Court Vacates Energy Efficiency Standards for Failure to Consider Alternatives and Explain Choices

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The Department of Energy (DOE) has been hit by a new adverse court decision on its energy efficiency program—this one overturning standards for three classes of products.[1] The court's decision shows the care the courts require the agency to take in justifying its determinations, including when it shifts position. This may create opportunities for regulated entities considering judicial review of DOE actions.

Court Decision. The Court of Appeals for the Fifth Circuit has vacated DOE's final rule setting the standards for one class of dishwashers and two classes of laundry machines.[2] The DOE rules were issued under the Energy Policy and Conservation Act (EPCA).[3]

In 2020, during the Trump Administration, DOE adopted final rules for classes of consumer dishwashers (2020 Dishwasher Rule)[4] and consumer clothes washers and dryers (2020 Laundry Rule).[5] On the day of his inauguration, President Biden issued an Executive Order broadly directing DOE to reconsider numerous Trump-era rules, which included the 2020 Dishwasher Rule and the 2020 Laundry Rule.[6] In 2022, DOE issued a new final rule (the Repeal Rule) revoking the 2020 Dishwasher and the 2020 Laundry Rules.[7]

The Fifth Circuit, in a strongly worded opinion, has now held that the Repeal Rule was "arbitrary and capricious" under the Administrative Procedure Act (APA).[8] Although the court did not decide the question, it said that it is unclear that DOE has any statutory authority to regulate water use in dishwashers and clothes washers. The court said that "DOE can set the maximum 'energy use' for most products—including dishwashers and laundry machines. '[O]r' it can set the maximum 'water use' for four other, specified products." The court also said that "[t]he EPCA does not appear to contemplate overlap between the products subject to 'energy' regulation and those subject to 'water' regulation."[9]

The court went on to say that, "even assuming [DOE] has [statutory] authority," the Repeal Rule "failed to adequately consider appliance performance, substitution effects, and the ample record evidence that DOE's conservation standards are causing Americans to use more energy and water rather than less."[10] And the Repeal Rule "rested instead on DOE's view that the 2020 Rules were legally 'invalid'—but even if true, that does not excuse DOE from considering other remedies short of repealing the 2020 Rules *in toto*."[11] Public comments, including those of industry, played a key role in developing the record relied on by the court.

The court stressed that administrative actions cannot survive solely on an agency's demand for policy deference. It said that the court "will not 'substitute [its] own policy judgment for that of

the agency.'"[12] "But due deference to agencies does not make arbitrary and capricious review 'toothless'; rather, it has 'serious bite.'"[13] The court also said that DOE was "required to consider the 'alternatives' that are within the ambit of existing policy,'" even though DOE concluded that the Trump-era rules were "illegal."[14]

The Fifth Circuit's emphasis on the need for an agency to consider alternatives and to explain its choices when reversing a prior policy choice—even a policy choice the agency concludes is illegal—is particularly important in the current environment. DOE has sought to reverse a number of decisions from the prior administration,[15] and the Fifth Circuit's decision provides an important reminder that the agency is subject to significant legal requirements in doing so, and that failure to adhere to those mandates can lead to judicial reversals.

The Fifth Circuit decision follows a decision by the Court of Appeals for the District of Columbia Circuit vacating DOE's final rule for standards for commercial package boilers (CPBs).[16] In 2022, the Court determined that DOE had failed to provide an adequate explanation for its final rule and ordered DOE to address comments raised during the standards rulemaking for CPBs. In response, DOE issued a supplement to the final rule. The Court then ruled that DOE should have provided notice and comment regarding the supplement given the agency's reliance on new literature and evidence. The Court also ruled that DOE again failed to offer a sufficient explanation in response to the comments challenging a key assumption in its analysis. Accordingly, the Court vacated the final rule and the supplement.[17]

Conclusion. DOE energy efficiency rulemakings continue to be a high priority of the Biden Administration—and are a fundamental element of the longstanding EPCA. DOE is required to take into account public input in such rulemaking proceedings. Industry should take advantage of these opportunities to provide input. The recent court decisions overturning DOE standards illustrate the value of stakeholders providing their views—and the risk to DOE of failing to offer a sufficient explanation in response to those views and of otherwise failing to justify its positions.

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1 The DOE program is discussed in our prior advisories. HWG LLP, News & Insights: Energy Efficiency, HWG Law, https://hwglaw.com/news-and-insights/?_sfm_relatedpractice=7803.

2 *Louisiana v. Dep't of Energy*, No. 22-60146, 2024 WL 80398 (5th Cir. Jan. 8, 2024) (*Louisiana v. DOE*).

3 42 U.S.C. § 6291 *et seq.*

[4] DOE, Office of Energy Efficiency and Renewable Energy, Establishment of a New Product Class for Residential Dishwashers, Final Rule, 85 Fed. Reg. 68723 (Oct. 30, 2020) (2020 Dishwasher Rule).

[5] DOE, Office of Energy Efficiency and Renewable Energy, Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers, Final Rule, *id.* 81359 (Dec. 16, 2020) (2020 Laundry Rule).

[6] *See* Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021); *see also Fact Sheet: List of Agency Actions for Review*, The White House (Jan. 20, 2021), https://perma.cc/9MWM-EWQ3.

[7] DOE, Office of Energy Efficiency and Renewable Energy, Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers, Final Rule, 87 Fed. Reg. 2673 (Jan. 19, 2022).

[8] *Louisiana v. DOE* at *1; *see* 5 U.S.C. § 706(2).

[9] *Louisiana v. DOE* at *5 (*quoting* 4 U.S.C. § 6291).

[10] The Court said that "the frustratingly slow pace of modern dishwashers caused consumer substitution away from dishwashers and toward handwashing." *Id.* at *7 (*citing* 2020 Dishwasher Rule at 68729). And a new appliance class for laundry products could prevent consumers from "completing multiple cycles to adequately clean or dry their clothing." *Id.* (*quoting* 2020 Laundry Rule at 81365).

[11] *Id.* at *11.

[12] *Id.* at *5 (*quoting Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)).

[13] *Id.* (*quoting Data Mktg. P'ship v. Dep't of Lab.*, 45 F.4th 846, 856 (5th Cir. 2022) (quotation omitted)).

[14] *Id.* at *10 (*quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Court 1891, 1913 (2020)).

[15] For example, in addition to action to repeal the 2020 Dishwasher Rule and the 2020 Laundry Rule, DOE has moved to revise Trump-era rules on: procedures for energy efficiency rulemaking (Process Rule), making it more difficult for DOE to issue regulatory guidance, automatically granting interim waiver requests unless DOE rules on it within forty-five days, furnaces and water heaters, general service lamps and general service incandescent lamps, and showerheads. These are addressed in prior advisories (*see* fn. 1 *supra*), including *DOE Proposes to Eliminate Rule on Guidance* (Mar. 31, 2021); *DOE Proposes to Amend Energy Efficiency Process Rule* (Apr. 12, 2021); *DOE Proposes More Changes to Trump-Era Energy Efficiency Process Rule* (July 7, 2021)*; DOE Proposes Changes to the Energy Efficiency Interim Waiver Process* (July 30, 2021); *DOE Continues Rollback of Trump-Era Rules; Updates Other Energy Efficiency Rules* (Aug. 19, 2021); *DOE Amends Energy Efficiency Process Rule* (Dec. 13, 2021); *DOE Amends Energy Efficiency Interim Waiver Rule* (Dec. 14, 2021).

[16] *Am. Pub. Gas Ass'n v. Dep't of Energy*, 72 F.4th 1324 (D.C. Cir. 2023). HWG LLP represented intervenor Air-Conditioning, Heating, and Refrigeration Institute in the litigation.

[17] *Id.* at 1330.