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

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Comments submitted via Regulations.gov and e-mail:
ConsumerWashersDryers2020STD0001@ee.doe.gov
U.S. Department of Energy
Appliance and Equipment Standards Program

Re:
EERE-2020-BT-STD-0001
RIN 1904-AE86
Conservation Program for Appliance Standards: Energy Conservation Standards for Clothes Washers and Clothes Dryers

The undersigned Attorneys General, and the Corporation Counsel of the City of New York, respectfully submit these comments in response to the Department of Energy's (DOE) Notice of Proposed Rulemaking for Energy Conservation Standards for Clothes Washers and Clothes Dryers. 85 Fed. Reg. at 49,297 (August 13, 2020) ("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.

In EPCA, Congress stated its intent "to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products." 42 U.S.C. § 6201(5). Congress made it clear that the Department of Energy is tasked with improving—and never weakening—energy efficiency standards. The so-called "anti-backsliding rule" 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). And the very next provision drives the same point home, stating that "[a]ny new or amended energy conservation standard prescribed by [DOE] under this section for any type (or class) of covered product shall be designed to achieve the maximum *improvement* in energy efficiency …" 42 U.S.C § 6295(o)(2) (emphasis added).

DOE's current Proposal is inconsistent with each of these provisions. Currently, all clothes washers and dryers are subject to energy efficiency standards. But the Proposal completely exempts certain washers and dryers from any energy efficiency standard. EPCA does not allow DOE to increase the maximum allowable energy use for these products in this way.

In addition to violating EPCA itself, the Proposal violates NEPA. DOE mistakenly asserts that the Proposal is subject to a categorical exclusion from NEPA, claiming it "would only establish new product classes" and therefore "would not result in any environmental impacts." 85 Fed. Reg. at 49,310. But when the current energy efficiency standards for washer and dryers were

adopted, DOE stated that each of those standards "would have significant environmental benefits," by reducing emissions of carbon dioxide, nitrogen oxides, and mercury. *See* 77 Fed. Reg. 32,308, 32,310 (for washers) and 76 Fed. Reg. 22,454, 22,457 (for dryers). At least a portion of those benefits will be lost under this Proposal.

It is self-evident that if *adopting* a standard has environmental benefits, carving out *exemptions* to that standard – which is what establishing these "new product classes" would do - will result in detrimental environmental impacts. Right now, manufacturers can only build and sell washers and dryers that meet efficiency standards. If they can build and sell washers and dryers that are subject to no standards, then – unless nobody buys the products – energy use and its associated negative environmental impacts will increase.

The Proposal also violates the APA because it is not supported by adequate evidence or reasoning. DOE has not demonstrated, as required by EPCA, that cycle time is properly considered to be a performance-related feature; that different standards are necessary to maintain short cycle times, even if they are a performance-related feature; or why the specific cycle times identified in the Proposal are the proper delineations between products that provide the supposed performance-related feature and those that do not. The Proposal is therefore arbitrary and capricious, and does not comply with the APA.

DOE's energy efficiency program has resulted in substantial economic and environmental benefits that are of major importance to our jurisdictions and residents: 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, in the past few years, DOE has acted contrary to the interests of 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 discretionary actions that undermine the energy efficiency program.[2] The Proposal is just the latest example of DOE's arbitrary and capricious rulemaking and failure to comply with its mandate under EPCA to regulate to improve energy efficiencies.

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[1] *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. *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-%202-17-2016.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.

[2] See Comments of Attorneys General of California, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Vermont, Washington, Commonwealth of Massachusetts, District of Columbia and City of New York, *Energy Conservation Program for Appliance Standards: Proposed Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment; Prioritization Process*, Docket No. 2020-07721, EERE-2020-BT-STD-0004 (May 15, 2020).

Accordingly, DOE should withdraw the Proposal and address the agency's many overdue statutorily mandated energy efficiency rulemakings.

I. DOE's Clothes Washer and Dryer Proposed Rulemaking

Under current DOE regulations, "clothes washers" are defined as "a consumer product designed to clean clothes, utilizing a water solution of soap and/or detergent and mechanical agitation or other movement," 10 C.F.R. § 430.2. The clothes washer definition is not limited by cycle time or other bases. All clothes washers are currently subject to energy efficiency standards and water efficiency standards. *See* 10 C.F.R. § 432.32(g)(4), designating standards for "top-loading compact," "top-loading standard," "front-loading compact" and "front-loading standard" washers. Thus, all clothes washers, regardless of cycle time, are subject to the existing standards in subsection 430.32(g)(4).

Similarly, clothes dryers are currently defined in 10 C.F.R § 430.2 as follows:

> *Electric clothes dryer* means a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is electricity and the drum and blower(s) are driven by an electric motor(s). *Gas clothes dryer* means a cabinet-like appliance designed to dry fabrics in a tumble-type drum with forced air circulation. The heat source is gas and the drum and blower(s) are driven by an electric motor(s).

The clothes dryer definitions are not limited by cycle time or other bases. All clothes dryers are currently subject to energy efficiency standards. See 10 C.F.R. § 432.32(h)(3).

On August 13, 2020, DOE published the Proposal, adding a new subsection (ii) to 10 CFR § 430.32(g)(4):

> 430.32(g)(4)(ii): Top-loading, standard clothes washers with an average cycle time of less than 30 minutes and front-loading, standard clothes washers with an average cycle time of less than 45 minutes are not currently subject to energy or water conservation standards.

85 Fed. Reg. at 49,311.

The Proposal also adds a new subsection (iii) to 10 CFR § 430.32(h):

> 430.32(h)(3)(ii): Vented, electric standard clothes dryers and vented gas clothes dryers with a cycle time of less than 30 minutes, when tested according to appendix D2 in subpart B of this part, are not currently subject to energy conservation standards.

85 Fed. Reg. at 49,311-12.

Although the Proposal contemplates the possibility that "DOE would consider appropriate energy and water standards for such product classes, if adopted, in separate rulemakings,"

85 Fed. Reg. at 49,297, it does not commit DOE to adopting such standards. With respect to both washers and dryers, the Proposal states that "[s]uch products would not be subject to the applicable DOE test procedure or energy conservation standards, *unless and until* DOE were to complete appropriate rulemaking to establish applicable test procedures and energy conservation standards." *Id.* at 49,300 (for washers) and again at 49,304 (for dryers) (emphasis added). The words "*unless* and until" clearly contemplate the possibility of permanent exemptions from any standards for such clothes washers and dryers.

II. The Proposal Violates Multiple Provisions of EPCA

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

As noted above, 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).

Currently, all clothes washers and dyers are subject to energy efficiency standards. By creating subclasses of clothes washers and dryers subject to no energy efficiency standards, DOE would allow certain clothes washers and dryers to consume unlimited amounts of energy.[3] The Proposal clearly "increases the maximum allowable energy use" applicable to those clothes washers and dryers in violation of the anti-backsliding provision. 42 U.S.C. § 6295(o)(1).[4]

DOE bases its decision to ignore the anti-backsliding prohibition of subsection 6295(o)(1) on subsection 6295(q), which provides:

> **(1)**A rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group …
>
> **(B)**
> have 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 will apply) to other products within such type (or class).

[3] DOE is acting as though has the authority to override the energy and water standards for clothes washers that Congress itself established in section 42 U.S.C 6295 (g)(9)(A), when it expressly does not. *See infra* at II.E.

[4] It is possible that some years from now, as a result of the Proposal, there will be no energy efficiency standards applicable to the washers and dryers purchased by consumers. This is because if, as DOE assumes, consumers demand faster cycle times, and if, as DOE assumes, only energy efficiency standards stand in the way of new, fast-cycle washers and dryers, presumably, in time, manufactures will make *only* fast-cycle models that would be exempt from any energy efficiency standards whatsoever, with each unit requiring energy in excess of that which is now permitted.

This subsection does not carve out an exemption to the anti-backsliding rule. Yet DOE claims that an exemption to the anti-backsliding rule is implied because the subsection uses the present and future tenses. According to DOE, subsection 6295(q)'s reference to a standard "which applies" combined with its reference to 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." 85 Fed. Reg. at 49,306.

But the logical way to read the language of subsection 6295(q) is that when a new rule "prescribes an energy conservation standard," that rule itself "applies" a new standard to appliances. It might also provide for future strengthening of the standards, stating that more stringent standards "will apply" at some future date. Thus, the words "apply" and "will apply" have a logical meaning that does not imply any conflict with the anti-backsliding rule.

Section 6295(q) contemplates that when an *initial* rule "applies" a general standard to a product category, it can also apply higher or lower standards to some product sub-categories which "have 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." The rule could also provide for future *tightening* of both the overarching standard for the category and the "higher or lower" standards for specific subcategories (thus designating standards that "will apply" in the future). But nothing in this language suggests that DOE can contravene the anti-backsliding rule by adopting new standards that are *weaker* than standards previously adopted for any product category or subcategory.

For purposes of illustration, imagine that DOE had numerical efficiency standards, with 10 being the highest possible level of efficiency and 0 being no standards at all. If DOE adopts, for the first time, energy efficiency standards for a product, it might "apply" a general efficiency standard of 8 for the product, and it might also (if it properly applies 6295(q)) designate a subcategory for which the standard is 7. The rule could also provide that in three years it "will apply" a standard of 9 to the basic category, and 8 to the sub-category. This illustration comports with the law's requirements. By contrast, under the anti-backsliding rule, DOE would be prohibited from weakening the standards by applying a standard of 6 to the product category, or 5 to the subcategory, or 0 to a newly invented subcategory.

Further, well-accepted principles of statutory construction stand against an interpretation of one statutory provision that renders another provision effectively meaningless and contrary to clear Congressional intent. This is discussed in further detail below in section II.D.

B. <u>The Proposal Violates Subsection 6295(o)(2)</u>

DOE also fails to address the energy efficiency requirement of subsection 6295(o)(2)(A), which provides that:

> Any new or amended energy conservation standard prescribed by the Secretary under this section for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency, or, in the case of showerheads, faucets,

water closets, and urinals, water efficiency, which the Secretary determines is technologically feasible and economically justified.[5]

DOE's Proposal clearly promulgates "amended energy conservation standards" here; the Proposal amends the current standards for washers and dryers.[6] But rather than being "designed to achieve the maximum improvement in energy efficiency," as required by law, DOE's proposed amendments completely exempt certain products from any regulatory efficiency standards whatsoever. Therefore, the Proposal violates subsection 6295(o)(2).

C. The Proposal Does Not "Specify a Level of Energy Use," and Thus Is Not Permitted Under Subsection 6295(q)

Not only does the Proposal violate the anti-backsliding rule and subsection 6295(o)(2); it could not be justified under subsection 6295(q) itself, even if those two provisions did not exist. The Proposal's grant of complete exemptions from energy efficiency standards is not contemplated in subsection 6295(q).

Subsection 6295(q)(1) 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. The Proposal does not "specify a level of energy use." Rather, it simply states that the subject washers and dryers "are not currently subject to energy [or water] conservation standards." 85 Fed. Reg. at 49,311-12.

Furthermore, subsection 6295(q)(2) states that "[a]ny rule prescribing a higher or lower level of energy use or efficiency under paragraph (1) shall include an explanation of the basis on which such higher or lower level was established." Since the Proposal does not prescribe *any* level of energy use, it also fails to provide any such explanation.

DOE's attempt to rely on subsection 6295(q) to carve out complete exemptions is unlawful.

D. DOE's Proposal Violates Principles of Statutory Construction By Not Giving Full Meaning to All Statutory Provisions, and Ignores the Fact that Congress Adopted the Anti-Backsliding Rule Subsequent to Subsection 6295(q)

DOE misreads the statute by failing to give full meaning to all of its provisions, as required by the canons of statutory interpretation. As described above, the Proposal unlawfully contradicts the prohibition in subsection 6295(o)(1), and the mandate of subsection 62959o)(2), 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.") Similarly, DOE's Proposal deprives the words of subsection 6295(q) itself ("specify a level of energy use") of any meaning.

[5] This subsection might reasonably be described as the "pro-frontsliding rule."

[6] DOE acknowledges that its creation of new product classes constitutes the adoption of an amended standard through its reliance on subsection 6295(q), which by its terms only applies to a "new or amended energy conservation standard."

Further evidence against DOE's assertion that EPCA's anti-backsliding provision is somehow limited by EPCA'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 if the two provisions conflicted, which they do not, 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, a finding that a conflict exists would also require a finding that 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, contrary to DOE's, 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, through its Proposal, may not render the statute's anti-backsliding provision inoperative.

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 the 2011 ventless clothes dryer product class determination and prospective rulemaking regarding network-connected products. 85 Fed. Reg. at 49,306. While DOE is correct that subsection 6295(q) does not prohibit standards that account for technological advances, subsection 6295(o)(1) nonetheless prohibits the weakening of duly prescribed energy efficiency standards for covered products. Therefore, DOE must accommodate technological innovation within those bounds. 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, all clothes washers and dryers, regardless of cycle time, are subject to standards and the Proposal's new classes would result in lowered standards (and, for the foreseeable future, no standards at all).

E. DOE Unlawfully Attempts to Override Efficiency Standards Set By Congress

Perhaps the most remarkable feature of the Proposal is that DOE attempts to override energy efficiency standards set by Congress itself.

In section 6295(g)(9), Congress directly established energy and water efficiency standards for clothes washers:

> **(9)RESIDENTIAL CLOTHES WASHERS MANUFACTURED ON OR AFTER JANUARY 1, 2011.**
> **(A)**In general. - A top-loading or front-loading standard-size residential clothes washer manufactured on or after January 1, 2011, shall have
> **(i)**
> a Modified Energy Factor of at least 1.26 …

Congress proceeded to authorize DOE to amend those standards:

> **(B)**Amendment of standards.
> **(i)**In general -
>
> Not later than December 31, 2011, the Secretary shall publish a final rule determining whether to amend the standards in effect for clothes washers manufactured on or after January 1, 2015.

EPCA manifestly requires DOE to consider *strengthening*, not weakening, the standards initially set by Congress. That is exactly what DOE's subsequent regulations did—the current rule provides that top-loading standard size washers manufactured since 2018 shall have a Modified Energy Factor (MEF) of no less than 1.57, and front-loading standard size washers shall have a MEF of not less than 1.84. 10 CFR § 430.320(g)(4).

But in its Proposal, DOE states that fast-cycle washers "are not currently subject to energy or water conservation standards" – period. DOE apparently believes it can not only weaken its own regulations, but also repeal the minimum standards Congress initially set. DOE's belief is erroneous, and its action is unlawful.

F. <u>The Proposal Does Not Identify a "Performance-Related Feature" Properly Subject to Different Standards Under 42 U.S.C. § 6295(q)</u>

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 clothes washer or dryer cycle time qualifies as a "performance-related feature" under subsection 6295(q). The consumer utility of clothes washers and dryers is to clean and dry clothes. While shorter cycles may provide clean, dry clothes in less time, they do not provide additional distinct utility beyond their purpose of washing and drying clothes. 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 define the term "performance-related feature," its legislative history provides guidance for DOE's authority under the provision. The 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. 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 are 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 washer and dryer classes proposed by DOE provides precisely the same utility as normal washer and dryer classes—that is, clean and dry clothes. Thus, while a difference in cycle time is "a detectable difference," it does not suffice to justify a separate energy efficiency class and standard.

G. 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 – aside from the recently proposed dishwasher rulemaking - 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 in support of its Proposal provided clear boundaries for DOE's exercise of its authority under subsection 6295(q). 85 Fed. Reg. at 49,299. 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). In this Proposal, however, DOE seeks to create a product class distinction in the same situation where the water heater rulemaking refrained. Contrary to DOE's position in the

Proposal, all washers and dryers, regardless of cycle speed, provide the same consumer utility of clean and dry clothes, 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 (other than the recent proposal to create a new class of dishwasher based on cycle length, to which a number of State Attorneys General objected in comments).[7]

DOE states that it "previously determined in the context of residential clothes washers that cycle time warrants consideration of separate classes. See final standards rule at 77 FR 32308, 32319 (May 31, 2012)." 85 Fed. Reg. 49,299. However, that rulemaking 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 washers by putting those models out of sync with clothes dryer cycles and thereby reducing 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 the cycle time itself. *Id*. In addition, DOE determined "Since the efficiency levels of top-loading CCWs on the market do not overlap with those of front-loading clothes washers, a single energy efficiency standard applicable to both top-loading and front-loading CCWs would likely result in the elimination of top-loading clothes washers from the market." *Id* at 74,498.

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." 85 Fed. Reg. at 49,299. 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 cycle time. Most commonly, separate product classes

[7] *See* Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking (July 16, 2019), EERE-2018-BT-STD-0005, and 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).

are created for product subsets which offer a distinct consumer utility that other products of their type cannot provide. Short cycle times are insubstantial by comparison and do not qualify.

III. In Violation of NEPA and the APA, DOE Has Not Evaluated the Environmental Impacts of its Proposed Action

In its Proposal, DOE has stated that its proposed action is categorically excluded from review under NEPA, 42 U.S.C. § 4321 *et seq.*, pursuant to Categorical Exclusion A5 under 10 C.F.R. part 1021, subpart D. 85 Fed. Reg. at 49,310. DOE bases its statement on the demonstrably false assertion that the Proposal "would not result in any environmental impacts." 85 Fed. Reg. at 49,310. 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 factual basis, 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 not only the effect of the Rule's immediate grant of a complete exemption to energy efficiency standards for certain clothes washers and dryers, but the effect of a hypothetical future rulemaking that would set standards, less stringent than current standards, for the new class of short cycle clothes washers and dryers.[8] 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 F.3d 1016, 1025 (9th Cir. 2007) ("Rules are federal actions under the regulations published by

[8] The Proposal contemplates the possibility that "DOE would consider appropriate energy and water standards for such product classes, if adopted, in separate rulemakings," 85 Fed. Reg. at 49,297.

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 new classes of clothes washers and dryers that, according to DOE, are not subject to any regulatory energy or water conservation standards;[9] and (2) it serves as a predicate to possible future rulemakings that will establish lower energy conservation standards than are currently in place for existing classes of clothes washers and dryers.

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 pollution emissions released and water resources depleted.[10] Accordingly, DOE must undertake the necessary NEPA review of its rulemaking, and its failure to do so is arbitrary and capricious and in violation of federal law. *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, which reads as follows:

> A5 INTERPRETIVE RULEMAKINGS WITH NO CHANGE IN ENVIRONMENTAL EFFECT: Rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.

See 85 Fed. Reg. at 49,310.

This determination is based on the bald, unexplained statement that creating exemptions to the existing energy and water efficiency standards "would not result in any environmental impacts," 85 Fed. Reg. at 49,310, which flies in the face of DOE's previous findings, not to mention common sense. 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 two reasons.

First, 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. The current rules,10 C.F.R. § 430.32(g) and (h), establish energy and conservation standards for all classes of clothes washers and dryers (and water efficiency standards for washers). However, the Proposal seeks to amend these rules by adding new classes of clothes washers and dryers that are "not currently subject to energy [or water] conservation standards." Amending these rules by creating new product classes that are not subject to any

[9] As noted above, in DOE's proposed regulatory text contained in the Proposal, it states for both the new class of washers and the new class of dryers that they are not currently subject to energy conservation standards, and that the new class of washers is not subject to water conservation standards.85 Fed. Reg. at 49,311-12.
[10] *See infra*, discussion at Section IV.B.1.

conservation standards, or lower standards, where they were previously subject to such standards, would undoubtedly change the environmental effects of these rules.

In fact, in its Proposal, DOE recognizes that a clothes washer or dryer with shorter cycle times would require more energy and/or water use in order to satisfy the current standards. Thus, DOE argues, the current standards should not be applied. Specifically, DOE states, "Offering products with shorter cycle times . . . would require more per-cycle energy and/or water use than would be permitted under the current standards in order to maintain the same level of performance in other areas . . . ." 85 Fed. Reg. at 49,299.

In adopting the current standards for clothes washers, DOE stated that

> today's standards would have significant environmental benefits. The energy savings would result in cumulative greenhouse gas emission reductions of approximately 113 million metric tons (Mt) of carbon dioxide (CO2) from 2015 through 2044. During this period, the standards would also result in emissions reductions 3 of approximately 94.1 thousand tons of nitrogen oxides (NOX) and 0.269 ton of mercury (Hg).

Energy Conservation Standards for Residential Clothes Washers, 77 Fed. Reg. 32308, 32310 (May 31, 2012).

DOE used similar language when it adopted the current standards for clothes dryers, in a rule which also included standards for room air conditioners. *See Energy Conservation Standards for Residential Clothes Dryers and Room Air Conditioners; Final Rule*, 76 Fed Reg 22,454, 22,457 (April 21, 2011):

> In addition, today's standards would have significant environmental benefits. The energy savings would result in cumulative greenhouse gas emission reductions of approximately 36.1 million metric tons (Mt) of carbon dioxide (CO2) from 2014 to 2043. During this period, the standards would also result in emissions reductions of approximately 29.3 thousand tons of nitrogen oxides (NOX) and 0.073 ton of mercury (Hg).

Slightly more than half of the carbon dioxide reductions expected from that rule – 18.67 million metric tons - were attributed to the clothes dryer standards. In addition, the clothes dryer standards were estimated to save 15.14 thousand tons of nitrogen oxides (again, more than half the total from the rule) and 0.051 tons of mercury (over two-thirds of the rule's total). See 76 Fed. Reg. at 22,545 (which gives estimates for "TSL 4"; DOE "adopt[ed] TSL 4 for residential clothes dryers, *Id.* at 22,553).

It is self-evident that if strengthening emissions standards for clothes washers and dryers can have significant environmental benefits, establishing exemptions from such standards can have significant environmental harm. DOE's statement that the proposed exemptions "would not result in any environmental impacts," 85 Fed. Reg. at 49,310, is simply incorrect.

Establishing new classes of clothes washers and dryers that are subject to no standards or lower standards for an undetermined period would increase the amount of energy that clothes washers

and dryers could use.[11] Today, manufacturers cannot build and sell any washers or dryers that do not meet current efficiency standards; under the Proposal, they would be able to build and sell washers and dryers that are not subject to any standards. Rather than conserving resources or promoting energy and water efficiency, as the 2011 and 2012 standards for dryers and washers sought to do, this Proposal will increase the amount of GHG emissions and emissions of other pollutants. Thus, it would have a significantly detrimental effect on the environment and the Categorical Exclusion does not apply.

Second, DOE's invocation of this categorical exclusion is arbitrary and capricious, in violation of the APA. Under the APA, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). In addition, an agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Finally, where an agency changes its prior approach, it "must display awareness that it is changing position" and "show that there are good reasons for the new policy," including providing "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fed. Communications Comm'n v. Fox Television Stations, Inc*. *("Fox"*), 556 U.S. 502, 515-16 (2009).

In this case, by claiming a categorical exemption from NEPA, DOE has "entirely failed to consider an important aspect of the problem" – the increased energy use and pollution emissions that will naturally follow from the Proposal. It has "offered an explanation for its decision that runs counter to the evidence before the agency," – *i.e.,* the agency's previous finding that more stringent energy efficiency requirements reduce emissions of pollutants. It has "offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise": the statement that granting wide exemptions to energy efficiency standards will have no environmental impact is implausible on its face. And, in failing to acknowledge that it previously found that stringent energy efficiency standards have environmental benefits, it has

[11] 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 2020), last updated June 18, 2020, available at https://www.eia.gov/energyexplained/use-of-energy/
Within the residential sector, 5% of home energy use was for clothes washers and dryers, not including energy required to heat water. Specifically, total electricity consumption by residential clothes washers and dryers in 201 was 72 billion kWh (61 billion for dryers, 11 billion for washers), again, 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 30, 2020, available at https://www.eia.gov/tools/faqs/faq.php?id=96&t=3

failed to "display awareness that it is changing its position" when it now states that weakening those standards has no environmental impact.

IV. The Proposal Is Not Supported by DOE's Reasoning or the Rulemaking Record

As explained above, to justify the creation of new product classes for quick cycle clothes washers and dryers 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; (2) that the quick cycle function necessitates different energy standards than other classes of that product type; and (3) that the performance-related feature "justifies" weaker energy efficiency standards. 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. *State Farm,* 463 U.S. 29, 43 (1983). Where it has changed its position, DOE must meet a higher standard to justify its actions. *Fox*, 566 U.S. at 515-16. Because the Proposal fails to provide sufficient justification for any aspect of subsection 6295(q), 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

Subsection 6295(q(1)(B) provides that DOE can only designate "higher or lower" efficiency standards for product subcategories if those subcategories "have 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 will apply) to other products within such type (or class)." In order to demonstrate that quicker cycle times "justif[y] a higher or lower standard," DOE would need to demonstrate that manufacturers are prevented from building quicker-cycle washers and dryers by energy efficiency standards, and that weakening such standards will enable the manufacture of quicker-cycle washers and dryers.

DOE makes no such demonstration; instead, it relies on pure speculation. As to washers, DOE states:

> DOE *presumes* that certain manufacturers are currently implementing the shortest possible cycle times that enable a clothes washer to achieve satisfactory cleaning performance (and other aspects of clothes washer performance) while meeting the applicable energy and water conservation standards. *Based on this presumption*, the current energy conservation standards *may* be precluding manufacturers from bringing models to the market with substantially shorter cycle times.

85 Fed. Reg. at 49,305 (emphases added). As to dryers, DOE states:

> DOE's data indicate that vented electric standard-size and vented gas clothes dryers that comply with the current energy conservation standards exhibit cycle times of approximately 30 minutes or longer. Thus, *assuming* certain manufacturers are currently implementing the shortest possible cycle times that enable a clothes dryer to achieve satisfactory drying performance (and other aspects of clothes dryer performance) while

> meeting the applicable energy conservation standards, the standards may preclude manufacturers from offering consumers clothes dryers that provide the utility of cycle times shorter than 30 minutes.

85 Fed. Reg. at 49,306 (emphases added).

Moreover, DOE ignores evidence that contravenes its presumptions. For example, DOE's own test data show that there are currently (i.e., under today's energy efficiency standards) models of top-loading clothes washers that have cycle times of 29 and 27 minutes.[12] And, as the Appliance Standards Awareness Project explains in its comments on the Proposal, Consumer Reports data shows that historically, stronger energy efficiency standards have not resulted in increased cycle times for clothes washers. If *stronger* standards have not *increased* cycle times, there is no reason to "presume" that *weaker* standards will *decrease* cycle times. The Northwest Energy Efficiency Alliance, in comments it is submitting on this rulemaking, also points to evidence showing that it is technologically possible to improve the efficiency of both washers and dryers and simultaneously reduce cycle time

"Presumptions" and "assumptions" are not "satisfactory explanations," nor can they provide a "rational connection between the facts found and the choice made" – especially when the agency involved ignores evidence that contradicts its presumptions and assumptions. The Proposal therefore violates the APA.

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). As explained above, quick cycle times do not qualify as a "performance-related feature." Moreover, DOE's claim that the quick cycle function is a performance-related feature is contradicted by the record and inadequately supported by DOE's reasoning.

As the Northwest Energy Efficiency Alliance explains in the comments that it is submitting on this rulemaking, the quick-cycle options available on current washers are used relatively infrequently. (For washers, NEAA cites a study showing that consumers used a quick-cycle option only 8% of the time.) Meanwhile, NEAA states, there is high consumer demand for efficient machines. NEAA state that its market data for the Northwest region found that more than 60% of all washers sold were ENERGY STAR qualified.

As to dryers, NEAA states that consumers already have access to fast dryer cycles on current models, and explains that even though almost all dryers have a fast cycle (high heat) option, consumers most often choose the 'medium' setting on their dryers. Meanwhile, demand for energy efficient (ENERGY STAR) dryers is high.

Thus, the market for washers and dryers is one in which consumers are clamoring for energy savings – not speed.

[12] 85 Fed. Reg. at 49,301. Table II.1.

C. DOE Does Not Provide a Satisfactory Explanation, Let Alone a Justification, for Its Choice of the Specific Cycle Times that Allegedly Warrant Exemptions

To comply with 42 U.S.C. § (q)(1)(B), DOE must show that a performance-related feature "justifies" weaker energy efficiency standards. To comply with the APA, DOE is required to provide a "satisfactory explanation" for its actions and a "rational connection between the facts found and the choice made" supporting its conclusions. *State Farm*, 463 U.S. at 43. In this case, DOE provides no meaningful explanation or factual support for why the selected cutoff points (30 minutes for top-loading washers, 45 minutes for front-loading washers, and 30 minutes for dryers) distinguish products that provide a performance-related feature from those that do not.

As noted above, DOE states that its "data indicate that vented electric standard-size and vented gas clothes dryers that comply with the current energy conservation standards exhibit cycle times of approximately 30 minutes or longer." 85 Fed. Reg. at 49,306. DOE provides no data to support the proposition that a dryer with a cycle time of 29.5 minutes, as opposed to 30 minutes, provides additional consumer utility which justifies exemptions from efficiency standards.

Similarly, DOE states that

> DOE's data indicate that for standard-size top-loading units on the market, the shortest available cycle time when tested under Appendix J2 (the currently applicable test procedure) is approximately 30 minutes. The data also indicate that for standard-size front-loading units on the market, the shortest available cycle time when tested under Appendix J2 is approximately 45 minutes.

85 Fed. Reg. at 49,304. Again, DOE provides no data to support the proposition that a top-loading washer with a cycle time of 29.5 minutes, as opposed to 30 minutes, or a front-loading washer with a cycle time of 44.5 minutes, as opposed to 45 minutes, provides additional consumer utility which justifies exemptions from efficiency standards.

Accordingly, DOE's choice of those cutoff points, and therefore the entire Proposal, is arbitrary and capricious and in violation of the APA. And DOE fails to "justify" the exemptions it proposes, in violation of subsection 6295(q)(1)(B).

V. CONCLUSION

For the reasons set forth above, the undersigned Attorneys General, and the Corporation Counsel of the City of New York, urge DOE to withdraw the Proposal and comply with EPCA, the APA, and NEPA.

Respectfully submitted,

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