

State of Tennessee  
Office of the Attorney General & Reporter



September 26, 2023

**SUBMITTED ELECTRONICALLY  
VIA REGULATIONS.GOV**

Appliance and Equipment Standards  
Program  
U.S. Department of Energy  
Building Technologies Office  
Mailstop EE-5B  
1000 Independence Ave. SW  
Washington, D.C. 20585

**Re: Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters, No. EERE-2017-BT-STD-0019**

Dear Secretary Granholm,

The Department of Energy is continuing its unprecedented effort to prohibit droves of existing products that are ubiquitous in American homes. At issue now is a new set of efficiency standards (the “Proposed Standards” or “Standards”) for residential water heaters that the Department has proposed under the Energy Policy and Conservation Act (EPCA). *See generally* Dep’t of Energy, *Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters*, 88 Fed. Reg. 49,058 (July 28, 2023).

All told, the past two years have seen the Department consider, propose, or move to finalize some **36** new EPCA standards. Products affected range from clothes washers and dryers, to microwave ovens, to stoves, to ceiling fans, to refrigerators, to dishwashers, to dehumidifiers, and many more.<sup>1</sup> At this point, the Department seems dead set on dictating the products Americans can use in nearly every aspect of domestic life. Yet the Proposed Standards would hamper access to affordable and effective water heaters for energy-efficiency gains that are marginal at best and illusory at worst.

Tennessee has previously written to register its concern with other of the Department’s proposed EPCA standards, *see, e.g.*, Cmt. of Tennessee *et al.* on Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers (Apr. 28, 2023), *available at* <https://tinyurl.com/38457upd> (State Refrigerator Cmt.); Cmt. of Tennessee *et al.* on Energy Conservation Standards for Residential Clothes Washers (May 3, 2023), *available at* <https://tinyurl.com/4h3hjbey> (State Washer Cmt.), and renews those objections here. In particular, the Department’s approach is unlawful on several fronts:

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<sup>1</sup> *See* Office of Information & Regulatory Affairs, Agency Rule List – Spring 2023 (Dep’t of Energy), <https://tinyurl.com/yc8v9zat> (last accessed Sept. 25, 2023).

1. The Standards Improperly Rely on Faulty Social-Cost-of-Carbon Estimates. As is now habit, the Department’s Proposed Standards rely extensively on the misguided use of the social costs of carbon, methane, and nitrous oxide (the “social cost of greenhouse gases” or “SCGHG” or “IWG estimates”), *see, e.g.*, 88 Fed. Reg. at 49,062 n.8 & tbl.I.3, 49,133-34, as developed by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), *see* IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990 (Feb. 2021) (discussing the development of those estimates) [hereinafter 2021 TSD].<sup>2</sup>

The issues with the IWG estimates have been addressed exhaustively in numerous other forums, including in prior comments to the Department’s proposed energy conservation standards for ovens and stoves. *See* Cmt. of Louisiana *et al.* on Energy Conservation Standards for Consumer Conventional Cooking Products (Apr. 3, 2023), *available at* <https://tinyurl.com/yby4zhav>. Tennessee incorporates those comments’ criticisms of the IWG estimates, as well as those contained in *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022). Though the Fifth Circuit reversed that decision for lack of standing, its analysis underscored that the Department “must exercise discretion in ... deciding to use the” IWG estimates. *Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 681 (5th Cir. 2023). The Department’s continued rote application of the fundamentally flawed IWG estimates fails this directive.<sup>3</sup>

2. The Standards Dismiss Federalism Concerns in Violation of Executive Order 13,132. Executive Order 13,132 requires agencies to consult with state and local officials to minimize the intrusive effect of “policies that have federalism implications.” E.O. 13,132 § 3(c). The Proposed Standards’ Executive Order 13,132 analysis is patently deficient. The Department “tentatively determined that [the Standards] would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” because (1) “EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule” and (2) “States can petition [the Department] for exemption from preemption.” 88 Fed. Reg. at 49,170. Thus, the Proposed Standards say, “no further action is required by Executive Order 13,132.” *Id.*

As Tennessee has previously explained, *see* State Refrigerator Cmt. 2-3; State Washer Cmt. 3, the Proposed Standards in fact have significant federalism implications within the meaning of Executive Order 13,132. For one, the Department’s standards have a preemptive effect on States’ procurement standards. *See* 42 U.S.C. § 6297(e). For another, States own and purchase appliances like water heaters.

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<sup>2</sup> *Available at* [https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument\\_SocialCostofCarbonMethaneNitrousOxide.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf).

<sup>3</sup> To be sure, the Department claims that the Proposed Standards are “economically justified even without inclusion of monetized benefits of reduced GHG emissions.” 88 Fed. Reg. at 49,153. That stands in significant tension with the Department’s statement that it is “important to take” such emissions into account via the IWG estimates, as well as its extensive discussion of IWG estimates throughout the Proposed Standards. *Id.* at 49,073; *see also id.* at 49,062 n.8 & tbl.I.3, 49,133-34. In all events, that tension underscores the importance of commenters’ previous requests that the Department forgo use of the IWG estimates altogether.

The Proposed Standards' effect on water heater costs thus directly affects States as purchasers. The Department's proposal directly implicates federalism and should have triggered E.O. 13,132 review.

3. The Standards Overlook EPCA's Constitutional Problems. Congress can only regulate intrastate activity under the Commerce Clause when that activity "substantially affects interstate commerce." *United States v Lopez*, 514 U.S. 549, 559 (1995) (quotations omitted). Yet the Proposed Standards, tracking the EPCA itself, cover all commercial activity, whether inter- or intrastate. For this to be proper, the Department must show that the intrastate activity covered by the Proposed Standards substantially affects the interstate market for covered products. There is no such analysis in the Proposed Standards and no constitutional basis for applying the Standards to intrastate commerce in water heaters. This flaw pervades the Proposed Standards even under present-day Commerce Clause precedent; it also renders the Standards invalid under the proper understanding of the Commerce Clause, which does not extend to empower Congress to regulate purely intrastate activities so long as they "substantially affect interstate commerce." *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). On top of all that, the Proposed Standards will dominate fields traditionally belonging to the States—*i.e.*, the regulation of consumer goods. That surely turns "the Tenth Amendment on its head," *id.* at 589 (Thomas, J., concurring), and suggests the EPCA does not provide the Department such sweeping authority, *see, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

4. The Standards Fail to Adequately Consider Important Rulemaking Factors Like Lost Consumer Utility and Strain on the Energy Infrastructure. The Department fails to grapple with several "important aspect[s]" of the regulatory problem the Proposed Standards address. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Among Tennessee's concerns, the Department has seemingly overlooked consumers' need for different types of water heaters (condensing versus non-condensing) depending upon the configuration of their homes. *Compare* Cmt. of Nat'l Propane Gas Ass'n *et al.* 2-3 (Aug. 28, 2023), *with* 88 Fed. Reg. at 49,151. Relatedly, the Proposed Standards risk backfiring by eliminating the market for non-condensing, gas-fired, instantaneous water heaters—which are more affordable than their electric-powered counterparts—and instead forcing consumers towards less-efficient, non-condensing gas-storage water heaters. *E.g.*, Cmt. of Nat'l Multifamily Housing Council *et al.* 5 (Sept. 24, 2023). Finally, the Department's proposal presents significant concerns for the Nation's energy infrastructure and power grid, which are under duress as it stands. *E.g., FERC Commissioners Tell Senators of Major Grid Reliability Challenges, with Some Blaming Markets*, Utility Daily (May 5, 2023), <https://tinyurl.com/2c3zdf3c>. The Proposed Standards necessitate a drastic shift from gas-fired water heaters to those powered by electric pumps—with the Department estimating that the share of storage water heaters powered by electric pumps will increase from 5% to 63% by 2030. 88 Fed. Reg. at 49,144. Yet the Department does not meaningfully address the strain its Proposed Standards' demand for additional electricity will place on an already overworked energy grid. Nat'l Propane Gas Ass'n Cmt. 4.

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Notwithstanding Tennessee and other States' previous objections, the Department continues to publish new energy-efficiency standards at a breakneck pace. Tennessee again requests that the Department cease and desist in its campaign to micromanage Americans' access to effective and affordable appliances that are central to daily life.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Skrmetti". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Jonathan Skrmetti

Tennessee Attorney General & Reporter