

**Petition for Reconsideration of DOE's
Final Rule: Energy Conservation
Program: Establishment of a New
Product Class for Residential Dishwashers**

Docket No: EERE-2018-BT-STD-0005

Date: April 28, 2021

Submitted via e-mail

Natural Resources Defense Council, Sierra Club, the Consumer Federation of America, and the Massachusetts Union of Public Housing Tenants submit the following petition for reconsideration of DOE's final rule "Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers," 85 Fed. Reg. 68,723 (Oct. 30, 2020). The final rule is unlawful because the class it established is contrary to multiple provisions of the Energy Policy and Conservation Act.

On behalf of the Natural Resources Defense Council, Sierra Club, the Consumer Federation of America, and the Massachusetts Union of Public Housing Tenants, we submit a petition under 5 U.S.C. § 553(e) to repeal the Department of Energy’s final rule establishing a new product class for dishwashers with a default cycle run time of less than 60 minutes.¹ Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers; Final Rule, 85 Fed. Reg. 68,723 (Oct. 30, 2020) (hereinafter “Dishwasher Rule”). As explained below, we submit this petition because in publishing the Dishwasher Rule DOE clearly exceeded its authority and violated its obligations under the Energy Policy and Conservation Act (EPCA). Although, as we have stated in comments, the rule was promulgated without the necessary factual basis to support it, there is no set of facts which would render the rule lawful.² The Dishwasher Rule violates core requirements of EPCA, and addressing these legal defects is critical to ensure that DOE does not repeat these mistakes in the future.³ Because of the fundamental legal and factual errors underlying the Dishwasher Rule, we urge DOE to grant this petition and repeal the rule.

Background

DOE last set efficiency standards for dishwashers in 2012. Energy Conservation Standards for Residential Dishwashers, 77 Fed. Reg. 31,918, 31,919 (May 30, 2012). Under those standards, standard-size and compact-size dishwashers may not 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 were the result of a joint proposal submitted on September 25, 2010, by groups representing manufacturers, energy and environmental advocates, and consumer groups; by direct final rule, DOE set standards consistent with those groups’ proposal. *See* 77 Fed. Reg. 31918. These standards remain in effect.⁴

On March 21, 2018, the Competitive Enterprise Institute (CEI) petitioned DOE to “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.” Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking, 83 Fed. Reg. 17,768, 17,771 (April 24, 2018) (Petition Notice). 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.* On April 24, 2018, DOE published the Petition Notice, seeking comment on the petition. *Id.* at 17,771.

¹ Sec. 553(e) provides that “each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

² NRDC previously joined comments opposing the Dishwasher Rule when the rulemaking was ongoing. *See, e.g.,* Dishwasher Rule, Docket No. EERE-2018-BT-STD-005-3145 (comments by Earthjustice and NRDC); and Docket No. EERE-2018-BT-STD-005-3139 (comments by the Appliance Standards Awareness Project, the Consumer Federation of America, the National Consumer Law Center, and NRDC). We reiterate our support for the legal and factual arguments contained therein.

³ We note that this is not an idle fear, given DOE’s creation of highly similar classes for clothes washers and clothes dryers. *See* Energy Conservation Program: Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers, 85 Fed. Reg. 81,359 (Dec. 16, 2020).

⁴ In 2016, DOE reviewed its existing standards and decided not to impose more stringent requirements. Energy Conservation Program: Energy Conservation Standards for Residential Dishwashers, 81 Fed. Reg. 90,072 (Dec. 13, 2016).

On July 16, 2019, DOE published a proposed rule, “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 proposed rule 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. Notably, the proposed rule did not also propose efficiency standards for one-hour-cycle dishwashers; rather, it proposed to amend the regulatory text to exclude this new proposed product class from the requirements of any energy and water efficiency standards. The proposed rule further asserted that any new energy and water use standards that DOE might eventually adopt for the new product class would not be subject to EPCA’s anti-backsliding provision, 42 U.S.C. § 6295(o)(1). 84 Fed. Reg. at 33,872-73.

On October 30, 2020, DOE published the final Dishwasher Rule, establishing a “product class for standard residential dishwashers with a cycle time for the normal cycle of one hour or less from washing through drying.” 85 Fed. Reg. at 68,723. The Dishwasher Rule adds a new subsection to DOE’s regulations governing dishwasher energy and water efficiency standards. That new subsection provides:

(iii) Standard size dishwashers with a “normal cycle” . . . of 60 minutes or less are not currently subject to energy or water conservation standards. . . .

10 C.F.R. § 430.32(f)(iii). We believe that DOE gravely erred in publishing the Dishwasher Rule and accordingly urge DOE to reverse course and repeal it.

The Dishwasher Rule Violates EPCA’s Anti-Backsliding Provision.

EPCA’s “anti-backsliding” provision bars DOE from relaxing energy conservation standards. Section 325(o)(1) of EPCA prohibits DOE from prescribing “any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.” 42 U.S.C. § 6295(o)(1). Dishwashers meet the definition of a “covered product” under EPCA: they are “a consumer product of a type specified in [42 U.S.C. § 6292].” *Id.* §§ 6291(2), 6292(a)(6) (listing dishwashers). Before the Dishwasher Rule, standards applied to all dishwashers, regardless of cycle time. By exempting the new product class from standards, at least until such time as DOE eventually sets new ones, the Dishwasher Rule plainly violates the anti-backsliding provision. 42 U.S.C. § 6295(o)(1).

The plain language of the anti-backsliding provision allows no exceptions. It prohibits “any amended standard which . . . decreases the minimum required energy efficiency” of a covered product. *Id.* (emphasis added); see *Ali v. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (noting the “expansive meaning” of “any”). As the Congress that enacted the provision explained, this rigidity serves an important purpose: “to maintain a climate of relative stability with respect to future planning by all interested parties.” H.R. Rep. No. 100-11, at 22 (Mar. 3, 1987). Moreover, as the U.S. Court of Appeals for the Second Circuit explained in *NRDC v. Abraham*, the anti-backsliding provision must be interpreted in light of “the appliance program’s goal of steadily increasing the energy efficiency of covered products” and congressional intent to provide a “sense of certainty on

the part of manufacturers as to the required energy efficiency standards.” 355 F.3d 179, 197 (2d Cir. 2004).

The anti-backsliding provision constrains DOE’s creation of new product classes under section 325(q)—EPCA’s “product-class” provision. *See* 42 U.S.C. § 6295(q). In relevant part, the product-class provision authorizes DOE to determine that the presence of a “performance-related feature” in certain products “justifies the establishment of a higher or lower standard” than the one that “applies (or will apply)” to those products. *Id.* § 6295(q)(1)(B). The Dishwasher Rule seized on this use of multiple tenses to argue the product-class provision authorizes DOE to reduce the stringency of a standard “which applies” to a covered product. 85 Fed. Reg. at 68,753. The interpretation advanced in the Rule reads the text of the product-class provision in a vacuum, ignoring that the statutory context and EPCA’s history and purposes must inform the meaning of the words. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (statutory interpretation is a “holistic endeavor”).

In light of the statutory context and purposes, the only plausible interpretation is that Congress intended the anti-backsliding provision to constrain DOE’s authority under the product-class provision. As already noted, the anti-backsliding provision applies to “any” standards that DOE issues. Its broad application is consistent with EPCA’s goals of “conserv[ing] energy supplies through energy conservation programs,” “provid[ing] for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products,” and “conserv[ing] water by improving the water efficiency of certain plumbing products and appliances.” 42 U.S.C. §§ 6201(4), (5), & (8). Further, the “climate of relative stability” that Congress sought to ensure would be undermined by a reading of the product-class provision that enables DOE to waive the applicability of the anti-backsliding provision as to all existing energy use or efficiency standards for consumer products. H.R. Rep. No. 100-11, at 22.

The Dishwasher Rule also ignores the history of Section 325. DOE’s authority to divide products into classes based on the presence of a performance-related feature originated in the amendments to EPCA enacted in 1978. As then enacted, the product-class provision authorized DOE to “specify a level of energy efficiency higher or lower than that which applies (or would apply)” to the product. National Energy Conservation Policy Act § 422, Pub. L. 95-619, 92 Stat. 3206, 3260 (Nov. 9, 1978) (emphasis added). As enacted in 1978, the product-class provision might have been reasonably interpreted to allow for the weakening of existing standards. However, when Congress imposed the anti-backsliding provision on DOE in 1987, that amendment altered the degree of discretion conferred in the product-class provision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”). Simply put, it is incorrect to read EPCA as continuing to allow the creation of new product classes that contravene the anti-backsliding provision.

Previously, DOE readily acknowledged that this reading of the product-class and anti-backsliding provisions is correct. DOE rejected the creation of a class of “very large” commercial packaged boilers, to which no standards would apply, as this “would essentially be repealing the existing standards for that equipment, which is prohibited by the anti-backsliding clause.” Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed.

Reg. 1592, 1611 (Jan. 10, 2020). So, too, here. The Dishwasher Rule’s contrary interpretation of EPCA is erroneous. DOE should harmonize the anti-backsliding provision and the product-class provision by recognizing that the anti-backsliding provision constrains DOE’s exercise of its product-class authority.

The Dishwasher Rule Is Not a Valid Use of Sec. 325(q).

Even if EPCA’s anti-backsliding provision did not bar DOE from applying a weaker standard to dishwashers with a normal cycle capable of washing a full load of normally soiled dishes in 60 minutes or less, doing so was still unlawful because DOE did not properly invoke its authority to create new product classes under EPCA Sec. 325(q). 42 U.S.C. § 6295(q). The product-class provision permits DOE to distinguish among classes of products when prescribing energy conservation standards only when products “have a capacity or other performance-related feature which other products . . . do not have” and “such feature justifies” a different standard. 42 U.S.C. § 6295(q)(1)(B). In other words, the product-class provision constrains the discretion it offers to DOE, and DOE did not make the requisite findings to justify use of the provision in promulgating the Dishwasher Rule.

It is well established that there are dishwashers currently available that are capable of completely washing a full load of normally soiled dishes in 60 minutes or less. As the comments of the Appliance Standards Awareness Project (ASAP) explained, dishwashers are available today with optional cycles capable of rapidly washing a full load of normally soiled dishes. Comments of ASAP et al. at 2 (Oct. 16, 2019) (Docket No. EERE-2018-BT-STD-0005-3139). Acknowledging this reality, the proposed rule attempted to describe the consumer utility interest as encompassing not only the ability to completely wash a full load of normally soiled dishes in 60 minutes or less, but also “that operation of the dishwasher as recommended by the manufacturer [i.e., in the normal cycle] would provide such function.” 84 Fed. Reg. at 33,875. In the Dishwasher Rule, DOE simply reiterated its assertion that there is value in a short runtime for a normal cycle that is somehow distinct from the runtime of a quick cycle. 85 Fed. Reg. at 68,730.

DOE’s approach is fatally flawed. First, avoiding the task of dishwasher cycle selection is not a “performance-related feature” under EPCA’s product-class provision. Construing EPCA as DOE does is contrary to congressional intent. When Congress enacted the product-class provision in 1978, it emphasized the limited application of the provision:

Obviously, if the Secretary established a separate standard for every appliance having a detectable difference in features, no matter how slight, as compared to other appliances in the class, then hundreds of standards might result Therefore, the conferees intend that the Secretary use his discretion carefully, and establish standards only if the feature justifies a separate standard, based on the utility to the consumer and other appropriate criteria.

H. Conf. Rep. No. 95-1751, at 116 (Oct. 10, 1978), *reprinted in* 95 U.S.C.C.A.N. 8134, 8159-60. If avoiding the need to push a button to select an alternative cycle qualifies as a “performance-related feature” under the product-class provision, it is hard to fathom what aspect of a consumer’s interaction with a covered product would not rise to the level of a feature justifying a unique standard.

The Dishwasher Rule Violated EPCA's Standard Setting Requirements.

DOE says that it will set a standard for the new dishwasher class at a later date. *See* Dishwasher Rule at 68,723 (“DOE intends to determine the specific energy and water consumption limits for the product class in a separate rulemaking”). However, DOE has already set a standard for this class. By authorizing a class of dishwashers to be distributed in commerce subject to *no standards whatsoever*, DOE has allowed products in this product class to consume unlimited amounts of energy and water. *See* 10 C.F.R. § 430.32(f)(1)(iii) (stating that the new class is “not currently subject to energy or water conservation standards”). By proceeding in this manner—contrary even to CEI’s expectation that standards would be set during the same rulemaking—DOE has violated the provisions in Sections 325(o) and (p) of EPCA pertaining to standard setting. *See* Petition Notice at 17,771.⁵

As DOE has elsewhere recognized, the agency “must follow specific statutory criteria for prescribing new or amended standards for covered products, including residential dishwashers.” 81 Fed. Reg. at 90,072. “Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified.” *Id.* (citing 42 U.S.C. § 6295(o)(2)(A) and (3)(B)); *see also* 42 U.S.C. § 6295(p)(1). “Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. *Id.* (citing 42 U.S.C. § 6295(o)(3)). And DOE must determine whether the benefits of the standard exceed its burdens. *See* 42 U.S.C. § 6295(o)(2)(B)(i). DOE must make this determination after receiving comments on the proposed standard, *see id.* § 6295(p)(2), and by considering, to the greatest extent practicable, the following seven statutory factors:

- (1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;
- (2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;
- (3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;
- (4) Any lessening of the utility or the performance of the covered products likely to result from the standard;
- (5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;
- (6) The need for national energy and water conservation; and
- (7) Other factors the Secretary of Energy (Secretary) considers relevant.

Id. § 6295(o)(2)(B)(i)(I)-(VII)). In setting a limitless standard for the new class of quick-cycle dishwashers, DOE did not comply with any of these requirements.

⁵ Alternatively, if the Dishwasher Rule is construed as *not* setting a standard, that would only provide an additional reason why the Dishwasher Rule violates Sec. 325(q) of EPCA. Section 325(q) requires that DOE issue new standards as part of a single rulemaking. It does not allow DOE to bifurcate the creation of the product class and the establishment of a new standard. Rather, the provision requires a “rule prescribing an energy conservation standard.” 42 U.S.C. § 6295(q)(1). The Dishwasher Rule either sets an unlawful limitless standard or sets no standard at all. Either way, it violates EPCA.

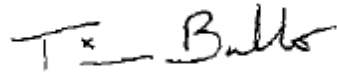
Finally, we note also that the limitless standard DOE set transgresses the standards Congress enacted in 2007. In the 2007 amendments to EPCA, Congress specified the particular efficiency standards that would apply to dishwashers from 2010 onward. 42 U.S.C. § 6295(g)(10). That provision commands that dishwashers “manufactured on or after January 1, 2010, shall . . . not exceed 355 kWh/year and 6.5 gallons per cycle” for standard-size dishwashers and “not exceed 260 kWh/year and 4.5 gallons per cycle” for compact dishwashers. DOE cannot set efficiency standards below that floor. By exempting dishwashers with a 60-minute normal cycle from those standards, DOE contravened that explicit congressional directive, and thus exceeded its authority.

Conclusion

For the above reasons, we ask that DOE grant this petition and initiate a rulemaking process to expeditiously repeal the Dishwasher Rule. To the extent that DOE has initiated proceedings to determine what would be appropriate standards for the newly created class, those efforts should be suspended pending a decision on repealing the Dishwasher Rule. We thank DOE for its consideration of this petition.



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