

No. 07-71576

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA ENERGY COMMISSION, Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al., Respondents

APPEAL OF ADMINISTRATIVE ACTION
BY RESPONDENTS UNITED STATES DEPARTMENT OF ENERGY, et al.

PETITIONER'S OPENING BRIEF

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INTRODUCTION

[Federal appliance law] is . . . designed to ensure that States are able to respond with their own appliance regulations to substantial and unusual . . . problems, such as high . . . prices . . . or adverse environmental or health and safety conditions that can be alleviated by . . . conservation in appliances. Congress anticipates that States that have such . . . problems, and that have met the burden of proof set forth in [the statute], will be granted waivers [from preemption].

H.R. Rep. No. 100-11, at 24 (1987).¹

There is a water crisis in California. The State's need for water grows inexorably, as her population will likely increase by nearly 50 percent in the next three decades. Cal. Energy Comm'n, Pet. to Exempt from Preemption Cal.'s Water Efficiency Standards for Residential Clothes Washers (Sept. 2005) ("California Petition" or "Cal. Pet.") 1, Petitioner's Excerpts of Record ("Pet'r's Excerpts") 0062.² At the same time, current water supplies are decreasing: every

¹ House of Representatives Report No. 100-11 discusses H.R. 87 of 1987. The corresponding Senate Report, S. Rep. No. 100-6 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 52, discusses S. 83 of 1987. The two bills were almost identical; S. 83 was enacted as the National Appliance Energy Conservation Act, Pub. L. 100-12, 101 Stat. 103 (1987) ("NAECA"), *codified at* 42 U.S.C. §§ 6291-6309. NAECA amended the Energy Policy and Conservation Act, Pub. Law No. 94-163, 89 Stat. 926 (1975), to update a program of federal efficiency standards, preemption of state standards (and waivers therefrom), and other matters. 42 U.S.C. § 6297(d), the statutory provision at issue here, has remained essentially unchanged since 1987. The House Report is included in the Addendum to this Brief.

² Citations to documents in DOE's Record include the page numbers where the document is found in Petitioner's Excerpts of Record.

major water supply source for the state – from the Klamath and Trinity Rivers in the north, to the Sacramento-San Joaquin Rivers and Delta in the Central Valley, to the Mono Lake and Owens River system in the Eastern Sierra, to the Colorado River, with its five-year record-breaking drought, in the South – is over-appropriated. *Id.*, Pet’r’s Excerpts 0062. And the state’s groundwater basins are severely overdrafted. *Id.*, Pet’r’s Excerpts 0062. To make matters worse, most of the State’s population lives long distances from the major water supplies, which results in costs for water pumping and treatment that are double the rest of the country’s. *Id.*, Pet’r’s Excerpts 0062. Moreover, California’s water supplies face increased environmental obstacles. For example, the recent federal court order limiting the movement of water from northern California to southern California, in order to protect the endangered Delta smelt, will further limit available supplies. *See* Tr. of Hr’g re Interim Remedies Ruling at 16-24, *Natural Res. Def. Council v. Kempthorne*, No. 05-CV-1207-OWW (E.D. Cal. Aug. 31, 2007), *available at* http://calwater.ca.gov/content/Documents/20070831_NRDC_Ruling_FINAL.pdf; *Smelt Ruling May Cut Into Water Supply*, L.A. Times, Aug. 31, 2007, *available at* [www.latimes.com/news/local/la-me-delta1sep01,1,255393,full.story? \[-\]ctrack=1&cset=true](http://www.latimes.com/news/local/la-me-delta1sep01,1,255393,full.story?[-]ctrack=1&cset=true). In addition, overuse of coastal aquifers has led to intrusion of salt water into those groundwater supplies, and irrigation pumping has caused increased salinity in inland underground sources. Cal. Pet. 12, Pet’r’s Excerpts

0073. And the looming specter of a hotter climate suggests that the Sierra Nevada will store increasingly less water in its winter snowpack than the State has historically enjoyed. *Id.* 12-13, Pet’r’s Excerpts 0073-0074.

Unfortunately, California has no new major conventional supplies on the horizon: all of the potential new water-storage sites that are part of the California Water Plan are relatively small projects. Cal. Pet. 12, Pet’r’s Excerpts 0073. As a result, water efficiency, recycling, and desalination hold the key to alleviating the State’s water crisis. But recycling and desalination are expensive and energy-intensive, so water use efficiency is clearly the best option, both economically and environmentally. *Id.*, Pet’r’s Excerpts 0073. Recognizing this fact, the California Legislature emphatically stated that “[i]t is . . . the policy of the state and the intent of the Legislature to promote *all* feasible means of . . . water conservation” Cal. Pub. Res. Code § 25008 (emphasis added). Thus for decades state and local water agencies have actively pursued water efficiency for residential, commercial, industrial, and agricultural customers. Cal. Pet. 1, Pet’r’s Excerpts 0062. But funds are limited, and most of the “low-hanging fruit” opportunities for savings have been achieved. *Id.*, Pet’r’s Excerpts 0062.

As a key response to these difficulties, the California Legislature has *required* the California Energy Commission (“CEC”), Petitioner here, to establish water efficiency standards for residential clothes washers – an appliance that

accounts for 22 percent of the water use in a typical household. Cal. Pet. 17, Pet'r's Excerpts 0078. In so doing the Legislature declared that "a significant portion of urban water demand in the state is for residential clothes washers" and that "water conservation is a proven tool that will make the most effective use of the state's limited water supply, and will conserve energy." Cal. Assemb. Bill 1561 (Kelley), Ch. 421, Stats. 2002, § 1(b) (enacting Cal. Pub. Res. Code § 25402(e)(1)). In turn, and with the overwhelming support of the hundreds of water agencies throughout California, the CEC adopted the Standards that are at issue in this case. Cal. Code Regs. tit. 20, § 1605.2(p)(1) ("California Standards"); *see* comments collected at Pet'r's Excerpts 0219-0272, 0308-0316.

The California Standards establish a maximum amount of water that residential clothes washers can use to wash and rinse a typical load, based on the size of the machine. The Standards are expressed in terms of "water factor" ("WF"), which is the ratio of (i) the gallons of water used for a load to (ii) the capacity, in cubic feet, of the washtub. Cal. Code Regs. tit. 20, §§ 1602(p), 1605.2(p)(1). Both elements are determined under strict testing conditions (which are established by Respondent U.S. Department of Energy ("DOE") pursuant to 42 U.S.C. § 6294). *See* Cal. Code Regs. tit. 20, §§ 1602(p), 1603, 1604(p), 1605.2(p)(1); 10 C.F.R. § 430.23(j) & App. J1. Thus a clothes washer that has 5 cubic feet of capacity and that uses 50 gallons of water per load would have a WF

of $50 \div 5 = 10$, while a machine of the same 5-cubic-foot capacity that uses only 25 gallons per load would have a WF of 5.0.

The California Standards apply to both top-loading and front-loading clothes washers, and they establish two different tiers, or standards levels, to take effect on different dates. Tier 1, nominally scheduled by California law to take effect on January 1, 2007, has 8.5 WF standards for top-loaders and front-loaders. Cal. Code Regs. tit. 20, § 1605.2(p)(1). Tier 2, nominally scheduled by California law to take effect on January 1, 2010, has 6.0 WF standards for top-loaders and front-loaders. *Id.*

If the federal government allows the Standards to be implemented – for they are preempted absent a waiver from DOE, 42 U.S.C. § 6297(c), (d) – then every year they will save almost as much water as is used annually in the City of San Diego, the second largest city in California and the seventh largest city in the country. Cal. Pet. 2, Pet’r’s Excerpts 0063. In addition, the Standards will save money for consumers and will help protect California’s environment. *Id.* 1, 5, 19, 25-26, Pet’r’s Excerpts 0062, 0066, 0080, 0086-0087.

However, the federal government has not allowed the Standards to take effect. Instead, DOE has, in reliance on misinterpretations of the law and misunderstandings of its own record, decided that California has not shown that the Standards are appropriate to the meet the State’s needs, and as a result the agency

has denied the State’s request for a waiver from preemption. DOE also decided, several years ago, that it did not have the authority to adopt *national* water efficiency standards for residential clothes washers. 66 Fed. Reg. 3314, 3319 (Jan. 12, 2001). Therefore, unless this Court reverses DOE’s denial of the waiver, California will be condemned to watch inefficient clothes washers waste large amounts of water for years to come. It is irrelevant whether DOE’s failure to adopt national standards is right for areas of the nation with plenty of rainfall; for California and the other dry Western states it is a serious blow, particularly if DOE’s current *modus operandi* continues, making it virtually impossible for any state to obtain a waiver from federal preemption. Congress “anticipate[d] that States” with “substantial and unusual . . . problems,” such as those in California, “will be granted waivers” H.R. Rep. No. 100-11, at 24 (1987). This Court should step in, correct DOE’s mistakes, and let Congress’s intent come to fruition.

JURISDICTIONAL STATEMENT

Statutory Basis of Subject-Matter Jurisdiction of the Agency. Respondents (the United States Department of Energy and the Department’s Secretary, Samuel W. Bodman, referred to collectively as “DOE”) have subject-matter jurisdiction over California’s request for a preemption waiver. DOE has adopted federal *energy* efficiency standards for residential clothes washers, 42 U.S.C. § 6295(g);

10 C.F.R. § 430.32(g), but under federal law the states are preempted from implementing their own energy *or water* efficiency standards for that appliance (except in circumstances not present here). 42 U.S.C. § 6297(b)-(c). However, a state may petition DOE for rule that waives preemption; DOE grants or denies such petitions based on criteria established by Congress. *Id.* § 6297(d).

Finality of the Agency Order. DOE denied California's waiver petition on December 28, 2006. 71 Fed. Reg. 78157 (Dec. 28, 2006). On January 29, 2007, the CEC requested reconsideration, which 10 C.F.R. section 430.48(d) states is required to exhaust administrative remedies. Cal. Energy Comm'n, California's Req. for Recons. (Jan. 29, 2007) ("Cal. Recons. Req."), Pet'r's Excerpts 0001-0031. DOE failed to take action on that request within 30 days and reconsideration was therefore denied by operation of law on February 28, 2007. 10 C.F.R. § 430.48(c); Pet'r's Excerpts 0304 ("Recons. Denial E-Mail").

Statutory Basis of Jurisdiction of This Court. Petitioner CEC seeks relief from denial of a rule by DOE. *See* 42 U.S.C. § 6297(d)(1). 42 U.S.C. § 6306(b)(1) places judicial review of DOE rulemaking in the courts of appeals; venue lies in the circuit in which the party adversely affected resides or has his principal place of business. *Id.* § 6306(b)(1). The principal place of business of the CEC is in Sacramento, California.

Timeliness: A petition for judicial review under 42 U.S.C. §

6306(b)(1) must be filed within 60 days after the date on which final rulemaking action was taken. California's Petition for a rule granting a waiver was deemed finally denied, by operation of law, on February 28, 2007. Reconsideration Denial E-Mail, Pet'r's Excerpts 0304. Petitioner CEC filed its Petition for Review with this Court on April 23, 2007, 54 days after DOE's denial of a waiver became final.

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW,
WHERE IN THE RECORD BELOW THE ISSUES WERE RAISED, AND
THE STANDARD OF REVIEW**

The issues presented for review, and the location in the record below where the issues were raised, are as follows. The standard of review for all issues is discussed immediately following the listing of the issues.

1. Unusual and compelling interests. DOE must grant a waiver for a state efficiency standard if (absent other considerations discussed below) it “finds . . . that the State . . . has established by a preponderance of the evidence that [the state standard] is needed to meet unusual and compelling State or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(B). Such interests are those that (i) “are substantially different in nature or magnitude than those prevailing in the United States generally” and (ii) “are such that the costs, benefits, burdens, and reliability of . . . savings resulting from the State [standard] make [it] preferable or necessary when measured against the costs, benefits, burdens, and reliability of

alternative[s].” *Id.* § 6297(d)(1)(C)(i)-(ii). DOE found that California’s interests are “substantially different in magnitude” from those in the U.S. generally, but the agency did not make the requisite findings on the other issues, “alternatives” and “needed.”

a. Alternatives.

(1) *Issue.* Did DOE commit legal error by determining that California had not met its burden of showing that the Standards are preferable to alternatives, on the sole grounds that (a) California did not adequately describe the assumptions supporting its analysis of the cost-effectiveness of the Standards, and (b) California did not compare the Standards to product-specific and state-specific alternatives, where (i) there is no legal requirement that a state do either of these things and (ii) the record shows that California did both?

(2) *Where raised below.* Cal. Recons. Req. 4, Pet’r’s Excerpts 0009.

b. Need.

(1) *Issue.* Did DOE commit legal error by not making a finding on whether the California Standards are “needed” to meet state and local interests, where the record convincingly shows that the Standards are “needed,” as Congress used that term?

(2) *Where raised below.* Cal. Recons. Req. 19, Pet’r’s

Excerpts 0024.

2. Availability of Consumer Attributes. DOE cannot prescribe a waiver rule if the agency “finds . . . that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of . . . performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of [DOE’s] finding, except that the failure of some classes (or types) to meet this criterion shall not affect [DOE’s] determination of whether to [grant a waiver] for other classes (or types).” 42 U.S.C. § 6297(d)(4).

a. Availability of top-loaders.

(1) *Issue.* Did DOE commit legal error by determining that opponents met their burden of proof on this issue, on the sole ground that the unavailability of top-loading washers with a WF under 6.3 in 2006 means that there will be no top-loaders that can meet a WF of 6.0 in 2010?

(2) *Where raised below.* Cal. Recons. Req. 14, Pet’r’s

Excerpts 0019.

b. Refusal to approve waiver for other classes.

(1) *Issue.* Did DOE commit legal error by refusing to grant a waiver for the 8.5 WF Standards, or the 6.0 WF Standard for front-loaders, even

though its determination of unavailability related only to top-loaders below 6.3 WF?

(2) *Where raised below.* Cal. Recons. Req. 13, Pet'r's Excerpts 0018.

3. The Three-Year Requirement. There is, in general, a three-year delay between the date of DOE's publication of a rule granting of a waiver, and the date on which a state standard takes effect under the rule. 42 U.S.C. § 6297(d)(5)(A).

a. *Issue.* Did DOE commit legal error by determining that the three-year requirement prevented the agency from granting a waiver, in 2006, for the 8.5 WF standards, which under state law were nominally scheduled to take effect in 2007?

b. *Where raised below.* Cal. Recons. Req. 3, Pet'r's Excerpts 0008.

4. Further Rulemaking. Section 6297(d) provides that when a state submits a waiver petition, DOE is to conduct a rulemaking proceeding and either (1) deny the petition, if the agency finds that the applicable statutory criteria are not met, or (2) "prescribe" a rule granting the waiver, if the agency finds that the criteria are met. 42 U.S.C. § 6297(d)(1), (3)-(5).

a. *Issue.* Did DOE commit legal error by stating that if it finds that the applicable statutory criteria are met, it would not grant prescribe a rule

granting a waiver, but instead would begin a new rulemaking?

b. *Where raised below.* Cal. Recons. Req. 21, Pet'r's Excerpts 0026.

The Standard of Review. 42 U.S.C. § 6306(b)(2) provides that judicial review of DOE rulemakings is “in accordance with chapter 7 of Title 5,” which is the judicial review chapter of the Administrative Procedure Act (“APA”). Under the APA, the reviewing court “shall . . . compel agency action unlawfully withheld [and] hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706(2)(A); *see Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (“*Env'tl. Def. Ctr.*”). Under this standard, generally referred to as the “arbitrary and capricious standard,” an agency decision can be upheld only on the basis of the reasoning articulated in the decision. *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997). Moreover, the court will overturn the decision if the agency:

- (1) relied on a factor that Congress did not intend it to consider;
- (2) failed to consider an important factor or aspect of the problem;
- (3) failed to articulate a rational connection between the facts found and the conclusions made;
- (4) supported the decision with a rationale that runs counter to the evidence or that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; or

(5) made a clear error of judgment.

E.g., Envtl. Def. Ctr., 344 F.3d at 858 n.36. In addition, under the APA an agency's factual findings are reviewed under the "substantial evidence" test. 5 U.S.C. § 706(2)(E). However, in the instant case DOE made no factual findings. Finally, the reviewing court is to "decide all relevant questions of law [and] interpret . . . statutory provisions" *Id.* § 706.

STATEMENT OF THE CASE

Nature of the Case. This is a case of first impression. Petitioner California Energy Commission seeks a judgment overturning Respondent U.S. Department of Energy's denial of California's request for rule granting a waiver of federal preemption for the State's water efficiency standards for residential clothes washers.

The Course of the Proceedings Below. California filed its Petition for a waiver rule with DOE on September 16, 2005, and the petition was accepted as complete on December 23, 2005. *See* 71 Fed. Reg. 6022, 6023 (Feb. 6, 2006), Pet'r's Excerpts 0155. DOE denied the Petition on December 28, 2006. 71 Fed. Reg. 78157 (Dec. 8, 2006), Pet'r's Excerpts 0139. On January 29, 2007, California requested reconsideration. Cal. Recons. Req., Pet'r's Excerpts 0001-0031. Following DOE's inaction for 30 days, the Request was denied by operation

of law on February 28, 2007. Reconsideration Denial E-Mail, Pet'r's Excerpts 0304. Petitioner CEC filed its Petition for Review with this Court on April 23, 2007.

STATEMENT OF FACTS

The CEC has been adopting and implementing statewide efficiency standards for appliances since 1976. *See* Cal. Pub. Res. Code § 25402(c). DOE has been doing so on a national level since 1987, under NAECA and subsequent legislation. *See* 42 U.S.C. § 6295; *id.*, Historical and Statutory Notes. In general, DOE's efficiency standards preempt state efficiency standards, but DOE may prescribe rules granting waivers from preemption. 42 U.S.C. § 6297(b)-(d). DOE also establishes procedures for the testing of appliances, *id.* § 6293, and the Federal Trade Commission establishes regulations on appliance labeling, *id.* § 6294.

In 2001, DOE adopted federal *energy* efficiency standards for residential clothes washers, pursuant to § 6295. 66 Fed. Reg. at 3314, *codified at* 10 C.F.R. § 430.32(g). However, DOE also decided that it does not have the authority to prescribe water efficiency standards for that appliance. 66 Fed. Reg. at 3319. In 2002, the CEC adopted energy and water efficiency standards for *commercial* clothes washers. *See* Cal. Code Regs. tit. 20, § 1605.3(p)(1). (Because commercial clothes washers were not at that time covered by federal law, those

California standards were not preempted then.)

Later in 2002, the California Legislature enacted a statute that required the CEC to adopt water efficiency standards for residential clothes washers. 2002 Cal. Stat., ch. 421 (enacting Cal. Pub. Res. Code § 25402(e)(1)). Recognizing that the water standards would be preempted by federal law, the Legislature also required the CEC to petition DOE for a rule waiving preemption. *Id.* The CEC responded by adopting the Standards, Cal. Code Regs. tit. 20, § 1605.2(p)(1), and by submitting the petition for a waiver rule, that are at issue here. DOE denied the rule requested in the waiver petition.

For a discussion of the potential effects of the Standards on California's water needs, see pp. 1-4 *supra*.

SUMMARY OF THE ARGUMENT

State Interests. DOE must prescribe a rule waiving preemption if the agency finds that the state has shown that its standard is “needed” to meet “unusual and compelling” interests – i.e., interests that are, among other things, such that the standard is preferable to alternatives in meeting the interests. 42 U.S.C. § 6297(d)(1)(B)-(C). DOE said that California failed to show that its Standards are preferable to alternatives because, the agency contended, California did not identify or explain the assumptions underlying its analysis, and California did not

examine alternatives that were specific to clothes washers or to the State. 71 Fed. Reg. at 78162-64. In fact, the record is clear that California did both things.

Because DOE determined that California had not shown that the clothes washer Standards are preferable to alternatives (and thereby determined that California does not have “unusual and compelling” interests), the agency made no determination on whether the standards are “needed” to meet the State’s interests. 71 Fed. Reg. at 78164. Had DOE correctly determined that California does have “unusual and compelling” interests, the agency could and should have found that California showed that the Standards are “needed” to meet those interests.

Product Attributes. DOE cannot prescribe a waiver rule if the agency determines that opponents of a state standard have shown that the standard is likely to result in the unavailability of product attributes, such as size or features, that were available at the time DOE rules on the waiver. 42 U.S.C. § 6297(d)(4). DOE stated that “[t]he lowest WF of a top-loading washer *currently* [December 2006] on the market is approximately 6.3. . . . [T]herefore the [2010] California [6.0] standard would result in the unavailability of top-loading residential clothes washers” 71 Fed. Reg. at 78167 (emphasis added). DOE’s non sequitur was error. That the market in 2006 had no better top-loader than a 6.3 WF model gives no support to DOE’s determination that the market is unlikely to have no 6.0 top-loaders in 2010, when the California 6.0 WF standard for top-loaders is scheduled

to take effect. Therefore, DOE should have determined that opponents had not shown that the 6.0 WF Standard is likely to result in the unavailability of any product attribute. Moreover, even if DOE's determination were correct, it would be irrelevant to the three other California standards: the 6.0 WF Standard for front-loading machines (many of which already meet the Standard), and the 8.5 WF Standards for top- and front-loaders. Nor would the determination prevent DOE from allowing California to enforce a 6.3 WF requirement for top-loaders.

The Three-Year Requirement. The federal statute establishes, in general, a three-year delay between the date when prescribes a waiver rule and the date on which a state standard takes effect pursuant to the waiver. 42 U.S.C. § 6297(d)(5)(A). DOE determined that this provision prevented granting of the waiver, on the ground that the prescription of a waiver rule would have been in 2006, and one section of California's appliance regulations indicates that the 8.5 WF Standards were nominally scheduled to take effect on January 1, 2007 (less than three years later). See 71 Fed. Reg. at 78160. This was error. The California regulations expressly recognize that a standard needing a waiver goes into effect only upon the effective date of a waiver, and the three-year provision in federal law trumps any nominal effective date in a state law.

Further Rulemaking. The waiver statute provides that when a state submits a waiver petition, DOE is to conduct a rulemaking proceeding and either (1) deny

the petition, if the agency finds that the applicable statutory criteria are not met, or (2) “prescribe” a rule granting the waiver, if the agency finds that the criteria are met. 42 U.S.C. § 6297(d)(1), (3)-(5). DOE, however, stated that if the agency had found that the applicable statutory criteria had been met by California’s Standards, it would not grant a waiver but instead would begin a new rulemaking. This was directly contradictory to the statute and was therefore error.

Remand with Instructions. All of DOE’s errors were legal errors: none involved factual findings by the agency. The record necessary to make the factual findings required by statute is fully developed and the conclusions that must be drawn from the record are clear. Therefore, further administrative proceedings would serve no purpose, and this Court should remand to DOE with instructions to prescribe a rule that grants a preemption waiver for the California Standards.

ARGUMENT

- I. DOE’s Denial of a Rule Granting a Preemption Waiver for California’s Clothes Washer Standards Should Be Overturned, Because It Is Arbitrary, Capricious, and Not in Accordance with the Law.**
 - A. DOE Committed Legal Error in Determining That California Did Not Demonstrate That the Standards Are Needed to Meet Unusual and Compelling Interests.**

DOE must prescribe a rule granting a waiver if the agency:

finds . . . that the State . . . has established by a preponderance of the evidence that [the] State regulation is needed to meet unusual and

compelling State or local energy or water interests. [¶] “[U]nusual and compelling State or local energy or water interests” means interests which . . . (i) are substantially different in nature or magnitude than those prevailing in the United States generally; and (ii) are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

42 U.S.C. § 6297(d)(1)(B)-(C). DOE determined that California showed that its water interests are “substantially different in . . . magnitude than those prevailing in the United States generally,” but the agency claimed that California failed to show that its Standards are “preferable or necessary” compared to alternatives. 71 Fed. Reg. at 78162-64, Pet’r’s Excerpts 0144-0146. DOE gave only two reasons for its determination on the alternatives analysis: according to DOE, California’s Petition (1) did not provide adequate support for its assessment of the cost-effectiveness of the standards, and (2) did not analyze alternatives that were specific to California and to residential clothes washers. *Id.* at 78162-64, Pet’r’s Excerpts 0144-0146. These were *not* factual findings, such as a finding that alternatives are preferable to the California Standards. Rather, they were essentially legal determinations that the California evidence was somehow inadequate per se. In any event, the determinations are “not in accordance with law,” were “clear error[s] of judgment,” and “run[] counter to the evidence,” and therefore they should be

overturned. *See* 5 U.S.C. § 706; *Env'tl. Def. Ctr.*, 344 F.3d at 858 n.36.

1. DOE's Determination That California Did Not Explain the Assumptions Supporting Its Analysis Is False and Is Contradicted by the Record.

California's Petition for a waiver rule contains a detailed analysis showing that the State's residential clothes washer Standards are highly cost-effective to consumers, and it indicates that the underpinnings of the analysis were subjected to rigorous analysis in the Energy Commission proceeding in which the Standards were adopted. Cal. Pet. 19, 20-26, Pet'r's Excerpts 0080, 0081-0088. DOE claims that California "did not provide a sufficient explanation of the analysis supporting its estimates," because California "did not indicate where [the Energy Commission's] rulemaking record could be located and where within the record the relevant assumptions, data, and analysis could be located; nor did [California] provide sufficient explanation of the underlying assumptions and data in its petition." 71 Fed. Reg. at 78163, Pet'r's Excerpts 0145. Thus DOE did *not* determine that California's evidence failed to preponderate over countervailing evidence (DOE cites no such evidence), but instead DOE determined that California's evidence was legally inadequate. This was error.

First, the determination was legally untimely. DOE's own regulations make clear that DOE has only a limited time – *before* the agency accepts a waiver petition for filing – to raise concerns about the adequacy of the evidence therein:

Within fifteen (15) days of the receipt of a petition [for waiver], [DOE] will either accept it for filing or reject it *Only such petitions* which conform to the requirements of [DOE's regulations] and *which contain sufficient information for the purposes of a substantive decision will be accepted for filing.*

10 C.F.R. § 430.42(f)(1) (emphasis added). Thus, when DOE accepted California's Petition for filing, "*as complete,*" 71 Fed. Reg. at 78160, Pet'r's Excerpts 0142, under the express terms of 10 C.F.R. section 430.42(f)(1) DOE had concluded that the Petition did "contain sufficient information for the purposes of a substantive decision." Therefore, it was arbitrary and capricious for DOE to have relied on the Petition's allegedly "[*in*]sufficient information for the purposes of a substantive decision," *see* 10 C.F.R. § 430.42(f)(1), as a justification for denying the Petition. *See, e.g., United States v. Nixon*, 418 U.S. 683, 694-96 (1974); *People of the State of California v. FCC*, 39 F.3d 919, 925 (9th. Cir. 1994), *cert. denied*, 514 U.S. 1050.

Second, a full explanation of all the Petition's assumptions, data, and analyses – indeed, the entire California rulemaking record – was readily available to the agency throughout the 15 months between the initial submittal of the Petition and DOE's denial. As DOE itself noted when it announced the filing of the Petition, California's rulemaking "[m]aterial related to this State regulation is available at the following URL address under Docket 03-AAER-1(RCW): http://www.energy.ca.gov/appliances/2003rulemaking/clothes_washers/index.htm

l.” 71 Fed Reg. at 6023, Pet’r’s Excerpts 0155. DOE’s later complaint that California did not provide its rulemaking record or citations thereto is inexplicable.

The only specific assumption or data that DOE found inadequate was the Energy Commission’s estimate of the increased first cost of washing machines that would result from the California Standards. 71 Fed. Reg. at 78163, Pet’r’s Excerpts 0145. Had DOE looked at or inquired about the California rulemaking record that was available at the website that DOE itself cited, it would have found, in the very first document listed, the study by California’s Pacific Gas & Electric Company that provided much of the analysis used in the CEC rulemaking. That study provides all the explanation of California’s incremental cost assumptions that DOE apparently believes is missing. *See* PG&E, “Title 20 Standards Development Analysis of Standards Options For Residential Clothes Washers” at 4 (2003), *available at* http://www.energy.ca.gov/appliances/2003rulemaking/clothes_washers/documents/2005-09-05_CASE_STUDY_CLOTHES_WASHERS.PDF.

2. DOE’s Determination That California Did Not Analyze Product- and State-Specific Alternatives Is False and Is Contradicted by the Record.

DOE asserted that California did not show that the California standards are “preferable or necessary when measured against . . . alternative[s],” 42 U.S.C. §

6297(d)(1)(C)(ii). 71 Fed. Reg. at 78164, Pet’r’s Excerpts 0146. This was not because DOE found that the preponderance of the evidence showed that alternatives are preferable. Rather, DOE once again determined that California’s showing was inadequate as a matter of law:

Comparison of the costs and benefits of the California regulation to non-regulatory alternatives . . . [1] requires estimates of the costs and benefits of those alternatives as implemented by California . . . [and] [2] must be in the context of the “products subject to the State regulation.” (42 U.S.C. 6297(d)(1)(C)(ii)) [T]he costs and benefits presented [by California] do not allow for a comparison of the costs and benefits of alternatives

Id. at 78164, Pet’r’s Excerpts 0145 (emphasis added). DOE was doubly wrong: nothing in the law requires that the alternatives considered by a state must be product- or state-specific, and even if there were such a requirement, California fully complied with it.

First, the law does not require that any alternatives discussed in a state waiver petition be product- or state-specific (except for the do-nothing alternative of reliance solely on the market, which must be product-specific). What the law does require is simply that a petition discuss “alternative approaches to energy or water savings or production.” 42 U.S.C. § 6297(d)(1)(C)(ii). Indeed, DOE’s gloss on the statute would lead to absurd results (and is therefore improper, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982)). The statute requires a comparison to “alternative approaches to . . . water savings *or production*” 42

U.S.C. § 6297(d)(1)(C)(ii) (emphasis added). Water “production” cannot possibly be *product*-specific, for utilities do not develop one water supply for clothes washers, another for showers, and so on. For those states served by any water source that passes through more than one state (such as those states bordering or containing the Colorado, the Columbia, the Mississippi, the Missouri, or the Ohio Rivers, a *state*-specific analysis of “production” alternatives from those sources would also be impossible. This is perhaps why Congress stated:

[42 U.S.C. § 6297(d)(1)(C)(ii)] *does not require the State to use any specific methodology.* It does require the State to show that it has engaged in a rational planning process in which the State has reviewed the cost-effectiveness of various alternatives to State appliance standards.

H.R. Rep. No. 100-11, at 25 (1987) (emphasis added).

Second, the record actually does contain an ample discussion of both product-specific and state-specific alternatives to the California RCW Standards. (As we demonstrate at pp. 41-44 *infra*, the record shows convincingly that the Standards are “preferable or necessary” when compared to those and other alternatives.) The Petition’s discussion of water *production* alternatives – the State Water Project; groundwater; new storage; and the major in-state rivers (Trinity, Sacramento, San Joaquin, and Owens) – is California-specific. *See* Cal. Pet. 11-12, Pet’r’s Excerpts 0072-0073. (The Petition also discusses the Colorado and Klamath Rivers, which are multi-state. *See id.*, Pet’r’s Excerpts 0072-0073.) Just

so, the Petition's discussion of the most prevalent and successful water *savings* alternatives, which are rebates and education, is both clothes washer- and California-specific, as is the discussion of the "rely on the market" alternative. *See id.* 27-32, 34-36, Pet'r's Excerpts 0088-0093, 0095-0097.

It is true that the Petition's discussion of some savings alternatives – early replacement of inefficient washing machines, mass government purchases, low income and senior subsidies, consumer tax credits, and manufacturer tax credits – relies on an analysis of savings from *nationwide* programs (that are specific to residential clothes washers). DOE concluded that it was "inappropriate" for California to rely on this analysis – which was prepared by DOE itself in a previous rulemaking proceeding – when the State determined that the Standards are "preferable or necessary" compared to the alternatives discussed in the analysis. 71 Fed. Reg. at 78163, Pet'r's Excerpts 0145. DOE's analysis showed that all of those alternatives combined would result in a nationwide savings of less than ten percent of the water and energy that nationwide clothes washer efficiency standards would achieve. *See Cal. Pet.* 33, Pet'r's Excerpts 0094. It was reasonable for California to conclude from this that the results in the nation's largest state would be similar, and therefore to conclude that the Standards are "preferable," or needed in addition, to such alternatives, without wasting further time and resources to analyze the alternatives in greater detail. DOE cites no

evidence to the contrary.

DOE's erroneous determinations on California's alternatives analysis led the agency to conclude that California did not show that the State has "unique and compelling" water interests, 42 U.S.C. § 6297(d)(1)(B). 78 Fed. Reg. at 78164, Pet'r's Excerpts 0150. As a result, the agency found it unnecessary to determine whether the record shows that the Standards are "needed," 42 U.S.C. § 6297(d)(1)(B), to meet such interests. 78 Fed. Reg. at 78164, Pet'r's Excerpts 0150. As we discuss at pp. 45-49 *infra*, the record is more than adequate to address the issue, and the Court should direct DOE to find that the Standards are in fact "needed."

B. DOE Committed Legal Error In Determining That Opponents of a Waiver Rule Demonstrated That One of the Standards Is Likely to Result in the Unavailability of Top-Loading Clothes Washers, and in Relying on That Determination To Deny a Waiver for All of the Standards.

DOE cannot prescribe a waiver rule if the agency:

finds . . . that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of . . . performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of [DOE's] finding, except that the failure of some classes (or types) to meet this criterion shall not affect [DOE's] determination of whether to prescribe a [waiver] rule for other classes (or types).

42 U.S.C. § 6297(d)(4). DOE concluded that opponents of the California Standards made the requisite showing here, based on two determinations. First,

DOE found that the California 6.0 WF Standard for top-loading washers “would likely result in the unavailability of top-loading residential clothes washers in California.” 71 Fed. Reg. at 78168, Pet’r’s Excerpts 0150. DOE then concluded that “[t]herefore, DOE is prohibited from . . . grant[ing] the California Petition.”

Id. The Court should overturn these determinations: the first one “runs counter to the evidence,” makes no “rational connection between the facts found and the [determination],” and is “implausible,” while the second “relied on factors which Congress has not intended it to consider” and constitutes “a clear error of judgment.” *See Env’tl. Def. Ctr. v. EPA*, 344 F.3d at 858 n.36.

1. DOE Erred by Relying Solely upon the Current Unavailability of Certain Top-Loaders to Support Its Determination That Those Products Would Not Be Available Three Years in the Future.

DOE stated its determination as follows:

[T]he lowest WF of a top-loading washer currently [December 2006] on the market is approximately 6.3. DOE finds that . . . there are no top-loading residential clothes washer[s] in the current [December 2006] market that would comply with the 6.0 WF level . . . and that therefore the proposed [January 2010] California [6.0 WF] standard would result in the unavailability of top-loading residential clothes washers

71 Fed. Reg. at 78167, Pet’r’s Excerpts 0149 (citations omitted). That the market in 2006 has no better top-loader than a 6.3 WF model is, standing alone (which is where DOE placed it), unresponsive of DOE’s conclusion that the market is unlikely to have no 6.0 WF top-loaders in 2010. Because there is no “rational

connection between the facts found and the conclusions made,” *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36., the conclusion is arbitrary and capricious. (At pp. 49-50 *infra* we discuss the evidence that shows that 6.0 WF top-loaders are in fact likely to be available by 2010.)

2. DOE Erred in Determining That a Factor Relevant to Only One of the California Standards Justified DOE’s Denial of a Preemption Waiver for All Four Standards.

DOE relied on its finding concerning top-loader availability to justify denying the waiver in its entirety – that is, for all four of the California standards:

	Maximum Water Factor	
	January 1, 2007	January 1, 2010
Front-Loading	<i>8.5</i>	<i>6.0</i>
Top-Loading	<i>8.5</i>	6.0

Cal. Code Regs. tit. 20, §1605.2(p)(1). But it is obvious that the “unavailability” of a *top-loading* washer with a WF below 6.3 has no relevance to the three standards italicized in the table above: the less-stringent 8.5 WF standards, and the 6.0 WF standard for *front-loading* machines (of which there are many models currently available with WFs well below 6.0). Therefore, DOE’s reliance on its “unavailability” finding to deny a waiver for those three standards was arbitrary and capricious. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (court must determine whether decision was based on consideration of

relevant factors); *Env'tl. Def. Ctr.*, 344 F.3d at 858 n.36 (agency reliance on a factor Congress did not intend to be considered is arbitrary and capricious). Indeed, the statute itself shows that DOE's all-or-nothing approach was inappropriate: "the failure of some classes (or types) to meet [the unavailability] criterion shall not affect [DOE's] determination of whether to prescribe a rule [i.e., grant a waiver] for other classes (or types)." 42 U.S.C. § 6297(d)(4).

DOE apparently considered prescribing a waiver rule for the front-loader Standards, but the agency decided not to do so for two reasons. First, DOE claimed that the California Petition did not distinguish between top-loaders and front-loaders "and therefore, the question of whether such levels would be appropriate for individual classes of residential clothes washers is not at issue." 71 Fed. Reg. at 78167, Pet'r's Excerpts 0149. Not so. The statute gives DOE the discretion to grant waivers for different classes or types regardless of what a state petition might say or not say. 42 U.S.C. § 6297(d)(4). Otherwise, a state would have to guess, in its petition, or perhaps even when adopting its standards, which types or classes of an appliance DOE might want to consider individually. In any event, the California Petition made clear that there are four separate standards. Cal. Pet. 4, Pet'r's Excerpts 0065.

Second, DOE stated:

Even if [the question of standards for different classes] were [at issue], however, DOE would be *concerned* that differing maximum WF

levels established for specific classes . . . *could* have negative consequences for water savings in California. Regulating . . . front-loading . . . washers to a 6.0 WF, while allowing a significantly less stringent WF level for top-loader washers, would likely further increase the existing price differential between top- and front-loading washing machines. . . . The result of this change in price difference *could* well increase purchases of less water efficient residential clothes washers, and *potentially* offset the intended benefit from setting a water efficiency standard for certain but not all classes of residential clothes washers.

71 Fed. Reg. at 78167, Pet’r’s Excerpts 0149 (emphasis added) (citations omitted).

DOE’s “concern” that something “could” happen that “could” result in “potentially” reduced (by how much?) savings from the Standards as a whole is not a valid evidentiary basis for a finding. *Natural. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 859 F.2d 156, 210 (D.C. Cir. 1988) (“mere speculation [is not] adequate grounds upon which to sustain an agency’s action”). Moreover, DOE’s solicitous concern is irrelevant. DOE is supposed to examine whether a state standard would result in the unavailability of consumer-useful attributes. 42 U.S.C. § 6297(d)(4). If DOE determines that the preponderance of the evidence shows that a standard would result in the unavailability of a type of attribute listed in the statute, then it must deny a waiver *for those classes or types of the appliance in which the attribute would be unavailable. Id.* Because DOE’s (unsupported) finding of unavailability relates *only* to the 6.0 WF Standard for top-loaders, the agency cannot rely on that finding as a reason to reject the 6.0 Standard for front-loaders or the 8.5 Standards for both types.

Finally, DOE's "concern" is merely an artifact of the agency's own making.

DOE's decisionmaking trail appears thus:

(1) if front-loaders have a 6.0 WF standard and top-loaders have no standard or a significantly less stringent standard, the price differential between the more-efficient front-loaders and the less-efficient top-loaders could increase;

(2) the increased price differential could cause consumers to buy fewer water-saving front-loaders;

(3) DOE cannot grant a waiver for the California 6.0 WF top-loader Standard to take effect in 2010, because the best top-loader WF available today is 6.3;

(4) because (as determined in (3)) DOE cannot give California a waiver for the 6.0 top-loader WF Standard, if DOE grants a waiver for the 6.0 front-loader WF Standard, then a larger price differential between top-loaders and front-loaders (as described in (1)) is in fact likely;

and, therefore,

(5) California cannot have standards for *either* top-loaders or front-loaders!

This carries out neither the letter nor the spirit of 42 U.S.C. § 6297(d). And, as California discussed at length in its Request for Reconsideration to DOE, the solution to the Gordian problem into which DOE has knotted itself is easy: simply grant a waiver for a 6.3 WF standard for top-loaders. Cal. Recons. Req. 14-16, Pet'r's Excerpts 0019-0021. DOE might have believed that it could not prescribe a waiver rule for a standard not expressly set forth in a waiver petition. But, as we also pointed out in our reconsideration request, DOE could accomplish the same practical result by granting a waiver for the 6.0 WF top-loader Standard, subject to

the condition that California could enforce the Standard only as to those top-loading machines – i.e., those “classes” or “types” of top-loaders, *see* 42 U.S.C. § 6297(d)(4)) – with a WF above 6.3. Cal. Recons. Req. 14-16, Pet’r’s Excerpts 0019-0021.

C. DOE Erred in Concluding That the “Three-Year Requirement” Prevents the Agency from Granting a Waiver To Take Effect Three Years in the Future.

42 U.S.C. § 6297(d)(5)(A) establishes a three-year delay between the date of DOE’s prescription of a waiver rule, and the date on which a state standard takes effect pursuant to the waiver. (The delay is five years if DOE makes certain findings, which were not made here.) 42 U.S.C. § 6297(d)(5)(A). DOE stated that this provision prevents granting of waiver, at least for the 8.5 WF Standards, on the ground that DOE’s grant of a waiver, had it occurred, would have been in 2006, and one section of California’s appliance regulations indicates that under California law the 8.5 WF Standards were nominally designated as taking effect on January 1, 2007, less than three years later. *See* 71 Fed. Reg. at 78160, Pet’r’s Excerpts 0142. (Obviously, DOE’s concern, expressed in late 2006, was at that time irrelevant to the 6.0 WF Standards, which under California law are nominally scheduled to take effect on January 1, 2010.) DOE mis-read the law in reaching this conclusion, and therefore the conclusion is “a clear error in judgment,” *Env’tl. Def. Ctr. v. EPA*, 344 F.3d at 858 n.36, that is “not in accordance with law,” 5

U.S.C. § 706(2)(A).

Each California appliance efficiency standard, such as the State’s clothes washer Standards, is set forth with a nominal effective date. *See* Cal. Code Regs. tit. 20, §§ 1605.2 - 1605.3. That is necessary in order to put all stakeholders on notice as to when enforcement is scheduled to begin under state law. But California also recognizes that under federal law certain standards require waivers from federal preemption before they can be enforced by the State. Therefore, California’s appliance regulations expressly provide that such standards take effect only upon the effective date of a DOE waiver, or on the date when statutory preemption is repealed, if that were to occur. *Id.* § 1605(b); *see also id.* § 1605.2 & 1605.2(p)(1). Thus even though the 8.5 WF standards are labeled with a nominal effective date of 2007, their real effective date under both state and federal law is the effective date of a federal waiver – that is, three (or five) years after the prescription of a rule granting the waiver. Here, that would have meant that had DOE granted, rather than denied, a waiver on December 28, 2006, the California “2007” 8.5 WF Standards would have taken effect three years later, on December 28, 2009. DOE’s determination that it could not grant a waiver for the “2007” 8.5 WF Standards is, therefore, “not in accordance with” either state or federal law, and therefore must be set aside. *See* 5 U.S.C. § 706(2)(A).

DOE’s interpretation is also erroneous because it would put the states in the

impossible situation of having to guess precisely when DOE is likely to grant a waiver (which determines the real effective date), when adopting a standard and assigning a nominal “effective date. The states’ task would be made even more daunting because the federal statute provides several dates when a waiver can take effect: the normal three years, five years if DOE finds that such a period is necessary for manufacturers to overcome significant compliance burdens, or the statutorily-prescribed effective date of the first amendment to a federal standard (but, complicating matters even further, this last constraint does not apply if DOE finds that the state has an “emergency condition”). *See* 42 U.S.C. § 6297(d)(5). Congress intended to save energy, not to require a state to be prescient about when DOE will act, the nature of that action, and whether an intervening federal standard will further complicate the “effective date” nominally assigned by the state.

For the same reasons, equally misplaced is DOE’s concern about the timeliness of the analyses in state petitions. *See* 71 Fed. Reg. at 78160, Pet’r’s Excerpts 0142. To the extent DOE is suggesting that if a state mis-guesses when DOE will allow a state standard to take effect, so that the state’s analyses might be based on a slightly different implementation schedule than will actually occur, DOE is erroneously assuming that the state’s burden is to predict costs and benefits at a precise date in the future rather than just providing, by a preponderance of the evidence, an analysis that is reasonable. *See* 42 U.S.C. § 6297(d)(2), (5).

D. DOE Erred in Stating That If a Rule Waiving Preemption Is Prescribed, Then DOE Conducts Another Rulemaking to Determine If Preemption Should Be Waived.

When DOE published California's Petition and announced the rulemaking proceeding below, the agency indicated that it would follow the procedures established by Congress:

After the period for written comments, the Department will consider the information and views submitted, and *make a decision on whether to prescribe a waiver* from Federal preemption for California with regard to water use standards for residential clothes washers.

71 Fed. Reg. at 6025, Pet'r's Excerpts 0157 (emphasis added). Yet four months later (when DOE extended the deadline for its decision), the agency indicated that it would take a much different approach:

[S]hould the Department decide to grant a petition, section [6306(a)(1)] requires that DOE afford interested persons the opportunity to present written and oral data, views, and arguments with respect to any *proposed rules prescribed* under section [6297]. (42 U.S.C. 6306(a)(1)) [¶] In this notice, the Department extends the period for evaluation of the California Petition to December 23, 2006 At such point, the Department will either provide *notice of a proposed rule on which it will seek written and oral comment*, or [deny] the California Petition.

71 Fed. Reg. 35419, 35420 (June 20, 2006), Pet'r's Excerpts 0152. Thus DOE now seems to believe that if it denies a waiver petition, then the matter is closed, but if it grants a waiver petition, then everyone begins anew and discusses the same issues all over again in another rulemaking proceeding. If that is indeed DOE's belief, it is "a clear error in judgment," *Env'tl. Def. Ctr. v. EPA*, 344 F.3d at 858

n.36, that is “not in accordance with law,” 5 U.S.C. § 706(2)(A).

The many provisions on state waivers in 42 U.S.C. § 6297(d) make clear that when DOE grants a waiver petition, the agency is then and there prescribing a final rule – not proposing a final rule, or prescribing a proposed rule – that grants a waiver with a specific effective date:

Any State . . . may file a petition with [DOE] requesting *a rule* that [its] State regulation become effective [¶] . . . DOE shall, within the [six-month or one-year] period described in paragraph (2) and after consideration of the petition and the comments of interested persons, *prescribe such rule* if the Secretary finds [¶] [DOE] shall . . . deny such petition or *prescribe the requested rule* [¶] [DOE] may not *prescribe a rule* under this subsection if [DOE] finds [significant industry burdens]. . . . [¶] [DOE] may not *prescribe a rule* under this subsection if [DOE] finds [unavailability of consumer attributes] [¶] No *final rule prescribed* by [DOE] under this subsection may . . . [¶] permit any State regulation to become effective with respect to any covered product manufactured within three years after *such rule is published* in the Federal Register or within five years if the Secretary finds that such additional time is necessary [¶] . . . a State *is issued a rule* under paragraph (1) with respect to a covered product

42 U.S.C. § 6297(d) (emphasis added).

DOE cites another provision of EPCA, 42 U.S.C. § 6306(a)(1), in the apparent belief that the latter section requires DOE to begin anew with another proceeding if the agency grants a waiver. 71 Fed. Reg. at 35420, Pet’r’s Excerpts 0152. DOE is wrong. That provision simply states:

(a) Procedure for prescription of rules

(1) In addition to the requirements of section 553 of Title 5, rules

prescribed under section 6293, 6294, 6295, 6297, or 6298 . . . shall afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule.

42 U.S.C. § 6306(a)(1). In its proceeding on the California Petition, DOE “afford[ed] interested persons an opportunity” to present their views, and the “addition[al] requirements” of “section 553 of Title 5,” which is in the federal Administrative Procedure Act, add little to section 6306(a)(1)’s “[p]rocedure.” In relevant part, section 553 states:

General notice of proposed rule making shall be published in the Federal Register The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . .

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553. DOE also complied with these requirements. *See* 71 Fed. Reg. at 6022-24, Pet’r’s Excerpts 0154-0156. As a result, in the proceeding below DOE has met (and in any future waiver proceeding the agency will undoubtedly meet) *all* of the statutorily-prescribed procedural “requirements [for] rules prescribed

under section . . .6295 [and] 6297,” 42 U.S.C. § 6306(a)(1). Therefore, when DOE grants a state waiver petition, it must, and thereby does, simultaneously give final approval to a rule waiving preemption and specifying an effective date for the state standards, without the need for any further administrative proceedings.

II. The Matter Should Be Remanded to DOE with Instructions to Prescribe a Rule Granting a Waiver, Because the Record Has Been Fully Developed, the Conclusions That Must Follow from It Are Clear, and Further Administrative Proceedings Would Serve No Useful Purpose.

This Court has explained the two basic options available to the judiciary when overturning agency action:

Although the normal course of action when the record fails to support an agency’s decision “is to remand to the agency for additional investigation or explanation,” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985), both Supreme Court and Ninth Circuit precedent acknowledge the propriety of remanding with instructions in exceptional cases. *See, e.g., id.* (“except in rare circumstances”) . . . *see also Sierra Club v. EPA*, 311 F.3d 853 (7th Cir. 2002) (remanding with instructions where the EPA had exceeded its statutory authority by [taking action based] on statutorily-unenumerated grounds).

Sierra Club v. EPA, 346 F.3d 955, 963 (9th Cir. 2003). We respectfully suggest that the “rare circumstances” here make this one of the “exceptional cases” where a remand with instructions – to grant California a waiver – is appropriate. *None* of DOE’s rationales for rejecting the waiver involves a factual finding by the agency on any of the applicable statutory criteria. Rather, as we will now show, for each

of the statutory criteria that DOE applies to waiver petitions, “the record . . . has been fully developed, and the conclusions that must follow from it are clear”; therefore, “further administrative proceedings would [not] serve a useful purpose” *See id.*

A. The Record Clearly Shows That the California Standards Are “Needed” to Meet the State’s “Unusual and Compelling” Interests.

1. California’s Interests are “Unusual and Compelling.”

DOE gave only two reasons for not finding that California has “unusual and compelling . . . interests,” both of them related to the State’s comparison of the Standards to alternatives: California’s alleged failures to justify the assumptions supporting the State’s cost-effectiveness analysis of the Standards, and to analyze product- and state-specific alternatives. *See pp. 19-26 supra.* A remand for further consideration on either issue would serve no purpose, because the record shows that the Standards are cost-effective and that they are preferable to alternatives.

Analytic Assumptions. The only analytic assumptions with which DOE specifically found fault were California’s estimates of the increased cost of washing machines that would result from the Standards. 71 Fed. Reg. at 78163-64, Pet’r’s Excerpts 0146-0147. (DOE had no complaint about California’s estimates of the savings in water and energy bills that the Standards would produce, savings that are almost two times as large as the increased costs for washing machines. *See*

Cal. Pet. 19-26, Pet'r's Excerpts 0080-0087.) In reality, the record shows that the Petition's first-cost estimates (increases of \$130.18 resulting from the 6.0 WF Standards, and \$66.44 from the 8.5 WF Standards, Cal. Pet. 20-21, 23, Pet'r's Excerpts 0081-0082, 0084) are entirely reasonable. For example, California's rebuttal comments noted that "Sears' 'Washer and Dryer Guide' [states] . . . that the higher first cost of front-load washers 'can be recouped in about 8 to 10 years . . .'" Rebuttal Comments of the Cal. Energy Comm'n 2 & n.6 (May 15, 2006) ("Cal. Rebuttal"), Pet'r's Excerpts 0034.³ This is sufficiently consistent with California's payback estimate – about six years for the more stringent 6.0 WF Standards – to provide strong support for California's conclusion that the Standards are cost-effective. (If the actual time for consumers to recoup the increased cost of a washing machine, through their water and energy bill savings, was at Sears' upper limit of 10 years, then the Standards would still be cost-effective, as the life of a typical clothes washer is 14 years. *See* Cal. Pet. 21, Pet'r's Excerpts 0082.) Similarly, California's first cost estimates are consistent

³ Our Rebuttal Comments cited the URL for the Sears Guide as it appeared at that time. Cal. Rebuttal 2 & n.6, Pet'r's Excerpts 0034 (citing "www.sears.com/sr/javasr/dpp.do?vertical=Buying%20Guides&cat=-Laundry&BV_UseBVCookie=Yes&splash=true&nstate=http://www.live.bguides.-webcollage.net/_wc/laundry_2.html~~~G!079078702827!XRHzYAguDp1Sw-H5C~~~~@http://guides.sears.com/server/sears/bguides-laundry-showcase#Top-Load%20vs.%20Front-Load (last visited May 9, 2006)"). We understand that shortly after we filed the Rebuttal Comments, the website material was changed.

with the estimates from Intervenor Association of Home Appliance Manufacturers (“AHAM”) of the financial impacts of the standards on the clothes washer industry. As California pointed out to DOE, AHAM’s estimate of an increased cost to manufacturers of approximately \$20 per unit would likely result in an increased cost to consumers well within the range of the California estimates, even after markups are taken into account. Cal. Rebuttal 9, Pet’r’s Excerpts 0041. (California also showed that other AHAM estimates, less consistent with California’s, were based on a failure to take account of federal energy standards for clothes washers. Cal. Recons. Req. 8, Pet’r’s Excerpts 0013.)

In sum, California’s estimates of the costs resulting from the 8.5 WF and 6.0 WF Standards are entirely reasonable. No reliable evidence in the record indicates that those estimates are incorrect. Therefore, not only was DOE wrong in asserting that California failed to justify or support its analyses, but DOE also overlooked the evidence in the record that supports the only part of the analyses about which DOE indicated any concern.

Comparison to Alternatives. The evidence strongly shows that the Standards are “preferable,” 42 U.S.C. § 6297(d)(1)(C)(ii), to alternatives. The most effective non-standards programs for increasing clothes washer efficiency are rebates and education. Cal. Pet. 27, Pet’r’s Excerpts 0088. Indeed, those were the alternatives that AHAM proposed. AHAM, Resp. to [the California Petition] 15, Pet’r’s

Excerpts 0180. The record shows that although those programs are important, and are actively being carried out in California, they are inferior to the Standards, for they cannot achieve anywhere near the same level of savings and are substantially more expensive. Cal. Pet. 27-28, 31, Pet’r’s Excerpts 0088-0089, 0092.

Not only are the Standards “preferable” in comparison to alternatives, they are also “necessary,” the second option provided by Congress in 42 U.S.C. § 6297(d)(1)(C)(ii). California is already implementing rebate, education, tax credit, and other programs to encourage clothes washer efficiency, as well as all feasible supply options – yet still more is necessary. The Standards that DOE would prevent the State from implementing are an integral part of California’s efforts to provide its citizens, its economy, and its environment with adequate water, as California’s Legislature, California’s statewide water supply agency, and hundreds of local water districts in California have recognized:

It is . . . the policy of the state and the intent of the Legislature to promote *all* feasible means of energy and water conservation

Cal. Pub. Res. Code § 25008 (emphasis added).

By wringing *every bit of utility from every drop of water*, Californians can stretch water supplies and help ensure continued economic, social, and environmental health.

Cal. Dep’t of Water Res., 2005 California Water Plan, vol. 1, ch. 1, p. 1-7

(emphasis added), *quoted in* Cal. Pet. 16, Pet’r’s Excerpts 0077.

Improving the efficiency of clothes washers is only part of the overall

solution for reliable water supply, yet it is a *vital* part. *Improving the efficiency of clothes washers will not supplant other cost effective water conservation efforts, such as rebate and voucher programs, improved leak detection, increased public education programs, local landscape and water use ordinances, water transfers, new local storage reservoirs and groundwater conjunctive use projects, increased reclamation of stormwater and treated wastewater, and salt and brackish water desalination.* It is clear that there is no one “silver bullet” to secure California’s water future, but ACWA [the Association of California Water Agencies, representing the more-than-400 water agencies that deliver over 90 percent of California’s water] supports the efforts of its water agencies to implement those that will make significant incremental contributions using water more efficiently.

ACWA, Ltr. to Samuel W. Bodman 1-2 (Apr. 4, 2006), Pet’r’s Excerpts 0253-0254 (emphasis added).

There are many alternative cost-effective methods to improve water efficiency, and *we are already implementing them.* The District evaluates water efficiency options and water supply options equally in its planning process. *We implement all* of the most cost-effective strategies available. Improving the efficiency of clothes washers does not supplant other reasonable means available. . . . [¶] Currently, the only available action [on RCW] to agencies is *to offer rebates or vouchers* to encourage the purchase of the high-efficiency washers; this method *has limited effect and is very costly, compared to appliance standards. Ratepayers bear an undue burden because washer efficiency standards cannot be adopted by the State.*

Olivenhain Water Dist., Ltr. to Samuel Bodman 2-3 (undated), Pet’r’s Excerpts 0228-0229 (emphasis added). (This comment from a California water district was echoed by many others, e.g., City of Del Mar, City of Napa, City of Roseville, City of Yreka, Crescenta Valley Water District, Cucamonga Water District, Foothill Municipal Water District, Los Angeles Department of Water and Power, North

Marin Water District, Santa Fe Irrigation District, Three Valleys Municipal Water District, and West Basin Municipal Water District. *See* Pet’r’s Excerpts 0232, 0247-0271, 0315-0318.)

Opponents suggested that the Standards are not “preferable or necessary” when compared with alternatives, because other efficiency measures, or potential supply sources such as desalination, might be capable of providing more water than the California standards. *See* Pet’r’s Excerpts 0175-0177, 0306-0307. This is quite similar to the erroneous assertion discussed at pp. 45-46 *infra*: that a State’s standard is not needed unless it can, by itself, completely meet the State’s interests. If the existence of any alternative (no matter how costly or environmentally damaging), can prevent DOE from granting a waiver, then there no petition can ever be successful. Obviously, Congress did not intend such a result. Opponents also failed to present any evidence that their suggested alternatives – tax credits, water markets, and desalination – are in fact preferable to the California Standards, for there were no estimates at all of the costs, or the savings potential, of such programs. *See, e.g.*, Pet’r’s Excerpts 0175-0177. The California Petition, however, demonstrates (1) that financial incentives such as tax credits are expensive and cannot cover the entire market, (2) that water markets are difficult to implement because water savings are not necessarily fungible across different economic sectors or geographic areas, and (3) that desalination is expensive and

energy-intensive. Cal. Pet. 11-12, 27-34, Pet'r's Excerpts 0072-0073, 0088-0095; *see also* Pet'r's Excerpts 0219-0220, 0312-0313. In any event, the essential point here is that *all* reasonably-priced water supply sources, and efficiency measures, must be pursued if California is to have any hope of meeting its water needs:

“Improving the efficiency of clothes washers is only part of the overall solution for reliable water supply, yet it is a vital part.” ACWA Letter 1-2, Pet'r's Excerpts 0253-0254; *see also* Pet'r's Excerpts 0219-0221.

DOE found that California met the first part of the two-part “unusual and compelling interests” test: i.e., the agency found that the State’s interests are “different in nature or magnitude” from those in the U.S. generally. 71 Fed. Reg. at 78162, Pet'r's Excerpts 0144. The discussion above shows that the record is clear that California also meets the second part of the test: the Standards are “preferable or necessary” in comparison to alternatives.

2. The Standards are “Needed” to Meet California’s Interests.

DOE made no finding here, but the evidence overwhelmingly demonstrates that the Standards are needed to meet California’s statewide and local interests.

The few opposing comments on this issue addressed not the facts of California’s water needs but rather a legal matter: the interpretation of the word “needed.” Opponents argued that a state’s standard cannot be “needed” unless it is capable, standing alone, of completely meeting the State’s “unusual and

compelling . . . interests,” 42 U.S.C. § 6297(d)(1)(B); *see* Pet’r’s Excerpts 0175-0177, or, similarly, that the standard is the *only* way for the state to meet its interests, *see* Pet’r’s Excerpts 0306. The Court should reject these extreme interpretations, which would make it impossible for any waiver petition ever to be granted. No single efficiency measure (or, for most states, and certainly California, no single supply source) is capable of meeting all of a State’s needs, and a state will always have some option besides a standard that could be implemented, albeit at extreme cost or with great environmental damage. *See Gallarde v. I.N.S.*, 486 F.3d 1136, at 1143 (9th Cir. 2007) (improper to read statute in a manner that creates an absurd result). Indeed, the more extreme a state’s need for saving water – e.g., the greater the environmental harm from over-use of water supplies, or the more rapidly that water demand is growing – the less likely it is that any single measure will be able to meet that need.

We respectfully suggest that “needed” in section 6297(d)(1)(B) is best interpreted in light of the language in section 6297(d)(1)(C)(ii), which, as we have seen, requires a state to demonstrate that its standard is “preferable *or* necessary” (emphasis added) in comparison to alternatives. *Gallarde v. I.N.S.*, 486 F.3d at 1143 (9th Cir. 2007) (statutory provision should be interpreted in context with other provisions). Had Congress intended, in section 6297(d)(1)(B), to require a state to demonstrate “need[]” by a showing that its regulation is the *only* way to

meet the state's interests (i.e., that there are no alternatives at all, no matter how costly or otherwise undesirable, that might meet the state's interests), it would have made no sense for Congress to have allowed the state to meet the alternatives test with a showing that the regulations are merely "preferable." But that is precisely what Congress did. Since one can always imagine some enormously costly and impractical way to achieve a goal, an interpretation of "needed" that requires the implementation of not only reasonable alternatives, but every conceivable alternative, is plainly inconsistent with the statutory language Congress enacted and with the legislative history in which Congress explained that it did not intend for the states to face an impossible task. *See* H.R. Rep. No. 100-11, at 24 (1987); *Gallarde v. I.N.S.* 486 F.3d at 1143 (9th Cir. 2007) (avoid absurd results in statutory interpretation). Rather, Congress apparently wants a state to show that a standard is "needed" by demonstrating that it has a serious problem and that it either has implemented the available alternatives or, after reasonable inquiry, has found them to be inferior. *See* 42 U.S.C. § 6297(d)(1)(B), (d)(1)(C)(ii). California has adhered to that sensible path.

In any event, no matter how many angels are "needed" to dance on the head of a statutory pin, the record demonstrates that the California Standards are "needed." In addition to the evidence showing that the Standards are "necessary" in the context of alternatives, see pp. 42-43 *supra*, the record is replete with

statements – from the people and institutions who are responsible for meeting California’s water needs – that the reasonable alternatives have already been tapped, that there is still unmet demand, and that the Standards are therefore “needed.” For example, the California Municipal Utilities Association (“CMUA”), which represents the vast majority of California’s publicly-owned water utilities (and energy utilities), stated that the Standards are “critical to the State’s economy and quality of life of populations that will make California their home for generations to come.” CMUA, Ltr. to Samuel W. Bodman (Mar. 28, 2006) 2, Pet’r’s Excerpts 0266. Representing investor-owned utilities, the California Water Association (“CWA”) stated that “[i]t is crucial that California carry out these . . . standards and responsibly reduce its dependence on overly tapped and energy-intensive regional and imported water supplies.” CWA, Ltr. to Samuel W. Bodman (Apr. 7, 2006), Pet’r’s Excerpts 0236. And Pacific Gas and Electric Company (“PG&E”), the nation’s largest combined electricity and natural gas utility, urged DOE to recognize that “[a]ll cost-effective tools are desperately needed to meet [California’s] manifold water and energy challenges. . . . Resources that are now being less efficiently spent on residential washer efficiency programs (relative to the cost efficiency of the preempted California standards) must be freed up to allow the State to develop new . . . programs” PG&E, “Comments prepared by PG&E . . .” 3 (Apr. 6, 2006), Pet’r’s Excerpts 0239; *see*

also, e.g., comments from the California Urban Water Conservation Council, the Alameda County Water District, and the City of Downey, Pet’r’s Excerpts 0219-0231.

There is no evidence in the record that counters these statements. As a result, “the record . . . has been fully developed, and the conclusions that must follow from it are clear,” so “further administrative proceedings would [not] serve a useful purpose” *See Sierra Club v. EPA*, 346 F.3d at 963.

B. DOE’s Determination That No Party Below Showed, by a Preponderance of the Evidence, That The California Standards Will Significantly Burden the Clothes Washer Industry on a National Basis, Is Unchallenged in this Court (and Is Clearly Supported by the Record) and Therefore Must Stand on Remand.

Unchallenged in this Court is DOE’s finding that waiver opponents did not show that the Standards would significantly burden the clothes washer industry on a national basis. *See* 71 Fed. Reg. at 78164-66, Pet’r’s Excerpts 0146-0148. There is nothing to do on remand here.

C. The Record Clearly Shows That the California Standards Are Not Likely To Result in the Unavailability of any Clothes Washer Characteristic, Feature, or Other Attribute.

DOE found that the current unavailability of top-loading washers with WFs under 6.3 makes it unlikely that top-loaders will be able to meet the 6.0 WF Standard in 2010. We have demonstrated the error of this finding (and its irrelevance to the 6.0 WF Standard for front-loaders and the 8.5 WF Standards for

both top- and front-loaders.) See pp. 26-32 *supra*. In fact, the record demonstrates that top-loaders are quite likely to achieve the small, approximately-five-percent improvement from 6.3 WF to 6.0 WF by 2010. See Pet'r's Excerpts 0235 (Pac. Gas & Elec. Co. stating to DOE that it is unlikely that there will be "any limitations in features, sizes, capacities or volumes that would result even after implementation of the 6.0 water factor standard"). Like the current 6.3 WF top-loading model, a 6.0 WF model will probably use horizontal-axis technology, which one U.S. manufacturer has been selling for years and which is a common design overseas. Cal. Pet. 46, Pet'r's Excerpts 0107. Therefore, DOE should have found, and the Court should direct it to find on remand, that "interested persons have [not] established, by a preponderance of the evidence, that the [California Standards are] likely to result in the unavailability . . . in the State of any . . . [attribute]" See 42 U.S.C. § 6297(d)(4).

If, however, the Court believes that the record indicates that DOE should examine whether a 6.0 WF standard, or only a 6.3 WF standard, for top-loaders is justified, California believes that its citizens, economy, and environment would be better served by moving forward immediately to establish a 6.3 WF standard, rather than taking many additional months, or years, for further DOE proceedings to consider whether the slight improvement to 6.0 WF is appropriate.

In sum, this Court can and should remand with instructions that DOE

immediately publish in the Federal Register:

- (1) a finding that California has established by a preponderance of the evidence that the Standards are needed to meet unusual and compelling State and local water interests;
- (2) a re-statement of the agency's previous and unchallenged finding that no interested person has established, by a preponderance of the evidence, that the Standards will significantly burden manufacturing, marketing, distribution, sale, or servicing of residential clothes washers on a national basis;
- (3) a finding that no interested person has established, by a preponderance of the evidence, that the Standards (or, in the alternative, the 6.0 WF Standard for front-loaders and a 6.3 WF Standard for top-loaders) are likely to result in the unavailability in the State of any residential clothes washer type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of DOE's finding; and
- (4) a final rule that the 6.0 WF Standards (or, in the alternative, the 6.0 WF Standard for front-loaders and a 6.3 WF Standard for top-loaders) may be enforced by California with respect to residential clothes washers three years after the date of publication of the rule.⁴

⁴ Allowing for time for oral argument, for opinion writing, and for the Court's mandate to become effective, if the Court issues the order that we request then DOE would probably publish a final rule sometime in the second half of 2008. That would mean, in turn, that under the three-year requirement, see p. 32 *supra*, the Standards would take effect in the second half of 2011. At that time it would make no sense for the 8.5 WF Standards, which were originally scheduled by California to take effect on January 1, 2007, to take effect at all, for they would take effect simultaneously with the 6.0 WF Standards, which were originally scheduled to take effect on January 1, 2010.

CONCLUSION

The Court should overturn DOE's decision and remand with appropriate instructions to prescribe a rule granting a waiver for the California Standards.

September 24, 2007

Respectfully submitted,

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FORM 8.
CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 07-71576

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *And Attached to the Back of Each Copy of the Brief*

I certify that: (check appropriate option(s))

XXX 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached *opening*/answering/reply/cross-appeal brief is

* Proportionately spaced, has a typeface of 14 points or more and contains **12,734** words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

* Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__2. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

* This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

* This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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4. Amicus Briefs

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is

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Date

Signature of Attorney or Unrepresented Litigant

STATEMENT OF RELATED CASES

Counsel for Petitioner are unaware of any “related cases” as that phrase is defined in Circuit Rule 28-2.6.