

## I. Discussion

A request for comments on Draft NUREG/BR-0006, Rev. 9 (ADAMS Accession No. ML20240A155) and Draft NUREG/BR-0007, Rev. 8 (ADAMS Accession No. ML20240A181) was published in the **Federal Register** on August 15, 2019 (84 FR 41644), with a 90-day comment period ending on November 13, 2019. Comments received on NUREG/BR-0006, Rev. 9 and NUREG/BR-0007, Rev. 8 can be found on the Federal Rulemaking website (<https://www.regulations.gov>) under Docket ID NRC-2019-0108.

NUREG/BR-0006 and NUREG/BR-0007 provide instructions for reporting information to the Nuclear Materials Management and Safeguards System, as required by NRC regulations. The NRC has revised these documents to provide additional clarification and examples of nuclear material transaction reports and nuclear material status reports, to aid the licensee community in preparing clear and accurate submittals.

Dated: October 15, 2020.

For the Nuclear Regulatory Commission.

**James L. Rubenstone,**

*Chief, Material Control and Accounting Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.*

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## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[EERE-2018-BT-STD-0005]

RIN 1904-AE35

### Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers

**AGENCY:** Office of Energy Efficiency and Renewable Energy (EERE), Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) received a petition from the Competitive Enterprise Institute (CEI) to define a new product class under the Energy Policy and Conservation Act, as amended (EPCA), for standard residential dishwashers with a cycle time for the normal cycle of less than one hour from washing through drying. Based upon its evaluation of the petition and careful consideration of the public comments, DOE granted CEI's petition and proposed a dishwasher product class with a cycle time for the normal cycle of less than one hour. In this final rule, DOE establishes a new product class for

standard residential dishwashers with a cycle time for the normal cycle of one hour (60 minutes) or less from washing through drying. DOE's decision to establish the new product class is based on its evaluation of CEI's petition, the comments the Department received in response to the petition and the proposed rule to establish the new product class, as well as additional testing and evaluation conducted by the Department. This rulemaking only sets out the basis for the new product class. DOE intends to determine the specific energy and water consumption limits for the product class in a separate rulemaking.

**DATES:** The effective date of this rule is November 30, 2020. The incorporation by reference of a certain publication in this final rule is approved by the Director of the Office of the Federal Register as of November 30, 2020.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at: <https://www.regulations.gov/docket?D=EERE-2018-BT-STD-0005>.

The docket web page contains instructions on how to access all documents, including public comments, in the docket.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kathryn McIntosh, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586-2002. Email: [Kathryn.McIntosh@hq.doe.gov](mailto:Kathryn.McIntosh@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** DOE incorporates by reference the following industry standard into 10 CFR part 430: ANSI/AHAM DW-1-2010, Household Electric Dishwashers, (ANSI approved September 18, 2010).

A copy of ANSI/AHAM DW-2010 is available at: Association of Home Appliance Manufacturers, 1111 19th Street NW, Suite 402, Washington, DC 20036, 202-872-5955, or go to <http://www.aham.org>.

For a further discussion of this standard, see section V.N.

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## I. Summary of the Final Rule

In this final rule, DOE establishes a product class for standard residential dishwashers with a cycle time for the normal cycle of one hour or less from washing through drying. DOE believes that the new product class will offer greater consumer choice within DOE's existing energy and water conservation standards for residential dishwashers and will spur innovation in the design of dishwashers.

Since receipt of the petition, DOE conducted additional testing of dishwasher cycle times, as described in section II.B. of this final rule. As explained in Section II.B., the data show that a dishwasher with a "Normal" cycle time of 60 minutes or less is achievable, and that establishing a product class where the "Normal" cycle is 60 minutes or less could spur manufacturer innovation to generate additional product offerings to fill the market gap that exists for these products.

In establishing a product class with a "Normal" cycle of 60 minutes or less, DOE is creating an opportunity to introduce additional consumer choice in the dishwasher market. Specifically, DOE would be providing consumers the

added option to purchase a standard residential dishwasher with a “Normal” cycle of one hour or less for the dishwasher to complete its operation from washing through drying. Consumers would still be able to purchase a dishwasher from the original dishwasher product class that is characterized by a longer “Normal” cycle, which often offers a “Quick” cycle (often recommended by the manufacturer for washing lightly soiled dishes) that may wash dishes even more quickly but potentially uses more energy or water than the “Normal” cycle. The distinction DOE has created through the introduction of this shorter one-hour “Normal” cycle product class and the original product class for standard dishwashers rests on the length of the cycle that manufacturers identify as the “Normal” cycle.

DOE’s decision to establish the one hour “Normal” cycle product class is supported by the Department’s test data, which indicate that the mean and median energy and water use values of the tested “Quick” cycles could meet the current DOE standards and had a mean and median duration of 1.3 hours (80 minutes). Further, ten of those quick cycles had a cycle time of less than one hour. The units selected for testing represent over 95 percent of dishwasher manufacturers and were a representative sample of the current dishwasher market. Based on these results, DOE is confident that, given the opportunity to do so, industry could feasibly develop and produce a standard dishwasher with the capabilities to meet the criteria of this new one hour product class. DOE intends to determine the specific energy and water conservation standards for the new product class, with a “Normal” cycle of one hour or less, in a separate rulemaking.

## II. Introduction

### A. Background

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, provides among other things, that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” (5 U.S.C. 553(e)) Pursuant to this provision of the APA, CEI petitioned DOE for the issuance of rule establishing a new product class under 42 U.S.C. 6295(q) that would cover dishwashers with a cycle time of less than one hour from washing through drying. (CEI Petition, No. 0006 at p. 1) <sup>1</sup> CEI stated that dishwasher

cycle times have become dramatically longer under existing DOE energy conservation standards, and that consumer satisfaction and utility have dropped as a result of these longer cycle times. CEI also provided data regarding the increase in dishwasher cycle time, including data that, according to CEI, correlated increased cycle time with DOE’s adoption of amended efficiency standards for dishwashers. (*Id.*, at pp. 2–3)

CEI requested that dishwasher product classes be further divided based on cycle time. CEI asserted that given the significant amount of consumer dissatisfaction with increased dishwasher cycle time, cycle time is a “performance-related feature” that provides substantial consumer utility, as required by EPCA for the establishment of a product class with a higher or lower energy use or efficiency standard than the standards applicable to other dishwasher product classes. (CEI Petition, No. 0006 at p. 5) CEI did not specify whether it requested the additional distinction apply to either the standard and compact classes or just the standard class.

CEI also cited 42 U.S.C. 6295(o)(4), which prohibits DOE from prescribing a standard that interested persons have established by a preponderance of the evidence would likely result in the unavailability in the United States in any covered product type (or class) of performance characteristics, features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of DOE’s finding. (*Id.*, at p. 4) CEI stated that despite this prohibition, it appears that dishwasher cycle times have been impaired by the DOE standards and that many machines that offered shorter cycle times are no longer available. (*Id.*)

In its petition, CEI suggested a cycle time of one hour or less as the defining characteristic for the new product class for standard dishwashers, because one hour is substantially below the cycle times for all current products on the market. (*Id.*, at p. 5) CEI stated that energy efficiency standards for current products would remain unchanged by the addition of the new product class, and that no backsliding would occur for the energy standards already in place. (*Id.*) Specifically, 42 U.S.C. 6295(o)(1) (“anti-backsliding provision”) prohibits DOE from prescribing a standard that increases the maximum allowable energy use, or in the case of showerheads, faucets, water closets or

urinals, water use, or decreases the minimum required energy efficiency, of a covered product. CEI’s petition did not suggest specific energy and water use requirements for the new product class, stating that the standards could be determined during the course of the rulemaking. (CEI Petition, No. 0006 at p. 1)

On April 24, 2018, DOE published a notice of receipt of CEI’s petition for rulemaking. 83 FR 17768 (April 2018 Notification of Petition for Rulemaking). DOE requested comments on the petition, as well as any data or information that could be used to assist DOE’s determination whether to proceed with the petition to create a new product class for standard residential dishwashers. In response to that request, the Department received a wide range of comments in favor of and opposing the creation of a new product class. Upon consideration of those comments, DOE granted CEI’s petition and proposed to create a new product class for standard residential dishwashers with a cycle time of one hour or less for the normal cycle. 84 FR 33869 (July 16, 2019) (July 2019 NOPR). DOE addressed the comments received in response to publication of the petition in its July 2019 NOPR. DOE assumed that CEI’s request, which did not specify whether it was requesting the additional product class distinction be applied to both standard and compact classes, would apply only to the standard dishwasher class because that class represents the vast majority of dishwasher shipments. *Id.* at 84 FR 33870. In response to the July 2019 NOPR, DOE received comments from industry and dishwasher manufacturers, state agencies and state officials, consumer organizations, utilities, energy efficiency advocates, and individuals. DOE discusses and responds to these comments in section III of this final rule.

In consideration of the comments received during this rulemaking, and supported by its own testing and evaluation, DOE establishes a new product class for standard residential dishwashers with a “Normal” cycle of one hour or less for washing through drying. DOE has determined that a cycle duration of this length provides for additional consumer choice in the dishwasher market. Specifically, in this final rule, DOE concludes that a product class of standard residential dishwasher with a “Normal” cycle of one hour or less would allow manufacturers to provide consumers with the option to purchase a dishwasher that maximizes the consumer utility of a short cycle time to wash and dry dishes. While the

<sup>1</sup> A notation in this form provides a reference for information that is in the docket of this rulemaking (Docket No. EERE-2015-BT-STD-0005). [https://www.regulations.gov/docket?D=EERE-2018-BT-](https://www.regulations.gov/docket?D=EERE-2018-BT-STD-0005)

STD-0005. This notation indicates that the statement preceding the reference is included in document number 6 in the docket at page 1.

short cycle product class will enable the development of products that can provide consumers with dishwashers that offer a shorter “Normal” cycle, creation of this product class will in no way limit or prevent consumers that prioritize energy efficiency from continuing to purchase dishwasher models that offer more energy efficient cycles that exceed the current standard or meet ENERGY STAR ratings. Introduction of this product class expands the options available to consumers, particularly those who prioritize cycle time for the “Normal” cycle, when considering the purchase of a new dishwasher.

#### B. DOE Testing and Analysis of Results

DOE testing and analysis included a review of normal and quick cycles available for a range of standard dishwashers currently available on the market. In conducting the testing, DOE analyzed the water and energy use, cycle duration, and cleaning performance of the “Normal” cycle and the shortest available cycle(s), as specified in the dishwasher’s user manual.<sup>2</sup> The testing enabled DOE to determine whether it was feasible to manufacture a dishwasher with a cycle time of 60 minutes or less that could clean a full load of normally-soiled dishes, or whether a new product class for dishwashers with a “Normal” cycle of 60 minutes or less could be created to incentivize manufacturers to fill that gap in the market.

DOE tested 31 standard dishwasher models that encompassed various brands, features, and cycle options for different soil loads and durations. Test units were selected on the basis of different water and energy use, cycle durations, and features (e.g., capacity, inlet water temperature requirement, soil sensors) with an emphasis on including a wide range of short-cycle options. The testing primarily examined short cycles with a duration of one hour or less. However, because many dishwasher units did not have cycles with such a short duration, cycles shorter in duration than the “Normal” cycle” for the given test unit but longer than one hour were also considered.

Each unit was tested according to the DOE dishwasher test procedure at 10 CFR, part 430, subpart B, appendix C1 (appendix C1) for the “Normal” cycle, and then the appendix C1 methodology was repeated for the short cycle(s) to compare water and energy use among the cycles. The duration of each test cycle from washing through drying was also measured and recorded. Additionally, though DOE does not regulate cleaning performance under EPCA, for purposes of this analysis, DOE used the ENERGY STAR Test Method for Determining Residential Dishwasher Cleaning Performance (Cleaning Performance Test Method) to determine the cleaning scores, expressed in terms of a per-cycle Cleaning Index, of the tested units on each of the three soiled cycles (heavy,

medium, and light soil loads) that are run for appendix C1 for soil-sensing dishwashers.<sup>3</sup>

The data summarizing the results of the testing, including 31 “Normal” cycles and 34 “Quick” cycles conducted on the 31 test units, may be reviewed in the docket for this rulemaking.<sup>4</sup> Parameters outlined include the per-cycle machine energy consumption, water consumption and associated water heating energy consumption, power dry energy consumption (if any), total energy consumption, duration, and Cleaning Index for each of the three soil load test cycles required under appendix C1. To determine the overall per-cycle values of energy and water consumption and cycle duration, for each “Normal” and “Quick” cycle, DOE applied the same weighting factors to the results from each soil load as specified in appendix C1. From these, along with the combined low-power mode energy consumption for each unit, an Estimated Annual Energy use (EAEU) for each “Normal” and “Quick” cycle was calculated, using the equations provided in 10 CFR 430.23(c)(2).

The results of DOE’s analysis for “Quick” cycles are specified in Table II–1. While all of DOE’s test results are included in the docket for this rulemaking, DOE presents the values for only the “Quick” cycle in Table II–1 because none of the “Normal” cycles on the units tested had a duration of less than 60 minutes.

TABLE II–1—MEAN AND MEDIAN VALUES OF WATER CONSUMPTION, EAEU, AND CYCLE TIME FOR THE TESTED “QUICK” CYCLES

	Mean	Median	Current DOE standard
Water (gal/cycle) .....	4.5	4.8	5.0
EAEU (kWh/year) .....	300	292	307

As shown in Table II–1, DOE calculated that the mean and median values of the EAEU for the tested “Quick” cycles are 292 and 300 kilowatt-hours per year (kWh/year), respectively, both of which are less than the current standard of 307 kWh/year. The corresponding mean and median values of the water consumption are 4.5 and 4.8 gallons/cycle, both of which are less than the current standard of 5.0 gallons per cycle (gal/cycle). See 10 CFR 430.32(f)(1)(i).

As noted previously, each unit was tested according to the DOE dishwasher test procedure at 10 CFR, part 430, subpart B, appendix C1 (appendix C1) for the “Normal” cycle, and then the appendix C1 methodology was repeated for the short cycle(s) to compare water and energy use among the cycles. The results of this testing demonstrated that ten of the units tested already complete a “Quick” cycle in 60 minutes or less. Of these ten “Quick” cycles tested with a time of less than one hour using the

same soil loads specified by the DOE test procedure for testing the “Normal” cycle, 90% of those cycles would meet the DOE standard for energy consumption that is based on the normal cycle of a standard-size dishwasher, 90% would meet the DOE standard for water consumption that is based on the normal cycle of a standard-size dishwasher, and 80% would meet both. DOE notes, however, that while five of these units had a weighted-average cleaning score greater than or

<sup>2</sup> Short cycles that the manufacturer’s instructions indicated were intended to only rinse the dishware or to wash only certain types of ware, such as plastics, were not considered.

<sup>3</sup> Although appendix C1 specifies a single cycle with a clean test load for non-soil-sensing dishwashers to minimize testing burden, for this purpose of this investigation, DOE conducted the three cycles with soiled test loads to obtain cleaning

performance results for both soil-sensing and non-soil-sensing dishwashers.

<sup>4</sup> Dishwasher NODA Test Data (5–21–20), <https://www.regulations.gov/document?D=EERE-2018-BT-STD-0005-3213>.

equal to 70<sup>5</sup>, only one of these units had a cleaning score of greater than or equal to 70 for all three soil loads tested, and only one of the units is recommended by the manufacturer for a full load of normally soiled dishware—that single unit had a weighted-average cleaning score of only 63. Based on these results, DOE finds that a dishwasher with a “Normal” cycle time of 60 minutes or less is achievable and that establishing a product class where the “Normal” cycle is 60 minutes or less could spur manufacturer innovation to generate additional product offerings to fill the market gap that exists for these products (*i.e.*, ability to clean a load of normally-soiled dishes in under 60 minutes). Building upon existing dishwasher capabilities and the results of this testing as a foundation for future development of dishwasher models, and recognizing the potential for innovation within the industry for this specific product, this final rule establishes a product class where a one hour or less cycle from washing through drying represents the “Normal” cycle.

### III. Discussion

Based on the evaluation of the petition and careful consideration of comments submitted during both comment periods provided for this rulemaking action, the Department of Energy establishes a new dishwasher product class for standard residential dishwashers with a “Normal” wash cycle that would completely wash and dry a full load of normally soiled dishes in one hour (60 minutes) or less. DOE intends to conduct a separate rulemaking to determine the applicable test procedure and energy conservation standards<sup>6</sup> for the new product class that provide the maximum energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy, 42 U.S.C. 6295(o)(2)(A). 84 FR 33869, 33873 (July 16, 2019).

In evaluating CEI’s petition and establishing a separate product class for dishwashers that wash and dry dishes in less than an hour during the “Normal” cycle, DOE has determined that under 42 U.S.C. 6295(q), dishwashers with a “Normal” cycle

time of one hour or less have a performance-related feature that other dishwashers lack that justifies a separate product class subject to a higher or lower standard than the standards currently applicable to the existing product classes of dishwashers. Testing conducted by DOE demonstrates that because many dishwashers currently offer a 60 to 90 minute “Quick” cycle wash that, on average, could meet the current DOE energy and water conservation standards, and a number of the units tested completed a “Quick” cycle in less than 60 minutes, that the potential exists for industry to develop a dishwasher that can complete a “Normal” cycle within one hour or less. Based on the test results described in Section II.B. of this final rule, the development of such a product will require effort on the part of industry product designers, and DOE establishes a product class to facilitate the development of a standard dishwasher where such values represent the “Normal” cycle through finalizing this rule.

#### *A. Establishment of a Short-Cycle Product Class for Standard Residential Dishwashers, 42 U.S.C. 6295(q)*

CEI petitioned DOE to establish a separate product class for dishwashers that have a cycle time of less than one hour from washing through drying. (CEI Petition, No. 0006 at p. 1) Under the current test procedure and energy conservation standards, dishwashers are tested and evaluated for compliance when operated on the “normal cycle.” Appendix C1, sections 2.6.1, 2.6.2, 2.6.3. “Normal cycle” is the cycle, including washing and drying temperature options, recommended in the manufacturer’s instructions for daily, regular, or typical use to completely wash a full load of normally soiled dishes, including the power-dry setting. Appendix C1, section 1.12. Manufacturers may add additional cycles to dishwashers, but those additional cycles are not tested nor considered the “Normal cycle”. Although CEI’s initial petition did not specify the cycle that would be limited to one hour under the separate product class, CEI provided information supplemental to its petition clarifying the request for a new product class for dishwashers for which the normal cycle is less than one hour.<sup>7</sup> In this final rule, based on evaluation of comments and the test data and analysis described in section II.B. DOE establishes a separate product class for dishwashers that have

a normal cycle time of one hour or less from washing through drying.

EPCA directs that when prescribing an energy conservation standard for a type (or class) of a covered product DOE must 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 DOE determines that covered products within such a group:

- Consume a different kind of energy from that consumed by other covered products within such type (or class); or
- have a capacity or other such 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.

In making a determination concerning whether a performance-related feature justifies the establishment of a higher or lower standard, DOE must consider such factors as the utility to the consumer of such a feature, and such other factors as DOE deems appropriate. (42 U.S.C. 6295(q)(1))

DOE has concluded that it has the legal authority to establish a separate short cycle product class for standard residential dishwashers with the manufacturer recommended “Normal” cycle of one hour or less, pursuant to the Department’s authority under 42 U.S.C. 6295(q). Dishwashers with a short “Normal” cycle have a performance-related feature that other dishwashers currently on the market lack, which justifies the establishment of a separate product class subject to a higher or lower standard than that currently applicable to dishwashers. 84 FR 33869, 33871 (July 16, 2019). Consumers that prioritize energy efficiency will still be able to purchase models characterized by a longer “Normal Cycle” while consumers who place a greater value on cycle time will now have the opportunity to select a model with a shorter “Normal cycle”. Creation of a new product class will allow the development of new offerings that will expand the market for standard residential dishwashers and provide consumers additional options when selecting the product that best meets their needs and differing preferences. As described in Section II.B., while many dishwashers on the market currently offer a “Quick cycle” option, these cycles are often not intended for normal loads, and the creation of a new product class will enable manufacturers to optimize their offerings to meet demand for short cycle products intended to

<sup>5</sup> Although DOE does not have information relating weighted-average cleaning scores to minimum consumer acceptance of cleaning performance, the ENERGY STAR program has established criteria for its 2020 ENERGY STAR Most Efficient dishwasher program of a minimum per-cycle Cleaning Index of 70 for each soil load.

<sup>6</sup> DOE will determine whether any updates to the test procedure are necessary prior to publication of any proposed energy conservation standard for the new product class. 10 CFR part 430, subpart C, appendix A, sec. 5(c).

<sup>7</sup> See document ID EERE–2018–BT–STD–0005–0007 available on <http://www.regulations.gov>.

clean a full load of normally soiled dishes.

DOE received comments from the Attorneys General of California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Vermont, Washington, the District of Columbia, and the City of New York (State AGs and NYC); Sierra Club, Natural Resources Defense Council, and Earthjustice (the Joint Commenters); the Association of Home Appliance Manufacturers (AHAM); Appliance Standards Awareness Project (ASAP), along with the Consumer Federation of America (CFA), National Consumer Law Center on (NCLC), and Natural Resources Defense Council (collectively referred to as ASAP); and others challenging the Department's proposal that a one hour or less normal cycle was a performance-related feature that justifies the establishment of a new product class for standard residential dishwashers.

Comments submitted by the State AGs and NYC argued that the proposal does not qualify as "a performance-related feature" under 42 U.S.C. 6295(q) and that the consumer utility of a dishwasher is to clean dishes and other cookware. According to the commenters, while shorter cycles may provide clean dishes in less time, they do not provide an additional distinct dishwasher utility beyond the purpose of washing and drying dishes. The fundamental utility of a dishwasher, regardless of cycle length, is to clean dishes. A reduced cycle time is not a "performance-related feature" that would justify the creation of its own separate product class. (State AGs and NYC, No. 3136, pp. 5–8) Commenters cite DOE's prior rulemakings to conclude that the Department was acting inconsistently in proposing to establish a new product class for short cycle dishwashers under 42 U.S.C. 6295(q)(1). These commenters relied on the Department's cooking products rulemaking, where DOE determined that self-cleaning ovens justified a separate product class because the self-cleaning function was a distinct feature that standard ovens did not provide, as an example for when a separate product class was justified based on the existence of a performance-related feature. (*Id.*, pp. 7–8; 73 FR 62034, 62047 (Oct. 17, 2008)) Commenters distinguished self-cleaning ovens from DOE's water heaters rulemaking, where DOE determined water heaters that utilized heat pumps or electric resistance technology were still of the same utility (*i.e.*, providing hot water), and did not justify the creation of a new

product class. Commenters argued that this dishwasher rulemaking was similar to the Department's water heaters rulemaking because dishwashers with a normal cycle exceeding one hour provided the same utility as a dishwasher with a normal cycle of one hour or less—both cycles provide clean dishes. Commenters' claim DOE provided insufficient justification as to why shorter cycle time deserves its own product class while a wide variety of other consumer options from speed to efficiency remain consumer preferences. (California Investor Owned Utilities (CA IOUs), No. 3142, p. 3)

Related comments also argued that if DOE were to establish "a separate standard for every appliance having a detectable difference in feature, no matter how slight . . . then hundreds of standards might result," and that such actions would be contrary to the intent of Congress. (State AGs and NYC, No. 3136, p. 6 referencing H. Conf. Rep. No. 95–1751, at 115 (1978); Joint Commenters, No. 3145, p. 4 referencing H. Conf. Rep. No. 95–1751, at 115–116 (1978))

In response, DOE disagrees with the assertion that it is acting inconsistently with prior rulemakings by establishing a product class for dishwashers with a "Normal" cycle of one hour or less. DOE has previously determined that refrigerator-freezer configurations, oven door windows, and top loading clothes washer configurations all offer performance-related features that justified the creation of new product classes, including relying on cycle time as a feature with respect to commercial clothes washers. 84 FR 33869, 33872 (July 16, 2019). DOE maintains that a short cycle product class, the feature at issue in this rulemaking, is no different. In these prior rulemakings DOE recognized that the value consumers received from the feature, *i.e.*, refrigerator-freezer configurations, oven door window and time, justified the establishment of the product class under 42 U.S.C. 6295(q)(1).

DOE has taken the view that utility is an aspect of the product that is accessible to the layperson and based on user operation, rather than performing a theoretical function. DOE's discussion of its prior rulemakings and what it has determined is a "utility" pursuant to this principle is described at length in the July 2019 NOPR. 84 FR 33869, 33872 (July 16, 2019). These commenters appear to be suggesting a very different principle—that DOE can determine that a product attribute is a feature only if it adds a performance characteristic or utility beyond the primary purpose of the product (here a

performance characteristic or utility beyond a dishwasher's primary purpose of cleaning dishes). Following the logic of this comment would mean a refrigerator-freezer's primary utility is to store and preserve fresh food, and that the configuration of the refrigerator-freezer does not provide a consumer with the utility of different ways to access its contents. The principle described in the comment would also mean that an oven's primary utility is to cook food, which would not allow for DOE to accommodate the utility provided by the ability to see the food cooking through a window. An oven door with a window uses more energy than an oven door without a window, but it allows the user to see the oven's contents without opening the oven door. DOE recognized that the oven door window offered a distinct consumer utility even though an oven door window did not go beyond the oven's primary function of cooking food. The commenter's argument does not explain why an oven door window justifies a product class when it does not add to the oven's primary purpose of cooking food. The food would come out cooked from an oven without a door window just as the dishes would come out clean from a dishwasher without a shorter "Normal" cycle. DOE has determined that in both cases, however, the oven door window and a shorter "Normal" cycle on a dishwasher are "features" that provide consumer utility and justify a separate product class.

The approach commenters suggest is contrary to the approach that DOE has taken in prior rulemakings, in which DOE recognized that the features for which consumers express a preference indicate that the feature provides some utility to the consumer, even if it is not the primary purpose of the product. For example, in a rulemaking to amend standards applicable to commercial clothes washers, DOE determined that the "axis of loading" constituted a feature that justified separate product classes for top-loading and front-loading clothes washers. DOE also determined that "the longer average cycle time of front-loading machines warrants consideration of separate [product] classes." 79 FR 74492, 74498 (Sept. 15, 2014). DOE stated that a split in preference between top-loaders and front-loaders would not indicate consumer indifference to the axis of loading, but rather that a certain percentage of the market expresses a preference for (*i.e.*, derives utility from) the top-loading configuration. Similarly, the location of the freezer compartment for residential refrigerator-freezers (*e.g.*,

top mounted, side-mounted, and bottom-mounted) on these products provides no additional performance-related utility other than consumer preference. In other words, the location of access itself provides distinct consumer utility that does not add to the food storage purpose of the refrigerator-freezer. *Id.*, at 79 FR 74499.

Additionally, DOE maintains that the approach taken in this final rule and prior rulemakings is consistent with the rulemaking history that the commenters reference. In DOE's view, establishing a product class based on a top mounted freezer and bottom mounted freezer, for example, is no different than identifying a one hour or less "Normal" cycle for dishwashers as a performance-related feature that justifies a separate product class. In both cases, DOE has identified a feature that provides utility to the consumer and established a product class on the basis of that utility. It would be unreasonable to adopt the position these commenters assert, that features offering a distinct utility to consumers would not merit a separate product class, because they are a preference that is unrelated to the primary purpose of the product.

DOE's prior rulemakings also illustrate the value DOE has recognized in evaluating consumer preferences. As noted above, DOE determined the consumer value in seeing inside the oven, as opposed to opening the door and releasing the heat, was a feature that justified a separate product class. 63 FR 48038, 48041 (Sept. 8, 1998). Applying the same logic, DOE determined that the configuration of a refrigerator-freezer, which provided consumers with a value based on access to the bottom-mounted freezer compartment, was also a feature. 75 FR 59469, 59488 (Sept. 27, 2010). Under the commenters' proposed approach, neither feature would have justified the creation of a separate product class. DOE remains committed to recognizing the features that provide a utility for which consumers express a preference and that expand consumer choice.

Similarly, in the 2012 clothes washers' rulemaking, the Department received comments stating that consumer preference supported maintaining clothes washer product class distinction by method of access. 77 FR 32307, 32318 (May 31, 2012). In addition to noting that consumers preferred not to stoop or bend while loading clothes (something not required for top-loading washers), one manufacturer estimated that top loading washers accounted for about 65 percent of the market. Consumer preference noticeably impacted the market and

established the method of loading as a utility that ultimately supported the retention of the top-loader product class. DOE also specifically recognized cycle time as a feature pursuant to 42 U.S.C. 6295(q). *Id.*, at 77 FR 32319. In this final rule, DOE concludes that EPCA authorizes the Department to establish a product class for dishwashers with a "Normal" cycle of one hour or less. *See* 42 U.S.C. 6295(q).

If DOE were to follow these contrary comments to their logical conclusion, DOE would then lack the ability to establish product classes for features that, in the commenters' view, do not add to or go beyond the primary purpose of a product even if consumers received a recognized utility from those features as specified in 42 U.S.C. 6295(q). The Department's authority to establish product classes based on capacity and fuel type cast doubt on the appropriateness of the commenters' suggested guiding principle. Congress included other criteria in EPCA for DOE to consider when using its discretion to identify the utility of a feature that justified the creation of a new product class—criteria that do not "add to" the primary purpose of the product—specifically, capacity and fuel use.

Protecting consumer utility, at the cost of potential increased energy use, clearly has a role to play while supporting consumer choice. Therefore, DOE has determined that it would be unreasonable to limit the authority granted in EPCA in 42 U.S.C. 6295(q) to prohibit the creation of product classes if the "feature" at issue does not somehow go beyond the primary purpose of a product. Like its prior rulemakings, DOE also finds here that consumers would receive a utility from a dishwasher cycle that can completely wash and dry normally soiled dishes in one hour or less, which justifies the creation of a product class on that basis.

Additionally, 42 U.S.C. 6295(q) cannot be read to prevent DOE from recognizing features that provide energy savings or other technological innovations that could yield consumer utility. When DOE determined that the window in an oven door was a "feature" justifying a different standard, DOE recognized that if the window were removed from the oven door that it may cause users to open the door more frequently. Such activity has the potential to result in an increase in energy usage even though some heat escapes through the window itself. While retaining the oven door window caused some loss of heat and therefore energy efficiency, DOE determined that the elimination of the oven door window would reduce the utility

consumers received from being able to see inside and cause a greater increase of energy use. 63 FR 48038, 48041 (Sept. 8, 1998).

Also, as mentioned in the July 2019 NOPR, DOE is exploring the energy use of network connectivity for covered products, a relatively new technology that is becoming a feature offered in updated models of covered products and is already considered a utility to consumers. 84 FR 33869, 33873 (July 16, 2019). While this feature requires some attendant energy use, consumers are interested in the benefits provided through the connectivity of appliances that allow for remote control access, automatic supply replenishment, and intelligent energy consumption. 83 FR 46886, 46887 (Sept. 17, 2018). The innovation that network connectivity provides is certainly a feature of increasingly great utility that many consumers may come to prefer.

The Joint Commenters also argued that DOE cannot justify this final rule by referencing the history of dishwasher standards. First, Joint Commenters stated that because Congress established tighter dishwasher standards in 2007 in the Energy Independence and Security Act (EISA), section 311(a)(2), DOE cannot now establish this product class because the Congress amended the statute to further increase the standards after most of the alleged increases in cycle length occurred. Joint Commenters contended that because Congress chose not to relax dishwasher standards then, DOE cannot use the product class provision to establish a feature that would lessen standards now. In response, DOE notes that this rulemaking does not alter any existing energy or water conservation standards for dishwashers; rather, this final rule creates a new product class for dishwashers with a short "Normal" cycle time of one hour or less. In addition, DOE emphasizes that Congressional action to establish new standards for dishwashers does not negate the authority Congress granted to DOE in 42 U.S.C. 6295(q) to establish product classes based on size, capacity, fuel use or other features after considering the utility of the feature to the consumer. The Joint Commenters also stated that DOE found that if it adopted stronger standards it would have required substantially longer cycle times to maintain cleaning performance and relied on this determination as a factor when rejecting stronger standards in 2012. (Joint Commenters, No. 3145, p. 5 referencing 77 FR 31918, 31956–31957 (May 30, 2012)) DOE notes that in issuing its "no new standard" determination for dishwashers in 2016

(81 FR 90072 (Dec. 13, 2016)), DOE determined that a substantially longer cycle time would be needed to maintain the cleaning performance of standards more stringent than those in place. 81 FR 90072, 90073 and 90116 (Dec. 13, 2016). There, DOE determined the existing standards were sufficient and rejected more stringent requirements that would have required longer cycle times. In addition, DOE clarifies that this final rule addresses an issue not addressed in that rulemaking, *i.e.*, whether a one hour or less “Normal” cycle provides a consumer performance-related feature or utility.

The Joint Commenters also sought support for their position by arguing that when DOE surveyed the utility or performance-related features of dishwashers in 1991 that affect energy efficiency and determined that establishing capacity-based product classes was the only action needed to minimize the impact on consumer utility. (No. 3145 at p. 5 referencing 56 FR 22250, 22254, 22275 (May 14, 1991)). Their reliance on this rulemaking is misplaced. The standards and product offerings today are significantly different from what was considered available and offered nearly three decades ago in 1991, and such comparison of performance related features is not relevant for this final rule.

Some commenters expressed a concern that if DOE relies only on consumer preference there would be a plethora of product classes created. (*Id.*, at p. 4) However, in the product types DOE describes herein (*e.g.*, ovens, refrigerator-freezers, clothes washers, etc.), in which the Department developed a product class based on consumer preference, DOE has not seen the concern manifested. CEI’s petition and the comments DOE received in response to the petition and its July 2019 proposed rule indicate that a significant number of consumers expressed various levels of dissatisfaction with the amount of time and energy necessary to run their dishwasher to clean a load of normally soiled dishes. The Committee for a Constructive Tomorrow (CFACT) cited a General Electric Appliances (GEA) survey of roughly 11,000 dishwasher owners that reported the long wait times for clean dishes as a major consumer annoyance. (CFACT, No. 2941 at p. 1) These comments express the utility consumers would receive from owning a dishwasher that could clean normally soiled dishes using a “short-cycle” dishwasher. (Attorneys General of Arizona, Indiana, Louisiana, Oklahoma, and South Carolina, and the then-

Governor of Mississippi, Phil Bryant (Attorneys General and Governor Bryant), No. 3131, pp. 1–2) CEI’s 2019 survey determined a majority of surveyed consumers would choose to own a faster dishwasher even if it cost more to operate. (No. 3137, p. 4)

Relying on their 2019 survey, CEI also considered the utility customers would receive from shorter cycle durations and faster dishwashers. (*Id.*, at pp. 2–3) The survey determined that 81% of participants believed a dishwasher that could clean and dry dishes in an hour or less would be useful and 92% of participants favored cycles with a duration of one hour or less. The survey polled consumers’ thoughts regarding washing dishes by hand and nearly half of those surveyed considered washing their dishes by hand because the cycle was too long with about 50% stating that they often or always wash dishes by hand due to the long cycle time. (*Id.*, at pp. 3–4) Because handwashing is often times more water intensive than using the dishwasher, the survey results indicated that faster cycles could substantially reduce energy and water consumption by reducing the amount of handwashing. (*Id.*) Targeting respondents who mostly run their dishwashers when they go to bed, CEI’s survey also asked respondents if they would run their dishwasher at some other time if the dishwasher was faster. The survey showed 77.7% of respondents said yes, indicating that even if all dishwashing was conducted overnight, there is evidence that households may do so as a result of long cycle times. (*Id.*, at 4)

The Joint Commenters remarked that if there are no dishwashers currently capable of meeting the proposal’s cycle duration limit and cleaning performance goals while operating in the normal cycle, EPCA’s product class provision does not provide DOE the authority to facilitate that capability. The Joint Commenters challenged DOE’s interpretation of the product class provision as providing the Department the discretion to determine that some covered products should have a capacity or other performance-related feature they presently do not have. (No. 3145, p. 4; 84 FR 33869, 33872–33873 (July 16, 2019)) The Joint Commenters contend that the provision was written in the present tense, meaning that a performance-related feature may trigger an action only when there are covered products with that feature already part of an existing product class. Joint Commenters referenced certain provisions in EPCA (*e.g.*, 42 U.S.C. 6295(bb) (establishing performance specifications for compact fluorescent

lamps and authorizing DOE updates), 42 U.S.C. 6295(i)(1), (3)–(5) (prescribing minimum color rendering index values for general service fluorescent lamps and authorizing DOE updates) to support their position. They argue that if there is no dishwasher currently capable of operating in the normal cycle in one hour or less, then the product class provision does not provide DOE the authority to make such a product available. Only in situations where the feature is already available does the product class provision provide DOE the authority to act. (Joint Commenters, pp. 4–5)

The Joint Commenters misunderstand the effect of DOE’s product class rule. DOE is not requiring manufacturers to make dishwashers with a normal cycle one hour or less; rather, this rule is establishing a product class based on that criterion. Manufacturers can choose to develop such products if they want to do so, but they are not forced to take such action. As a result, the provisions cited in EPCA that establish performance specifications for fluorescent lamps and color rendering index values and authorize DOE to update those requirements cited by the commenter are inapplicable to this final rule establishing a new product class for dishwashers.

Additionally, while the commenter is correct that DOE does not regulate in a vacuum, the testing described by DOE in section II.B. of this final rule indicates that dishwashers already exist on the market that can wash dishes in a designated “Quick” cycle in 60 to 90 minute time periods. In this final rule, DOE is establishing a product class for dishwashers where the one hour or less time period denotes the “Normal” cycle. EPCA does not specify how prevalent a specific feature must be on the market (*i.e.*, the commenter specifies that DOE can act only when there are covered products with that feature already part of an existing product class). For example, as noted in the July 2019 NOPR and DOE’s 2018 RFI on “smart products” (83 FR 46886 (Sept. 18, 2018)), DOE is just beginning to explore the energy use of the network connectivity of covered products. Network connectivity is a technology that has only recently begun to appear on the market. Moreover, it clearly has a desirable consumer utility and is a fast growing feature of new models of covered products. Network connectivity, however, comes with attendant energy use. EPCA’s product class provision cannot be read to prohibit DOE from establishing product classes for products that have network mode connectivity simply because that



feature is not currently common on the market.<sup>8</sup> Similarly, for dishwashers, 42 U.S.C. 6295(q) authorizes DOE to establish standards for product features that provide consumer utility, such as shorter cycle times.

DOE acknowledges that it has previously established product classes based on features that have been in the market for a significant period of time. For example, ventless clothes dryers had been on the market for at least 25 years when the Department established separate energy conservation standards for ventless clothes dryers.<sup>9</sup> In that rulemaking, DOE reasoned that ventless clothes dryers provided a unique utility to consumers because these products could be installed in areas where vents were otherwise impossible to install. 76 FR 22454, 22485 (Apr. 21, 2011). In that situation, however, manufacturers of those products had been operating for many years under a waiver from DOE's test procedure. It is important to note that a test procedure waiver is not a waiver from the standard. Those manufacturers were potentially at risk because their product met the definition of a clothes dryer but could not meet the standards applicable to clothes dryers even when using a modified test procedure. DOE established a test procedure and standards for ventless clothes dryers—standards that were lower than the standards currently applicable to other clothes dryers on the market—in 2011 (76 FR 22454, 22469–22471 (Apr. 21, 2011)), but early DOE action would provide manufacturers with certainty earlier in the process of product development as to the test procedure and standards applicable to their products. As noted in the previous paragraph, DOE is applying this reasoning to new technology and is exploring the energy use of network connectivity of covered products as the technology becomes more available. Similarly, the development of a new product class for dishwashers with a “Normal” cycle of one hour or less would initiate the development of innovative technologies that could

achieve normal wash performance within a shorter cycle time.

DOE also received comments asserting that the proposal was unnecessary given that dishwashers on the market already offered a quick cycle and that there was no consumer utility to a short cycle to justify a new product class. ASAP and other commenters argued that because such quick cycles were already widely available, the utility of a short cycle already existed, making the creation of a separate product class unwarranted. (No. 3139, p. 2; Alliance to Save Energy (ASE), No. 3185, p. 2) Similarly, the Joint Commenters stated that because there are products currently capable of a quick wash, EPCA does not provide DOE the authority to mandate that the normal cycle should be one hour or less. (No. 3145, p. 4) The California Energy Commission (CEC) explained that EPCA's product class provision requires DOE to show that the new product class has a feature that other products in the class lack, not that the feature exists but is not offered as the normal cycle. CEC continued that with such quick cycle dishwashers already on the market, this situation fails to justify creating a new product category that would operate with a higher or lower standard under 42 U.S.C. 6295(q)(1)(B). (CEC, No. 3132, p. 6) Similarly, ASE commented that a new product class is not necessary, as demonstrated by AHAM's data, because dishwashers with cycle durations of about an hour are available. (No. 3185, p. 2) Arguing further that the proposal was unnecessary, the State AGs and NYC contended that cycle times have limited importance to consumers and that DOE's position does not meet the burden for explanation for the new product class. (No. 3136, p. 11) Electrolux Home Products (EHP) also noted that a specific short cycle dishwasher product was not a high priority for consumers and that short cycles consistently ranked low as the feature most wanted by consumers. (No. 3134, p. 1) Relying on the data provided from its members surveyed, AHAM similarly noted that, when selecting a dishwasher, cycle time was ranked lowest in importance among the features available to consumers whereas cleaning performance, loading, and dish rack features were considered much more important to consumers. AHAM indicated that this meant there was limited demand for such products. (No. 3188, pp. 4–5)

In contrast, other commenters noted in support of DOE's rule that the public will ultimately receive a significant benefit from the creation of such products. The Attorneys General and

Governor Bryant commented that the new product class would provide a product that will clean and dry dishes within the hour that meet consumers' needs while reducing the total energy used and saving money as consumers will no longer need to run their dishwashers multiple times. (No. 3131, p. 3) Further, a new product class would increase the number of available dishwashers on the market and provide consumers with more freedom to select a product that best meets their needs. (*Id.*, pp. 4–5)

DOE maintains that while there may be dishwashers that offer a “Quick” wash cycle in 60 to 90 minute intervals, these cycles are not tested nor considered the “Normal” wash cycle for purposes of demonstrating compliance with existing energy and water conservation standards. The existence of these products in the market does not prevent the establishment of the product class DOE is creating with this rulemaking. Manufacturers' compliance with existing dishwasher standards requires testing be conducted on the “Normal cycle”, which is defined as the “the cycle type recommended by the manufacturer for completely washing a full load of normally soiled dishes including the power dry feature.” See 10 CFR part 430, subpart B, appendix C1. Commenters note that current dishwasher models offer a variety of cycle options or settings such as normal, heavy, light, eco, quick, pots, and pans, china, and so on that include a quick wash cycle. These cycles do not meet DOE's regulatory definition of the “Normal cycle” and are not subject to the Department's established dishwasher test procedure that is used when determining compliance with energy conservation standards. DOE intends to conduct a rulemaking to establish standards for the new product class for standard residential dishwashers based on the one hour or less “Normal” cycle. This would provide consumers with a means to compare products across the product class and make an informed decision when deciding to purchase a product that emphasizes cycle time or a different product attribute subject to the applicable minimum standards. Contrary to the commenters' assertions, a new product class does not inevitably mean a loss of existing energy savings. DOE will consider the appropriate standards for the new product class in a separate rulemaking, where it will complete its rulemaking analysis pursuant to the seven factors specified in 42 U.S.C. 6295(o) for the establishment of standards.

<sup>8</sup> As discussed in section III. B, EPCA's anti-backsliding provision also cannot be used to prohibit the development of product classes that allow for covered products to be connected to a network simply because standards for those products were established prior to the time that network connectivity was even contemplated, and thereby eliminating the ability to implement this consumer desired option.

<sup>9</sup> On February 17, 1995, DOE issued a decision and order granting a waiver from the clothes dryer test procedures to Miele Appliances Inc., (60 FR 9330), DOE later granted similar waivers to LG Electronics, (73 FR 6641, Nov. 10, 2008) and BSH Home Appliances Corporation, (78 FR 53448, Aug. 28, 2013).



AHAM and others commenters argued that most dishwashers available today already offer consumers cycle options that clean dishes in less time than the normal cycle, *i.e.*, quick cycle. AHAM based this statement on a recent survey that claimed 86.7% of reported 2017 dishwasher shipments provided consumers a cycle option that could wash and dry a load in just over an hour. (AHAM, No. 3188, p. 2; ASE, No. 3185, pp. 2–3; and ASAP, No. 3139, p. 1) Ceres BICEP, relying on Consumer Reports' 2017 Spring Dishwashers Survey, also remarked that nearly every dishwasher today offers a quick cycle mode and that the majority of consumers surveyed either did not view the cycle length as an issue, or used a quick cycle to address concerns about cycle length. (No. 2746, pp. 2–3)

In response to these comments, DOE acknowledges that quick or fast cycles are available. CEI provided evidence that these quick cycles do not satisfy consumers' needs as these cycles are not designed and intended for normal use. (No. 3137, pp. 4–5) CEI identified various models that offered a quick wash cycle for lightly soiled recently used dishes or lightly soiled dishes with no dried-on food.<sup>10</sup> These cycles are not considered for testing purposes to determine compliance with DOE's energy conservation standards. DOE recognizes ASE's comment that, for a substantial percentage (just under half) of dishwashers with short cycles, manufacturers do not discourage consumers from using these cycles to wash normally soiled loads. Some even recommend using short cycles for normally soiled dishes. (No. 3185, p. 3) The fact that dishwashers have separate "Normal" and "Quick" cycles, however, indicates that these cycles provide a separate utility and that the consumer recognize that there is a difference between using the "Normal" versus the "Quick" cycle. The fact that manufacturers "do not discourage" use of the "Quick" cycle for a full load of normally soiled dishes also does not equate to the manufacturer-recommended cycle for doing so.

Based on the manufacturer descriptions of the intended use of these quick cycles, DOE reiterates that the "Quick" cycles available on current dishwasher models do not provide the same utility as the Department's new one hour or less short cycle product

class. The new product class would be suited for cleaning normally soiled dishes and be subject to applicable energy and water conservation standards and testing like product classes for all covered products, pursuant to the outcome of separate rulemaking(s) to address these requirements.

Furthermore, while AHAM argued that existing quick wash cycles satisfy consumer needs, CEI's 2019 survey provided different consumer feedback. Consumer responses determined that 46.1% of consumers did not have a quick or express cycle available and only 13.5% of those surveyed said they used such a cycle more often than the manufacturer recommended normal cycle. Additionally, 84.6% of those consumers with a quick or express cycle stated that they would find a one-hour normal cycle useful. Of those consumers with a quick or express cycle, 87.6% said they would use such a cycle more if it cleaned their dishes better. (CEI, No. 3137, p. 5) Additionally, commenters supporting the new product class explained that the quick cycles identified by AHAM tend to include disclaimers with time additions that ultimately result in cycle durations that are comparable to the normal wash cycle. There is clearly a demand for such a product based on these results and the comments DOE received in response to its publication of the petition and the July 2019 NOPR. DOE reiterates that consumers, by expressing a preference, have identified a consumer utility that provides the basis for creating a product class based on cycle duration.

The CA IOUs commented that while manufactures do not always recommend quick cycles for daily use, DOE offered no evidence demonstrating that these cycles were less effective at cleaning. The CA IOUs called for DOE to conduct its own analysis regarding the cleaning adequacy for these quick cycles. (No. 3142 p. 2) The CEC called the proposed one hour cycle time arbitrary based on the fact that the cycle proposed is less time than current normal cycles. CEC argued that the rule relied on limited data that did not reach the conclusion that there is a consumer preference for this short cycle duration or that the cycle time would result in cleaner dishes. CEC concluded that DOE and CEI failed to demonstrate that a one-

hour cycle time could not meet the existing standard, and that DOE made this presumption with no evidence provided as needed to justify the creation of a new product class. (No. 3132 p. 4)

In response, DOE emphasizes that EPCA does not authorize DOE to establish test procedures and standards that require manufacturers to evaluate or meet a certain level of cleaning performance. DOE test methods and standards pertain to the measurement of and establishment of minimum levels of energy use (and, for some products, water use) or maximum levels of energy efficiency. *See* 42 U.S.C. 6293 and 42 U.S.C. 6295. DOE has also previously addressed the argument concerning the consumer utility provided by a dishwasher with a faster manufacturer identified normal cycle in the preceding paragraphs of this section.

In establishing this product class, the Department conducted a comprehensive review assessing a range of dishwashers with additional cycles shorter than the manufacturers' recommended normal cycle, *i.e.*, the cycle subject to DOE testing and compliance with efficiency standards. Based on this review, DOE determined that it was feasible to manufacture a dishwasher with a "Normal" cycle time of 60 minutes or less and that establishing a product class where the "Normal" cycle is 60 minutes or less could spur manufacturer innovation to generate additional product offerings to fill the market gap that exists for these products (*i.e.*, ability to clean a load of normally-soiled dishes in under 60 minutes).

DOE determined that ten of the 34 cycles tested offered a "Quick" cycle of less than one hour. Of those models with a "Quick" cycle of less than one hour using the same soil loads specified by the DOE test procedure for testing the "Normal" cycle, 90% could meet the current DOE energy consumption standard that is based on the normal cycle of a standard-size dishwasher, 90% would meet the water consumption standard that is based on the "Normal" cycle of a standard-size dishwasher, and 80% could meet both standards.<sup>11</sup> The "Quick" cycles of less than one hour were identified as offering lesser mean and median per-cycle cleaning indices (*i.e.*, the mean and median Cleaning Index for the heavy, medium, and light soil loads)

<sup>10</sup> CEI, p. 5 (LG, LD-12AS1/LD-12AW2, <https://www.lg.com/au/support/products/documents/LD-12AS1.pdf> ("This program is for that quick wash of lightly soiled recently used dishes and cutlery."); Samsung, DW60J99X0 Series, <https://www.appliancesonline.com.au/public/manuals/Samsung-WaterWall-Dishwasher-DW60H9970US->

[User-Manual.pdf](https://www.whirlpool.eu/_doc/19513945500.pdf) ("Lightly soiled with very short cycle time."); Whirlpool, ADP 502, [http://docs.whirlpool.eu/\\_doc/19513945500.pdf](http://docs.whirlpool.eu/_doc/19513945500.pdf) (1 hour cycle, "For lightly soiled loads that need a quick basic drying," quick cycle "Fast cycle to be used for slightly dirty dishes, with no dried-on food.")).

<sup>11</sup> While DOE does not have legal authority under EPCA to establish a test for cleaning performance or a standard that requires a certain level of cleaning performance, DOE does consider cleaning performance in screening available technologies to ensure that the program does not consider as a dishwasher a device that cannot clean dishes.

than those for the “Normal” cycle and all “Quick” cycles including other slightly longer “Quick” cycles.

all “Quick” cycles including other slightly longer “Quick” cycles.

TABLE II–2—MEAN AND MEDIAN VALUES OF CLEANING INDEX FOR EACH SOIL LOAD OF THE TESTED “NORMAL” AND “QUICK” CYCLES

Per-cycle cleaning index	Normal cycle			All quick cycles			Quick cycle <1 hour		
	Heavy soil load	Medium soil load	Light soil load	Heavy soil load	Medium soil load	Light soil load	Heavy soil load	Medium soil load	Light soil load
Mean .....	63.1	67.9	78.0	68.2	73.4	82.1	49.5	57.9	75.9
Median .....	68.4	72.5	80.8	73.1	78.4	84.6	53.8	60.4	76.2

This indicates that the currently available 60 minute or less “Quick” cycles, on average, are less effective at cleaning dishes when compared to the “Normal” and other slightly longer “Quick” cycle options. As described in Section II.B., while DOE realizes that these “Quick” cycles are not necessarily intended to clean normally soiled dishes, at least some of these cycles appear to be capable of cleaning dishes at this soil level. DOE sees this as an opportunity for industry to develop a dishwasher that is characterized by a “Normal” cycle of one hour or less that manufacturers would recommend to clean normally soiled dishes. Based on this assessment and in consideration of comments received, DOE maintains the position taken in the July 2019 NOPR and characterizes the new short cycle product class for standard dishwashers on the one hour or less cycle for the manufacturer tested “Normal” wash.

Commenters also identified the prevalence of ENERGY STAR rated models, many offering “Quick” cycle models, as indicating that “Quick” cycles operate within in the existing standards. These commenters argued that a new class of dishwashers and accompanying different standards were not necessary to establish quicker cycles. This was because existing models already had the capability to provide “Quick” cycles while operating within the existing standard, therefore, the record failed to support the creation of a new product class. (State AGs and NYC, No. 3136, p. 10)

DOE cannot conclude that the existence of dishwashers with an ENERGY STAR rating that also offer “Quick” cycles is an indication that “Quick” cycles operate within the confines of current energy and water consumption standards. As stated previously, dishwasher energy and water efficiency is tested during the “Normal” wash cycle, not the “Quick” setting. The manufacturer’s identified “Normal” wash is the cycle subject to energy and water consumption use testing and standards. While DOE test

data indicated that the ten “Quick” cycles of less than 60 minutes duration met the current DOE standards, and five of the units had a weighted-average cleaning score of greater than 70, only one of these units had a cleaning score of greater than or equal to 70 for all three soil loads tested, and only one of the units is recommended by the manufacturer for a full load of normally soiled dishware—that single unit had a weighted-average cleaning score of only 63. This demonstrates that manufacturer innovation within the new product class could lead to dishwashers with a “Normal” cycle of 60 minutes or less and cleaning performance acceptable to consumers.

To excuse some dissatisfaction customers expressed with cycle time, AHAM noted many consumers were unaware that other options, such as a “Quick” cycle wash, were available on their dishwasher models. AHAM suggested such consumers should educate themselves about their dishwashers as opposed to having DOE issue new regulations. (AHAM, p. 5) DOE acknowledges AHAM’s position that some consumers may not be aware of these cycle options, but DOE cannot rely on such a presumption in determining whether to establish the one hour or less “Normal” cycle product class in this final rule. This rulemaking is premised on consumers expressing their comments and views on cycle time and the appropriateness of a product class for “Normal” cycle dishwashers with a cycle time of one hour or less, rather than a discounting of consumer understanding of product user manuals.

Commenters supporting the new product class noted that the existing regulations were counterproductive to the goal of increasing energy efficiency of dishwashers as many consumers end up running their dishwasher multiple times to get dishes clean. (CEI, No. 3137, pp. 3–4; CFAST, No. 2941, p. 2) This was because the current standards do not take into account pre-washing or multiple wash cycles of the same load,

which can increase the water and energy use associated with washing dishes. (Attorneys General and Governor Bryant, No. 3131, p. 3; CFACT, No. 2941, p. 1) These commenters acknowledged that DOE’s rulemaking would remedy the problems of redundant or prewashing and the unaccounted energy and water use by establishing a new product class specifically for residential dishwashers that allow “a ‘normal’ wash to accomplish” the task of cleaning dishes in an amount of time that meets consumer needs. (Attorneys General and Governor Bryant, No. 3131, p. 3)

DOE reiterates that the creation of a new product class would provide a utility to consumers based on consumers expressing their interest in a shorter cycle duration for the “Normal” cycle. Similar to the product class for oven doors with windows, a product class for dishwashers with a shorter “Normal” cycle could save energy and water by preventing the handwashing of dishes or the running of a dishwasher multiple times for the same load. CEI also responded directly to commenters who argued that cycle length was unimportant because consumers mostly run their dishwashers at bedtime or at night. Relying on data collected during a 2019 survey, CEI determined that 50% of Americans do not run their dishwasher at night. And, when consumers were asked whether they would run their dishwasher at some other time if the dishwasher cycle was faster, 77.7% of respondents said they would. From this information, CEI determined that “even if *all* dishwashing was done at bedtime, this would just be evidence that it is long dishwasher cycles that lead to much of the bedtime dishwasher use.” (No. 3137, p. 4) DOE concludes that even if the majority of consumers ran their dishwasher at night, this still indicates that consumers consider cycle time important. 84 FR 33869, 33874 (July 16, 2019).

CEI also responded to AHAM’s arguments that there was no demand for

a faster dishwasher, but that consumers were more interested in features such as quieter machines. (No. 3137, p. 4) CEI's survey asked consumers "[i]f you could choose between today's dishwasher models, or a model that is faster but costs slightly more to run, which would you choose?" The results found 59.4% would choose the faster model even if it cost slightly more to run. (CEI, p. 4) The survey provided evidence that consumer demand for faster dishwashers does exist even in light of increased expenses. DOE also notes that even if attributes such as noise level or detergent formulation lead to increases in cycle time, these factors do not undercut DOE's establishment of a shorter product class for the "Normal" cycle. Manufacturers can continue to determine desired trade-offs for cycle time, noise level, and other factors in developing their product offerings.

DOE received comments arguing that the Department's proposal violated EPCA's product class provision because the 2019 NOPR failed to include accompanying efficiency standards for the newly created product class for short cycle dishwashers. These commenters specified that when exercising its authority under 42 U.S.C. 6295(q), DOE is required to promulgate energy efficiency standards for any class created thereunder, in accordance with the other requirements of 42 U.S.C. 6295, including EPCA's anti-backsliding provision, and the economic justification and technological feasibility analyses. Commenters contend that DOE improperly bifurcated the product class rulemaking by separating the creation of the product class from the promulgation of applicable standards. (State AG and NYC, No. 3136, pp. 8–9; Joint Commenters, No. 3145, p. 7)

The Joint Commenters and ASAP continued to argue that DOE cannot avoid complying with an existing standard through the creation of a product class that lacks an accompanying standard. The establishment of a new product class is to accompany the establishment of a standard. DOE cannot delay evaluating whether a new standard would meet the anti-backsliding provision in a separate rulemaking because such actions must be considered together. (Joint Commenters, No. 3145 pp. 7–8; ASAP, No. 3139, p. 3)

DOE addresses commenters' concerns regarding anti-backsliding in section III.B. of this final rule. In response to the comments arguing a purported EPCA requirement to establish standards whenever a product class is established exists, DOE emphasizes that EPCA does

not contain such requirement. Section 325(q) of EPCA states that, "[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[.]" This provision does not specify any requirements for the timing of product class designation in regards to a parallel establishment of a standard. The language of the statute accommodates pre-designation of a product class prior to the designation and establishment of applicable standards, as well as the simultaneous designation envisioned by commenters.

DOE's 2009 beverage vending machines (BVM) energy conservation standard rulemaking offers an example of a rulemaking where DOE designated a product class prior to the designation and establishment of an applicable standard for that product or equipment. When DOE initially considered energy conservation standards for BVMs, DOE did not consider combination vending machines as a separate equipment class, but considered that equipment with all other Class A and Class B BVMs. Based in part on the comments received concerning the proposed rule, DOE recognized that combination vending machines had a distinct utility, and concluded that combination vending machines were a class of BVMs. However, DOE was unable to determine whether energy conservation standards for combination vending machines were economically justified and would result in significant energy savings and subsequently decided to not set standards for the equipment class at that time. Instead, DOE reserved standards for combination vending machines and modified the definition of Class A and Class B BVMs to accommodate a definition for combination vending machines. 74 FR 44914, 44920 (Aug. 31, 2009). This action thereby reserved a place for the development of future standards for combination vending machines that DOE then established in 2016. 81 FR 1028, 1035 (Jan. 08, 2016).<sup>12</sup>

The energy conservation standards rulemaking for distribution transformers in 2007 offers another example of this type of activity by the Department. There, DOE clarified that although it believed that underground mining distribution transformers were within

the scope of coverage, it recognized that mining transformers were subject to unique and extreme dimensional constraints that impacted their efficiency and performance capabilities and decided to not establish energy conservation standards for underground mining transformers. In the final rule DOE established a separate equipment class for mining transformers and reserved a section with the intent to develop the analysis needed to establish an appropriate energy conservation standard in the future. 72 FR 58190, 58197 (Oct. 12, 2007). DOE later reached a similar conclusion in 2013 when it decided to again not set standards for mining distribution transformers. 78 FR 23336, 23353 (Apr. 18, 2013).

Both of these examples highlight prior instances where the Department established a new product class without simultaneously ascribing an associated energy conservation standard. DOE is simply doing the same by finalizing this rulemaking for a new product class for dishwashers with a one hour or less normal cycle.

In the July 2019 NOPR, DOE granted CEI's petition for a new product class for standard residential dishwashers with a short "Normal" cycle of one hour or less and finalizes the creation of such a product class through this final rule. This rulemaking considers the parameters of the new class of dishwashers through the identification of a performance-related feature pursuant to EPCA, 42 U.S.C. 6295(q)(1)(B). EPCA does not require DOE to simultaneously establish energy conservation standards in the same rulemaking as the determination of a new product. In fact, this action is similar to situations where DOE has finalized a determination and a covered product exists without an applicable standard until the Department completes a test procedure rulemaking and a standards rulemaking for that product. *See* 42 U.S.C. 6292(b).

Following issuance of this final rule, DOE intends to conduct the necessary rulemaking to consider and evaluate the energy and water consumption limits for the new product class to determine the standards that provide the maximum energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy, 42 U.S.C. 6295(o)(2)(A). DOE will provide interested members of the public an opportunity to comment on any preliminary rulemaking documents and proposed energy conservation standards for this product class during that rulemaking proceeding. 84 FR 33869, 33874 (July 16, 2019).

<sup>12</sup> In 2016, DOE amended the definition of combination vending machine, created two classes of combination vending machine equipment, and promulgated standards for those classes. 81 FR 1028, 1036 (Jan. 08, 2016).

In response to CEI's claim that longer cycles are the product of Federal regulation, some commenters countered that longer cycles are actually a product of growing consumer preference for quieter dishwashers and mandated environmentally friendly detergents. (State AGs and NYC, No. 3136, p. 10; CA IOUs, No. 3142, p. 1; CEC, No. 3132, p. 4) ASE noted that changes in detergent over the past decade have lengthened dishwasher cycle times because of the change in using phosphates to enzyme-based detergents, which has also increased consumer interests in owning quieter dishwashers. This commenter argued that the creation of a new product class for dishwashers with a normal cycle time of less than one hour will not solve the residual problems of noise or associated heat damage—one or both of which will have to increase to insure adequate performance without phosphate detergents. (ASE, No. 3185, pp. 4–5)

DOE recognizes that consumers' interest in dishwasher attributes may extend beyond cycle duration. Consumers may be interested in environmentally friendly and energy efficient products, as well as products that produce less noise. DOE maintains that these interests are not mutually exclusive. The Department's creation of a new product class provides manufacturers the opportunity to invest in innovation to address the many aspects of product performance valued by consumers.

#### *B. Anti-Backsliding Considerations, 42 U.S.C. 6295(o)*

When establishing a new product class, DOE must consider EPCA's general prohibition against prescribing “any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product” in any rulemaking to establish standards for a separate product class. 42 U.S.C. 6295(o)(1). DOE recognizes that this provision must be read in conjunction with the authority provided to DOE in 42 U.S.C. 6295(q) to specify “*a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type or class . . .*” if the Secretary determines that covered products within such group consume a different type of energy or have a capacity or other performance-related feature that justifies “*a higher or lower standard from that which applies (or will apply) to other products within such type (or class).*” 42 U.S.C. 6295(q) (emphasis added). Therefore, EPCA

explicitly acknowledges that product features may arise that require the designation of a product class with a standard lower than that applicable to other product classes for that covered product. 84 FR 33869, 33872 (July 16, 2019).

Opponents of the new product class argued that the finalization of the class would result in a weakening of efficiency standards for residential dishwashers and challenged that DOE cannot use the establishment of performance-related feature as a workaround for complying with EPCA's anti-backsliding provision, 42 U.S.C. 6295(o)(1).

Specifically, the State AGs and NYC commented that the proposal aimed to add a third product class without an applicable efficiency standard, thereby establishing a dishwasher subclass that could consume unlimited amounts of energy and water, violating the anti-backsliding provision. (No. 3136, p. 3, referencing 84 FR 33869, 33873 and 33880 (July 16, 2019)) These commenters disagreed with DOE's argument in the 2019 NOPR that the anti-backsliding prohibition of 42 U.S.C. 6295(o)(1) was conditioned by 42 U.S.C. 6295(q) because the latter subsection uses the present and future tense: DOE “shall specify a level of energy use or efficiency higher or lower than that *which applies (or will apply)* for such type (or class) for any group of covered products which have the same function or intended use.” 42 U.S.C. 6295(q) (emphasis added); (State AGs and NYC, No. 3136, p. 4 referencing 84 FR 33869, 33872–73 (July 16, 2019)). Commenters continued that DOE misconstrued the meaning of section 6295(q)'s reference to a standard not yet applicable as intending to account for situations where a basic product class and standards have not been established or yet to go into effect. The Department's reading, the commenters conclude, effectively repeals the anti-backsliding provision in product class designations. These commenters argue that while 42 U.S.C. 6295(q) acknowledges that differences in energy consumption, capacity or other performance-related features among products within a product group may justify the application of different standards, the provision cannot be construed to allow DOE to prospectively establish product classes as a means of evading EPCA's prohibition against backsliding. (State AGs and NYC, No. 3136, p. 4)

DOE received similar comments arguing that even if it had the authority to create a new product class based on a shorter cycle time qualifying as a performance-related feature, the anti-

backsliding provision prevents the standard that applies to that class from being less stringent than the current standard applicable to all dishwashers regardless of cycle duration. (Joint Commenters, No. 3145, p. 1–2; CEC, No. 3132, pp. 6–7) EPCA's anti-backsliding provision prohibits DOE from prescribing “any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.” Therefore, even if DOE could lawfully create a new product class for dishwashers based on cycle duration, these commenters assert that any new standard established cannot “decrease the minimum required energy efficiency” of the dishwashers in that new class. 42 U.S.C. 6295(o)(1); (Joint Commenters, No. 3145, p. 1–2; Ceres BICEP, No. 2746, p. 1).

As an initial matter, DOE has yet to determine the standards that would be applicable to this new product class. Such standards will be established through DOE's standards-setting rulemaking process that includes opportunities for public comment. In the absence of such a rulemaking, neither DOE nor commenters can conclude that the potentially applicable standards for this new product class will be lower than the standards currently applicable to dishwashers. Data developed by DOE through the testing described in section II.B. of this final rule offer suggestions for what may be possible based on the existing dishwasher models evaluated against the current dishwasher standards as part of the Department's assessment of CEI's petition for a new product class of short cycle dishwashers. The current standards require standard residential dishwashers to not exceed 307 kWh/year and 5.0 gallons per cycle. 10 CFR 430.32(f)(1)(i). DOE's test data indicate that a short cycle product class characterized by a one hour or less cycle could, in theory, operate within the scope of the existing standards. Even with these considerations, DOE emphasizes that EPCA does not prohibit the establishment of a standard for dishwashers in the new product class that is ultimately lower than the standards currently applicable to residential dishwashers.

While some commenters expressed their disagreement with the overall application of the anti-backsliding provision to DOE's activities, DOE maintains that these concerns are too broad and ignore the limitations that EPCA itself places on the scope of the anti-backsliding provision, 42 U.S.C.

6295(o)(1). As stated in the NOPR, “EPCA’s anti-backsliding provision is limited in its applicability with regard to water use to four specified products, *i.e.*, showerheads, faucets, water closets, or urinals. DOE’s existing energy conservation standard for dishwashers is comprised of both energy and water use components. As dishwashers are not one of the products listed in anti-backsliding provision with respect to water use, there is no prohibition on DOE specifying a maximum amount of water use for dishwashers that is greater than the existing standard without regard to whether DOE were to establish a separate product class for dishwashers as proposed in this proposed rule.” 84 FR 33869, 33873 (July 16, 2019); *see* 42 U.S.C. 6295(o)(1).

DOE also found the comments challenging the Department’s reading of 42 U.S.C 6295(q) as avoiding 42 U.S.C. 6295(o)(1)’s anti-backsliding provision and evading EPCA’s prohibition against backsliding unpersuasive because the statute does not contain such limitations. As DOE explained in the July 2019 NOPR, the term “which applies” included in the text of the product class provision undercuts the argument that DOE may only use this provision when there is no standard yet established. By using the present tense, “a higher or lower standard than that which applies,” EPCA authorizes DOE to reduce the stringency of the standard currently applicable to the products covered under the newly established separate product class. The applicability of this provision to current standards is further evidenced by the additional reference to standards that are not yet applicable (*i.e.*, standards that “would apply”). If 42 U.S.C. 6295(q)(1) were only to operate in instances in which standards have not yet been established, there would be no need to separately indicate the applicability to future standards. Nor would there be any purpose to calling out the potential for higher or lower standards since there would not be any standards against which to measure that potential. In this manner, 42 U.S.C. 6295(q) authorizes DOE to reduce the stringency of a currently applicable standard upon making the determinations required by 42 U.S.C. 6295(q).

Additionally, the term “will apply” is not by its term limited to the interim period between when the Department establishes a standard for a covered product and when compliance with that standard is required. This time limitation is nowhere expressly stated or implied in EPCA and is nonsensical because the Department would not be taking any further action with regard to

the establishment of standards between the time it “applies” the standard through rulemaking and when compliance with that standard is required. As noted in the July 2019 NOPR, 42 U.S.C. 6295(q) of EPCA 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 (*i.e.*, consumer utility) to the consumer. DOE relied on this concept when, in 2011, DOE established separate energy conservation standards for ventless clothes dryers, reasoning that the “unique utility” presented by the ability to have a clothes dryer in a living area where vents are impossible to install (*i.e.*, a high-rise apartment) merited the establishment of a separate product class. 76 FR 22454, 22485 (Apr. 21, 2011). Another example of this that DOE is just beginning to explore, as explained further in the July 2019 NOPR, is network connectivity of covered products. *See also* DOE’s Smart Products RFI at 83 FR 46886 (Sept. 18, 2018).

In contrast, DOE’s interpretation of 42 U.S.C. 6295(q) recognizes the potential for technological innovation and the development of product features like network mode (which was not contemplated at the time dishwasher standards were initially established) that result in the short term increase in energy consumption but have the potential in the long term to significantly improve energy efficiency overall. 84 FR 33869, 33872 (July 16, 2019). DOE does not think a reasonable reading of the statute would conclude that technology must be held constant to a single point in time.

DOE also stated in the July 2019 NOPR that this interpretation is consistent with DOE’s previous recognition of the importance of technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality to the consumer. In the proposed and supplemental proposed rule to establish standards for residential furnaces, 80 FR 13120, 13138 (Mar. 12, 2015); 81 FR 65720, 65752 (Sept. 23, 2016), DOE stated that tying the concept of a feature to a specific technology would effectively “lock-in” the currently existing technology as the ceiling for product efficiency and eliminate DOE’s ability to address such technological advances. 81 FR 65720, 65752 (Sept. 23, 2016). The Department finds it unrealistic to set limitations that would ultimately prevent the manufacturing of

innovative products sought by consumers.

The State AGs and NYC additionally argued that EPCA allows the exercise of 42 U.S.C. 6295(q)’s authority within the bounds of 42 U.S.C. 6295(o)(1), which means DOE may designate separate product classes when justified under subsection 6295(q) but must do so within the limits of 42 U.S.C. 6295(o)(1) by not weakening existing standards. (State AGs and NYC, No. 3136, p. 4) State AGs and NYC explained that if the two sections are in conflict, the newer provision would control. Here the anti-backsliding provision was enacted after the product class provision; therefore, 42 U.S.C. 6295(o)(1)’s prohibition against retreating to less stringent standards limits the exercise of 42 U.S.C. 6295(q)’s product class provision. (*Id.*, pp. 5–6, referencing *Watt*, 451 U.S. at 267; *Hines, Inc. v. United States*, 551 F.2d 717, 725 (6th Cir. 1977)) This in turn means DOE must accommodate technological innovation within the same limitations. The commenters cite the creation of the ventless clothes dryer product class as, in their view, an example of DOE working within the limits of EPCA’s anti-backsliding prohibition. Commenters asserted that DOE did not establish less stringent standards for this product class because no energy efficiency standards were “lowered in the creation of that product class as ventless clothes dryers were not previously subject to standards.” (State AGs and NYC, No. 3136, pp. 5–6 referencing 76 FR 22454, 22485 (Apr. 21, 2011))

DOE does not read these provisions in conflict as these comments suggest. In 2011 DOE determined that ventless clothes dryers offered a unique utility because they provided a means of including a dryer into a living area where traditional vents were impossible to install due to the configuration of high rise apartments. The Department recognized this feature as a unique utility that justified the creation of a separate product class and associated standard for ventless clothes dryers. 76 FR 22454, 22485 (Apr. 21, 2011). What commenters overlook when referencing this rulemaking is that prior to the establishment of the ventless clothes dryers product class, ventless clothes dryers were subject to the standards set for the product class as a whole. However, as these dryers could not at the time be tested using the applicable test procedure, ventless clothes dryers subsequently sought and received waivers from test procedure requirements from the Department. 76 FR 33271 (June 8, 2011).

The very fact that DOE issued waivers to the DOE test procedure for these products means that these products were subject to DOE testing and standards compliance requirements. As DOE noted in a waiver granted to LG in 2008 (73 FR 66641 (Nov. 10, 2008)), commenting stakeholders (AHAM, Miele, and Whirlpool) all stated that ventless clothes dryers cannot meet the DOE efficiency standard and recommended a separate product class and efficiency standard for ventless clothes dryers. DOE responded by acknowledging the commenters' experience in working with this type of product, but noted DOE had not been able to find data as to whether ventless clothes dryers can meet the existing DOE clothes dryer energy conservation standard. DOE further stated that if this type of clothes dryer is indeed unable to meet the standard, DOE cannot, in a waiver, establish a separate product class and associated efficiency level. These actions must be taken in the context of a standards rulemaking. DOE did indeed issue a final rule that included standards for ventless clothes dryers in 2011. 76 FR 22454 (Apr. 21, 2011).

DOE stated in the LG waiver that although it would be feasible to provide LG with an alternative test procedure, that the problem is likely more fundamental than one limited to a needed test procedure change; instead, in spite of technological developments, it was expected (though not definitively known at the time the waiver was issued) that ventless clothes dryers would not meet the DOE energy conservation standard, and that a separate clothes dryer class (with a separate efficiency standard) would have to be established for ventless clothes dryers. Otherwise, a type of product with unique consumer utility could be driven from the market. However, the establishment of product classes cannot be done in a waiver, but only in a standards rulemaking.

DOE therefore, consistent with the long-standing waiver granted to Miele, granted a similar waiver to LG from testing of its ventless clothes dryers. 73 FR 66641, 66642 (Nov. 10, 2008).<sup>13</sup>

Commenters are incorrect that ventless clothes dryers were not subject to any standard. As in the case of

ventless clothes dryers, which were subject to standards prior to the creation of a separate product class and separate (less-stringent) standard, DOE continues to read EPCA's provisions together to authorize the establishment of future standards for short cycle dishwasher product class at a level different from the existing standard if necessary.

Moreover, the current standard requires standard residential dishwashers to not exceed 307 kWh/year and 5.0 gallons per cycle for the "Normal" cycle. 10 CFR 430.32(f)(1)(i). Consistent with the results of the Department's evaluation of dishwashers offering a 60 to 90 minute "Quick" cycle, DOE's has identified an innovative opportunity for the further development of a dishwasher model offering a "Normal" cycle of one hour or less. In this final rule, DOE establishes a product class characterized by a cycle of one hour or less for the manufacturer-identified "Normal" cycle. Because DOE has not yet considered the appropriate standards for the new product class, the commenters are assuming an outcome of an action DOE has yet to take. As stated above, DOE will consider the appropriate energy use standards for the short cycle product class in a separate rulemaking.

Some commenters turned to case law to support the notion that EPCA's anti-backsliding provision prevents DOE from establishing a new product class. Citing to *NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004), these commenters claimed that the anti-backsliding provision must be interpreted in light of "the appliance program's goal of steadily increasing the energy efficiency of covered products" and Congress's intent to provide a "sense of certainty on the part of manufacturers as to the required energy efficiency standards." (Joint Commenters, No. 3145, p. 2) The State AGs and NYC also argue, based on existing case law, that amendments to EPCA's anti-backsliding provision have steadily increased energy efficiency standards over time. Therefore, DOE may not render the anti-backsliding provision inoperative as it would counter case law and thwart the intent of Congress to maintain stability for future standards. (State AGs and NYC, No. 3136, p. 5; Joint Commenters, No. 3145, p. 2)

Congress crafted EPCA using both present and future-tense language to provide for the creation of new product classes with a level of energy use higher or lower than the product class as a whole that would be justified where the facts supported a differing standard. 42 U.S.C. 6295(q)(1)(B). The product class

provision itself demonstrates that other factors such as capacity can be considered when setting a different standard for a new product and that energy efficiency at all cost was not the intent of EPCA. The Attorneys General and Governor Bryant suggest that the one hour or less dishwasher cycle is "plainly an essential performance characteristic of great utility to consumers." (No. 3131, pp. 5–6) Looking to the facts surrounding CEI's petition, as referenced above, and the consumer utility evidenced by a short cycle product class, EPCA authorizes the Secretary to create such a product class, notwithstanding EPCA's anti-backsliding provision.

The State AGs and NYC also contend that EPCA's prohibition against backsliding bars DOE from retroactively asserting that cycle time is a performance feature under 42 U.S.C. 6295(o)(4). (No. 3136, p. 5) Under 42 U.S.C. 6295(o)(4) commenters assert that DOE may not prescribe standards that result in the elimination of "performance characteristics" or "features" and may designate and prescribe different standards for classes of a covered product if necessary to maintain a "performance-related feature" under section 6295(q). These commenters assert that because DOE never previously determined that cycle time was a distinct performance characteristic, the Department cannot make such a determination now that a dishwasher with a cycle of one hour or less is no longer available. (*Id.*, at p. 4) CEC also argued that even if cycle time was a utility and the one hour cycle was not arbitrary, the record does not demonstrate that the existing standards have prevented manufactures from offering consumers a dishwasher with a one-hour cycle, thereby causing the unavailability of such products, 42 U.S.C. 6295(o)(4). This means, according to the commenters, that DOE lacks the statutory authority to create new product features and classes in order to retroactively establish features that CEI speculates may have become unavailable due to decades of lawful standard setting. (CEC, No. 3132, p. 5)

In this final rule, the Department is establishing a product class based on the utility consumers would receive from having a dishwasher characterized by having a "Normal" cycle of one hour or less. The Department is not establishing a standard that would result in the unavailability of a feature, which 42 U.S.C. 6295(o)(4) prohibits. Instead, DOE is creating a product class that incentivizes manufacturers to develop a product that can meet consumers' interests by manufacturing a

<sup>13</sup> DOE stated in the 1995 Miele waiver that the standard "did not apply" to ventless clothes dryers. See 60 FR 9330 (Feb. 17, 1995). While the exact meaning of that statement is not precisely clear, DOE interprets it to mean that DOE would not subject Miele to enforcement action for noncompliance. As DOE correctly points out in the 2008 LG waiver, determining that a product is or is not subject to standards is not a decision that can be made in a test procedure waiver.

dishwasher defined by a one hour or less “Normal” cycle that would be subject to energy conservation standards. Whether DOE has previously defined cycle time as a feature for residential dishwashers is irrelevant. DOE has recognized the loss of the short cycle time feature as a result of the increased length of the manufacturer’s identified “Normal” cycle.

In its initial petition, CEI voiced concern that Federal standards impaired dishwasher cycle times and that dishwashers with shorter “Normal” cycle times were no longer available on the market. (CEI Petition, No. 0006 at p. 4) EPCA prohibits DOE from prescribing efficiency standards that would result in the unavailability of any covered product (or class) of performance characteristics (including reliability), features, sizes, capacities and volumes that are substantially the same as those generally available at the time of the Secretary’s finding. 42 U.S.C. 6295(o)(4).

Commenters contend that DOE cannot claim that the 42 U.S.C. 6295(o)(4) unavailability provision authorizes DOE to establish the new product class. These commenters assert that the 42 U.S.C. 6295(o)(4) unavailability provision does not authorize DOE to reanimate a feature not currently on the market. (Joint Commenters, No. 3145, p. 8 referencing 84 FR 33869, 33873 (July 16, 2019)) Commenters argue that using this as a justification for creation of a new product class is contrary to the anti-backsliding provision and lacks support in the text of the product class provision. (*Id.*)

DOE is not relying on 42 U.S.C. 6295(o)(4) of EPCA to authorize the creation of a new product class of dishwashers or to establish weaker conservation standards through this rulemaking. EPCA provides that DOE may set standards for different product classes based on features that provide a consumer utility. 42 U.S.C. 6295(q). As stated previously, DOE has determined that the facts supporting a performance-related feature justifying a different standard may change depending on the technology and the utility provided to the consumer, and that consumer demand may cause certain products to disappear from or reappear in the market. DOE has also previously determined that the value consumers receive from a feature is to be determined based on a case-by-case assessment of its own research and information provided through public comment. 80 FR 13120, 13138 (Mar. 12, 2015). Lastly, DOE confirms that once the Department recognizes an attribute of a product as a feature, DOE cannot reasonably set standards that would

cause the elimination of that feature. DOE notes that its test data also indicate that some dishwashers are available with a quick cycle that meets these performance characteristics. Establishing the product class characterized by a “Normal” cycle of one hour or less will provide manufacturers an opportunity for innovation. By finalizing this rulemaking, DOE will have responded to a gap in the market by establishing a new product class for a short cycle dishwashers. 84 FR 33869, 33873 (July 16, 2019).

### C. Other Comments

Some commenters contend that DOE has failed to conduct a proper analysis of the data provided by commenters that justifies the creation of a new product class of dishwashers with a short cycle time. These commenters looked to the data provided by energy efficiency advocates and manufactures to claim that CEI’s petition was based on insufficient analyses and relied on anecdotal information, and DOE’s reliance on such information could compromise the integrity of the appliance standard and rulemaking process. (CA IOUs, No. 3142, p. 1) DOE also received comments asserting that the proposal failed to consider alternative cycle durations such as 50 or 70 minutes. (State AGs and NYC, No. 3136, p. 11) Throughout this rulemaking, DOE has requested comments from members of the public and has considered the comments received and conducted its own testing and analysis in determining how to proceed in this final rule. Based on its testing data, DOE has recognized that a dishwasher with a short cycle of one hour or less for the “Normal” cycle would provide a consumer utility not currently available. While DOE has identified some dishwashers offering “Quick” cycles that can accomplish a full cycle of cleaning and drying dishes in 60 to 90 minutes with energy and water use comparable to the existing conservation standards, DOE believes industry can develop a dishwasher with a “Normal” cycle to meet the criteria of the new product class.

Other commenters argued that by categorically excluding this proposed action from environmental review, the Department has also violated the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, first by failing to follow the applicable regulations and second for applying an inapplicable categorical exclusion. (State AGs and NYC, No. 3136, p. 12) Commenters argue that DOE misplaces its reliance on the proposed categorical

exclusion because finalizing the product class would in fact result in a significant impact to the environment and qualify as a major federal action. (Joint Commenters, No. 3145, p. 9; State AGs and NYC, No. 3136 p. 13) Commenters assert that DOE’s decision to apply the A5 categorical exclusion, rather than conduct the environmental review required for major federal actions, is arbitrary and capricious for three reasons: (1) There is no standard for the new class of dishwashers, (2) DOE failed to consider circumstances related to the rulemaking that may affect the significance of the environmental effects of the action, and (3) DOE failed to account for the reasonably foreseeable connected and cumulative actions between the creation of a new product class and future rulemakings setting standards for the product class. (State AGs and NYC, No. 3136, pp. 14–16)

DOE maintains that this rulemaking, once finalized, will only establish a new product class for dishwashers with a “Normal” cycle of one hour or less from washing through drying. Finalization of the rule will not result in adverse environmental impacts and is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D. This categorical exclusion applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. DOE maintains that establishing a new product class for covered products will not result in a change to the environmental effect of the existing dishwasher product classes.

DOE will determine a standard for the product class established in this final rule that provides for the maximum improvement in energy efficiency that is technologically feasible and economically justified, and will result in a significant conservation of energy. 42 U.S.C. 6295(o)(2)(A). That standard will be developed in a separate rulemaking. This action, which only establishes a product class for dishwashers with a “Normal” cycle of one hour or less, therefore falls within the scope of the A5 Categorical Exclusion.

Additionally, commenters stated that DOE also violated the Administrative Procedure Act (APA), 5 U.S.C. 551, *et seq.*, by failing to provide a satisfactory explanation and articulate a rational connection between the facts found and decision made in the NOPR. (State AGs and NYC, No. 3136, p. 9) Commenters argued that the proposal departs from DOE’s previous determinations that only standard and compact dishwasher classes were appropriate, meaning DOE must explain why a quick cycle



function is a performance-related feature to meet the burden of such a change. Commenters explain that changing a policy position, which they contend DOE is doing here, also requires good reasons for the reversal and that the new policy is permissible under the statute (*Fox*, 556 U.S. at 515), and an unexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change. *Nat'l Cable & Telecomms. Ass'n v. Brand X internet Servs.*, 545 U.S. 967, 981 (2005). Commenters conclude that based on the limited explanation provided in the record that DOE has failed to meet this burden. (State AGs and NYC, No. 3136, pp. 10–11)

The Department maintains that it has met the APA's requirements for issuing a final rule and explained its reasoning for establishing a new product class for the one hour or less "Normal" cycle dishwasher sufficiently in the notice of proposed rulemaking and this final rule. DOE has responded to the information submitted through the public comment process and concluded that the public would derive a utility from the introduction of dishwasher that can clean normally soiled dishes in a shorter period of time than is presently available. The comments submitted identify a recognizable gap in the market for such a product and many consumers expressed a preference for such a product. (CEI, No. 3137, pp. 2–3)

Some commenters argued that if DOE created a new, less efficient product class for residential dishwashers that such actions would result in significant uncertainty on the part of manufacturers, businesses, and consumers. (Ceres BICEP, No. 2746, pp. 3–4) Commenters continued that a new product class would likely result in stranded investments, because manufacturers have already invested heavily in meeting existing conservation standards and responding to consumers' energy and water efficiency interests, and manufacturers would essentially be required to abandon these innovations. (AHAM, No. 3188, pp. 1–2, 6; GEA, No. 3189, p. 2; Public Interest Advocacy Collaborative (PIAC), No. 3132, p. 1) Some commenters argued that the new product class would also require manufacturers to operate two research and development cycles at significant expense while providing no real benefit to consumers. (ASE, No. 3185, p. 5) These commenters conclude that the costs of such activity also remain unknown as DOE has not proposed any accompanying efficiency standards to the new product class and that this

deregulation will increase the market uncertainty for manufacturers. (AHAM, No. 3188, p. 6; PIAC, No. 3132, p. 3; Whirlpool, No. 3180, p. 1)

DOE emphasizes that manufacturers seeking to push innovation in efficiency will not be forced to abandon their efforts as some commenters claim. This is because no current product would be prohibited as a result of the new product class characterized by the one hour or less "Normal" cycle. (CEI, No. 3137, p. 5) Additionally, if consumers do place a higher value on efficiency over cycle duration as some manufacturers claim, manufacturers will continue to have a viable market as those consumers will continue to purchase existing efficient products. Investments only become stranded if consumers value faster products over current models. (*Id.*, pp. 5–6) Understandably, manufacturers that choose to enter this new market will incur expenses in order to satisfy the potential demand created as a result of finalizing the creation of this new product class, but that is a business decision manufacturers will make based on an evaluation of whether doing so would be a worthwhile investment. No company will be forced to enter this market as a result of the new product class. (*Id.*, p. 6)

#### IV. Conclusion

DOE has concluded that it has the legal authority to establish a separate product class as suggested by CEI pursuant to 42 U.S.C. 6295(q). DOE has created a separate product class for dishwashers characterized by a "Normal" cycle of one hour or less as identified by the dishwasher manufacturer for daily, regular, or typical use to completely wash and dry a full load of normally soiled dishes. DOE will consider energy conservation standards and test procedures for this product class in a separate rulemaking.

DOE also proposed to update the table specifying currently applicable dishwasher standards in 10 CFR 430.32(f) in the 2019 NOPR. The current requirement includes a table that specifies the obsolete energy factor requirements for standard and compact dishwashers. This table was intended to be removed in a final rule for dishwasher energy conservation standards published on December 13, 2016, but was inadvertently retained by the amendatory instructions for paragraph (f). 81 FR 90072, 90120. DOE will now remove this table and add a new paragraph (f)(1)(iii) that specifies standard dishwashers with a normal cycle of 60 minutes or less are not currently subject to energy or water

conservation standards. Additionally, DOE amends paragraphs (f)(1)(i) through (iii) to clarify the terms "standard" and "compact" and to include reference to the ANSI/AHAM DW–1–2010 standard, which is the current industry standard referenced in the dishwasher test procedure at 10 CFR part 430, subpart B, appendix C1.

#### V. Procedural Issues and Regulatory Review

##### A. Review Under Executive Orders 12866 and 13563

This regulatory action is a "significant regulatory action" under the criteria set out in section 3(f) of Executive Order 12866, "Regulatory Planning and Review." (58 FR 51735 (Oct. 4, 1993)). Accordingly, this regulatory action was subject to review under the Executive order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). As previously discussed in this preamble, DOE does not anticipate that the creation of a new product class will, in and of itself, result in any quantifiable costs or benefits. Rather, those costs or benefits would derive from the applicable test procedures and energy conservation standards, which the Department will prescribe in separate rulemakings.

##### B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, "Reducing Regulation and Controlling Regulatory Costs." (82 FR 9339 (Jan. 30, 2017)). More specifically, the order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." (82 FR 12285 (March 1, 2017)). The order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing

regulations, consistent with applicable law.

DOE has determined that this final rule is consistent with these Executive orders. The proposed rule granted a petition submitted to DOE by the Competitive Enterprise Institute requesting that DOE establish a product class for dishwashers with “normal cycle” times of one hour or less from washing through drying. In this final rule, DOE has established a product class for dishwashers with “Normal” cycle time of one hour or less from washing through drying. DOE has designated this rulemaking as “deregulatory” under E.O. 13771 because it is an enabling regulation pursuant to OMB memo M–17–21. DOE will make a determination of the appropriate standard levels for the product class in a subsequent rulemaking.

#### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel’s website at: <http://energy.gov/gc/office-general-counsel>.

DOE reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has concluded that this rule will not have a significant impact on a substantial number of small entities. The factual basis for this determination is as follows:

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its

affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System (NAICS) that are available at: <https://www.sba.gov/document/support-table-size-standards>. The threshold number for NAICS classification code 335220, “Major Household Appliance Manufacturing,” which includes dishwasher manufacturers, is 1,500 employees.

Most of the companies that manufacture dishwashers are large multinational corporations. DOE collected data from DOE’s compliance certification database<sup>14</sup> and surveyed the AHAM member directory to identify potential manufacturers of dishwashers. DOE then consulted publicly-available data, such as Dun and Bradstreet, to determine if those manufacturers meet the SBA’s definition of a “small business.” Based on this analysis, DOE identified two potential small businesses, but determined that this rule does not impose any compliance or other requirements on any manufacturers, including small businesses. This rulemaking establishes a product class for dishwashers with a “Normal” cycle of one hour or less from washing through drying as described in the preamble. The rulemaking does not establish or impose energy conservation standards for the new product class of residential dishwashers that manufacturers will now be required to follow. Such requirements will be established in separate rulemakings where DOE will determine the appropriate standard levels and associated testing procedures. This rule will not result in any subsequent costs to any dishwasher manufacturer. Therefore, DOE concludes that the impacts of this final rule would not have a “significant economic impact on a substantial number of small entities,” and that the preparation of a FRFA is not warranted. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

#### *D. Review Under the Paperwork Reduction Act of 1995*

Manufacturers of covered products/equipment generally must certify to DOE that their products comply with

any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for such products/equipment, including any amendments adopted for those test procedures, on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (March 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This rule establishes a product class for dishwashers with a “Normal” cycle of one hour or less from washing through drying but does not set conservation standards or establish testing requirements for such dishwashers, and thereby imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### *E. Review Under the National Environmental Policy Act of 1969*

Pursuant to the National Environmental Policy Act (NEPA) of 1966, DOE has analyzed this action in accordance with NEPA and DOE’s NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning

<sup>14</sup> <https://www.regulations.doe.gov/certification-data> (Last accessed May 22, 2020).

of NEPA, and does not require an environmental assessment or environmental impact statement.

#### *F. Review Under Executive Order 13132*

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (65 FR 13735). EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE’s regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

#### *G. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity

and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

#### *H. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at <http://www.energy.gov/gc/office-general-counsel> under “Guidance & Opinions” (Rulemaking)) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

#### *I. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *J. Review Under Executive Order 12630, “Governmental Actions and Interference With Constitutionally Protected Property Rights”*

Pursuant to Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), DOE has determined that this rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

#### *K. Review Under the Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

#### *L. Review Under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”*

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the

supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, the establishment of a new product class for dishwashers with a “Normal” cycle of one hour or less from washing through drying, is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rule.

#### *M. Review Consistent With OMB’s Information Quality Bulletin for Peer Review*

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government’s scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are “influential scientific information,” which the Bulletin defines as “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” *Id.* at 70 FR 2667 (Jan. 14, 2005).

In response to OMB’s Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the

actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The “Energy Conservation Standards Rulemaking Peer Review Report,” dated February 2007, has been disseminated and is available at the following website: [http://www1.eere.energy.gov/buildings/appliance\\_standards/peer\\_review.html](http://www1.eere.energy.gov/buildings/appliance_standards/peer_review.html). Because available data, models, and technological understanding have changed since 2007, DOE has engaged in a new peer review of its analytical methodologies.

#### *N. Description of Materials Incorporated by Reference*

In this document, DOE incorporates by reference the industry standard published by ANSI/AHAM, titled “Household Electric Dishwashers,” ANSI/AHAM DW–1–2010. ANSI/AHAM DW–1–2010 is an industry-accepted standard to measure the energy and water consumption of residential dishwashers and is already incorporated by reference for the current dishwasher test procedure at 10 CFR part 430, subpart B, appendix C1. DOE incorporates by reference this industry consensus standard at 10 CFR 430.32(f), which specifies the energy conservation standards for compact and standard dishwashers, for the purpose of distinguishing the standard and compact product classes pursuant to the industry standard.

Copies of ANSI/AHAM DW–1–2010 may be purchased from AHAM at 1111 19th Street NW, Suite 402, Washington, DC 20036, 202–872–5955, or by going to <http://www.aham.org>.

#### *O. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

#### **VI. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this final rule.

#### **List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses, Test procedures.

#### **Signing Authority**

This document of the Department of Energy was signed on October 19, 2020,

by Daniel R. Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 22, 2020.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

For the reasons set forth in the preamble, DOE amends part 430 of title 10 of the Code of Federal Regulations as set forth below:

#### **PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

#### **§ 430.3 [Amended]**

■ 2. Section 430.3(i)(2) is amended by adding “§ 430.32 and” immediately before “appendix C1”.

■ 3. Section 430.32 is amended by revising paragraph (f) to read as follows:

#### **§ 430.32 Energy and water conservation standards and their compliance dates.**

\* \* \* \* \*

(f) *Dishwashers.* (1) All dishwashers manufactured on or after May 30, 2013, shall meet the following standard—

(i) Standard size dishwashers shall not exceed 307 kwh/year and 5.0 gallons per cycle. Standard size dishwashers have a capacity equal to or greater than eight place settings plus six serving pieces as specified in ANSI/AHAM DW–1–2010 (incorporated by reference, see § 430.3) using the test load specified in section 2.7 of appendix C1 in subpart B of this part.

(ii) Compact size dishwashers shall not exceed 222 kwh/year and 3.5 gallons per cycle. Compact size dishwashers have a capacity less than eight place settings plus six serving pieces as specified in ANSI/AHAM DW–1–2010 (incorporated by reference, see § 430.3) using the test load specified

in section 2.7 of appendix C1 in subpart B of this part.

(iii) Standard size dishwashers with a “normal cycle”, as defined in section 1.12 of appendix C1 in subpart B of this part, of 60 minutes or less are not currently subject to energy or water conservation standards. Standard size dishwashers have a capacity equal to or greater than eight place settings plus six serving pieces as specified in ANSI/AHAM DW-1-2010 (incorporated by reference, see § 430.3) using the test load specified in section 2.7 of appendix C1 in subpart B of this part.

(2) [Reserved]

\* \* \* \* \*

[FR Doc. 2020-23765 Filed 10-29-20; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 7

[Docket ID OCC-2020-0026]

RIN 1557-AE97

### National Banks and Federal Savings Associations as Lenders

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is issuing this final rule to determine when a national bank or Federal savings association (bank) makes a loan and is the “true lender,” including in the context of a partnership between a bank and a third party, such as a marketplace lender. Under this rule, a bank makes a loan if, as of the date of origination, it is named as the lender in the loan agreement or funds the loan.

**DATES:** The final rule is effective on December 29, 2020.

#### FOR FURTHER INFORMATION CONTACT:

Andra Shuster, Senior Counsel, Karen McSweeney, Special Counsel, Alison MacDonald, Special Counsel, or Priscilla Benner, Senior Attorney, Chief Counsel’s Office, (202) 649-5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY users may contact (202) 649-5597.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Lending partnerships between national banks or Federal savings

associations (banks) and third parties play a critical role in our financial system.<sup>1</sup> These partnerships expand access to credit and provide an avenue for banks to remain competitive as the financial sector evolves. Through these partnerships, banks often leverage technology developed by innovative third parties that helps to reach a wider array of customers. However, there is often uncertainty about how to determine which entity is making the loans and, therefore, the laws that apply to these loans.<sup>2</sup> This uncertainty may discourage banks from entering into lending partnerships, which, in turn, may limit competition, restrict access to affordable credit, and chill the innovation that can result from these relationships. Through this rulemaking, the Office of the Comptroller of the Currency (OCC) is providing the legal certainty necessary for banks to partner confidently with other market participants and meet the credit needs of their customers.

However, the OCC understands that there is concern that its rulemaking facilitates inappropriate ‘rent-a-charter’ lending schemes—arrangements in which a bank receives a fee to ‘rent’ its charter and unique legal status to a third party. These schemes are designed to enable the third party to evade state and local laws, including some state consumer protection laws, and to allow the bank to disclaim any compliance responsibility for the loans. These arrangements have absolutely no place in the federal banking system and are addressed by this rulemaking, which holds banks accountable for all loans they make, including those made in the context of marketplace lending partnerships or other loan sale arrangements.

On July 22, 2020, the OCC published a notice of proposed rulemaking (proposal or NPR) to determine when a bank makes a loan.<sup>3</sup> Under the proposal, a bank made a loan if, as of the date of origination, it (1) was named as the lender in the loan agreement or (2) funded the loan.

As the proposal explained, federal law authorizes banks to enter into contracts, to make loans, and to subsequently transfer these loans and assign the loan contracts.<sup>4</sup> The statutory

<sup>1</sup> In this rulemaking, use of the terms “partner” or “partnership” does not connote any specific legal relationship between a bank and a third party, and the terms “partnership” and “relationship” are used interchangeably to describe a variety of relationships between banks and third parties.

<sup>2</sup> This is often referred to as a question of which entity is the ‘true lender.’

<sup>3</sup> 85 FR 44223.

<sup>4</sup> See 12 U.S.C. 24(Third), 24(Seventh), 371, 1464; see also 12 CFR 7.4008, 34.3, 160.30.

framework, however, does not specifically address which entity makes a loan when the loan is originated as part of a lending partnership involving a bank and a third party, nor has the OCC taken regulatory action to resolve this ambiguity. In the absence of regulatory action, a growing body of case law has introduced divergent standards for resolving this issue, as discussed below. As a result of this legal uncertainty, stakeholders cannot reliably determine the applicability of key laws, including the law governing the permissible interest that may be charged on the loan.

This final rule establishes a clear test for determining when a bank makes a loan, by interpreting the statutes that grant banks their authority to lend. Specifically, the final rule provides that a bank makes a loan when it, as of the date of origination, (1) is named as the lender in the loan agreement or (2) funds the loan.

##### II. Overview of Comments

The OCC received approximately 4,000 comments on the proposal, the vast majority of which were from individuals using a version of one of three short form letters to express opposition to the proposal. Other commenters included banks, nonbank lenders, industry trade associations, community groups, academics, state government representatives, and members of Congress.

Commenters supporting the proposal stated that the judicial true lender doctrine has led to divergent standards and uncertainty concerning the legitimacy of lending partnerships between banks and third parties. They also stated that, by removing the uncertainty, the OCC would help ensure that banks have the confidence to enter into these lending relationships, which provide affordable credit to consumers on more favorable terms than the alternatives, such as pawn shops or payday lenders, to which underserved communities often turn. Supporting commenters also observed that the proposal would enhance a bank’s safety and soundness by facilitating its ability to sell loans. These commenters also noted that the proposal (1) makes clear that the OCC will hold banks accountable for products with unfair, deceptive, abusive, or misleading features that are offered as part of a relationship and (2) is consistent with the OCC’s statutory mission to ensure that banks provide fair access to financial services.

Commenters opposing the proposal stated that it would facilitate so-called rent-a-charter schemes, which would