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Docket Number EERE-2021-BT-STD-0016; Energy Conservation Program: Definition of Showerhead; Notice of Proposed Rulemaking And Public Meeting  
86 FR 38,594 (July 22, 2021)

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## I. Introduction

The undersigned free market and consumer organizations have a longstanding interest in bringing to light the deleterious consequences of federal regulations, which are often neglected by agencies in their attempts to adopt a regulatory agenda. For over 20 years, we have participated in rulemakings conducted by the Department of Energy (DOE) regarding energy and water conservation standards for home appliances. This includes past agency actions impacting dishwashers, air conditioners, clothes washers and dryers, light bulbs, and, as relevant here, showerheads.<sup>1</sup> Our particular focus has been on ensuring that the consumer protections built into

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<sup>1</sup> See, Competitive Enterprise Institute, Comments Regarding the Department of Energy's Fiscal 2004 Priorities for the Appliance Standards Rulemaking Process, August 14, 2003, [https://cei.org/regulatory\\_comments/comments-regarding-does-fy-2004-priorities-for-the-appliance-standards-rulemaking-process/](https://cei.org/regulatory_comments/comments-regarding-does-fy-2004-priorities-for-the-appliance-standards-rulemaking-process/); Competitive Enterprise Institute, Petition for Rulemaking on a New Product Class of Fast Dishwashers, March 18, 2018, <https://cei.org/sites/default/files/DOE%20Dishwasher%20Petition.pdf>; Comments of Free Market Organizations to the Department of Energy, Energy Conservation Standards for General Service Incandescent Lamps, Notice of Proposed Determination, November 4, 2019, [https://cei.org/sites/default/files/GSIL\\_Comment-10-2019.pdf](https://cei.org/sites/default/files/GSIL_Comment-10-2019.pdf); Comments of the Competitive Enterprise Institute to the Department of Energy, Test Procedure for Showerheads, Notice of Proposed Rulemaking, September 20, 2020, <https://cei.org/wp-content/uploads/2020/11/Showerhead-Comment-9-30-2020-011.pdf>; Comments of Consumers' Research to the Department of Energy, Test Procedure for Showerheads, Notice of Proposed Rulemaking, September 14, 2020, <https://consumersresearch.org/consumers-research-comment->

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 excessively stringent efficiency standards that raise costs and/or reduce product quality and choice.

For these reasons, we fully supported DOE's December 16, 2020 regulatory clarification (Final Rule) allowing more powerful showers for those who prefer them.<sup>2</sup> This pro-consumer measure corrected a previous regulatory interpretation that impermissibly constrained product choice and features. For the reasons discussed below, we oppose the July 22, 2021 proposal to reverse the gains of the 2020 rule by re-establishing the constraints on showers (Proposed Rule), and we do so on the grounds that it is incompatible with the law and detrimental to consumers.<sup>3</sup>

## II. Background

The Energy Policy and Conservation Act of 1975 (EPCA) established at DOE a program for setting and revising energy and water conservation standards for numerous home appliances.<sup>4</sup> The Energy Policy Act of 1992 (EPACT) expanded this program to include a federal water conservation standard for showerheads which was set by statute at a maximum flow rate of 2.5 gallons-per-minute (gpm).<sup>5</sup> However, some fixtures on the market utilized more than one showerhead, and it was not clear whether the 2.5 gpm limit applied to each showerhead or the unit overall. The statutory definition of showerhead is circular (it defines a showerhead as a showerhead) and is of little assistance.<sup>6</sup> Most likely, the intent is that the 2.5 gpm restriction is applicable to each individual showerhead, otherwise the statute would have used the term shower instead. Further, the Final Rule concluded that the statutory uncertainty was largely resolved when the per-showerhead approach was adopted by the American Society of Mechanical Engineers (ASME), whose work is incorporated by reference in the statute.<sup>7</sup> Nonetheless, the Proposed Rule asserts ongoing doubt.

For the nearly two decades after EPACT was enacted, the more expansive interpretation was applied by the agency. Thus, multi-showerhead fixtures in which each showerhead complied with the 2.5 gpm limit but the entire unit potentially exceeded it remained available for those consumers who wanted them. This included some models designed to assist the elderly and disabled who may otherwise have difficulty using a conventional shower.

That changed in 2011 when the Obama Administration issued an enforcement guidance clarifying that the overall shower, no matter how many showerheads, must not exceed the 2.5

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[on-the-notice-of-proposed-rulemaking-and-announcement-of-public-meeting-docket-number-eere%e2%80%902020%e2%80%90bt%e2%80%90tp%e2%80%900002-rin-1904%e2%80%90ae85-concerning/](#).

<sup>2</sup> 85 FR 81,341 (December 16, 2020).

<sup>3</sup> 86 FR 38,594 (July 22, 2021).

<sup>4</sup> 42 U.S.C. §§6291 *et seq.*

<sup>5</sup> 42 U.S.C. §6295(j)(1).

<sup>6</sup> 42 U.S.C. §6291(31)(D).

<sup>7</sup> 42 U.S.C. §6293(b)(7).

gpm limit.<sup>8</sup> The agency allowed a two-year grace period for manufacturers to sell existing units that no longer complied and to wind up production of them. In 2013, DOE issued a final rule superseding the enforcement guidance and effectively ending the legal sale of multi-showerhead models exceeding 2.5 gpm in total.<sup>9</sup>

DOE later revisited showerhead standards and finalized the 2020 Final Rule reverting back to the original interpretation that allowed the higher-flow models. It is this Final Rule that the Proposed Rule seeks to withdraw, effectively reinstating the Obama Administration definition of a showerhead.

### III. DOE's Proposed Rule Departs From Statutory Intent

DOE asserts that the more restrictive definition of showerhead in the Proposed Rule would “better effectuate EPCA’s water conservation purposes.”<sup>10</sup> However, this claim is based on an unacceptably narrow and one-sided reading of the underlying provisions in EPCA and EPACT, which actually require the agency to carefully balance energy and/or water conservation against other factors important to consumers. Unlike DOE’s characterization of the statutes under which it operates, EPCA and EPACT do not take an approach that prioritizes efficiency above all else and indeed require the agency to preserve multi-showerhead units that may exceed 2.5 gpm.

#### A. The Proposed Rule Violates The Consumer Protections Written Into The Law

EPCA and EPACT contain a number of consumer protections against which the pursuit of higher efficiency must be balanced. For example, the law requires the agency to weigh the potential energy and/or water savings against any increase in the purchase price or maintenance costs that may result from a new or amended standard.<sup>11</sup> The latter typically increase with the stringency of the standard, and thus a point is reached beyond which efficiency levels do more consumer harm than good and are contrary to law.

Most relevant here are the consumer protections explicitly forbidding any standard that compromises product features and performance. In particular, EPCA requires 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

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<sup>8</sup> Department Of Energy, “Showerhead Enforcement Guidance,” March 4, 2011, [https://www.energy.gov/sites/default/files/gcprod/documents/Showerhead\\_Guidancel.pdf](https://www.energy.gov/sites/default/files/gcprod/documents/Showerhead_Guidancel.pdf).

<sup>9</sup> 78 FR 62970 (October 23, 2013)

<sup>10</sup> 86 FR at 38,597.

<sup>11</sup> 42 U.S.C. §6295(o)(2)(B)(II)

United States at the time of the Secretary’s finding.”<sup>12</sup> In effect, efficiency cannot come at the expense of desired features. The Final Rule correctly found that multi-showerhead models that may exceed 2.5 gpm in total are protected by this provision.

It is worth reflecting on the strength of this statutory protection. For example, it is not necessary to show that the performance characteristic at issue is in high demand among consumers. The law only requires a showing that at least one model including it was generally available at the time the standard was promulgated. Thus, even a relatively niche product feature cannot be allowed to fall victim to DOE standards. Here, the Obama Administration DOE acknowledged that multi-head showers potentially exceeding 2.5 gpm overall had been available when it endeavored to change the definition of showerhead, and it offered a two-year grace period to clear the market of the now non-compliant models.

In many previous appliance rulemakings, DOE set energy or water conservation standards at levels less extreme than that technologically possible in order to preserve product features and choice. The Final Rule points to examples of such standards, including those which enabled the continued availability of windows in oven doors and ones that allowed for all available door configurations for refrigerator/freezers to remain on the market.<sup>13</sup> Sacrificing such features may have made possible more stringent standards, but the agency concluded that the law requires striking a balance that preserves them.

Congress could have explicitly overridden the consumer protections in the law and categorically outlawed any and all shower configurations that allow more than 2.5 gpm in total. However, since the statute did not clearly do so, we believe the agency must implement these provisions so as to comport with the other provisions in the law, including those that preserve consumer choice.

DOE also asserts that any changes to the definition of a showerhead are not a new or amended standards rulemaking but rather a reinterpretation of an existing standard, implying that the consumer protections in the statute may not apply.<sup>14</sup> Nonetheless, we believe its proposed reinterpretation, which would have the effect of changing the standard, must also comply with the pro-consumer provisions in the statute.

DOE has acknowledged that there were multi-head models on the market that could use more than 2.5 gpm overall, and thus its proposed redefinition of a showerhead would outlaw such models. Nonetheless, DOE argues that multi-showerhead units are not being banned per se, and that they can still be manufactured and sold as long as the unit cannot use more than 2.5 gpm in total.<sup>15</sup> While this is technically true (and indeed DOE notes that models meeting this description are currently available), such weaker multi-showerhead models are unlikely to

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<sup>12</sup> 42 U.S.C. §6295(o)(4).

<sup>13</sup> 85 FR 81,347.

<sup>14</sup> 86 FR 38,602.

<sup>15</sup> 86 FR 38,601-2.

deliver the desired performance that some consumers want and the statutory provisions protect. In other words, they would not meet the “substantially the same” requirement in the statute.

In addition to preservation of product features, there is also the statutory requirement that the water savings from agency actions be significant. The law explicitly forbids any new or amended standard if the agency “determines, by rule, that the establishment of such standard will not result in significant conservation of energy or, in the case of showerheads, faucets, water closets, or urinals, water...”<sup>16</sup> This provision protects the public from efficiency regulations that may be more trouble than they’re worth.

The Proposed Rule sidesteps an obvious point relevant to the requirement of significance - even if multi-head showers with a maximum flow rate above 2.5 gpm are allowed to remain on the market, no consumer would be forced to choose them. Without evidence of widespread adoption of such showers, the agency has not shown that re-imposing the restrictions on them would result in significant water savings.

The Proposed Rule avoids another obvious point – showers are adjustable. Simply because a particular shower model has a maximum flow rate above 2.5 gpm does not mean users will turn the knob all the way up and keep it there for every use. More likely, the highest settings in such showers would only be used occasionally. It may also be the case that stronger showers are shorter in duration.

Overall, no evidence has been put forward by DOE that the Proposed Rule would result in significant water savings as is required by statute.<sup>17</sup>

It is worth noting that the insignificance of the water savings also undercuts the climate change rationale offered by DOE as part of the reason for the Proposed Rule.<sup>18</sup> While true that providing treated water to a user and heating it for a shower both require energy and thus result in greenhouse gas emissions, any reduction in such emissions from the Proposed Rule would be even more trivial than the reduction in water use.

#### B. The 2020 Final Rule Follows The Law While The Current Proposed Rule Does Not

DOE mischaracterizes the Final Rule as one that prioritizes compliance with the ASME definition of showerhead above compliance with the water-saving purpose of the statute. In reality, the Final Rule was faithful to all the provisions in the statute, including the consumer protections, while the Proposed Rule engages in selective compliance.

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<sup>16</sup> 42 U.S.C. §6295(o)(3)

<sup>17</sup> The Proposed Rule cites previous comments predicting significant water savings from outlawing the shower types at issue. 86 FR 38,598-9. However, these comments are based on unsupported assumptions about such showers gaining substantial and unprecedented market share and being used at maximum flow rates.

<sup>18</sup> 86 FR 38,597.

It is true that the Final Rule was justified in part by the fact that the ASME definition of showerhead, which is incorporated by reference in the statutory text, strongly suggests that the 2.5 gpm limit applies to each showerhead individually and not the entire unit.<sup>19</sup> However, DOE also relied on the provisions in EPCA which protect consumers against the detrimental effects of excessively stringent standards. DOE concluded that “this rule complies with the congressional directive to preserve performance characteristics and features that were available on the market at the time DOE originally acted to essentially eliminate them. Further, this rulemaking allows manufacturers to continue innovating and provide consumers choice in the marketplace.”<sup>20</sup> On the other hand, the Proposed Rule’s critique of the Final Rule is based on the misleading belief that the statutory provisions prioritize efficiency above everything else.

#### IV. Conclusion

EPCA and EPACT are not, as DOE now asserts, simply energy and water efficiency statutes – they are consumer protection statutes that require the agency to strike a beneficial balance between efficiency and other factors important to the appliance-using public. This includes the preservation of product features and choice. The original interpretation of the showerhead provisions that prevailed for nearly two decades applied the maximum flow rate of 2.5 gpm to each showerhead of a multi-showerhead unit, and thus allowed that sale of some models with a maximum flow above 2.5 gpm. The Obama administration then chose to flout the consumer protections in the law by forbidding such showers, and now the Proposed Rule seeks to re-instate these restrictions. Doing so shortchanges consumers while accomplishing little towards to the goal of water savings. For these reasons, we believe that both the law and the public interest are best served by withdrawal of the Proposed Rule. Thank you.

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<sup>19</sup> 85 FR 81,345-6.

<sup>20</sup> 85 FR 81,355.

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