State of Tennessee
Office of the Attorney General & Reporter

May 2, 2023

SUBMITTED ELECTRONICALLY
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Appliance and Equipment Standards
Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, D.C. 20585

Re: Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, No. EERE-2017-BT-STD-0014

Dear Secretary Granholm,

The States of Tennessee, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and West Virginia appreciate the chance to comment and register their concern with the Department of Energy's new attempt to control what appliances Americans can buy. This time, through the EPCA, the Department of Energy has proposed efficiency standards (the "Proposed Standards" or "Standards") for residential clothes washers. *See generally* Dep't of Energy, Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 88 Fed. Reg. 13,520 (Mar. 3, 2023).

This rule follows three other proposed EPCA standards—one for dishwashers, 87 Fed. Reg. 2,673 (Jan. 19, 2022), one for ovens and stoves, *see* 88 Fed. Reg. 6,818 (Feb. 1, 2023), and one for refrigerators, refrigerator-freezers, and freezers, *see* 88 Fed. Reg. 12,452 (Feb. 27, 2023). This inexplicable slog through Americans' homes is unwarranted by the facts and unauthorized by the law. The States, for the fourth time in as many months, urge the Department to pull back and leave decisions about what appliances Americans will use daily to each American.

Comment

I. The Department should not use or reference the IWG estimates in its analysis.

Once again, a significant problem with the Proposed Standards is the Department's extensive and misguided use of the social costs of carbon, methane, and nitrous oxide (the "social cost of

greenhouse gases" or "SCGHG" or "IWG estimates"), *see, e.g.*, 88 Fed. Reg. at 13,523 tbl.I.3, 13,579–83, as developed by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), *see* IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990 (Feb. 2021) (discussing the development of those estimates) [hereinafter 2021 TSD].[1]

The issues with the IWG estimates have been addressed exhaustively in numerous other forums—very recently in the context of the Department's proposed energy conservation standards for consumer conventional cooking products (ovens and stoves). The States attach that comment letter, and its exhibits, as Exhibit A and incorporate the letter's criticisms of the IWG estimates in Section I with one update: The Fifth Circuit reversed the preliminary injunction that a coalition of States received in *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), because the States lack standing. *See Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 677 (5th Cir. 2023). That does not change the criticisms in Section I.B of the attached letter because "standing in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see Lopez v. Pompeo*, 923 F.3d 444, 447 (5th Cir. 2019) (holding that a jurisdictional dismissal does not preclude later adjudication on the merits). Thus, the Department cannot refuse to grapple with the district court's substantive analysis. *See Texas v. Biden*, 20 F.4th 928, 992 (5th Cir. 2021), *rev'd on other grounds* 142 S. Ct. 2528 (2022) (being aware of legal challenges to a rule means the agency must "consider the problem" identified in the challenge).

This rulemaking is not the first time the Department has extensively used the SCGHG. *See, e.g.*, 88 Fed. Reg. at 6,865–68 (conventional cooking products); 88 Fed. Reg. at 12,494–97 (refrigerators, refrigerator-freezers, and freezers). The Department's rote application of the IWG estimates is inappropriate. The Fifth Circuit's decision underscores that the Department "must exercise discretion in … deciding to use the" IWG estimates. *Louisiana ex rel. Landry*, 64 F.4th at 681 (citing Exec. Order No. 13,990, § 5(b)(ii)). So even if it is "important to take into account" emissions reductions "when considering the need for national energy conservation," 88 Fed. Reg. at 13,583—a questionable proposition to begin with—the IWG estimates are unlawful and poor methods for doing so.

In light of the many issues with the IWG estimates, the States request that the Department revisit its blind reliance on those numbers in this and other proposed EPCA standards.[2] The IWG estimates are fundamentally flawed and are an unreliable metric on which to base administrative action.

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[1] *Available at* https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[2] The Department, to be sure, says that the Proposed Standards are "economically justified even without inclusion of monetized benefits of reduced GHG emissions." 88 Fed. Reg. at 13,606; *see also id.* at 13,612. That stands in significant tension with the Department's statement that it is "important to take" such emissions into account via the IWG estimates. *Id.* at 13,583; *see also id.* at 13,537. In all events, that tension underscores the importance of the States' proposal that the Department forego use of the IWG estimates, as laid out in Section I generally, and in detail in Section I.C, of the attached letter.

II. The Department's analysis does not comply with Executive Order 13,132.

Next, the Proposed Standards' Executive Order 13,132 analysis is woefully deficient. Per the Proposed Standards, the Department "tentatively determined that [the Standards] would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" because (1) "EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule" and (2) "States can petition [the Department] for exemption from preemption." 88 Fed. Reg. at 13,616. Thus, the Proposed Standards say, "no further action is required by Executive Order 13,132." *Id.*

The determination to ignore federalism is incorrect. The Proposed Standards have significant federalism implications within the meaning of Executive Order 13,132. For example, if the Proposed Standards are promulgated, "[a]ny State regulation which sets forth procurement standards" relating to clothes washers is "superseded" unless those "standards are more stringent than the corresponding Federal energy conservation standards." 42 U.S.C. § 6297(e). Preempting, even in part, State procurement rules directly affects the States and alters the federal-state relationship by directly regulating the States. *See* Exec. Order No. 13,132 § 6(c).

Furthermore, States own appliances like clothes washers. That indicates the Proposed Standards implicate reliance interests the Department must consider. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). It is also another example of an effect of the Standards on the State—indeed, of an effect that could give rise to "substantial direct compliance costs." Exec. Order No. 13,132 § 6(b). So, since the efficiency standards set forth in the Proposed Standards are "not required by statute," section 6(b) applies.

In sum, the Proposed Standards misstate whether Executive Order 13,132 applies. It does. The Department must rectify that before promulgating any final standards.

III. The Department failed to consider the EPCA's constitutional issues in analyzing the Proposed Standards.

Next, the Proposed Standards do not reflect consideration of the EPCA's constitutional issues. The EPCA is an exercise of Congress's Commerce Clause power. The law prohibits "any manufacturer or private labeler to distribute in *commerce* any new covered product which is not in conformity with an applicable energy conservation standard established in or prescribed under this part." 42 U.S.C. § 6302(a)(5) (emphasis added). "Commerce," in turn, "means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)." § 6291(17). Consistent with that language, the Proposed Standards do not differentiate between interstate and intrastate markets. The Standards—like § 6291(17)—cover all commercial activity, whether inter- or intrastate.

This cavalier approach to the Commerce Clause is improper. Precedent dictates that Congress can only regulate intrastate activity under the Commerce Clause when that activity "substantially affects interstate commerce." *United States v Lopez*, 514 U.S. 549, 559 (1995) (quotations omitted). Thus, for the Proposed Standards to reach the intrastate market for clothes washers, the

Department must show that the intrastate activity covered by §§ 6291(17) and 6302(5) substantially affects the interstate market for those products. There is no such analysis in the Proposed Standards and no constitutional basis for applying the Standards to intrastate commerce in clothes washers. Furthermore, if such an analysis showed that the intrastate market did not substantially affect the interstate market (and so was not properly the subject of federal regulation), then the Department must redo its cost-benefit analysis since the Proposed Standards would apply to a more limited set of products—those traveling interstate. *See* 42 U.S.C. § 6295(*o*)(2)(B)(i) (focusing on the effect of "the proposed standard").

Moreover, even if the Department finds that intrastate commerce in clothes washers substantially affects interstate commerce, it should *still* exclude purely intrastate activities from any promulgated standard. The original meaning of the Commerce Clause does not give Congress the power to regulate "activities that 'substantially affect' interstate commerce." *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). That includes pairing the Commerce Clause with the Necessary and Proper Clause. If, by the combination of the two, Congress could regulate intrastate activities with a substantial effect on interstate commerce, "much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage." *Id.* at 588–89. Such a construction also threatens to turn "the Tenth Amendment on its head" by giving "to the United States all powers not expressly *prohibited* by the Constitution." *Id.* at 589; *see also Printz*, 521 U.S. at 923–24 ("When a Law for carrying into Execution the Commerce Clause violates the principle of state sovereignty … it is not a Law proper for carrying into Execution the Commerce Clause.") (alterations and quotations omitted); *In re MCP No. 165*, 20 F.4th 264, 283 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc) (The Commerce Clause is "not a clause that grants the national government all of the police powers customarily associated with state governments in order to fix any new societal challenge.").

The Proposed Standards illustrate the point. Per the Department, only "14 percent of" current shipments of clothes washers meet the Proposed Standards (TSL 4 standards). 88 Fed. Reg. at 13,611. That number falls to two percent when focusing on top-loading clothes washers. *Id.* The Proposed Standards, therefore, remake the regulated market and so "foreclose[] the States from experimenting and exercising their judgment in an area to which States lay claim by right of history and expertise"—regulation of consumer goods. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). That the Proposed Standards expressly affect water use, *see, e.g.*, 88 Fed. Reg. at 13,521 ("The proposed standards … are expressed in terms of … water efficiency ratio ('WER') measured in pounds per gallon per cycle … ."); *see also* 42 U.S.C. § 6201(8) ("The purposes of this chapter are … to conserve water by improving the water efficiency of certain plumbing products and appliances."), adds to the issue. "[F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982) ("The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry."). Because the Proposed Standards regulate water use, they trench on the States' authority in that area.

So if implemented, the Proposed Standards will dominate fields traditionally belonging to the States—the regulation of consumer goods and water use. That surely turns "the Tenth Amendment on its head," *id.* at 589 (Thomas, J., concurring), and suggests the EPCA does not provide the Department such sweeping authority, *see*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (major-questions doctrine); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (avoiding agency interpretations that push constitutional boundaries); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (federalism canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (avoiding interpretations that raise constitutional doubts).

The fix is to exclude from the Proposed Standards all intrastate activity, even if such activity substantially affects interstate commerce in clothes washers. *See In re Aiken County*, 725 F.3d 255, 261 (D.C. Cir. 2013) (opinion of Kavanaugh, J.) (Under the Take Care Clause, "the President (and subordinate executive agencies supervised and directed by the President) may decline to follow [a] statutory mandate or prohibition if the President concludes that it is unconstitutional."). Doing so ensures that the federal government stays within its constitutionally proscribed limits and preserves the "healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

IV. The Department's analysis ignores important aspects of the problem.

1. The States also have concerns about the Department's dismissal of manufacturers' observations regarding "consumer perceptions" and their effect on the EPCA analysis. For example, Whirlpool noted that "decreasing water levels and wash temperatures would negatively impact consumer perceptions that their clothes washers are working correctly." 88 Fed. Reg. at 13,602. As a result, consumers "will likely take some sort of action to compensate, including adding their own water to the cycle or choosing to largely or exclusively use deep fill and deep water wash options on their clothes washer." *Id.* at 13,603. So far as the States can tell, the Department ignored that comment; indeed, it appears that the Department avoided analyzing any human reaction to having to purchase clothes washers meeting TSL 4 standards. But such reactions are plainly relevant in determining, for example, "the total projected amount of energy, or as applicable, water, savings," the effect the Proposed Standards would have on "the utility or the performance of" clothes washers, and "the need for national energy and water conservation." 42 U.S.C. § 6295(*o*)(B)(i)(III), (IV), (VI). To ignore them biases the analysis in favor of the Proposed Standards and "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

It is no defense to say that the manufacturers did not provide "any quantitative data," *id.* at 13,611, because there is no reason to believe that the Department cannot easily quantify at least some of those human reactions, *cf.* 88 Fed. Reg. at 13,563 (asking for comments about potential rebound effects). Indeed, such modeling would be significantly simpler than the models that generated the IWG estimates. Those models involve, for example, assumptions about human behavior stretching out for nearly 300 years. *See* Ex. A § I.A. If the Department is going to use the IWG estimates, there is no justification for not attempting the simpler task of modeling how consumers will react to having to purchase clothes washers that meet the Proposed Standards.

2. A related issue is the absence of any analysis of shortened lifecycle and lifecycle cost. The Department points to projected energy savings and economic justifications, and hints at consideration of product lifetime. But a major component of a product's lifetime energy use is the energy consumed in manufacturing the product. Decreased water and energy use—*i.e.*, increased operational efficiency—almost always come at the cost of increased complexity, with attendant increased maintenance costs and decreased lifespan. The result is that more units of the more operationally efficient product must be produced. To channel Milton Friedman and Robert Heinlein, "[t]here ain't no such thing as a free lunch." The Department's ignoring of lifecycle energy use and lifecycle cost is another failure "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

At core, the two issues flagged above are important factors of the statutory scheme as applied by the Department. As a matter of logic and basic economics, if products were capable of increased efficiency that would result in cost-savings without lessening of their utility or performance, there would be no need to dictate their manufacture by regulatory decree. Market incentives would be sufficient. That manufacturers do not currently produce such products—and consumers do not currently demand and buy them—strongly suggests that the Department's analysis is defective. That is, the fact the Proposed Standards require significant redesign, especially for top-loading clothes washers, *see* 88 Fed. Reg. at 13,611, is evidence that the Department's analysis is defective because it is evidence that the Department failed to consider the utility of existing models to consumers. *Cf.* 42 U.S.C. § 6295(*o*)(B)(i)(IV) (requiring consideration of "any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard").

3. The States are also concerned about the costs to industry. The Proposed Standards project a decrease of $361.6 to $530.2 million (20.8 to 30.5 percent) in industry net present value from the no-new-standards case. 88 Fed. Reg. at 13,611. And high conversion costs mean "manufacturers may need to access cash reserves or outside capital to finance conversion efforts." *Id.* at 13,593. Thus, the Proposed Standards threaten the finances, and even the underlying financial stability, of manufacturers.

Those manufacturers are important to the States' economies. *See, e.g.*, Press Release, LG, LG Expands Tennessee Laundry Factory Operations to Support Unprecedented U.S. Demand (Apr. 14, 2021).[3] The States, therefore, encourage the Department to rethink its economic analysis. It cannot be "economically justified," 42 U.S.C. § 6295(*o*)(2)(A), to impose a standard that threatens the financial stability of manufacturers, *see* § 6295(*o*)(2)(B)(i)(I). That reconsideration should also determine whether the extensive redesigns the Proposed Standards would require, *see* 88 Fed. Reg. at 13,611, results in more frequent part-replacement and the effect of that replacement on energy efficiency.

[3] *Available at* https://www.lg.com/us/press-release/lg-expands-tennessee-laundry-factory-operations-to-support-unprecedented-us-demand.

Conclusion

To summarize: The Department should not use or reference the IWG estimates. The IWG used a fatally flawed model to generate those estimates. Furthermore, the estimates are unlawfully promulgated and inconsistent with the EPCA. The States' suggestion is thus modest and logical: eschew the analysis. After all, the IWG's analysis does not turn on data, but on assumptions—and under equally reasonable assumptions, the SCGHG may be negative or zero. There is thus no reason for the Department to conclude that the Proposed Standards' effect on greenhouse gases will have a measurable economic impact.

Moreover, the Department needs to do the federalism analysis that Executive Order 13,132 requires because the Proposed Standards are "policies that have federalism implications" within the meaning of the order.

The Department should also exclude intrastate commerce in clothes washers from any final standards to avoid constitutional issues with the regulation. At a minimum, the Department must adjust its analysis to reflect the fact the federal government can regulate purely intrastate activity under the Commerce Clause only where such activity has a substantial effect on interstate commerce.

Lastly, the Department has failed to analyze a number of key aspects of the problem. It ignores consumer's reactions and preferences—both of which are important to determining whether the Proposed Standards are economically justified. And it too easily dismisses the costs manufacturers will incur to comply with the proposed standards.

Sincerely,

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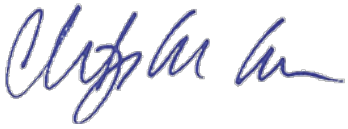

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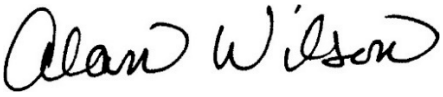

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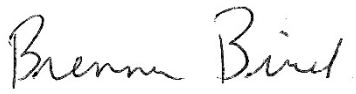

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