

In the
United States Court of Appeals
For the
Ninth Circuit

CALIFORNIA ENERGY COMMISSION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

Respondents,

ASSOCIATION OF HOME APPLIANCE MANUFACTURERS,

Intervenor.

*Appeal of Administrative Action of the Department of Energy
No. EE-RM-PET-100*

BRIEF OF INTERVENOR

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CORPORATE DISCLOSURE STATEMENT

The Association of Home Appliance Manufacturers, a non-stock, non-profit trade association, headquartered in Washington, DC, has no parent corporation, and no publicly-held corporation owns stock in AHAM.

Dated: January 7, 2008

Signed by:



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JURISDICTIONAL STATEMENT

As stated in the brief for respondents United States Department of Energy, et al. (“DOE Brief”), this case is an appeal under the Energy Policy and Conservation Act (“EPCA”), Pub. L. No. 94-163, 49 Stat. 871 (1975), amended and codified at 42 U.S.C. §§ 6291-6309, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. Under appeal is a ruling by the Department of Energy (“DOE” or “the Department”) denying a petition by the California Energy Commission (“CEC”) for a waiver or exemption from federal preemption. *See* 71 Fed. Reg. 78,157 (Dec. 28, 2006). The CEC applies for review in this Court under the provisions of 42 U.S.C. § 6306(b)(1). In fact, for the reasons stated by DOE, this case has been brought in the wrong court. Proper jurisdiction under EPCA and the APA is found in a federal district court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

As CEC recognizes, since DOE has adopted federal energy efficiency standards for residential clothes washers pursuant to 42 U.S.C. § 6295(g), (*see* 10 C.F.R. § 430.32(g) (2007)), federal law preempts the states from implementing their own energy or water standards for that appliance. 42 U.S.C. §§ 6297(b)-(c). EPCA allows states to seek a waiver for preemption under detailed criteria and procedures. 42 U.S.C. § 6297(d).

The Association of Home Appliance Manufacturers (“AHAM”) agrees with the Department that essentially two questions are presented here:

1. Whether 42 U.S.C. § 6306(b)(1) provides jurisdiction for direct review in this Court of DOE’s order denying the petition for waiver of federal preemption or whether the appropriate court is a federal district court.
2. If jurisdiction is proper in this Court, then whether DOE’s decision to deny the waiver was arbitrary, capricious or otherwise contrary to law.

AHAM supports DOE’s view on jurisdiction, and will limit its arguments to the second issue presented for review.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

AHAM adopts the statement of the case and statement of facts presented in DOE's brief.

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

AHAM supports the arguments, including the jurisdictional argument, made in DOE's brief and in the brief of amici Gas Appliance Manufacturers Association and Air Conditioning and Refrigeration Institute. AHAM will not repeat these arguments, but wishes to provide the Court with information and perspective from the manufacturing sector directly affected by the CEC and DOE actions.

AHAM is the United States trade association for the manufacturers of major, portable and floor care appliances and related suppliers. AHAM membership includes virtually all of the manufacturers of residential clothes washers selling machines in this country.

AHAM has represented the appliance industry on energy issues for over 30 years. AHAM and its members are the principal industry architects of the federal energy laws on appliance standards and federal preemption, and have been active on state appliance standards activities, particularly in California. AHAM led the regulatory and negotiations effort which culminated in the January 2001 final rule for the residential clothes washers federal energy efficiency standards, effective first in 2001 and then in 2007. That rule was expressly and carefully designed to save significant amounts of energy and water, to maintain full lines of clothes washer models for

consumers, and to mitigate manufacturer, including U.S. employment, impact. *See* Final Rule, 66 Fed. Reg. 3314 (Jan. 12, 2001); Proposed Rule, 65 Fed. Reg. 59,550 (Oct. 5, 2000). The careful balance that the final rule achieved and the viability of a national system of standards are at stake in this litigation.

The bottom line is that this lawsuit is about the future of a U.S. manufacturing base producing conventional top-loading, vertical-axis clothes washers most Americans, including most Californians, prefer. Simply put, if this Court's decision leads to a granting of the petition, top-loading clothes, and vertical-axis washers will not be available in California. AHAM was engaged in the CEC rulemaking which promulgated the standard at issue. The rulemaking was a circumscribed proceeding because the California Legislature sharply limited the possible results. As CEC indicates, it did not choose to do a clothes washer standard based on its own expert assessment of state needs and prioritization. Rather, it was required to do so by preemptory state legislative action. *See* Cal. Assemb. B. No. 1501, Ch. 421, §1(b) (Cal. 2002); CEC Br. at 3, 15.

AHAM also negotiated with the water efficiency amici the new federal water standards for clothes washers and dishwashers contained in the

just-enacted energy bill. This legislation has effectively superseded the policy arguments in the petition.

AHAM first argues that it is not a matter of chance that the federal statutory scheme provides almost complete preemption with a limited opportunity for waivers or exemption from preemption based on what might seem to a first-time observer to be a complex, almost labyrinth, scheme of procedures and criteria. From industry's viewpoint, the purpose of the federal energy law is to maintain a viable program of energy (now water) standards with strong federal preemption. Only in rare circumstances will a state be able to justify an exemption from preemption.

A review of CEC's underlying statute (the so-called Warren-Alquist Act, CAL. PUB. RES. CODE §§ 2500-25986 (2007)) demonstrates starkly why federal preemption is so important and must be maintained except in unusual circumstances. CEC's standards criteria do not explicitly include a wide range of considerations of economic and technical impacts on industry or consumers outside or inside the state of California. The fate of U.S. appliance production, for example, is a matter of indifference to CEC.

The Warren-Alquist Act is in sharp contrast with the underlying policy in EPCA that consumer product and appliance manufacturers must have a national, often international, market for their goods. The very

considerations that DOE takes into account in its rulemakings and in the waiver petition process are foreign to the CEC and the Warren-Alquist Act, but critical to the overall national welfare, striking an appropriate balance between the environmental and economic benefits of efficiency standards while maintaining a strong economy and marketplace.

Second, the high bar that the law and DOE set for granting a waiver petition is supported by focusing on the language in EPCA which states that DOE must find that “the state has established by a preponderance of the evidence that such state regulation is NEEDED to meet unusual and compelling state or local energy interests.” 42 U.S.C. § 6297(d)(1)(B) (emphasis added). Rules of statutory construction favor interpreting “needed” in its strongest meaning.

The CEC has attempted, through electronic links to California dockets, to throw at DOE thousands of pages of documentation, forcing DOE to forage through internet links to a proposed state water plan. But, there is nothing in the CEC’s filing that shows that clothes washer water standards for California are necessary. In fact, the CEC’s administrative record and the state water plan (which EPCA requires CEC and DOE to evaluate) indicate that there are a number of other options that are more powerful and effective.

The lack of necessity for a California clothes washer water standard to mitigate California's water interests is even more obvious today given the recent enactment by Congress, supported by the California water interests and NRDC amici, of federal water standards for clothes washers. Whatever void the California Legislature found in the federal standards has now been substantially filled.

Third, overall DOE fairly and reasonably evaluated the administrative record. There is no obligation under federal law that in the face of CEC data dumping of documents and web links the federal agency is required to develop an argument and rationale for CEC. EPCA requires CEC to do more than proffer a thin analysis it considers sufficient under state law for proving interest and cost-benefit.

Fourth, the unavailability of the basic, popular, moderately-priced vertical-axis clothes washer that predominates in over two-thirds of the U.S. market is alone sufficient for the denial of this petition. As CEC recognizes, there is no vertical-axis product in the United States that meets the proposed CEC standards. *See* CEC Br. at 27. Vertical-axis products have been recognized by EPCA and DOE as a critical and distinctive product class or type that requires regulatory protection so that it continues to be available to consumers in California and throughout the United States.

Finally, even if the Court finds one or more deficiencies in DOE's determination, the Court must remand to DOE to reopen or undertake a new waiver proceeding. There is no support in administrative law for this Court to make a final decision on the petition; there are additional criteria and factual determinations DOE would need to consider.

ARGUMENT

I. UNDER THE LAW, DOE IS JUSTIFIED IN SETTING A HIGH BAR TO GRANTING A WAIVER

A. Congress Intended That Waivers Be Rare in Order to Protect Consumers and the National Market

In many federal preemption cases under statutory schemes, courts are justified in protecting state authority based on federalism considerations. EPCA is a strong statement of Congressional will to preempt states and maintain that preemption. The essence, the “bargain,” of EPCA is a comprehensive system of federal regulations and periodic updates for a range of appliances, consumer, commercial and industrial products in exchange for which there is virtually complete federal preemption of state energy conservation testing, labeling, standards, and related requirements. *See* 42 U.S.C. § 6297.

Here, CEC sought approval under the limited opportunity for states in urgent and exigent circumstances to obtain a waiver from the Department. DOE can only grant such a waiver where the state can make a detailed, credible case for “*unusual and compelling State or local energy or water interests.*” 42 U.S.C. § 6297(d)(1)(B) (emphasis added). The statute provides a comprehensive set of criteria that the state must satisfy to make this case. Even if such a case can be made, the Secretary may not grant the

exemption if he or she finds that the regulation either would (a) “significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis,” or (b) “result in the unavailability in the State of any covered products 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 the Secretary’s finding. . . .” 42 U.S.C. §§ 6297(d)(3)-(4). This latter provision is known as a “safe harbor” because it protects consumers and the national market regardless of the state’s interests and the benefits of the standard.

One might expect that the first waiver petition filed by a state would occur under extreme circumstances where the state-proposed solution is clear, effective and central to a plan, and where consumers and manufacturers left unharmed. Unfortunately, just the opposite occurs here. The proffered water requirements attached to a CEC energy standard were not based on a rigorous consideration by state agencies of expertise. In fact, the CEC was considering other products as the subject of the first waiver petition filed by any state with DOE. But, CEC was itself preempted by the action of the California Legislature in imposing the requirements that the CEC adopt this standard, make it at least as stringent as the standard for a

then non-federally regulated product (commercial clothes washers) and that CEC file a waiver. CAL. PUB. RES. CODE § 25402(e)(1). Under these circumstances, it is not surprising that the petition is cobbled together.

Nor was the legislation or the standard based on careful consideration in the state water and energy plans of whether and how state water standards for residential clothes washers may be central and critical to dealing with California's water supply problems. In fact, as AHAM pointed out in its comments to the DOE proceeding, it does not appear that the clothes washer standard is even a part of the thousands of pages of the draft state water and energy plans, or if it is, it is buried as an inconsequential piece of the overall picture. See AHAM Comments to the Department of Energy at 13, (Apr. 7, 2006) (contained in Petitioner's Excerpt of Record) [hereinafter AHAM Comments].

In light of this background, careful consideration of the statutory scheme and congressional intent in the exemption-from-preemption provision is critical because it reveals the considerable burden on both a petitioner and DOE before a waiver could be granted and that a successful petition must overcome three levels of criteria.

First, the state's interest in and consideration of the proposed standard must be demonstrated under several substantive criteria. 42 U.S.C. §

6297(d)(1)(C). Second, even if this demonstration is made, DOE still must consider whether the state regulation will significantly burden the production, distribution and marketing of the product on a national basis. 42 U.S.C. § 6297(d)(3).

Finally, no matter what DOE's evaluation of the national market is, DOE may not prescribe the rule if it finds that the standard will likely result in the unavailability in the state of certain types of products, classes, performance characteristics and other significant aspects of the product that are currently available. 42 U.S.C. § 6297(d)(4). There is no argument from California that under its proposed standard, conventional top-loading vertical axis machines now on the market will not be available in California. California does not deny this effect; it simply belittles it. But under the law it is a show stopper.

Thus, if CEC fails to meet any aspect of its initial burden on state interests, the petition fails. Even if California meets this burden, the petition fails if the national market will be adversely affected. And, no matter what DOE's evaluation is of the state interest and the national impact, consumers in California must not be deprived of significant products, features, or product utilities that exist in the marketplace.

This three-tier structure was intentionally designed to eliminate all but the most extraordinary requests. The 1987 revision to the federal preemption provisions, The National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103 (1987) (“NAECA”), was an intentional upgrading and tightening of preemption. Congress was concerned that appliance manufacturers were facing “a growing patchwork of different State regulations” and “numerous conflicting state requirements.” H.R. REP. NO. 100-11, at 24, 100th Cong. (1st Sess. 1987); S. REP. NO. 100-6, at 4-5, 100th Cong. (1st Sess. 1987) (contained in Addendum to this Brief). The Senate report stated that NAECA, by adding a number of specific federal standards and rule making schedules, “increases Federal preemption of State Regulation.” S. REP. 100-6, at 12.

Indeed, NAECA enhanced, and made more difficult, the process to obtain waivers by, among other revisions, changing the state’s burden from showing “a significant state or local interest,” Pub. L. No. 94-163, 89 Stat. 871 (1975) (contained in Addendum to this Brief), to establishing “by preponderance of the evidence that such state regulation is needed to meet unusual and compelling state or local energy interests.” The Senate report states that this change provided “new and more stringent criteria” that a state must establish. S. REP. 100-6, at 9.

There was no controversy in Congress about the preemption provisions which were proposed by CEC and NRDC, among others, with appliance manufacturers. Energy conservation groups and states, led by California, testified about their importance. For example, amicus NRDC testified that appliance manufacturers benefit under NAECA “by being protected from a potential patchwork of state regulations.” *Hearing before the Subcommittee on Energy Conservation and Power, 99th Cong. 99-165, at 127 (Sept. 10, 1986) (Contained in Addendum to this Brief.)* The Chairman of the CEC stated in a letter to the Subcommittee that “we understand that this bill is the result of intense negotiations, and that the explicit trade-off was national standards for stronger preemption of state standards than exist under current law. We have thought seriously about the new exemption criteria, which significantly reduces the states’ ability to set standards and weighed them against the benefit of nationwide conservation. We conclude that the trade-off is worthwhile.” *Id.* at 162.

California and New York did request, however, that Congress revise the legislative language or create a legislative history to state that DOE would analyze a petition based on the overall benefits of the exempted standard versus the burdens on manufacturers and consumers. Significantly, that proposed language, which would have fundamentally changed the

nature of this provision to an overall balancing provision, is not part of the intent of Congress, as evidenced in the descriptions of the House and Senate reports. The requests are only included in the records of submitted testimony. *Id.* at 174-185, 162-163.

B. CEC Failed to Show the Standard Is “Needed” to Protect its Interests

Intervenor wishes to direct the Court’s attention to two other specific aspects of the statutory scheme which justify DOE’s view of how the waiver petitions work and its decision. First, the state must show, by preponderance of the evidence, that the state regulations are “needed” to solve the unusual and compelling state or local energy and water interests. 42 U.S.C. § 6297(d)(1)(B). It does not mean these standards alone must solve the state problem but they must be critical to the resolution.

A range of definitions are recognized by courts as to what “needed” or “necessity” means. They range from simply “useful or helpful” to “indispensable.” *See USW Comm. v. ATT Comm.*, 31 F. Supp. 2d 839, 854 (D. Or. 1998) (recognizing that although the FCC has defined “necessary” to mean simply that equipment is “used” or “useful”, not that it is “indispensable”; “the court’s dictionary defines ‘necessary’ as ‘essential’ and ‘necessaries’ as ‘items . . . that cannot be done without . . .’ .). Here, the statutory context argues for adoption of those lines of cases under which

“necessary” means “essential” and that there is no alternative means available. *See, e.g., Spradley v. Sistrunk*, No. 92-136, 1996 U.S. Dist. LEXIS 11993, at **8-9 (Dist. Fl. 1996) (interpreting the terms “necessary” or “essential” to mean that there is no alternative means of protecting jail security that is reasonably available to prison officials”).

The statute juxtaposes the less stringent concept of “preferable” against “necessary” in defining “unusual and compelling state or local energy or water interests” as those where the “costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary. . . . ” 42 U.S.C. § 6297(d)(1)(C)(ii). Since “necessary” is distinguished from “preferable” in the same section of the statute, it is reasonable to interpret “needed” in this context as meaning “impossible to do without.” *See, e.g., In re Braswell*, No. 06-00318, 2006 Bankr. LEXIS 2902, at **2-3 (Bankr. Aug. 23, 2006) (discussing what is “reasonably necessary” for purposes of maintenance and support of a debtor and ensuring that the debtor does not artificially inflate actual expenses, therefore, the court defined “necessary” to mean “impossible to do without”).

Measures subject to waiver must be needed, requiring a proof of condition beyond desirability, convenience or mere cost effectiveness. It is

reasonable for DOE to require that the state or local energy or water interests be proven not to be achievable under any reasonable circumstances without this specific standard and that, in fact, it will be achieved substantially with the application of the standard.

C. CEC Must Prove the State Standard is Integral and Critical to the State Water and Energy Plans

The failure of the CEC petition is further understood by reviewing another requirement in the law. Determining whether an unusual and compelling state or local energy or water interest exists must be evaluated in the context of the state's energy or water plan and forecast, if they exist. 42 U.S.C. § 6297(d)(1)(C). The proffered standard must be an integral part of the plan. Congress stated: "It does require the state to show that it is 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. 100-11, at 25. AHAM pointed out in its comments (AHAM Comments at 9) that this or a similar clothes washer water standard is essentially non-existent in the draft state water plan that CEC uses as the basis of its petition. These facts certainly indicate that this standard is far from "needed."

The CEC rulemaking was not part of a rational planning process. It was a mandated rulemaking with literally a pre-ordained result. Thus, it is

not surprising that neither the California water nor energy plans contain any significant reference or reliance on this standard.

D. California Law and the CEC Neglect the National and State Interests which Federal Law Protects

Preemption and the stringent proof required for waivers are particularly important when considering EPCA's inclusion of detailed evaluation of national and state aspects of energy, environmental and economic impacts versus the Warren-Alquist Act's narrow and parochial view.

In setting standards under 42 U.S.C. §§ 6295(o)-(q) of EPCA, DOE must consider a range of technical feasibility and economic justification criteria, including the economic impact of the standards on manufacturers and consumers, the amount of energy and water savings, lessening of utility or performance of products and the impact and possible lessening of competition, particularly on smaller firms. The economic justification criteria are multiple and detailed, and DOE is prohibited from establishing standards that will adversely impact on the availability of desired product features, utility and performances.

These same considerations are reflected in the waiver petition procedures and criteria. 42 U.S.C. § 6297(d) requires consideration of not only the state's interests within the context of a thorough and detailed cost-

benefit analysis (which DOE determined was not conducted or at least not provided in the petition), but also without the context of the impact in California and nationally of a range of economic and environmental considerations. The state must evaluate, and show evidence of thorough consideration in its petition, that it has compared the proposed standard to a range of alternatives, including market-induced improvements and other regulatory and non-regulatory approaches. DOE found nothing in the water plan or in the petition that evidences this comprehensive evaluation. 71 Fed. Reg. 78,157, 78,161-162, 78,163 (Dec. 28, 2006).

DOE must also consider the impact of the state regulation in terms of national burdens on manufacturing, marketing, distribution, sale or servicing of the product, the impact and disadvantage to smaller manufacturers, distributors or dealers in the state and lessening competition in the state, the impact of the lessening of the shipment of current models in both the state and the United States and the loss to consumers of popular models features and utilities.

None of these considerations is required under California law. Instead, the relevant portion (to the extent applicable, since the Legislature limited CEC's discretion to apply these factors) of the Warren-Alquist Act, § 25402(c)(1), states that CEC shall:

[p]rescribe, by regulation, standards for minimum levels of operating efficiency, based on a reasonable use pattern, and may prescribe other cost-effective measures . . . to promote the use of energy-efficient appliances. . . . The minimum levels of operating efficiency shall be based on feasible and attainable efficiencies or feasible improved efficiencies which will reduce the electrical energy consumption growth rate. . . . The standards shall be drawn so they do not result in any added total costs to the consumer over the designed life of the appliances concerned.

This law does not prescribe a full consideration of the various energy, environmental and economic issues required under federal law. Rather, a simple cost-benefit analysis is sufficient.

Further, when the California Legislature required CEC to promulgate the clothes washer water petitions, it did not do so on the basis that CEC should first determine under subsection (c)(1) whether the standards were feasible, justified or cost effective. Rather, the provision states that the Commission “shall” amend its regulations to “require that residential clothes washers manufactured on or after January 1, 2007 be at least as water efficient as commercial clothes washers” and that CEC petition DOE for an exemption from preemption. Warren-Alquist Act, § 25402(e). Thus, the Legislature mandated that there be water standards and essentially mandated the minimum levels based on preexisting commercial clothes washer

standards. CEC was under no obligation to consider the national or even comprehensive state aspects and impacts of its standard.

The CEC statutory and regulatory scheme exemplify perfectly the necessity for absolute preemption, except under exigent circumstances accompanied by a full justification, that DOE did not find CEC provided here.

II. DOE FAIRLY AND REASONABLY EVALUATED THE ADMINISTRATIVE RECORD IN DENYING THE CEC PETITION

A. DOE has No Obligation to Search Through the Vast Administrative Record of Several State Agencies to Cobble Together a Case for the CEC Petition

DOE indicated that a partial ground for denying the petition was that CEC failed to present a detailed cost-benefit analysis relating to its proposed state standards, including the underlying facts and assumptions. CEC does not deny this. Rather, it somewhat imperiously indicates that it told DOE that “the underpinnings of the analysis were subject to a rigorous analysis in the energy commission proceeding in which the standards were adopted.” CEC Br. at 20-22. The CEC believes that it is satisfactory to require a federal agency to root through the state administrative record, via electronic links provided in the waiver application, to find evidence to support a federal requirement.

The CEC also makes the odd claim that, following CEC's initial filing failure, when DOE found that CEC finally had filed a complete petition, DOE waived its ability to subsequently find substantive insufficiencies in the petition. This is absurd. All DOE determined—as the DOE brief explains—in its initial finding of sufficiency is that all the parts of a petition were included. That determination is totally unrelated to a subsequent substantive analysis of the petition's adequacy under the criteria in EPCA. Otherwise, the logical extension of CEC's view is that DOE should have summarily granted the petition because it was sufficient. (Many high school seniors would be delighted to learn that the confirmation letter indicating that a complete application has been filed means that they have been admitted to every college to which they submitted a complete application.)

To protect federal agencies in the Internet age, this Court should clearly state that a party with the burden of proof before an agency cannot simply reference a URL address in a state proceeding and expect the federal agency to work its way through relevant and irrelevant material. Yet, this is exactly what CEC tells this Court is sufficient. *See* CEC Br. at 21-22. CEC even wants to require DOE to find CEC contractor materials in the California record and conclude that they are relevant to a determination of costs and benefits. *See* CEC Br. at 22.

Although the APA was enacted in 1946, well before the age of the Internet, it has been understood that an administrative record includes “all relevant material presented prior to the issuance of rules.” Senate Doc. No. 248, 79th Cong., 2d Sess. 25 (1946) (emphasis added). Failing to present the underlying data and assumptions in a cost-benefit analysis and demanding that DOE search for it, mostly unguided, in a state administrative record is not a presentment.

DOE’s view on what material is in the record is consistent with its action in other areas. For example, the Department of Energy Office of Fossil Energy states that: “the administrative record in a proceeding . . . will consist of the proposed order . . . and related documents, all related evidence presented at the public hearing, all written comments, and any other information in the possession of [DOE] and made a part of the public record of the proceeding.” 10 C.F.R. § 501.66 (emphasis added). It is unreasonable, and would create enormous burdens on a federal agency, to accept that references to a nonfederal record--which could have been, but were not presented to the agency--should properly be considered part of the public decision-making record.

Further, it should be assumed that the administrative agency properly designated the administrative record unless there is clear evidence to the

contrary. See, *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 739 (10th Cir. 1993). Here, the DOE administrative record does not contain much of the material that CEC now alludes to in its brief, whatever its value.

B. The Administrative Record is Replete with Support for DOE's Decision to Deny the Petition

DOE analysis of the petition and industry comments in the administrative record more than justify DOE's decision. Although not all industry arguments were accepted, these comments contained credible criticisms of CEC's assertions and other information relevant to the environmental, water, technical and economic assumptions and issues in EPCA.

For example, AHAM delved into the voluminous draft California water plan and other state materials to show that clothes washer water use is a relatively insignificant part of overall water or residential water use in California. (Clothes washers account for only 14% of indoor water use and less than 1% of total water consumption). Industry comments also made clear that the draft 2005 water plan does not even mention, much less rely on, California water standards for residential clothes washers or any other product as integral to a successful water plan. AHAM Comments at 13.

There are differences in expert views on future California water needs. AHAM comments at 9. Further, the AHAM comments showed that

the water use the CEC attributes to clothes washers and the savings through standards are based on unreasonable assumptions (e.g., that the total stock of clothes washers would be instantly replaced by products meeting the new water standards.) *Id.* at 34. Industry comments also indicated a number of other alternatives, in the residential and nonresidential sector, which would far surpass any reasonable water savings attributed to residential clothes washer standards but which CEC had not seriously considered in its petition. *Id.* at 13-15. For example, extremely modest reductions in agricultural water use (1%) would equal all the water consumed by clothes washers. The use of incentive programs and other market transformation measures would increase use of high water and energy efficiency products in California, for example by using water submeters. *Id.*

Industry presented DOE with evidence that California water costs and interests are similar to those in many other regions of the country. *Id.* at 17. Within the product category itself, industry showed that as a practical, technological matter the standards CEC proposes to adopt make it impossible for the conventional top-load, vertical-axis clothes washer to be sold in California. And, although there has been increasing popularity of alternative front-load, horizontal-axis, European-style models (sold by AHAM members) industry showed market evidence that there was a limit to

the popularity of these units and limitations on their utility. CEC is proposing to eliminate from the California market a product that has 60% plus share of the national market. *Id.* at 20-28. AHAM presented recent consumer research and national marketplace experience indicating adverse impacts on California consumer satisfaction and loss of utility if these moderately-priced machines are no longer available. *Id.* at 25.

Industry comments also indicated the adverse impact on the national market, including on many manufacturers and retailers, from allowing a California-only standard. Between DOE's own analysis of the California-petition and the industry comments, there was more than sufficient record evidence for DOE to find that CEC had presented less than the statutory minimum to justify the granting of a petition. 71 Fed. Reg. at 78,157, 78,163-164. CEC did not prove an unusual and compelling state water interest and the likely unavailability of vertical-axis units in California is violative of EPCA.

Although it is too late for CEC to bring more information to the table supporting its position, its new interpretation of the record evidence in its brief does not add to its case.

The first major, salient fact is that there still are no conventional vertical-axis machines which meet the CEC standards. The CEC believes

that there may or should be units in the future, but bases this on no information relating to vertical-axis units. Rather, its view is that since there has been improvement with another type of products, horizontal-axis units, the same progress can be made with vertical-axis. And, in CEC's view, vertical-axis products are not important to consumers. But, DOE has long recognized that vertical-axis is a separate product category with its own features and utilities ranging from washing time, consumer accessibility during the wash cycle, capacity, to washability. This is consistent with the requirement in EPCA that different product designs, features and utilities justify separate product classes. *See* 66 Fed. Reg. 3314, 3322, (last DOE clothes washer rule), 10 C.F.R. § 430.32(g); 42 U.S.C. § 6295(q). DOE reasonably concluded that there was a significant threat that these conventional, moderately-priced units would not be available in California under the California standards. This is exactly what the "safe harbor" provision in EPCA is designed to prevent.

The 6.3 Water Factor "top loader" mentioned by CEC (CEC Br. at 27) is made by a small niche manufacturer, Staber, and is a "top-load" horizontal-axis (not vertical-axis) product in which there is access to a horizontal drum from the top. To extrapolate from this model, which is not vertical-axis, to shipments of millions of units needed in California,

designed and produced by high-volume manufacturers, is highly speculative and hardly a basis for this Court to reverse DOE's judgment. Nor is this an inexpensive product; current (January 3, 2008) Internet pricing for the lowest-priced Staber model is \$1,299.00. *See Staber Washing Machines*, <http://www.staber.com/washingmachines> (Contained in the Addendum to this Brief.) This unit hardly justifies CEC's claim that "the record demonstrates that top-loaders are likely to achieve the . . . improvement from 6.3 WF to 6.0 WF by 2010. . . ." CEC Br. at 50.

Although previously rebutted, CEC still erroneously insists that the standard will provide significant financial savings to California consumers. But their consumers will be forced to replace top-load, vertical-axis units priced as low as \$220 (not \$550 as CEC estimates) vertical-axis units with \$600 front loading, horizontal-axis products. AHAM comments at 38-39. The price increase to achieve the 8.5 Water Factor CEC proposed standard is estimated by consultants hired by AHAM at \$280 (a payback of over 25 years) and \$380 to achieve the 6.0 Water Factor CEC proposed standard (17 years payback). *See AHAM comments at 39.*

Contrary to California's claim that the petition "contains a detailed analysis showing that the state's residential clothes washer standards are highly cost-effective to consumers. . . .", (CEC Br. at 20), the record is thin.

California identifies (again through a separate web site, not the DOE record) a report by a contractor to PG&E as providing “much of the analysis used.” CEC Br. at 22.

The results referenced are contained in a report by a contractor PG&E that made liberal use of questionable assumptions but conducted very limited direct research. The report estimates the price of the average baseline unit sold in California at \$550. This value is unsubstantiated and higher than AHAM data. AHAM Comments at 34-35. As a result, the financial benefit of water saved versus higher washer price (payback) is significantly overestimated.

Significantly, this study was not cited by CEC in its initial petition to DOE as a source for clothes washer prices and only surfaced as part of the pricing argument in the later Motion for Reconsideration. *Compare* CEC Pet. at 19, *with* CEC Req. for Recons. at 8-9.

C. There is Still Significant U.S. Clothes Washer Employment Which Would Be Adversely Affected by Granting this Petition

The consequences of reversing DOE and potentially granting the CEC petition are not restricted to consumer interests in conventional vertical-axis clothes washers or manufacturer profitability. There are real US employees, albeit not in California and not of apparent concern to CEC or covered by the ambit of the Warren-Alquist Act, whose lives will be affected if the

products they use are obsoleted in a significant portion (approximately 20%) of the United States market. AHAM Comments at 41-42. This includes approximately 3700 employees who make clothes washers for Whirlpool in Clyde, Ohio; 700 employees who make clothes washers for General Electric in Louisville, Kentucky; over 2000 employees who make clothes washers in Iowa for Electrolux; and 1408 employees who are involved in laundry production in Ripon, Wisconsin for Alliance Laundry.

The stakes here are not just whatever significance one attributes to consumer satisfaction and desires, but U.S. manufacturing operations holding on to their domestic base in light of increasing imports from Mexico, Europe and Asia.

III. THE NEW FEDERAL LAW ESTABLISHING FEDERAL CLOTHES WASHER WATER EFFICIENCY STANDARDS SUBSTANTIALLY MITIGATES CALIFORNIA'S WATER CONCERNS

Subsequent to the petition procedure and the filing of this lawsuit, the United States Congress passed on December 18, 2007, and the President signed on December 19, the 2007 Energy Act, H.R. 6, The Energy Independence and Security Act of 2007, Pub. L. No. 110-140. This new law established, in section 311(a)(2), a new EPCA, provisions 42 U.S.C. § 6295(g). This provision, proposed by numerous stakeholders, including the environmental and water interests amici in this case, sets federal water

standards for both clothes washers and dishwashers along with a schedule of future rulemakings to tighten these standards.

This important environmental measure was proposed to the Congress by the appliance manufacturers and a nationwide coalition of energy and water efficiency supporters. The Addendum to this brief includes the text of the new law, the agreement between these organizations and the press release issued by their spokesman which quotes not only AHAM but NRDC, the Association of Metropolitan Water Agencies, and the California Urban Water Conservation Council. These environmental and water groups estimated that the national water savings from the clothes washer and dishwasher standards would provide nationally nearly 11 million acre-feet (3 trillion gallons) of water savings over approximately 30 years, sufficient to meet the needs of about 44 million people for one year. When combined with preexisting energy standards for clothes washers, these water and environmental groups estimate the cumulative national utility bill savings could be as high as 68 billion dollars and meet the annual water needs of about 272 million people.

This recent event makes the CEC argument much more academic, outdated and unlikely for success if the petition is renewed either through reversal by the Court of the DOE decision or the filing of a new petition.

IV. ANY COURT REMAND MUST LEAVE DOE FREE TO REVIEW THOROUGHLY THE PETITION IN LIGHT OF THE STATUTE AS INTERPRETED BY THE COURT

Contrary to CEC's assertion (CEC Br. at 35-38), it would not be appropriate for the Court—if it finds that DOE has erred—to take any action other than to remand the matter to the agency to reopen proceedings consistent with the Court's decision. The Court would not be justified in mandating a granting of the waiver.

This is not an “exceptional” case under the Ninth Circuit and other court precedent that requires any different conclusion. The very case cited by the CEC, *Sierra Club v. EPA*, makes clear that “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.” 346 F.3d 955, 963 (9th Cir. 2003) (internal quotations and citations omitted) (remanding the matter to the EPA with instructions only because the EPA's determination ran “counter to the evidence before it” which made it impossible for the EPA to make a correct determination.)

This Circuit has recognized that only in an exceptional case should the court remand to the agency with instructions to take a specific action. *See Sierra Club v. EPA*, 346 F.3d at 963. A review of Ninth Circuit and other cases in which a remand has included the mandate of a required result

indicates that these are situations where no other factual determinations or policy evaluations can possibly reach a different result. Otherwise, if the record before the agency does not support the agency action, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (concluding that if the administrative record does not support an agency's decision, it is appropriate to remand to the agency for additional explanation because the reviewing court does not have the authority to conduct a *de novo* inquiry into the matter and to reach its own conclusions based on such inquiry); or the agency has not considered all relevant factors, *Hines v. Bowen*, 872 F.2d 56, 59 (4th Cir. 1989) (holding that the administrative law judge did not adequately consider the combined effect of the claimant's impairments as required by Congress, and remanding with instructions for further proceedings to consider such effects), then a remand for further agency rulemaking is required.

A remand for the agency to reevaluate its previous action is not appropriate only in the narrow set of cases where there is no possibility that the agency drew the correct conclusion from the fully-developed record before it. *Sierra Club v. EPA*, 346 F.3d at 963. This may occur where only one agency decision is possible, *see, e.g., Sierra Club v. EPA*, 311 F.3d 853, 859, 862 (7th Cir. 2002); where the agency failed to execute its

congressionally-mandated duty and only a court-specific direction to execute this duty would fulfill the statutory requirement, *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 769-70 (9th Cir. 2007); or when a court issues a mandate for agency to take a specific action if a remand would serve no useful purpose. *Tourus Records, Inc v. DEA*, 259 F.3d 731, 739 (D.C. Cir. 2001).

Here, even a substantial reversal of the DOE's decision and rejection of its analysis would require DOE to consider all of the EPCA waiver factors and to refresh the record, which is now several years old. For example, if the Court finds that DOE must filter through the state water and energy records, then the DOE must weigh costs and benefits against alternative approaches.

CONCLUSION

DOE had sufficient, perfectly lawful reasons to deny the CEC petition on several grounds. CEC's attitude throughout the state rulemaking, the federal rulemaking and before this Court is that because it is California, the largest and most powerful state economically (and perhaps politically), it is not obligated to provide the evidence and make the showing that any other petitioner, including industry, must make to justify federal agency action.

There may be well a case to be made for a federally-covered product that a state petition is justified, but it is not this case, based on this record evidence. For the reasons stated in the DOE, the ARI/GAMA Briefs and Intervenor's Briefs, we respectfully submit that, assuming the Court finds subject matter jurisdiction, the CEC petition for review be denied.

Respectfully submitted,



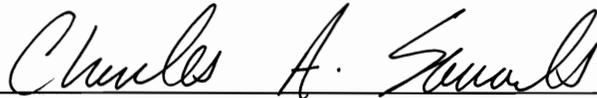
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CERTIFICATE OF COMPLIANCE

The undersigned certify that this brief complies with the type-volume limitations contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Exclusive of exempted provisions as set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, this brief contains **7,113** words according to the word count function in the Microsoft Word 2003 software with which this brief was produced.



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ADDENDUM

NATIONAL APPLIANCE ENERGY CONSERVATION ACT

MARCH 3, 1987.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DINGELL, from the Committee on Energy and Commerce, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 87]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 87) to amend the Energy Policy and Conservation Act with respect to energy conservation standards for appliances, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:
Strike out all after the enacting clause and insert in lieu thereof the following:

United States at the time of the Secretary's finding." This term precludes DOE from promulgating a standard that manufacturers are only able to meet by adopting engineering changes that eliminate performance characteristics. A manufacturer's decision to eliminate such characteristics rather than to implement other technologically feasible changes does not render the product type "unavailable." A standard would result in the "unavailability" of characteristics, etc., if, as a result of the standard, a product containing such characteristic would become prohibitively expensive, *i.e.* if there would be minimal demand for the product having such characteristic. Nor does the inability of a particular manufacturer to meet a standard necessarily make the product type "unavailable."

The purpose of this provision is to ensure that an amended standard does not deprive consumers of product choices and characteristics, features, sizes, etc. Significant achievements in energy conservation can be made without sacrificing the utility or convenience of appliances to consumers. A valid standard may entail some minor loss of characteristics, features, sizes, etc.; for this reason, the Act requires that "substantially the same," though not necessarily identical, characteristics or features should continue to be available. This provision also does not apply to trivial effects in which a standard might result. If a standard level for a given product type or class fails to meet the statutory criterion, the Secretary should determine the most stringent standard level that would satisfy the criterion for that product type or class and adopt a standard for it that meets the statutory criteria. In addition, the Secretary may make adjustments to the standard levels for certain product types or classes to meet this requirement (*e.g.*, setting a lower standard level for certain types or classes), and the failure of particular product types or classes to meet this requirement shall not affect the Secretary's determination with respect to other product types or classes.

The burden of producing evidence and proving that a standard level will result in the unavailability of certain characteristics, etc., rests on interested persons asserting the claim of unavailability.

Product types or classes are those defined by the Act or by the Secretary. Examples of "performance characteristics" of particular products are: safety; cooling; refrigeration and heating; dehumidification; ability to clean or dry without adverse effects; serviceability; and incidence and cost of repair. Examples of "features" are: automatic defrost, through the door ice, size of room air conditioners, and noise levels. Assessment of standard sizes (*i.e.*, the availability of sizes that fit in standard building spaces), capacities and volumes should be based on a review of products available in the marketplace.

Section 7. Effect on Other Law

Overview.—Section 7 provides for preemption of certain State and local regulations that address the energy consumption of covered products. In overall form, the section follows substantially the preemption requirements in current EPCA. Thus, the section continues the current rules for preemption with respect to certain State testing and labeling requirements applicable to covered prod-

ucts that are inconsistent with Federal law. It also continues the basic concept of preempting State energy efficiency standards and allowing waivers of preemption under certain circumstances.

Preemption applies to an entire product type as listed in the coverage section of the Act. For example, State standards for electric and gas kitchen ranges and ovens are preempted.

H.R. 87 significantly changes the criteria to be applied by the Secretary in determining whether to grant State petitions for waivers of preemption. The waiver provisions in Section 7 are intended to give DOE clearer direction and to give the States and other interested persons clearer notice of what the provisions entail. The combination of the new preemption provisions and the Federal standards mandated by Section 5 provide an appropriate solution to the problems caused by the absence of Federal standards and the adoption of numerous and inconsistent State standards. Section 7 makes appropriate allowance for the interests of the States through such features as "grandfathering" rules for existing State requirements, special rules for energy requirements relating to covered products in building codes and State procurement standards, and waivers from preemption.

Under the new waiver provisions, a State may petition for a waiver of preemption where a State regulation is necessary to meet "unusual and compelling State or local energy interests." As a general rule, a State may not receive a waiver for a standard that takes effect prior to the effective date of a Federal standard, except in the case of "unusual and compelling State or local energy interests" (discussed below) that also qualify as an energy emergency. In addition, a "grandfather" provision applies with respect to this period.

Special rules also permit State and local building codes to continue to regulate the energy consumption of covered products both before and after the effective date of Federal standards so long as the codes meet certain requirements. Provisions relating to State and local building codes recognize the increasingly important role of these codes in a State's management of energy resources. H.R. 87 does not affect a State's authority to adopt provisions in building codes that do not affect the energy efficiency or energy use of covered products, such as insulation, structure, fire, heating or safety standards.

Section 7 is designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements. It is also designed to ensure that States are able to respond with their own appliance regulations to substantial and unusual energy problems, such as high electricity, gas, or heating oil prices, high dependence on oil (or fuels whose price is tied to oil) for electricity generation or on out-of-State energy sources, unusual climatic conditions, or adverse environmental or health and safety conditions that can be alleviated by energy conservation in appliances. Congress anticipates that States that have such energy problems, and that have met the burden of proof set forth in Section 327, will be granted waivers.

Period prior to the effective date of a Federal standard.—For the period from the date of enactment of the Act until a Federal standard becomes effective, State energy requirements for covered products are permitted to remain in effect if they were prescribed or

enacted before January 8, 1987, and are applicable to products before January 3, 1988. Otherwise, State energy efficiency requirements for covered products generally are preempted during this period. The primary exception to this general rule is that DOE may grant waivers from preemption for "unusual and compelling State or local energy interests" that qualify as an "energy emergency condition." This narrow exception is to be utilized by DOE on a case-by-case basis in conformity with the statutory criteria.

Period when a Federal standard becomes effective.—In general, effective on the date of a Federal standard for a covered product, the Federal standard preempts all State standards that may be applicable to that product. DOE may grant a waiver from preemption if the State establishes that a State regulation is needed to meet "unusual and compelling State or local energy interest," unless interested persons demonstrate that the waiver should not be granted. These provisions are not intended to impose an absolute bar on State regulation; it is anticipated that States satisfying the statutory criteria will be granted waivers from preemption.

To meet the criterion of "unusual and compelling State or local energy interests," a State must show that its interests are substantially different in nature or magnitude from those prevailing in the United States generally. In addition, the State must show that it has evaluated appliance standards as part of an energy plan and forecast which shows that the costs, benefits, burdens and reliability of energy savings resulting from the regulation make it preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings and production, including reliance on reasonably predictable market-induced improvements in efficiency of the product subject to the regulations. This provision does not constitute a Federal requirement for State energy planning or forecasting and 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.

The Secretary may not, however, issue a waiver if he finds that interested persons have demonstrated, by a preponderance of the evidence, that the waiver would significantly burden manufacturing, marketing, distribution, sale or servicing of affected products on a national basis. H.R. 87 specifies several relevant factors that the Secretary should consider in making this determination.

Finally, the Secretary may not issue a waiver if he finds that interested persons have demonstrated that the State regulation is likely to result in the unavailability of product types, performance characteristics, features, etc. This final criterion is identical to the criterion for the establishment of a Federal standard set forth in new Section 325(1)(4), discussed above, except that the examination under Section 327 is limited to the effect in the State rather than on a national basis.

State building codes.—Section 7 contains new provisions relating to State building codes. These provisions are warranted because of the significant growth of State building codes as a tool for State energy management since the 1978 amendments to EPCA. These provisions generally apply only to appliances regulated directly by

a building code, such as heating and cooling equipment and water heaters, and not to appliances like refrigerators.

As a general rule, Section 7 prevents State building codes from being used as a means of setting mandatory State appliance standards in excess of the Federal standards. Subject to this restriction, Section 7 permits regulations or other requirements concerning the energy efficiency or energy use of covered products in building codes both before and after the effective date of a Federal standard under specified criteria.

The Act contains three basic provisions with respect to building codes. First, a "grandfather" provision covers energy efficiency requirements in building codes enacted or prescribed before January 8, 1987, permitting them to operate without preemption until the effective date of a Federal energy standard for a covered product.

Second, such a requirement enacted or prescribed on or after January 8, 1987 in a code for new construction is not preempted until the date of a Federal standard if the code does not require that the energy efficiency of the covered product exceed the applicable minimum efficiency requirement in national voluntary consensus standards (such as those of the American Society of Heating, Refrigeration, and Air-Conditioning Engineers) or certain other specified levels.

Third, on the effective date of a Federal standard for any covered product, such a State regulation or other requirement for a covered product in a code for new construction is not preempted if it does not require that the covered product have an energy efficiency exceeding the Federal standard or the level permitted in a waiver of preemption, and if it meets certain other criteria. The provisions give the State flexibility in implementing performance-based building code approaches. Such approaches authorize builders to adjust or trade off the efficiencies of the various building components, including certain covered products, so long as an overall energy objective is met. The section's limited restrictions are designed to ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed either the applicable Federal standard or a State standard for which a waiver from preemption has been granted.

Generally, H.R. 87 does not require a State or local government to submit a petition to DOE in order to enforce or apply its building code for new construction. However, if the code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard and any applicable State standard that has been granted a waiver of preemption, that requirement in the building code shall not apply unless DOE has granted a waiver for the requirement.

BACKGROUND AND NEED FOR LEGISLATION

Appliance efficiency has been a subject of national interest since at least the initial energy price jolts of the early 1970's. In 1975, Congress passed the Energy Policy and Conservation Act (EPCA), which required the U.S. Department of Energy (DOE) to mandate energy labeling of appliances and to prescribe voluntary, industry-wide appliance efficiency improvements. In addition, EPCA author-

ized, but did not require, DOE to set mandatory efficiency standards if the labeling and voluntary approaches proved ineffective.

In 1978, Congress enacted the National Energy Conservation Policy Act (NECPA), 42 U.S.C. 6291 *et seq.* NECPA, among other things, amended EPCA to require DOE to promulgate expeditiously mandatory Federal efficiency standards for 13 covered products (refrigerators, freezers, water heaters, room air conditioners, central air conditioners, furnaces, dishwashers, clothes washers, clothes dryers, home heating equipment, kitchen ranges/ovens, television sets, and humidifiers/dehumidifiers). DOE proceeded with the rule-making and, on June 30, 1980, issued proposed standards for 8 of the 13 covered appliances.

In 1982 and 1983, DOE embarked upon a new rulemaking procedure. In December 1982 and August 1983, DOE issued final "no-standard" standards for most of the covered appliances. These standards constituted DOE's determination that, applying the statutory criteria of "technological feasibility" and "economic justification," the most appropriate Federal appliance standards were no standards at all.

The "no-standard" standards resulted in litigation. The Natural Resources Defense Council, joined by Congressman Richard Ottinger and the States of California, Minnesota and New York, sued DOE to overturn the standards as a wholesale misapplication of the Congressional directive to promulgate Federal standards. On July 16, 1985, the D.C. Circuit Court of Appeals struck the "no-standard" standards and directed the Department to initiate a new rulemaking procedure in accordance with the statutory intent. *NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985). That rulemaking is still in progress.

While Congress was enacting the first Federal appliance standards legislation in the 1970s, some states begin enacting their own appliance standards legislation. First California, and later New York, Wisconsin, Minnesota and Oregon, passed legislation or promulgated regulations establishing standards for appliances covered under Federal law. Although NECPA provides that Federal appliance standards preempt state standards, the law also allows DOE to grant waivers to states able to demonstrate a "significant State or local interest" justifying the State's standards in lieu of the Federal standard.

At the same time that DOE promulgated the "no-standard" standards it began a practice of granting waiver petitions filed by the states. As a result, the major activity in appliance standards over the past decade has been at the state level. At present, more than a half-dozen states have appliance standards legislation of one kind or another on the books, and another ten states are moving in that direction. In addition, many States and localities regulate the efficiency of certain products by adopting requirements in their building codes, which govern overall energy consumption in new buildings.

In December 1985, DOE and the Solicitor General's Office decided not to appeal the Court's decision in *NRDC v. Herrington*. Appliance manufacturers, accordingly, were confronted with the absence

of Federal appliance standards for the immediate future, and a growing plethora of differing state regulations, complicating industry's long-term planning. Environmental groups, for their part, were put to the task of fighting a series of legislative battles at the state level, with litigation ensuing in some cases. In early 1986, the major appliance manufacturer associations and the Natural Resources Defense Council began a negotiation to resolve their longstanding differences in the area of appliance standards. That negotiation continued for close to six months and resulted in a comprehensive agreement which is the foundation of the National Appliance Energy conservation Act.

A version of the appliance standards bill substantially identical to H.R. 87 passed both Houses of Congress by unanimous consent in the last days of the 99th Congress. The bill was pocket vetoed by President Reagan on November 1, 1986. The President's vote message stated that "[t]he bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase lower-cost appliances, and constitutes a substantial intrusion into traditional State responsibilities and prerogatives."

Need For and Benefits of Legislation

As indicated, H.R. 87 represents a breakthrough in a decade-long battle between appliance manufacturers and environmental groups on the subject of appliance standards.

For manufacturers, H.R. 87 establishes explicit and uniform standards in the near term, and a detailed schedule for future standards in the long term. These provisions bring a degree of regulatory and certainty to the business planning of the appliance manufacturing industry, which has had to grapple in recent years with a growing number of differing State appliance laws and regulations.

For environmentalists, H.R. 87 realizes a long-term objective of a rigorous, uniform standard effective in all 50 States. It also represents the close of a long era of costly, piecemeal battles in State legislatures and administrative rulemaking procedures to establish State and local appliance standards.

According to estimates prepared by the American Council for an Energy Efficient Economy (ACEEE), appliance standards will result in substantial energy cost savings to consumers and businesses. This legislation is designed to achieve these goals by establishing initial energy conservation standards for eleven major home appliances. These appliances account for approximately 24 percent of electricity consumption in the United States. In addition, this legislation requires DOE periodically to review the standards according to the schedule and criteria set forth in the new Act to determine whether to make the standards more stringent.

Table I, which was prepared by NRDC, compares the initial standards set forth in the Act with the most stringent existing or proposed State standards and with typical products currently on the market. The table also calculates the percentage difference in energy consumption of appliances meeting the initial standards set forth in the Act compared to typical current products.

Table II, also prepared by NRDC, shows the percentage of current models that do not meet the initial standards set forth in the Act.

Table III sets forth forecasts prepared by ACEEE. These forecasts project future energy consumption by appliances in the absence of standards and subtract from these values projected energy consumption with the standards.

TABLE 1.—NATIONAL APPLIANCE ENERGY CONSERVATION ACT OF STANDARDS

Appliance type	1984 average efficiency	Act efficiency	Resulting efficiency	State efficiency	Percent ¹
Refrigerators.....	1140 kWh/yr	976 kWh/yr	903 kWh/yr	1023 kWh/yr (CA'87) 722 kWh/yr (CA'92)	21
Freezers.....	799 kWh/yr	671 kWh/yr	621 kWh/yr	737/yr (CA'87) 511 kWh/yr (CA'92)	22
Room air conditioners.....	7.5 EER	8.6 EER	9.3 EER	8.4 EER (CA'79) 8.45 EER (NY'88-prop.) 8.7 EER (NY'92-prop.)	19
Central air conditioners.....	8.8 SEER	10.0 SEER	10.3 SEER	9.5 SEER (NY'85) 9.9 SEER (CA'93)	17
Water heaters:					
Gas.....	.484 EF	.544 EF	.554 EF	.524 EF (ASHRAE/CA)	13
Electric.....	.807 EF	.884 EF	.894 EF	.864 EF (ASHRAE/CA)	10
Furnaces.....	70% AFUE	78% AFUE	84% AFUE	71% AFUE (CA'78)	20%

¹ Percent change 1984 efficiency vs. resulting efficiency.
Revised September 12, 1986.

TABLE 2.—Redesign requirements of appliance standards in the National Appliance Energy Conservation Act

Appliance and product category	Percent Redesign
Refrigerators ¹ (includes models with through-the-door ice): ²	
Top-freezer, auto defrost ²	89
Side-freezer, auto defrost ²	92
Manual defrost	42
Freezers: ¹	
Chest	83
Upright manual	87
Room air conditioners: ³	
No reverse cycle—with side louvers:	
Less than 6,000 Btu/hr	78
6,000 to 7,999 Btu/hr	49
8,000 to 13,999 Btu/hr	56
14,000 to 19,999 Btu/hr	81
20,000 Btu/hr and over	60
Reverse cycle—with side louvers	17
No reserve cycle—without side louvers:	
Less than 6,000 Btu/hr	0
6,000 to 7,999 Btu/hr	45
8,000 to 13,999 Btu/hr	76
14,000 to 19,999 Btu/hr	100
20,000 Btu/hr and over	(²)
Reverse cycle—without side louvers	0
Central air conditioners: ⁴	
Split system	⁵ 90
Package system	⁵ 89

Appliance and product category	Percent Redesign
Furnaces:⁶	
Oil boiler.....	57
Oil furnace.....	58
Gas boiler.....	79
Gas furnace.....	79

¹NRDC sort of AHAM 1986 Directory of Certified Refrigerators and Freezers, Edition No. 2, June, 1986.

²No models offered.

³NRDC sort of AHAM 1986 Consumer Selection Guide For Room Air Conditioners. The earlier version of this table contained an error which omitted the redesign percentages for air conditioners over 20,000 BTU/hr and substituted the percent redesign for the Reverse Cycle with Side Louvers category, which in turn was left blank. Other small variations in the redesign numbers reflect differences with the AHAM sort which includes Special Application Models and other unique classes which were not considered in the original NRDC sort.

⁴ARI 3rd Quarter 1985 Efficiency Statistics of Nationally-shipped units Figure 4 of ARI Submission to Massachusetts Executive Office of Energy Resources, March, 1986.

⁵These figures refer to shipments, not models.

⁶Sort of GAMA Consumers' Directory of Certified Furnace and Boiler Efficiency Ratings, May 1986, done by Glenn Reed, Massachusetts Executive Office of Energy Resources. These numbers differ from the previous version of this table because they were based on an AFUE of 78% according to GAMA's indoor air/indoor furnace test. Since the bill specifies 78% AFUE using outdoor air, the rule-of-thumb adjustment to the indoor test is 2% AFUE upward. Thus the sort is computed at the 80% AFUE level in this version, not the 78% AFUE level.

Revised September 12, 1986.

TABLE 3.—FORECAST OF FUTURE ENERGY CONSUMPTION OF APPLIANCES

Product	Electricity savings by 2000			Energy savings by 2000		Cost savings by 2000
	Annual (Twh/yr)	Lifetime (Twh)	Peak MW	Annual (Tbtu/yr)	Lifetime (quads)	Net lifetime \$ $\times 10^6$
Refrigerators.....	13.86	263	1,851	159.39	3.02	\$5,696
Freezers.....	2.59	54	340	29.79	0.62	1,358
Electric water heaters.....	20.87	271	2,573	240.01	3.12	8,798
Room air conditioners.....	4.59	69	4,890	52.79	0.79	854
Central air conditioners.....	11.62	139	12,385	133.63	1.60	829
Furnaces.....				121.78	2.80	3,010
Gas water heaters.....				190.19	4.37	6,280
Gas ranges.....				31.83	0.73	1,325
Total.....	53.53	796	22,039	959.40	17.05	28,150

¹ Net lifetime, dollars $\times 10^6$.

Source: American Council for an Energy Efficient Economy, "Energy and Economic Savings Potential From National Appliance Efficiency Standards" (August 1986).

These calculations forecast energy savings up to the year 2000, and assume that DOE maintains the Federal standards at the initial levels set forth in the bill. ACEEE estimates a reduction in energy consumption of 17 quads by the year 2000 by virtue of the standards in H.R. 87. Based on their assumptions, peak demand for electrical capacity would be reduced by 22,000 megawatts. Based on the same assumptions, ACEEE estimates that the present value of cost savings to consumers, based on national average utility rates, would be \$28 billion.

Although not all members of the environmentalist-industry coalition agree with these projected energy and cost savings, all do agree that the standards will enhance the certainty and reliability of future energy demand projections. Specifically, these standards would end an era of confusion and uncertainty. The issue of standards has remained unsettled for many years; in the absence of this legislation, this situation could continue for the indefinite future. The D.C. Circuit's decision in *NRDC V. Herrington* requires DOE to conduct a new rulemaking proceeding for appliance standards. This

proceeding will continue for a substantial time, and its outcome is uncertain. Litigation over DOE's determination would cause further delay and uncertainty. Such delay and uncertainty does not serve the public interest, including the interests of energy conservation and of rational planning by utilities, businesses, and other public and private entities. In the meantime, the States may be expected to fill the void--leading to a patchwork of unpredictable and inconsistent requirements. For these reasons, H.R. 87 is an important step in the Congressional initiative on appliance standards that began in 1975.

HEARINGS

No legislative hearings were held in the 100th Congress. In the 99th Congress, the Subcommittee on Energy Conservation and Power held one day of hearings on the National Appliance Energy Conservation Act on September 10, 1986. Testimony was received from 6 witnesses, representing 6 organizations, with additional material submitted by numerous other individuals and organizations. The witnesses testifying at the hearing were: Peter A. A. Berle, President and C.E.O., National Audubon Society; Charles A. Dowd, President, Admiral, A Division of Maytag Company, representing the Association of Home Appliance Manufacturers; David Goldstein, Senior Staff Scientist, Natural Resources Defense Council; Robert J. Bauer, President and C.E.O., Empire Comfort Systems, Inc., representing the Gas Appliance Manufacturers Association; Howard Geller, Associate Director, American Council For An Energy-Efficient Economy; and John W. Norris, Jr., President and C.E.O., Lennox Industries, Inc., representing the AirConditioning and Refrigeration Institute.

COMMITTEE CONSIDERATION

On February 24, 1987, the Subcommittee on Energy and Power met in open session and ordered reported the bill H.R. 87, as amended, by voice vote, a quorum being present. On February 26, 1987, the Committee met in open session and ordered reported the bill H.R. 87 with amendments by voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(1)(3)(A) of Rule XI of the Rules of the House of Representatives, no oversight findings or recommendations have been made by the Committee.

COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no significant impact on spending for fiscal years 1988 through 1992.

Calendar No. 15

100TH CONGRESS }
1st Session }

SENATE

{ REPORT
100-6

NATIONAL APPLIANCE ENERGY CONSERVATION ACT OF 1987

JANUARY 30, 1987.—Ordered to be printed

Filed under authority of the order of the Senate of January 29, 1987

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 83]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 83) to amend the Energy Policy and Conservation Act with respect to energy conservation standards for appliances, having considered the same, reports favorably thereon with amendments to the text and recommends that the bill (as amended) do pass.

The amendments are as follows:

1. On page 3, line 7, delete the word "and" and insert in lieu thereof the word "or".
2. On page 3, line 8, before the semicolon insert "and does not communicate with air in the conditioned space".
3. On page 20, between lines 16 and 17 insert the words "in gallons" following the word "Volume" each place it appears.
4. On page 23, line 13, delete the word "and".
5. On page 23, line 17, delete "percent." and insert in lieu thereof "percent; and".
6. On page 23, between lines 17 and 18 insert the following: "(iii) which the Secretary determines is not likely to result in a significant shift from gas heating to electric resistance heating with respect to either residential construction or furnace replacement."
7. On page 49, line 5 delete the word "basis." and insert in lieu thereof "or equivalent cost basis."

Because the State of California has already enacted standards and has been very active on this issue, special provisions are included in the bill relating to these State standards. In the case of the refrigerator/freezer standard, if DOE does not promulgate a final rule establishing a new Federal standard following the initial "lock-in" period ending January 1, 1993, then California's second tier standards (now to be effective on January 1, 1992) would go into effect on January 1, 1993, but only in California, without California receiving a waiver from Federal exemption.

Test procedures, enforcement, and reporting: S. 83 has three other general provisions relating to test procedures, enforcement, and reporting. First, test procedures would not change from existing law unless DOE recommends their revision. In this case, S. 83 requires that standards shall be adjusted so that revisions of the test procedures do not affect the actual stringency of the standards. Second, the bill would provide expeditious judicial relief should DOE fail to comply with statutory deadlines by stating that there is a Federal cause of action in such cases and that the courts are required to advance and expedite such cases. Section 336 of EPCA relating to administrative procedures and judicial review remains essentially intact except for technical changes and the addition of a new subsection to allow persons to seek declaratory judgments that State building codes do not comply with the Act. S. 83 does not require a State to petition DOE to show that their building codes are consistent with the Act. Finally, as for reporting, DOE may require submission of reports by manufacturers but DOE would be required to use existing information when possible and to minimize industry's reporting burden.

BACKGROUND AND NEED

In 1975, Congress passed the Energy Policy and Conservation Act (EPCA) (Public Law 94-163) which required the Department of Energy (DOE) to mandate energy efficiency labeling of major residential appliances and to prescribe voluntary industry appliance efficiency improvements. In addition, EPCA authorized, but did not require, DOE to establish mandatory efficiency standards if necessary. In 1978, Congress enacted the National Energy Conservation Policy Act (NECPA) (Public Law 95-619) which amended EPCA to require that energy efficiency standards be established for each of 13 classes of appliances that are major consumers of energy. The standards, which would preempt State laws on appliance efficiency, were to "be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified."

The Department proceeded with rulemaking and in 1980 issued proposed standards for 8 of the 13 classes of covered appliances. In January of 1981, however, the Department suspended this process and announced in April 1982 a finding that no standards were economically justified. The DOE adoption of this "no-standard" standard precluded individual States from adopting their own efficiency standards due to the preemption provisions of EPCA.

The "no-standard" standard was immediately challenged in court by the Natural Resources Defense Council (NRDC) which sued to

overturn the standards as thwarting the congressional intent that Federal standards be established. On July 16, 1985, the D.C. Circuit Court of Appeals issued a unanimous decision striking down the "no-standard" standards as "... contrary to law" and directing DOE to initiate a new rulemaking in accordance with the statutory intent of NECPA (*NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985)). That new rulemaking is still in progress.

It is currently estimated that approximately 18 percent of the Nation's energy is consumed by major home appliances such as furnaces, hot water heaters, clothes washers and dryers, air conditioners, refrigerators, stoves, etc. Since the energy price increases of the early 1970's, appliance efficiency has been the subject of national interest.

During the 1970's some States began enacting appliance efficiency standards on their own. NECPA provides that the Federal standards preempt State standards, except that States may petition DOE to grant a waiver from preemption if a State is able to show justification for its standards over those of DOE. While DOE adopted its policy of the "no-standard" standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards has begun to emerge and the trend is growing.

Because of this trend, appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed. In an effort to resolve this problem the major appliance manufacturer associations began negotiations with the Natural Resources Defense Council in early 1986. At the end of July an agreement was reached and it was embodied in legislation which was introduced on August 15, 1986, in the House (H.R. 5465) and in the Senate (S. 2781). H.R. 5465 was passed without objection by both Houses of Congress on October 15, 1986 and with only four substantive changes:

1. Television sets were added as a covered product for which the Secretary of Energy may prescribe an energy conservation standard (section 322(a)(12) and section 325(i)(3)).

2. An energy conservation standard was established for the heating cycle of heat pumps (section 325(d)(2) and section 325(d)(3)(A)).

3. The energy conservation standards for furnaces were modified to provide different treatment for furnaces having an input of less than 45,000 Btu's per hour (section 325(f)(B)).

4. Two new sections were added which did not relate to appliance standards, but instead dealt with issues pending before the Federal Energy Regulatory Commission.

On November 1, 1986, H.R. 5465 was pocket-vetoed by the President. The President's Memorandum of Disapproval stated that: "The bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase lower-cost appliances, and constitutes a substantial intrusion into traditional state responsibilities and prerogatives."

As introduced, S. 83 is the same legislation which was unanimously approved by Congress last October, except that sections 12 and 13 of last year's bill, regarding issues unrelated to appliance efficiency, have been deleted.

LEGISLATIVE HISTORY

Last year, S. 2781 and the House companion measure, H.R. 5465, were introduced on August 15, 1986. The Subcommittee on Energy Regulation and Conservation held a hearing (S. Hrg. 99-943) on S. 2781 on September 16, 1986. On September 22, 1986, the House passed H.R. 5465 and it was reported (S. Rpt. 99-497) by the Senate Committee on Energy and Natural Resources on September 24, 1986 in lieu of S. 2781. The Senate passed H.R. 5465, and the House concurred with the Senate amendments, on October 15, 1986. The measure was pocket-vetoed on November 1, 1986. S. 83 was introduced on January 6, 1987, as was House companion measure H.R. 87.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTES

The Committee on Energy and Natural Resources, in open business session on January 28, 1987, without objection of a quorum present, recommended that the Senate pass S. 83, if amended as described herein.

COMMITTEE AMENDMENTS

The Committee ordered S. 83 reported with seven amendments.

1. On page 3, line 7, delete the word "and" and insert in lieu thereof the word "or". This is a technical amendment.

2. On page 3, line 8, before the semicolon insert "and does not communicate with air in the conditioned space". This is a clarifying amendment with the result that, for the purposes of testing, it is assumed that all combustion and ventilation air used by warm air furnaces is admitted through grills or ducts from outdoors and does not communicate with air in the conditioned (heated) space. In effect, then the furnace is assumed to be isolated from the conditioned space, i.e., the living space. This was the intent of the bill as passed last year.

3. On page 20, between lines 16 and 17, insert the words "in gallons" following the word "Volume" each place it appears. This is a clarifying amendment to identify the unit of measurement to be used for the storage volume of water heaters when calculating energy factors.

4, 5, and 6. On page 23, lines 13 through 18, the Committee modified the language of the bill amending section 325(f)(1)(B) of EPCA to include an additional clause (iii). The purpose of the new clause is to clarify that, in setting an energy conservation standard for small gas furnaces (those having an input of less than 45,000 Btu's per hour), the Secretary of Energy shall, in a manner which is otherwise consistent with this Act, establish the standard at a level between 71 percent and 78 percent AFUE "which the Secretary determines is not likely to result in a significant shift from gas heat-

ing to electric resistance heating with respect to either residential construction or furnace replacement."

The Committee did not establish an initial standard for small gas furnaces in the statute and instead directed the DOE to establish the standard by rule at an annual fuel utilization efficiency of not less than 71 percent and not more than 78 percent. The Committee was concerned that setting a standard for small gas furnaces, at or near 78 percent (the level for larger gas furnaces), would increase their initial price. Because of the competition between small gas furnaces and electric resistance heating in some areas of the Nation, such a price increase for small gas furnaces could induce builders or consumers to switch to electric resistance heating. No specific standard for electric resistance heating is included in this bill.

Section 325(j) provides additional safeguards against a standard for small gas furnaces being set at a level that results in a buying preference or significant switching from gas heating to electric resistance heating (see section-by-section analysis).

7. On page 49, line 5, delete the word "basis." and insert in lieu thereof "or equivalent cost basis." Section 327(f)(3) establishes the requirements which a State building code, concerning the efficiency of a covered product, must meet in order to avoid preemption upon enactment of a Federal standard. Section 327(f)(3)(C) requires that a credit to the energy consumption or conservation objective allowed by the code, for installing covered products having energy efficiencies exceeding the standard, be given in terms of energy use. The amendment is necessary because some State energy codes are based on energy costs, and not on an energy use. This amendment clarifies that such credits may also be based on equivalent energy cost. For example, Oregon's code relies on total life-cycle costs for building construction and operation. Thus, the legislation, as amended, would allow tradeoffs between components based either on their energy usage or equivalent energy costs; including the appliances' initial purchase cost and operating costs, but excluding subsidies or rebates. This construction parallels section 327(f)(3)(F), which allows energy objectives to be specified in either energy use or energy cost terms.

SECTION-BY-SECTION ANALYSIS

Section 1 entitled the "National Appliance Energy Conservation Act" (the "Act").

Section 2 (definitions) amends section 321(a) of the Energy Policy and Conservation Act ("EPCA") by adding definitions which are required to implement the specific standards provisions and other provisions added to EPCA by the Act. Section 2(a) defines "energy conservation standard" to include the performance standards set forth in the Act as well as the design requirements. Section 2(b) defines the technical terms that are used in the standards.

Section 3 (Coverage) amends section 332(a) of EPCA, listing the products that are covered by the Act. These products are: refrigerators; refrigerator-freezers; freezers; room air conditioners; central air conditioners and central air conditioning heat pumps; central air conditioners and central air conditioning heat pumps; water

heaters; pool heaters; direct heating equipment; furnaces; dishwashers; clothes washers; clothes dryers; television sets and kitchen ranges and ovens. Other consumer products may be regulated by the Secretary under existing section 322(b) of EPCA. Consumer products designed solely for use in recreational vehicles and other mobile equipment are not covered by the Act.

Section 4 (Test Procedures): Section 323 of EPCA is amended so as to conform with the establishment of specific standard levels in the Act. New section 323(a) states that all test procedures and related determinations prescribed or made by the Secretary with respect to any covered product, which are in effect on the date of enactment of the Act, remain in effect until the Secretary amends the test procedures and related determinations.

New section 323(b) authorizes the Secretary, with the assistance of the National Bureau of Standards, to amend existing test procedures, or to prescribe new test procedures for any covered product for which there are no test procedures. If the Secretary determines that a test procedure should be prescribed or amended, he shall promptly publish in the Federal Register proposed test procedures and afford interested parties an opportunity for comment. The Act extends the comment period to a minimum of 60 days (compared to 45 days under current law) and allows the Secretary to extend this comment period to as much as 270 days for good cause shown.

New section 323(c) modifies existing law regarding the restrictions on certain representations in writing or in broadcast advertisements about the energy characteristics of covered products.

New section 323(d) restates existing law with minor revisions regarding cases in which test procedures are not required.

New section 323(e) addresses the steps the Secretary must take to conform an energy conservation standard to an amended test procedure in the event a test procedure is amended.

Section 5 (Energy Conservation Standard): This section significantly amends existing Section 325 of EPCA by establishing the specific initial energy conservation standards for the covered products (with the exception of televisions and small gas furnaces), and by requiring future rulemakings under mandatory schedules and revised criteria.

Under each subsection, a minimum duration period (i.e., the period between the effective date of standards and the dates of possible revisions thereto) is prescribed for each initial and revised standard. Manufacturers are also given specified lead times (i.e., the time between final publication of a revised standard by DOE and the effective date of the revised standard) within which to redesign their products to comply with new standards.

New section 325(a) contains the purpose of this section.

New section 325(b) contains the initial standard levels for refrigerators, refrigerator-freezers and freezers.

New sections 325(c) through 325(h) contain the initial standard levels and applicable dates for, respectively: room air conditioners (section 325(c)); central air conditioners and central air conditioning heat pumps (section 325(d)), water heaters, pool heaters, and direct heating equipment (section 325(e)); furnaces (section 325(f)); dishwashers, clothes washers and clothes dryers (section 325(g)); kitch-

en ranges and ovens (section 325(h)); and television sets (section 325(i)(3)).

New section 325(i), which essentially restates existing law, allows the Secretary in his discretion to promulgate standards for additional products, and specifies that a 5-year lead time is required between the publication of a final rule and the effective date of the standards. The subsection explicitly permits the Secretary to prescribe an energy conservation standard for television sets but such a standard may not become effective with respect to products manufactured before January 7, 1992.

New section 325(j) establishes the criteria by which the Secretary may prescribe new or amended standards. The Secretary may not increase the maximum allowable energy use or decrease the minimum required energy efficiency of a covered product.

This section retains the requirements of existing law that energy conservation standards, including new or amended standards, shall be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is "technologically feasible" and "economically justified."

With respect to the small gas furnace, it is the Committee's intent that should the Secretary determine that significant switching is occurring as a result of the small gas furnace standard, then he has the authority to review the standard and through a rule-making establish a new standard, otherwise consistent with this Act, which the Secretary determines will avoid such switching. Obviously, in this case, the Secretary is authorized to lower an energy conservation standard notwithstanding section 325(j)(1), but he may not lower the standard below 71 percent.

This section also modifies the requirements of existing law regarding the Secretary's evaluation of the technological feasibility and economic justification of a proposed standard. For example, the section creates a statutory rebuttable presumption that a new or amended standard level is economically justified if the Secretary makes certain findings.

New section 325(j)(4) also prohibits the Secretary from prescribing a new or amended standard if he finds that the standard is likely to result in the unavailability in the United States in any covered product type or class of performance characteristics (including reliability), features, sizes, etc.

With respect to the small gas furnace standard (section 25(f)(1)(B)), the Secretary must consider the impact of any lessening of competition that is likely to result from the establishment of a standard for small furnaces. He must consider the economic impact of the standard on manufacturers and consumers. In addition, the Secretary must consider the total projected amount of energy savings likely to result from the establishment or revision of a standard for small furnaces.

Finally, section 325(j)(4) forbids a standard being set so as to result in the unavailability in the United States in any covered product type (or class) of performance characteristics, such as size or capacity. This paragraph, upon a sufficient showing, would forbid a standard for small gas furnaces being set at a level that would increase the price to the point that the product would be

noncompetitive and that would result in minimal demand for the product.

New subsection 325(k) contains procedures for prescribing new or amended standards. This section increases to 60 days (versus 45 days in current law) the public comment period on an advanced notice of proposed rulemaking and on proposed rules. It also provides that an amended or new final rule shall be published as soon as practicable but not less than 90 days after the publication of the proposed rule in the Federal Register. In other respects, this subsection essentially retains the requirements of current law.

Subsections (l), (m) and (o) are essentially identical to subsections (f), (j) and (e), respectively, or current law.

Subsection (n) states that compliance with the performance standards either set forth in or required by section 325 shall be determined using the test procedures and compliance criteria of section 323.

Section 6 (Requirements of Manufacturers): Section 326(d) of EPCA is amended to add a requirement that the Secretary shall consider existing public sources of information including nationally-recognized certification programs of trade associations. The Secretary is also required to exercise his authority in a manner designed to minimize unnecessary burdens on manufacturers of covered products.

Section 7 (Effect on Other Laws): Section 327 of EPCA is amended to create new preemption provisions, including criteria under which States can receive waivers from preemption.

Section 327(a), which essentially restates existing law, and provides that the Act supersedes State and local regulations regarding testing and labeling in certain cases.

New section 327(b) describes how preemption would apply during the period between the date of enactment of the Act and the effective dates of each Federal energy conservation standard. As a general principle, no State appliance efficiency regulations or requirements shall be applicable unless such regulations or requirements are prescribed or enacted before January 8, 1987, and are applicable to products before January 3, 1988. The section also lists other exceptions to preemption.

New section 327(c) states that on the effective date for each Federal energy conservation standard, that standard preempts State regulation, as provided under current law. This preemption is subject to the certain exceptions for building codes in new section 327(f), a state procurement regulation described in subsection (e), a regulation prohibiting constant burning pilot light for pool heaters, and any waiver from preemption granted by DOE upon State petition.

New section 327(d) allows States to file petitions seeking waiver of Federal preemption. This subsection provides new and more stringent criteria that a State must establish by a preponderance of the evidence in order to receive an exemption. The State is required to show that its regulation is needed to meet "Unusual and compelling" State or local interests.

New subsection (d) also provides that even if the State has made a showing of an unusual and compelling interest, the Secretary may not grant the requested waiver if he finds that interested per-

a defense or justification for a failure by the Secretary to comply with a nondiscretionary duty.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of costs of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 29, 1987.

Hon. J. BENNETT JOHNSTON, Jr.,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 83, the National Appliance Energy Conservation Act of 1987, as ordered reported by the Senate Committee on Energy and Natural Resources, January 28, 1987.

S. 83 establishes energy conservation standards for categories of covered appliances. It provides a schedule for the Secretary of Energy to evaluate these standards to ensure that the maximum energy efficiency that is technologically feasible and economically justified is being achieved. This bill also provides for the preemption of state energy conservation appliance standards after the federal standards are in effect.

CBO estimates that S. 83 will have no significant impact on government spending for fiscal years 1988 through 1992. The Department of Energy currently plans to conduct technical and economic evaluations of appliances on essentially the same schedule described in S. 83.

Enactment of this bill would not directly affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD GRAMLICH,
(for Rudolph G. Penner, Director).

REGULATORY IMPACT EVALUATION

Under existing law the Department of Energy is required to implement a Federal energy conservation program for home appliances. S. 83 would amend existing law and decrease the number of regulations associated with others. On balance, however, the net effect of S. 83 would be a reduction in regulations resulting from the existing program.

S. 83 eliminated the need for certain regulations. For example, S. 83 would substantially reduce the regulatory and economic burdens of the Federal appliance energy conservation program on the appliance manufacturing industry by reducing appliance regulation at the State level. The bill increases Federal preemption of State regulation. As a result, industry would avoid the burdens of a patchwork of conflicting and unpredictable State regulations. In addition, S. 83 establishes energy conservation standards for appliance

types which, without enactment of the measure, would be required to be established through more costly regulatory procedures conducted by the Department.

S. 83 would, on the other hand, increase regulations in other areas by requiring greater State and local compliance with the Federal program. For Example, S. 83 would establish two procedures under which a State may petition for a waiver from Federal preemption of State appliance efficiency regulations. Currently, there is only one petition procedure. Additionally, S. 83 would establish a new regulatory requirement that State building codes must comply with certain requirements of the Federal appliance energy conservation program in order to avoid preemption. These compliance provisions of S. 83 increase the regulatory burden for States which, under current law, are free to develop and promulgate building codes without regard to the Federal appliance energy conservation program.

Although it is not possible to quantify the areas in which regulations are increased or decreased by S. 83, an evaluation of such areas clearly demonstrates that the net effect of the measure would be to reduce, rather than increase, regulations and economic costs. Moreover, the Congressional Budget Office estimates a net reduction in Federal Government costs over the next 3 fiscal years as a result of passage of this legislation. In addition, there is a strong consensus within the appliance manufacturing industry that the measure would reduce the industry's economic and regulatory burdens.

EXECUTIVE COMMUNICATIONS

The Committee has received no reports or communications relating to S. 83.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, S. 83, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENERGY POLICY AND CONSERVATION ACT

* * * * *

TITLE III—IMPROVING ENERGY EFFICIENCY

* * * * *

PART B—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS OTHER THAN AUTOMOBILES

DEFINITIONS

SEC. 321. (a) For purposes of this part:



TABLE OF CONTENTS—Continued

TITLE III—IMPROVING ENERGY EFFICIENCY

PART A—AUTOMOTIVE FUEL ECONOMY

Sec. 301. Amendment to Motor Vehicle Information and Cost Savings Act.

"TITLE V—IMPROVING AUTOMOTIVE EFFICIENCY

"PART A—AUTOMOTIVE FUEL ECONOMY

- "Sec. 501. Definitions.
- "Sec. 502. Average fuel economy standards applicable to each manufacturer.
- "Sec. 503. Determination of average fuel economy.
- "Sec. 504. Judicial review.
- "Sec. 505. Information and reports.
- "Sec. 506. Labeling.
- "Sec. 507. Unlawful conduct.
- "Sec. 508. Civil penalty.
- "Sec. 509. Effect on State law.
- "Sec. 510. Use of fuel efficient passenger automobiles by the Federal Government.
- "Sec. 511. Retrofit devices.
- "Sec. 512. Reports to Congress."

PART B—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS OTHER THAN AUTOMOBILES

- Sec. 321. Definitions.
- Sec. 322. Coverage.
- Sec. 323. Test procedures.
- Sec. 324. Labeling.
- Sec. 325. Energy efficiency standards.
- Sec. 326. Requirements of manufacturers and private labelers.
- Sec. 327. Effect on other law.
- Sec. 328. Rules.
- Sec. 329. Authority to obtain information.
- Sec. 330. Exports.
- Sec. 331. Imports.
- Sec. 332. Prohibited acts.
- Sec. 333. Enforcement.
- Sec. 334. Injunctive enforcement.
- Sec. 335. Citizen suits.
- Sec. 336. Administrative procedure and judicial review.
- Sec. 337. Consumer education.
- Sec. 338. Annual report.
- Sec. 339. Authorization of appropriations.

PART C—STATE ENERGY CONSERVATION PROGRAMS

- Sec. 361. Findings and purpose.
- Sec. 362. State energy conservation plans.
- Sec. 363. Federal assistance to States.
- Sec. 364. Energy conservation goals.
- Sec. 365. General provisions.
- Sec. 366. Definitions.

PART D—INDUSTRIAL ENERGY CONSERVATION

- Sec. 371. Definitions.
- Sec. 372. Program.
- Sec. 373. Identification of major energy consumers.
- Sec. 374. Industrial energy efficiency improvement targets.
- Sec. 375. Reports.
- Sec. 376. General provisions.

TABLE OF CONTENTS—Continued

TITLE III—IMPROVING ENERGY EFFICIENCY—Continued

PART E—OTHER FEDERAL ENERGY CONSERVATION MEASURES

- Sec. 381. Federal energy conservation programs.
- Sec. 382. Energy conservation in policies and practices of certain Federal agencies.
- Sec. 383. Federal actions with respect to recycled oil.

TITLE IV—PETROLEUM PRICING POLICY AND OTHER AMENDMENTS TO THE ALLOCATION ACT

PART A—PRICING POLICY

- Sec. 401. Oil pricing policy.
- Sec. 402. Limitations on pricing policy.
- Sec. 403. Entitlements.

PART B—OTHER AMENDMENTS TO THE ALLOCATION ACT

- Sec. 451. Amendments to the objectives of the Allocation Act.
- Sec. 452. Penalties under the Allocation Act.
- Sec. 453. Antitrust provision in Allocation Act.
- Sec. 454. Evaluation of regulation under the Allocation Act.
- Sec. 455. Conversion to standby authorities.
- Sec. 456. Technical purchase authority.
- Sec. 457. Direct controls on refinery operations.
- Sec. 458. Inventory controls.
- Sec. 459. Hoarding prohibitions.
- Sec. 460. Asphalt allocation authority.
- Sec. 461. Expiration of authorities.
- Sec. 462. Reimbursement to States.
- Sec. 463. Effective date of Allocation Act amendments.

TITLE V—GENERAL PROVISIONS

PART A—ENERGY DATA BASE AND ENERGY INFORMATION

- Sec. 501. Verification examinations.
- Sec. 502. Powers of the Comptroller General and reports.
- Sec. 503. Accounting practices.
- Sec. 504. Enforcement.
- Sec. 505. Amendment to Energy Supply and Coordination Act of 1974.
- Sec. 506. Extension of energy information gathering authority.

PART B—GENERAL PROVISIONS

- Sec. 521. Prohibition on certain actions.
- Sec. 522. Conflicts of interest.
- Sec. 523. Administrative procedure and judicial review.
- Sec. 524. Prohibited acts.
- Sec. 525. Enforcement.
- Sec. 526. Effect on other laws.
- Sec. 527. Transfer of authority.
- Sec. 528. Authorization of appropriations for interim period.
- Sec. 529. Intrastate natural gas.
- Sec. 530. Limitation on loan guarantees.
- Sec. 531. Expiration.

PART C—CONGRESSIONAL REVIEW

- Sec. 551. Procedure for congressional review of Presidential requests to implement certain authorities.
- Sec. 552. Expedited procedure for congressional consideration of certain authorities.

been in effect at least 18 months prior to the effective date of the rule under this section.

REQUIREMENTS OF MANUFACTURERS

42 USC 6296.

SEC. 326. (a) Each manufacturer of a covered product to which a rule under section 324 applies shall provide a label which meets, and is displayed in accordance with, the requirements of such rule. If such manufacturer or any distributor, retailer, or private labeler of such product advertises such product in a catalog from which it may be purchased, such catalog shall contain all information required to be displayed on the label, except as otherwise provided by rule of the Commission. The preceding sentence shall not require that a catalog contain information respecting a covered product if the distribution of such catalog commenced before the effective date of the labeling rule under section 324 applicable to such product.

(b) (1) Each manufacturer of a covered product to which a rule under section 324 applies shall notify the Commission, not later than 60 days after the date such rule takes effect, of the models in current production (and starting serial numbers of those models) to which such rule applies.

(2) If requested by the Administrator or Commission, the manufacturer of a covered product to which a rule under section 324 applies shall provide, within 30 days of the date of the request, the data from which the information included on the label and required by the rule was derived. Data shall be kept on file by the manufacturer for a period specified in the rule.

(3) When requested by the Commission, the manufacturer of covered products to which a rule under section 324 applies shall supply at his expense a reasonable number of such covered products to any laboratory designated by the Commission for the purpose of ascertaining whether the information set out on the label, as required under section 324, is accurate. Any reasonable charge levied by the laboratory for such testing shall be borne by the United States.

(4) Each manufacturer of a covered product to which a rule under section 324 applies shall annually, at a time specified by the Commission, supply to the Commission relevant data respecting energy consumption developed in accordance with the test procedures applicable to such product under section 323.

(5) A rule under section 323, 324, or 325 may require the manufacturer or his agent to permit a representative designated by the Commission or the Administrator to observe any testing required by this part and inspect the results of such testing.

(c) Each manufacturer shall use labels reflecting the range data required to be disclosed under section 324(c)(1)(B) after the expiration of 60 days following the date of publication of any revised table of ranges unless the rule under section 324 provides for a later date. The Commission may not require labels be changed to reflect revised tables of ranges more often than annually.

EFFECT ON OTHER LAW

42 USC 6297.

SEC. 327. (a) This part supersedes any State regulation insofar as such State regulation may now or hereafter provide for—

(1) the disclosure of information with respect to any measure of energy consumption of any covered product—

(A) if there is any rule under section 323 applicable to such covered product, and such State regulation requires test-

ing in any manner other than that prescribed in such rule under section 323, or

(B) if there is a rule under section 324 applicable to such covered product and such State regulation requires disclosure of information other than information disclosed in accordance with such rule under section 324; or

(2) any energy efficiency standard or similar requirement with respect to energy efficiency or energy use of a covered product—

(A) if there is a standard under section 325 applicable to such product, and such State regulation is not identical to such standard, or

(B) if there is a rule under section 323 or 324 applicable to such product and such State regulation requires testing in accordance with test procedures which are not identical to the test procedures specified in such rule.

(b) (1) If a State regulation provides for an energy efficiency standard or similar requirement respecting energy use or energy efficiency of a covered product and if such State regulation is not superseded by subsection (a) (2), then any person subject to such State regulation may petition the Administrator for the prescription of a rule under this subsection which supersedes such State regulation in whole or in part. The Administrator shall, within 6 months after the date such a petition is filed, either deny such petition or prescribe a rule under this subsection superseding such State regulation. The Administrator shall issue such a rule with respect to a State regulation if and only if the petitioner demonstrates to the satisfaction of the Administrator that—

(A) there is no significant State or local interest sufficient to justify such State regulation; and

(B) such State regulation unduly burdens interstate commerce.

(2) Notwithstanding the provisions of subsection (a), any State regulation which provides for an energy efficiency standard or similar requirement respecting energy use or energy efficiency of a covered product shall not be superseded by subsection (a) if the State prescribing such standard demonstrates and the Administrator finds, by rule, that—

(A) there is a substantial State or local need which is sufficient to justify such State regulation;

(B) such State regulation does not unduly burden interstate commerce; and

(C) if there is a Federal energy efficiency standard applicable to such product, such State regulation contains a more stringent energy efficiency standard than the corresponding Federal standard.

(c) Notwithstanding the provisions of subsection (a), any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such State standards are more stringent than the corresponding Federal standards.

(d) For purposes of this section, the term "State regulation" means a law or regulation of a State or political subdivision thereof.

(e) Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost, which is required to be made under the provisions of this part, shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved, or that such energy use or estimated annual operating cost will not be exceeded, under conditions of actual use.



APPLIANCE STANDARDS

HEARING
BEFORE THE
SUBCOMMITTEE ON
ENERGY CONSERVATION AND POWER
OF THE
COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

ON

H.R. 5465

A BILL TO AMEND THE ENERGY POLICY AND CONSERVATION ACT
WITH RESPECT TO ENERGY CONSERVATION STANDARDS FOR APPLI-
ANCES

SEPTEMBER 10, 1986

Serial No. 99-165

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TESTIMONY OF THE NATURAL RESOURCES DEFENSE COUNCIL

By David B. Goldstein, Ph.D.
and David B. Edelson

I. Introduction

The Natural Resources Defense Council (NRDC) is a national environmental organization with over 62,000 members and contributors. NRDC has been involved in planning for energy efficiency on the national and state level for over a dozen years, and has focused throughout that time on obtaining efficiency improvements from appliances.

The National Appliance Energy Conservation Act of 1986 represents an achievement unique in the history of our involvement in energy: a consensus proposal in which a compromise position acceptable to all parties has been negotiated. The major proponents of this bill have been on opposite sides of administrative and judicial disputes for over ten years. This legislation will resolve most of the disagreements and provide the nation with a wide array of benefits to an extremely broad range of beneficiaries.

Supporting it are a broad spectrum of groups that traditionally have disagreed on major energy planning issues: environmental and consumer organizations along with appliance manufacturer and homebuilder organizations; publicly owned and privately owned utility organizations and their regulators; and state and regional governmental agencies. Some of the reasons for this unusually broad base of support are described in Section II below. The process of arriving at such a compromise is described in Section III. Some of the effects of the bill are presented in Section IV.

II. Benefits of this Legislation

This bill demonstrates how environmental protection can go hand in hand with economic growth, the creation of new jobs, and consumer protection. The standards provided explicitly in the bill, along with future standards that DOE is required to set, will save money for consumers and businesses, reduce financial risk for utilities, and reduce the need for fossil fuel combustion, resulting in significant decreases in pollution.

The standards contained in this bill are estimated by the American Council for An Energy Efficiency Economy (ACEEE) to save 22,000 megawatts of peak electric power by the year 2000. Thus, this bill saves the equivalent of one quarter of the capacity of the entire U.S. nuclear program in only 14 years. Cumulative energy savings by the turn of the century exceed 17 quads, considerably more energy than is contained in the areas off the California coast that the Department of Interior is proposing for oil and gas leasing.

The ACEEE study shows a savings to consumers of over \$28 billion nationwide, or a cost reduction of over \$250 for an average American family. These savings were calculated conservatively by subtracting the increased cost of the more efficient appliances from the direct savings in energy use multiplied by the average electric, gas or oil prices to consumers and by accounting for predicted efficiency improvements in the absence of standards.

Actual savings are likely to be considerably larger, as

utilities are able to defer expensive generating capacity and avoid the need for rate increases to finance them. As an example of such savings, constructing enough coal capacity to supply 22,000 megawatts would cost America utilities some \$50 billion, a construction cost considerably larger than the entire calculated value of energy savings to consumers.

These reductions in energy use can lead to substantial reductions in air pollution. For example, the California Energy Commission calculated that its refrigerator standards would reduce emissions of nitrogen oxides by 5% statewide and emissions of sulfur oxides by 20%. These two pollutants are major precursors to acid rain. If these energy reductions are provided in the context of acid rain control legislation, they can help produce major reductions in the emissions of these precursor pollutants and also reduce the cost of clean up for utilities.

Utilities are a major beneficiary of this bill. Appliance efficiency standards allow utilities prudently to forecast energy savings and to reduce power plant construction needs accordingly. This helps them in two ways. First, it reduces overall investment requirements, keeping rates lower than they would otherwise be and protecting the utilities' financial standing. Second, it reduces the risk of over-building or under-building because of inaccurate forecasts of appliance energy usage. Erroneous forecasts have cost the utility industry over \$20 billion in wasted investment, according to DOE analyses.

Businesses benefit both directly and indirectly from these

energy savings. Money saved by consumers on their energy bills will be spent on other activities, fostering job creation and economic growth. Analysis by the California Energy Commission has shown significant economic multiplier effects from conservation savings. Business also benefits from lower utility rates and from cost reductions resulting from their own use of appliances.

Appliance manufacturers benefit from this bill by obtaining increased certainty in planning their products and by being protected from a potential patchwork of state regulations. Also, appliance manufacturers will increase their own sales volumes through the substitution of sales of more efficient (and more expensive) appliances for current models.

Finally, this legislation helps enhance national security by reducing the need for energy imports. Projected savings in oil and gas, which translate into reductions in oil imports, are 160,000 barrels per day equivalent by the year 2000.

In sum, everyone wins if this legislation is passed. This is perhaps why the bill has obtained such a broad base of support from public interest and business organizations and virtually no opposition.

III. A Consensus Approach to Setting Appliance Efficiency Standards

This bill is a product of negotiations between the Natural Resources Defense Council and the three major appliance trade associations and also incorporates the views of states and other

interested parties. These negotiations, extending over several months, were difficult for all parties. There were substantial differences in the opinions and perspectives that the parties brought to the negotiating table. During the negotiating process, both sides gained a greater respect for and understanding of the needs and problems of the others.

The resulting agreement effected in the legislation is a compromise. Both sides benefit from the uniformity of national regulation: if only half of the states were to adopt standards, consumer and environmental interests would lose the predictability of savings in the other states, while manufacturers would find it more difficult than complying with the standard in all 50 states.

The level of standards provided explicitly in the bill requires a significant level of product redesign. Table I displays the percentages of appliance models currently on the market that must be redesigned to meet the standards over a period of 3 to 5 years. The percentages are high, up to 90%. Despite the extensiveness of redesign involved, appliance manufacturers believe that the levels of efficiency are feasible and practicable.

Energy savings to be expected from the bill are significant. The magnitude of savings is discussed in Section IV. However, the standards fall short of achieving the maximum level of conservation that is technologically feasible and economically justified as would be required from DOE under both existing law

and this legislation. This is one of the reasons that the Department of Energy remains in the picture and is required to set future standards on a firm schedule.

Past DOE (and state) proceedings have been contentious, and both DOE and state standards have resulted inevitably in litigation. The interim standards provided in this legislation eliminate uncertainty and advance the effective date of standards compared to reliance on DOE or the states if the legislation were not enacted.

Manufacturers can begin immediately to redesign their products to meet known performance targets on fixed dates, confident that products designed to meet these standards can be sold nationwide. Utilities and their consumers benefit by being able to eliminate plans for power plants immediately, without the need to invest money as a hedge against the risk that DOE might not set standards at reasonable levels, or that the standards might not withstand litigation.

The explicit standards contained in the bill are generally more stringent than the state standards prevailing at the time of their effectiveness. For example, the refrigerator standard saves about 5% more than the most stringent state standard in effect in 1990, that of California. The freezer standard saves about 15% compared to the California requirement. The furnace efficiency requirement is significantly more stringent than that in effect in any state, providing additional energy savings of 10% compared to California's furnace efficiency standards.

The only major issue about which participants in the negotiation could not agree was the establishment of a national refrigerator/freezer standard based on the 1992 California requirement. Rather than resolving this issue directly, the legislation basically perpetuates the status quo. It requires the Department of Energy to resolve the technical disputes through its rulemaking process, and provides that the existing California standard not be preempted unless DOE acts. (Under current law, California standards also would not be preempted unless DOE acts.)

IV. Calculations of Energy Saved By the Legislation

This legislation will result in significant savings in energy consumption by establishing initial energy conservation standards for eleven major home appliances. These appliances account for approximately 24% of electricity consumption in the United States. Further energy savings will be obtained as DOE revises the standards according to the schedule and criteria set forth in the new Act.

The effect of the interim standards on national utility energy consumption can be computed in a number of different ways; each method produces a different type of answer. These differing types of answers concerning energy savings reflect different ways of framing the energy policy question. The first, and most simple, summarized in Table II, compares the interim standards adopted in this Act with the most stringent existing state

standards and with typical products currently on the market. The right hand column, percentage energy savings, compares the estimated energy consumption of products that currently comply with the standards proposed in the Act with the energy consumption of typical existing appliances. As noted, energy consumption is generally about 20% lower for products that currently meet the standards than for average existing products.

The next level of sophistication is the forecast presented by the American Council for An Energy Efficient Economy (ACEEE). This calculation is analogous to that performed by DOE in its rulemaking. It projects energy consumption with the standards, and then projects energy consumption in a base case, and subtracts the difference. In the base case, it relies on historic trends of efficiency improvement as well as the projections of the appliance industry, where these are available. Energy savings are calculated for appliances sold before the turn of the century, because further extensions of the computation, although theoretically more correct (since the standards will indeed be in effect for more than the rest of the century) become increasingly meaningless because of the likelihood that DOE will set more demanding standards following the provisions of this Act in future years.

The results of this calculation are cumulative savings of 17 quads of energy for all appliances sold by the year 2000, and a reduction in electrical capacity needs of 22,000 megawatts, the full output of 22 large power plants, or the equivalent in

capacity of one quarter of the entire U.S. nuclear program. Present value savings to consumers, based on national average utility rates, are \$28 billion or over \$250 per household. Reductions in gas usage from gas appliances add to 160,000 barrels of oil equivalent per day by the year 2000; further reductions in oil use from peak electricity generation can be anticipated.

A more sophisticated framing of the issue would show a range of appliance energy consumption forecasts in the base case, which would vary depending on the forecaster's perception of the responsiveness of the market; the likelihood of state regulation, the policy maker's predictions of whether energy prices would rise or fall, as well as variations in economic growth. In this base case, the energy forecaster would be confronted with a range of possible futures for appliance energy consumption and energy use in general.

There is considerable debate over which of the possible base case projections is most plausible. NRDC has argued in the DOE proceedings that the projections of market progress used by DOE, which are similar to those employed in the ACEEE study, are overly optimistic and understate savings. Unfortunately, there is no factual basis for accepting any specific base forecast: the future of energy efficiency is uncertain in the absence of standards.

With appliance standards, much of this uncertainty can be eliminated. All forecasts of energy use must assume that

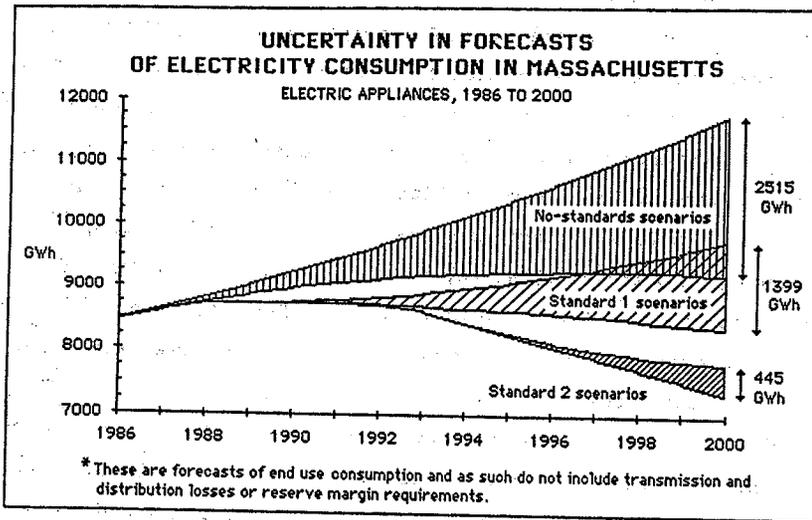
appliances use no more energy than provided by the standards. This results not only in the lower mean forecast, but in less variation between the high and the low cases. This is illustrated by Figure 1, taken from a forecast for the Commonwealth of Massachusetts. The impact of this bill falls somewhere between the Standards 1 and Standards 2 bands on the figure. The range of uncertainty with the standards is less than half of the range without them. Such reduction in uncertainty is a major economic benefit to utilities, exclusive of the other benefits from direct energy savings. This type of analysis, performed on a regional, state, or utility basis, provides the best indication of the value of appliance efficiency standards.

The overall benefits of this bill therefore exceed the numerical estimates computed by a wide margin.

It is not common for the government to be able to establish a policy that helps so many of its citizens and businesses without there also being "losers". But this legislation offers economic gains to virtually everyone: to all regions, to consumers and manufacturers, and to the environment.

NRDC joins with the appliance industry in a growing coalition to urge passage of this legislation.

Figure 1.
Effect of Appliance Standards on Energy Forecasts



CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CALIFORNIA 95814

September 3, 1986.

The Honorable Edward J. Markey
House of Representatives
2133 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Markey:

The California Energy Commission is pleased to support the proposed National Appliance Energy Conservation Act of 1986. Over the last ten years the CEC's appliance efficiency standards have been an important element of California's energy policy. These standards save more energy than any other conservation program in the state, and are extremely cost-effective for our ratepayers. We believe that this bill will achieve similar savings for consumers nationwide.

We understand that this bill is the result of intense negotiations, and that the explicit trade-off was national standards for stronger preemption of state standards than exists under current law. We have thought seriously about the new exemption criteria, which significantly reduces the states' ability to set standards, and weighed them against the benefit of nationwide conservation. We conclude that the trade-off is worthwhile.

We believe that the Legislative History of this bill should reflect the fact that the intent of the bill is to make it tougher for states to set standards than under current law, not that all standards are intended to be preempted. California is willing to accept the tougher criteria, but feels that future circumstances could warrant State standards. Including a discussion of the intent of the preemption criteria in the Legislative History would ensure that this bill does not preclude the possibility of state standards. We have attached proposed language.

The California Energy Commission looks forward to supporting your bill actively in Congress.

Sincerely,

Charles R. Imbrecht
Chairman

9/3/86 - California Energy Commission

PROPOSED LEGISLATIVE HISTORY LANGUAGE
REGARDING FEDERAL PREEMPTION PROVISIONS

Section 327

This section is designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting state requirements. It is also designed to ensure that states can respond with appliance regulations to substantial and unusual energy problems, such as high electricity, gas, or heating oil prices, high dependence on oil (or fuels whose price is tied to oil) for electricity generation or on out-of-state energy sources, unusual climatic conditions, or adverse environmental or health and safety conditions, or adverse environmental or health and safety conditions that can be alleviated by energy conservation in appliances. Congress intends that the Secretary will carefully consider such potential benefits of state or local regulations and weigh them carefully along with potential burdens to the appliance industry when determining whether to grant exemptions from preemption. Congress anticipates that states that have such energy problems, and that have competently analyzed the factors called for in Section 327, will be granted waivers.

**NEW YORK STATE ENERGY OFFICE**WILLIAM D. COTTER
COMMISSIONER

September 5, 1986

Honorable Edward Markey
United States House of
Representatives
2133 Rayburn Office Building
Washington, DC 20515

Re: S.2781/H.R.5465 - A Bill to Amend the Energy Policy and
Conservation Act with respect to Energy Conservation
Standards for Appliances

Dear Congressman Markey:

As you may know, New York State has long favored adoption of national appliance efficiency standards, as was provided for in Federal legislation enacted in 1978. The State actively participated in Federal rulemaking proceedings to establish such standards and joined with others in successfully challenging in court the decision of the Department of Energy (DOE) to adopt "no-standard" standards under existing Federal law.

As you also know, the appliance industry and a number of environmental organizations led by the Natural Resources Defense Council (NRDC) have concluded negotiations resulting in a legislative proposal (S.2781/H.R.5465) to establish national appliance efficiency standards for certain residential appliances. We have comprehensively reviewed this proposal and are supportive of it. We believe that this proposal has been made possible, to a large extent, by the efforts of States like New York in pursuing their own meaningful standards. We commend you for your sponsorship of this important national energy legislation.

At the same time, however, we believe the proposal can be improved in several important respects, particularly the provisions relating to the preemption of more stringent State standards, as discussed below.

The current language of S.2781/H.R.5465 requires that DOE reject any State petition to retain more stringent State standards if industry can show that a State standard will cause a significant burden, or that a proposed State regulation is likely to result in the unavailability of performance characteristics, features, sizes, capacity or volumes of affected appliances generally available within the State, regardless of how compelling a State's need for such standards may be. We believe the Department of Energy should be required instead to balance the impacts of such burden and the needs of

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the State in determining whether to grant the State's petition. Where the burdens outweigh the need for a more stringent standard, it is reasonable for the State regulation to be preempted; but where the benefits of the State standard exceed the burdens, it should be exempt from preemption.

We appreciate industry's desire to avoid a proliferation of inconsistent State requirements for their products. However, we believe there should remain a reasonable opportunity for States, in limited circumstances, to address their particular energy conditions through the imposition of more stringent efficiency standards. We recommend therefore that S.2781/H.R.5465 be amended to provide for a balancing of interests in connection with the waiver process.

Although we are also concerned about the manner in which the "unavailability" provision may be applied, these concerns could be mitigated by providing guidance on its application through legislative history.

A related problem regarding the waiver process concerns the timing of the effective date of State standards which are the subject of a successful State petition. The bill would delay the effective date of such standards until three years after the publication of the approval of the petition or the earliest possible effective date for DOE revised standards for that appliance, whichever is later. In some cases, as with respect to air conditioners, furnaces and boilers, this would generally preclude a State standard which has been exempted from preemption from becoming effective until the next century.

We believe the bill should be amended to provide that the effective date of a State standard which is granted a waiver be determined on a case-by-case basis after considering all the evidence presented in connection with the State's petition, rather than arbitrarily fixing such date by statute.*

I have attached for your consideration proposed language to amend S.2781/H.R.5465 to accomplish these objectives. (Alternative 1.) A small number of clarifying language changes are also proposed, as well as an amendment which would accord New York the same treatment as accorded California with respect to the application of more stringent standards for refrigerators, refrigerator/freezers, and freezers, provided New York State enacts or prescribes standards which are the same as those which have been adopted in California. Also included in Alternative 1 is proposed legislative history language which would provide desirable guidance on such issues as: the meaning of the terms "significant burden" on the appliance

*At a minimum, an exception should be provided in connection with the three-year delay in the effective date of a waiver in the case of an energy emergency. Where such condition exists, which imperils the health, safety and welfare of a State's residents and cannot be substantially alleviated through other means, it would be unreasonable to delay the imposition of the State standard.

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industry and the "unavailability" of an affected product, as used in connection with DOE's consideration of a State petition for a waiver from Federal preemption and DOE's consideration of new or amended Federal standards; and the extent of potential energy savings a new or amended Federal standard must be able to achieve before DOE is authorized to prescribe such a standard which is technologically feasible and economically justified.

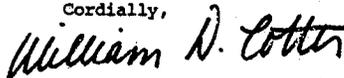
New York is dependent on out-of-state sources for over 90 percent of the fuels consumed in the State, and many New Yorkers pay the highest electric rates in the nation. Accordingly, it is important that New York have the ability to establish in a timely fashion State appliance standards which are necessary or appropriate to address our special energy circumstances.

If our proposed amendments to S.2781/H.R.5465 are not acceptable, then as an alternative, Congress should provide legislative history that clarifies its intention that States be given substantial latitude in adopting and implementing more stringent State standards where unusual and compelling energy conditions exist. I have included in Alternative 2 legislative history language which we propose be included in a Committee Report in this case to accomplish this and other related objectives.

In summary, we strongly support the intent and purpose of the proposed bill. We believe, however, that the revisions we are proposing would provide DOE and the States with greater flexibility to respond to national needs as well as to unique energy conditions confronting each particular State, while not imposing any unreasonable hardship on the appliance industry.

If we can provide any additional information or assistance in your consideration of these issues, please contact my General Counsel, Stanley Klimberg, at (518) 473-4937.

Cordially,



William D. Cotter
Commissioner

WDC/md
Attachments

PROPOSED AMENDMENTS TO S.2781/H.R. 5465

Section 327. Effect on Other LawsObjectives:

1. To require the balancing of unusual and compelling State energy conditions and significant burdens on industry in determining whether a waiver from preemption should be granted.
2. To modify the evidentiary showing required for determining the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production under the unusual and compelling State energy conditions test.
3. To uncouple the effective date of a waiver from preemption from the earliest effective date of a DOE revised standard for such product, and to allow DOE to determine the effective date of such waiver on a case-by-case basis.
4. To clarify the timing of the application of a DOE withdrawal of a waiver of preemption.

§327(d)(1)(A). Any State with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use or energy efficiency for any type (or class) of covered product for which a Federal energy conservation standard is applicable under section 325 may file a petition with the Secretary requesting a rule that such State regulation become applicable to such covered product.

Proposed language additions are underlined; proposed language deletions are bracketed.

(B) Subject to paragraphs (2) and [(5)] (6), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy conditions.

(C) For purposes of this subsection, the term 'unusual and compelling State or local energy conditions' means conditions 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 savings resulting from the State regulation makes such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production, including reliance on reasonably predictable market-induced improvements in efficiency for all products subject to the State regulation.

Provided, however, that a State's determination with respect to the factors described in clause (ii) shall be conclusive if such factors are evaluated as part of the State's energy plan and forecast and such determination is not arbitrary or capricious.

(2) The Secretary shall give notice of any petition filed under paragraph (1) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the six-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after

the date the petition is filed. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of such denial and the reasons for such denial.

(3) [The Secretary may not prescribe a rule under paragraph (2) if] Except as provided by paragraph (5), the Secretary shall prescribe the requested rule unless the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of affected products on a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including--

(A) the extent to which the State regulation will increase manufacturing or distribution costs of affected businesses;

(B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of subject products in the State; [and]

(C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the subject product type (or class), taking into consideration the extent to which the regulation, if applied to the State or to the entire United States, would result in a reduction--

(i) in the current models or in the projected availability of models that could be shipped on the effective date of the regulation; or

(ii) in the current or projected sales volume of the subject product type (or class); and

(D) the extent to which the State regulation is likely to contribute significantly to a proliferation of inconsistent State appliance efficiency requirements and the cumulative impact such requirements would have.

(4) Where the Secretary finds that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of affected products on a national basis, he shall nonetheless prescribe the requested rule, except as provided by paragraph (5), if he finds (and publishes such finding) that the benefits of the State regulation in meeting the unusual and compelling State or local energy conditions exceed such burdens.

[(4)](5) The Secretary shall not prescribe a rule pursuant to paragraphs (1) or (2) if the Secretary finds (and publishes such finding) 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 any covered product 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 the Secretary's finding except that the failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination whether to prescribe a rule for other classes (or types).

[(5) No final rule prescribed by the Secretary pursuant to paragraph (2) may--

(A) permit any State regulation covered by such rule to apply 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 due to the substantial

burdens of retooling, redesign, or distribution needed to comply with the State regulation; or

(B) apply to a covered product manufactured before the earliest possible effective date specified in section 325 for the initial amendment of the energy conservation standard established under such section for the covered product; except that such rule may apply before such date if the Secretary finds (and publishes such finding) that the State has established, by a preponderance of the evidence, that--

(i) because of circumstances not reasonably foreseeable by the State, an energy emergency condition exists within the State which--

(I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy to its residents at less than prohibitive costs; and

(II) cannot be substantially alleviated by the importation of energy or the use of interconnection agreements; and

(ii) the State regulation is necessary to substantially alleviate such condition.]

(6) In determining the effective date of a final rule prescribed by the Secretary pursuant to paragraphs (1) or (2), the Secretary shall take into consideration all the evidence presented in connection with a State's petition.

~~(6)~~(7) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended pursuant to section 325, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraphs (1) or (2) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), [and] (4), and (5) except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraphs (1) or (2) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it[.] but in no event shall the effective date of such withdrawal be earlier than the date on which the amendment to the Federal energy conservation standard shall take effect.

Section 325. Energy Conservation StandardsObjective:

To give increased refrigerator/freezer standards that may be adopted by New York similar treatment to that accorded such standards adopted by California, if the New York standards are the same as the California standards.

§325(b)(3)(A)(ii)(I) If the Secretary does not publish a final rule by January 1, 1990, relating to the revision of the energy conservation standards for refrigerators, refrigerator/freezers and freezers, the regulations which established standards for such products and were promulgated by the California Energy Commission on December 14, 1984, to be effective January 1, 1992 (or any amendments to such standards that are not more stringent than the standards in the original regulations) and any standards which are the same as the California standards prescribed or enacted by the State of New York shall apply in California and New York to such products, effective beginning January 1, 1993, and at all times thereafter, notwithstanding the provisions of subsection (c) of section 327.

Section 323. Test ProceduresObjective:

To clarify DOE's authority to amend an energy conservation standard during the "lock-in" period because of a change in test procedures.

§323(e)(2) If the Secretary determines that the amended test procedure will alter the measured efficiency or measured use, the Secretary shall amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. In determining the amended energy conservation standard, the Secretary shall measure, pursuant to the amended test procedure, the energy efficiency or energy use of a representative sample of covered products that minimally comply with the existing standard. The average of such energy efficiency or energy use levels determined under the amended test procedure shall constitute the amended energy conservation standard for the applicable covered products. Any such amended energy conservation standard shall take effect on the same date as the amended test procedure upon which it is based shall take effect.

(3) Models of covered products in use before the date on which the amended energy conservation standard becomes effective (or revisions of such models that come into use after such date and have the same energy efficiency or energy use characteristics) that comply with the energy conservation standard applicable to such covered products on the day before such date shall be deemed to comply with the amended energy conservation standard.

(4) The Secretary's authority to amend energy conservation standards under this subsection shall not affect the Secretary's obligation to issue final rules as described in section 325.

(5) The Secretary's authority to amend energy conservation standards under this subsection, and the effective date of any such amended energy conservation standard, shall not be affected by any provision of section 325.

PROPOSED LEGISLATIVE HISTORY LANGUAGE
FOR AN AMENDED S.2781/H.R.5465

Section 327 Effect on Other Laws

Objective:

To clarify the meaning of the terms "significantly burden" industry and "unavailability" of an affected appliance product, as used in connection with the consideration of a State petition to DOE for a waiver from Federal preemption.

This section is designed to protect the appliance industry from having to comply with a patchwork of numerous, conflicting and unjustified State regulations. It is also designed to ensure that States can address unusual and compelling energy problems -- such as high electricity, gas, or heating oil prices, high dependence on oil (or fuels whose price is tied to oil) for electricity generation or on out-of-State energy sources, unusual climatic conditions, or adverse environmental or health and safety conditions that can be alleviated by energy conservation in appliances -- by adopting appliance efficiency standards or requirements that are more stringent than standards or requirements established pursuant to this Act.

In order to justify the unusual and compelling interest which a State has in a regulation that would be subject to preemption under this Act, it must demonstrate (1) that the energy situation within the State is substantially different in nature or magnitude from that existing within the nation as a whole; and (2) that it reasonably determined, as part of its overall energy plan, that the State regulation is preferable to alternative approaches to energy savings or production, after evaluating the costs, benefits, burdens and reliability of energy savings which would result from such regulation and from the alternative approaches.

The Secretary is required to exempt from preemption a State regulation where the State has established an unusual and compelling interest, unless other interested persons have established that such regulation will significantly burden the appliance industry on a nationwide basis, taking into account such factors as: the extent of any increased distribution costs that would occur as a result of the exclusion of certain models of covered products from the State; the extent of increased manufacturing costs for retooling or redesigning by manufacturers, where large percentages of covered products would otherwise be excluded from the State; the extent of any disproportionate adverse impacts on smaller manufacturers, distributors or dealers; the extent of the impact of any lessening of any competition among manufacturers or dealers able to sell covered products within the State; and the extent to which the State regulation is likely to contribute significantly to a proliferation of conflicting State requirements for such product.

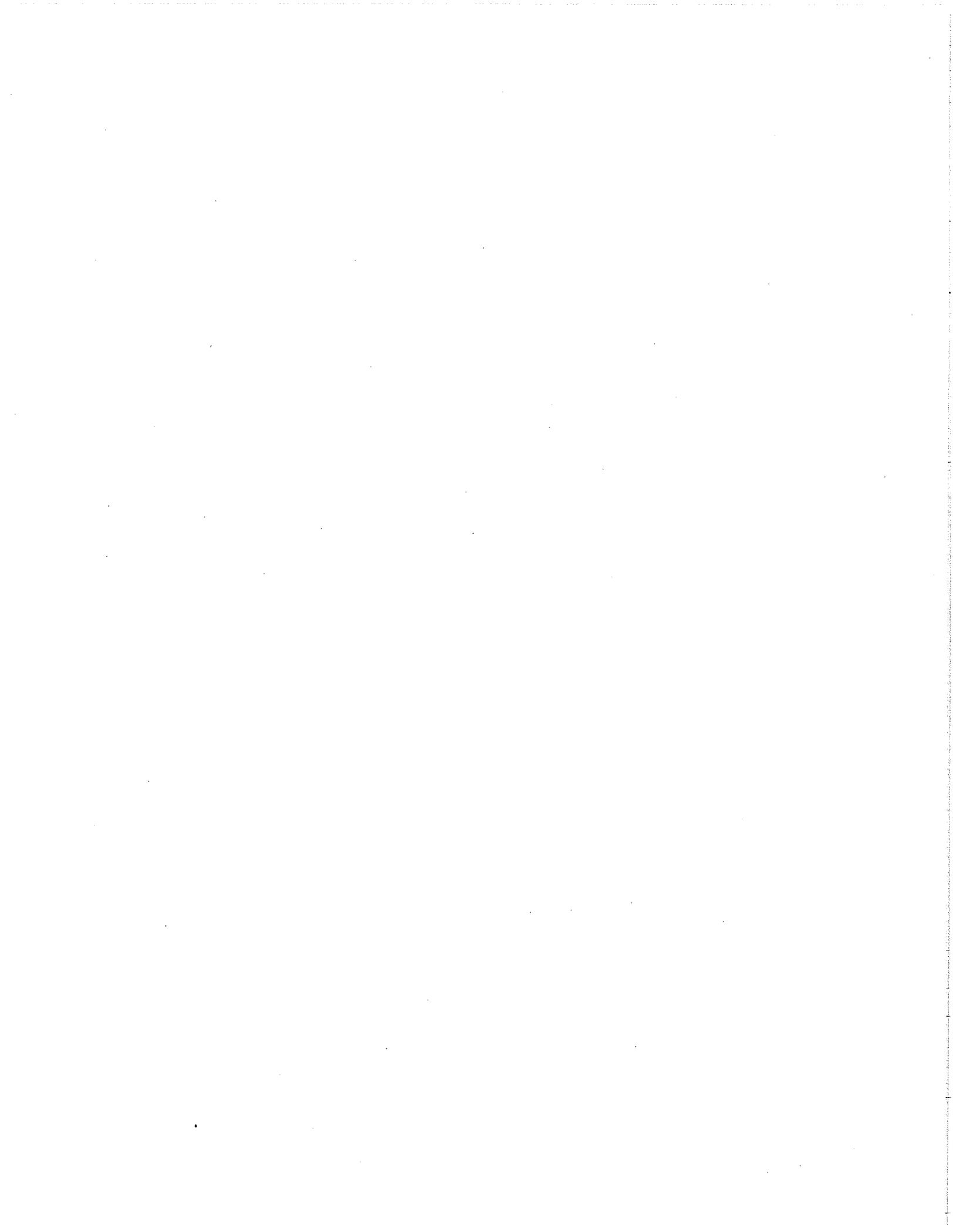
In determining whether the burden on industry is significant, Congress intends that industry be required to establish convincingly that such standards would have a very severe impact on the manufacturing, marketing, distribution, sale or servicing of affected products on a national basis. Congress does not intend that the elimination of a number of manufacturers,

distributors or dealers from marketing an affected product within a State shall constitute, on its own, a significant burden. If eliminating such entities from the State marketplace, however, would result in a significant reduction in competition on a national basis, the State standard may not be justified.

Similarly, Congress recognizes that the existence of a more stringent State standard will cause some increase in distribution costs in most cases, and may cause increases in manufacturing costs in order to enable certain manufacturers to continue to compete effectively within the State marketplace. Congress does not intend that such increased costs shall constitute a significant burden, however, unless they would constitute a significant increase in the total manufacturing and distribution costs, on a nationwide basis, for such affected product.

Even where the Secretary finds that a State standard will significantly burden the industry, he shall exempt such standard from preemption, if he finds that its benefits in meeting the State's unusual and compelling energy interests exceeds such burdens.

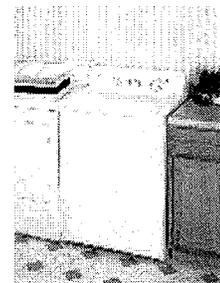
The Secretary is prohibited, however, from exempting a State standard from preemption to the extent that he finds that such standard is likely to result in the unavailability within the State of certain products, i.e. that it would eliminate the possibility of manufacturing or marketing a product with specific performance characteristics, features, sizes or other physical attributes which are then generally available in the State. Congress intends that such finding will rest upon a showing that it is not technologically feasible or economically justifiable to manufacture and market product models which could comply with the State regulation and still incorporate specific performance characteristics, features, sizes or other physical attributes substantially the same as that available in the State at the time of the Secretary's ruling, by the effective date of such ruling. To the extent that such finding is made, the Secretary shall not prescribe the requested rule with respect to product models with such performance characteristics, features, sizes or other physical attributes; such finding, however, shall not affect the Secretary's authority to delay the effective date of the requested rule with respect to such product models, or to prescribe the requested rule with respect to other classes of such product.





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One Hundred Tenth Congress
of the
United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Thursday,
the fourth day of January, two thousand and seven*

An Act

To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Energy Independence and Security Act of 2007”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Definitions.
- Sec. 3. Relationship to other law.

**TITLE I—ENERGY SECURITY THROUGH IMPROVED VEHICLE FUEL
ECONOMY**

Subtitle A—Increased Corporate Average Fuel Economy Standards

- Sec. 101. Short title.
- Sec. 102. Average fuel economy standards for automobiles and certain other vehicles.
- Sec. 103. Definitions.
- Sec. 104. Credit trading program.
- Sec. 105. Consumer information.
- Sec. 106. Continued applicability of existing standards.
- Sec. 107. National Academy of Sciences studies.
- Sec. 108. National Academy of Sciences study of medium-duty and heavy-duty truck fuel economy.
- Sec. 109. Extension of flexible fuel vehicle credit program.
- Sec. 110. Periodic review of accuracy of fuel economy labeling procedures.
- Sec. 111. Consumer tire information.
- Sec. 112. Use of civil penalties for research and development.
- Sec. 113. Exemption from separate calculation requirement.

Subtitle B—Improved Vehicle Technology

- Sec. 131. Transportation electrification.
- Sec. 132. Domestic manufacturing conversion grant program.
- Sec. 133. Inclusion of electric drive in Energy Policy Act of 1992.
- Sec. 134. Loan guarantees for fuel-efficient automobile parts manufacturers.
- Sec. 135. Advanced battery loan guarantee program.
- Sec. 136. Advanced technology vehicles manufacturing incentive program.

Subtitle C—Federal Vehicle Fleets

- Sec. 141. Federal vehicle fleets.
- Sec. 142. Federal fleet conservation requirements.

not be used to determine compliance with product standards established prior to the adoption of the amended test procedures.

“(3) INCORPORATION INTO STANDARD.—

“(A) IN GENERAL.—Subject to subparagraph (B), based on the test procedures required under paragraph (2), any final rule establishing or revising a standard for a covered product, adopted after July 1, 2010, shall incorporate standby mode and off mode energy use into a single amended or new standard, pursuant to subsection (o), if feasible.

“(B) SEPARATE STANDARDS.—If not feasible, the Secretary shall prescribe within the final rule a separate standard for standby mode and off mode energy consumption, if justified under subsection (o).”; and

(4) in paragraph (2) of subsection (hh) (as redesignated by paragraph (2)), by striking “(ff)” each place it appears and inserting “(gg)”.

SEC. 311. ENERGY STANDARDS FOR HOME APPLIANCES.

(a) APPLIANCES.—

(1) DEHUMIDIFIERS.—Section 325(cc) of the Energy Policy and Conservation Act (42 U.S.C. 6295(cc)) is amended by striking paragraph (2) and inserting the following:

“(2) DEHUMIDIFIERS MANUFACTURED ON OR AFTER OCTOBER 1, 2012.—Dehumidifiers manufactured on or after October 1, 2012, shall have an Energy Factor that meets or exceeds the following values:

“Product Capacity (pints/day):	Minimum Energy Factor (liters/ kWh)
Up to 35.00	1.35
35.01–45.00	1.50
45.01–54.00	1.60
54.01–75.00	1.70
Greater than 75.00	2.5.”.

(2) RESIDENTIAL CLOTHES WASHERS AND RESIDENTIAL DISHWASHERS.—Section 325(g) of the Energy Policy and Conservation Act (42 U.S.C. 6295(g)) is amended by adding at the end the following:

“(9) RESIDENTIAL CLOTHES WASHERS MANUFACTURED ON OR AFTER JANUARY 1, 2011.—

“(A) IN GENERAL.—A top-loading or front-loading standard-size residential clothes washer manufactured on or after January 1, 2011, shall have—

“(i) a Modified Energy Factor of at least 1.26;
and

“(ii) a water factor of not more than 9.5.

“(B) AMENDMENT OF STANDARDS.—

“(i) IN GENERAL.—Not later than December 31, 2011, the Secretary shall publish a final rule determining whether to amend the standards in effect for clothes washers manufactured on or after January 1, 2015.

“(ii) AMENDED STANDARDS.—The final rule shall contain any amended standards.

“(10) RESIDENTIAL DISHWASHERS MANUFACTURED ON OR AFTER JANUARY 1, 2010.—

“(A) IN GENERAL.—A dishwasher manufactured on or after January 1, 2010, shall—

“(i) for a standard size dishwasher not exceed 355 kWh/year and 6.5 gallons per cycle; and

“(ii) for a compact size dishwasher not exceed 260 kWh/year and 4.5 gallons per cycle.

“(B) AMENDMENT OF STANDARDS.—

“(i) IN GENERAL.—Not later than January 1, 2015, the Secretary shall publish a final rule determining whether to amend the standards for dishwashers manufactured on or after January 1, 2018.

“(ii) AMENDED STANDARDS.—The final rule shall contain any amended standards.”

(3) REFRIGERATORS AND FREEZERS.—Section 325(b) of the Energy Policy and Conservation Act (42 U.S.C. 6295(b)) is amended by adding at the end the following:

“(4) REFRIGERATORS AND FREEZERS MANUFACTURED ON OR AFTER JANUARY 1, 2014.—

“(A) IN GENERAL.—Not later than December 31, 2010, the Secretary shall publish a final rule determining whether to amend the standards in effect for refrigerators, refrigerator-freezers, and freezers manufactured on or after January 1, 2014.

“(B) AMENDED STANDARDS.—The final rule shall contain any amended standards.”

(b) ENERGY STAR.—Section 324A(d)(2) of the Energy Policy and Conservation Act (42 U.S.C. 6294a(d)(2)) is amended by striking “January 1, 2010” and inserting “July 1, 2009”.

SEC. 312. WALK-IN COOLERS AND WALK-IN FREEZERS.

(a) DEFINITIONS.—Section 340 of the Energy Policy and Conservation Act (42 U.S.C. 6311) is amended—

(1) in paragraph (1)—

(A) by redesignating subparagraphs (G) through (K) as subparagraphs (H) through (L), respectively; and

(B) by inserting after subparagraph (F) the following:

“(G) Walk-in coolers and walk-in freezers.”;

(2) by redesignating paragraphs (20) and (21) as paragraphs (21) and (22), respectively; and

(3) by inserting after paragraph (19) the following:

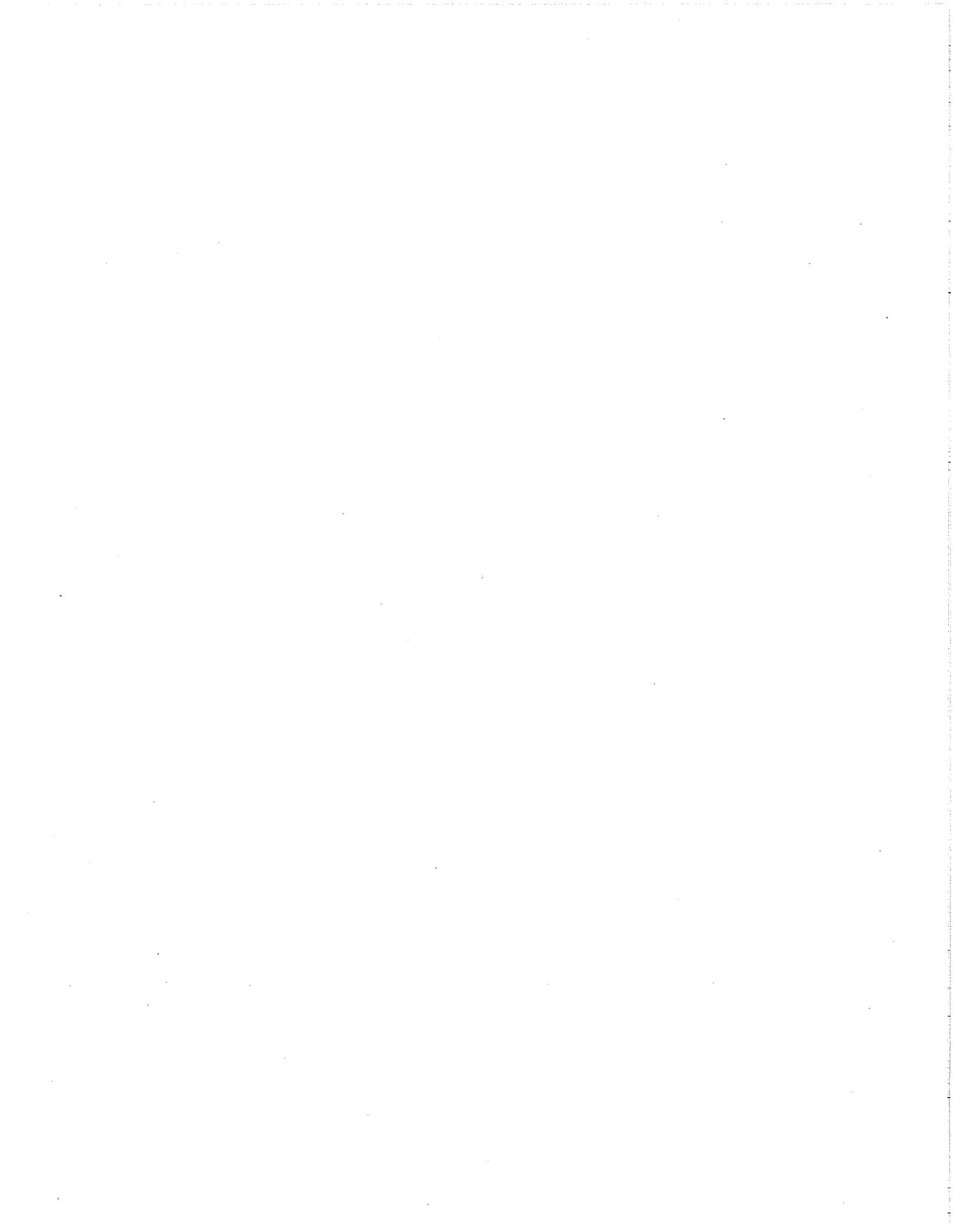
“(20) WALK-IN COOLER; WALK-IN FREEZER.—

“(A) IN GENERAL.—The terms ‘walk-in cooler’ and ‘walk-in freezer’ mean an enclosed storage space refrigerated to temperatures, respectively, above, and at or below 32 degrees Fahrenheit that can be walked into, and has a total chilled storage area of less than 3,000 square feet.

“(B) EXCLUSION.—The terms ‘walk-in cooler’ and ‘walk-in freezer’ do not include products designed and marketed exclusively for medical, scientific, or research purposes.”

(b) STANDARDS.—Section 342 of the Energy Policy and Conservation Act (42 U.S.C. 6313) is amended by adding at the end the following:

“(f) WALK-IN COOLERS AND WALK-IN FREEZERS.—



Agreement on Minimum Federal Efficiency Standards,
Energy Star Qualifying Levels, Federal Tax Credits and
Related Matters for Specified Appliances

THIS AGREEMENT memorializes the commitments made by the undersigned representatives of the organizations (the "Joint Stakeholders") regarding the enactment of minimum federal energy efficiency standards legislation for specific appliances by the U.S. Congress ("Congress"); the establishment by the Department of Energy ("DOE") of Energy Star qualifying levels for specified products; the adoption of legislation for manufacturer tax credits for specified products, and other related matters such as preemption.

1. The Joint Stakeholders will jointly submit to Congress the agreement set forth in Attachment I and mutually agreed to legislative or additional language which would (a) require the Department to establish minimum federal energy efficiency standards and/or rulemakings for the appliances described in Attachment I; (b) enable the Department to set Energy Star qualifying levels or take the actions specified in Attachment I; (c) extend the existing federal manufacturer tax credits for specified appliances as stated in Attachment I; and (d) include other provisions as specified in Attachment I.

2. The Stakeholders will:

- a. Support in good faith and proactively the adoption by federal law or regulation of the standards, related regulatory measures, including preemption, Energy Star levels and tax credits stated in Attachment I and will oppose any federal laws or regulations to the contrary.
- b. Not support and will oppose the enactment into state or local law or regulation of any energy or water standards for residential clothes washers, residential dishwashers, and dehumidifiers. It is recognized that California has routinely adopted the federal energy standards as state standards and this commitment to not support/oppose does not apply to California adoption of federal standards. This commitment to not support/oppose includes non-federal standards sought under the waiver of federal preemption provisions provided for in the U.S. Code, except that it does not apply to the California Energy Commission's petition for a waiver for state clothes washer water efficiency standards originally filed in 2005 and any judicial and administrative appeals of said petition, including re-filing a modified petition with U.S. Department of Energy.¹

¹ While all signatories agree with the policy in this paragraph, any signatory that does not ordinarily and customarily take positions on public policy issues within a state or local context is not bound to participate in such activities by virtue of this paragraph.

This paragraph (the "Standstill Agreement") expires when this overall agreement expires (12/31/2008).

However, if federal legislation, as described in paragraph 1 and included in Attachment I, has not been enacted by 12/31/2008 this agreement expires, but if the signatories to this agreement have, in good faith, engaged in activities to enact such legislation, then the Joint Stakeholders agree to consider the continuation of the Standstill Agreement. Any such continuation would be undertaken by an affirmative decision of the signatories.

3. The stakeholders shall submit a joint recommendation to the Department for revised Energy Star levels as described in Attachment I. The letter recommending these levels is part of this agreement and is included as Attachment II.

4. Any filings, proposals or responses to DOE notices shall be consistent with this Agreement and the parties shall file rulemaking petitions, file comments or take other actions with DOE or other regulatory agencies consistent with Attachment I.

5. The Joint Stakeholders agree to cooperate with each other in the preparation of press releases and public statements in support of the federal standards, the proposed legislation, the Department's rulemaking, the Energy Star revisions and the tax credits.

6. The Joint Stakeholders agree to support and cooperate with each other to obtain passage of the legislation described in Paragraph 1 and in Attachment I, including advocacy in Congress and to the Administration.

7. The Joint Stakeholders agree to consult with and obtain consent from all parties before supporting, advocating or agreeing to changes in the legislation. Such consent will not unreasonably be withheld.

8. The Joint Stakeholders agree that once enacted, they will take no action to overturn or revise the specific legislative proposals envisioned by paragraph 1 of this Agreement.

9. The Joint Stakeholders agree to jointly petition DOE and the Federal District Court in State of New York v. Bodman to add to the Court Order the rulemakings referenced in Attachment I for residential clotheswashers, commercial clotheswashers, residential dishwasher and refrigerator/freezer rulemaking.

10. The Joint Stakeholders agree to implement the commitments made in this Agreement individually or in groups. Each Joint Stakeholder will respond in good faith to reasonable requests by other Joint Stakeholders for joint implementation of any of these commitments.

11. This Agreement is hereby agreed to, in counterparts, by the undersigned Joint Stakeholders. This Agreement binds the undersigned Joint Stakeholders, their employees, their agents, and any successors and will take effect when all signatures are affixed. This agreement applies until December 31, 2008 except that paragraph 8 is not time limited and the Joint Signatories agree not to seek a waiver from federal preemption except as provided for in paragraph 2, if at all, any earlier than December 31, 2008.

12. Nothing in this Agreement is intended to inhibit in any way efforts by individual stakeholders to research, develop, or market products to standards that differ from those contemplated by this Agreement, provided such products are in compliance with applicable laws and regulations. Nothing in this Agreement is intended to direct any technical or product design approach to achieving efficiency standards and the parties shall not take any act to establish any such common approach.

(Agreement reached: March 20, 2007; signatures affixed to written agreement; August 2, 2007.)

Joint Stakeholders



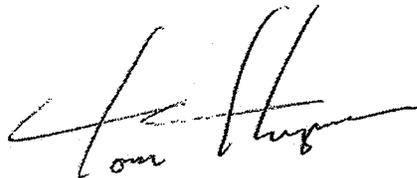
Kateri Callahan
President
Alliance to Save Energy



Joseph Maguire
President
Association of Home Appliance
Manufacturers



William Prindle
Acting Executive Director
American Council for an Energy-Efficient
Economy



Tom Thompson
Vice President of Engineering
Electrolux



Tom Curtis
Deputy Executive Director
for Government Affairs
American Water Works Association



Lynn S. Pendergrass
President and CEO
GE Consumer & Industrial, Americas



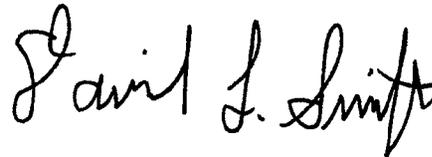
Andrew deLaski
Executive Director
Appliance Standards Awareness Project



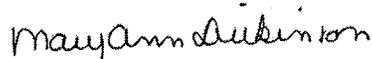
John Herrington
President
Digital Appliances
LG Electronics USA, Inc.



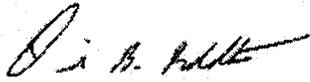
Diane VanDe Hei
Executive Director
Association of Metropolitan Water Agencies



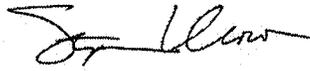
David L. Swift
President
Whirlpool North America



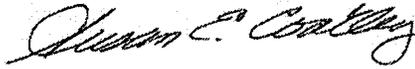
Mary Ann Dickinson
Executive Director
California Urban Water Conservation Council



David B. Goldstein
Energy Program Co-Director
Natural Resources Defense Council



Steven L. Crow
Executive Director
Northwest Power and Conservation Council



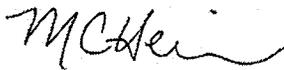
Susan E. Coakley
Executive Director
Northeast Energy Efficiency Partnerships



Jorge Carrasco
Superintendent
Seattle City Light



Chuck Clarke
Director
Seattle Public Utilities



Mike Hein
City Manager
Tucson, Arizona



APPLIANCE INDUSTRY JOINS ENERGY, WATER EFFICIENCY ORGANIZATIONS TO ANNOUNCE AGREEMENT FOR NEW MINIMUM EFFICIENCY STANDARDS, UPDATED ENERGY STAR LEVELS, AND ENERGY-EFFICIENCY TAX CREDITS

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FOR IMMEDIATE RELEASE

May 1, 2007

Washington, D.C. — Major home appliance manufacturers, their trade organization, and a nationwide coalition of energy and water efficiency supporters announced an historic agreement today that will establish new mandatory federal energy and water efficiency standards, recommendations for new ENERGY STAR levels, and manufacturer tax credits for the production of super-efficient clothes washers, dishwashers, refrigerators, and dehumidifiers.

The agreement, which seeks legislation for appliance efficiency standards and tax credits, represents significant energy and water savings for U.S. consumers. According to an analysis conducted for the U.S. Department of Energy (DOE), which supported the negotiations, the agreement will result in a savings of up to 3.3 quadrillion btus (quads) of energy and nearly **11 million acre feet (3.6 trillion gallons) of water over about 30 years**. (Eleven million acre feet is enough to meet the needs of about 44 million people for one year; and 3.3 quads is enough energy to meet the needs of about 15 percent of the U.S. population for one year.) Consumers will benefit from a savings of up to \$14.7 billion in cumulative utility bill reductions.

The agreement, when combined with additional appliance efficiency standards for refrigerators and clothes washers, could increase total 30-year savings to nearly 15 quads of energy and 68 million acre feet of water. The specific efficiency levels for refrigerators and clothes washers will be determined by DOE and will depend on cost-benefit and other analyses. Total cumulative utility bill savings could be as high as \$68 billion. (68 million acre feet would meet the annual water needs of about 272 million people; 15 quads would meet one year's energy needs for about 70 percent of the U.S. population.)

Key features of the agreement include:

- The first-ever national minimum water efficiency standards for residential clothes washers and dishwashers.
- Required DOE rulemakings to determine new minimum efficiency standards for refrigerators and clothes washers; they must be completed no later than December 31, 2010 and December 31, 2011, respectively.
- Aggressive production tax credits to spur market share growth for the most energy-efficient refrigerators, residential and commercial clothes washers, residential dishwashers, and dehumidifiers.
- Recommendations for revised ENERGY STAR levels, including water efficiency for residential and commercial clothes washers and dishwashers.

"This accord represents a landmark consensus agreement between industry and energy and water advocates to increase the energy and water efficiency of many home appliance products. Through stringent new mandatory federal efficiency standards and tax credits that will incentivize manufacturers to produce super-efficient products, this agreement will help transform the market for efficient home appliances and have a lasting effect on national energy and water use. It also affirms the importance of a federal role in regulating the energy and water use of appliance products," said Joseph M. McGuire, president, Association of Home Appliance Manufacturers.

"The Alliance to Save Energy is proud to be part of the forward-looking coalition of manufacturers and efficiency advocates whose landmark agreement on higher energy and water efficiency standards, as well as tax incentives to make major appliances more affordable, will save consumers energy and money and help curb the polluting emissions that contribute to climate change," said Alliance to Save Energy President Kateri Callahan. "Minimum efficiency standards pay dividends for years to come by establishing base energy-efficiency levels for newly manufactured products and by locking in savings for the considerable lifespan of products such as clothes washers and dishwashers. They also push the U.S. economy, on a continuing basis, towards greater energy efficiency."

"This agreement shows how to move energy policy forward in this country," said David B. Goldstein, NRDC Energy Program director. The nation needs:

- Minimum standards to assure consumers are protected from high energy costs and that unnecessary greenhouse gas pollution is not emitted;
- Expanded use of the ENERGY STAR program, which shows consumers how they can do better than minimum standards; and
- Tax incentives to commercialize the most advanced technologies.

"This agreement paves the way for this policy to be implemented for a number of important energy- and water-using appliances."

"Linking water efficiency to ENERGY STAR requirements and national minimum efficiency standards for residential clothes washers and dishwashers is an important step in empowering America's consumers to make strong, positive advances in water conservation. The drinking water utilities of the Association of Metropolitan Water Agencies actively promote sensible water use, both for water resource management and to mitigate the need for costly infrastructure expansion. We see today's agreement as major progress toward a sustainable water future," said Diane VanDe Hei, executive director, Association of Metropolitan Water Agencies (AMWA).

"This agreement continues a decade of progress in consensus agreements on home appliances. Just seven years ago, we negotiated a major increase in clothes washer standards that took affect this year; the new agreement shows that substantial further progress is already occurring. The agreement demonstrates the importance of continuing dialogue between manufacturers and advocates to keep accelerating technology innovation; meeting the climate challenge requires us to do no less," said William Prindle, executive director, American Council for an Energy-Efficient Economy.

"California is pleased to see the improved efficiency standards under this agreement. Water and energy efficiency are key statewide initiatives for us as we move forward to address water shortage, energy shortage, and climate change impacts. This positive forward movement in national appliance efficiency is welcome," said Mary Ann Dickinson, executive director, California Urban Water Conservation Council.

"As an organization that has worked over the last five years on promoting appliance standards at the state level in the Northeast, we're very pleased to see consensus develop that will create these important standards at the national level," noted Susan Coakley, executive director of Northeast Energy Efficiency Partnerships (NEEP). "Efficiency standards represent one of the least costly yet most effective means of meeting our energy needs, while saving consumers money and conserving our natural resources. We're

very pleased to have been part of the development of this consensus and look forward to continuing to work with all parties involved to keep efficiency standards at the top of our national policy agenda."

"As a thriving desert community, the City of Tucson has been actively promoting water efficiency for decades," states Mike Hein, city manager of Tucson, Ariz. "Our successes in this area have been significant, but we recognize that the future sustainability of our community demands that we achieve even greater efficiencies in both water and energy usage. We are grateful to have been given the opportunity to play a role in the development of this agreement and fully support its goals. We sincerely look forward to achieving the significant water and energy savings that these new standards, ENERGY STAR levels, and tax incentives will make possible."

"We all play a role in the stewardship of our community water supplies," said American Water Works Association Executive Director Jack Hoffbuhr. "This agreement will help water providers manage their resource as demands continue to grow in the future."

"Our aggressive 25-year pursuit of energy efficiency in the Pacific Northwest has helped to maintain the livability of the region during a time of tremendous change and growth," said Tom Karier, chair of the Northwest Power and Conservation Council. "Not only has it lowered electricity costs, saving electricity consumers more than \$1.25 billion each year, it also lowers annual carbon emissions in the Northwest by about 13 million tons. Energy efficiency is the Northwest's least cost, least risk energy resource, and I am pleased to support this agreement that will help spread the efficiency revolution to every other region in the country."

Other signatories to the agreement include Whirlpool, General Electric, Electrolux, LG, the Appliance Standards Awareness Project, Seattle City Light, and Seattle Public Utilities.

AFFIDAVIT OF SERVICE

DOCKET NO. **07-71576**

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CALIFORNIA ENERGY COMMISSION,
Petitioner,
v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents,

ASSOCIATION OF HOME APPLIANCE MANUFACTURERS,
Intervenor.

-----X

EDWARD T O'CONNELL
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GARFIELD, NJ 07026

I, _____, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

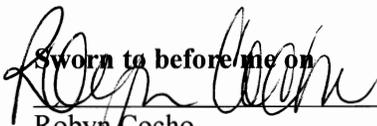
on

I served the within in the above captioned matter upon:

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Sworn to before me on _____

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2012



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