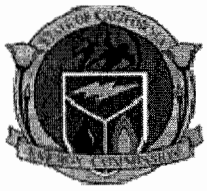
UNITED STATES DEPARTMENT OF ENERGY

California Energy Commission Petition for
Exemption from Federal Preemption of
California's Water Conservation Standards for Residential Clothes Washers

DOE Docket Number EE–RM–PET–100

CALIFORNIA'S REQUEST FOR RECONSIDERATION



California Energy Commission
January 29, 2007

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Preliminary Statement

> [EPCA] is . . . designed to ensure that States are able to respond with their own appliance regulations to substantial and unusual . . . problems, such as high . . . prices . . . or adverse environmental or health and safety conditions that can be alleviated by . . . conservation in appliances. Congress anticipates that States that have such . . . problems, and that have met the burden of proof set forth in Section [6297(d)], will be granted waivers [from preemption].

H.R. Rep. No. 100-11, at 24.

It is undeniable that California faces special, urgent, and important water and energy challenges. Overcoming these imposing challenges requires the immediate, combined, cooperative effort of government agencies at all levels, as well as the private sector, working together towards a common goal.

In this country, our individual states have been accurately called the laboratories of democracy. Our society depends on individual states to be leaders and innovators in addressing their own needs, rather than relying solely upon the Federal government.

California has always been a leader and innovator on environmental and efficiency issues because California has historically faced some of the greatest challenges in those areas.[1] California went to considerable effort over considerable time to develop its water efficiency standards for residential clothes washers – which will also save considerable amounts of energy – to specifically tailor them to California's particular needs.

In this era of dangerous and precarious energy dependence and dwindling water supplies, such specialized state efficiency standards matter. They drive innovation and efficiency, and those benefits inevitably flow to the nation as a whole. Rather than leading to a proliferation of standards, such state innovation typically leads to improved national standards based on the best and most effective state

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[1] For example, last year the Governor of California championed limits on greenhouse gas emissions in the state of California and important new legislation was enacted. Several months later, ten leading U. S. corporations, including General Electric, Alcoa, DuPont, and California's Pacific Gas and Electric, launched a nationwide coalition with four environmental groups to push for mandatory federal emissions controls on greenhouse gases.

standards. The type of state innovation represented by the California clothes washer standards is a key element in our nation's eventual achievement of energy independence. Conversely, a failure to allow California to implement its standards may deter other states from considering efficiency issues, and that could end up being a key element in the eventual failure of U.S. policy.

We cannot afford to fail. It is in this context that California respectfully and urgently requests that DOE reconsider its denial of the State's waiver petition.

Introduction and Summary

DOE denied California's Petition on December 28, 2006. 71 Fed. Reg. 78157 (Dec. 28, 2006). This Request for Reconsideration demonstrates that the denial was based on errors of law and fact that are found in the record of the proceedings. *See* 10 C.F.R. § 430.48(b).

In addition, in order to provide a complete discussion of the denial, and to ensure that we have exhausted all administrative remedies, we also address two matters on which DOE made findings but which were not relied upon by DOE as reasons for the denial: (1) DOE's erroneous finding that California's water and energy interests are not different in "nature" from those in the U.S. generally, and (2) DOE's correct finding that waiver opponents failed to submit evidence demonstrating that there would be an adverse impact on the appliance industry from the California standards (that is so; more important, the record affirmatively shows that there will be no significant impacts). We also show that the California Standards are "needed" to meet the State's water and energy interests, a matter not addressed by DOE. Finally, we address DOE's erroneous notion that the granting of a waiver petition requires only that DOE begin a follow-on rulemaking proceeding to consider whether the state standard should go into effect. Actually, granting a waiver means that DOE has *established* a rule allowing the state standard to take effect upon a specified date.

We respectfully request that DOE reconsider the denial, grant the Petition, and immediately adopt a rule allowing the California Standards to go into effect.

We also request that DOE recognize that California has requested a waiver of preemption for four separate standards: (1) an 8.5 WF standard for front-loading Residential Clothes Washers (RCWs), (2) an 8.5 WF standard for top-loading RCWs, (3) a 6.0 WF standard for front-loading RCWs), and (4) a 6.0 WF standard for top-loading RCWs. Cal. Code Regs. tit. 20, § 1605.2(p)(1). Throughout its decision, DOE states that it is denying "the petition" rather than addressing specifically the

different standards that California has adopted. Yet most of DOE's rationales for denying "the petition" do not apply to all of the California standards. Thus even if DOE does not, upon reconsideration, grant "the petition" in its entirety, DOE should clarify whether it will grant a waiver for any of the four California Standards.

I. DOE Erred in Denying the Waiver.

A. DOE erred in concluding that it could not grant the waiver because of EPCA's three-year effective-date rule.

EPCA establishes a three-year delay between the date of DOE's action granting a waiver and the date on which a state standard takes effect pursuant to the waiver. (The delay is five years if DOE makes certain findings, which were not made here.) 42 U.S.C. § 6297(d)(5)(A). DOE erroneously states that this provision prevents granting of the waiver, apparently on the ground that DOE's grant of a waiver, had it occurred, would have been in 2006, and one section of California's appliance regulations indicates that the 8.5 WF Standards were nominally designated as taking effect on January 1, 2007. *See* 71 Fed. Reg. at 78160.

Each California appliance efficiency standard is set forth with a nominal effective date, as are the four RCW Standards at issue here. That is necessary in order to put all stakeholders on notice as to when state law would provide that enforcement will begin. But the State recognizes that certain standards, such as the RCW Standards, require waivers from federal preemption before they take effect, and therefore the regulations also provide that such standards take effect only upon the effective date of a DOE waiver (or on the date when preemption is repealed, if that were to occur). Cal. Code Regs. tit. 20, § 1605(b). Therefore, even though the 8.5 WF standards are labeled with a nominal effective date of 2007, their real effective date is the effective date of a waiver – three (or five) years after the granting of the waiver. 42 U.S.C. § 6297(d)(5)(A). Therefore, DOE's belief that it could not grant a waiver for the "2007" 8.5 WF Standards because they would "take effect" less than three years after DOE acted on December 28, 2006, is wrong. (Obviously, DOE's concern, expressed in late 2006, is irrelevant to the 6.0 WF Standards, which are nominally scheduled to take effect on January 1, 2010.)

DOE not only overlooked the California law explicitly providing for later effectiveness for standards that need a waiver, but also mis-read EPCA. The 3-year effective date provision governs when DOE's rule approving a waiver goes into effect; contrary to DOE's interpretation, it has no application to any "effective date" that might be assigned by the state. 42 U.S.C. § 6297(d)(5)(A) ("No final rule

prescribed by [DOE] . . . may permit any State regulation to become effective . . . within three years after such rule is published"). As a result, whatever the state "effective date" might be is irrelevant to DOE's legal authority to grant a waiver.

DOE's interpretation erroneously assumes that Congress intended to put states in an impossible situation – that is, that a state, when adopting a standard and assigning a nominal "effective date," would have to guess precisely when DOE is likely to grant the waiver, which determines the effective date when the standard can actually be enforced. Any doubt about the impossibility of this task vanishes when one realizes that EPCA provides *several* possible effective dates for a waiver: the effective date is constrained not only by (1) the date on which DOE acts (after which the waiver can become effective either in the normal three years, or five years if DOE finds that such a period is necessary for manufacturers to comply) but also potentially by (2) the effective date of a federal standard for the appliance if DOE adopts one after the state files its waiver petition (but, complicating matters even further, this constraint does not apply if DOE finds that the state has an emergency condition).[2] 42 U.S.C. § 6297(d)(5). Congress intended EPCA to save energy, not to require a state to be prescient about when DOE will act, the nature of that action, and whether an intervening federal standard will further complicate the "effective date" nominally assigned by the state.[3]

B. DOE erred in concluding that California did not show that the standards are preferable to alternatives.

EPCA requires states seeking waivers to demonstrate by a preponderance of the evidence that the benefits and burdens of their standards make the standards preferable to alternatives. 42 U.S.C. § 6297(d)(1)(B)-(C). DOE determined that

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[2] For the same reasons, equally misplaced is DOE's concern about the timeliness of the analyses in state petitions. *See* 71 Fed. Reg. at 78160 (Part III., final ¶). To the extent DOE is suggesting that if a state mis-guesses when DOE will allow a state standard to take effect, so that the state's analyses might be based on different years of assumed implementation of the state standard than will actually occur, DOE is erroneously assuming that the state's burden is to predict costs and benefits at a precise date in the future rather than just providing, by a preponderance of the evidence, an analysis that is reasonable. See Section I.B.1, pp. 5-9 *infra*.

[3] DOE's suggestion that after granting a waiver petition, it would merely commence another rulemaking (rather than actually granting the waiver), would add yet more uncertainty to the states' impossible task of determining, up front, when waivers for their regulations would become effective. See Section IV, pp. 21-23 *infra*.

California's Petition failed to provide adequate support for the analysis of the cost-effectiveness of the standards, and that the Petition failed to analyze alternatives that were sufficiently specific to California and to residential clothes washers. 71 Fed. Reg. at 78162-64. Those determinations are erroneous in law and in fact.

1. Cost-effectiveness analysis.

The Petition contains a detailed analysis showing that the California standards are highly cost-effective, and it indicates that the underpinnings of the analysis were subjected to rigorous analysis in the Energy Commission proceeding in which the standards were adopted. DOE claims that California "did not provide a sufficient explanation of the analysis supporting its estimates," because, DOE states, California "did not indicate where [the Energy Commission's] rulemaking record could be located and where within the record the relevant assumptions, data, and analysis could be located; nor did [California] provide sufficient explanation of the underlying assumptions and data in its petition." 71 Fed. Reg. at 78163. Thus DOE did *not* determine that California's evidence failed to preponderate over countervailing evidence (DOE cites none); rather, DOE determined that California's evidence was somehow inadequate as evidence per se.

This was error. Congress did not provide that states seeking waivers must meet their burden of proof by presenting evidence "beyond a reasonable doubt" or even "clear and convincing" evidence. By using the lower standard of "preponderance of the evidence," Congress required DOE to examine simply whether, given the evidence before it, a state has shown that it is more probable than not that its standards are needed to meet unusual and compelling state or local interests. The state does have to reach a reasonable conclusion (i.e., the evidence it presents must be legally substantial), but the conclusion can be reasonable even if DOE concludes that one or more of the assumptions the state made in its analysis were too high or too low, or inadequately supported. (Certainly nothing in EPCA or in DOE's regulations says anything about a requisite level of support for assumptions or other data.) Only if the state's assumptions are so clearly wrong on their face that the state's overall conclusion is simply not reasonable should DOE conclude that the state's evidence standing alone is inadequate to meet the burden of proof.

In addition, no matter what the law might say about the nature or sufficiency of evidence in a state waiver petition, DOE's own regulations make clear that DOE has only a limited time – *before* the agency accepts a petition for filing – to raise concerns about the adequacy of the evidence therein:

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

10 CFR § 430.42(f)(1) (emphasis added). California initially submitted its Petition to DOE on September 16, 2005. Sixty-three (63) days later, DOE rejected the Petition, on the sole ground that the Petition failed to state whether California was aware of activity by any other state on similar standards. 71 Fed. Reg. at 78160. California supplied the missing information (the answer was "no"), and DOE accepted the Petition for filing, "*as complete*," on December 23, 2005. *Id.* (emphasis added). Therefore, under the express terms of 10 CFR section 430.32(f)(1), DOE had at that time concluded that the Petition did in fact "contain sufficient information for the purposes of a substantive decision." Thus when DOE published the Petition and invited comments thereon, the notice posed many substantive questions, including these:

> Is the analysis used in the California Petition *accurate*? For example, are the State's savings estimates *correct*? How *valid* are the State's assumptions?

71 Fed. Reg. 6022, 6025 (Feb. 6, 2006) (emphasis added). These questions would not make sense if DOE actually believed that the Petition had "failed to provide sufficient explanation of the underlying assumptions and data." It was arbitrary and capricious for DOE to have changed its mind – and especially so to have relied on allegedly "[in]complete" data or "[in]sufficient information for the purposes of a substantive decision" as a justification for denying the petition. *See, e.g., United States v. Nixon*, 418 U.S. 683, 694-96 (1974); *People of the State of California v. FCC*, 39 F.3d 919, 925 (9th. Cir. 1994), *cert. denied*, 514 U.S. 1050; *Northern California Power Agency v. FERC*, 37 F.3d 1517, 1522 (D.C. Cir. 1994).

Moreover, even if DOE had been right on the law, it would not have mattered, for a full explanation of all the Petition's assumptions, data, and analyses – indeed, the entire California rulemaking record – was readily available to the agency throughout the 15 months between the initial submittal of the Petition and DOE's denial. *As DOE itself noted almost a year ago*, California's rulemaking "[m]aterial related to this State regulation is available at the following URL address under Docket 03-AAER-1(RCW):

http://www.energy.ca.gov/appliances/2003rulemaking/clothes_washers/index.html." 71 Fed Reg. at 6023. DOE's new complaint that California did not provide its rulemaking record or citations thereto rings hollow.

Finally, even if the California rulemaking record had been somehow unavailable or inadequate, *DOE's* rulemaking record contains all the "explanation" that DOE needs. The only assumption or estimate about which DOE specifically complained was the Energy Commission's estimate of the increased first cost of washing machines that would result from the California standards. 71 Fed. Reg. at 78163. As we discuss immediately below, the evidence in the record shows that the Petition's estimates ($130.18 for the 6.0 WF Standards, and $66.44 for the 8.5 WF Standards, Petition at 21) are entirely reasonable. That is sufficient (without conceding that it is necessary), whether or not DOE thinks that there is an "adequate explanation" of the estimates.

For example, our Rebuttal noted that "Sears' 'Washer and Dryer Guide' [states] . . . that the higher first cost of front-load washers 'can be recouped in about 8 to 10 years . . . .'" CEC Rebuttal, No. 79 at p. 2 & n.6. This is certainly sufficiently consistent with California's estimate of a payback of about six years for the 6.0 WF standards to support California's cost-effectiveness conclusion. (If the actual payback were 10 years, at Sears' upper limit, the Standards would still be cost-effective, as the life of a typical clothes washer is 14 years. *See* CEC Petition, No. 1 at 21.)

Similarly, the record shows that the California estimates of increased first costs are consistent with AHAM's estimates of the financial impacts of the standards on the clothes washer industry. AHAM's analysis shows a manufacturer cost of approximately $20 per unit, which is likely to result in an increased cost to consumers well within the range of the California estimates, even after markups are taken into account. CEC Rebuttal, No. 79 at 9 (discussing AHAM, No. 52).[4]

In addition to estimating the financial impacts on the clothes washer industry (from which is derived the $20/unit cost discussed in the previous paragraph), AHAM also made direct estimates of the prices consumers are likely to pay for washing machines under the California standards. Once again, there is little

[4] AHAM filed timely comments on the petition, AHAM, No. 52, and also attempted to file a response to California's rebuttal comments, AHAM, No. 81. Any reliance by DOE on the latter would be improper, for EPCA allows rebuttal but not responses thereto. 42 U.S.C. § 6297(d)(2).

significant difference between AHAM's estimates and California's; indeed, AHAM's estimates were *lower* than California's.

AHAM estimated that "[a] WF of 8.5 will create a situation where the lowest priced washer will be approximately $500 . . . . A WF of 6 will result in a minimum price of approximately $600 . . . ." AHAM, No. 52 at 29. These estimates are consistent with California's estimates of average costs of $616 resulting from the 8.5 WF standard and $680 resulting from the 6.0 WF standard. CEC Petition, No. 1 at 21. The larger difference between AHAM's and California's *incremental* first cost estimates – that is, the *increase* in first cost that will result from the standards – is due primarily to the differences in the parties' estimates of the *base case* price of washing machines – that is, what washing machines cost now, in the absence of the California standards:

	A		B	C		D	E
	Base Case Price		Price with 8.5 Standard	Incremental Cost of 8.5 Standard (B – A)		Price with 6.0 Standard	Incremental Cost of 6.0 Standard (D – A)
AHAM	$220		$500	$280		$600	$380
Calif.	$550		$616	$66		$680	$130
Estimates from CEC Petition, No. 1 at 21; AHAM, No. 52 at 29.							

But AHAM's estimates of base case prices – and thus its estimates of the incremental costs resulting from the standards – appear unreliable. $220 washers were a very small part of the market as far back as 1998. *See* DOE, Clothes Washer Technical Support Document, Table 3.6 (Docket No. EE-RM-94-403). In addition, the database from which AHAM appears to have derived its estimates for the instant proceeding is represented on a graph that shows that the vast majority of the top loading agitator models with Water Factors of between 10 and 16 "today" (all of which were also part of AHAM's "shipment weighted average" cost of $325 "today"), are no longer part of the market as of January 1, 2007, because the federal energy standard has taken effect. *See* AHAM, No. #52 at 22. Those models very likely include the $220 model that the AHAM analysis uses as its "base case" number and also the vast majority of the "shipment weighted average" sales that made up the $325 estimate, which indicates that AHAM's base case assumptions are unreliable.

By contrast, had DOE looked at (or inquired about) the California rulemaking record that was available at the URL DOE itself cited, it would have found, in the

first document listed at the URL, the study by Pacific Gas & Electric Company that provided much of the analysis used in the CEC rulemaking. That study provides all the explanation of California's incremental cost assumptions that DOE apparently believes is missing. It properly estimates the "base case" costs against which the Standards' costs were compared; it states, for example, that "[t]o establish the most probabl[e] baseline in 2007, the estimate must take into effect the impact of the 2007 DOE standard of 1.26 MEF." PG&E, "Title 20 Standards Development Analysis of Standards Options For Residential Clothes Washers" at 4 (2003), http://www.energy.ca.gov/appliances/2003rulemaking/clothes_washers/documents/2005-09-05_CASE_STUDY_CLOTHES_WASHERS.PDF ("PG&E CASE Study"). The study continues with a detailed explanation of how the base case cost estimate, and the incremental cost estimates, were derived. *Id.* at 7-9.[5]

In sum, California's estimates of the costs resulting from the 8.5 WF and 6.0 WF Standards are entirely reasonable, and nothing in the record indicates that those estimates (or any other data) are incorrect or unreliable. Therefore, not only is DOE wrong in asserting that California failed to justify or support its analyses, but DOE also overlooks the independent evidence in the record that supports the only estimates about which DOE indicated any concern.

2. Comparing the California standards to alternatives.

California's Petition and the many comments supporting it demonstrate that the State's RCW standards:

> [a]re such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation

[5] PG&E's study estimated a "base case" cost of $550 *for a 12 WF RCW.* PG&E CASE at 4, 7. However, California's cost-effectiveness analysis assumed a "base case" of *10.5* WF. CEC Petition, No. 1 at 21. As a result, the cost-benefit analysis in the Petition substantially understates the benefits of the California Standards, because the water and energy savings benefits took credit only for the difference between 10.5 and the Standards levels of 8.5 and 6.0; the savings would have been substantially higher if the comparison had been to a base case of 12. In DOE's proceeding, PG&E also pointed out another way in which the cost-benefit analysis understates the Standards' benefits: the Standards will likely result in a shipment-weighted average water use that is substantially lower than the usage level assumed in the analysis (i.e., that no washer would use less water than required by the Standards). PG&E, No. 44 at 5.

> preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

42 U.S.C. § 6297(d)(1)(C)(ii). But DOE asserts that California did not meet its burden of showing that the California standards are preferable to alternatives, stating:

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

71 Fed. Reg. at 78164 (emphasis added). DOE is incorrect in asserting that EPCA requires that the alternatives considered must be RCW- and California- specific. DOE is also wrong in determining that the California petition did not present an adequate alternatives analysis (even if RCW- and California- specific alternatives must be included in the analysis).

First, on its face EPCA does not require that the alternatives discussed in a state petition (except for the do-nothing alternative of reliance solely on the market) be appliance- or state-specific; rather, it requires only that a petition discuss "alternative approaches to energy or water savings or production." 42 U.S.C. § 6297(d)(1)(C)(ii). (Nor has DOE attempted to adopt any regulation giving states notice that their analyses of alternatives would need to be product- or state- specific.) Indeed, under the interpretive maxim of *expressio unius est exclusio alterius*, Congress's specific requirement that one alternative – "reliance on reasonably predictable market-induced improvements in efficiency" – be specific to "all products subject to the State regulation," *id.*, necessarily indicates that Congress did *not* intend to require that any other alternative considered be product- or state-specific, *see Case v. Kelly*, 133 U.S. 21 (1890). Thus Congress stated:

> [42 U.S.C. § 6297(d)(1)(C)(ii)] 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.

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

Second, DOE's interpretation would lead to absurd results and is therefore improper. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). EPCA requires a comparison to "alternative approaches to . . . savings *or production* . . . ." 42 U.S.C. § 6297(d)(1)(C)(ii) (emphasis added). "Production" cannot possibly be product-specific, and for many states (e.g., those served by any water source that passes through more than one state, such as those states bordering or containing the Colorado, the Columbia, the Mississippi, the Missouri, or the Ohio River) a state-specific analysis of "production" alternatives from those sources would also be impossible.

Third, DOE is wrong about what the Petition contains. The Petition's discussion of major in-state water production alternatives – the State Water Project; groundwater; new storage; and the major in-state rivers (Trinity, Sacramento, San Joaquin, and Owens) – is California-specific. *See* CEC Petition, No. 1 at 11-12. (The Petition also discusses the Colorado and Klamath Rivers, which are multi-state. *See id.*) Just so, the Petition's discussion of the most prevalent and successful water and energy savings alternatives – rebates and education – is both RCW- and California-specific, as is the "rely on the market" discussion. *See id.* at 27-32, 34-36.

It is true that the Petition's discussion of some savings alternatives – early replacement, mass government purchases, low income and senior subsidies, consumer tax credits, and manufacturer tax credits – relies on DOE's 2000 rulemaking analysis of potential savings from nationwide RCW energy-savings programs. DOE finds this "inappropriate." 71 Fed. Reg. at 78163. But DOE itself relies on the 2000 analysis in assessing the merits of the California standards. *See id.* at 78166. Moreover, DOE's analysis showed that all such programs *combined* would save, in dollar value, less than ten percent of the water and energy savings from timely standards, so it was certainly reasonable for the State to conclude that standards are "preferable" and not to waste further time and resources analyzing the other alternatives in greater depth. *See* CEC Petition, No. 1 at 33. For DOE to criticize California's reliance on the 2000 analysis simply because California reasonably believed that such programs would not be an order of magnitude more effective is arbitrary and capricious.

Finally, although the evidence clearly shows that the Standards are preferable to alternatives, an even more important point – also clearly demonstrated by the

record – is that California has determined that it must pursue *all* feasible water supply and efficiency options, i.e., both the Standards and "alternatives." California is already implementing RCW rebate, education, tax credit, and many other programs. The Standards that DOE would prevent the State from implementing are an integral part of California's efforts to provide its citizens, its economy, and its environment with adequate water, as the Legislature, the State's water supply agency, and hundreds of State water districts have recognized:

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

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

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

2005 California Water Plan, vol. 1, ch. 1, p. 1-7 (emphasis added).

> Improving the efficiency of clothes washers is only part of the overall solution for reliable water supply, yet it is a *vital* part. Improving the efficiency of clothes washers will not supplant other cost effective water conservation efforts, such as rebate and voucher programs, improved leak detection, increased public education programs, local landscape and water use ordinances, water transfers, new local storage reservoirs and groundwater conjunctive use projects, increased reclamation of stormwater and treated wastewater, and salt and brackish water desalination. It is clear that there is no one "silver bullet" to secure California's water future, but ACWA [the Association of California Water Agencies, representing the almost 450 water agencies that deliver over 90 percent of California's water] supports the efforts of its water agencies to implement those that will make significant incremental contributions using water more efficiently.

ACWA, No. 40 at 1-2. One relatively small water district (48 square miles) described the extraordinarily lengths that California is going to, in both water production and water conservation, as follows:

> There are many alternative cost-effective methods to improve water efficiency, and *we are already implementing them.* . . . . The District *evaluates water efficiency options and water supply options equally* in

its planning process. *We implement all* of the most cost-effective strategies available. Improving the efficiency of clothes washers does not supplant other reasonable means available. Our efforts to provide a reliable source of water California include the following:

- Weather-based Irrigation Controller and mulch Distributions
- Vouchers for water-saving devices
- Free surveys to inspect irrigation systems for leaks and make recommendations for efficient water use
- Irrigation system upgrade grants of up to $5,000
- Various school and public information programs including classes on California friendly landscape design, drought tolerant plants and efficient irrigation systems
- California friendly landscape contests
- An ordinance prohibiting water waste
- Product standards support
- Water transfers
- Recycled water
- Groundwater recharge
- Desalination.

Currently, the *only* available action to agencies is to offer rebates or vouchers to encourage the purchase of the high-efficiency washers; this method *has limited effect and is very costly, compared to appliance standards. Ratepayers bear an undue burden because washer efficiency standards cannot be adopted by the State.*"

Olivenhain Water Dist., No. 58 at pp. 2-3 (emphasis added); *see also* Sierra Nevada Alliance, No. 4; North Marin Water District, No. 6; Three Valleys MWD, No. 12; Foothill MWD, No. 16; Santa Fe Irrigation Dist., No. 20; West Basin MWD, No. 24; City of Roseville, No. 32; Crescenta Valley WD, No. 42; Los Angeles Dept. Water and Power, No. 46; Irvine Ranch WD, No. 48; City of Napa, No. 56; City of Del Mar, No. 72; City of Yreka, No. 9; Cucamonga WD, No. 13.

C. DOE erred in finding that the California standards would cause the elimination of top-loading washers and in relying on that finding when denying the waiver.

DOE found that the California 6.0 WF standards "would likely result in the unavailability of top-loading residential clothes washers in California" and stated that

"[t]herefore, DOE is prohibited from . . . grant[ing] the California Petition." 71 Fed. Reg. at 78168. Even if this were true, it would be irrelevant to the 8.5 WF Standards. Moreover, with regard to the 6.0 WF Standards, DOE's finding is wrong on the facts and DOE's reliance on the finding is wrong on the law.

1. Elimination of Top-Loaders.

DOE stated its finding as follows:

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

71 Fed. Reg. at 78167 (emphasis added). That the market in 2006 has no better top-loader than a 6.3 WF model is, standing alone (which is where DOE placed it), irrelevant to a conclusion that the market is unlikely to have no 6.0 top-loaders in 2010. Indeed, the existence of such a model now strongly suggests, and the evidence shows, that the market is in fact likely to have 6.0 top-loaders by 2010. *See* CEC Petition, No. 1 at 46; CEC Rebuttal, No. 79 at 13.

2. Denial of the Waiver.

Even if the 6.0 WF Standards would eliminate *top-loaders* from the California market in 2010, that finding would not justify DOE's decision to deny a waiver not only for the Standard as applied to top-loaders, but also for the Standard as applied to *front-loaders*. "[The failure of some classes (or types) to meet [the feature-unavailability] criterion shall not affect [DOE's] determination of whether to prescribe a rule for other classes (or types)." 42 U.S.C. § 6297(d)(4).
As we noted in the Introduction to this Request, there are two separate 6.0 WF Standards – one for top-loaders and one for front-loaders – although the two Standards are the same numerically. Cal. Code Regs. tit. 20, § 1605.2(p)(1). As a result, DOE could have easily solved the "problem" – the (unlikely) possibility that there will no top-loading 6.0 WF RCWs in the 2010 California market – by granting an unconditional waiver for the 6.0 WF Standard for front-loaders, and a conditional

waiver for top-loaders (conditioned on enforcement of the 6.0 WF Standard for top-loaders only against those with greater than 6.3 WF). [6]

DOE refused to grant a separate waiver for front-loaders for two reasons. First, DOE claimed that the California Petition did not distinguish between top-loaders and front-loaders "and therefore, the question of whether such levels would be appropriate for individual classes of residential clothes washers is not at issue." 71 Fed. Reg. at 78167. Not so. EPCA gives DOE the discretion to grant waivers for different classes or types regardless of what a state petition might say, 42 U.S.C. § 6297(d)(4), and in any event the analyses in the California Petition apply to *all* classes and types, CEC Petition, No. 1 at 4.

Second, DOE stated:

> Even if [the question of standards for different classes] were [at issue], however, DOE would be *concerned* that differing maximum WF levels established for specific classes . . . *could* have negative consequences for water savings in California. Regulating . . . front-loading . . . washers to a 6.0 WF, while allowing a significantly less stringent WF level for top-loader washers, would likely further increase the existing price differential between top- and front-loading washing machines. . . . . The result of this change in price difference *could* well increase purchases of less water efficient residential clothes washers, and *potentially* offset the intended benefit from setting a water efficiency standard for certain but not all classes of residential clothes washers.

71 Fed. Reg. at 78167 (citations omitted). DOE's "concern" that something "could" happen that might "potentially" reduce the savings from standards is not a valid evidentiary basis for a finding. And DOE's "concern" is purely an artifact of DOE's own making. DOE appears to reason thus:

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[6] DOE might have believed that it has no authority to grant a waiver for a state standard not expressly set forth in a waiver petition, such as a 6.3 WF Standard for top-loaders. But DOE can accomplish the same practical result without actually modifying a state standard. Thus here, DOE could grant a waiver for California's 6.0 WF Standards, but, with regard to top-loaders, the waiver would be subject to the condition that the State could enforce the Standard only as to those machines with a WF above 6.3.

(1) a large price differential could occur between top-loading and front-loading RCWs if the former has no WF requirement or one much less stringent than the latter;

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

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

(4) because (as determined in (3)) DOE must not allow California to regulate top-loader RCWs to *any* WF standard, a large price differential between top-loaders and front-loaders is in fact likely;

and therefore,

(5) California cannot regulate *either* top loaders or front loaders!

With all due respect to DOE, this does not carry out either the letter or the spirit of section 6297(d). Even if the first three premises are accepted (despite the weaknesses discussed above), the fourth is solely a problem of DOE's own creation, for, as footnote 6 *supra* explains, nothing stops DOE from granting a conditional waiver for top-loaders at a level (6.3) that would substantially limit the likely price differential.

II. The California Standards Are "Needed" to Meet Unusual and Compelling State and Local Water and Energy Interests, Which Are Different in Both "Nature" and "Magnitude" from Those Prevailing Generally in the U.S.

A. DOE erred in concluding that California's water and energy interests are not "different in nature" from those prevailing generally in the U.S.

Although DOE correctly concluded that California met its burden of showing that the State's water and energy interests differ in "magnitude" from those in the U.S. generally, DOE erroneously concluded that the State failed to show that its interests are different in "nature." 71 Fed. Reg. at 78161-62, 78167-68.

The Petition demonstrates that California's population, California's water use, California's water supplies, California's water costs, California's energy use for water pumping and for treatment of water supplies, the need of California's economy for water, and the implications of water and energy supplies and use on California's

environment are, both singly and in combination, unique *both* in nature and magnitude. CEC Petition, No. 1 at 5-15. For example:

> California is the largest state in the nation . . . . California's total water . . . withdrawals exceed all other states . . . . [¶] [T]he median [population] growth rate for all states is expected to be approximately 20 percent through 2025, well under California's projected growth rate. . . . [¶] . . . California . . . generated one-eighth of the total nationwide [agricultural] receipts and more than the combined receipts from Texas and Iowa, which are the second and third largest agricultural producers in the U.S. . . . . California has the largest proportion of irrigated land to total farmed acreage . . . as well as the highest amount of irrigated farm land of any state in the country . . . . [¶] California's water supply situation is unique in scope and scale compared to other states or even the world. . . . . [¶] Five years of record-breaking drought along the Colorado River . . . have resulted in flows among the lowest in the past 500 years . . . . Even if the Colorado River returns to its full flows, California is legally required to reduce the amount it takes from the River . . . . [¶] . . . [F]or more than a decade California's State Water Project has delivered only half its contract volumes . . . . All of the state's major river systems . . . are over-appropriated, and groundwater basins face severe overdrafts. . . . . [¶] California's water rates substantially exceed the national average. . . . . [W]ater saved in California is worth even more . . . than water saved in the United States . . . . [T]he gap between the water rates in California and in the rest of the country is likely to increase . . . . [¶] California is where "the highest concentrations of MTBE [in groundwater] are reported . . . ." . . . . California's water supplies have one of the highest embodied energy costs in the nation. "California's water systems are uniquely energy-intensive, relative to national averages . . . ."

CEC Petition, No. 1 at 5, 7, 9, 11, 12, 13-14. This and a large amount of evidence elsewhere in the record, submitted by both supporters and opponents of the waiver, overwhelmingly demonstrates that California's water and energy interests are "different" in both "nature" and "magnitude" from those in the U.S. generally. *See, e.g.*, California Municipal Utilities Association (representing the vast majority of California's publicly-owned water utilities and energy utilities), No. 7 at 1 ("California's water systems are *unique*[] . . . due to pumping requirements to deliver . . . water long distances . . . over mountain ranges") (emphasis added); California Water Association (representing investor-owned water utilities), No. 51 at 1 ("[a]s *the nation's largest* water user . . . California has a series of water systems that are

uniquely energy-intensive") (emphasis added); San Diego County Water Authority, No. 19 at 1 ("The State Water Project [is] *the nation's largest* state-built water conveyance system [with] reservoirs, lakes, power plants, pump stations, canals, tunnels and a 444 mile-long aqueduct") (emphasis added); Association of California State Water Agencies, No. 40 at 2-3 ("California has *the most extensive* water importation and distribution system in the nation. Significant water supplies are located more than 300 miles from the urban areas . . . . Much of the water supply system is vulnerable to catastrophic effects of earthquakes and/or levee failures") (emphasis added); Pacific Gas and Electric Company, No. 44 at 3 ("The totality of the challenges for both water and energy supply, the environmental impacts, the connection of these factors with the California economy, and in fact, the sheer size of the California population ensure that *the California situation can only reasonably be described as unique and compelling*. Recently increased concerns . . . such as the deteriorating condition of California's water delivery system (i.e., inadequate levees), add more urgency to the California situation") (emphasis added); Marin Municipal Water District, No. 5 ("The extensive importation and distribution of water supplies not only increases costs; it greatly increases security risks. Much of California's water supply travels through the Sacramento Delta, contained and channeled to Southern California through a myriad of levees. Now, these aging levees are susceptible to failure. The liability has become so great that the Governor of California has recently requested that the Delta levees be granted National Emergency status. Seawater intrusion threatens groundwater sources where over-pumping has become necessary; further surface water interruptions could cause irreparable damage. *No other state* is so susceptible to the catastrophic effects of natural or intentional interruptions in water supply") (emphasis added); *see also* Air-Conditioning and Refrigeration Institute (opponent of waiver), No. 35 at 3; Sierra Nevada Alliance, No. 4; North Marin Water District, No. 6; Three Valleys MWD, No. 12; Foothill MWD, No. 16; Santa Fe Irrigation Dist., No. 20; West Basin MWD, No. 24; City of Roseville, No. 32; Crescenta Valley WD, No. 42; Los Angeles Dept. Water and Power, No. 46; Irvine Ranch WD, No. 48; City of Napa, No. 56; City of Del Mar, No. 72; Cucamonga WD, No. 13; San Diego County Water District, No. 29; NRDC, No. 41; California Urban Water Conservation Council, No. 61; Long Beach Water Department, No. 22; Olivenhain Water District, No. 58; Channel Islands Beach CSD, No. 26; Municipal Water District of Orange County, No. 70.

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B. The California Standards are "needed."[7]

Because DOE (erroneously) concluded that California did not show that it has "unique and compelling" water or energy interests, the agency found it unnecessary to determine whether the record shows that the State's clothes washer Standards are "needed," 42 U.S.C. § 6297(d)(1)(B), to meet such interests. 78 Fed. Reg. at 78164. The record is more than adequate to address the issue, and on reconsideration DOE should find that the Standards are in fact "needed."

First, DOE should recognize that "needed" does not mean absolutely indispensable (no State standard could meet such a criterion except in an "emergency" situation, *see* 42 U.S.C. § 6297(d)(5)(B), but rather "'[n]eeded' should be reasonabl[y] interpreted as '[a] condition or situation in which something is required *or wanted*.'" CEC Rebuttal, No. 79 at 5 (emphasis in original) (footnote omitted).

Second, DOE should conclude that no matter how one interprets the word "needed," the evidence overwhelmingly demonstrates that the Standards are in fact "needed," because the people responsible for meeting California's water and energy needs – the State's water and energy utilities – unanimously and strongly said that they are. For example, the California Municipal Utilities Association, which represents the vast majority of California's publicly-owned water utilities and energy utilities, stated that the Standards are "*critical* to the State's economy and quality of life of populations that will make California their home for generations to come." CMUA, No. 7 at 2 (emphasis added). Representing investor-owned utilities, the California Water Association stated that "[i]t is *crucial* that California carry out these . . . standards and responsibly reduce its dependence on overly tapped and energy-intensive regional and imported water supplies." CWA, No. 51 at 2 (emphasis added). Similarly, the Association of California Water Agencies informed DOE that "[m]aximum practicable water use efficiency is *essential* to minimize the severe negative impact of major interruptions in California's unique and precarious water supply network. . . . . [¶] Improving the efficiency of clothes washers is only part of the overall solution for reliable water supply, yet it is a *vital* part." ACWA, No. 40 at 2 (emphasis added). Focusing on energy needs, Pacific Gas and Electric Company, the nation's largest combined electric and natural gas utility, urged DOE to recognize that "[a]ll cost-effective tools are desperately *needed* to meet [California's] manifold water and energy challenges. . . . . Resources that are now being less efficiently

[7] The material in this section is also relevant to the "alternatives" discussion in Part I.B.2., at pp. 9-13 *supra*.

spent on residential washer efficiency programs (relative to the cost efficiency of the preempted California standards) *must* be freed up to allow the State to develop new . . . programs . . . ." PG&E, No. 44 at 3 (emphasis added); *see also, e.g.*, California Urban Water Conservation Council, No. 61; Alameda County Water District, No. 57; City of Downey, No. 60.

III. The Preponderance of the Evidence Demonstrates That the California Standards Will Not Significantly Burden the Clothes Washer Industry on a National Basis.

DOE stated that:

> . . . DOE has not made a determination as to whether the California regulation would significantly burden the manufacturing, marketing, distribution, sale or servicing of residential clothes washers on a national basis. . . . . [¶] . . . . Manufacturers did not provide detailed cost estimates and AHAM's analysis did not provide justification for its underlying assumptions. Therefore, the interested parties opposed to the California Petition did not satisfy their burden of providing sufficient information to allow DOE to determine that, if the California Petition were granted, the proposed California regulation would significantly burden manufacturing, marketing, distribution, sale or servicing of the residential clothes washers on a national basis. (42 U.S.C. 6297(d)(3))

71 Fed. Reg. at 78164, 78167; *see also id.* at 78164-67. DOE was correct in rejecting as inadequate the manufacturers' evidence on the ground that "[m]anufacturers did not provide cost estimates for redesigning their products to meet the WF levels of the California regulation," *id.* at 78166; *see also id.* at 78164-67 – in other words, manufacturer "analyses" of the potential impacts on the clothes washer industry from the California Standards are not actually related to the Standards and are therefore irrelevant.

DOE was also correct in rejecting AHAM's analyses, because "[e]verything that [AHAM] said on this matter flows from a . . . study that is based primarily on 'interviews' with manufacturers," CEC Rebuttal, No. 79 at 8, and therefore could not be adequately assessed. (By contrast, the methodology and data used in the Energy Commission's analyses were open and available. See pp. 5-9 *supra* and evidence cited therein.) Moreover, the record demonstrates that "the [AHAM] estimates of manufacturer costs – and therefore the predictions about all other industry burdens –

are substantially exaggerated." CEC Rebuttal, No. 79 at 8; *see also id.* at 8-13 and evidence cited therein.

Not only was the evidence presented by waiver opponents inadequate to meet their burden of showing adverse impacts on the industry, but also, and even more important, the record affirmatively demonstrates that there would be no such impacts from the Standards. *E.g.*, CEC Rebuttal, No. 79 at 8-17 and evidence cited therein; PG&E, No. 44 at 5-8 ("the implications for manufacturing, marketing, distribution, sale and servicing of covered products on a national basis is clear: minimal impact").

IV. If a Waiver Petition Is Granted, DOE Must Immediately Adopt a Rule Specifying the Effective Date of the State Standards, without Conducting Another Rulemaking.

When DOE published California's Petition and announced this rulemaking proceeding, it indicated that it would follow the procedures established in EPCA:

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

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

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

71 Fed. Reg. 35419, 35420 (June 20, 2006). Thus DOE now seems to believe that if it denies a waiver petition, the matter is closed, but if grants a waiver petition, then everyone begins anew and discusses the same issues all over again. If that is indeed DOE's belief, it is wrong.

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

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

42 U.S.C. § 6297(d) (emphasis added).

DOE cites another provision of EPCA, 42 U.S.C. section 6306(a)(1), in the apparent belief that the latter section requires DOE to begin again with another proceeding. 71 Fed. Reg. at 35420. DOE is wrong. That provision simply states:

> (a) Procedure for prescription of rules
>
> (1) In addition to the requirements of section 553 of Title 5, rules prescribed under section 6293, 6294, 6295, 6297, or 6298 . . . shall afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule.

42 U.S.C. § 6306(a)(1). The "addition[al] requirements" of "section 553 of Title 5," which is in the federal Administrative Procedure Act, add little to section 6306(a)(1)'s "[p]rocedure." In relevant part, section 553 states:

> General notice of proposed rule making shall be published in the Federal Register . . . . The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. . . . .
>
> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553. In its proceeding on the California Petition, DOE has complied with these provisions, as well as with the provisions of 42 U.S.C. section 6306(a)(1). As a result, DOE has met *all* of the statutory "requirements [for] rules prescribed under section . . . 6297 . . . ." Therefore, if DOE grants the Petition, which it should, it must (and thereby does) simultaneously give final approval to a rule waiving preemption and specifying an effective date for the California standards without any further administrative proceedings.

Conclusion and Options for DOE Action

Although there is only one action fully consistent with the law and the facts, several options would be available to DOE if, upon reconsideration, the agency changed its mind on some of the issues discussed above but (erroneously) affirmed its original determination on others. The following scenarios, which do not exhaust the possibilities, combine:

> the 30-day deadline for DOE to act after the January 29 filing of this Request > February 28, 2007;
>
> an assumed additional 30 days for publication in the Federal Register > March 30, 2007;

application of EPCA's three-years-after-publication rule > March 30, 2010; and

the addition of two days, in order to provide record-keeping clarity and efficiency by putting the effective date at the beginning of a month >

to arrive at Thursday, April 1, 2010 as the effective date of the California standards. (If EPCA's five-years-after-publication rule were applied, the same process (plus adding one more day to start on a weekday) would lead to Monday, April 2, 2012 as the effective date.)

1. 6.0 WF Standards Take Effect on Thursday, April 1, 2010. As we demonstrated above, the preponderance of the evidence shows that the California 8.5 and 6.0 WF Standards are needed to meet unusual and compelling State and local water and energy interests, will not significantly burden the clothes washer industry on a national basis, and are not likely to result in the unavailability of any product characteristics, features, and the like. *See* 42 U.S.C. § 6297(d). Therefore, all the Standards should receive a waiver and take effect three years after DOE's action. However, the 8.5 Standards would be meaningless while the 6.0 WF Standards were also in place. As a result, the 8.5 WF Standards should receive a waiver, but their taking effect should be conditioned upon the 6.0 Standards not taking effect because of a future, external, controlling event (e.g., being completely overturned in court).

2. 6.0 WF Standards Take Effect (but Enforcement is Limited to Models Above 6.3 WF for Top-Loaders) on Thursday, April 1, 2010. If DOE were to determine that the appropriate showings had been made on all of the Standards, except (erroneously) that no top-loader below a 6.3 WF will likely be available in California in 2010, then based on those determinations there should be a waiver that allows enforcement of California's 6.0 WF Standard for top-loaders only against those models above a 6.3 WF and that allows full enforcement of the 6.0 WF Standard for front-loaders, both to take effect in 2010.

3. 8.5 WF Standards Take Effect on Thursday, April 1, 2010; 6.0 Standards Take Effect on Monday, April 2, 2012. If DOE were to determine that the appropriate showings had been made on all of the Standards, but also determined (erroneously) that the record shows that an additional two-year delay for the 6.0 WF Standards is necessary to accommodate retooling, redesign, or distribution needs, *see* 42 U.S.C. § 6297(d)(5)(A), then the 8.5 WF Standards should take effect in three years and the 6.0 WF Standards in five years.

Respectfully submitted,

William M. Chamberlain, Chief Counsel
Jonathan Blees, Assistant Chief Counsel
William Staack, Senior Staff Counsel
Michael Doughton, Senior Staff Counsel

Case Name: California Energy Commission Petition for Exemption from Federal Preemption of California's Water Conservation Standards for Residential Clothes Washers

DOE Docket Number: EE–RM–PET–100

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 9th Street, Sacramento, California 95814. On this date, I served the following document:

CALIFORNIA'S REQUEST FOR RECONSIDERATION

__X__ **by U.S. Mail** – by placing a original thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at Sacramento, California addressed as set forth below:

__X__ **by Courier Service** – a true copy thereof to the office(s) of the addressees:

Ms. Brenda Edwards-Jones
U.S. Department of Energy
Building Technologies Program
Mail Stop EE-2J, Room 1J-018
1000 Independence Avenue, SW
Washington, DC 20585-0121

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 29, 2007, at Sacramento, California.

CHESTER HONG
Print Name

Signature