Alliance for Water Efficiency
Appliance Standards Awareness Project
American Council for an Energy-Efficient Economy
American Water Works Association
Association of Metropolitan Water Agencies
Ceres
Consumer Federation of America
Earthjustice
Natural Resources Defense Council

July 15, 2025

Mr. David Taggart
U.S. Department of Energy
Office of the General Counsel, GC-1
1000 Independence Avenue SW
Washington, DC 20585

RE: EERE-2025-BT-STD-0008: Water Conservation Standards for Commercial Prerinse Spray Valves

Dear Mr. Taggart:

This letter constitutes the comments of the Alliance for Water Efficiency (AWE), Appliance Standards Awareness Project (ASAP), American Council for an Energy-Efficient Economy (ACEEE), American Water Works Association (AWWA), Association of Metropolitan Water Agencies (AMWA), Ceres, Consumer Federation of America (CFA), Earthjustice, and Natural Resources Defense Council (NRDC) on the notice of proposed rulemaking (NOPR) for Water Conservation Standards for Commercial Prerinse Spray Valves (CPSVs). 90 Fed. Reg. 20,935 (May 16, 2025).[1] We appreciate the opportunity to provide input to the Department.

1. About the signatories

AWE is a nonprofit dedicated to advancing the efficient and sustainable use of water across North America. AWE advocates for water-efficient products and programs, develops cutting-edge research, and provides technical assistance to its diverse membership base. AWE partners with over 550 member organizations, providing benefits to local water utilities, businesses and industries, government agencies, universities, and professional associations.

ASAP advocates for appliance, equipment, and lighting standards that cut planet-warming emissions and other air pollution, save water, and reduce economic and environmental

[1] Relevant excerpts of documents cited below, except for statutes, regulations, published judicial decisions, and Federal Register notices, are provided in an appendix to these comments.

burdens for low- and moderate-income households. ASAP's steering committee includes representatives from environmental and efficiency nonprofits, consumer groups, the utility sector, and state government.

ACEEE, a nonprofit research organization, develops policies to reduce energy waste and combat climate change. Its independent analysis advances investments, programs, and behaviors that use energy more effectively and help build an equitable clean energy future.

Established in 1881, AWWA is the largest nonprofit, scientific and educational association dedicated to managing and treating water, the world's most vital resource. With approximately 50,000 members, AWWA provides solutions to improve public health, protect the environment, strengthen the economy and enhance our quality of life.

AMWA represents the largest publicly owned drinking water systems in the United States. AMWA member utilities collectively provide clean drinking water to over 160 million people across the nation.

Ceres builds a cleaner and more resilient economy by working alongside over 80 major businesses to support clean energy policies at the state and national level.

CFA is an association of more than 250 non-profit consumer and cooperative groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education.

Earthjustice is the premier nonprofit public interest environmental law organization, wielding the power of law and the strength of partnership to protect people's health, to preserve magnificent places and wildlife, to advance clean energy, and to combat climate change.

NRDC is an international, non-profit environmental organization with more than three million members and online activists. NRDC advocates to reduce greenhouse gas emissions that cause climate change, increase the resilience of communities to the unavoidable impacts of climate change, and safeguard human health for all. NRDC advocates for clean energy policies that will build the U.S. economy, reduce air pollution, help keep electricity prices affordable and strengthen the electricity grid.

2. Introduction

Energy and water conservation standards save consumers significant amounts of money by reducing utility bills. According to DOE, efficiency standards reduced Americans' utility bills by $105 billion in 2024 alone, with a typical household saving $576.[2] Efficiency standards also saved 6.0 quadrillion Btus ("quads") of primary energy in 2024, which is equivalent to 6.5% of total U.S. annual energy consumption, and 1.7 trillion gallons of

[2] U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, Appliance Standards Fact Sheet (March 2025). www.energy.gov/sites/default/files/2025-03/Appliance%20Standards%20Fact%20Sheet-02.pdf.

water, which is equivalent to approximately 12% of the annual water withdrawals for public supply in the United States in 2015.[3] These tremendous savings can help avoid costly buildout of new infrastructure like water treatment facilities, power plants, and power lines, which would further increase water and energy prices.

In the NOPR, DOE is proposing to rescind the amended water use standards for CPSVs, weakening the standards for these products by returning the requirements to older standards established by Congress. This action does not stand on its own. It is one of 17 proposals issued the same day to roll back efficiency standards.

Below we describe how DOE's proposal would raise costs for restaurants and other businesses; increase water and energy waste and exacerbate drought; hamper population growth, business expansion, and real estate development; upend water and wastewater utility planning; increase emissions that harm human health and the environment; and undermine manufacturer investments. We also outline the numerous reasons why DOE's proposal is unlawful. DOE should therefore withdraw the proposed rule.

3. DOE's proposal would increase costs for restaurants. Many restaurants struggle to turn a profit, which makes managing water and energy costs especially important. According to the U.S. Environmental Protection Agency, CPSVs can account for nearly one-third of the water used in a typical commercial kitchen.[4]

Reverting to the statutory CPSV standard, as proposed by DOE, would increase costs for restaurants and other businesses that purchase the less efficient products. In the June 2016 final rule, DOE found that the current standards save businesses who purchase the most common CPSV type (Product Class 3 [>8.0 ozf]) an average of $713 over the life of the product compared to a baseline model at the time of the rulemaking (i.e., a model that just meets the statutory standards);[5] there is no upfront cost increase associated with the standards. In other words, reverting to the statutory standard could increase costs for restaurants over the life of a common CPSV by $713. DOE also found in the June 2016 final rule that the standards for CPSVs will provide net present value (NPV) savings for purchasers of between $0.72 billion and $1.48 billion over 30 years of sales.[6] In other words, DOE's current proposal could cost restaurants and other businesses hundreds of millions of dollars over the coming decades.

These higher costs for restaurants would come at a time when water rates are rising. Between 2008 and 2021, average annual water utility rates throughout the U.S. grew 3.0% faster than inflation for water utilities and 3.2% faster than inflation for wastewater

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[3] Lawrence Berkeley National Laboratory, Energy and economic impacts of U.S. federal energy and water conservation standards adopted from 1987 through 2024 Report (January 2025). eta-publications.lbl.gov/sites/default/files/2025-01/standards_1987-2024_impacts_overview3.pdf. p. 4.
[4] www.epa.gov/sites/default/files/2019-04/documents/ws-products-prsv_updated_fact_sheet.pdf.
[5] Table V.6. 81 Fed. Reg. 4,781 (January 27, 2016). Calculated as the difference between the total life-cycle cost (LCC) at the baseline efficiency level ($3,643) and the LCC at the standard level adopted, TSL 3 ($2,929).
[6] 81 Fed. Reg. 4750 (January 27, 2016). NPV = present value of operating cost savings – present value of total incremental installed costs; range corresponds to 7% and 3% discount rates, respectively.

utilities.[7] Water utility rates are projected to continue to increase across the country due to aging infrastructure, increases in capital and operating costs, increased water quality compliance challenges, and decreased federal funding for local utilities.[8] EPA estimates that the cost to fund clean water and drinking water projects nationwide over the next 20 years will be approximately $1.25 trillion.[9] This increased spending on water infrastructure will only drive rates higher.

While some may assert that customers are best able to decide which CPSV product they want, this ignores the fact that many customers won't know that they are buying a less water-efficient product nor that it would increase their water and energy bills. Even if customers are aware, plumbing fixtures like CPSVs often need to be purchased immediately to replace a broken product. In this scenario, customers will purchase what is available locally, which may not include efficient models. Efficiency standards are therefore an important policy tool to protect purchasers.

4. DOE's proposal would increase water and energy waste. DOE estimated that the water efficiency standards finalized in the June 2016 final rule for CPSVs will cumulatively save about 120 billion gallons of water over 30 years of product sales.[10] DOE also found that the standards will cumulatively save about 0.1 quads of energy.[11] By reverting to the statutory standards, DOE's current proposal threatens those savings.

5. DOE's proposal would undermine "water abundance." DOE's NOPR states that "This new policy would support….water abundance." In reality, the proposal to allow the sale of less water-efficient CPSVs could exacerbate water scarcity and water unaffordability. For example, based on U.S. EPA estimates, a typical commercial kitchen that switches to a less efficient 1.6 gpm CPSV allowed under this proposal would increase water use by more than 7,000 gallons per year[12] – nearly enough to fill an 18-foot diameter above ground swimming pool.

As a local example, Phoenix is estimated to have about 3600 restaurants.[13] Assuming each restaurant has at least one CPSV that complies with the current standard and switches to a less efficient 1.6 gpm CPSV, annual water use would increase by approximately 25

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[7] Pacific Northwest National Laboratory, Water and Wastewater Annual Price Escalation Rates for Selected Cities Across the United States: 2023 Edition (March 2023). www.osti.gov/servlets/purl/1975260. p. ii.
[8] National Association of Clean Water Agencies (NACWA), The Growing U.S. Water Affordability Challenge and the Need for Federal Low-Income Water Customer Assistance Funding (December 2022). www.nacwa.org/docs/default-source/resources---public/nacwa-affordability-report_dec22.pdf?sfvrsn=1ab5c761_2. p. 1.
[9] U.S. Environmental Protection Agency (EPA), Water Affordability Needs Assessment: Report to Congress (December 2024), www.epa.gov/system/files/documents/2024-12/water-affordability-needs-assessment.pdf. p. 5.
[10] 81 Fed. Reg. 4,750 (January 27, 2016).
[11] *Id*.
[12] EPA, High-Efficiency Pre-Rinse Spray Valves Fact Sheet (April 2019). www.epa.gov/sites/default/files/2019-04/documents/ws-products-prsv_updated_fact_sheet.pdf.
[13] List of restaurants in Phoenix. rentechdigital.com/smartscraper/business-report-details/united-states/arizona/list-of-restaurants-in-phoenix.

million gallons per year in Phoenix. To put this in perspective at the state level, Texas lawmakers recently sent to voters a proposal to spend $20 billion for various strategies to shore up the state's dwindling water supplies.[14] DOE's proposals to weaken water efficiency standards for CPSVs and other products only adds to the price tag.

6. DOE's proposal would exacerbate drought. Across the United States, droughts have become more frequent and longer term as weather patterns have changed. For example, in October 2024, the United States Drought Monitor found that "Abnormal dryness and drought" affected over 242 million people across the United States including Puerto Rico—about 77.8% of the nation's population. This was the most widespread coverage since the Drought Monitor began 25 years ago.[15] Making matters worse, the changing climate has led to drier soils that result in less rainwater flowing into rivers, lakes and reservoirs that supply water for many towns and farms.

In order to ensure affordable, dependable water supplies, communities go to great lengths to encourage residents and businesses to use less water, especially during drought. Their challenges will be even greater if DOE's proposals to weaken federal water efficiency standards for CPSVs and other products are implemented.

7. DOE's proposal would hamper population growth, business expansion, and real estate development by exacerbating water scarcity. The lack of dependable, affordable water supplies has already become an impediment to growth in some communities,[16] and that risk will only increase if federal standards are weakened and the marketplace turns to less water-efficient products. Communities may struggle to meet the increased demand for water, particularly in states already facing water scarcity alongside rapid growth, including Texas, Florida and Arizona. Water-efficient products, like the 2019 compliant CPSVs, help cities grow without needing significantly more water and the corresponding wastewater services. For example, Phoenix grew from about 1 million people to more than 1.6 million between 1991 and 2020, with only a modest increase in water use.[17] Increased demand for water resulting from weakened federal standards could force communities to tap local rate payers for expensive new water and wastewater infrastructure.

8. DOE's proposal would upend water and wastewater utility planning. Water and wastewater utilities regularly plan to assure safe drinking water and effective sanitation.

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[14] Texas Tribune, A $20 billion effort to avoid calamity: Here's what Texas lawmakers did to save the state's water supply (June 2025). www.texastribune.org/2025/06/12/water-texas-legislation/.

[15] National Centers for Environmental Information, National Oceanic and Atmospheric Administration, U.S. Drought: Weekly Report for October 29, 2024 (Oct. 29, 2024). www.ncei.noaa.gov/news/us-drought-weekly-report-october-29-2024.

[16] Reuters, Arizona restricts Phoenix home construction amid water shortage (June 2023). www.reuters.com/world/us/arizona-restricts-phoenix-home-construction-amid-water-shortage-2023-06-02/.

[17] City of Phoenix, Historical Population and Water Use. www.phoenix.gov/administration/departments/waterservices/supply-conservation/save-water/historical-population.html.

Part of that planning involves assuring adequate infrastructure and treatment capacity for both services, and reasonable assumptions for both new development and existing development must be made. The introduction of less efficient products in residential and commercial settings where standards have been in place for years upends these plans and over time could lead to the need for additional infrastructure at considerable cost to those communities. Additionally, introducing less efficient products undermines utility conservation programs designed to assist customers and assure adequate supplies. These are challenges that would have been apparent if DOE had performed an adequate analysis of the impacts of this decision.

9. DOE's proposal would increase emissions that harm human health and the environment. In the January 2016 final rule, DOE found that the standards will result in cumulative emissions reductions over 30 years of sales of 5.87 million metric tons of carbon dioxide, 1.79 thousand tons of sulfur dioxide, 14.7 thousand tons of nitrogen oxides, 47.37 thousand tons of methane, 0.04 thousand tons of nitrous oxide, and 0.01 tons of mercury. In other words, rescinding the standards for CPSVs would increase emissions of these harmful pollutants.

10. DOE's proposal would undermine manufacturer investments. Manufacturers have been required to comply with the standards in the January 2016 final rule since January 2019. To meet the standards, manufacturers likely incurred conversion costs including capital costs (one-time investments in plant, property, and equipment) and product conversion costs (research and development, testing, and marketing costs). DOE estimated that manufacturers would incur total conversion costs of $1.0 million to $1.6 million to comply with the current standards for CPSVs.[18] These investments would be undermined by DOE's proposal to revert to the statutory standards. Furthermore, the manufacturers that made these investments and who sell products in the U.S. could be undercut by manufacturers that currently serve other markets.

11. DOE lacks the authority to rescind standards. The proposed rule states that DOE is proposing to "rescind" the amended water conservation standards for CPSVs. EPCA authorizes DOE to promulgate new standards and to prescribe amended standards.[19] But no provision in EPCA authorizes DOE to rescind or repeal existing standards.[20] That is true even if DOE frets that the existing standard might have been unlawful, or holds a general preference for reducing regulatory burdens. DOE cannot "construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion."[21] Congress specified what analysis DOE must complete, and what determinations it must make, to change a standard. DOE must comply with those limitations even if its motivation is a belief that the current standard was mistaken.

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[18] Tables V.12, V.13. 81 Fed. Reg. 4,783 (January 27, 2016).

[19] 42 U.S.C. § 6295(a)(2), (*l*), (m), (n), (o), & (p).

[20] *See also NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (holding that under EPCA DOE lacks any "inherent power to reconsider a final rule following its announcement in the Federal Register.").

[21] *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008). In *New Jersey*, EPA purported to revoke a listing because it was inconsistent with the statutory limits on listing.

12. The proposed rule fails to identify the statutory authority under which the Department is acting. To the extent DOE believes it is exercising some lawful authority to rescind a standard, the proposed rule must notify the public of that legal authority.[22] DOE has ignored this obligation. Nowhere in the proposed rule does the Department identify the source of statutory authority it is relying on to rescind the amended water flow rate requirements for CPSVs. The proposed rule's failure to "include … [a] reference to the legal authority under which the rule is proposed" denies the public a meaningful opportunity to comment on the proposed action.[23]

If DOE is instead prescribing an amended standard for CPSVs at the level contained in 42 U.S.C. § 6295(dd), it still must identify the section of EPCA that it is relying on and explain how it has complied with the requirements of that provision.

13. The CPSV standard is an energy conservation standard. DOE's NOPR appears to misunderstand, in a fundamental way, the nature of DOE's CPSV standards.

First, CPSVs are faucets, a product for which DOE is expressly allowed to set standards for water consumption. A "faucet," in ordinary English, simply means "a fixture for drawing or regulating the flow of liquid especially from a pipe."[24] That is of course what CPSVs do. Despite the name "commercial pre-rinse spray valve," they are not simply valves; a CPSV is a product that is designed to draw water from a supply pipe, typically at a sink, and dispense it, often as a component of an overall faucet. It is commonplace for these assemblies to be called faucets.[25] The 2005 amendments to EPCA declared a standard specifically for the CPSV subcategory of faucets, as a Congress is entitled to do. But it does not follow that CPSVs are distinct and separate, segregated from being faucets simply because Congress determined there should be a different and tighter standard for this particular product class within faucets.

Second, even if CPSVs were not faucets, DOE's standards for CPSVs are also inherently *energy* conservation standards even though they are expressed in terms of the flow of water. That is because the nature of CPSVs is to use hot, pressurized water to achieve mechanical outcomes, namely the removal of food from dishes. The hot water is the energy source for the work that CPSVs do. EPCA allows DOE to treat energy sources besides electricity and fossil fuels as "energy,"[26] and the CPSV rulemaking did just that. DOE focused its CPSV rulemakings on the *energy* to be saved by revising the CPSV standards. As DOE said in 2016,"amended energy conservation standards for these

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[22] 5 U.S.C. § 553(b)(2).

[23] 5 U.S.C. § 553(b)(2); *see also* U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 29 (1947) (explaining that "[t]he reference [to legal authority] must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule"); *Glob. Van Lines, Inc. v. I.C.C.*, 714 F.2d 1290, 1297–98 (5th Cir. 1983) (explaining that the agency's "failure to articulate the legal basis" for its rule "effectively deprived the petitioners of *any* opportunity to present comments").

[24] www.merriam-webster.com/dictionary/faucet.

[25] See, for example: www.regencyequipment.com/product/600PRD12/#productOverview.

[26] 42 U.S.C. § 6291(3).

products would result in significant conservation of *energy*."[27] DOE calculated the energy savings based on the energy content of the hot water dispensed by CPSVs.[28] That the CPSV standard reduces water use does not erase its character as an *energy* conservation standard, any more than the consideration of health benefits in a given energy conservation standard would make it a health regulation.

Further demonstrating its intent to authorize amended energy conservation standards for CPSVs, Congress included the CPSV standards under 42 U.S.C. § 6295. The purposes of 42 U.S.C. § 6295 are to provide energy conservation standards for covered products and to authorize amended or new standards for covered products.[29]

Finally, DOE has for nearly two decades treated standards for CPSVs as energy conservation standards. DOE does not explain or even acknowledge that it is changing its approach.[30] Both when it incorporated the initial statutory standards into the Code of Federal Regulations and when it amended those initial standards, DOE based those actions on the conception that the standards for CPSVs are "energy conservation standards."[31]

14. The proposal would violate the anti-backsliding provision in EPCA. Section 6295(o)(1) prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use, or, in the case of . . . faucets, . . . water use . . . of a covered product." 42 U.S.C. § 6295(o)(1). The proposed rule suggests a "tentative[] determin[ation]" that this provision does not apply, but that tentative notion is mistaken.

First, as discussed above, CPSVs are faucets. So DOE cannot amend the applicable standard in a way that would increase the maximum allowable water use for this product. The proposed change would do exactly that. Characterizing it as a rescission of the standard is irrelevant, because the ordinary English meaning of "amended standard" is simply a standard that has changed. The current standard for CPSVs allows water flow up to 1.28 gpm (for the highest-force class), and allowing flows up to 1.6 gpm would be a change in the standard.

Second, as noted above, the CPSV standard directly regulates energy, because DOE determined that the standard developed in 2016 would primarily save the energy content

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[27] 81 Fed. Reg. 4,748, 4,748 (Jan. 27, 2016) (emphasis added). Treating the hot water through a CPSV as *energy* use is not inconsistent with the statutory language that calls out four products for which an energy conservation standard can regulate water use. Those four products—showerheads, faucets in general, water closets, and urinals—use both hot and cold water, or for some only cold water. CPSVs, unlike other faucets (and unlike the other three types) ordinarily use hot water for their function. So it was proper and permissible for DOE to regulate that energy consumption.

[28] *Id.* at 4,764.

[29] 42 U.S.C. § 6295(a).

[30] *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) ("a lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law").

[31] *See* 70 Fed. Reg. 60,407, 60418 (Oct. 18, 2005); 81 Fed. Reg. 4,748 (Jan. 27, 2016).

of the hot water consumed by CPSVs. DOE's current NOPR would revise the standard to let CPSVs consume more hot water, and thus more energy.

15. DOE fails to explain the legal relevance of its "policy of reducing regulatory burdens wherever possible." The considerations governing DOE's amendment of energy conservation standards are set out in EPCA. DOE is not free to ignore the statutory criteria to pursue the administration's policy of "maximally reducing regulatory burdens." Even if the policy were a permissible "other factor" under subsection 6295(o)(2)(B)(i)(VII), the NOPR fails to explain how the new policy fits into EPCA's criteria for the amendment of standards.

16. DOE's alleged policy constraining the coverage of industrial equipment cannot justify the proposed action. DOE alleges that it has established a policy of "classifying industrial equipment as covered equipment only if energy conservation standards will significantly increase the energy resources of the nation, without compromising the performance of industrial products." For reasons that the NOPR does not provide, DOE apparently believes this policy is relevant to the status of CPSVs and that CPSVs do not satisfy the policy.

First, there is no reason why a policy constraining the classification of industrial equipment as covered equipment has any application to an amendment to the standards for CPSVs. By providing for energy conservation standards for CPSVs in 42 U.S.C. § 6295, Congress clarified they are covered products, not industrial equipment.[32] Other provisions of EPCA confirm that CPSVs are a covered product. For example, 42 U.S.C. § 6294(a)(5)(A) refers to the "covered products" described in 42 USC 6295(dd), which covers CPSVs. Similarly, 42 U.S.C. § 6295(ii)(2) provides for the onset of preemption for CPSVs, but preemption applies only to covered products under 42 U.S.C. § 6297(c)).

Even if the alleged policy were somehow relevant, DOE has not provided the public with notice and an opportunity to comment on the policy. DOE has not explained its reasons for adopting the policy, nor how the policy aligns with EPCA's provisions governing DOE's coverage of industrial equipment.

The alleged policy also departs from DOE's Process Rule. The Process Rule does not apply any such policy to DOE's coverage determinations or amendments to standards for covered products or commercial equipment.[33] The NOPR does not even acknowledge this conflict with the Process Rule, much less address it.

Finally, DOE provides no support for its claim that CPSVs do not satisfy the policy's threshold for coverage. In fact, efficient CPSVs save significant amounts of energy and water while performing well. Efficient CPSVs meeting the current standards provide the same spray force as less efficient products (as insured by DOE's product classes, which are based on spray force) and thus perform effectively to remove food waste from dishes.

[32] The purposes of 42 U.S.C. § 6295 are to provide energy conservation standards for covered products and to authorize amended or new standards for covered products. 42 U.S.C. § 6295(a).
[33] *See* 10 C.F.R. Pt. 430, Subpt. C. Appx. A.

For example, spray hole design improvements are used in efficient CPSVs to reduce water usage while maintaining spray force performance.

17. DOE must determine that the proposed revision will be the standard that achieves the "maximum improvement" in water and energy efficiency that is "technologically feasible and economically justified." The NOPR asserts that the existing standards are unlawful, are not economically justified, and are "inconsistent with the policy of maximally reducing regulatory burdens." None of these notions is a legitimate rationale for amending a standard under EPCA. The NOPR never explains in what way DOE believes the current regulations are unlawful, nor does it explain what relevance that would have for the action it is proposing here. The NOPR also leaves unexplained DOE's assertion that the existing standards are not economically justified, but even if that were true, it would have no direct bearing on the decision-making process prescribed by EPCA. Congress stated explicitly what DOE must determine before amending a standard. The standard resulting from the change must "be designed to achieve the maximum improvement in . . . water efficiency, which the Secretary determines is technologically feasible and economically justified."[34] DOE must assess the benefits and burdens of the *amended* standard, not the existing one.

To make the change that it has proposed, DOE must determine that the amended standard satisfies the criteria in section 6295(o)(2)(A). DOE cannot show the proposed amendment would achieve the greatest water and energy efficiency that is technologically feasible and economically justified. Certainly, the existing standard is technologically feasible; the marketplace is rife with products that comply with the existing standard. The revised standard would allow more water and energy use than needed for feasible products. And the revised standard would not be economically justified. To the contrary, revising the standard would force manufacturers to undertake expensive product development projects, without generating any significant user benefit. Moreover, DOE has provided no evidence of what the supposed economic benefit from the revision would be. A political preference for reduced regulation is not inherently an economic benefit; if DOE has some evidence that the revised standard would actually generate economic benefits it must put that evidence before the public for comment.

18. The NOPR misinterprets section 6295(p)(1). Section 6295(p)(1) requires DOE, in a proposed rule, to "determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered products." (i.e. "max-tech"). As explained below, DOE has not fulfilled this requirement. Of course, EPCA does not require that DOE always select the max-tech standard level, and the last sentence of subsection 6295(p)(1) requires DOE to provide its reasons in the proposed rule for not selecting max-tech. The NOPR appears to assume wrongly that 6295(p)(1) is the only standard it need apply – that so long as DOE can explain why it is not implementing max-tech that concludes the statutory decisionmaking process. But the fact that DOE is not choosing to implement the max-tech standard does not relieve DOE from

[34] 42 U.S.C. § 6295(o)(2)(A).

its obligation to fulfill the requirement of section 6295(o)(2)(A). That section requires that any new or amended standard be "designed to achieve the maximum improvement in energy efficiency…which the Secretary determines is technologically feasible and economically justified."

19. The proposed rule fails to determine "max-tech" as required by 42 U.S.C. § 6295(p)(1). Subsection 6295(p)(1) provides:

> A proposed rule which prescribes an amended or new energy conservation standard or prescribes no amendment or no new standard for a type (or class) of covered products shall be published in the Federal Register. In prescribing any such proposed rule with respect to a standard, *the Secretary shall determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for each type (or class) of covered products*. If such standard is not designed to achieve such efficiency or use, the Secretary shall state in the proposed rule the reasons therefor.

This provision requires the Secretary, at the proposed rule stage, to determine the maximum improvement in energy efficiency that is technologically feasible. *See* 10 C.F.R. § Pt. 430, Subpt. C, App. A ("As required by 42 U.S.C. 6295(p)(1) of EPCA, the NOPR also will describe the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards."). DOE colloquially refers to this maximum threshold as "max tech."[35] Of course, DOE is not obligated to select the max-tech efficiency level for every standard, and very frequently does not. The last sentence of section (p)(1) requires DOE to provide its reasons if it declines to set a standard based on max-tech.

The NOPR appears to assume wrongly that 6295(p)(1) is the only standard it need apply – that so long as DOE can explain why it is not implementing max-tech that concludes the statutory decisionmaking process. But the fact that DOE is not choosing to implement the max-tech standard does not relieve DOE from its obligation to fulfill the requirement of section 6295(o)(2)(A). As the D.C. Circuit has explained, EPCA "establishes a clear decisionmaking procedure,"[36] pursuant to which "DOE must first identify, for all product types or classes, the maximum improvement in energy efficiency that is technologically feasible."[37] In the proposed rule, DOE has ignored that obligation entirely. Indeed, the proposed rule contains no discussion of CPSV technology at all. This omission is not one that DOE can remedy at the final rule stage. Congress specified that the determination of max-tech must be in the "proposed rule."[38] DOE may not "ignore the decisionmaking

[35] *See, e.g.,* Energy Conservation Program: Energy Conservation Standards for Dedicated Purpose Pool Pump Motors, 88 Fed. Reg. 66,966, 66,978 (Sept. 28, 2023).
[36] *NRDC v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985).
[37] *Id*. at 1391 – 92.
[38] 42 U.S.C. § 6295(p)(1).

procedure Congress specifically mandated because the agency thinks it can design a better procedure."[39]

20. DOE has failed to present any evidence to support its proposed rule. Even if it were otherwise permissible for DOE to pursue the proposed action, the NOPR does not provide a rational basis for doing so. For an agency action to withstand judicial review, the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[40] This requirement applies in equal force when an agency, like DOE here, is proposing to rescind earlier rules that were themselves supported by substantial evidence. When an agency reverses itself, it must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy,"[41] a category that includes the technical and economic data that was presented to justify the existing standards.

In the NOPR, DOE has failed to provide any data or analysis to support its proposal. Again, per section 6295(o)(2)(A), DOE must establish that its proposed standard represents the "maximum improvement in energy efficiency" that is "technologically feasible and economically justified." The NOPR provides no information at all regarding CPSV technology or the alternative efficiency levels that might have been considered, either at the max-tech level or below. Nor does the NOPR provide any information to support the conclusion that its proposed standard is "economically justified." Section 6295(o)(2)(B) provides that, when evaluating "whether a standard is economically justified" DOE must to the maximum extent practicable consider:

(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;

(II) the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;

(III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

(IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

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[39] *NRDC*, 768 F.2d at 1396.

[40] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also id*. (a rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency").

[41] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

(V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(VI) the need for national energy and water conservation; and

(VII) other factors the Secretary considers relevant.

The NOPR does not consider any of these factors, even on a preliminary basis.

Nor has DOE provided any explanation for disregarding the analysis and data it presented in its 2016 final rule. That rule demonstrated that increasing efficiency requirements above the levels DOE now proposes to reinstate was warranted. The data and analysis presented, which DOE ignores here, certainly does not support the conclusion that prescribing an amended standard at the 2005 level represents the "maximum improvement in energy efficiency" that is "technologically feasible and economically justified."

When DOE finalized the current standards for CPSVs in 2016, the Department found that the average LCC savings were $547 for the one affected product class and that no purchasers would be negatively impacted.[42] DOE further estimated that the total NPV savings for are $720-1,480 million, and that the standards will save about 120 billion gallons of water and 0.1 quads of energy.[43] The savings for consumers vastly outweigh the costs to manufacturers; DOE estimated that the NPV savings outweigh the maximum estimated loss of industry net present value (INPV) by a factor of 650.[44] DOE concluded that the levels adopted represent the maximum improvement in energy efficiency that is technologically feasible and economically justified.

21. DOE's complete failure to substantiate its factual claims means that it must issue a new proposal for public comment if it wishes to proceed. Agencies must present critical factual material at the proposed rule stage in order to ensure a meaningful opportunity for public comment.[45] When it has new or revised data that it wants to rely on that arises after the publication of a NOPR, DOE will often issue a Notification of Data Availability and Request for Comment in order to fulfill this requirement.[46]

In the NOPR, DOE has provided no evidence. Thus, any evidence relied upon at the final rule stage will necessarily be both new and critical to the ultimate decision. Any such critical factual material must be made available for public comment before DOE issues a

[42] 81 Fed. Reg. 4,749 (January 27, 2016). DOE estimated that all shipments already meet the finalized standards for Product Classes 1 and 2 and that there was no upfront cost increase for Product Class 3.
[43] 81 Fed. Reg. 4,750 (January 27, 2016).
[44] Based on the NPV savings using the more conservative 7% discount rate ($720 million) and the maximum estimated loss of INPV of $1.2 million at TSL 3. Ibid.
[45] See Ass'n of Data Processing Serv. Organizations, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984)(Scalia, J.) ("the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation."); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995) ("Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment[.]").
[46] *See, e.g.*, Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters, 89 Fed. Reg. 59,692 (July 23, 2024).

final rule. This obligation to accept further comment applies as well to any analysis conducted under the National Environmental Policy Act (NEPA), as described below.

22. DOE has failed to comply with the National Environmental Policy Act. The proposed rule fails to comply with the requirements of NEPA, which requires agencies to prepare detailed environmental analyses of major actions significantly affecting the quality of the environment.[47] Agencies may adopt categorical exclusions (CXs) to this requirement, but only for actions that do not "individually or cumulatively have a significant effect on the human environment."[48] Not only would the proposed rule itself have a significant effect on the human environment by rolling back energy savings, but this action must be considered cumulatively with the many other proposed rollbacks that have also been issued by DOE.[49]

Nor does the proposed rule meet DOE's own regulatory conditions for the applicability of CXs. It is DOE's burden to demonstrate why it believes a CX applies, and it must consider whether a nominally excluded action would nevertheless significantly affect the environment.[50] Indeed, as a predicate matter, DOE has an affirmative obligation, before applying a CX, to determine whether the unique circumstances of an action would lead to significant environmental effects.[51] DOE has offered no explanation of its reasoning on this point, despite that, as described below, the proposed rule would undo significant benefits to the environment. Instead, in the NOPR, DOE invites comment on the use of CX B5.1, which applies to "actions to conserve energy or water."

But the plain language of CX B5.1 demonstrates its inapplicability. This CX applies specifically for "*improvements* in appliance efficiency ratings" and "water *conservation*." It makes sense that this CX would ordinarily apply to EPCA rules, because EPCA requires that new or amended standards must improve energy and/or water efficiency. When DOE adopted this CX to complement its EPCA rulemaking activities, it emphasized the purpose of energy conservation, and it further specified that the CX does not apply for appliance efficiency standards that would "have the potential to cause a significant increase in energy consumption in a state or region."

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[47] 42 U.S.C § 4332(C);10 C.F.R. § 1021.213 (covering DOE rulemakings); *NRDC v. Herrington*, 768 F.2d 1355, 1429 – 33 (D.C. Cir. 1985) (holding a DOE rule promulgated under EPCA violated NEPA).

[48] Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956, 991 (9th Cir. 2023).

[49] *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) ("when several proposals . . . will have cumulative or synergistic environmental impact . . . their environmental consequences must be considered together"); *see also* Nat'l Env't. Pol'y Act Implementing Procs., 57 Fed. Reg. 15,122 (Apr. 24, 1992) ("DOE agrees that to be eligible for categorical exclusion, a class of actions must not individually or cumulatively have significant effects on the human environment").

[50] Pub. Employees for Env't. Responsibility v. Nat'l Park Serv., 605 F. Supp. 3d 28, 56 (D.D.C. 2022); *see also* California v. Norton, 311 F.3d 1162, 1176 (9th Cir. 2002) ("concern for adequate justification of the categorical exclusion is heightened because there is substantial evidence in the record that exceptions to the categorical exclusion are applicable").

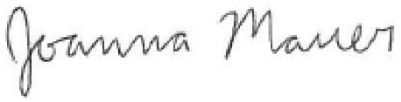
[51] 10 C.F.R. § 1021.410(b)(2); *see* Oak Ridge Env't. Peace Alliance v. Perry, 412 F. Supp. 3d 786, 846-47 (E.D. Tenn. 2019) (emphasizing mandatory nature of this portion of DOE's NEPA regulations and holding arbitrary and capricious the agency's issuance of sixty-nine CXs).

The proposed rule fails to meet the CX B5.1 requirements on numerous fronts. First, it is not "an action[s] to conserve energy or water" because it does the opposite: it would increase energy and water use. Second, it does not propose an improvement in efficiency ratings because it would result in a *diminishment* of efficiency ratings. Finally, it has the potential to cause a significant increase in energy consumption in a state or region because it would roll back the savings in energy consumption that provided part of the original justification for the standard.

Thank you for considering these comments.

Sincerely,

Ron Burke
President and CEO
Alliance for Water Efficiency



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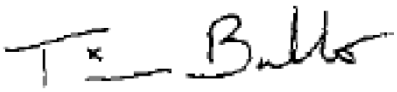

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