

September 30, 2019

Via: <http://www.regulations.gov>

Re: Docket Number EERE-2020-BT-TP-0002: Energy Conservation Program: Test Procedure for Showerheads; Notice of Proposed Rulemaking and Announcement of Public Meeting

Comments Submitted by the Competitive Enterprise Institute

Introduction

The Competitive Enterprise Institute is a policy and analysis organization committed to advancing the principles of free markets and limited government. For over 20 years, we have commented on numerous rulemakings conducted by the Department of Energy (DOE) regarding energy and water conservation standards for home appliances. Our particular focus has been on ensuring that the consumer protections built into the law are given full weight in the rulemaking process. In our view, these protections have often been downplayed or ignored by the agency when setting standards that are excessively stringent and counterproductive. Most recently, we have participated in DOE actions regarding dishwashers and light bulbs, both with the goal of preserving product features and consumer choice.¹

We fully support the proposed clarification of the test procedure for showerheads that would once again allow the sale of models with multiple showerheads. We believe that

¹ Competitive Enterprise Institute, "Petition for Rulemaking on a New Product Class of Fast Dishwashers," March 21, 2018, at <https://cei.org/sites/default/files/DOE%20Dishwasher%20Petition.pdf>; Comments of the Competitive Enterprise Institute et al., "Energy Conservation Standards for General Service Incandescent Lamps, Notice of Proposed Rulemaking," November 4, 2019, at https://cei.org/sites/default/files/GSIL_Comment-10-2019.pdf.

finalizing the rule as proposed would both comply with the law and best serve the interests of consumers.

Background

The Energy Policy and Conservation Act of 1992 contains the provisions authorizing a federal water conservation standard for showerheads, but the language was less than clear as to what was meant by the 2.5 gallons per minute (gpm) limit being imposed.² In particular, there was some ambiguity regarding models with multiple showerheads whether the 2.5 gpm restriction applied to each showerhead or the entire shower unit. It would seem this water use limit would apply to each showerhead, else the law could have explicitly set water use restrictions per shower rather than per showerhead. Nonetheless, the statutory language left at least some doubt. For the next 19 years, the former interpretation prevailed and several manufacturers continued to make and sell multi-showerhead models, with each showerhead meeting the 2.5 gpm limit but the overall shower exceeding it.

This changed in 2011 when the Obama administration issued an enforcement guidance asserting that the overall shower must meet the 2.5 gpm limit, thus making multiple-showerhead units illegal.³ DOE gave makers of such devices a two-year grace period to sell existing units and wind up production, but the agency then promulgated a final rule in 2013 effectively ending the legal sale of showers that exceeded 2.5 gpm in total.⁴

² 42 U.S.C. 6295(j).

³ DOE, Showerhead Enforcement Guidance, March 4, 2011, https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.

⁴ 78 FR 62970, October 23, 2013.

Now, the Trump DOE proposes to reverse these Obama DOE actions and return to the statutory interpretation that prevailed in the 19 years prior to this change, namely that the 2.5 gpm limit applies to each individual showerhead but not the unit overall.

The Law Strongly Favors Consumer Choice And Thus Supports the Proposed Rule

For purposes of understanding the requirements of the law, it is critical to acknowledge the reason why the multi-showerhead units were being produced in the first place – some consumers wanted them. This is why several such models were on the market prior to the federal restrictions placed on them, and it is also why the proposed rule allowing them to return to the market is a more faithful interpretation of the underlying statutory provisions than that of the Obama DOE.

While the 2.5 gpm water use limit is somewhat ambiguous, this provision must be interpreted along with the other statutory language that established DOE’s efficiency standards program. These provisions, in the Energy Policy Act of 1975 as amended, contain requirements for preserving product features and consumer choice.⁵

Most importantly, the law explicitly states that “the Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of evidence that the 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

⁵ 42 U.S.C. 6291 to 6317.

Secretary's finding."⁶ In other words, desired product features that were available before a federal standard was imposed must still be available afterwards.

Another provision in the law sets out the process for promulgating a separate standard when necessary for any product subgroup that preserves desired features, and instructs the Secretary that "in making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate."⁷ This is the provision under which the agency is in the process of considering a separate standard for dishwashers that can complete a load in an hour or less, a feature that was impermissibly sacrificed by a previous dishwasher efficiency standard.

Granted, Congress can override the consumer protections built into the law and explicitly outlaw a product type like multi-showerhead showers, but it is far from clear that the statutory language did so here. For this reason, the interpretation of the showerhead provisions must favor preservation of features desired by consumers.

In conclusion, the Obama DOE 2011 enforcement guidance and 2013 final rule tried to exploit the ambiguity in the showerhead provisions so as to remove from the marketplace those models with multiple heads. It did so even though they were the preferred choice for some consumers and thus were protected under other provisions in the law. The proposed rule returns the application of the showerhead water use limits to one that better comports with the totality of statutory provisions applicable to DOE's appliance standards program, and in so doing is more pro-consumer than the current interpretation. For these reasons, we urge its finalization.

⁶ 42 U.S.C. 6295(o)(4).

⁷ 42 U.S.S. 6295(q).

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