

December 9, 2024

**Department of Energy, Energy Conservation Program: Energy Conservation Standards
for Dishwashers, Residential Clothes Washers, and Consumer Clothes Washers
Notification of Proposed Confirmation of Withdrawal and Request for Comment
Docket Number EERE-2024-BT-STD-0002
89 FR 88,661 (November 8, 2024)**

Comments of the Competitive Enterprise Institute

I. SUMMARY

The Notification of Proposed Confirmation of Withdrawal and Request for Comment (proposal) seeks to terminate Department of Energy proceedings creating a separate regulatory category for dishwashers, clothes washers, and clothes dryers that can complete a cycle in a short amount of time. Doing so would ignore the consumer protections in the Energy Policy and Conservation Act as well as recent federal court precedent and should not be finalized. Instead, the agency should renew efforts to address the serious problem of lengthier cycle times caused by its previous appliance regulations by creating new energy conservation standards that are achievable by faster models.

II. INTRODUCTION

The Competitive Enterprise Institute (CEI) is a policy and analysis organization committed to advancing the principles of free markets and limited government. For over 20 years, we have participated in rulemakings conducted by the Department of Energy (DOE) regarding energy and water conservation standards for home appliances. Most recently, we have submitted comments for proposed DOE rules targeting residential furnaces, stoves, clothes washers, dishwashers, and water heaters.¹ Our focus has been on ensuring that the consumer

¹Comments of Free Market Organizations to the Department of Energy, Energy Conservation Standards for Consumer Furnaces, Notice of Proposed Rulemaking, October 5, 2022, <https://cei.org/wpcontent/uploads/2022/10/FurnaceComment-10-5-2022-final.pdf>; Comments of the Competitive Enterprise Institute to the Department of Energy, Energy Conservation Standards for Conventional Cooking Products, Notice of Proposed Rulemaking and Direct Final Rule, June 3, 2024, <https://cei.org/wp-content/uploads/2024/06/StovesComment-5-30-2024.pdf>; Comments of Free Market Organizations to the Department of Energy, Energy Conservation Standards for Dishwashers, July 18, 2023, <https://cei.org/wp-content/uploads/2023/07/dishwashers-7-18-2023.pdf>; Comments of the Competitive Enterprise Institute and

protections built into the underlying statute, the Energy and Policy Conservation Act of 1975 (EPCA), are given full weight by DOE in the rulemaking process.² In our view, these consumer protections have frequently been downplayed or ignored by the agency when setting excessively stringent appliance efficiency standards that raise overall costs and/or compromise product choice, features, performance, and reliability.

III. BACKGROUND

Of all the appliances targeted by DOE, dishwashers may well be the most overregulated, having been subjected to four rounds of successively tighter energy and water use limits since 1987. A fifth such standard was recently finalized and will impose even more stringent requirements beginning in 2027.

Past DOE standards have compromised dishwasher quality in several ways, including poorer cleaning performance and reduced reliability.³ Most relevant to the proposal here is the increase in the amount of time it takes to complete a normal load of dishes, from an hour or less in most pre-standards dishwashers to two or more in covered models. DOE has long acknowledged the causal association between its standards and longer cycle times, saying that “[t]o help compensate for the negative impact on cleaning performance associated with decreasing water use and water temperature, manufacturers will typically increase the cycle time.”⁴

It is for this reason that CEI in 2018 petitioned DOE to address the regulation-induced disappearance of dishwashers that can complete a normal load of dishes in an hour or less.⁵ Under EPCA, the agency is not allowed to set an appliance standard so stringent that it deprives consumers of any desired feature, and the cure is to promulgate a separate standard with a stringency level achievable by models that can provide that feature.⁶ The petition requested such a separate standard.

Michael Mannino to the Department of Energy, Energy Conservation Standards for Residential Clothes Washers, May 17, 2023, https://cei.org/regulatory_comments/comments-to-thedepartment-of-energy-on-its-proposed-clothes-washerregulation/; Comments of Free Market Organizations to the Department of Energy, Energy, Energy Conservation Standards for Consumer Water Heaters, Notice of Proposed Rulemaking, September 26, 2024, <https://cei.org/wpcontent/uploads/2023/09/WaterHeaters-9-2023.pdf>.

² 42 U.S.C. §6291 et seq.

³ Comments of Free Market Organizations to the Department of Energy, Energy Conservation Standards for Dishwashers, July 18, 2023, <https://cei.org/wp-content/uploads/2023/07/dishwashers-7-18-2023.pdf>.

⁴ Department of Energy, 2016-11-22 Final Rule Technical Support Document, p. 3-28, Nov. 22, 2016, <https://www.regulations.gov/document?D=EERE-2014-BT-STD-0021-0029>. (2016 DOE Technical Support Document).

⁵ Competitive Enterprise Institute, Petition to the Department of Energy for Rulemaking on a New Class of Fast Dishwashers, Mar. 21, 2018, <https://cei.org/sites/default/files/DOE%20Dishwasher%20Petition.pdf>. (CEI Petition).

⁶ 42 U.S.C. §6295(q).

DOE granted this petition and in 2020 finalized a rule establishing a separate category for dishwashers that can complete a normal cycle in an hour or less.⁷ The next step for the agency would have been to promulgate a rule setting the specific requirements for such dishwashers, but the entire effort was abruptly halted in 2022 when the agency repealed any separate category for fast dishwashers.⁸ This repeal rule was challenged in the U.S. Court of Appeals for the Fifth Circuit by 11 state attorneys general. CEI co-authored with FreedomWorks an amicus curiae brief filed in the case in opposition to the repeal rule and in support of the original 2020 final rule.⁹

On January 8, 2024, the decision in *Louisiana, et al. v. United States Dept. of Energy, et al. (Louisiana)*, granted the petition of the state attorneys general, remanded DOE’s 2022 repeal rule back to the agency, and provided a detailed rebuke of the agency’s reasoning as arbitrary and capricious.¹⁰

In response, the agency has promulgated the current proposal, which claims to address the court’s concerns while leaving unchanged its decision not to set a standard for fast dishwashers as well as for clothes washers and dryers.

IV. ARGUMENT

The proposal purports to address the issues raised by *Louisiana* about the 2022 repeal rule and provides some novel arguments against the necessity of a one-hour standard. None of these arguments are convincing. The agency is no closer than it was in 2022 to making an EPCA-compliant case for failing to set a separate category and standard for the faster appliances that were made unavailable as a consequence of its regulations. The following discussion focuses on dishwashers, but we believe there are equally valid reasons for setting separate new standards protecting faster clothes washers and dryers.

A. Dishwasher features other than cycle times don’t negate DOE’s obligation to set a one-hour standard.

⁷ Department of Energy, “Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers,” 85 FR 68,713 (Oct. 30, 2018), <https://www.federalregister.gov/documents/2020/10/30/2020-23765/energy-conservation-program-establishment-of-a-new-product-class-for-residential-dishwashers>.

⁸ Department of Energy, “Energy Conservation Program: Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers,” 87 FR 2,673 (Jan. 19, 2022), <https://www.federalregister.gov/documents/2022/01/19/2022-00833/energy-conservation-program-product-classes-for-residential-dishwashers-residential-clothes-washers>. (Repeal Rule).

⁹ Brief Amicus Curiae of the Competitive Enterprise Institute and FreedomWorks, in *Louisiana v. United States Department of Energy*, United States Court of Appeals for the Fifth Circuit, No. 22-60146, July 9, 2022, https://cei.org/legal_brief/cei-files-brief-of-amici-curiae-in-louisiana-v-department-of-energy/ (Amicus Brief).

¹⁰ *Louisiana v. United States Dept. of Energy*, 90 F.4th 461 (5th Cir. 2024), <https://ago.mo.gov/wp-content/uploads/Dishwashers-CA5-Opinion.pdf>.

The agency’s proposal concedes that cycle times for dishwashers are a performance-related feature under EPCA and that normal cycle times have increased substantially over the span that its standards have been imposed. But then it asserts that increased cycle times have not been caused by past standards (as the agency had previously conceded) but that they may be a side effect of creating quieter dishwashers.¹¹ The agency further speculates that consumers have been willing to give up the convenience of finishing a normal load in a hour for quieter operation and that there is no dissatisfaction over the longer cycle times. This argument was not raised in DOE’s 2022 repeal rule.

Even AHAM and Whirlpool, who oppose short-cycle dishwashers, note that “energy conservation standards beyond EL 1 will cause rebound consumer behavior, such as running the dishwasher more than once to reach the desired cleanliness, re-rinsing dishes before placing them in the dishwasher, or handwashing, all of which undercut projected energy and water savings.” 89 FR 31435. AHAM acknowledged “that consumers are already hesitant to use their dishwashers for reasons not yet known” to AHAM. *Id.* This defeats the baseless assertions by AHAM that “consumers are satisfied with current cycle times” and that “consumers are choosing to wash their dishes by hand because of perceived longer cycle times.”

The 2020 University of Michigan study that AHAM cites shows that 67% of consumers prewash their dishes, demonstrating a lack of confidence in the performance of their dishwashers. How much energy does that prewashing use because current standards are too strict? Some of the studies AHAM claims show that handwashing was due to low consumer knowledge were specifically talking about countries other than the United States.¹² DOE should be careful not to use studies that specifically talk about countries other than the United States to make claims about the United States.

CEI is glad that DOE has recognized that cleaning performance can lead consumers to wash dishes multiple times and has tried to establish a minimum level of cleaning performance. But a minimum level of performance does not mean that consumers don’t desire dishwashers that provide excellent cleaning performance and not barely beat the minimums. DOE should allow manufacturers to exceed the minimums. Additionally, DOE continues to ignore the handwashing that occurs due to long cycle times.

DOE concedes that it has not previously tested for dishwasher noise and is relying on claims from commenters opposed to a one-hour standard.¹³ Such comments do not provide evidence of consumer sentiment as they are not a representative sample. CEI commissioned a representative sample of public opinion.¹⁴ It found that 82% of people found a dishwasher that cleans in less than an hour to be useful—the statutory standard for a new product class. Furthermore, 49% of people always or often handwash dishes because the dishwasher takes too

¹¹ Department of Energy, “Energy Conservation Program: Energy Conservation Standards for Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers,” 89 FR 88,661, 88,668-9 (proposed Nov. 8, 2024).

¹² Berkholz, P., V. Kobersky, and R. Stamminger. 2011. “Comparative analysis of global consumer behaviour in the context of different manual dishwashing methods.” *International Journal of Consumer Studies*, 37(1), 46-58. doi.org/10.1111/j.1470-6431.2011.01051.x.

¹³ *Id.* at 88,678.

¹⁴ Attachment B Survey Concerning Dishwashers, Document No. EERE-2021-BT-STD-0002-0239, https://downloads.regulations.gov/EERE-2021-BT-STD-0002-0239/attachment_3.pdf

long, and 36% sometimes do so. The commentators who complain about noise likely fall within the 14% who never handwash due to how long the dishwasher takes. That such a small percentage have that opinion and submitted comments is not relevant to what the standard should be.

AHAM did not provide the questions asked or the scope of the survey they conducted, making it inherently unreliable. The full survey should be provided if AHAM wants DOE to rely upon it. Furthermore, AHAM only asked if people were “satisfied” with the current cycle time, not if they would prefer a faster cycle time. A person can both be satisfied and wish their was a faster one on the available.

But even assuming that dishwashers have to take longer in order to be quieter, EPCA would still require a one-hour standard. As CEI has documented in its 2018 petition and 2022 amicus brief, there is overwhelming public dissatisfaction with the longer cycle times.¹⁵ It strains credulity that there are absolutely no consumers who would prioritize the convenience of shorter cycle times over decibel levels.

At most, other factors like noise would play a role in determining the stringency of a new one-hour standard, but they fail to justify no new standard whatsoever. EPCA does not allow for the sacrifice of one performance feature in pursuit of another.

The proposal also suggests, with equally questionable support provided by a commenter, that longer cycle times may have been necessitated by new dishwasher detergents required in some states.¹⁶ As with the noise claims, this assertion directly conflicts with earlier acknowledgements by DOE that the longer cycle times are the result of its restrictions on allowable water and energy consumption.¹⁷ And in any event, the EPCA-compliant solution would be to pursue a one-hour standard calibrated to reasonably accommodate new detergents, not to forego a one-hour standard entirely.

DOE’s conclusion “that any consumer handwashing or pre-washing is unlikely to have been the result of past or current standards” is false and without substantial evidence.

Indeed, the court in *Louisiana* held that the DOE’s failure to consider any alternative other than refusing to promulgate a rule was arbitrary and capricious.¹⁸ One such alternative would have been to set a new one-hour standard that addressed cycle times while also taking other relevant features into account – precisely what EPCA requires.

B. The existence of a quick wash option in many dishwasher models doesn’t make up for the lengthier times for normal cycles.

¹⁵ CEI Petition, at 1-5; Amicus Brief at 7-10.

¹⁶ 89 FR at 88,668.

¹⁷ 2016 DOE Technical Support Document, p. 3-28.

¹⁸ *Louisiana*, 90 F.4th at 476-7.

The proposal repeats the claim relied upon heavily in the 2022 repeal rule that a faster “quick wash” cycle available on many dishwasher models obviates the need for one-hour standard applicable to the normal cycle in such models. *Louisiana* sharply criticized this argument, concluding that “[t]he Repeal Rule does not explain why ‘quick’ buttons would provide an efficacious substitute.”¹⁹

The proposal notes that DOE recently relaxed its test procedure for dishwashers – among other things, “spots, streaks, and rack contact marks on glassware are not included in the cleaning index calculation.”²⁰ The agency goes on to note that at least one model has a quick wash cycle that meets the modified test procedure (test procedures typical apply only to the normal cycle).²¹ However, we are still not aware of any manufacturer claiming that its quick wash cycle is the equal of the normal cycle in terms of cleaning performance and other factors – if it was, one wonders why it wouldn’t be the normal cycle in the first place.

DOE suggests that a normal cycle that takes two hours or more accompanied by a shorter quick wash option that can meet the new test procedure is good enough to comply with the law. However, EPCA does not allow for any diminished features and performance resulting from its standards. Even if some quick wash cycles meet the agency’s modified test procedure, this does not change the fact that they still represent a decline in performance as compared to the normal cycle, and that this decline justifies creating a separate category for one-hour dishwashers.

The agency’s time and resources would have been better spent promulgating a new one-hour standard instead of altering the test procedure and then claiming that a new standard is no longer necessary.

The agency’s misuse of quick wash cycles to deny promulgating a separate one-hour normal cycle standard for dishwashers was rejected in *Louisiana*, and nothing in the current proposal addresses the court’s concerns about it. In addition, *Louisiana* makes the important point that the lack of a one-hour standard not only violates that law and harms consumers but also undercuts the energy and water efficiency rationale of its program.²² As CEI and others have noted since 2018, the longer cycle times and reduced cleaning performance of currently available models encourages some consumers to, in the court’s words, “use more energy and more water to preclean, reclean, or handwash their stuff before, after, or in lieu of using DOE-regulated appliances.”²³

The agency’s analysis in its TSD concerning the shipment declines under new standards presents a flawed view. DOE acknowledges that higher standards result in a drop in consumer dishwasher purchases and that 36% don’t have a dishwasher today. And “DOE assumed that those consumers who forego buying a dishwasher because of the higher purchase price would then wash their dishes by hand.” But when comparing standards, DOE says, “it would be

¹⁹ *Louisiana*, 90 F.4th at 474-5.

²⁰ 89 FR at 88,666.

²¹ 89 FR at 88,678.

²² It should be noted that *Louisiana* raises doubts that EPCA allows DOE to set water limits for dishwashers.

Current standards include both energy and water restrictions, the combination of which has led to longer cycle times.

²³ *Louisiana*, 90 F.4th at 472.

inappropriate to count energy savings that result from shipments that decline because of higher efficiency cases.” No explanation was given by DOE as to why it would be inappropriate to count the increased water and energy use due to more stringent standards that DOE acknowledges will occur from delayed purchases. DOE just simply ignores handwashing due to price and cycle time as inappropriate to consider. That is arbitrary and capricious.

Overall, dishwashers that can complete a normal cycle in an hour or less were widely available prior to the imposition of DOE standards, but no more. They are an example of products that “the Secretary determine[d] . . . 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).”²⁴ Thus, a separate standard for them is required.

V. CONCLUSION

EPCA contains provisions designed to preserve all appliance features and performance characteristics desired by consumers but jeopardized by its energy conservation standards.²⁵ When this occurs, the agency is required to create a separate standard achievable by models that maintain such features and performance characteristics. The impact of previous dishwasher standards on cycle times is perhaps the clearest example yet of a DOE appliance regulation that crossed the line. To comply with the law, as well as best serve the interests of consumers, DOE should withdraw its proposal and renew the rulemaking process for one-hour dishwashers as well as ones for faster clothes washers and dryers.

Respectfully Submitted,

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²⁴ 42 U.S.C. §6295(q)(1)(B); 85 FR at 68,728.

²⁵ 42 U.S.C. §6295(q).