DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Docket No. EE–RM–PET–100]

Energy Efficiency Program for Consumer Products: California Energy Commission Petition for Exemption From Federal Preemption of California's Water Conservation Standards for Residential Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of Denial of a Petition for Waiver from Federal Preemption.

SUMMARY: The Department of Energy (hereafter ''DOE'') announces its denial, and the reasons therefore, of the California Energy Commission's Petition for Exemption from Federal Preemption of California's Water Conservation Standards for Residential Clothes Washers (hereafter ''California Petition'').

DATES: A request for reconsideration of the denial must be received by DOE not later than January 29, 2007.

ADDRESSES: A request for reconsideration must submitted, identified by docket number EE–RM–PET–100, by one the following methods:

• Mail: Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.

• Hand Delivery/Courier: Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

Instructions: All submissions received must include the agency name and docket number for this proceeding.

FOR FURTHER INFORMATION CONTACT: Bryan Berringer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–0371, or e-mail: *Bryan.Berringer@ee.doe.gov*; or Francine Pinto, Esq., or Chris Calamita, Esq., U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7432 or (202) 586–1777, e-mail: *Francine.Pinto@hq.doe.gov* or *Christopher.Calamita@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of Today's Action

DOE is denying a petition submitted by the California Energy Commission (CEC) for a waiver from Federal preemption of its residential clothes washer regulation contained in section 1605.2(p)(1) of the California Code of Regulations.[1] DOE is denying the petition for three separate and independent reasons. First, DOE is denying the petition because DOE does not have the statutory authority to prescribe a rule for California that would become effective by January 1, 2007, the first of two compliance dates contained in Title 20, section 1605.2(p)(1) of the California Code of Regulations. Section 327(d)(5)(A) of the Energy Policy and Conservation Act (Pub. L. 94–163, as amended) (EPCA) requires that a final rule prescribed by DOE to grant a petition such as the California Petition must have an effective date at least three years following publication of the final rule. (42 U.S.C. 6297(d)(5)(A)) The California Petition does not comply with the effective date criteria in EPCA, and CEC has not petitioned for an effective date other than that provided in the California regulation. CEC has provided information only in the context of the compliance dates of the California regulation, and has not provided the information necessary for DOE to promulgate a rule with an effective that would be compliant under EPCA, i.e., a rule with an effective date three years following the date of issuance. Therefore, DOE denies the California Petition's waiver request.

Second, CEC has not established by a preponderance of the evidence that the State of California has unusual and compelling water interests, a condition required by EPCA for DOE to grant California a waiver from Federal preemption. (42 U.S.C. 6297(d)(1)(B)) CEC did not provide sufficient support for what CEC alleges to be the costs and benefits of the California regulation presented in the petition. Further, CEC did not provide an appropriate analysis of non-regulatory alternatives for comparison to the California regulation. Without support for the likely costs and benefits associated with the California regulation and an appropriate alternatives analysis, DOE was unable to evaluate if the California regulation is ''preferable or necessary'' as compared to non-regulatory alternatives, which is a required showing in order for DOE to determine that an unusual and compelling water interest exists. (42 U.S.C. 6297(d)(1)(C)(ii)) Therefore, DOE cannot find that the California regulation is preferable or necessary as compared to non-regulatory alternatives, and denies the California Petition's waiver request.

Third and finally, interested parties demonstrated by a preponderance of evidence that the State of California regulation would likely result in the unavailability of a class of residential clothes washers in California. Commenters submitted to DOE information demonstrating that the 2010 water factor (WF) standard would likely result in the unavailability of top-loader residential clothes washers in California. Thus, even if DOE had the authority to ignore or override the first effective date of the California

[1] The Appliance Efficiency Regulations, (California Code of Regulations, Title 20, sections 1601 through 1608) dated January 2006, were adopted by the California Energy Commission on October 19, 2005, and approved by the California Office of Administrative Law on December 30, 2005. The Appliance Efficiency Regulations include standards for both federally-regulated appliances and non-federally-regulated appliances.

regulation (i.e., 2007) and promulgate a rule that complied with the EPCA requirement that the rule not take effect for another three years, the rule would violate EPCA in another way, i.e., it would mandate the 6.0 WF standard in 2010, which would likely result in the unavailability of top-loader residential clothes washers. Therefore, under section 327(d)(4) of EPCA, DOE denies the California Petition's waiver request. (42 U.S.C. 6297(d)(4))

II. Background

A. Energy Conservation Standards Under EPCA

Part B of Title III of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) Products covered under the program, including residential clothes washers, are listed in section 322(a) of EPCA. (42 U.S.C. 6292(a)) Section 325(g) of EPCA establishes energy conservation standards for residential clothes washers and authorizes DOE to amend these standards. (42 U.S.C. 6295(g))

B. Preemption of State Standards

Generally under the provisions of EPCA, where an energy efficiency standard is effective for a ''covered product'' under EPCA, including a standard for residential clothes washers, a State regulation concerning the energy efficiency, energy use, or water use of that product is preempted and is not effective. (42 U.S.C. 6297(c)) Section 322(a)(7) lists residential clothes washers as a product covered under Part B of Title III of EPCA. (42 U.S.C. 6292(a)(7)) DOE has established energy efficiency standards for residential clothes washers as a covered product under section 325(g)(4)(A), and those standards are currently in effect (10 CFR 430.32(g)). (42 U.S.C. 6295(g)(4)(A)) Therefore, State regulations concerning the water use of residential clothes washers are preempted by the Federal standards. EPCA provides several provisions in which the Federal standards do not preempt State regulation, but for residential clothes washers the only applicable exception from the preemption provision is if a waiver is granted under section 327(d). (42 U.S.C. 6297(c)(2))

1. DOE Energy Conservation Standards for Residential Clothes Washers

The initial Federal efficiency standards prescribed in EPCA, as amended by the National Appliance Energy Conservation Act of 1987 (Pub. L. No. 100–12) (NAECA), required an unheated rinse water option for residential clothes washers manufactured on or after January 1, 1988. (42 U.S.C. 6295(g)) On January 12, 2001, DOE issued a final rule establishing energy efficiency standards for five product classes of residential clothes washers (hereafter referred to as ''the January 2001 final rule''): top-loading compact; top-loading, standard; front-loading; top-loading, semi-automatic; and top-loading, suds-saving. 66 FR 3314.

The January 2001 final rule established minimum energy efficiency standards, set forth in Table II.1, below, to become effective on January 1, 2004, and January 1, 2007. The January 2001 final rule constituted the second residential clothes washer rulemaking required by EPCA. DOE's standards for residential clothes washers are energy efficiency standards only; DOE has not set a water use requirement for residential clothes washers.[2] (10 CFR 430.32(g))

TABLE II.1.—FEDERAL RESIDENTIAL CLOTHES WASHER STANDARD LEVELS

Product class	Capacity (ft.[3])	Modified energy factor (ft.[3]/ kWh / cycle)	
		Effective date 1/1/2004	Effective date 1/1/2007
Top-Loading, compact	< 1.6	0.65	0.65
Top-Loading, standard	≥ 1.6	1.04	1.26
Front-Loading	—	1.04	1.26
Top-Loading, Semi-automatic	—	Unheated rinse water option	Unheated rinse water option
Suds-saving	—	Unheated rinse water option	Unheated rinse water option

2. Waiver of Preemption

As stated above, Federal energy efficiency standards for residential products generally preempt State laws, regulations and other requirements concerning energy conservation testing, labeling, and efficiency standards. (42 U.S.C. 6297(a)–(c)) Section 327(d) of EPCA sets forth the procedures and provisions for granting waivers from Federal preemption (hereafter ''waiver'') for particular State laws or regulations. (42 U.S.C. 6297(d)) Section 327(d)(1)(A) of EPCA provides that any State or river basin commission with a State regulation regarding energy use, energy efficiency, or water use requirements for products regulated by DOE may petition for a waiver of Federal preemption and seek to apply its own State regulation. (42 U.S.C. 6297(d)(1)(A)) Regulations implementing the statutory provisions regarding petitions for waiver from Federal preemption are codified at 10 CFR part 430 subpart D.

Section 327(d)(1)(B) of EPCA requires a petitioner to establish ''by a preponderance of the evidence'' that its proffered regulation ''is needed to meet unusual and compelling State or local energy or water interests.'' (42 U.S.C. 6297(d)(1)(B)) ''[U]nusual and compelling'' interests are defined as interests which:

(i) Are substantially different in nature or magnitude than those prevailing in the United States generally; and

(ii) Are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.''

(42 U.S.C. 6297(d)(1)(C)(i) and (ii))

The Secretary may not grant a waiver if he finds ''that interested persons have established, by a preponderance of the evidence, that'' the State regulation would ''significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis.'' (42 U.S.C.

[2] The Energy Policy Act of 2005 (Pub. L. 109–58) amended EPCA with new energy efficiency and water conservation standards for commercial clothes washers. These new standards require products manufactured on or after January 1, 2007, to have a modified energy factor of at least 1.26 and a water consumption factor2 of not more than 9.5. (42 U.S.C. 6313(e))

6297(d)(3)) This is the case even if a State has sufficiently demonstrated the existence of ''unusual and compelling interests.''

To evaluate whether the State regulation will create a significant burden, the Secretary must consider ''all relevant factors,'' including the following:

(A) The extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;

(B) The extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;

(C) The extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction—

(i) In the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or

(ii) In the current or projected sales volume of the covered product type (or class) in the State and the United States; and

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

(42 U.S.C. 6297(d)(3)(A) through (D))

The Secretary also may not grant a waiver if interested persons have established, by a preponderance of the evidence, that

[T]he State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding[.]''

(42 U.S.C. 6297(d)(4)) The failure of some classes (or types) to meet these statutory criteria shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types). (*Id.*)

The phrase ''any covered product type (or class) of performance characteristics'' is not clear on its face. (42 U.S.C. 6297(o)(4)) Grammatically, the phrase ''of performance characteristics'' appears to modify the term ''product type'' and the term ''class.'' While that phrase fits with the term ''class,'' it is ambiguous at best when read with the term ''product type.''

DOE interprets section 327(d)(4) consistent with a parallel provision in section 325(o)(4) which reads,

[T]he standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding.

(42 U.S.C. 6295(o)(4)) The similarity of the language regarding ''covered product type (or class) of performance characteristics'' in section 327(d)(4) and section 325(o)(4) indicates that this language should be read consistently between the two sections. Further, the similarity in function between these two sections supports a consistent reading.

Section 325(o) establishes the criteria for prescribing new or amended Federal standards. (42 U.S.C. 6295(o)) In past discussions of section 325(o)(4), DOE has stated that it is prohibited from establishing a standard that the Secretary finds will result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time of the Secretary's finding. 61 FR 36974, 36984 (July 15, 1996).

Section 327(d) establishes the criteria for prescribing a rule that grants a waiver from preemption for a State regulation. Section 327(d)(4) prohibits DOE from prescribing such a rule if the rule would impact the availability of covered products. Concern with the impact of an efficiency standard on product availability is equally applicable for a State standard for which a waiver from preemption is requested, as it is with a Federal standard. Therefore, DOE sees no need or reason to interpret the ''covered product type (or class) of performance characteristics'' language differently in section 327(d)(4) than in section 325(o)(4).

Furthermore, this interpretation of 327(d)(4) is consistent with the balance Congress apparently meant to strike between more stringent efficiency standards and consumer product choice. The Senate report accompanying NAECA states that DOE shall not ''grant a waiver if interested persons show that the State regulation is likely to result in the unavailability in the State of a product type or of products of a particular performance class, such as frost-free refrigerators.'' (S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987). at 2)

A final reason for choosing this interpretation of section 327(d)(4) is that in response to the notice of receipt of the California Petition and request for comment (71 FR 6022; February 6, 2006) neither California nor any commenter in response to the California petition has suggested that DOE has misconstrued section 327(d)(4).

If a petition for a waiver from Federal preemption is denied, the petitioner may ''request reconsideration within 30 days of denial.'' 10 CFR 430.48. The request must contain a statement of facts and reasons supporting reconsideration. DOE will only reconsider a denial of a petition where it is alleged and demonstrated that the denial was based on an error of law or fact and that evidence of the error is found in the record of proceedings. 10 CFR 430.48(b).

3. Legislative History

The current waiver provisions are, in part, the result of amendments to EPCA under NAECA. In 1987, Congress passed NAECA which amended EPCA's provisions on petitions for waiver from Federal preemption under section 327(d). Under the original provisions, DOE could grant a petition only if it found that there was a ''significant State or local interest to justify such State regulation'' and that ''such State regulation contains a more stringent energy efficiency standard than such Federal standard.'' (S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987). at p. 40) Furthermore, DOE could not prescribe a rule if DOE found that ''the State regulation would unduly burden interstate commerce.'' (*Id.*)

Under the NAECA revisions, the preemption provisions allow States to ''petition DOE to be waived from Federal preemption, but achieving the waiver is difficult.'' (S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987) at p. 2.) In addition, according to the Senate Report, the amended provision ''provides new and more stringent criteria that a State must establish by a preponderance of the evidence in order to receive an exemption.'' (S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987). at p. 9)

For all of the above-mentioned criteria that DOE must consider in evaluating a petition, Congress placed the burden on the petitioner, interested parties supporting the petition, and interested parties opposing the petition, depending on the criteria, to establish facts and to meet the statutory criteria ''by a preponderance of the evidence.'' The California Petition is the first petition for a waiver of Federal preemption submitted under section 327(d) since Congress amended the preemption provisions in 1987.

C. California Petition

California Assembly Bill 1561, passed by the California legislature and signed into law in 2002, required CEC to adopt water efficiency standards for residential clothes washers by January 2004, and to file a petition with DOE for a waiver by April 2004. The California legislation also requires that residential clothes washers ''be at least as water-efficient as commercial clothes washers.'' (California Public Resources Code section 25402(e)) California currently requires that commercial clothes washers meet a maximum water factor (WF) [3] of 9.5 by January 1, 2007, the same standard as prescribed by Section 342 of EPCA. (20 C.C.R. 1605.3(p) and 42 U.S.C. 6313(e)) In 2004, CEC adopted water efficiency standards for top- and front-loading residential clothes washers, setting a two-tier standard of 8.5 WF effective January 1, 2007, and 6.0 WF effective January 1, 2010. (20 C.C.R 1605.2(p)(1)) (CEC, No. 1 at p. 3)

On September 16, 2005, DOE received from CEC a petition dated September 13, 2005, for a waiver from Federal preemption pursuant to the requirements of section 327(d) of EPCA (42 U.S.C. 6297(d)) and 10 CFR part 430, subpart D. However, by letter dated November 18, 2005, DOE notified CEC that its petition had failed to comply with certain requirements set out in 10 CFR 430.42(c).[4] In particular, the original petition had not included the statement required by 10 C.F.R. 430.42(c), on whether ''[to the best knowledge of the petitioner] the same or related issue, act or transaction has been or presently is being considered or investigated by any State agency, department, or instrumentality.'' CEC responded on December 5, 2005, and provided the required information, stating that it was aware of only its petition and the California standard the CEC adopted in 2004. (CEC, No. 2 at p. 2) By letter dated December 23, 2005, DOE notified CEC that it had accepted as complete the California Petition as supplemented.[5]

On February 6, 2006, DOE published a notice of receipt of the California Petition in the **Federal Register** (hereafter referred to as the ''February 2006 notice'') and requested comments on the California Petition. (71 FR 6022) DOE received 78 comments on the California Petition, including more than 50 from California utilities, agencies, districts, water service districts, and cities.

III. Effective Date Requirements of EPCA

Section 327(d)(5)(A) of EPCA requires minimum lead times for any rule prescribed by DOE under the waiver provisions. In general, EPCA requires that,

> [N]o final rule prescribed by the Secretary under [the waiver provisions] 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 due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation.

(42 U.S.C. 6297(d)(5)(A)) EPCA also establishes separate lead time requirements if a State regulation were to become effective prior to the earliest possible effective date for the initial amendment of the energy conservation standard established by the statute. (42 U.S.C. 6297(d)(5)(B)) This separate provision is not applicable to the case at hand, as the earliest possible effective date for the initially amended standard for residential clothes washers was January 1, 1993. (42 U.S.C. 6295(g)(4)(A)) As noted above, the California Petition requests a two-tier regulation with two effective dates: 8.5 WF effective January 1, 2007, and 6.0 WF effective January 1, 2010. (20 C.C.R 1605.2(p)(1)) The requested effective date of 2007 would not allow for the minimum three-year lead time required by EPCA. Further, it is not clear what impact a revised effective date would have on the analyses provided by CEC and interested parties. If the effective dates of the two-tiered standard were each set three years beyond that of the California regulation, or if the first tier were eliminated, the water savings and costs could be different from that presented in the California petition as well as in comments provided by interested parties.

IV. Analysis of the California Petition

A. Necessity of State Regulation To Address Unusual and Compelling State Water Interests

As indicated above, in order for DOE to grant CEC's petition for a waiver from preemption, the State must establish by a preponderance of the evidence that its regulation is needed to meet unusual and compelling water interests. For such interests to exist, California's water interests must, first, be substantially different in nature or magnitude from those prevailing in the U.S. generally, and, second, be such that the State regulation is necessary or preferable to alternative approaches, evaluated in light of several specified factors. (42 U.S.C. 6297(d)(1)(C))

1. Interests Substantially Different in Nature or Magnitude From Those Prevailing in the United States Generally

a. Consideration of ''U.S. generally''.

In the February 2006 notice requesting comments on the California Petition, DOE asked whether it should interpret the phrase ''in the United States generally'' to include a comparison to both regional and national averages. 71 FR 6025. DOE received several comments on this issue, with differing opinions on whether simply a national comparison or also regional and local comparisons were appropriate.

In its comments, the San Diego County Water Authority (SDCWA) and CEC (in its rebuttal comment) asserted that DOE should not use regional comparisons to assess whether California's water interests are substantially different. The SDCWA commented that ''if Congress had intended for regional comparisons to apply, it would have stated this in [EPCA].'' (SDCWA, No. 29 at p. 3) CEC emphasized that section 327(d)(1)(C)(i) of EPCA refers to ''the United States generally.'' (42 U.S.C. 6297(d)(1)(C)(i)) CEC also challenged the relevancy of a comparison to individual States or cities and asserted that examining California's interests in the context of regions does not negate the unique water and energy costs experienced by the State of California. (CEC, No. 79 at pp. 3–4)

The National Electrical Manufacturers Association (NEMA) commented that it believes DOE should consider water use issues faced by other States on an individual basis or regions of the United States. Further, NEMA asserted that a comparison to other States on an individual basis and regions would help DOE to assess how unusual and compelling California's water interests are and the potential for the proliferation of State standards. (NEMA, No. 36, at p. 4)

The Gas Appliance Manufacturers Association (GAMA) and the Association of Home Appliance Manufacturers (AHAM) commented that a decision by DOE to grant the California standards could result in a

[3] According to the California Code of Regulations (CCR); ''Water factor'' means the quotient of the total weighted per-cycle water consumption divided by the capacity of the clothes washer, determined using the applicable test method *** which is the same test method as prescribed by DOE (i.e., 10 CFR Part, 430 Subpart B, Appendix J1 for residential clothes washers). (20 C.C.R. 1602(p) and 1604(p))

[4] Faulkner, D.L. Letter to Jonathan Blees. November 18, 2005.

[5] Faulkner, D.L. Letter to Jonathan Blees. December 23, 2005.

proliferation of State waiver requests, if other States have similar situations to California's. In its comment, GAMA questioned whether California's water concerns are so substantially different in nature or magnitude from those of many other States. (GAMA, No. 38 at p. 2) In addition, AHAM argued that California's situation is similar to that in other regions, including other western States, and could thus result in a proliferation of State standards. (AHAM, No. 52 at p. 50)

DOE interprets the term ''U.S. generally'' in section 327(d)(1)(C)(i) of EPCA as necessitating a comparison of a State's interests to national averages. The Webster's II, New Riverside University Dictionary (1994) defines ''generally'' as ''widely,'' ''usually,'' and ''in disregard of particular instances, and details.'' The Random House College Dictionary (1980) defines ''generally'' as ''with respect to the larger part,'' ''usually, commonly,'' and ''without reference to or disregarding particular * * * situations * * * which may be an exception.'' Based on the dictionary definition and plain meaning of ''generally,'' an evaluation of whether a State's interest is substantially different in nature or in magnitude calls for a comparison of the State's interests to the U.S. as a whole, instead of a comparison with discrete regions or specific States.

Further, comparison of a State's interests to national averages is reasonable given the purpose of a waiver from preemption provisions in EPCA. The waiver of Federal preemption provisions provide for the establishment, in limited instances, of a State standard that is more stringent than a Federal, i.e., national standard. Essentially, the State must demonstrate that its energy or water interests are not adequately addressed by the Federal standard.

Federal efficiency standards address, in part, the need for national energy conservation. (42. U.S.C. 6295(o)(2)(B)(i)(VI)) Consideration of the need for national energy conservation requires DOE to analyze the interests of the Nation as a whole. DOE believes that in order for a State to demonstrate the State's need for a waiver, the State must demonstrate that State or local energy or water interests are substantially different in nature or magnitude than the national energy or water interests considered by DOE in establishing the Federal standard. Therefore, a State's interests must be compared to national averages, as opposed to regional averages or averages specific to sister States.

While under the terms of EPCA the potential proliferation of State standards is an issue that DOE must consider, this issue is better addressed when conducting the necessary analysis of costs and burdens, not when considering the nature and magnitude of a State's water interests. When analyzing the costs and burdens, DOE must consider:

> The extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

(42 U.S.C. 6297(d)(3)(D)) Additionally, if DOE were to grant a request for a waiver from Federal preemption, DOE believes that the potential burden from multiple State standards could be addressed, in part, through responses to individual waiver petitions.

b. Substantially different in nature or magnitude—analysis of California's water interests.

In its petition and its rebuttal to comments, CEC stated that California's water interests are substantially different in both nature and magnitude from those prevailing in the United States generally. (CEC, No. 1 at p. 5; CEC, No. 79 at p. 4) Several interested parties provided statements in support of CEC on this point. (CUWCC, No. 61 at p. 3; SDCWA, No. 29 at p. 4)

CEC asserted that California's water interests are substantially different in nature than those prevailing in the U.S. generally. CEC stated that its water supplies are limited, noting that existing reservoirs are being drawn down in the face of drought, streams and groundwater supplies face overdraft, and under the terms of the Colorado River Agreement California will be able to draw less water from the Colorado River. (CEC, No. 1 at p. 11) CEC also stated that California has higher water rates than the U.S. in general, stating that a thousand gallons of water saved in California is valued on average at $3.15, compared to a national average of $2.88. (CEC, No. 1 at pp. 13)

CEC stated that California's water distribution has one of the highest associated energy costs in the nation, and cited a report stating that California's water systems are uniquely energy intensive due to the pumping requirements for the major conveyance systems. (CEC, No. 1 at p. 14) CEC stated that associated energy values (e.g., the energy required to transport water) average 8.4 KWh per 1,000 gallons in Southern California and can be as high as 11 kWh per 1,000 gallons in California for marginal water supplies. CEC did not provide national averages for the associated energy, generally. However, CEC stated that the average rural household well in the U.S. requires 2.61 kWh per 1,000 gallons of delivered water, whereas California estimates range from 4.1 kWh to 6 kWh per 1,000 gallons. (CEC, No. 1 at pp. 14–15)

Additionally, CEC asserted in its petition that the magnitude of California's water use is substantially different than that prevailing in the U.S. generally. CEC stated that California's total (fresh and saline) withdrawals exceed that of all other States at 51 billion gallons per year. CEC cited U.S. Geological Survey Circular 1268, ''Estimated Use of Water in the United States in 2000-Table 2,'' (revised February 2005), which estimates the average State withdrawal at 8.1 billion gallons per year. (CEC, No. 1 at pp. 5–6) CEC also stated that its projected population growth through 2025 is expected to be above the national median. (CEC, No. 1, at p. 6) CEC stated that U.S. Bureau of Census figures estimate the median growth rate for all States to be 20 percent through 2025. (Id.) Relying again on U.S. Bureau of Census figures, CEC stated that California's population is expected to increase by approximately 36 percent through 2025; increase from the current population of 36 million to 49 million in 2025. (Id.)

CEC indicated that in addition to the water demands generated by its increasing population, the State's agricultural economy requires more water than compared to the U.S. generally. CEC stated that California has the highest amount of irrigated farm land of any State in the country—8.7 million acres, and that California has the largest proportion of irrigated farm land to total farm land (32 percent) in the country. (CEC, No. 1 at p. 7)

While CEC presented information indicating that its water supplies are becoming limited and that the State faces high energy costs associated with water distribution, most of this information was not placed in the context of supply and costs on a national level. It may well be as CEC asserts that California is facing a drought and that reservoirs are being overdrawn, and that under the Colorado River Agreement California is required to decrease the amount of water it draws from the river. However, CEC failed to provide DOE with a comparison of California's supply problems to the Nation in general. Without such information, DOE is unable to determine if the nature of California's interests is different than the Nation in general. If the Nation on average, or substantial

portions thereof, was facing a drought and water supplies were being overdrawn, California's interests would not be substantially different than the U.S. generally. Similarly, neither CEC nor comments supporting its petition, provided information regarding energy costs associated with water distribution on the national level. CEC did provide a comparison of energy costs for water drawn from rural wells, but this limited comparison was not sufficient to meet the ''preponderance of evidence'' burden established by EPCA. The water interests CEC is seeking to address through the proposed California regulation are much broader than those related to water demand from rural wells; i.e., the proposed California regulation would impact all consumers of residential clothes washers, not just those that rely on rural wells.

With regard to the magnitude, DOE has determined that the California Petition demonstrated by a preponderance of the evidence that California's water interests are substantially different in magnitude from those faced by the U.S. generally. In analyzing the magnitude, as well as the nature, of a State's energy or water interests, DOE does not rely on any single factor in making a determination, but instead balances all of the relevant information presented.

CEC presented evidence that the volumetric total demand for water in California is substantially greater than that of other States in the U.S. in general. As evidenced by data submitted by CEC, California's water withdrawal is over six times that of the national per-State average, 51 billions gallons per year as compared to 8.1 billion gallons per year. (CEC, No. 1 at pp. 5–6) The California Petition also indicated that water demand would likely increase as a result of population growth which is above the national median. (CEC, No. 1 at p. 6)

Volumetric total demand in and of itself does not demonstrate a substantial difference in magnitude for the purpose of EPCA, but the total demand considered in conjunction with the likely increase in demand that will accompany California's projected population growth and the value of water saved demonstrates by a preponderance of the evidence that California's water interests are substantially different in magnitude than in the U.S. generally. If DOE were to consider only a State's total water demand in determining whether a State's water interests were substantially different in magnitude, more populous States would likely be able to demonstrate that their interests are substantially different in magnitude from the U.S. generally simply due to the fact that the State's population is greater than the average State population. This would be contrary to the general intent of the waiver provision, which is that it establishes a high bar for granting a waiver request. (See S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987). at p. 2)

CEC has demonstrated by a preponderance of the evidence that California's water interests are substantially different in magnitude from the U.S. generally by demonstrating that it has a volumetric total demand far greater than the national average—by far the largest demand in the Nation—and this demand is accompanied by a projected population increase that is above the median growth rate for all States, and an average value of water saved in California that is greater than the national average value of water saved. As stated above, CEC reported that California has higher water rates than the U.S. in general, an average of $ 3.15 per thousand gallons of water saved in California versus a national average of $2.88 per thousand gallons of water saved. (CEC, No. 1 at pp. 13)

Conversely, the California Petition asserted that California's per capita water use (for all uses) is relatively low (CEC, No. 1 at p. 5) and according to the CUWCC, California consumers use less indoor water per capita than many other States. (CUWCC, No. 61 at p. 3) The per capita demand for water by the California residential sector would indicate that California's demand is not substantially different in magnitude from the U.S. in general, on a per capita basis.

While per capita demand may be low in comparison to the national average, this fact alone is too narrow a basis to reject CEC's assertion that California's water interest is greater in magnitude than that of the U.S. generally. As stated above, DOE balances all of the factors presented by the petitioner and comments provided by interested parties in support of the petition. A per capita demand in California that was substantially higher than the average per capita demand for the U.S. generally would support a substantial difference in magnitude. However, a per capita demand in California that is lower than the national average per capita demand does not negate the fact that California faces a higher than average total volumetric demand, a projected population increase that is higher than generally projected for all of the States, and higher than average water rates.

DOE based its determination on the full spectrum of information provided by CEC and various interested parties. As stated above, on balance with all of the water demand information provided, DOE has determined that the California Petition has shown by a preponderance of the evidence that the magnitude of California's water interest is substantially different from the U.S. generally. The data regarding California's greater than average volumetric total demand, the likely increase in demand that will accompany a projected population growth that is higher than the median for all States, and the greater than average value of water saved (per thousand gallons of water) demonstrate by a preponderance of the evidence that California's water interests are substantially different in magnitude from the U.S. generally.

The Air-Conditioning and Refrigeration Institute (ARI) asserted that the Senate provided direction on the meaning of ''substantial'' in the phrase ''substantially different in nature or magnitude than those prevailing in the United States generally'' in the 1987 Senate Report on NAECA. In particular, ARI cites the Senate's reference to a ''3 to 10 year 'lock-in' period for the Federal standards except if the State can show that an 'energy emergency condition' exists within the State[.]'' (S. Rep. No. 100–6, 100th Cong., 1st Sess. (1987) at p. 2) (ARI, No. 35 at pp. 2–3)

DOE does not agree with the assertion that a State must demonstrate that an emergency exists in order for DOE to find that a State's interests are substantially different in nature or magnitude from the U.S. generally. Section 327(d)(5)(B)(i) explicitly requires a showing of an emergency condition if DOE were to prescribe by final rule that a State regulation is to become effective prior to the earliest possible effective date of a Federal standard. (42 U.S.C. 6297(d)(5)(B)(i)) The statute establishes no such requirement for determining whether a State's water interests are ''unusual and compelling.'' DOE declines to read into section 327 an additional requirement, i.e., the existence of an emergency as an element of the ''unusual and compelling'' provision—that does not appear in the text.

2. Costs, Benefits, and Burdens of the State Regulation as Compared to Alternative Measures

In addition to demonstrating that the nature or magnitude of a State's interests are different from those in the U.S. generally, CEC must also demonstrate by a preponderance of the evidence that the costs, benefits,

burdens, and reliability of the water savings resulting from its regulation make such regulation preferable or necessary when measured against alternative approaches. (42 U.S.C. 6297(d)(1)(C)(ii)) If the petitioner fails to make such a showing, DOE cannot determine that California's water interests are ''unusual and compelling.'' In the present instance, CEC and commenters supporting the California Petition failed to satisfy their burden of providing sufficient information to allow DOE to make such a determination.

a. Cost benefit analysis.

CEC estimated the energy, water, and dollar savings of the California regulation for individual consumers and for the State, and summarized these savings and a simple payback period [6] calculation in the California Petition. (CEC, No. 1 at pp. 19–26 and 36) Savings estimates presented by CEC were both annual and cumulative and calculated per standard level. CEC presented its individual consumer savings estimate as annual and as cumulative over what CEC estimated was the average lifetime of a residential clothes washer. CEC presented annual statewide estimates in the regulation's first-year and once the entire stock of products had become compliant. (CEC, No. 1 at pp. 21–24) CEC also presented a cumulative statewide savings estimate for products operated between 2010 and 2054. (CEC, No. 1 at p. 36) The simple payback period presented by CEC considered the payback to an individual consumer from the California regulation as a whole.

While CEC provided its estimates of the costs and benefits associated with the California regulation, it did not provide a sufficient explanation of the analysis supporting its estimates. CEC stated that the ''the economic assumptions and data inputs used in this analysis were vigorously tested in the Commission's public rulemaking process that led to the adoption of this standard.'' (CEC, No. 1 at p. 19) However, CEC did not indicate where its rulemaking record could be located and where within the record the relevant assumptions, data, and analysis could be located; nor did CEC submit any of that information to DOE. Further, CEC did not provide sufficient explanation of the underlying assumptions and data in its petition. For example, CEC states that ''perhaps the most important driver of the economic analysis is the estimate of the increased first cost of washing machines that would result from the standards.'' (CEC, No. 1 at pp. 19–20) However, CEC did not provide a sufficient explanation of how it derived its estimates of incremental first costs; in fact, CEC did not even attempt to do so. CEC simply presented its estimates of incremental first costs, by standard level, and asserted that they were consistent with (though different than) DOE's incremental first cost estimate for its 2000 rulemaking. (CEC, No. 1 at p. 20) Without the underlying analysis of CEC's assumptions and data inputs, DOE is unable to determine whether the cost and benefit estimates provided are reasonable, and is unable to determine that the California Petition meets EPCA requirements.

b. Analysis of alternatives.

CEC discussed several alternatives to the State regulation in the California petition—specifically, rebates, other non-regulatory programs, and ''reasonably predictable market-induced improvements in efficiency.'' CEC estimated the cost to utilities and consumers of achieving water savings through rebates for highly efficient residential clothes washers and asserted that rebates would be much more expensive for utilities and consumers than regulations. (CEC, No. 1 at pp. 27–32) In particular, CEC estimated participation rates and the cost of providing rebates and purchasing compliant products to develop weighted average costs per eligible washer for the utilities and the consumer. CEC then compared this estimate to its estimate of the increased cost of residential clothes washers under the California standard. (CEC, No. 1 at pp. 30–31) Finally, CEC concluded that rebate and educational programs would be much more expensive for utilities and consumers than standards and that such savings would not persist after the rebates terminated. (CEC, No. 1 at p. 32)

With regard to other non-regulatory programs, CEC cited DOE's 2000 analysis of alternatives to DOE's own energy efficiency standards for residential clothes washers as an approximate assessment of the cost of the proposed State standards versus alternatives. (CEC, No. 1 at pp. 32–34) DOE's 2000 analysis reviewed enhanced public education and information, six-year financial incentives (including tax credits to consumers and manufacturers, consumer rebates and subsidies), voluntary efficiency targets, mass government purchases, early replacement programs, and performance standards. (DOE, ''Regulatory Impact Analysis for Proposed Energy Conservation Standards for Residential Clothes Washers,'' September 2000) From this, CEC concluded that there is no ''close alternative'' to the California standards for ''cost-effectively acquiring water savings and ensuring that the savings are persistent over time.'' (CEC, No. 1 at p. 34)

CEC discussed the potential impact of other non-regulatory programs on the market penetration of residential clothes washers with higher water efficiency, as compared to the current market. However, CEC's reliance on DOE's 2000 analysis to address the costs and benefits of non-regulatory programs is inappropriate, and does not satisfy CEC's burden of demonstrating by a preponderance of the evidence that the costs, benefits, burdens and reliability of water savings resulting from the State regulation would make such regulation preferable or necessary when measured against alternative approaches. (42 U.S.C. 6297(d)(1)(C)(ii)) The cost and benefit estimates provided in the DOE analysis are national estimates (CEC, No. 1 at p. 33) and do not consider the costs and benefits of alternative California-based programs; the estimates certainly do not evaluate the standards being advocated in the California Petition. For example, CEC provided estimated water savings, energy savings and the net present value for a national voluntary efficiency target. (CEC, No. 1 at p. 33) CEC made no assertion, or demonstration, concerning whether the estimate of water savings, energy savings and the net present value would be comparable if voluntary efficiency targets were set by California. In addition, we note that the voluntary consensus alternative presented by CEC was for a voluntary energy efficiency target, rather than a voluntary water use reduction target.

Comparison of the costs and benefits of the California regulation to non-regulatory alternatives available to California requires estimates of the costs and benefits of those alternatives as implemented by California. While the analysis of the nature and magnitude of California's water interests are in the context of the nation in general, the analysis of the costs and benefits of alternatives must be in the context of the ''products subject to the State regulation.'' (42 U.S.C. 6297(d)(1)(C)(ii)) As such, the costs and benefits presented in the DOE analysis cited by CEC do not allow for a comparison of the costs and benefits of alternatives in California.

Interested parties provided additional information on water saving strategies also being pursued within California.

[6] Payback period is the length in time it would take the purchaser of the appliance to recoup the increase in sales price through annual savings in operating costs. In the case of clothes washers, the operating cost savings include the savings in both energy consumption and water consumption.

For example, CUWCC listed some of the water saving strategies its members have implemented, and cited their total savings and expenditures. (CUWCC, No. 61 at pp. 1–3) Also, SDCWA cited a variety of strategies to increase supply and limit demand. SDCWA also noted a range of costs in $/acre-foot for various supply sources it uses and estimates the cost it pays in $/acre-foot for conservation measures it uses (SDCWA, No. 29 at pp. 4–5) However, the information provided was not specific to the product ''subject to the State regulation'' (42 U.S.C. 6297(d)(1)(C)(ii)); *i.e.*, residential clothes washers. As stated above, EPCA requires that the consideration of alternatives be specific to the product (or products) subject to the State regulation. Comments from other interested parties in support of the petition did not provide enough detail for DOE to assess the relative benefits and costs of alternative approaches to the proposed California regulation for residential clothes washers.

3. Unusual and Compelling State Water Interests

CEC, and the comments supporting its petition, have failed to establish by a preponderance of the evidence that California has an ''unusual and compelling'' water interest, within the meaning of that term as defined by EPCA. As stated above, CEC has established that the magnitude of California's water interest is substantially different than that prevailing in the U.S. generally. However, CEC and other commenters supporting the California Petition have failed to establish that the State regulation proposed in the California Petition is necessary or preferable as compared to other alternatives.

EPCA places the burden on CEC of demonstrating by a preponderance of the evidence that the costs and benefits of its proposed standard make the standard preferable or necessary when compared to alternatives. (42 U.S.C. 6297(d)(1)(C)(ii)) CEC did not provide data and several of the assumptions underlying its cost and benefit estimates associated with the California regulation. CEC did not provide an evaluation of the costs and benefits of other non-regulatory programs, beyond rebates (*e.g.*, voluntary efficiency targets, mass government purchases, early replacement programs), in California. Without the ability to review and analyze the assumptions, analysis, and data underlying CEC's cost and benefit estimates and without information on the potential costs and benefits of non-regulatory programs in California, beyond rebates, DOE is unable to conclude that the California regulation is necessary or is preferable to these alternatives.

By not demonstrating the necessity or preference of the proposed State regulatory action as opposed to other possible alternatives, CEC has failed to demonstrate by a preponderance of the evidence that the State regulation is necessary or preferable to alternatives, and therefore has failed to meet the EPCA requirement that it demonstrate that California's water interests are ''unusual and compelling.'' DOE has not evaluated whether CEC has met the EPCA requirement of establishing that the proposed State regulation is ''needed'' to address an unusual and compelling State interest. DOE has no occasion to consider the ''need'' issue because the existence of ''unusual and compelling interests'' has not been established.

B. Impacts of California's Standards on Manufacturing, Marketing, Distribution, Sale or Servicing

As indicated above, under section 327(d)(3) of EPCA DOE is prohibited by law from granting the California Petition if interested parties establish by a preponderance of the evidence that the California regulation will significantly burden the manufacturing, marketing, distribution, sale or servicing of residential clothes washers on a national basis. (42 U.S.C. 6297(d)(3)) In considering this prohibition, EPCA requires DOE to consider ''all relevant factors'' including the extent to which the State regulation will:

(1) Increase manufacturing or distribution costs;

(2) Disadvantage smaller manufacturers, distributors or dealers, or lessen competition;

(3) Cause a burden on manufacturers to redesign and produce the product covered by the State regulation; and

(4) likely contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

(42 U.S.C. 6297(d)(3)(A)-(D)) As discussed below, 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.

1. Manufacturing and Distribution Costs

DOE received comments from manufacturers stating that the burden of the proposed California regulation on manufacturing would be such that the manufacturers would be required to remove several of their current product offerings from the California market (ALS, No. 50 at p. 1; F&PA, No. 30 at p. 2; GE, No. 55 at pp. 3 and 7; Maytag, No. 53 at p. 3; and Whirlpool, No. 17 at pp.2) Some manufacturers claimed that this would reduce their presence in the California market (ALS, No. 50 at p. 1; and GE, No. 55 at pp. 3–4) or result in their exit from it. (ALS, No. 50 at p. 1). (Section IV.B.2. further evaluates such comments) Most manufacturers commented that this would limit their ability to recoup prior investments. (F&PA, No. 30 at p. 2; GE, No. 55 at p. 7; Maytag, No. 53 at p. 3; and Whirlpool, No. 17 at p.3) Maytag stated that the California regulation would increase distribution complexity and costs because products that would not comply with the California regulation would still be shipped to distribution centers in California that service other West Coast States. (Whirlpool, No. 17 at p. 3) Comments from individual manufacturers on the impact to manufacturing and distribution were presented in general terms and did not provide specific estimates of the cost burden resulting from the potential elimination of products from the California market.

To demonstrate the industry-wide financial impacts of attempting to meet the California regulation, AHAM modeled industry cash flows with the Government Regulatory Impact Model (GRIM), a tool used in several of DOE's energy conservation rulemaking analyses. AHAM commented that manufacturers could divert shipments or invest in new capacity to meet the 8.5 WF. To meet the 6.0 WF standard AHAM stated that it believes its member companies would have to invest in new manufacturing capacity. (AHAM, No. 52 at pp. 34 and 40) According to AHAM, if manufacturers invested in new manufacturing capacity to meet the standard, the proposed California regulation would necessitate $150 million of additional manufacturer investment. (AHAM, No. 52 at p. 38)

AHAM's GRIM analysis modeled the effect of capital investments to meet the 8.5 WF level in 2007 and the 6.0 WF level in 2010. According to AHAM's GRIM analysis, the proposed California regulations would result in a decline in industry value [7] of $100 to $641 million

[7] Industry value refers to the net present value of cash flows for the industry due to manufacturers' sale of products in the U.S. market. DOE uses change in industry value as a metric for measuring the potential impacts of an energy efficiency standard on manufacturers. See, for example, ''Final Rule Technical Support Document (TSD): Energy Efficiency Standards for Consumer Products: Clothes Washers'', Manufacturer Impact Analysis, Chapter 11, December 2000).

dollars, depending on assumptions regarding gross margins. According to AHAM estimates, these numbers reflect 16 to 103 percent share of total industry value, respectively. (AHAM, No. 52 at p. 39) In addition, AHAM commented that additional costs would be required for spending on ''engineering, product development, product introduction and marketing to support the introduction of new models for California consumers.'' (AHAM, No. 52 at p. 38)

AHAM's methodology of using GRIM to assess the magnitude of manufacturer impacts resulting from the California regulation is a useful tool for DOE to evaluate the California petition. However, DOE notes that the results from GRIM are very sensitive to three cost elements factored into the model: conversion capital expenditures, product conversion expenses, and variable production costs. Given the importance of these data inputs to the model DOE must evaluate the reasonableness of these estimates before it can draw conclusions about the significance of the results projected by GRIM. AHAM did not provide sufficient substantiation of the values it assigned these cost inputs for DOE to evaluate appropriately the model's results.

AHAM provided aggregated figures of $150 million for conversion capital expenditures (AHAM, No. 52 at p. 38) and $105 million for product conversion expenses (AHAM, No. 52 at pp. 46 and 48). According to AHAM's presentation of its analysis, it appears that conversion capital expenditures represent the capital needed for three manufacturers to prepare a total production capacity of 1.5 million residential clothes washers per year. (AHAM, No. 52 at pp. 46 and 48) AHAM did not provide a basis for the total production capacity value. In fact, the value relied on by AHAM , according to AHAM's own projected shipment numbers, appears to exceed the expected annual demand of the California market. (AHAM, No. 52 at pp. 44–45) Moreover, AHAM's comment would have benefited from including separate estimates for manufacturing equipment, tooling, and buildings and a quantification and description of the stranded assets; information that could support the conversion capital costs projected by AHAM. Justification of the estimates along with references to source data, where appropriate, would also have been useful.

Similarly, for product conversion costs DOE would have benefited from disaggregated estimates and descriptions of engineering, product development, product introduction, and marketing costs. Additionally, AHAM was not clear as to whether current products which meet the California regulation would need to undergo substantial redesign, and if so why that would be required.

Estimates of the incremental variable product costs are also a major element contributing to the magnitude and uncertainty of GRIM results. AHAM and CEC have vastly different estimates for the incremental consumer prices of lower water factor residential clothes washers. In its GRIM analysis AHAM calculated Costs of Goods Sold (COGS) as a percentage of estimated future residential clothes washer prices. (AHAM, No. 52 at p. 46) AHAM stated in its comments that ''the basic bill of materials needed to achieve low water usage at acceptable wash and rinse performance adds significant costs that can not be avoided through experience or productivity improvement.'' (AHAM, No. 52 at p. 32) However, AHAM did not present a breakdown of the basic bill of materials that underlies its estimated incremental production costs.

AHAM provided DOE with a detailed model to estimate the cost implications to manufacturers resulting from the California regulation. However, AHAM failed to provide sufficient discussion of the assumptions and inputs employed in the model. Without an understanding of the model's assumptions and inputs DOE is unable to appropriately evaluate the results, and therefore AHAM has failed to demonstrate by a preponderance of the evidence the extent to which the proposed California standard would increase the manufacturing and distribution costs of manufacturers and distributors. (42 U.S.C. 6297(d)(3)(A))

2. Effect on Competition and Smaller Entities

AHAM and several manufacturers commented that the California standards would affect different types of manufacturers differently. In particular, AHAM commented that the engineering, product development, and product introduction costs plus capital conversion investments of introducing a new model will exceed $40–50 million for most manufacturers, regardless of actual production volume.'' (AHAM, No. 52 at p. 41) AHAM also stated that manufacturers with smaller market shares might not be able to support investment in the design and production of residential clothes washers with WF levels capable of meeting the standard. (AHAM, No. 52 at p. 41) AHAM did not provide a basis for its $40–50 million dollar estimate and did not provide a discussion of the level of investment manufacturers with smaller market shares would be unable to support.

ALS commented that production volume lost from the removal of its non-compliant top-loading washers in California would not be fully replaced by the sale of its compliant front-loading washer. It stated that foreign manufacturers with lower manufacturing costs, due to ''lower labor costs and unequal or non-existent employee benefit costs,'' would have a competitive advantage by being able to offer compliant products at a lower cost. (ALS, No. 50 at pp. 2 and 6)

GE claimed that its sales volume would fall because its limited product offerings would not be able to compete with ''larger and specialty marketers.'' (GE, No. 55 at p. 4) Maytag commented that competitors larger than itself would have a better ability to absorb additional costs. (Maytag, No. 53 at p. 3)

AHAM commented that several manufacturers would likely continue to sell in California only if their current products (*i.e.*, those products already in the market place) met the proposed California standard. Furthermore, it stated that it believes that some low-volume manufacturers would likely leave the California market instead of making additional investments in new products. (AHAM, No. 52 at p. 41)

Though they did not specify their market volumes, both GE and ALS commented that they currently have limited product offerings that comply with the proposed California standards and that they believe their market presence in California would be reduced as a result of the California regulation. (GE, No. 55 at pp. 3–4; ALS, No. 50 at pp. 1–2) In particular, GE commented that it ''does not have a large enough marketshare over which to spread the huge costs of investment to develop a more complete line of laundry product offerings[.]'' (GE, No. 55 at p. 4)

Fisher & Paykel Appliance commented that it has experience with developing residential clothes washers to meet water factor criteria in Australia. (F&PA, No. 30 at p. 1) Furthermore, it commented that it currently produces high efficiency washers for a niche market and that the 8.5 WF standard would likely have a small impact on it (though its current product does not meet the 6.0 WF level). (F&PA, No. 30 at p. 2)

Maytag commented that it believes small retailers could be adversely impacted by the California proposed regulations, bearing an uneven burden compared to larger retailers. It commented that the short time-period to the proposed effective dates would ''shock'' smaller retailers'' business

models and ''force them out of business.'' (Maytag, No. 53 at p. 5)

CEC commented that the California regulation would not likely have an adverse affect on small businesses or on sales competition. (CEC, No. 1 at p. 40) In particular, CEC correlated DOE 2001 energy standards with a growth in the types of residential clothes washer technologies and features, and in the number of qualifying models on the market. Furthermore, CEC commented that the number of manufacturers selling in the U.S. has grown in the past five years despite concentration in many business sectors.[8] According to CEC, both the growth in residential clothes washer technologies and the growth in the number of manufacturers selling residential clothes washers in the U.S. indicate that there would be no reason to expect that the California standard would have a negative impact. (CEC, No. 1 at p. 40).

DOE is concerned about the ability of smaller manufacturers to spread their investment costs over lower production volumes. Analysis from DOE's January 2001 final rule indicated that cost structures did vary between small and large manufacturers. 66 FR 3314. In the TSD that accompanied the January 2001 final rule, DOE noted that ''manufacturing large volumes and optimizing production for these levels can create a significant cost advantage. Smaller manufacturers of clothes washers could thus be affected more negatively than other manufacturers by any proposed standard because of their need to spread fixed costs over smaller production volumes.'' (DOE, ''Final Rule Technical Support Document (TSD): Energy Efficiency Standards for Consumer Products: Clothes Washers'', Manufacturer Impact Analysis, pp. 11–53 and 11–54, December 2000)

Manufacturers did not provide cost estimates for redesigning their products to meet the WF levels of the California regulation. Further, manufacturers did not provide analysis of spreading such costs across production volumes. DOE recognizes that smaller manufacturers may have a significantly more difficult time in responding to the WF levels in the California regulation. However, manufacturers did not provide cost data that would allow DOE to determine the extent of this difficulty and its significance to smaller manufacturers, and therefore comments opposed to the California Petition did not adequately demonstrate the extent to which the proposed California regulation would disadvantage smaller manufacturers, distributors, or dealers, or lessen the competition in the sale of residential clothes washers in California. (42 U.S.C. 6297(d)(3)(B))

3. Redesign and Production

In assessing the impacts of a State regulation if a waiver were to be granted, EPCA requires DOE to consider the extent to which the State regulation would cause a burden on manufacturers to redesign and produce the covered product. (42 U.S.C. 6297(d)(3)(C)) While this analysis is similar to the evaluation of the resulting manufacturing and production costs, EPCA directs DOE to specifically consider the extent to which the regulation would result in a reduction—

> (i) In the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or
>
> (ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States[.]

(42 U.S.C. 6297(d)(3)(C)(i) and (ii)) Evaluation under section 327(d)(3)(C) considers the availability of compliant units by the effective date and any impact on the total number of sales for the covered product. Essentially, DOE must consider whether compliant residential clothes washers would be available by the effective date and whether the California standard would impact the overall sale of residential clothes washers.

AHAM commented that manufacturers could respond to the 8.5 WF by producing redesigned compliant units, shifting production in favor of compliant front-loaders and non-conventional top-loaders, shifting distribution of compliant front-loaders and non-conventional top-loaders to California and away from the general U.S. market, or, presumably, through a combination of these responses. (AHAM, No. 52 at pp. 34 and 40) AHAM stated that for the 8.5 WF level, it is possible that there is sufficient U.S. capacity to meet California demand under the California regulation by largely eliminating shipments of compliant units to other States. (AHAM, No. 52 at p. 34) AHAM also stated, however, that the design of such products is targeted towards specialty customers and is not geared towards the demands of the average consumer; *i.e.*, current unit designs that would comply with the proposed California regulation are typically higher cost models not ''optimized for the vast majority of the market that wishes simple, reliable, low cost washers.'' (AHAM, No. 52 at p. 40)

With regard to demand for residential clothes washers, AHAM stated that due to price elasticity and what it asserted where necessary design changes, shipments to California will decline as consumers choose to repair current washers as opposed to purchasing new, more expensive washers. (AHAM, No. 1 at p. 38) Based on its analysis, AHAM projected that shipments of washers would decline by 10 percent from 2007 through 2009, by 20 percent in 2010 through 2012, and recover between 2013 and 2015. (AHAM, No. 52 at p. 39)

AHAM did not provide a breakdown of the costs associated with shifting production in favor of compliant front-loading and non-conventional top-loading residential clothes washers or redistributing compliant residential clothes washers to California. Further, AHAM did not indicate whether or why such changes to manufacturing and distribution could be accomplished in the lead times provided for under the California regulation. The comments received did not provide specific information indicating whether manufacturers would have difficulty in shifting production and distribution within the lead time provided by the California regulation in order to provide sufficient products for the U.S. market in 2007. Therefore, commenters opposed to the California Petition have not provided sufficient evidence or analysis for DOE to determine the extent to which the proposed California regulation would cause a burden to manufacturers to redesign and produce residential clothes washers that would comply with the proposed California regulation. (42 U.S.C. 6297(d)(3)(C))

4. Proliferation of State Standards

Currently, no other State has petitioned DOE for a waiver of preemption regarding the water efficiency of residential clothes washers. If other States petitioned for a waiver, DOE would consider the extent to which other States chose standards levels identical to those proposed by California, as well as levels proposed by any other States. Furthermore, DOE would consider whether the cumulative impact of similar or differing State standards would burden the manufacturing, marketing and distribution of residential clothes washers nationally. However, DOE did not consider the impact of other State petitions because currently California is

[8] DOE notes, however, that since this proceeding started, Maytag Company has been purchased by the Whirlpool Corporation, further concentrating the clothes washer industry. Based on DOE estimates of data reported in Appliance Magazine, DOE estimates that Whirlpool Corporation accounts for approximately 71 percent of clothes washer sales, GE 17 percent and the remaining 12 percent is spread over the remaining manufacturers, nationally.

the only State to have submitted a petition under section 327 of EPCA.

5. Significant Impact on Manufacturing, Marketing, Distribution, Sale, or Servicing

Interested parties have not demonstrated by a preponderance of the evidence that the California regulation would significantly burden manufacturing, marketing, distribution, sale or servicing of the covered product on a national basis. Interested parties asserted that the California regulation would increase manufacturing and distribution costs, would negatively impact smaller manufacturers, and that the California regulation could result in redistribution of product. As discussed above, however, the interested parties did not provide adequate justification to support these assertions. 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))

C. Availability of Product Performance Characteristics and Features

1. Top-Loading Residential Clothes Washers

Under EPCA section 327(d)(4), DOE is prohibited by law from granting California a waiver of preemption if interested persons have demonstrated by a preponderance of the evidence that California's proposed regulation is likely to result in the unavailability in California in any covered product type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding. (42 U.S.C. 6297(d)(4))

Manufacturers' comments indicated that the design changes necessary to comply with the 6.0 WF level would eliminate traditional top-loading residential clothes washers from the California market. (AHAM, No. 52 at pp. 1 and 32; ALS, No. 50 at pp. 2 and 6; Whirlpool, No. 17 at p. 1; Maytag, No. 53 at p. 3; GE, No. 55 at p. 3) Maytag stated that traditional top-loading residential clothes washers currently represent at least 60 percent of California's residential clothes washer sales. (Maytag, No. 53 at p. 3) Data submitted by AHAM, including ENERGY STAR data, indicate that only front-loading residential clothes washers currently meet the 6.0 WF level; current models of top-loading residential clothes washers, regardless of design, have a WF level of greater than 6.0. (AHAM, No. 52 at p. 22) In its comments, CEC identified a top-loading, horizontal-axis residential clothes washer as a potential design to meet the 6.0 WF level. (CEC, No. 1 at p. 46; CEC, No. 79 at p. 13) However, the model to which CEC referred (CEC, No. 1 at p. 46) does not currently meet the 6.0 WF level, and would require redesign. Moreover, the residential clothes washer identified by CEC appears to represent a small portion of the market.

A number of stakeholders, including the CUWCC, PG&E, NRDC, Consolidated Smart Systems (CSS) and several California entities commented that the California market currently offers a variety of models that can meet the 8.5 and 6.0 WF levels. (CUWCC, No. 61 at p. 5; NRDC, No. 41 at p. 2; PG&E, No. 44 at pp. 6–7 and 9; CSS, No. 77 at p. 2) DOE is aware that several models of residential clothes washers in the market today can meet the 8.5 WF and 6.0 WF levels. However, DOE also notes that this discussion of the availability of products, generally did not distinguish between front- and top-loading residential clothes washers.

DOE knows of no top-loading residential clothes washers on the market that meet a 6.0 WF. Neither CEC nor any other commenter has asserted or demonstrated that such a product exists. As noted above, several stakeholders commented that, while existing residential clothes washers can currently meet the 6.0 WF level, there is no indication that any of these residential clothes washers are top-loading. For example, according to data on ENERGY STAR products submitted by AHAM, the lowest WF of a top-loading washer currently on the market is approximately 6.3. (AHAM, No. 52 at p. 22; and CEC, No. 1 at p. 46) DOE finds that it has been established by a preponderance of the evidence that there are no top-loading residential clothes washer in the current market that would comply with the 6.0 WF level of the proposed California regulation, and that therefore the proposed California standard would result in the unavailability of top-loading residential clothes washers in the California market. Therefore, even had CEC met its requirements under EPCA, the California Petition should be rejected on this additional ground.

2. Other Product Classes

EPCA states that the failure of some classes (or types) to meet the criterion of the State regulation shall not affect DOE's determination on whether to prescribe a rule for other classes (or types). (42 U.S.C. 6297(d)(4)) As noted above, DOE has established energy efficiency standards for five classes of residential clothes washers, including top-loading residential clothes washers. (10 CFR 430.32(g)) However, the California Petition in its discussion of the impact of the California regulation does not distinguish between classes of residential clothes washers and therefore, the question of whether such levels would be appropriate for individual classes of residential clothes washers is not at issue.

Even if it were, however, DOE would be concerned that differing maximum WF levels established for specific classes of residential clothes washers could have negative consequences for water savings in California. Regulating more efficient residential clothes washers like front-loading residential clothes 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. (AHAM, No. 52 at pp. 32 and 35) 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. (See, AHAM, No. 52 at pp. 32 and 35)

V. Denial

As discussed above, the California Petition requests a waiver of Federal preemption for a State regulation that establishes effective dates not permitted under EPCA. Therefore, DOE denies the requested waiver.

Second, in order to grant a petition for a waiver from Federal preemption, a State must show by a preponderance of the evidence that its regulation is needed to address unusual and compelling State or local water or energy interests. Such a showing requires that a State demonstrate that its interests are substantially different in nature or magnitude compared to those in the United States generally and that the State standards are ''preferable or necessary'' when compared to alternatives, including market-induced ones. As discussed above, DOE has determined that the California Petition has demonstrated by a preponderance of

the evidence that the State's water interests are substantially different in magnitude from those present in the United States generally. CEC and comments supporting the California Petition, however, failed to provide sufficient information to demonstrate by a preponderance of the evidence that the proposed State standard is preferable or necessary when compared to alternative approaches. Since CEC has established only one of the two elements necessary to show an unusual and compelling State interest, DOE denies the waiver request.

Third and finally, even if CEC had established by a preponderance of the evidence that California's water interests are unusual and compelling, DOE is denying the waiver request because interested parties have established by a preponderance of the evidence that the California regulation would likely result in the unavailability of top-loading residential clothes washers in California. Therefore, DOE is prohibited from prescribing a rule that would grant the California Petition.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice.

Issued in Washington, DC, on December 20, 2006.

Alexander A. Karsner,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E6–22270 Filed 12–27–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency information collection activities: submission for OMB Review; comment request.

SUMMARY: The EIA has submitted the Oil and Gas Reserves System Surveys to the Office of Management and Budget (OMB) for review and a three-year extension under section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 et seq). The EIA requests that the EIA–23P, ''Oil and Gas Well Operator List Update Report'' be discontinued, as it is no longer necessary.

DATES: Comments must be filed by January 29, 2007. If you anticipate that you will be submitting comments but find it difficult to do so within that period, you should contact the OMB Desk Officer for DOE listed below as soon as possible.

ADDRESSES: Send comments to Sarah P. Garman, OMB Desk Officer for DOE, Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure receipt of the comments by the due date, submission by FAX (202–395–7285) or e-mail (*Sarah_P._Garman@omb.eop.gov*) is recommended. The mailing address is 726 Jackson Place NW., Washington, DC 20503. The OMB DOE Desk Officer may be telephoned at (202) 395–4650. (A copy of your comments should also be provided to EIA's Statistics and Methods Group at the address below.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Kara Norman. To ensure receipt of the comments by the due date, submission by FAX (202–287–1705) or e-mail (*kara.norman@eia.doe.gov*) is also recommended. The mailing address is Statistics and Methods Group (EI–70), Forrestal Building, U.S. Department of Energy, Washington, DC 20585–0670. Kara Norman may be contacted by telephone at (202) 287–1902.

SUPPLEMENTARY INFORMATION: This section contains the following information about the energy information collection submitted to OMB for review: (1) The collection numbers and title; (2) the sponsor (i.e., the Department of Energy component); (3) the current OMB docket number (if applicable); (4) the type of request (i.e., new, revision, extension, or reinstatement); (5) response obligation (i.e., mandatory, voluntary, or required to obtain or retain benefits); (6) a description of the need for and proposed use of the information; (7) a categorical description of the likely respondents; and (8) an estimate of the total annual reporting burden (i.e., the estimated number of likely respondents times the proposed frequency of response per year times the average hours per response).

1. Forms EIA–23L, 23S, and 64A, ''Oil and Gas Reserves System Surveys''
2. Energy Information Administration
3. OMB Number 1905–0057
4. Three-year extension
5. Mandatory
6. EIA's Oil and Gas Reserves Systems Surveys collect data used to estimate reserves of crude oil, natural gas, and natural gas liquids, and to determine the status and approximate levels of production. Data are published by EIA and used by public and private analysts. Respondents are operators of oil wells, natural gas wells, and natural gas processing plants.
7. Business or other for-profit
8. 49,120 hours.

Please refer to the supporting statement as well as the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses (including possible nonstatistical uses) of the information. For instructions on obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

Statutory Authority: Section 3507(h)(1) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (44 U.S.C. 3501 *et seq.*, at 3507(h)(1)).

Issued in Washington, DC December 21, 2006.

Jay H. Casselberry,

Agency Clearance Officer, Statistics and Methods Group, Energy Information Administration.

[FR Doc. E6–22266 Filed 12–27–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER07–239–000]

BG Energy Merchants, LLC; Notice of Issuance of Order

December 19, 2006.

BG Energy Merchants, LLC (BG Energy) filed an application for market-based rate authority, with an accompanying tariff. The proposed market-based rate tariff provides for the sale of energy, capacity and ancillary services at market-based rates. BG Energy also requested waivers of various Commission regulations. In particular, BG Energy requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by BG Energy.

On December 19, 2006, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the requests for blanket approval under Part 34. The Director's order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard or to protest the blanket approvals of issuances of