycle Products

In order to justify the creation of a separate product class, DOE must determine that (1) products in the potential subset class have a "performance-related feature" that provides substantial, unique utility to consumers, and (2) that different standards are necessary to maintain that performance-related feature. As discussed in the State Commenters' comments,<sup>20</sup> the administrative records compiled in support of the Short-Cycle Class Rules failed to meet either burden, as they did not support DOE's determination that short-cycle functionality was a "performance-related feature" as that term is interpreted under EPCA, or that separate standards were necessary to maintain that functionality.

In regards to the performance-related feature, DOE failed to demonstrate that short-cycle functionality was in fact a "performance-related feature" consistent with the agency's interpretation of that term under EPCA, because DOE did not demonstrate it provided sufficient unique consumer utility. Consumer survey data demonstrated that consumers generally used the products in a manner in which short-cycle functionality would not provide a substantial benefit, while ENERGY STAR data indicated that consumer preferences were more influenced not by the efficiency and other features of the products at issue that cycle time. Thus, short-cycle functionality did not qualify as a "performance-related feature" that could justify a separate product class with different energy conservation standards under EPCA.

Moreover, even if short-cycle functionality could be a performance-related feature under EPCA, DOE did not demonstrate that different energy conservation standards were necessary to provide short-cycle functionality for the subject products. To begin, for each product, products already existed prior to the promulgation of the Short-Cycle Class Rules that provided the short-cycle functionality that supposedly justified the creation of separate short-cycle classes. DOE's presumption that weaker energy conservation standards would result in quicker cycle times was also belied by the data in the rulemaking records, which, when assessed accurately, showed that energy conservation standards did not cause in any increase in cycle times.

#### **IV. Conclusion**

For the reasons set forth above, the undersigned Attorneys General and local government entities urge DOE to finalize the Proposal and rescind the Short-Cycle Class Rules.

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<sup>20</sup> Dishwasher Comments, pp. 9-11; Clothes Products Comments, pp. 8-9, 15-17)

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