No. 21-1166 (consolidated with No. 21-1167)

In the United States Court of Appeals
for the Seventh Circuit

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ALLIANCE FOR WATER EFFICIENCY, U.S. PUBLIC INTEREST RESEARCH GROUP, and ENVIRONMENT AMERICA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DAVID HUIZENGA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,

Respondents,

On Petition for Review of a Rule of the
United States Department of Energy

MOTION FOR STAY PENDING REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 26.1, Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America (collectively, "Petitioners") submit the following corporate disclosure statement:

Petitioners are nonprofit corporations. None of the Petitioners has parent corporations or any publicly issued stock shares or securities. No publicly held corporation holds stock in any of the Petitioners.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

For decades, all clothes washers and dryers have been subject to minimum energy efficiency standards, and all clothes washers to minimum energy efficiency and maximum water use standards. Respondents (collectively, "DOE") have now erased those standards for washers and dryers that have "average cycle times" less than 30 minutes (45 minutes for some types).

DOE purported to act under an authority in the Energy Policy and Conservation Act ("EPCA") that permits it, in appropriate circumstances, to create energy efficiency standards specific to product groups with particular performance features. But DOE's rule established a "short-cycle" standard of zero, a level for which DOE has no justification. The rule also violated a statutory prohibition on decreasing the energy efficiency standard for any product. Meanwhile, the "product group" authority is not available for water conservation standards at all. DOE also willfully ignored multiple important factors, and flouted the National Environmental Policy Act ("NEPA").

Commenters demonstrated that many products already on the market comply with the pre-existing standards and have cycle times just as short as DOE's new product groups. DOE openly acknowledged that it has decided

there should be more, and that it wants to "spur innovation" by giving manufacturers a break on conservation standards. DOE's naked engagement in industrial policy is contrary to its statutory mandate, which is simply to develop conservation standards and increase them over time as technology enables greater efficiency.

Petitioners represent water utilities managing scarce and dwindling water supplies; manufacturers that strive to make water-efficient products; and a public grappling with the consequences of water overuse, as well as organizations committed to reducing energy consumption. DOE's rule will increase residential water and energy consumption, and consequently increase utility costs, and will erode the energy and water efficiency gains made by manufacturers in the past two decades. The Court's immediate intervention is necessary because every washer and dryer sold while this case is pending will remain in use, consuming scarce water and increasing energy demands, for the rest of its lifetime.

BACKGROUND

I. Existing Rules Mandated Minimum Energy and Water Efficiency for Washers and Dryers.

DOE implements energy and water conservation standards under EPCA. 42 U.S.C. §§ 6291 *et seq.*[1] EPCA specifies initial conservation standards—minimum energy efficiency, maximum water usage, or associated design requirements—for various products. *Id.* § 6295. It is unlawful to "distribute in commerce" a product that does not meet an applicable standard. *Id.* § 6302(a)(5). DOE must periodically assess whether to tighten each product's conservation standard. *Id.* § 6295(m). EPCA's "anti-backsliding provision" expressly bars DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use" of a product. *Id.* § 6295(o)(1). "Any new or amended energy conservation standard prescribed by [DOE] ... shall be designed to achieve the maximum improvement in energy efficiency." *Id.* § 6295(o)(2).

Section 435(q) permits DOE, when it issues "[a] rule prescribing an energy conservation standard for a type … of covered product[]," to set a different standard than what "applies (or would apply) for such type … for

[1] EPCA Part B addresses consumer products, while Part A covers commercial products. The rule at issue affects only the consumer products, not commercial washers and dryers.

any group of covered products which have the same function or intended use," if one of two preconditions applies. *Id.* § 6295(q)(1). The relevant prerequisite here is a determination that products "within such group … have a capacity or other performance-related feature which other products within such type … do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type." *Id.* "Any rule" exercising this authority "shall include an explanation of the basis on which such higher or lower level was established." *Id.* § 6295(q)(2).

Until now, all washers and dryers were subject to energy and water conservation standards: for dryers, a minimum "combined energy factor" ranging from 2.08 to 3.73 lbs./kWh (depending on certain product characteristics); for washers, a minimum "integrated modified energy factor" ranging from 1.13 to 1.84 ft^3/kWh/cycle and a minimum "integrated water factor" from 4.7 to 12.0 gal./cycle/ft^3. 10 C.F.R. § 430.32(g), (h).

II. DOE Created New Categories of Washers and Dryers for Which it Eliminated Standards.

Last summer, DOE proposed to establish new product classes for washers and dryers defined by the ability to wash or dry clothes in under 30 minutes. 85 Fed. Reg. 49,297 (August 13, 2020) ("Proposal"). DOE said that

characteristic is a "performance-related feature" warranting group-specific standards under section 435(q).

Commenters objected nearly unanimously. Selected comments are attached as Exhibits A through E. Among other themes, commenters complained that DOE was flouting the text and the intent of EPCA, which mandate progressive increases in conservation. Industry representatives pointed out that many washers and dryers on the market have cycles shorter than DOE's target while satisfying existing conservation standards. Ex. B (95% of front-loading washers offer short cycles averaging 20 minutes); Ex. D ("more than 90% of GEA washers and more than 60% of GEA dryers have a fast wash or fast dry cycle that is faster than the targets proposed by DOE"). Thus DOE's claims that new standards-free product classes are necessary to preserve that feature are false. DOE responded that the existence of such products shows consumers value short cycle times, and said it "intends to … push for the development of short-cycle products" that *DOE* thinks will be useful. 85 Fed. Reg. 81,359, 81,366 (Dec. 16, 2020) ("Washer-Dryer Rule").

Commenters, including petitioners, also pointed out that any new washer or dryer group must be subject to energy efficiency standards at least

as tight as the existing standards; otherwise, DOE would violate EPCA's anti-backsliding provision. *See* Ex. A at 2.

Nonetheless, on December 16, 2020, DOE published the Washer-Dryer Rule establishing the new short-cycle product groups and stating those groups are no longer subject to standards. *Washer-Dryer Rule* at 81,375-76 (codified at 10 C.F.R. § 430.32(g)(4)(ii), (h)(3)(ii)).

The Washer-Dryer Rule took effect on January 15, 2021. Now, DOE permits the sale of short-cycle washers and dryers that meet no energy or water conservation standards at all.

LEGAL STANDARD

EPCA section 336 and Administrative Procedure Act section 705, made applicable here by section 336, *see* 42 U.S.C. § 6306(b)(1); 5 U.S.C. § 705, empower the Court to stay DOE's rule. The standard for staying a rule pending appeal is like that for a preliminary injunction. *Cook Cty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). First, a movant must show it will suffer irreparable harm absent a stay, traditional legal remedies would be inadequate, and its claim has some likelihood of succeeding on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am. Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If that is shown, the Court determines

"whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.* Greater harm can bolster a weaker showing on the merits, and a stronger likelihood of success can warrant a stay with less injury at stake. *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607, 611 (7th Cir. 2012).

ARGUMENT

I. The Court Has Jurisdiction Over the Petition.

This Court has jurisdiction (upon a timely petition) to review a rule "prescribed under" EPCA section 323, 324, or 325 (42 U.S.C. §§ 6293, 6294, and 6295). 42 U.S.C. § 6306(b)(1). The action under review was such a rule; DOE purported to act under section 325(q). *Washer-Dryer Rule* at 81,361 ("Establishment of Short-Cycle Product Classes Pursuant to 42 U.S.C. 6295(q)").

The Court's jurisdiction depends also on petitioners' standing. The showing of irreparable harm below suffices to establish standing. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (same injuries established standing and irreparable harm).

II. DOE Has Not Stayed the Rule.

Petitioners asked DOE to stay the Rule. Ex. F. DOE refused, and is likely to oppose this motion. *See* Fed. R. App. P. 18(a).

III. Petitioners Will Suffer Irreparable Harm Without a Stay.

Products that used to be, and should still be, unlawful to distribute in commerce can now be sold to U.S. consumers. These products are washers and dryers that have short cycle times and are now not subject to any water or energy conservation standards. Any consumer that buys a short-cycle washer or dryer will be able to keep using it even if the Court vacates the Washer-Dryer Rule as petitioners request, because EPCA generally does not regulate end-users. Every short-cycle washer or dryer sold thanks to DOE's unlawful removal of standards will remain in place, consuming excessive amounts of water and energy, for the rest of its durable lifetime—on average, 10-13 years. Ex. G, at 24.

This excessive energy and water consumption is a substantial and irreparable harm. DOE previously recognized that its energy and water conservation standards for washers and dryers have "significant environmental benefits" because they reduce energy and water consumption. 77 Fed. Reg. 32,308, 32,310 (May 31, 2012); 76 Fed. Reg. 22,454, 22,457 (Apr. 21, 2011). DOE previously concluded that the washers standards will, over 30 years, save an estimated "2.04 quads of energy and 3.03 trillion gallons of water" reduce carbon dioxide emissions by about 113 million

metric tons. 77 Fed. Reg. 32,310. Efficient clothes washers have helped reduce water use by an average of 5.4 gallons per person per day—nationwide savings of more than 640 billion gallons a year, the single most effective per-capita water reduction effort in 15 years. Ex. A at 2, 3.

Similarly for dryers, DOE previously found its conservation standards will, over 30 years, save 0.39 quads of energy, reduce electricity generation requirements by nearly 1 gigawatts, and reduce carbon dioxide emissions by about 36 million metric tons. 76 Fed. Reg. 22,457.

Petitioner Alliance for Water Efficiency represents utilities responsible for supplying water in locations across the United States; its mission, for its members, is to support and enhance water conservation efforts. Ex. H ¶ 3. Utilities in most states are already confronting serious water shortages. *Id.* ¶ 4; Ex. A at 2. These pressures will only grow, due to population increases in areas like the Southwest where water has always been scarce, and climate change is causing a "mega-drought." Ex. A at 2.

AWE's members are constantly working to manage and mitigate the scarcity of water. Ex. H ¶¶ 4-5. AWE and its members have consistently advocated for policies to foster water conservation. They have done so because, to supply growing populations from ever-tighter water sources,

they need to reduce per-capita usage. Ex. H ¶ 4; Ex. I, ¶ 14. Water providers are relying on the pre-existing reductions to extend future supplies and serve new customers. Ex. I ¶¶ 7-14, 18-19. The increased demand on water from washers newly released from conservation standards will make it more difficult and costly for AWE's members to fulfill their customers' needs for water, and negatively impact American utilities and consumers for years. Ex. H ¶¶ 8, 12; Ex. I ¶¶ 15-21.

Petitioners U.S. Public Interest Research Group and Environment America represent hundreds of thousands of individuals affected by the consequences of energy production and consumption. Ex. J. The consumption of fossil fuels—a staple in the nation's energy diet—inevitably produces pollutants such as particulate matter and carbon dioxide. Petitioners' members suffer directly from those pollutants, through inhaling toxic byproducts, through experiencing the climate impacts, and more. Exs. K & L. DOE's decision to lift the energy conservation standards from washers and dryers representing a significant portion of the market will inevitably lead to increased energy usage. DOE said explicitly that it intended to give consumers the opportunity to prioritize cycle time at the expense of lower energy efficiency. *Washer-Dryer Rule* at 81,362. The

byproducts from the resulting energy consumption will cause increased harm to petitioners' members. Exs. K & L.

Courts routinely conclude such harms warrant injunctions. *Cf. Downstate Stone Co. v. United States*, 651 F.2d 1234, 1242 (7th Cir. 1981) (recognizing "public interest in the wise management of our natural resources," environmental damage "constitutes irreparable harm of the greatest magnitude"); *California v. BLM*, 286 F. Supp. 3d 1054, 1073 (N.D. Cal. 2018) (wasteful energy consumption constitutes irreparable harm).

To be sure, petitioners cannot say with certainty whether any given distributor will sell short-cycle washers or dryers, or how many consumers will buy them. However, that lack of certainty is not an obstacle. For one thing, AWE must now commit its limited resources to monitor the market for such products. Ex. H ¶ 11; Ex. M ¶ 12; *See Cook Cty.*, 962 F.3d at 233 ("[D]ivert[ing] resources away from existing programs to respond to the effects of [a] Rule" constitutes irreparable harm). This is necessary given AWE's mission and membership, and given the long-term consequences of any sales of high-flow washers. If AWE discovers such products for sale, it must undertake immediate advocacy efforts to try to prevent those sales. AWE's monitoring cannot be comprehensive and it may not find every

product of concern. But it is something AWE is forced to do by DOE's precipitous elimination of standards.

Moreover, the significant risk of harmful product sales, on its own, is enough to warrant preliminary relief. *Baird v. Hodge*, 605 F. App'x 568, 572 (7th Cir. 2015); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) (irreparable harm need not have actually occurred, or even be certain to occur, to award injunctive relief). DOE said it intended and expected the rule to "spur manufacturer innovation," freeing "[c]onsumers who place a higher value on time saved" to purchase short-cycle products. *See Washer-Dryer Rule* at 81,360, 81,362. At a minimum, the rule creates the very substantial risk that such sales will occur; and from those washers and dryers that are sold under the Washer-Dryer Rule, the harmful consequences are inevitable and irreversible. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011) (harms that "are difficult—if not impossible—to reverse," are irreparable). Even short-term operation of the rule pending review, permitting about a year's-worth of sales of these products with decade-scale lifetimes, locks in part of the damage from DOE abrogating its standards.

IV. Legal Remedies Are Inadequate.

Inadequacy of legal remedies is the natural consequence of irreparable harm. *E.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 990-91 (7th Cir. 2019). Money damages cannot make more rain to offset increased water use or remediate the consequences of extra energy consumption. Similarly, "environmental injury, by its nature, can seldom be adequately remedied by money damages and ... the balance of harms will usually favor the issuance of an injunction." *Amoco Prods. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Moreover, DOE bears sovereign immunity against damages to remediate an unlawful EPCA policy. DOE will not compensate AWE for the monitoring work it must do.

Once a short-cycle washer or dryer is sold, neither DOE nor the Court can recover the product from the consumer. The product will overconsume water and/or energy for the duration of its lifetime. The longer the Washer-Dryer Rule is operational, the greater the harm will be. Only a stay can prevent petitioners' harms.

V. Petitioners Are Likely to Succeed on the Merits.

To obtain injunctive relief, a movant need only show its chances of success are "better than negligible"; likelihood of "absolute success" is not required. *Whitaker*, 858 F.3d at 1046. Petitioners easily clear this threshold.

The rule has too many defects to cover in this motion; petitioners highlight some of the more glaring problems.

A. DOE Has No Authority to Exempt a Product Group from Water Conservation Standards.

Before the Washer-Dryer Rule, all washers were subject to minimum water conservation standards. The Rule eliminated those standards for products with short cycle times. DOE's sole purported authority for doing that was section 325(q). *Proposal* at 49,298 ("DOE … has legal authority pursuant to 42 U.S.C. 6295(q) to establish separate product classes."); *Washer-Dryer Rule* at 81,361 ("Establishment of Short-Cycle Product Classes Pursuant to 42 U.S.C. 6295(q)"). But section 325(q) gives DOE no such authority for water conservation standards.

Section 325(q) says "[a] rule prescribing an energy conservation standard" can "specify a level of ***energy use or efficiency***" specific to a "group of covered products" within the larger type. 42 U.S.C. § 6295(q)(1). Nothing about setting a different level of water use or efficiency.

This is no mere technicality. DOE itself has stressed repeatedly that another EPCA provision (the anti-backsliding restriction) does not generally limit its relaxation of water standards, precisely because that provision addresses "maximum allowable energy use … or minimum required energy

efficiency." *Id.* § 6295(o)(1); 84 Fed. Reg. 33,869, 33,873 (July 16, 2019) (explaining that section 325(o)(1) covers water standards only for four specific products). DOE took that position in the Washer-Dryer Rule too. *Washer-Dryer Rule* at 81,370. The same principle applies for section 325(q). When Congress wrote "energy use or efficiency," it meant energy. Not water.

When commenters raised this issue, DOE's *non sequitur* response was that washers are not among the products for which section 325(o) limits backsliding on water standards. *Id.* at 81,369-70. DOE did not address the real defect, which is that section 3256(q) does not allow special product-group water standards at all.[2] Besides being contrary to law, DOE's approach is arbitrary and capricious, because DOE ignored that key issue.

B. DOE Did Not Comply with the Requirements for a Section 325(q) Rule.

Even with respect to energy efficiency, DOE violated the plain terms of section 325(q).

[2] The pre-existing standards do include different product-group standards that DOE established using section 325(q) authority. When DOE defined those product groups, it did not assess whether section 325(q) permits such segregation; it used a special EPCA authority, 42 U.S.C. § 6295(p)(4), to adopt a consensus proposal from a cross-section of interested parties. 77 Fed. Reg. 32,307, 32,319 (May 31, 2012).

- Section 325(q) applies in a "rule prescribing an energy conservation standard for a type … of products." In such a rule, DOE may choose a different standard "for any group" with special features. 42 U.S.C. § 6295(q)(1). This was not a rule prescribing a standard for any larger type of products. It was solely a rule to define a group of products to have zero standards.
- In a section 325(q) rule, DOE "shall specify a level of energy use … or efficiency" for the special group. *Id.* "This court (like others) has consistently interpreted 'shall' as mandatory language." *Smart Oil, LLC v. DW Mazel, LLC*, 970 F.3d 856, 865 (7th Cir. 2020). DOE declined to specify a level of energy use or efficiency for short-cycle products; instead it simply abrogated all standards for these groups.
- A section 325(q) rule "shall include an explanation of the basis on which such higher or lower level was established." 42 U.S.C. § 6295(q)(2). Again, a mandatory instruction. DOE did not explain why the standards should be immediately eliminated—effectively setting the minimum energy efficiency at zero—for its new product groups. On its face, the decision was irrational. Washers and dryers have been subject to energy conservation standards for decades. Even if short-

cycle products were a valid category, there is no apparent reason they should be completely unregulated.

Commenters raised these issues too. DOE offered two unlawful, irrational responses. First, it claimed it intends eventually to issue new standards for short-cycle products, *Washer-Dryer Rule* at 81,369, at which time it will analyze what standards are appropriate. That plan is no excuse. For one thing, DOE did alter standards for these products. They used to be subject to minimum efficiency requirements like energy factor of at least 2.08. 10 C.F.R. § 430.32(g), (h). Now there is no minimum efficiency for short-cycle products. Whatever group-specific standard DOE might eventually settle on, section 325(q) required it to explain why it immediately erased the existing standard.

Moreover, an agency cannot "defer[] consideration of the statutory factors and objectives." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 350 (D.C. Cir. 2019). In *Carlson* an agency declined to determine its ratemaking satisfied statutory standards because it planned to consider the details in annual reviews; the D.C. Circuit rejected that approach because "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices" such as the requirement to evaluate certain factors. *Id.*

(quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). EPCA specifically directs DOE to explain, in the section 325(q) rule, what group-specific standard it chooses and why. A plan to come up with a standard at some unspecified future time is simply not the same.

Second, DOE asserted that it may establish a 325(q) group and set the standard later. *Washer-Dryer Rule* at 81,367. DOE did not explain how that claim could be consistent with the clear mandate. Section 325(q) is an authority to establish a group-specific standard. By declining to set a standard, DOE was failing to do the one and only thing that section 325(q) allows.

DOE said it had explained its interpretation previously. *Id.* But it cited no such explanation. It only described two examples of cases in which DOE deferred setting standards for particular product groups. *Id.* at 81,367-68. "[T]hat is history, not explanation." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009). None of those examples considered the statutory question. "No matter how consistent its past practice, an agency must still explain why that practice comports with the governing statute and reasoned decisionmaking," and "no amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one." *Id.*; *see also*

Atchison, Topeka & Santa Fe R. Co. v. United States, 617 F.2d 485, 493 n.13 (7th Cir. 1980) (similar).

C. DOE Violated the Anti-Backsliding Provision.

DOE also flouted the strict limitation that it must not amend any standard in a way that increases a product's allowable energy use. 42 U.S.C. § 6295(o)(1).

DOE insisted that because it will set the short-cycle standards later, it is "premature to presume" they will be lower than the pre-existing standards. *Washer-Dryer Rule* at 81,369. ***They are already lower.*** The Rule self-evidently amended the existing standards for washers and dryers. *Id.* at 81,375-76 (amendatory instructions). Short-cycle products used to be subject to the same standards as other washers and dryers. Now they are "not currently subject to … standards," *id.*, meaning that any amount of energy use is allowable, and certainly amounts higher than the prior standards permitted. DOE has already violated the anti-backsliding rule; pretending otherwise is irrational.

DOE's musings that a future short-cycle standard might be no lower than prior standards are irrational for a second reason too. The whole premise of the rulemaking was that existing products have the shortest cycle

times that are achievable under the pre-existing standards, and those standards are "precluding manufacturers from introducing models" with shorter cycle times. *Washer-Dryer Rule* at 81,361. If the future group-specific standards will not be lower, there was no point. DOE's refusal to acknowledge that reality was irrational. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. U.S. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious."). Worse, if DOE does not know whether it will choose a higher or lower standard, it cannot possibly satisfy section 325(q), which as noted applies only when DOE determines product features actually do warrant a different standard.

DOE further asserted that the anti-backsliding rule is no limit at all, because section 325(q) is (it says) an exception. *Washer-Dryer Rule* at 81,368-69. DOE didn't even comply with section 325(q), so it can hardly rely on that authority to exempt it from the anti-backsliding restriction.

Even if it had complied, there is no ground for thinking section 325(q) is an exception. Nothing in EPCA says so. Section 325(o)(1) says DOE "may not prescribe any amended standard which increases … allowable energy use." No exceptions. Section 325(q) allows DOE to set a group-specific standard. No mention of any exception from the anti-backsliding limitation.

DOE thinks EPCA means it generally can't reduce standards, but it can so long as it is reducing them for particular product groups. That reading eviscerates the anti-backsliding restriction, as the rule under review—in which DOE eliminated a standard in order to encourage manufacturers to develop less efficient products that DOE hypothesizes consumers might want—demonstrates. DOE cited nothing in EPCA or its history suggesting Congress intended such an exception.

A court—and an agency—is "not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). That is certainly possible here. When DOE considers a new or amended standard for an overall type of products, it might increase the standard in general, while leaving the existing, lower standard in place for a subgroup. That action could comport with both section 325(q) and the anti-backsliding rule.

DOE, on the other hand, suggested that section 325(q) creates some conflict by using the present tense. It says DOE can set a group-specific standard that is lower than what "applies (or would apply)" to the broader category; DOE believes the word "applies" must mean DOE can set a standard lower than the prior, pre-existing one. *Washer-Dryer Rule* at 81,369.

That rationale is far too thin a reed to support a reading that disregards the explicit, blanket prohibition of section 325(o)(1). Moreover, the reed buckles when one realizes that when DOE sets a new standard for a product type, that standard "applies," present-tense, in many senses. *E.g.* 42 U.S.C. § 6297(c) (EPCA standards preempt state law immediately upon their effective dates). Thus, in a rule that establishes a broad standard, setting a group-specific standard lower than the one that "applies" to the broad category just means deviating from the new standard—not going lower than the old one.[3] The supposed conflict—DOE's sole justification for inferring an exception from the anti-backsliding rule—disappears.

The Court must, of course, defer to DOE's interpretation if EPCA is ambiguous on this point and DOE adopted a reasonable interpretation. *See Cook Cnty.*, 962 F.3d at 221-22. The foregoing discussion demonstrates that EPCA is not ambiguous. Even if it were, DOE had no rational policy justification for its interpretation. DOE asserted that it must be able to accommodate new technologies and features, like network connectivity for "smart products," even though the new features increase energy usage.

[3] Setting a standard lower than the one that "would apply" or "will apply," 42 U.S.C. § 6295(q)(1), just refers to the possibility of standards that come into force later.

Proposal at 49,306. That rationale is contrary to the purposes and structure of EPCA. The overarching goal is energy conservation, 42 U.S.C. § 6201; and the statute mandates DOE to drive technological innovation towards conservation and efficiency. *See id.* § 6295(o)(2) ("Any new or amended standard" must "be designed to achieve the maximum improvement in energy efficiency" that is "technologically feasible and economically justified."). Nothing in EPCA asks DOE to foster innovation that increases energy usage. That DOE thinks short-cycle washers and dryers or smart home products are good ideas, and worth increased energy usage, does not justify deviating from the choices Congress made. *See Cook Cnty.*, 962 F.3d at 226-27 (holding interpretation unreasonable because it "disregards the statutory context").

D. DOE Violated NEPA.

Instead of assessing the rule's environmental impacts as NEPA requires, 42 U.S.C. § 4332(c), DOE relied on "categorical exclusion" A5 in its NEPA-implementing regulations. *Washer-Dryer Rule* at 81,370.

Exclusion A5 is for a "rulemaking[] interpreting or amending an existing rule … that does not change the environmental effect of the rule." 10 C.F.R. part 1021 subpart D app. A. But "merely … asserting that an activity …

will have an insignificant effect" is not enough to qualify for a categorical exclusion. *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). "[A]n agency must provide a reasoned explanation of its decision." *Id.*

Invoking exclusion A5 was irrational. DOE said the Rule won't change the environmental effect of washer and dryer standards because DOE plans to develop standards for short-cycle products in the future. *Washer-Dryer Rule* at 81,370. But the Rule eliminated the conservation standards for short-cycle products. When DOE originally adopted those standards, it determined they would have significant environmental benefits by causing reductions in energy usage, water usage, and the associated environmental detriments. *See* 77 Fed. Reg. 32,310; 76 Fed. Reg. 22,457. Zeroing out the standards for a subset of products—as it happens, a subset that comments showed would encompass a substantial portion of the existing market, *see supra* at _—cannot help but cause increases in those areas. DOE's refusal to acknowledge the reality of its own rule was not reasoned decisionmaking.

VI. The Balance of Harms Weighs Overwhelmingly in Petitioners' Favor.

In light of the significant harms petitioners face and the invalidity of the rule, the balance of harms to the parties and the public need tip only slightly in petitioners' favor. *Whitaker*, 858 F.3d at 1054 (discussing the

"sliding scale" approach to balancing harms). That balance favors, by a wide margin, staying the Washer-Dryer Rule.

A. A Stay Will Not Harm DOE.

Maintaining the status quo will have no harmful effect on DOE or the manufacturers it regulates. Industry members opposed the relaxation of standards, arguing that the consumers were satisfied with products already available. Exs. A–E.

B. The Public Interest Mandates a Stay.

Public comments nearly unanimously opposed the rule change. *See* 85 Fed. Reg. 81,345-56.

DOE contended the rule beneficially adds "consumer choice" to the clothes washer and clothes dryer market. *Washer-Dryer Rule* at 81,360. The desire of some consumers to buy short-cycle washers and dryers that use more water and energy while the case is pending pales compared to the decade-long harms from their continued ability to use those products even if the Court invalidates the rule.

DOE says the rule will "spur manufacturer innovation." *Washer-Dryer Rule* at 81,366. If so, that goal addresses the longer term. The innovation that DOE dreams of can still happen, even if the rule is stayed during review. Meanwhile, manufacturers and distributors generally prefer the stability of

knowing what the standards are. If unregulated short-cycle products are allowed into distribution networks now and the Court then invalidates the Rule, distributors will be left holding unlawful inventory. Ex. N ¶¶ 13-15. Far better to preserve the pre-rule status quo; then, distributors will only be demanded to carry the unregulated products in the unlikely event that the Court concludes DOE's rule was lawful and reasonable.

Finally, and above all, "there is an overriding public interest" in "an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). DOE tried to maneuver around its statutory obligations to loosen water and energy conservation standards; "faithful adherence" to EPCA calls for enjoining the Washer-Dryer Rule.

CONCLUSION

For these reasons, the Court should stay the Washer-Dryer Rule pending review.

Dated: February 17, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Keith Bradley
Keith Bradley

No. 21-1167 (consolidated with No. 21-1166)

In the United States Court of Appeals
for the Seventh Circuit

ALLIANCE FOR WATER EFFICIENCY, U.S. PUBLIC INTEREST RESEARCH GROUP, and ENVIRONMENT AMERICA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DAVID HUIZENGA , IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,

Respondents,

On Petition for Review of a Rule of the
United States Department of Energy

MOTION FOR STAY PENDING REVIEW

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February 17, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 26.1, Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America (collectively, "Petitioners") submit the following corporate disclosure statement:

Petitioners are nonprofit corporations. None of the Petitioners has parent corporations or any publicly issued stock shares or securities. No publicly held corporation holds stock in any of the Petitioners.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In summer 2020, President Trump announced his displeasure with conservation standards for showerheads, which prevent his "wash[ing][his] beautiful hair properly."[1] Congress established those standards, but respondents (collectively "DOE") rushed to find a way to loosen them. Despite nearly unanimous opposition, DOE redefined the word "showerhead" to mean each individual nozzle within a showerhead. Congress said a showerhead can use only 2.5 gallons per minute ("gpm") of water; in DOE's revision, a showerhead can use multiples of that amount, for however many nozzles it has. The redefinition is contrary to any reasonable understanding of "showerhead," and violates a statutory bar on loosening conservation standards. DOE also willfully ignored multiple important factors, and flouted the National Environmental Policy Act ("NEPA").

Petitioners represent water utilities managing scarce and dwindling water supplies; manufacturers that strive to make water-efficient products; and a public grappling with the consequences of water overuse. Showers are

[1] Remarks by President Trump at Whirlpool Corporation Manufacturing Plant (Aug. 6, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-whirlpool-corporation-manufacturing-plant/.

a major portion of residential usage, and DOE's rule will make this country's water problems significantly worse. The Court's immediate intervention is necessary because every showerhead sold while the case is pending will remain in use, consuming scarce water, for the rest of its lifetime.

BACKGROUND

I. EPCA Capped Water Usage for Showerheads.

DOE implements conservation standards under the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6291 *et seq.* EPCA specifies initial conservation standards—minimum energy efficiency, maximum water usage, or associated design requirements—for various products. *Id.* § 6295. It is unlawful to "distribute in commerce" a product that does not meet an applicable standard. *Id.* § 6302(a)(5). DOE must periodically assess whether to tighten each product's conservation standard. *Id.* § 6295(m). EPCA's "anti-backsliding provision" bars DOE from "prescrib[ing] any amended standard which increases the maximum ... water use." *Id.* § 6295(o)(1).

In 1992, Congress added a conservation standard for showerheads: maximum water flow of 2.5 gpm. *Id.* § 6295(j). "The term 'showerhead' means any showerhead (including a handheld showerhead), except a safety shower showerhead." *Id.* § 6291(31). To assess water flow, test procedures are

necessary; the "[t]est procedures for showerheads and faucets … shall be the test procedures specified in ASME A112.18.1M-1989 for such products." *Id.* § 6293(b)(7)(A). The reference is to a standard entitled "Plumbing Supply Fittings," developed by the American Society of Mechanical Engineers ("ASME-112.18"). If ASME-112.18 is revised, DOE "shall amend [its] test procedures … to conform … unless [DOE] determines" that the revised procedures would not reasonably measure "water use … of a covered product during a representative average use cycle." *Id.* § 6293(b)(7)(B), (3).

II. DOE Previously Believed the 2.5-gpm Limit Covers Multi-Nozzle Showerheads.

At first, DOE did not vigorously enforce the showerheads standard. *See* Ex. A (DOE Showerhead Enforcement Guidance (Mar. 4, 2011)). Over the years, some manufacturers developed multi-nozzle products that purported to comply with the 2.5-gpm limitation on a per-nozzle basis. *Id.* In 2011, DOE warned them that EPCA clearly does not permit that approach. "[M]ultiple spraying components sold together as a single unit designed to spray water onto a single bather constitutes a single showerhead for purposes of the maximum water use standard." *Id.*

In 2013, DOE updated its test procedures to reflect changes to ASME-112.18. 78 Fed. Reg. 62,970 (Oct. 23, 2013). That rule also revised DOE's

definition of "showerhead" to mean "[a] component or set of components … for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position." *Id.* at 62,973; 10 C.F.R. § 430.2. ASME-112.18 uses the word "accessory" rather than "component." But commenters had worried that "accessory," in ASME-112.18, means something a user can readily remove, and therefore might not encompass built-in products such as body sprays. DOE responded by defining "showerheads" to be "components" rather than "accessories." 78 Fed. Reg. 62,973. DOE reiterated its previous view that any "system … that is packaged and/or distributed in commerce as a single 'accessory' or a single set of 'accessories,' designed to be attached to a single fitting, would be defined as a single showerhead." 77 Fed. Reg. 31,742, 31,748 (May 30, 2012) (proposed rule).

III. DOE Relaxed the Standard by Redefining "Showerhead."

In August 2020, DOE proposed to "revisit its prior interpretation" and adopt the exact ASME-112.18 definition of "showerhead." 85 Fed. Reg. 49,284 (Aug. 13, 2020). ASME-112.18 had not changed in any relevant way. But DOE asserted that the statutory term "showerhead" is "ambiguous in key respects." *Id.* at 49,287. "Under DOE's proposed definition, each showerhead included in a product with multiple showerheads"—*i.e.* nozzles—"would

separately be required to meet the 2.5 gpm standard established in EPCA." DOE offered this revision as an amendment to the test procedure, and proposed new specifications for testing "products with multiple showerheads." *Id.* at 49,288.

DOE's justification was that Congress, having directed DOE to use ASME-112.18 for its test procedure, intended the substantive standard to align as well. 85 Fed. Reg. 49,289-90. EPCA says that before adopting ASME-112.18 revisions, DOE must evaluate whether the revised procedures will properly measure the water usage of covered products. 42 U.S.C. § 6293(b)(7)(B), (3). DOE offered no such assessment.

Petitioners, alongside many other commenters, provided substantial criticism. Exs. B–E. Even industry representatives that favored aligning the textual definitions with industry standards did not want DOE to relax the substantive standard by treating each nozzle as its own 2.5-gpm showerhead. Exs. B & C.

DOE's Showerheads Rule, published on December 16, 2020, defined a "showerhead" as an "accessory." 85 Fed. Reg. 81,341. DOE reiterated that a multi-nozzle showerhead will count as multiple "showerheads" for

standards purposes. *Id.* DOE also explicitly excluded body sprays from the standard. *Id.* at 81,359.

Despite having offered the proposal as an amendment to test procedures and purporting to justify it on the basis of EPCA's test-procedure provisions, DOE abandoned the actual change to test procedures. 85 Fed. Reg. 81,349.

The Showerheads Rule took effect on January 15, 2021; as of that date, high-flow multi-nozzle showerheads can be lawful for sale.[2]

LEGAL STANDARD

EPCA section 336 and Administrative Procedure Act section 705, made applicable here by section 336, *see* 42 U.S.C. § 6306(b)(1); 5 U.S.C. § 705, empower the Court to stay DOE's rule. The standard for staying a rule pending appeal is like that for a preliminary injunction. *Cook Cty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). First, a movant must show it will suffer irreparable harm absent a stay, traditional legal remedies would be inadequate, and its claim has some likelihood of succeeding on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am. Inc.*, 549

[2] Procedurally, a manufacturer would first need to file a report certifying its product complies with the relaxed multi-nozzle standard. 10 C.F.R. § 429.12.

F.3d 1079, 1086 (7th Cir. 2008). If that is shown, the Court determines "whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id*. Greater harm can bolster a weaker showing on the merits, and a stronger likelihood of success can warrant a stay with less injury at stake. *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607, 611 (7th Cir. 2012).

ARGUMENT

I. The Court Has Jurisdiction Over the Petition.

This Court has jurisdiction (upon a timely petition) to review a rule "prescribed under" EPCA section 323, 324, or 325 (42 U.S.C. §§ 6293, 6294, and 6295). 42 U.S.C. § 6306(b)(1). The action under review was such a rule. Section 325 establishes conservation standards, authorizes DOE to revise them, and sets procedures and principles for amending standards. 42 U.S.C. § 6295. Section 323 is the corresponding provision for test procedures. *Id.* § 6293.

The Rule amended the definition of "showerhead" in 10 C.F.R. § 430.2. That definition "applies to test procedures, standards, and labeling."[3] 85 Fed. Reg. 81,349. It delineates, among other things, the scope of DOE's regulatory

[3] Labeling is the topic of EPCA section 324, the third arena within this Court's direct review. 42 U.S.C. § 6306(b).

conservation standard, 10 C.F.R. § 430.32(p), and its showerheads test procedure, *id.* § 430.23 & subpart B app. S. The Rule changed the substance of those regulations, issued under sections 323 and 325.

Indeed, DOE said explicitly that the goal and the consequence of its redefinition was to change the meaning of the 2.5-gpm standard. 85 Fed. Reg. 81,342; 85 Fed. Reg. 49,284-85. Previously, DOE had firmly stated that the standard limits the flow from an entire showerhead. 85 Fed. Reg. 49,286. DOE now says the term "showerhead" is ambiguous and has been reinterpreted to apply only to individual nozzles. *Id.* at 49,287-88. DOE has thus changed the meaning of the 2.5-gpm standard.

Granted, DOE did not specifically characterize its rule as prescribed under section 323, 324, or 325. As authority, it cited EPCA title III part B as a whole. 85 Fed. Reg. 81,342-43. And DOE insists it was not amending the showerheads standard. *Id.* at 81,349 col. 3.

The rule is within this Court's jurisdiction nonetheless. "[M]ost acts undertaken by DOE under its grant of authority regarding home appliances are subject to review by the court of appeals." *NRDC v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004); *see Cal. Energy Comm'n v. DOE*, 585 F.3d 1143, 1148 (9th Cir. 2009) (similar). In *Abraham* DOE postponed a standard's effective date.

Though DOE had not cited EPCA as authority, the Second Circuit accepted jurisdiction because "altering the effective date … could be, in substance, tantamount to an amendment or rescission of the standards." 355 F.3d at 194. Here, changing the definition of "showerhead," a revision that DOE says outright will alter the meaning of the standard, is even more clearly "tantamount to an amendment." In *California Energy Commission* DOE refused to exempt California from preemption by a particular standard; the Ninth Circuit accepted jurisdiction because the denial was "closely intertwined" with section 325. 585 F.3d at 1148. Changing the definition used in DOE's section 325 regulations is not just "closely intertwined," it is indistinguishable from the standard.

Those cases relied on a presumption that under a direct-review provision like section 336, doubts should be resolved in favor of review by the court of appeals. 355 F.3d at 193; 585 F.3d at 1148. This Court has adopted the same principle. *Ind. & Mich. Elec. Co. v. U.S. EPA*, 733 F.2d 489, 491 (7th Cir. 1984).

The Court's jurisdiction depends also on petitioners' standing. The showing of irreparable harm below suffices to establish standing. *See League*

of Women Voters of U.S. v. Newby, 838 F.3d 1, 9 (D.C. Cir. 2016) (same injuries established standing and irreparable harm).

II. DOE Has Not Stayed the Showerheads Rule.

Petitioners asked DOE to stay the Rule. Ex. F. DOE refused, and is likely to oppose this motion. *See* Fed. R. App. P. 18(a).

III. Petitioners Will Face Irreparable Harm.

Products that used to be, and should still be, unlawful to distribute in commerce can now be sold to U.S. consumers. These products are showerheads that have multiple nozzles and can thus, under DOE's new interpretation, use multiples of the 2.5-gpm water-flow limit. Any consumer that buys a high-flow showerhead will be able to keep using it even if the Court vacates the rule as petitioners request, because EPCA generally does not regulate end-users. Ex. A, at 2. Every showerhead sold thanks to DOE's unlawful relaxation of standards will remain in place, consuming excessive amounts of water, for the rest of its durable lifetime.[4]

This excessive water consumption is a substantial and irreparable harm. Petitioner Alliance for Water Efficiency ("AWE") represents utilities responsible for supplying water in locations across the United States; its

[4] On average, a showerhead is replaced after 12 years. Ex. G, at 31.

mission, for its members, is to support and enhance water conservation efforts. Ex. H ¶ 3. Utilities in most states are already confronting serious water shortages. *Id.* ¶ 4; Ex. D. These pressures will only grow, due to population increases in areas like the Southwest where water has always been scarce, and climate change, which is causing long-term declines in rainfall in many regions. Ex. E. AWE's members are constantly working to manage and mitigate the scarcity of water. Ex. H ¶¶ 4-5. AWE and its members have consistently advocated for policies to foster water conservation, because, to supply growing populations from ever-tighter water sources, they need to reduce per-capita usage. *Id.* ¶ 4; Ex. I ¶¶ 7-14. The increased usage resulting from the Showerheads Rule will make it more difficult and costly for AWE's members to fulfill their customers' needs for water. Ex. H ¶¶ 8, 12; Ex. I ¶¶ 15-21.

Showers represent 17% of an average home's water use. Ex. G at 31. The Showerheads Rule will increase residential water consumption upwards of 160 billion gallons annually, and increase annual energy consumption by 25 trillion BTUs for each gpm increase in shower flow rate. Ex. E. Even the short-term operation of the rule, pending review, will exacerbate the burden on strained reservoirs and utilities. As noted above, *supra* n.4, an average

showerhead lasts 12 years. If this case takes one year and high-flow showerhead sales are allowed in the meantime, roughly one tenth of the increased water usage from the rule will be locked in before a decision.

Moreover, increased water flow in showers also increases energy consumption, both to heat the water and to produce the clean water. Ex. E, at n.6 & 7; Ex. D, at 3; *California v. BLM*, 286 F. Supp. 3d 1054, 1073 (N.D. Cal. 2018) (wasteful energy consumption constitutes irreparable harm). Petitioners U.S. Public Interest Research Group and Environment America represent hundreds of thousands of individuals affected by the consequences of energy production and consumption. Ex. J. The consumption of fossil fuels—a staple in the nation's energy diet—inevitably produces pollutants such as particulate matter and carbon dioxide. Petitioners' members suffer directly from those pollutants, through inhaling toxic byproducts, through experiencing the climate impacts, and more. Exs. K & L. DOE's decision to allow shower water consumption well in excess of the 2011 guidance will inevitably lead to increased energy usage. The byproducts will cause increased harm to petitioners' members. Exs. K & L.

Courts routinely consider harms like these to warrant injunctions. *Cf. Downstate Stone Co. v. United States*, 651 F.2d 1234, 1242 (7th Cir. 1981)

(environmental damage "constitutes irreparable harm of the greatest magnitude").

To be sure, petitioners cannot say with certainty whether any given distributor will sell high-flow showerheads or how many consumers will buy them. That lack of certainty is not an obstacle. For one thing, AWE and its member Plumbing Manufacturers International ("PMI") must now commit their limited resources to monitor the market for such products. Ex. E ¶ 11; Ex. M ¶ 12; *see Cook Cty.*, 962 F.3d at 233 ("[D]ivert[ing] resources away from existing programs to respond to the effects of [a] Rule" constitutes irreparable harm). This is necessary given their missions and memberships, which include domestic manufacturers threatened by new high-flow imports. If AWE or PMI discovers such products for sale, it must undertake immediate advocacy efforts to try to prevent those sales. Their monitoring cannot be comprehensive and may not find every product of concern. But it is something AWE and PMI are forced to do by DOE's precipitous elimination of standards.

Moreover, the significant risk of harmful product sales, on its own, warrants preliminary relief. *Baird v. Hodge*, 605 F. App'x 568, 572 (7th Cir. 2015); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d

1034, 1045 (7th Cir. 2017) (irreparable harm need not have actually occurred, or even be certain to occur, to deserve injunctive relief). DOE said it intended and expected its rule to enable sales of high-flow showerheads. *See* 85 Fed. Reg. 49,291 (noting proposal would free the market for multi-nozzle showerheads); 85 Fed. Reg. 81,342 (explaining each nozzle gets 2.5 gpm). At a minimum, the rule creates the very substantial risk that such sales will occur; and from those showerheads that are sold, the harmful consequences are inevitable and irreversible. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011) (harms that "are difficult—if not impossible—to reverse," are irreparable).

IV. Legal Remedies Are Inadequate.

The inadequacy of legal remedies—*i.e.*, money damages—is the natural consequence of irreparable harm. *E.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 990-91 (7th Cir. 2019). Money damages cannot make more rain to offset increased water consumption. Similarly, "environmental injury, by its nature, can seldom be adequately remedied by money damages and ... the balance of harms will usually favor the issuance of an injunction." *Amoco Prods. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Moreover, DOE bears sovereign immunity against damages to remediate an unlawful EPCA

policy. DOE will not compensate AWE and PMI for the monitoring work they must do.

Once a high-flow multi-nozzle showerhead is sold, neither DOE nor the Court can recover the product from the consumer. The showerhead will overconsume water and energy for the duration of its useful life. The longer the Showerheads Rule is operational, the greater the harm will be. A stay is the only way to prevent petitioners' harms.

V. Petitioners Are Likely to Succeed on the Merits

To obtain injunctive relief, a movant need only show its chances of success on the merits are "better than negligible"; likelihood of "absolute success" is not required. *Whitaker*, 858 F.3d at 1046. Petitioners easily clear this threshold. The rule has too many defects to cover in this motion; petitioners highlight some of the more glaring problems.

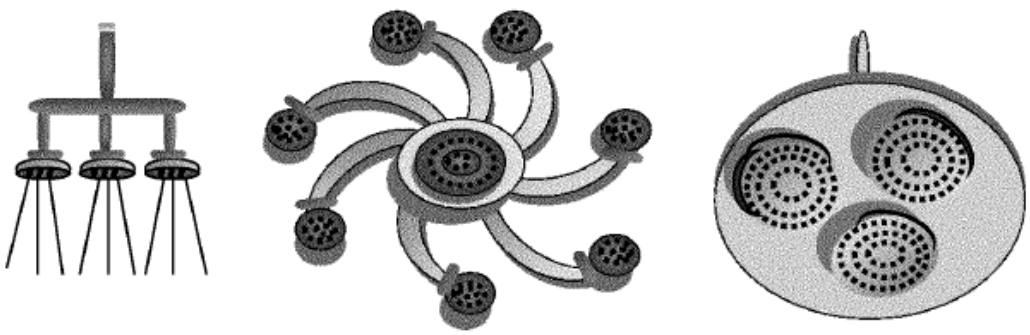
A. The Showerheads Rule Violates EPCA's Anti-Backsliding Provision.

EPCA prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable ... water use ... of a covered product." 42 U.S.C. § 6295(o)(1). Yet that is exactly what the Showerheads Rule did, contrary to the statute.

The violation is plain on the face of the rule. Showerheads are a covered product. *Id.* § 6292(a). The maximum allowable water use for what one conventionally calls a showerhead has long been 2.5 gpm, no matter many nozzles it has. Ex. A, at 1-2. DOE's rule increased the allowable water use of any such object that has multiple nozzles. 85 Fed. Reg. 81,342.

Consider, for example, the product on the left in DOE's Figure 1. 85 Fed. Reg. 49,290.

Figure 1. Products with multiple individual showerheads.



Previously, the maximum flow through that product was 2.5 gpm. 42 U.S.C. § 6295(j); Ex. A (2011 guidance with a similar figure). The Showerheads Rule allows it to use 7.5 gpm. And the middle product can now consume eight times the previous limit.

DOE insists the Rule does not violate the anti-backsliding provision because DOE did not "amend[] the current [water] conservation standard." 85 Fed. Reg. 81,349. That assertion blinks reality. The regulation sets the

standard for a "showerhead," 10 C.F.R. § 430.32(p); and the rule "revis[ed] the definition of 'Showerhead.'" 85 Fed. Reg. 81,359 (amendatory instructions). DOE explained that under the new definition, each nozzle is its own showerhead, and the multi-nozzle assembly gets a multiple of the 2.5-gpm standard. *Id.* at 81,342.

That amendment to the regulatory definition, on its own, violates the anti-backsliding provision. Moreover, DOE just as plainly amended the statutory standard. DOE says it exercised policy discretion to reinterpret ambiguous statutory language. 85 Fed. Reg. 81,345; 85 Fed. Reg. 49,288. That decision "amend[ed] the current ... standard" under any sensible reading of the phrase. *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2018), is instructive. That case addressed a provision in the Medicare Act that requires notice and comment before the Department of Health and Human Services ("HHS") "establishes or changes a substantive legal standard" regarding reimbursements. 42 U.S.C. § 1395hh(a)(2). HHS contended it had simply interpreted a pre-existing standard. 139 S. Ct. at 1811. The Supreme Court rejected that argument because the concept of a "legal standard" is not limited to legislative rules; an interpretative rule can change the substantive legal standards. *Id.* at 1813. Similarly here, the Showerheads Rule changed

the applicable legal standard even though DOE did not formally acknowledge the amendment.

DOE now believes its previous interpretation of the statute was not the best choice. 85 Fed. Reg. 81,344-45. An asserted error in the reasoning for a prior rule does not create an exemption from the anti-backsliding provision. *Cf. New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("EPA's disbelief that it would be prevented from correcting its own listing 'errors' ... cannot overcome the plain text enacted by Congress.").

DOE also noted it did not follow the EPCA procedures for amending a standard, either in this rule or in the previous interpretation. 85 Fed. Reg. 81,349. For this rule, that observation just shows another way DOE violated the law. It does not mean there was no amendment. *See Allina*, 139 S. Ct. at 1812 ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements."). Regarding the previous interpretation, it does not matter whether DOE had engaged in a formal EPCA standards amendment.[5] The anti-backsliding provision asks whether DOE is *currently* amending a standard in a way that increases maximum

[5] In fact, DOE's prior interpretation appeared in enforcement guidance. DOE notified manufacturers that the standard unambiguously applied across all nozzles, and then said it would exercise discretion to refrain from enforcement for two years. Ex. A, at 2-3.

permissible water use. Until now, each product shown in Figure 1, and others like them, was only permitted to consume 2.5 gpm, across all nozzles. The anti-backsliding prohibition does not change depending on how that came to be the rule.

B. "Showerhead" Means a Showerhead, and ASME-112.18 is not to the Contrary.

DOE's previous understanding, that EPCA unambiguously subjects a whole showerhead to the 2.5-gpm standard, was correct. The commonplace, ordinary meaning of "showerhead" is the primary guide to the statute's meaning. *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2017) ("[W]ords will be interpreted as taking their ordinary, contemporary, common meaning."). A "showerhead" is simply "a fixture for directing the spray of water in a bathroom shower." *Showerhead*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/showerhead (last visited Jan. 22, 2021).

In ordinary speech, each of the three objects depicted in Figure 1 above is a showerhead; it is a fixture directing a spray of water. You expect to find one showerhead in a shower—perhaps a couple if you have, say, a handheld and an overhead option, but not eight. The difficulty in speaking about the rule reveals the awkwardness of DOE's interpretation. If showerhead means

just each nozzle, what is the whole object called? Ordinarily one would call it a showerhead, but DOE eschews that common-sense manner of speech.

DOE maintains it should redefine the standard on a per-nozzle basis to align with ASME-112.18 by defining a "showerhead" as an "accessory." That rationale is contrary to the statute. EPCA tells DOE to use ASME-112.18 for its test procedures, 42 U.S.C. § 6293(b)(7), but the statute indicates DOE should *not* use that standard to determine the definition of "showerhead." Congress defined "water closet," "urinal," and several other terms by explicit reference to ASME-112.18. *Id.* § 6291(31). The same paragraph, enacted simultaneously, did not invoke ASME-112.18 in defining "showerhead." *Id.* That is a clear signal that DOE should not look to ASME-112.18 to understand what the covered product is. *Cf. United States v. Carnell*, 972 F.3d 932, 939 (7th Cir. 2020) ("When Congress includes particular language in one section of a statute but omits it in another a court must presume that Congress intended a difference in meaning.").

DOE's explanation is not even really founded in ASME-112.18. Nothing in it says *only* an individual nozzle is considered a showerhead. ASME-112.18 defines a "showerhead" as an "accessory"; an "accessory" is an object that is readily removable from a "supply fitting." 85 Fed. Reg. 81,343. Each object

depicted above—the whole showerhead, not just each nozzle—is readily removable from the supply fitting (*i.e.* the pipe) it is attached to. So, even under ASME-112.18, the whole thing is a "showerhead"—and thus, even if ASME-112.18 determined the standard, subject as a whole to the 2.5-gpm limit.

C. DOE Refused to Consider the Consequences of the Showerhead Rule.

The extra 160 billion gallons a year from high-flow showerheads will cost residential customers alone—not to mention commercial users—about $960 million a year. Ex. E, at 11. The energy required to heat that extra water will cost $1.7 billion. *Id.* Sewerage to drain it will cost around $1 billion. *Id.* These amounts represent just what showerhead users will pay. The societal costs will be even greater. Outside investment will be needed to support the additional water usage. *Id.* U.S. manufacturers will have to develop new high-flow products to compete with newly lawful imports from countries with laxer standards. *Id.* at 12.

DOE refused to discuss the costs or benefits of high-flow multi-nozzle showerheads. Commenters pointed out how important these considerations are. DOE responded that it did not have to think about the consequences

because it was simply "revis[ing] the regulatory definition of showerhead consistent with congressional intent." 85 Fed. Reg. 81,348.

Ducking these issues was irrational. The Showerheads Rule was a policy choice, DOE's interpretation of what it says is an ambiguous provision, for which DOE "must ... engage in 'reasoned analysis.'" *Good Fortune Shipping v. IRS*, 897 F.3d 256, 263 (D.C. Cir. 2018). "[A]gency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

The economic and environmental consequences of DOE's choice are "relevant factors"—indeed central concerns. EPCA directs DOE to consider, in amending any standard, the economic impact on manufacturers and consumers; the savings in operating costs; projected changes in water usage; and the overall importance of water conservation. 42 U.S.C. § 6295(o). Even if DOE were right that it was not amending a standard, DOE must consider these economic and environmental factors when it interprets the standards. Decades ago, the D.C. Circuit held that DOE cannot claim its EPCA interpretations are "based on congressional intent" unless it has "reasonably accommodated the policies of [the] statute." *NRDC v. Herrington*, 768 F.2d

1355, 1377-83 (D.C. Cir. 1985). DOE's refusal to consider those policies here ignores that principle.

DOE's other excuse was that its new interpretation "does not impose costs on manufacturers or consumers." 85 Fed. Reg. 81,348. Nothing in EPCA limits the relevant economic and environmental costs to those imposed directly on the regulated parties. Indeed, EPCA rules usually don't impose costs on consumers, because EPCA does not regulate what consumers may buy and use—only what companies may sell. Yet DOE routinely considers the costs and benefits a standard will cause for consumers. *E.g., inter alia*, 85 Fed. Reg. 81,558, 81,580 (Dec. 16, 2020) (forecasting increased product prices and decreased operating costs from amending lamp-ballast standards). That DOE was relaxing, instead of tightening, the standard does not justify a refusal to assess the consequences.

D. The Showerheads Rule Violated NEPA.

Instead of assessing the rule's environmental impacts as NEPA requires, 42 U.S.C. § 4332(c), DOE relied on "categorical exclusion" A5 in its NEPA-implementing regulations. 85 Fed. Reg. 81,357-58.

Exclusion A5 is for a "rulemaking[] interpreting or amending an existing rule … that does not change the environmental effect of the rule." 10

C.F.R. part 1021 subpart D app. A. Invoking it here was irrational. DOE stated, without explanation, that the Showerheads Rule "will not result in a change to the environmental effect of the existing showerhead standards." 85 Fed. Reg. 81,356; *id.* at 81,358 (similar). "[M]erely ... asserting that an activity ... will have an insignificant effect" is not enough to qualify for a categorical exclusion. *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). "[A]n agency must provide a reasoned explanation of its decision." *Id.*

That is exactly what DOE refused to do. DOE said its rule would reopen the market for multi-nozzle showerheads with flows well above 2.5 gpm. 85 Fed. Reg. 81,355; 85 Fed. Reg. 49,288. That change has to alter the environmental effect of the standard, as commenters explained in detail. Exs. D, E & O. DOE did not respond to the substance of those observations; it just repeated its mantra that it was only revising a definition. DOE cannot rationally maintain both that the revision will permit higher-flow products that used to be prohibited and that it will have no consequences.

VI. The Balance of Harms Weighs Overwhelmingly in Petitioners' Favor.

In light of the significant harms petitioners face and the invalidity of the rule, the balance of harms need tip only slightly in petitioners' favor. *Whitaker*, 858 F.3d at 1054 (discussing the "sliding scale" approach to

balancing harms). That balance favors, by a wide margin, staying the Showerheads Rule.

A. A Stay Will Not Harm DOE.

Maintaining the status quo will have no harmful effect on DOE or on the manufacturers it regulates. DOE cited no evidence that manufacturers are unable to comply with the previous standard; and in fact industry representatives opposed the relaxation of standards. Exs. B & C.

B. The Public Interest Mandates a Stay.

Public comments nearly unanimously opposed the rule change. *See* 85 Fed. Reg. 81,345-56. DOE said the rule provides needed clarity. *Id.* at 81,344-45. But after DOE's 2011 pronouncement, Ex. A, there cannot have been confusion about how the 2.5-gpm limit operated; and the record reveals no such uncertainty. Manufacturers have been selling multi-nozzle products that comply with the pre-rule version of the 2.5-gpm standard. Ex. E, at 4 & n.6 (identifying example products).

DOE contended the rule beneficially promotes "consumer choice." 85 Fed. Reg. 81,355. The desire of some consumers to buy high-flow showerheads while the case is pending pales compared to the decade-long harms from their continued ability to use those showerheads even if the Court invalidates the rule.

Beyond the costs caused by people's buying and using the new high-flow showerheads, the rule's operation pending review will be costly to organizations such as AWE and domestic manufacturers and their workers. U.S. manufacturers were prohibited from making showerheads that use more than 2.5 gpm. So the first high-flow products on the market will be imported from countries without such standards, and domestic manufacturers will have to catch up. Ex. N ¶¶ 9-11; Ex. M ¶¶ 11-14. AWE and PMI must monitor for such products entering the market. Ex. H ¶ 11; Ex. M ¶ 12. A stay while the Court determines the fate of the Showerheads Rule will permit a more orderly transition. Ex. N ¶¶ 13-15.

Above all, "there is an overriding public interest" in "an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). DOE tried to maneuver around its statutory obligations to find a way to loosen water conservation standards; "faithful adherence" to EPCA calls for enjoining the Showerheads Rule.

CONCLUSION

For these reasons, the Court should stay the Showerheads Rule pending review.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Keith Bradley
Keith Bradley