

SHORT RECORD
NO. 21-1167
FILED 01/27/2021

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ALLIANCE FOR WATER
EFFICIENCY, U.S. PUBLIC
INTEREST RESEARCH GROUP, and
ENVIRONMENT AMERICA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF
ENERGY and DAVID HUIZENGA,
IN HIS OFFICIAL CAPACITY AS
ACTING SECRETARY, UNITED
STATES DEPARTMENT OF
ENERGY,

Respondents.

No. _____

PETITION FOR REVIEW

Pursuant to section 336(b)(1) of the Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. § 6306(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America hereby petition this Court for review of a final rule of the United States Department of Energy (“DOE”), entitled *Energy Conservation Program: Definition of Showerhead*, adopted on December 8, 2020, with docket number EERE-2020-BT-TP-0002, and

published on December 16, 2020, at 85 Fed. Reg. 81,341. A copy of the rule is attached hereto as Exhibit A.

Dated this 27th day of January, 2021.

Respectfully submitted,

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EXHIBIT A

through October 29, 2021 and §§ 590.149(b) and (c), 590.580(b)(1), 591.1(b), and 591.2(a) and (c) are stayed through October 31, 2022.

§ 590.504 [Corrected]

2. On page 68679, second column, amendatory instruction 55 and § 590.504 are corrected, and amendatory instructions 55a and 55b are added, to read as follows:

55. Amend § 590.504 by revising paragraphs (a) through (e) to read as follows:

§ 590.504 General operating procedures.

(a) Operations involving the processing, storing, and handling of eggs, ingredients, and egg products must be done in a sanitary manner.

(b)(1) Eggs and egg products are subject to inspection in each official plant processing egg products for commerce.

(2) Any eggs and egg products not processed in accordance with the regulations in this part or part 591 or that are not otherwise fit for human food must be removed and segregated.

(c)(1) All loss and inedible eggs or inedible egg products must be placed in a container clearly labeled “inedible” and containing a sufficient amount of denaturant or decharacterant, such as an FDA-approved color additive, suspended in the product. Eggs must be crushed and the substance dispersed through the product in amounts sufficient to give the product a distinctive appearance or odor. Inedible product may be held in containers clearly labeled “inedible” which do not contain a denaturant as long as such inedible product is properly packaged, labeled and segregated, and inventory controls are maintained. Such inedible product must be denatured or decharacterized before being shipped from a facility.

(2) Undenatured egg products or inedible egg products that are not decharacterized may be shipped from an official plant for industrial use or animal food, provided that it is properly packaged, labeled, and segregated, and inventory controls are maintained.

(d) [Reserved]

(e) Inspection program personnel may allow an official plant to move egg products that have been sampled and analyzed for Salmonella, or for any other reason, before receiving the test results, if they do not suspect noncompliance by the plant with any provisions of this part. The official plant must maintain control of the products represented by the sample pending the results.

* * * * *

§ 590.504 [Amended]

55a. Effective October 29, 2021, amend § 590.504 by removing and reserving paragraphs (f) through (n), and removing paragraphs (p) and (q).

§ 590.504 General operating procedures.

55b. Effective October 31, 2022, amend § 590.504 by adding paragraph (d) and removing paragraphs (f) through (o) to read as follows:

* * * * *

(d)(1) Egg products must be processed to meet the standard set out in § 590.570.

(2) Unpasteurized or microbial pathogen-positive egg products may be shipped from an official plant to another official plant only when they are to be pasteurized, heat treated, or treated using other methods of treatment sufficient to produce egg products that are edible without additional preparation to achieve food safety in the second official plant. Official plants must maintain control of shipments of unpasteurized or microbial pathogen-positive egg products shipped from one official plant to another official plant for pasteurization or treatment. Shipping plants must seal such shipments in cars or trucks and label them in accordance with § 590.410(c). Containers of unpasteurized or microbial pathogen-positive egg product must be marked with the identification mark shown in Figure 2 of § 590.415.

* * * * *

§ 590.570 [Corrected]

3. On page 68680, second column, amendatory instruction 66 is corrected as instruction 66b, and new amendatory instructions 66 and 66a are added, to read as follows:

§ 590.570 [Amended]

66. Amend § 590.570 by removing paragraph (c).

§ 590.570 [Amended]

66a. Effective October 29, 2021, amend § 590.570 by removing and reserving paragraph (a).

66b. Effective October 31, 2022, revise § 590.570 to read as follows:

Done at Washington, DC.

Paul Kiecker,
Administrator.

[FR Doc. 2020-26798 Filed 12-15-20; 8:45 am]

BILLING CODE 3410-DM-P

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2020-BT-TP-0002]

RIN 1904-AE85

**Energy Conservation Program:
Definition of Showerhead**

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

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (“DOE”) adopts a revised definition for “showerhead” and definitions for “body spray” and “safety shower showerhead”. The revised regulatory definition for “showerhead” is consistent with the most recent standard developed by the American Society of Mechanical Engineers (“ASME”) in 2018, such that each showerhead in a product containing multiple showerheads would be considered separately for purposes of determining standards compliance. DOE has determined that the definition is consistent with EPCA and, unlike the current definition, compliant with the National Technology Transfer and Advancement Act and Office of Management and Budget (“OMB”) Circular A-119. In addition, the definition is consistent with DOE’s treatment of other products, such as body sprays. DOE is also defining the terms “body spray” and “safety shower showerhead” to clarify which products are not subject to the current energy conservation standard. With regard to the showerhead test procedure, DOE emphasizes in this final rule that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. DOE is not finalizing any test procedure amendments in this final rule.

DATES: The effective date of this rule is January 15, 2021. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register on January 15, 2021.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The docket web page can be

found at: <http://www.regulations.gov/docket?D=EERE-2020-BT-TP-0002>. The docket web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586-2588. Email: Amelia.Whiting@hq.doe.gov.

SUPPLEMENTARY INFORMATION: DOE incorporates by reference the following industry standard into 10 CFR part 430:

ANSI/ISEA Standard Z358.1-2014, “American National Standard for Emergency Eyewash and Shower Equipment”, approved January 8, 2015.

Copies of ANSI/ISEA Z358.1-2014, can be obtained from International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209 or American National Standards Institute, 25 West 43 St., 4th Floor, New York, NY 10036, <http://ansi.org>.

For a further discussion of this standard, see section IV.M.

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I. Summary of Final Rule

In this final rule, DOE is revising its prior interpretation of the EPCA definition of “showerhead” to interpret the term as defined in ASME A112.18.1-2018. DOE defines “showerhead” as “any showerhead including a handheld showerhead other than a safety shower showerhead.” This definition restates the statutory definition of “showerhead,” at 42 U.S.C. 6291(31)(D). Through this final rule, DOE also includes in its regulatory definition of “showerhead”, its interpretation of the term “showerhead” to mean “an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.” This interpretation incorporates the ASME definition.

DOE believes that interpreting the term “showerhead” consistent with the ASME definition is more appropriate than DOE’s previous interpretation of “showerhead.” As described in section II.A of this document, DOE recognizes that the statutory definition of the term “showerhead” is ambiguous in key respects. Accordingly, to provide clarity to regulated entities and the public concerning what is meant by the term, DOE is revising its regulatory definition of showerhead using the definition of “showerhead” in ASME A112.18.1-2018. The most current ASME standard continues to define a showerhead as it did in 2011 when DOE first issued interpretive guidance for showerheads that defined the term to include all showerheads in a multi-head product —“an accessory to a supply fitting for spraying water onto a bather, typically from the overhead position.”

Under DOE’s definition, each showerhead included in a product with multiple showerheads would separately be required to meet the 2.5 gallons per minute (“gpm”) standard established in EPCA. As explained in the discussion that follows, DOE concludes that its interpretation of the term “showerhead” is consistent with Congressional intent in establishing the EPCA definition of “showerhead” and the associated energy conservation standard. DOE’s final rule is also consistent with the requirements of the National Technology Transfer and Advancement Act of 1995, Public Law 104-113, section 12(d), Mar. 7, 1996, 110 Stat. 783, as amended by Public Law 107-

107, Div. A, Title XI, section 1115, Dec. 28, 2001, 115 Stat. 1241 (“NTTAA”), 15 U.S.C. 272 note, and the associated OMB Circular A-119, which directs Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable.¹ In addition, DOE’s rule treats products with multiple showerheads in a manner consistent with DOE’s treatment of similar products, such as body sprays. Body sprays are not included in the current definition of showerhead. A regulatory definition of showerhead that allows each showerhead in a multiheaded product to be tested for purposes of compliance with the 2.5 gpm standard provides more consistent regulatory treatment for these products than a definition that considers all of the showerheads together, essentially prohibiting products with multiple showerheads that are no different from body sprays in their water use.

DOE also is defining the terms “body spray” and “safety shower showerhead” so that it is clear that these products are not considered showerheads subject to DOE’s test procedures and energy conservation standards.

II. Authority and Background

A. Authority

Title III of EPCA (42 U.S.C. 6291, *et seq.*) sets forth a variety of provisions designed to improve energy efficiency and, for certain products, water efficiency.² Part B of Title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291-6309, as codified), establishes the “Energy Conservation Program for Consumer Products Other Than Automobiles,” which includes

¹ Section 12(d) of the NTTAA provides that with one exception, all Federal agencies and departments shall use technical standards developed or adopted by voluntary consensus standards bodies (“voluntary consensus standards”), using such standards as a means to carry out policy objectives or activities determined by the agencies and departments. The statutory exception is that a Federal agency or department may elect to use other technical standards if using voluntary consensus standards is inconsistent with applicable law or otherwise impractical, and if the agency head submits to OMB an explanation of the reasons for using the alternative standards. See 15 U.S.C. 272 note. Section 6 of OMB Circular A-119, available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revise_circular_a-119_as_of_1_22.pdf, reiterates the requirement for Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable, and to issue guidance for agency reporting to OMB when standards other than voluntary consensus standards are used.

² All references to EPCA refer to the statute as amended through America’s Water Infrastructure Act of 2018, Public Law 115-270 (Oct. 23, 2018).

showerheads, the subject of this rulemaking. (42 U.S.C. 6292(a)(15)) Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

B. Background

EPCA defines a showerhead simply as “any showerhead (including a handheld showerhead), except a safety shower showerhead.” In addition to defining “showerhead,” EPCA established a maximum water use threshold of 2.5 gallons per minute (“gpm”) applicable to “any showerhead.” Both the definition of showerhead and the 2.5 gpm standard were added to EPCA by the Energy Policy Act of 1992 (Pub. L. 102–486; Oct. 24, 1991, “EPCA 1992”). From 1992 to 2013, DOE regulations did not contain a separate definition of “showerhead.”

DOE issued a notice of availability of a proposed interpretive rule relating to the definition of showerhead in May 2010. 75 FR 27926 (May 19, 2010). In the proposed interpretive rule, available at <https://www.regulations.gov/document?D=EERE-2010-BT-NOA-0016-0002>, DOE noted that there were a myriad of showerhead designs marketed under names such as waterfalls, shower towers, rainheads and shower systems. DOE intended the proposed interpretive rule to address “uncertainty” in how the EPCA definition of showerhead and the 2.5 gpm water conservation standard apply to such products, which have multiple nozzles. The proposed interpretive rule sought comment on DOE’s proposed interpretation of the term “showerhead” to mean “any plumbing fitting designed to direct water onto a bather,” including a fitting that comprises a set of showerheads, as conventionally understood (*i.e.*, a set of accessories that each spray water onto a bather). Under this interpretation, the Department would find a “showerhead” (*i.e.*, a fitting comprising multiple showerheads) to be noncompliant with EPCA’s maximum water use standard if the showerhead’s standard spraying “components,” operating in their maximum design flow configuration and when taken together, use a total in excess of 2.5 gpm, even if each spraying component individually does not use an amount that exceeds 2.5 gpm. *Id.*

DOE did not finalize the proposed interpretive rule. Instead, DOE withdrew the draft interpretive rule from review by OMB and in 2011 issued enforcement guidance that achieved essentially the same result. (See <https://www.energy.gov/sites/prod/files/gcprod/>

[documents/Showerhead_Guidancel.pdf](#)).³ The Department stated in the enforcement guidance that multiple spraying components, when sold together as a single unit designed to spray water onto a single bather, constitute a single showerhead for purposes of compliance with the 2.5 gpm standard. The guidance did not apply to tub spouts, locker room showers, or emergency showers, or to handheld showers where the sprayer cannot run at the same time as the main nozzle. To determine whether a showerhead complied with the standard, DOE would measure a showerhead’s water use by turning on all of the unit’s sprays and nozzles to their maximum flow settings. *Id.* In issuing the guidance, DOE stated its view that the term “any showerhead” was sufficiently clear that no interpretive rule was needed. The Department also stated its view that this interpretation was consistent with both the industry standard incorporated into EPCA and the plain language and intent of Congress in establishing a maximum water use requirement for showerheads. Because manufacturers had developed the “myriad of products” referenced in the draft interpretive rule based on their “apparent misunderstanding” of how to measure compliance with the 2.5 gpm standard, however, DOE provided an enforcement grace period of 2 years from issuance of the guidance for manufacturers to sell any remaining non-compliant multi-nozzle products and adjust product designs to ensure compliance with the standard. *Id.*

DOE subsequently proposed to change its regulatory definition of showerhead as part of a proposed rule to revise the test procedures for showerheads and other products. 77 FR 31742, 31747–31748, 31755 (May 30, 2012). In that proposed rule, DOE proposed to adopt definitions for the terms “fitting” and “accessory”, as well as a definition of “showerhead” that used those terms. Under DOE’s proposed definition, all components defined as an “accessory,” or a combined set of accessories, to a supply fitting represented a single covered product that would be required to meet the 2.5 gpm standard established in EPCA.

Specifically, DOE proposed to define an “accessory”, with respect to plumbing fittings, as a component that can, at the discretion of the user, be readily added, removed or replaced. Removal of the accessory will not

prevent the fitting from fulfilling its primary function. 77 FR 31742, 31755. DOE proposed to define a “fitting” as a device that controls and guides the flow of water. *Id.* These definitions were consistent with the ASME definition current at that time, ASME A112–18.1–2011. DOE also proposed to define a “showerhead”; however, it defined that term in a manner different from the ASME definition. Specifically, the ASME standard defined “showerhead” as “an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.” DOE proposed to define a showerhead as “an accessory, or set of accessories, to a supply fitting distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position.” *Id.* DOE stated that the definition included body sprays and hand-held showerheads but did not include safety showerheads.⁴

In response to comments on the proposed rule, DOE issued a supplemental notice of proposed rulemaking (“SNOPR”) to revise the definitions of showerhead and hand-held showerhead and to remove body sprays from the definition of showerhead. 78 FR 20832, 20834–28835, 20841 (Apr. 8, 2013) (“April 2013 SNOPR”). Specifically, Kohler Company (“Kohler”) and Sloan Valve Company (“Sloan Valve”) responded to the proposal by recommending that DOE use the definition of showerhead in ASME A112.18.1–2011. The Natural Resources Defense Council (“NRDC”) commented that a showerhead should not be defined as an accessory, and both NRDC and the International Code Council supported including body sprays in the DOE definition. These comments were contrary to comments from the Plumbing Manufacturers International (“PMI”), Moen Incorporated (“Moen”) and Kohler, who stated that body sprays should not be included or considered an accessory because they cannot be readily added or removed by the user. *Id.* at 78 FR 20834–28835.

In the April 2013 SNOPR, DOE again declined to propose the ASME definition of showerhead. DOE reasoned that the ASME definition did not sufficiently address DOE’s regulatory coverage, because it did not specifically include hand-held showerheads or exclude safety showerheads. DOE also

³The 2011 guidance was superseded by the October 2013 final rule described. This final rule would supersede the 2013 final rule by providing for a different interpretation of the term “showerhead” as defined in EPCA.

⁴DOE proposed to define “body spray” as a shower device for spraying water onto a bather from other than the overhead position. DOE proposed to define a “hand-held showerhead” as a showerhead that can be fixed in place or used as a movable accessory for directing water onto a bather.

revised its proposed definition of showerhead (and hand-held showerhead) so that the term “accessory” would not be included in the proposed definition. DOE instead proposed to use the undefined term “component”. Specifically, DOE proposed to define showerhead as “a component of a supply fitting, or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position, including hand-held showerheads but excluding safety shower showerheads.” 78 FR 20832, 20841. DOE proposed that body sprays not be covered by the DOE definition of showerhead, stating that further study of the issue was needed before it could determine whether to include body sprays in the definition. 78 FR 20832, 20834–20835. DOE also considered defining the term “safety shower showerhead” to address the question of which products qualify for exclusion from coverage under EPCA and DOE regulations. DOE noted that the Occupational Safety and Health Administration (“OSHA”) did not define the term, but that certain state regulatory requirements referenced ANSI standard Z358.1, Emergency Eyewash and Shower Equipment, which contains specific design and performance criteria that must be met, such as flow rate and accessibility. DOE stated that these criteria could help develop a definition of safety shower showerhead. Id.

Industry commenters on the April 2013 SNO PR, including Kohler, PMI, NSF International (“NSF”), the International Association of Plumbing and Mechanical Officials, Chicago Faucets, and Moen, stated that DOE should adopt the definition of showerhead in ASME A112.18.1. The majority of these commenters also supported DOE’s proposal not to include body sprays within the definition of showerhead. NRDC, the Appliance Standards Awareness Project, and the California Energy Commission did not support removal of body sprays from the definition. These comments are described in DOE’s final rule, published in October 2013. 78 FR 62970, 62973 (Oct. 23, 2013) (“October 2013 final rule”).

After considering these comments, DOE issued a final rule in October 2013 adopting a slightly modified version of the definition set forth in the April 2013 SNO PR. Specifically, DOE defined showerhead in the October 2013 final rule as “a component or set of components distributed in commerce for attachment to a single supply fitting, for spraying water onto a bather,

typically from an overhead position, excluding safety shower showerheads.” 78 FR 62970, 62973, 62986. DOE continued to include hand-held showerheads within the definition of showerhead. DOE excluded body sprays from the definition but did not finalize the definition of “body spray” set forth in the NOPR. DOE also declined to adopt a definition of “safety shower showerhead” to clarify those showerheads that EPCA had exempted from coverage.

DOE issued a NOPR on August 13, 2020 proposing to revise the current definition of “showerhead”, to adopt definitions for “body spray” and “safety shower showerhead”, and to clarify application of the current test procedure consistent with the proposed definitional changes. 85 FR 49284 (“August 2020 NOPR”). DOE held a public webinar on September 3, 2020 to hear oral comments and solicit information relevant to the August 2020 NOPR.

III. Discussion

Based on careful consideration of comments submitted during the comment period provided for this rulemaking, the Department is revising its prior interpretation of the EPCA definition of “showerhead” to interpret the term showerhead using the definition of the term in ASME A112.18.1–2018. DOE is also adopting definitions for the terms “body spray” and “safety shower showerhead.” DOE is not finalizing the proposal to clarify application of the test procedure discussed in the NOPR.

DOE received comments including from the International Association of Plumbing and Mechanical Officials (“IAPMO”); Sierra Club and Earthjustice (the Joint Commenters); Alliance for Water Efficiency, et al. (“AWE, et al.”); Appliance Standards Awareness Project (“ASAP”), along with Alliance for Water Efficiency (“AWE”), Consumer Federation of America (“CFA”), the National Consumer Law Center, NRDC, the Northwest Energy Efficiency Alliance, and the American Council for an Energy-Efficient Economy (“ACEEE”) (collective referred to as ASAP); the Competitive Enterprise Institute (CEI); interested consumers; and others.

A. Justification for Showerhead Definition Revision

1. Ambiguity in Showerhead Definition

EPCA defines the term “showerhead” generically to “mean[] any showerhead (including a handheld showerhead), except a safety shower showerhead.”

(42 U.S.C. 6291(31)(D)) In a May 2010 draft interpretive rule, DOE stated that uncertainty existed in application of the EPCA definition of showerhead and the 2.5 gpm standard to the “myriad of products” marketed under names such as waterfalls, shower towers, rainheads and shower systems. These products had been designed, manufactured, and marketed with knowledge of, and in the 19 years since, the 1992 law that established a definition of showerhead and the applicable 2.5 gpm standard. Less than a year later, in March 2011, DOE published enforcement guidance defining the term showerhead in a manner that deviated significantly from the ASME definition by determining that products with multiple showerheads constitute only one showerhead for purposes of EPCA. In the enforcement guidance, DOE further stated that the term “any showerhead” in EPCA was “sufficiently clear such that no interpretive rule was needed”. DOE reached this conclusion despite DOE’s statements in its 2010 draft interpretive rule about a lack of clarity and the development of the market since enactment of the 1992 definition of showerhead. Also despite the supposed clarity in the definition, DOE provided a two year grace period for manufacturers to sell products that the enforcement guidance in effect rendered noncompliant with the standard. DOE’s October 2013 final rule then codified in its regulations the showerhead definition set forth in the 2011 enforcement guidance, rendering the guidance unnecessary. Following these developments, the number of multi-headed showerheads in the market decreased significantly from the “myriad of products” cited by DOE in 2010.

DOE received comments in support of addressing ambiguity regarding the definition of a “showerhead.” (Grimm, No. 0065; CEI, No. 0058 at p. 2) Grimm supported the proposal that clarifies regulatory intent on the definition of showerhead and coincides with the current edition of the ASME voluntary standards. (Grimm, No. 0065) The Competitive Enterprise Institute (“CEI”) explained that historically there was some ambiguity regarding models with multiple showerheads and whether the 2.5 gpm standard applied to each showerhead or the entire unit. (CEI, No. 0058 at p. 2)

DOE reiterates its view that ambiguity exists regarding what is considered a “showerhead” under EPCA. To address this confusion noted by Grimm and the CEI, DOE is finalizing this rule to clarify what constitutes a showerhead, consistent with statutory direction that

DOE's regulations for plumbing products, including showerheads, be based on the voluntary consensus definition in ASME A112.18.1–2018.

Other commenters stated that there does not seem to be any ambiguity perceived by the industry or stakeholders. (Bay Area Water Supply & Conservation Agency (“BAWSCA”), No. 0050 at p. 2; Walnut Valley Water District (“WVWD”), No. 0051 at p. 1) Miulli argued that DOE has admitted that the term “showerhead” is not ambiguous and that the 2-year grace period was not due to ambiguity, but rather to allow industry to adapt to new rules. (Miulli, No. 0052 at p. 2) Further, Miulli stated that manufacturers of showerheads have been complying with the testing requirements since 2016 without evidence of ambiguity. To the extent that the DOE is basing this rulemaking on confusion within the industry, the DOE should disclose such evidence to the public. (Miulli, No. 0052 at p. 2)

In response, DOE notes that a number of considerations support the conclusion that the term “showerhead” in EPCA is ambiguous: (1) DOE's own statements in the May 2010 draft interpretive rule; (2) the long-standing existence of waterfalls, shower towers and similar products on the market prior to DOE's 2011 enforcement guidance that effectively eliminated these products; and (3) the two-year grace period DOE provided in the enforcement guidance in recognition of these products. Specifically, in relation to the two-year grace period, DOE stated that manufacturers had developed a myriad of products based on a “misunderstanding” of how to measure compliance with the 2.5 gpm standard, and that the two year grace period provided manufacturers the time to adjust product designs to comply with the standard. (See https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf.) DOE has historically noted that the term “showerhead” is ambiguous, as evidenced by the May 2010 draft interpretive rule. If there was no ambiguity in what was meant by the definition of “showerhead”, it is unclear why manufacturers would have developed so many noncompliant products during the time period from adoption of the definition in 1992 to the issuance of DOE's enforcement guidance in 2011, and why a 2-year grace period was provided to allow for the sale of such product. Further, this final rule does not amend current test procedure for showerheads. Instead, this rulemaking aligns the definition of

showerhead with that of the industry standard, ASME A112.18.1–2018.

2. Reasoning for “Showerhead” Definition Revision

DOE received comments questioning DOE's reasoning for this rulemaking. (Shojinaga, No. 0015; Shepard, No. 0020; Sheegog, No. 0014 at p. 1; White, No. 0013; ASAP, No. 0086 at p. 3–4; ASAP, Public Meeting Transcript at p. 9) ASAP also stated that the information on the record and in the public domain demonstrates that the complaints are unfounded. In response, DOE reiterates that it is finalizing this rulemaking to address ambiguity regarding what constitutes a showerhead.

CEC asserted that DOE's proposed interpretation effectively creates regulatory loopholes that would exempt certain showerheads, specifically multi-headed showerheads and body sprays, from the maximum water flow standard set by Congress and as such, is not a “permissible construction of the statute” nor is it “sufficiently reasonable” to effectuate the statutory language. If Congress had intended to exclude more showerheads than safety showerheads, it would have done so explicitly. (CEC, No. 0083 at p. 3) PIRG also claimed that Congress did not intend the “showerhead” definition to be based on ASME because other definitions in the same paragraph include the phrase “the meaning given such term in ASME A112.19.2M–1990.” (PIRG, No. 0082 at p. 6 citing 42 U.S.C. 6291 (31)(F–H))

As DOE discussed in the August 2020 NOPR, EPCA relies on ASME standard for the test method, the standards, and the marking and labeling requirements. In the definition section, immediately preceding the definition of showerhead, Congress also included definitions of ASME and ANSI. (42 U.S.C. 6291(31)(B)–(C)) Because the other provisions in EPCA regarding showerheads relate to the ASME standard, Congress clearly intended that the definition would also align with the ASME standard. It would be inconsistent if the definition developed by DOE deviated significantly from the ASME definition such that it creates confusion in how to apply the standards and test methods. This final rule ensures that there is no confusion between the definition of showerhead and the testing and standard requirements for showerheads. In addition, DOE is not creating “loopholes” in revising the regulatory definition; each showerhead in a multi-headed product would be required to comply with the standard. DOE further emphasizes that body sprays are not

currently within the definition of showerhead under the 2013 final test procedure rule, so they are not currently subject to DOE's testing requirements and the existing energy conservation standard.

PIRG also argued DOE says EPA Act 1992 “relied on the ASME standard for measuring the water use of showerheads.” 85 FR 29290 (citing 42 U.S.C. 6293(b)(7)). But the cited section states only that “[t]est procedures for showerheads . . . shall be the test procedures specified in ASME A112.18.1M–1989.” (42 U.S.C. 6293(b)(7)) PIRG stated that test procedures simply measure water use—the rate of water flow through a fitting and through a nozzle (or multiple nozzles). (42 U.S.C. 6293(b)(3)) PIRG argued further that the cited statutory section says nothing about what constitutes a showerhead in the first place, or how much water should be allowed to flow through a nozzle. Making the test procedures depend on ASME's methods certainly does not suggest that ASME documents should determine those broader questions of showerhead definition and cumulative flow. (PIRG, No. 0082 at pp. 6–7) CEC further claimed that because DOE is bound by EPCA, and ASME/ANSI is not so bound, Congress explicitly instructed DOE to adopt the ASME/ANSI test procedure unless the Secretary determines that the test procedure, including the instructions and relevant definitions, conflicts with EPCA. (CEC, No. 0083 at p. 4)

As explained in the NOPR, the Energy Policy Act of 1992 illustrated Congress' intent that DOE adhere to ASME standards. When EPCA was amended in 1992 to define showerhead and to establish a test method and water conservation standard for showerheads, Congress specified that the test method applicable to showerheads is the procedure specified in ASME A112.18.1M–1989. (42 U.S.C. 6293(b)(7)(A)) If that ASME standard is revised and approved by ANSI, DOE is required to amend its test procedures to conform to those revisions unless doing so would be inconsistent with other provisions of EPCA. (42 U.S.C. 6293(b)(7)(B)) In the definition section, immediately preceding the definition of showerhead, Congress also included definitions of ASME and ANSI. 42 U.S.C. 6291(31)(B)–(C). The 2.5 gpm standard required compliance with ASME/ANSI A112.18.1M–1989 with regard to the amount of force needed to remove the flow restrictor from the showerhead. (42 U.S.C. 6295(j)(1)) Even the marking and labeling requirements are required to be consistent with those

of ASME A112.18.1M–1989, or a subsequently revised version as appropriate. 42 U.S.C. 6294(a)(2)(E). While commenters are correct that EPCA does not include an explicit direction regarding the definition of showerhead, as discussed previously, DOE has found that reliance on the ASME standard for this final rule is consistent with Congress’s reliance on ASME. In particular, if the definition developed by DOE deviated significantly from the ASME definition, it would create confusion in how to apply the standards and test methods that Congress directed be consistent with ASME.

The CA Investor-Owned Utilities (IOUs) argued that this proposal will introduce confusion into an established market. (CA IOUs, Public Meeting Transcript at p. 13) Commenters also claimed that the proposal is inconsistent with previous DOE statements regarding the ASME definition. (CA IOUs, Public Meeting Transcript at p. 13; Miulli, No. 0052, pg. 3) PIRG also argued that none of DOE’s justifications provide any reasonable basis for changing the definition of showerhead so as to allow more than 2.5 gpm cumulatively from a single fitting. (PIRG, No. 0082 at p. 6)

DOE disagrees that this final rule would introduce confusion into the market by aligning DOE’s definition of “showerhead” with the ASME definition. DOE’s 2011 enforcement guidance introduced confusion such that the Department felt it necessary to provide a 2-year grace period for manufacturers to sell product that the guidance effectively rendered noncompliant. In contrast, this rulemaking ensures that the definition in DOE’s regulations aligns with that used in the ASME standard for showerheads, which is well known by manufacturers in the industry. As discussed throughout this document, DOE is only revising the definition of showerhead and has not amended the current energy conservation standard nor is it finalizing the test procedure clarifications.

PIRG asserted that DOE’s supposed justification is that Congress preferred DOE to align with voluntary industry standards. 85 FR 49287 & n.5. Therefore, DOE says, it must adopt a definition of “showerhead” consistent with the one in ASME’s current standard. PIRG notes that an “accessory,” under the ASME standards, can be “readily added, removed, or replaced.” As a result, PIRG asserts that DOE’s interpretation of the ASME definition of “showerhead” in the NOPR cannot be correct because ASME defines an accessory as “a component that can, at the discretion of

the user, be readily added, removed, or replaced and that, when removed, will not prevent the fitting from fulfilling its primary function.” PIRG stated that removal of one showerhead from a multi-headed product would result in an uncontrolled jet of water from the empty port. As a result, because removal prevents the fitting from fulfilling its primary function, a single showerhead in a multi-headed product cannot, on its own, be considered a showerhead. PIRG further asserts that DOE used the word “component” in the 2013 final rule because it wanted to be able to cover sprayers that cannot so easily be removed—namely, body sprays. DOE’s original proposed definition used the word “accessory,” but then explicitly included body sprays. As a result of commenters’ statements that body sprays are not accessories because they are not removable, PIRG states that DOE issued a supplemental proposal to switch from “accessory” to the word “component” to eliminate removability as a criterion. (PIRG, No. 0082 at pp. 4–5)

Commenters also noted that to fulfill the intent of greater alignment noted in the NOPR, DOE should also incorporate the definitions of accessory, body spray, showerhead, and safety showerhead in the current ASME standard. (AWE, et al., No. 0079 at p. 2)⁵ Other commenters stated that DOE has ignored defining key provisions including “accessory” and “supply fitting.” (Joint Commenters, No. 0085 at p. 3; ASAP, No. 0086 at pp. 3–4)

DOE has adopted the ASME definitions for showerhead and body spray in this final rule. The term “supply fitting” is not defined in the ASME standard. The term “safety shower showerhead” is also not defined in the ASME standard, but DOE has adopted as the definition of “safety shower showerhead” a showerhead that is consistent with the requirements of another voluntary consensus standard, ANSI Z358.1–2014, American National Standard for Emergency Eyewash and Shower Equipment. With regard to adoption of the term “accessory” in the ASME standard, DOE acknowledges commenters’ concerns regarding application of the ASME definition of “accessory” (which includes showerheads) to a single showerhead in a multi-headed product, and the attendant result of removal of that showerhead. DOE notes, however, that removal of a showerhead with a single

nozzle (as opposed to one showerhead from a multi-headed product) would also result in an “uncontrolled jet of water from the empty port”. Because removal of that single showerhead would therefore also prevent the fitting from fulfilling its primary function, under the commenters’ approach, even a showerhead with a single nozzle would not be considered an accessory pursuant to the ASME definition. Therefore, the issue raised by commenters existed under DOE’s 2013 regulatory definition of “showerhead,” though no concern had previously been expressed.

DOE continues to believe it is not necessary to include the definition of “accessory” in its regulations. ASME defines the term “accessory” to include a showerhead. DOE reads that definition of accessory in concert with the definition of showerhead to mean that a showerhead is a type of accessory and ASME makes clear that an accessory includes, as an example, showerheads. Accordingly, adding a definition of accessory (a commonly understood term) in DOE’s regulations would add nothing that is essential to an understanding of what constitutes a showerhead.

In addition, and as stated previously, adoption of ASME’s definition of showerhead conforms to Congressional intent, and is also consistent with comments received by DOE in the 2013 rulemaking that urged DOE to adopt the definition in the ASME standard. 78 FR 20832, 20834. During this proceeding, questions arose related to the use of the word “accessory” and its impact on body sprays. DOE chose to use the phrase “component” rather than “accessory” (which commenters indicated would not include body sprays), but did not address whether body sprays are included in showerheads. 78 FR 62970, 62972–62973 (Oct. 23, 2013). But as stated in the NOPR, an interest in retaining the ability to include body sprays within the regulatory definition of showerhead at some future time should not lead DOE to depart from the term “accessory” that had been, and continues to be, used consistently in the ASME definition. Similarly, DOE now recognizes that defining products with multiple showerheads to constitute a single “showerhead” inappropriately expands the definition of “showerhead” beyond the ASME definition.

With regard to whether 42 U.S.C. 6295(o)(4) precluded DOE from effectively banning multi-nozzle showerheads, the Joint Commenters claimed that DOE has not shown any consumer utility in allowing higher

⁵ The AWE stakeholders submitted two versions of their stakeholder letter. The first version is comment No. 0072; the second letter, which includes additional signatures, is the version referenced throughout this document.

water use levels for multi-nozzle showerheads, much less the degree of utility that must be present to support invoking 42 U.S.C. 6295(o)(4). The Joint Commenters stated that DOE's claim that 42 U.S.C. 6295(o)(4) somehow raises the bar for Congress to legislate a product out of existence by codifying an energy conservation standard is incorrect. That Congress chose to restrict DOE's ability to adopt standards that would eliminate certain product features from the market says nothing about what a subsequent Congress intended when it enacted legislation that can reasonably be read to restrict the availability of certain products. (Joint Commenters, No. 0085 at p. 4) CEC argued that based on the plain language of the statute, section 6295(o)(4) applies only to standards. However, CEC stated that DOE's 2013 final rule did not directly or effectively amend any standards; instead, it clarified existing authority and had no regulatory effect. CEC commented that DOE seems to reference 42 U.S.C. 6295(o)(4) as evidence that DOE's previous rulemaking was unlawful because it impermissibly resulted in the unavailability of a certain performance characteristic. (CEC, No. 0083 at p. 6) Commenters argued that DOE's own analysis shows that the existing market includes multi-headed showerheads that meet the current standard. Therefore, no performance characteristic was eliminated from the market and DOE has not provided any evidence that consumers are not happy with the existing multi-headed showerheads. (CEC, No. 0083 at p. 6; PIRG, No. 0082 at pp. 3–4)

PIRG argued that DOE's new interpretation is contrary to those standards and goals of EPCA 1992, as it will permit higher water usage. DOE has said plainly that the new interpretation will mean a three-nozzle showerhead counts, for purposes of the water conservation standard, as three showerheads, each permitted to emit 2.5 gpm of water flow. Single-nozzle heads have been commonplace for decades, and single nozzles with 2.5 gpm flow have been the norm since DOE announced its current interpretation in 2011. PIRG also asserted that DOE does not suggest the three-nozzle showerhead has a distinctive functionality, or a value as a product category that DOE's 2011 interpretation would have eliminated. If the standard is interpreted to apply only at the level of nozzles, then the sole functional difference is that the three-nozzle head would allow for exceeding the statutory maximum of 2.5 gpm. Presumably, PIRG argues, DOE

believes that consumers will value being able to get additional water flow from multiple nozzles. But that functionality—enabling increased water use beyond the maximum standard set by Congress—is not one that can justify a regulatory decision under EPCA. (PIRG, No. 0082 at p. 3)

Section 6295(o)(4) of EPCA states that DOE may not prescribe a new or amended standard if the Secretary finds that the standard “is likely to result in the unavailability of performance characteristics and features that are substantially the same as those generally available in the United States at the time of the Secretary's finding”. DOE is uncertain as to the commenters' reference to “value as a product category”, as that term does not appear in 42 U.S.C. 6295(o)(4). With regard to the “distinct functionality”, or whether being multi-headed as opposed to single headed is a “feature”, DOE has previously determined that refrigerator-freezer configurations, oven door windows, and top loading clothes washer configurations are all features. 84 FR 33869, 33872 (July 16, 2019). DOE's consideration of a two, three or eight showerheads (as opposed to one) in a given product as a “feature” is consistent with DOE's previous rulemakings and determinations of what constitutes a feature. DOE also acknowledges, as is the case with this definitional rule, that the 2013 rule was not a standards rulemaking and did not comply with the statutory requirements of a standards rulemaking. The effect, however, was the same in that multi-headed showerhead products, while not entirely eliminated from the market, were significantly reduced in availability as a result of the 2011 enforcement guidance. In addition, DOE acknowledges that Congress may pass legislation to eliminate a performance characteristic or feature from the market. The Joint Commenters imply that in establishing the 2.5 gpm standard, Congress intended to restrict the availability of certain showerheads in the market. (See Joint Commenter, No. 0085 at p. 4) In 42 U.S.C. 6295(j)(1), EPCA sets a maximum water use standard for showerheads, but it does not provide any other restrictions about how the showerhead is designed beyond that it must meet the requirements of ASME/ANSI A112.18.1M–1989, 7.4.3(a). Contrary to commenters' assertions, Congress did not act to remove products from the market.

Commenters stated that DOE violated the Administrative Procedure Act (APA) in proposing to revise the regulatory definition of showerhead. (PIRG, No. 0082 at p. 14; Center for Biological

Diversity, No. 0071 at pp. 1–2; AWE, No. 0080 at p. 3) PIRG stated that the proposal falls far short of what the APA requires for such a substantial change. PIRG also asked DOE to provide information on: What products exist currently with multiple nozzles? How popular will high-flow showerheads be? How much additional water will showers consume? How much energy will that cost? How long will it take manufacturers to design, and retool to make these products and what is the cost? (PIRG, No. 0082 at p. 14) The Center for Biological Diversity also argues that DOE violated the APA by failing to provide analysis of its impact on the environment or threatened or endangered species. The commenter cites the Supreme Court decision in (*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 371 (1962) to assert that for DOE's showerhead NOPR, as with the rule at issue in that case, there are no findings and no analysis to justify the choice made, and no indication of the basis on which the agency exercised its expert discretion. The Court stated that the Court was not prepared to, nor would the APA permit the Court to, accept agency promulgation of a rule under such circumstances.

AWE cited to *Encino Motorcars v. Navarro* (2016), stating that the U.S. Supreme Court has required agencies attempting to change definitional standards that have actual legal effects to explain the change in greater detail than if they were rulemaking for the first time. Changes in agency interpretations may be arbitrary and capricious under the APA unless fully explained and the implication of the change fully set forth. (AWE, No. 0080 at p. 3) The Joint Commenters argued that were DOE to follow its own professed rationale and align its regulations with ASME, each nozzle in a multi-nozzle showerhead would not meet the Department's proposed “showerhead” definition. DOE's refusal to act in accord with its own reasoning renders the proposal arbitrary and capricious. (Joint Commenter, No. 0085 at p. 3 (citing *Air Transport Ass'n v. DOT*, 119 F.3d 38, 43 (D.C. Cir. 1997) (“the most serious logical problem” with the agency's regulation—which the Court “simply cannot accept”—is that agency's explanation “is internally inconsistent”).)

DOE has met the APA's requirements for issuing a final rule and has explained its reasoning for revising the definition of showerhead and defining body spray and safety shower showerhead. As discussed in Section II of the NOPR and section III of this final rule, DOE has explained in detail the

reasons for the definitional change. With respect to the information requested by PIRG, DOE provided information in the NOPR with regard to the very small percentage of multi-headed showerheads available on the market today. Other information requested by PIRG is speculative (*e.g.*, How popular will high-flow showerheads be? How much additional water will showers consume? How much energy will that cost? How long will it take manufacturers to design, and retool to make these products and what is the cost?) DOE emphasizes that the rule does not impose costs on manufacturers or consumers. The rule instead revises the regulatory definition of showerhead consistent with congressional intent. DOE does not dictate manufacturing or consumer purchasing choices as a result of this rule, and manufacturers can choose whether to produce multi-headed showerhead products depending on their particular circumstances.

3. NTTAA and OMB Circular A-119

In accordance with the NTTAA, OMB Circular A-119, and EPCA, DOE proposed to adopt definitions from voluntary consensus standards. 85 FR 49284, 49289-49291. DOE received comments regarding the appropriateness of relying on the consensus industry standards as it relates to showerhead. PIRG claimed that DOE cannot rely on the NTTAA to justify its matching of the definition of showerhead to the ASME standard. The 2.5 gpm showerhead maximum flow rate was not a policy objective determined by DOE; it was a water conservation standard determined by Congress. NTTAA does not instruct DOE to base its interpretation of Congress's policy by referring to industry standards. NTTAA itself states that an agency should not follow an industry standard where that is "inconsistent with applicable law." Public Law 104-113, 12(d), 110 Stat. 775, 783. And as discussed, EPA 1992 described in detail how the showerheads program should interact with ASME standards—NTTAA does not repeal or amend those directives. (PIRG, No. 0082 at p. 8)

PIRG argued that DOE's reliance on OMB Circular A-119 is misplaced for the same reasons. To state the obvious, Circular A-119 cannot trump the statute. Like the NTTAA, Circular A-119 does not instruct an agency to follow industry standards where doing so would be "inconsistent with applicable law." 85 FR 49287 n.5. In particular, Congress specified the policy goals that DOE must consider when it makes rules under EPCA. Circular A-

119 cannot supplant those policy goals with an extra-statutory mandate. (PIRG, No. 0082 at p. 8) Commenters also argued that the reference to OMB Circular A-119 and DOE's explanation clearly points out the inappropriateness of this proposed change in the definition, because the ASME definition frustrates and is inconsistent with the statutory requirement to establish and maintain an upper bound on the flowrate of showerhead. (NRDC, No. 0033 at pp. 21-22; Joint Commenters, No. 0085 at pp. 3-4) Earthjustice questioned whether the proposed testing requirements that you only test the nozzle with the highest flow is consistent with the ASME standard; if not, this would seem inconsistent with DOE's rationale for this rulemaking. (Earthjustice, Public Meeting Transcript at pp. 18-19)

DOE considered the requirements of the NTTAA when developing its definitions. The NTTAA requires DOE to use voluntary consensus standards in lieu of government-unique standards in their regulatory activities, except where inconsistent with law or otherwise impractical. (See Pub. L. 104-113, section 12(d), Mar. 7, 1996, 110 Stat. 783, as amended by Pub. L. 107-107, Div. A, Title XI, section 1115, Dec. 28, 2001, 115 Stat. 1241 ("NTTAA"), 15 U.S.C. 272 note https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revise_circular_a-119_as_of_1_22.pdf.) As the commenters note, OMB Circular A-119 directs Federal agencies to use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable. EPCA certainly does not preclude DOE from using such industry standards. The statutory text of EPCA does not make compliance with OMB Circular A-119 inconsistent with applicable law or otherwise impracticable. DOE disagrees that the ASME definition frustrates and is inconsistent with the requirements of EPCA. Similar to the discussion above in regards to NTTAA, DOE has concluded that its definition, which is the same as the ASME definition, is compliant with EPCA. DOE has also determined that it is practicable to adopt the ASME definition. The ASME definition is well understood by showerhead manufacturers. In addition, contrary to DOE's reasoning in the 2013 rulemaking, it is not necessary that the ASME definition specifically exclude safety showerheads, because EPCA already does so.

B. Anti-Backsliding Consideration

When establishing a new product class, DOE must consider EPCA's

general prohibition against prescribing "any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product" in any rulemaking to establish standards for a separate product class. (42 U.S.C. 6295(o)(1))

Commenters argued that the rule is an attempt to circumvent the federal standards in EPCA. (Save Water, No. 0031; Fisseler, No. 0032; Northwest Power and Conservation Council ("NPCC"), No. 0060 at p. 2) Further, commenters stated that the proposal is a violation of the anti-backsliding provision. (ASAP, No. 0086 at p. 5; PIRG, No. 0082 at p. 9; Davis, No. 0064 at p. 1) Los Angeles Department of Water and Power ("LADWP") claimed that the proposed definitions violate the anti-backsliding provision because they will allow for both increased water and energy usage due to the augmented water consumption, higher operational energy demands, and diminished water conservation. (LADWP, No. 0066 at p. 3)

Commenters stated that EPCA's anti-backsliding provision prohibits DOE from prescribing any amended standard which increases the maximum allowable . . . water use. (CEC, No. 0083 at p. 6; the Joint Commenters, No. 0085 at p. 1; PIRG, No. 0082 at p. 9) CEC argued that the anti-backsliding clause must be read to restrict DOE's subsequent discretionary ability to weaken that standard at any point thereafter. (CEC, No. 0083 at p. 6) The Joint Commenters noted that as the Congress that enacted the provision explained, this rigidity serves an important purpose: "to maintain a climate of relative stability with respect to future planning by all interested parties." (Joint Commenters, No. 0085 at p. 1 (citing H.R. Rep. No. 100-11 (Mar. 3, 1987) at 22))

Commenters argued that it is not plausible that Congress prohibited DOE from prescribing increases in the maximum allowable water use of a showerhead, while also permitting DOE to increase water use by redefining a term, citing *NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004). (Joint Commenters, No. 0085 at p. 2, PIRG, No. 0082 at p. 9) The commenters argued that EPCA's anti-backsliding provision must be interpreted in light of "the appliance program's goal of steadily increasing the energy efficiency of covered products" and Congress' intent to provide a "sense of certainty on the part of manufacturers as to the required energy efficiency standards." *Abraham*, 355 F.3d at 197. In addition, reading

EPCA this way would “effectively render” the anti-backsliding provision “inoperative” or a “nullity.” (PIRG, No. 0082 at p. 9 citing *Abraham*, 355 F.3d at 197; Joint Commenters, No. 0085 at pp. 1–3 citing *Abraham*, 355 F.3d at 197 and referencing *Hearth, Patio & Barbecue Association v. DOE*, 706 F.3d 499, 508 (D.C. Cir. 2013) (observing that changes to covered product definitions can “effectuate[] [a] workaround of statutory limits” applicable to energy conservation standards under EPCA”).

EPCA’s anti-backsliding provision prohibits DOE from prescribing “any amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency, of a covered product.” (42 U.S.C. 6295(o)(1)) In this rulemaking, DOE is not amending the current energy conservation standard. If DOE were to do so, those standards would be established through DOE’s standards-setting rulemaking process, which is governed by the Department’s Process Rule and includes multiple distinct steps and includes opportunities for public comment. In the absence of such a rulemaking, neither DOE nor commenters can conclude that the revised definitions amend the standards currently applicable to showerheads. To argue otherwise, as commenters do, would mean that DOE undertook an unauthorized standards rulemaking in 2013.

DOE disagrees with commenters’ reliance on *NRDC v. Abraham* to support their anti-backsliding argument. In that case, the Second Circuit held that the publication date in the **Federal Register** of a final rule establishing an energy conservation standard operates as the point at which EPCA’s anti-backsliding provision applies to a new or amended standard. 355 F.3d at 196. This case is inapplicable to the present rulemaking because DOE has not yet published a final rule amending standards for showerheads. In this rulemaking, DOE is only finalizing definitions for showerheads.⁶

⁶ DOE finds the *Hearth, Patio & Barbecue Association* decision inapplicable to this rulemaking. In that case, the court determined that DOE could not simply define direct heating equipment to include decorative fireplaces, because Congress did not intend for decorative fireplaces to be considered direct heating equipment. The court instead determined that DOE should have issued a coverage determination, with the attendant required findings, prior to establishing standards for decorative fireplaces. In this rule, there is no suggestion that a coverage determination is necessary or appropriate. That is, the statute clearly applies to showerheads. Instead, DOE is revising its regulatory definition consistent with statutory intent such that each showerhead in a multi-headed

The Joint Commenters also claimed that other provisions of EPCA confirm the applicability of the statute’s anti-backsliding provision to actions that alter regulatory definitions in ways that weaken the standards applicable to a covered product. EPCA broadly authorizes DOE to classify additional consumer products and commercial equipment as covered products and equipment subject to energy conservation standards. (42 U.S.C. 6292(a)(20), (b), 42 U.S.C. 6311(1)(L), 42 U.S.C. 6312(b)) In contrast, the statute confers no similarly broad authority to terminate the coverage of a product and allows products to be exempted from standards only under specified circumstances. The handful of EPCA provisions explicitly authorizing DOE actions that weaken energy conservation standards are the exceptions that prove the rule: the anti-backsliding provision blocks those changes to product definitions that would result in weaker standards. (Joint Commenters, No. 0085 at pp. 2–3)

DOE disagrees with the Joint Commenters’ assertion that EPCA’s anti-backsliding provision applies to changes to a definition. As discussed above, the language in 42 U.S.C. 6295(o)(1) prohibits DOE from prescribing an amended standard that results in a reduction in energy efficiency or increase in energy use. That provision does not limit DOE’s discretion to amend definitions for covered products.

PIRG contended that in recent briefing on the standards for general service lamps, DOE asserted that it could undo or revise a prior standard, despite the anti-backsliding rule, if the previous standard was incorrect. The Second Circuit has already rejected that proposition with respect to EPCA itself, *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004). Besides, DOE has not even suggested that its existing interpretation of “showerhead” is incorrect. A shift in policy preference like that is certainly not an exception to the anti-backsliding rule. Nor can an error in the reasoning for a prior regulation, if there was one, exempt it from the anti-backsliding provision. According to the commenter, DOE purports to frame its revision as part of a test procedure rather than a standard. In fact, the regulatory definition at issue applies across the showerhead regulations—to the standard as well as to the test procedures. 10 CFR 430.2. Moreover, even if DOE were only amending a test procedure, it would still be engaged in impermissible backsliding. (PIRG, No.

product must comply with the 2.5 gpm standard established in EPCA.

0082 at pp. 9–10 (citing 42 U.S.C. 6293(e))

DOE is not amending the current energy conservation standards in this rulemaking, nor has DOE asserted that the current standard is incorrect. The adoption of new or revised definitions for a product, including showerheads, does not implicate the anti-backsliding provision because it is not a standard nor does it alter the current standards. Further as discussed previously, DOE developed this rulemaking as a result of ambiguity regarding what products fall under the definition of “showerhead.” Accordingly, the revised definition will provide clarity regarding what products qualify as a showerhead. DOE agrees that the definition of “showerhead” applies to test procedures, standards, and labeling.

The August 2020 NOPR included references to the test procedure for showerheads because DOE had proposed clarifications to the test procedure. DOE has decided not to finalize its test procedure clarification proposal.

C. Definition of Body Spray and Safety Shower Showerhead

In the proposed rule, DOE proposed to define the term “body spray” separately from the definition of showerhead, defining “body spray” as a “shower device for spraying onto a bather other than from the overhead position.” 85 FR 42984, 49291. DOE also proposed to adopt the ANSI standard as the definition of “safety shower showerhead”: “a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.” 85 FR 49284, 49292. DOE received general comments opposing the proposed definitions that would remove “body spray” and “safety shower showerhead” from the definition of showerhead, such that energy conservation standards do not apply to body sprays and safety shower showerheads. (Hare, No. 0012; Cohen, No. 0036; City of Santa Rosa Water Department (“Santa Rosa Water”), No. 0037 at p. 2; BAWSCA, No. 0050 at p. 2; WVWD, No. 0051 at p. 1; City of Tucson, No. 0052 at p. 1; Western Municipal Water District, No. 0054; City of Sacramento Department of Utilities, No. 0055 at p. 2)

DOE notes that the current definition of “showerhead” in 42 U.S.C. 6291(31)(D) and 10 CFR 430.2 both exempt “safety shower showerheads” from the definition of showerheads. This rulemaking does not alter the current exception of “safety shower showerheads” from the definition of a

“showerhead”. Instead, DOE defines what products are considered safety shower showerheads. In regards to “body sprays”, as discussed below, this rulemaking clarifies ambiguity resulting about whether “body sprays” fall under the definition of showerhead. It is important to note that DOE has not changed the current water conservation standard in this rulemaking.

1. Body Spray

In the proposed rule, DOE proposed to define the term “body spray” separately from the definition of showerhead, defining “body spray” as a “shower device for spraying onto a bather other than from the overhead position.” 85 FR 42984, 49291. Thus, DOE’s regulations would make clear that body sprays are not covered by DOE’s test procedure or the energy conservation standard applicable to showerheads, consistent with DOE’s proposed interpretation of the term “showerhead.” Id.

Consumer Research supported the proposal, stating that the term “body spray” is left undefined in the current rule, leaving it unclear whether body sprays are subject to the 2.5 gpm limit. The rule remedies this situation, again adopting language consistent with the current ASME standard, ASME A112.18.1–2018, and makes it clear that body sprays are not showerheads. (Consumer Research, No. 0039 at pp. 3–4)

DOE has concluded that the definition of showerhead in the October 2013 Final Rule did not specifically include or exclude body sprays. DOE agrees that this omission may have introduced uncertainty for regulated parties and that it is appropriate to clarify that body sprays are not showerheads.

Commenters also raised concerns that the proposed rulemaking will result in wasteful and unnecessary “deluge” showers, which will also consume much more hot water increasing energy consumption. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et. al, No. 0079 at p. 2) AWE argued that U.S. plumbing codes require body sprays to comply with the current ASME A112.18.1/CSA B125.1 standard, which requires body sprays to flow no more than 2.5 gpm. If DOE exempts body sprays instead of aligning the definition with that in the industry standard, consumers will be able to purchase higher flow body sprays, but they will not be able to legally install them. (AWE, et. al., No. 0079 at pp. 2–3) Commenters stated that under the proposal, body sprays would not be covered under DOE’s test procedure or the energy conservation standard

applicable to showerheads, which would allow body sprays to be developed with no limits on flow rate. (NPCC, No. 0060 at p. 2; Santa Clara Valley Water District (“Valley Water”), No. 0076 at p. 1)

CEC also raised concerns that DOE’s proposed definition for body sprays relies solely on manufacturer intent and consumer installation decision, rather than discernable technical differences between the products. CEC argued that the proposed definition is overly broad and this ambiguity is compounded by the phrase defining showerhead as being “typically from an overhead position.” The word “typically” is not specific and inserts ambiguity and discretion into DOE’s regulation. Because the definitions together are fundamentally subjective, excluding body sprays and adopting the ASME definition for them creates a loophole that could be used to circumvent Congress’s maximum water flow of 2.5 gpm for any showerhead. (CEC, No. 0083 at p. 3)

The CA IOUs argued that in their analysis the marketplace does not clearly distinguish stand-alone body sprays from conventional showerheads. (CA IOUs, No. 0084 at p. 3) The CA IOUs also conducted a review of retailer websites that indicated that shower units with body spray capability are generally marketed or sold as combination shower systems or shower panels with an overhead showerhead component. Without a reliable way to distinguish stand-alone body sprays from other showerheads, retailers, consumers, and test labs will have no way to determine if a product is a body spray and exempt from current water conservation standards. The CA IOUs argue that industry considers body sprays a form of showerhead, and thus that action that exempts body sprays will result in backsliding. (CA IOUs, No. 0084 at pp. 4–5) The CA IOUs also highlight the WELS, WaterSense, EPA–2018, NCC, and EU standards to discuss how 3 of the 5 standards do not have an orientation requirement for showerheads and that 4 of the 5 standards treat multi-spray products and body spray components similarly. (CA IOUs, No. 0084 at p. 12)

DOE has determined that leaving the scope of products not subject to EPCA’s energy conservation standard undefined, and potentially subjecting manufacturers of body sprays to DOE standards, causes more confusion than establishing a regulatory definition. In this rulemaking, DOE determined it was appropriate to clarify the existing ambiguity following the October 2013 Final Rule that did not include body

sprays within the definition of “showerhead,” and also did not define what constituted a “body spray”. This rulemaking clarifies the definitions of showerhead and body spray. DOE believes that defining what constitutes a “body spray” will help to distinguish “body sprays” from showerheads. Further, CEC and the CA IOUs raised concern about how consumers may install body sprays. (CEC, No. 0083 at p.3; CA IOUs, No. 0084 at p.12) Under EPCA, DOE does not have the authority to regulate where a consumer locates a showerhead after purchase. DOE notes its final rule does not affect any existing building code requirements, but emphasizes that neither its current regulation nor this final rule include body sprays as showerheads, and DOE recognizes the importance of clarity with regard to what products manufacturers must certify to DOE to demonstrate standards compliance.

2. Safety Shower Showerhead

DOE also proposed to adopt the ANSI standard as the definition of “safety shower showerhead”: “a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.” 85 FR 49284, 49292. In DOE’s October 2013 final rule establishing the current definition of “showerhead”, DOE declined to define the term “safety shower showerhead,” which meant that the class of showerheads that EPCA excluded from standards was undefined and subject to DOE’s discretion as to what was considered a safety shower showerhead. DOE noted in the October 2013 final rule that ANSI standard Z358.1, “Emergency Eyewash and Shower Equipment”, defines an emergency shower as “a device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.” 78 FR 62970, 62974; Oct. 23, 2013. Commenters, including NSF and PMI, supported inclusion of the definition of safety shower showerhead consistent with the requirements of ANSI standard Z358.1. At the time, DOE declined to adopt this definition, stating that DOE could not identify a definition that would clearly distinguish these products from showerheads covered under EPCA and that adopting an unclear definition would cause additional confusion. Id. Upon further reflection, DOE is of the view that leaving the scope of products not subject to EPCA’s energy conservation standards undefined, and potentially subjecting manufacturers of safety shower showerheads to DOE standards

when EPCA specifically excluded them from coverage, causes confusion and is inappropriate. What is meant by a “safety shower showerhead” or emergency shower is understood in the regulated industry, and DOE believes that it is unlikely that manufacturers of showerheads intended for use by residential consumers would design a showerhead to meet the specifications of the ANSI standard to avoid compliance with DOE standards. In this final rule, DOE is incorporating by reference the definition of safety shower showerhead from American National Standards Institute/International Safety Equipment Association (“ANSI/ISEA”) Z358.1–2014: “a showerhead that is designed to meet the requirements of ANSI Standard Z358.1.”

Commenters proposed that DOE define safety shower showerheads according to ANSI Z358.1. (CA IOUs, Public Meeting Transcript at pp. 33–34; ASAP, No. 0086 at p.6; ASAP, Public Meeting Transcript at p. 24; CA IOUs, No. 0084 at pp. 12–13) ASAP asserted that the proposed definition of “safety shower showerhead” is too broad and that many showerheads sold for bathing could be viewed as meeting this definition. (ASAP, No. 0086 at p. 6) Specifically, the commenters proposed that DOE adopt the full definition of safety shower showerheads from ANSI Z–358.1–2014 including definitions for terms used in the emergency shower definition and criteria related to flow rate, pattern, fluid temperature, and installation. (CA IOUs, Public Meeting Transcript at pp. 33–34; CA IOUs, No. 0084 at pp. 12–13; ASAP, No. 0086 at p. 6)

DOE agrees with the commenters that the proposed definition is overly broad and does not provide clarity as to what the specific terms in the “safety shower showerhead” definition mean. In the October 2013 Final Rule, DOE declined to adopt ANSI definition of “emergency shower” as the definition for “safety shower showerhead” because DOE could not identify a definition that would clearly distinguish these products from showerheads covered under EPCA and that adopting an unclear definition would cause additional confusion. 78 FR 62970, 62974. The adoption of the ANSI definition of “emergency shower” by itself, as proposed in August 2020 NOPR, does not clearly explain what differentiates a “safety shower showerhead” from a “showerhead.” Accordingly, DOE is defining “safety shower showerhead” to mean a showerhead designed to meet the requirements of ANSI/ISEA Z358.1 (incorporated by reference, see § 430.3).

This standard sets forth specific performance criteria for emergency shower and would require that “safety shower showerheads”: (1) Be capable of delivering flushing fluid at a minimum of 75.7 liters per minute (or 20 gpm) for a minimum of 15 minutes; (2) have a spray pattern with a minimum diameter of 50.8 centimeters (cm) (or 20 in.) at a height of 153.4 cm (or 60 in.) above the surface on which the user standards, and the center of the spray pattern shall be located at least 40.6 cm (or 16 in.) from any obstruction and that the flushing fluid shall be substantially dispersed throughout the pattern; (3) deliver tepid flushing fluid, where “tepid” is defined as a “flushing fluid temperature conducive to promoting a minimum 15-minute irrigation period.” (a suitable range is 16 °C to 38 °C (60 °F to 100 °F)); (4) be located in an area identified with a highly visible sign positioned so the sign shall be visible within the area served by the emergency shower; and (5) be operable with a valve that can be opened in under one second and remained open without user intervention for the duration of a flush.⁷ The inclusion of the related definitions and performance criteria in the definition of “safety shower showerhead” addresses the concerns noted by commenters and clearly distinguishes a “showerhead” from a “safety shower showerhead.”

D. Testing Requirements

In the August 2020 NOPR, DOE proposed to amend the testing provision in appendix S to subpart B of 10 CFR part 430 to address the testing of a single showerhead in a product with multiple showerheads. DOE proposed that a measurement would be required for only one showerhead when all showerheads in the product are identical. If the showerheads in such a product are not identical, only the showerhead with the maximum water flow would need to be tested to determine compliance with the 2.5 gpm standard. Additionally, DOE proposed to specify that where it is not possible to turn on only the showerhead being tested, testing would be performed with all showerheads flowing at the maximum rate. Measurement would be taken of only the showerhead under test. 85 FR 49284, 49292. In this final rule, DOE is not finalizing the proposed testing clarifications. Instead, as noted previously, DOE emphasizes in this final rule that the existing test procedure remains applicable for

⁷ ANSI/ISEA Standard Z358.1–2014, American National Standard for Emergency Eyewash and Shower Equipment.

purposes of measuring the water use of a showerhead as defined in this final rule. It would be speculative for DOE to determine what products manufacturers may choose to produce subsequent to DOE’s revision of its regulatory definition of showerhead. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27. DOE also notes the general requirement in EPCA for DOE to consider on a periodic basis whether test procedures for a covered product should be amended. See 42 U.S.C. 6293. As always, DOE welcomes input from interested parties regarding testing methodology during this required review.

DOE also received comments arguing that the proposal failed to define what constitutes a representative average use cycle for showerheads. (CEC, No. 0083 at pp. 4–5; CA IOUs, No. 0084 at p. 8, ASAP, No. 0086 at p. 5) CEC argued that without determining the representative average use cycle, the average use cycle or period of use of a multi-nozzle showerhead would reasonably include use of all the available nozzles. (CEC, No. 0083 at p. 5) The CA IOUs asserted that the proposed approach would on have one spray component turned on for testing, but that the expected average use of multi-spray component showerhead accessories is to maximize the number of spray components operating. (CA IOUs, No. 0084 at p. 8) Commenters also requested DOE provide data to demonstrate the representative average use of the multi-spray showerhead accessories. (CA IOUs, No. 0084 at p. 8; CEC, No. 0083 at p. 5) Serratos stated that multiple showerheads or body shower heads should not be exempt from the existing testing requirements. A test that would only test one of the showerheads in a multiple head shower would not be an accurate representation of total water use. (Serratos, No. 0041) Klein stated that the understanding of testing organizations is that you test everything that comes out of a showerhead at one time, regardless of the number of heads. (Klein, Public Meeting Transcript at p. 39) DOE is not finalizing the proposed clarifications to the test procedure. Instead, DOE clarifies in this final rule that the existing test procedure remains applicable for measuring the water use of a showerhead as defined in this final rule.

Commenters noted the impact of water pressure on the performance of showerheads. (Gassaway, No. 0009;

Klein, No. 0063 at p. 5; Consumer Research, No. 0039 at p. 3; Klein, Public Meeting Transcript at p. 26) Commenters suggested that the testing conditions clarify the water pressure used for testing as water pressure, which can fluctuate daily as is impacted by factors including the proximity to the water supply and the water quality, and impacts the flow rate from the showerhead. (Gassaway, No. 0009; Consumer Research, No. 0039 at p. 3) A commenter also highlighted that the use of a pressure compensating flow regulator in a majority of showerhead products sold in the United States such that the flow rate remains almost the same over a wide range of operating pressures. (Klein, No. 0063 at p. 5; Klein, Public Meeting Transcript at p. 27)

Commenters noted that test labs interpret the ASME 2018 standard to require that a showering product, regardless of the number of spray heads, be tested for performance in each mode of operation. (ASAP, No. 0086 at p. 4; Joint Commenters, No. 0085 at p. 3; CA IOUs, No. 0084 at pp. 2–3) Commenters also highlighted that stakeholders appeared to agree in comments made at the public webinar hearing. (ASAP, No. 0086 at p. 4; Joint Commenters, No. 0085 at p. 3) DOE is not finalizing the proposed test procedure clarification. Instead, as noted previously, DOE clarifies in this final rule that the existing test procedure remains applicable for measuring the water use of a showerhead as defined in this final rule. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

E. Water Conservation

Numerous commenters, including a comment with 10,184 signatures, raised the importance of water conservation and protecting the environment. (Environment America, No. 0069 at p.1; Peltzman, No. 0006; White, No. 0013; Manduca, No. 0019; Kelley, No. 0023; Huggins, No. 0077; Baker, No. 0078; Rivet, No. 0003; Save Water, No. 0031; Shojinaga, No. 0015) Some commenters specifically highlighted the impact the water efficiency requirements in EPA Act 1992 have had in reducing household water use. (Ruff, No. 0010; Sheegog, No. 0014 at p. 1; Hamilton, No. 0028; Cohen, No. 0036; BAWSCA, No. 0050 at p. 2; City of Sacramento Department of Utilities, No. 0055 at p. 3)

DOE also received numerous comments discussing how the proposal

will waste water and energy and raise greenhouse gases. (Woodroffe, No. 0025; Anonymous, No. 0026; Cyra-Korsgaard, No. 0046; Goodwin, No. 0042; Gooch, No. 0043) One commenter stated that the proposal harms human health by wasting our most precious natural resource. (Anonymous, No. 0022) Commenters also focused on how conservation of treated drinking water and reducing the amount of domestic wastewater routed to sewage treatment plants is important. (Fisseler, No. 0032; Anonymous, No. 0049) Klein stated that assuming 200 million people shower daily, there is approximately 160 million kilowatt hours per year of water and wastewater treatment, which could increase if homes are using showerheads with more than one showerhead. (Klein, Public Meeting Transcript at p. 40) LADWP stated that to go backward on water conservation efforts would compromise the achievements that have been attained thus far and negatively affect economic growth and quality of life. (LADWP, No. 0066 at p. 2)

Commenters also provided estimates of water and energy savings. (AWE, et al., No. 0079 at p. 4; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3) Commenters estimated that in 10 years, the savings for 2.5 gpm showerheads at the federal standard alone accumulate to the equivalent of supplying 1 million homes with water and 670,000 homes with energy. (AWE, et al., No. 0079 at p. 4; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3; Davis, No. 0064) The Texas Water Development Board and the City of Sacramento also outlined the impact that water conservation standards, including those for showerheads, have had on reducing municipal water demands and treatment chemical usage. (Texas Water Development Board, No. 0074 at p. 1; City of Sacramento Department of Utilities, No. 0055 at pp. 2–3) Commenters noted that federal water efficiency standards assist states and counties in implementing their water conservation programs and meeting water use efficiency and water conservation goals. The proposed changes threaten to undo local and state investments in these programs, which has ensured the efficient use of water and potentially forcing water utilities to meet future water demands through alternative water supply projects. (Wisconsin Department of Natural Resources, No. 0038; Broward County, No. 0081)

Numerous commenters also highlighted the ongoing water crises and droughts faced by states around the country and the resulting need for water

conservation. (Anonymous, No. 0070; eb1mom, No. 0002; Fetting, No. 0004; Anonymous, No. 0022; Interested Citizen, No. 0005; Shepard, No. 0020; Shaw, No. 0059; Wargo, No. 0007; Hall, No. 0048; Moir, No. 0021; Lish, No. 0057; Santa Rosa Water, No. 0037 at p. 1, California State Water Resources Control Board (“State Water Board”), No. 0045 at p. 2; Ruff, No. 0010; Cohen, No. 0036; Godwin, No. 0042; Gooch, No. 0043; CA IOUs, Public Meeting Transcript at p. 12) Commenters noted that 40 to 50 states are confronting water shortages, according to a United States Government Accountability Office Report. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et al., No. 0079 at p. 3; Valley Water, No. 0076 at p. 1)

Numerous commenters also stated that the proposal will increase water and energy consumption and lead to higher utility bills for consumers. (CFA, No. 0029; CFA, Public Meeting Transcript at p. 14; Hall, No. 0048; Green Builder Coalition, Public Meeting Transcript at p. 35; Public Service Commission of Wisconsin (“PSC of Wisconsin”), No. 0061 at p. 2; Santa Rosa Water, No. 0037 at p. 2; LADWP, No. 0066 at 3) The NPCC stated that the impacts of this proposal could include increased energy consumption and water use by the consumer, decreased utility by the consumer, increased burden and cost on the water utility, increased burden and cost on water treatment facilities, and possible changes to plumbing, and needs for larger water heater storage tanks. (NPCC, No. 0060 at p. 2) The IAPMO noted that high flow showerhead devices can also deplete hot water from tank type water heaters in a very short period of time, potentially causing accidents when hot water runs out. (IAPMO, No. 0087 at p. 3) Klein stated that residential water heaters typically hold 40–50 gallons and that approximately 70% of the volume can be used during a long event or a series of events before the shower becomes cold. (Klein, No. 0063 at p. 6)

Commenters stated that the proposal will lead to increased water use. (Fisseler, No. 0032) Klein estimated that allowing the output of two headed showerheads to be 5.0 gpm would increase hot water use per shower by 5–20%, depending on the rate of adoption. For 3-headed showers, the increase would be 10–40% per shower depending on the rate of adoption. (Klein, No. 0063 at p. 13) CA IOUs relied on the analysis by Gary Klein and Associates, Inc. suggesting that even limited adoption of multi-spray component products will significantly increase national water use and hot

water use. For example, installing a three-spray component product increases total hot water use, normalized per shower, from 34 gallons (gal) to 61.2 gal, an increase of 80%. If 10% of showerheads were converted to three-spray component products, national residential hot water use could increase by as much as 8%. (CA IOUs, No. 0084 at pp. 5–6) ASAP, relying on Klein’s analysis, stated that assuming a 5% adoption rate for showers using 7.5 gpm, the increase in hot water nationally would be 120 billion gallons per year with cold water usage increasing as well. (ASAP, No. 0086 at pp. 4–5; Klein, No. 0063 at p. 13) Other commenters suggest that the national water increase could be as high as 161 billion gallons in a single year. (Valley Water, No. 0076; AWE, et al., No. 0079 at p. 2; BAWSCA, No. 0050 at p. 3, WVWD, No. 0051 at p. 2)

The PSC of Wisconsin stated that showers account for 20% of indoor water use in the average American home, and homes with showerheads meeting the current standard use about 20.7 gallons per day (gpd), whereas homes using showerheads not meeting the current standard use approximately 34.8 gpd, a nearly 70% increase. A residential customer with average water use that installs a showerhead meeting the revised definition could potentially experience a water bill increase of \$36 per year, which does not include any additional utility capital and operating costs that may result from increased demand on the water system if a significant portion of the customer base installs new showerheads with the higher flow rate. (PSC of Wisconsin, No. 0061 at p. 1)

Commenters also stated that the efficient plumbing standards and conservation programs lower costs for customers, allowing communities to delay or avoid developing new supplies and treatment capacity. (State Water Board, No. 0045 at p. 2; Anonymous, No. 0049; AWE, et al., No. 0079 at p. 3; PSC of Wisconsin, No. 0061 at p. 2; ASAP, No. 0086 at pp. 4–5; Green Builder Coalition, Public Meeting Transcript at p. 35; City of Tucson, No. 0053 at p. 2; Texas Water Development Board, No. 0074 at p. 2) Commenters noted that increasing the consumption of treated drinking water through this proposal will increase water utility costs for providing new supplies—and therefore increase customer bills, as those costs for procuring needed new supplies are then passed on to the customers. (BAWSCA, No. 0050 at pp. 3–4, WVWD, No. 0051 at p. 2) Commenters suggested that each additional 1 gpm of shower flow on a

national basis could cost \$1.14 billion. (Davis, No. 0064; Valley Water, No. 0076 at p. 1; BAWSCA, No. 0050 at p. 4; WVWD, No. 0051 at p. 3; AWE, et al., No. 0079 at p. 3)

One commenter stated that the inability of updated showerheads to allow more water during use is frustrating. (Goehring, No. 0062) A commenter stated that the free market has improved the water use/waste issue to the point where efficiency has succeeded. (Chick, No. 0047) DOE also received a comment suggesting that there is no need for water restrictions for homes on well water and septic systems as all water used returns to the grounds. (Bandy, No. 0030) Gurley claimed that DOE’s determination that this proposal is not a significant energy action is incorrect as it ignores the fuels required to condition the additional gallons of water. (Gurley, No. 0035)

DOE recognizes the importance of water conservation and water savings around the country, especially in those communities facing droughts and water scarcity. As evidenced by the water conservation information provided by commenters, consumers have chosen to install efficient showerheads in their residences, resulting in significant reduction in water and energy consumption. As DOE has consistently stated in this rulemaking, this rulemaking does nothing to alter the current energy conservation standard for showerheads and is therefore not a significant energy action (see also Section IV.L). Instead, it revises and add definitions related to showerheads to provide clarity in the marketplace and preserve consumer utility. Further, while water conservation is obviously a purpose of EPCA, the definitional changes follow congressional reliance on the ASME standard.

F. Additional Issues

1. State Regulation of Showerheads

Commenters also discussed the regulation of showerheads by states. Some commenters argued that the redefinition would create confusion and uncertainty because some states already have more restrictive standards than the federal standard of 2.5 gpm for showerhead, and that the intention of EPAAct 1992 was to establish a uniform regulation for all states. (BAWSCA, No. 0050 at p. 3; Valley Water, No. 0076 at p.1; WVWD, No. 0051 at p.2; AWE, et al. No. 0079 at p.3) ASAP argued that it is likely that state regulation of showerheads and body sprays will proliferate in response to this proposal. (ASAP, Public Meeting Transcript at p. 11)

LADWP noted concern that DOE’s proposal would supersede measures adopted by the State of California, to regulate showerheads at a maximum flow rate of 1.8 gpm and that the proposal would allow high-flow showerheads on online marketplaces. (LADWP, No. 0066 at p. 2) The State Water Board noted that some states already regulate showerheads and that California would not be affected because of existing CEC regulations on showerheads. (State Water Board, No. 0045 at pp. 1–2) Commenters noted that DOE waived preemption in 2010 and that the proposal would have no preemptive effect on states. (CEC, No. 0083 at p. 8; ASAP, Public Meeting Transcript at p. 11)

As noted in the proposed rule, this rulemaking would not have substantial direct effect on the States. 85 FR 49284, 49295. On December 22, 2010, DOE issued a final rule waiving Federal preemption for energy conservation standards under 42 U.S.C. 6297(c) with respect to any State regulation concerning the water use or water efficiency of showerheads if such State regulation is: more stringent than Federal regulation concerning the water use or water efficiency for the same type or class of product; and applicable to any sale or installation of all products in that particular type or class. 75 FR 80289, 80289. Accordingly, states may currently develop more stringent regulations that the federal standard and this proposal does not change that ability. As noted by some commenters, this rulemaking would not supersede state regulation of water use or water efficiency of showerheads that are more stringent than the Federal standard.

2. Procedural Comments

Following publication of the NOPR, DOE received a request from PMI to extend the comment period by 30 days. (PMI, No. 0011) On August 31, 2020, DOE announced the extension of the comment period by 30 days. 85 FR 53707, 53707. On September 15, 2020, DOE received another request to extend the comment period to 90 to 120 days. (ASAP, AWE, ACEEE, CFA, NRDC, NEEA, No. 0040) DOE further extended the comment period by an additional 14 days for a total of 62 days. 85 FR 61653, 61653 (Sept. 30, 2020).

DOE received comments stating that this proposal violated DOE’s Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment⁸

⁸ 85 FR 8626.

(“the Process Rule”). (ASAP, No. 0086 at p. 5; CA IOUS, No. 0084 at pp. 9–10; PIRG, No. 0082 at p. 14; CEC, No. 0083 at p. 2) The CA IOUs argued that DOE must follow the Process Rule guidelines for changing scope of coverage of water conservation standards. These commenters further stated that the Process Rule includes specific guidance regarding changing scope of coverage of existing standards including describing the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible and, if the proposed standards would not achieve these levels, the reasons for proposing different standards. Furthermore, these commenters assert that the Process Rule requires a public comment period for a change in scope of coverage of not less than 75 days. (CA IOUs, No. 0084 at p. 9)

In this rulemaking, DOE proposed to revise its definition of “showerhead” and define the terms “body spray” and “safety shower showerhead.” EPCA provides DOE with the discretionary authority to classify additional types of consumer products as “covered” within the meaning of EPCA. (See 42 U.S.C. 6296(b) and 42 U.S.C. 6295(l)) This authority allows DOE to consider regulating additional products/equipment that would further the goals of EPCA. Under the Process Rule, DOE is required to provide a minimum of a 60-day comment period following publication of a notice of proposed determination. To conduct a coverage determination, DOE must determine that the classifying the product as a covered product is necessary or appropriate to carry out the purpose of this chapter and the average annual per-household energy use of products of such type is likely to exceed 100 kilowatt-hours per year. (42 U.S.C. 6292(b)(1)) This rulemaking does not attempt to make either of these determinations; rather it defines showerhead and related terms to avoid confusion in the market. Accordingly, this proposal is not a coverage determination. 10 CFR part 430, subpart C, appendix A.

Commenters also argued that DOE did not follow the Process Rule as it relates to requirements for amending a test procedure. (CA IOUs, No. 0084 at p. 10; ASAP, Public Meeting Transcript at p. 38; PIRG, No. 0082 at p. 14; CEC, No. 0083 at p. 2) Commenters stated that Process Rule requires an early assessment process, and DOE has not provided it in this rulemaking. (ASAP, Public Meeting Transcript at p. 38; CA IOUs, No. 0084 at p. 10; CEC, No. 0083 at p. 2) PIRG argued that DOE promised

that the comment period on a proposed rule would be at least 75 days. (PIRG, No. 0082 at p. 14)

DOE has committed to following the Process Rule when amending a test procedure. DOE’s proposal did not propose to amend the current test procedure for showerheads in any substantive fashion. Rather, the proposed rule was an attempt to provide clarification that DOE expected would be sought by regulated entities as to how the existing test procedure would apply to showerheads with multiple outlets. While DOE appreciates commenters’ support for the recently revised Process Rule and seeking DOE’s strict adherence thereto, to avoid any ambiguity regarding application of the Process Rule DOE is not finalizing the proposed test procedure clarifications, including the provisions specifying how to apply the test procedure if the showerheads in a multi-headed showerhead use different amounts of water. Instead, in this final rule, DOE emphasizes that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. It would be speculative for DOE to determine what products manufacturers may choose to produce subsequent to DOE’s revision of its regulatory definition of showerhead. If, in the future, a manufacturer believes that the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can consider seeking a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

DOE also received also comments arguing that the public comment period should have been longer. AWE argued that despite separate extensions requested by stakeholders, the end result was still only a 62-day public comment period. (AWE, No. 0080 at p. 1) Commenters stated that DOE published a NOPR without immediately announcing a required public hearing, and initially only provided 32 days for public comment, even though EPCA requires a comment period of “not less than 60 days.” (CEC, No. 0083 at p. 2; CA IOUs, No. 0084 at p. 10) Valley Water stated that the proposed definition did not follow past DOE practices of allowing at least 60 days for public review. (Valley Water, No. 0076 at p. 1) ASAP further argued that DOE is statutorily required to provide a 60 day comment period and, under the Process Rule, DOE is required to provide 75 days. (ASAP, Public Meeting Transcript at p. 7)

Further, at the webinar, CFA requested an extension of 90 days to

allow DOE to provide a cost impact analysis and allow the public the opportunity to review this data. (CFA, Public Meeting Transcript at p.15) Commenters argued that given the magnitude of the potential impact, the proposed rulemaking should allow at least 90 days or more for public comment and review. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE et. al, No. 0079 at p. 3) Commenters argued that DOE is not following its normal rulemaking process noting that DOE provided little notice for the public meeting. (ASAP, Public Meeting Transcript at p. 7; CA IOUs, No. 0084 at p. 10) Commenters stated the DOE did not follow typical procedure for pre-releasing rules. (ASAP, Public Meeting Transcript at p. 7; CA IOUS, No. 0084 at p.10)

Similar to previous discussion, this proposal was not an amendment to the current showerhead test procedure; instead, it was a clarification. Even if this proposal were considered to be an amendment of the test procedure, under EPCA, DOE is required to provide a comment period of not less than 60 days for a new or amended test procedure. (42 U.S.C. 6293(a)(2)) Commenters had a total of 62 days to comment on the proposal exceeding the 60 minimum provided by EPCA. Finally, as mentioned before, DOE is not finalizing the proposed clarification to the showerhead test procedure. As stated previously, in this final rule, DOE emphasizes that the existing test procedure remains applicable for purposes of measuring the water use of a showerhead as defined in this final rule. If issues arise where the existing test procedure does not produce a representative measurement of the water use of a particular showerhead product, the manufacturer can seek a waiver from DOE pursuant to DOE regulations at 10 CFR 430.27.

3. Consumer Choice

A commenter urged DOE to use latitude available under EPCA to minimize impacts on consumers and maximize choice as the energy posture of the country has changed since the enactment of EPCA. (Strauch, No. 0067) Consumer Research stated that the current rule artificially limits both the number and types of available multiple showerhead products. This restriction on consumer choice is undesirable and contrary to Congressional intent. (Consumer Research, No. 0039 at p. 2) Commenters noted that EPCA prohibits DOE from establishing a new or amended standard under the authority of 42 U.S.C. 6295 if DOE finds that such a standard is likely to result in the

unavailability of performance characteristics, features, sizes, capacities, and volumes substantially similar to those available in the U.S. at the time of the finding. (Consumer Research, No. 0039 at p. 3; CEI, No. 0058 at p. 3–4) CEI also described another provision of EPCA outlining the process for setting a separate standard for a product subgroup, which 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. (CEI, No. 0058 at p. 4) While multiple showerheads were not prohibited, the effects of the 2013 regulatory interpretation of the term “showerhead” was to substantially reduce the availability of such products on the market, contrary to the provisions of EPCA or the intent of EPCA, which was to protect the consumer from losing such choices. (Consumer Research, No. 0039 at pp. 2–3; CEI, No. 0058 at p. 4) Commenters also argued that people should be free to use the showerhead and amount of water of their choosing. (Bell, No. 0016; Caspar, No. 0024)

In response, DOE emphasizes 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.

4. Cost Impact and Technical Analysis

DOE received comments requesting that DOE complete a cost impact analysis of the proposal. (CFA, No. 0029; CFA, Public Meeting Transcript at pp. 14–15; BAWSCA, No. 0050 at p. 1; WVWD, No. 0051 at p.1; AWE, et al. No. 0079 at p. 2; Davis, No. 0064; Valley Water, No. 0076 at p.2; Miulli, No. 0052 at p. 3; Shojinaga, No. 0015; NPCC, No. 0060 at p. 2;) Cyra-Korsgaard argued that this rulemaking is not supported by facts. (Cyra-Korsgaard, No. 0046) A commenter asked if there should be a discussion of the amount of water used by these devices. (Wargo, No. 0007) CEC argues that DOE has not provided any data or analysis to show that the proposed amendments would be less burdensome for manufacturers and that the additional instructions in this proposal will be more burdensome than the existing test. (CEC, No. 0083 at p. 5)

Further, commenters stated that DOE has failed to provide any analysis of the impact of the proposed rule including the impacts on consumers, on water and wastewater utilities, on water supplies, on energy use, on the environment, on manufacturers of showerheads, and on the market. (ASAP, Public Meeting Transcript at pp. 9–10 ; ASAP, No. 0086 at p. 4; NRDC, Public Meeting Transcript at p. 21; CA IOUs, No. 0084 at p. 7; CA IOUs, Public Meeting Transcript at pp. 24– 25; PIRG, No. 0082 at p. 10–12)

Commenters argued that in order to meet the requirements of 42 U.S.C. 6295(o)(1) that the Secretary may not prescribe any amended standard which increases the maximum allowable energy use, or, in the case of showerheads . . . , water use, or decreases the minimum required energy efficiency, of a covered product rulemakings that amend a test procedure typically include analysis of the impacts of the changes to the test procedure on the conservation standard, a process commonly referred to as a “crosswalk.” (CA IOUs, No. 0084 at p. 9; PIRG, No. 0082 at p. 13) However, the CA IOUs argue that the proposed rule contains no assessment of the impact of the proposed test procedure amendment on standards for either body sprays or multi-spray component products. (CA IOUs, No. 0084 at p. 9) PIRG also argues that DOE’s Process Rule⁹ also requires DOE to assess whether a proposed standard will result in “significant savings” of energy of water. More specifically, PIRG stated that even if the proposal were solely a revision to test procedures, DOE has not undertaken key assessments. It is required to evaluate whether the change in test procedures will change the measured water usage of products.¹⁰ (PIRG, No. 0082 at p. 13)

This rule does not amend the current energy conservation standards or test procedures for showerheads; rather, it defines terms related to showerheads to address existing ambiguity. Accordingly, the requirement of completing analyses for energy conservation standards under 42 U.S.C. 6295(o)(1) are not required. Similarly, DOE is not required to conduct analyses regarding whether a test procedure is reasonably designed to produce results measuring water use or estimated annual operating costs during a representative average use cycle because DOE is not amending the current test

procedure for showerheads. (See 42 U.S.C. 6293 (a)(3), (a)(7)(B))

5. Adoption of Consensus Standards

Consumer Research stated that the proposed rule returns the definition of showerhead to the intended definition in EPCA, which states that the test procedures for testing and measuring the water use of showerheads shall be ASME/ANSI standard A112.18.1M –1989. (Consumer Research, No. 0039 at p. 1) Other commenters supported aligning the definitions with the ASME A112.18.1–2018 standard. (IAMPO, No. 0087 at pp. 1–2; Kohler, No. 0075) IAPMO stated that all definitions pertaining to products regulated by Title III of EPCA should align with the definitions contained in products standards that are designated as American National Standards. (IAMPO, No. 0087 at pp. 1–2) DOE agrees that this rulemaking aligns the definition of showerhead with the definition in ASME as intended by Congress in EPCA.

Commenters also recommends that DOE incorporate the definitions for “accessory”, “body spray”, and “safety shower showerhead”, contained in the current ASME A112.188.1. (IAPMO, No. 0087 at pp. 1–2; PMI, No. 0073 at pp. 2–4) CA IOUs stated that while they are supportive of reducing burdens on industry and confusion for consumers, they are concerned that the proposal misinterprets the 2018 ASME standard definition of “showerhead” by failing to consider the definition of the term “accessory” in the showerhead definition. (CA IOUs, No. 0084 at p. 2; CA IOUs, Public Meeting Transcript at p. 34) Kohler noted that consistency between the industry and DOE reduces burden and increases efficiency in bringing products to market. Kohler expressed opposition to amending the test procedure for measuring the energy efficiency of shower heads, but supported test methods aligning with the most recent industry consensus standard for showerheads, ASME A112.18.1/CSA B1 25.1—2018. Deviating from the current requirements, industry standards as well as consumer trends, can create disruption not only in design and manufacturing, but also with supply chain and the end user. Additionally, prior to increasing or decreasing plumbing product now rates, research should be conducted to understand the impact of new capacity on our infrastructure, including wastewater systems. (Kohler, No. 0075).

The American Supply Association (“ASA”) stated that the current test procedure is correct and consistent with

⁹ 10 CFR part 430, subpart C, appendix A.

¹⁰ 42 U.S.C. 6293(3), (7)(B); 10 CFR part 430, subpart C, app. A.

the ASME standard. Adopting the proposed rulemaking would create inconsistencies regarding testing of multi-head showerheads and body sprays and cause confusion in the market place. ASA recommended that DOE codify the 2011 Enforcement Guidance such that body sprays fall under the 2.5 gpm flow rate and ASME references should refer to the current edition of the ASME standard. ASA stated that there is no ambiguity in industry when following the consensus-based industry standards including definitions and test procedures. The plumbing industry has spent a significant amount of time and investment to develop products to comply with the ASME standard test procedure and the DOE's 2011 Enforcement Guidance and to change the test procedure now will lead to confusion and a competitive disadvantage for US manufacturers who comply with the current requirements. (ASA, No. 0068 at pp. 1–2) PMI supports the current test procedure except that the reference should be updated to the latest edition. (PMI, No. 0073 at p. 4) As discussed previously, DOE is not finalizing a proposed test procedure clarification at this time.

6. Other Comments

Commenters argued that the proposal does not qualify for a categorical exclusion under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, as DOE failed to provide analysis of the environmental impacts. (BAWSCA, No. 0050 at p. 3; WVWD, No. 0051 at p. 2; AWE, et al., No. 0079 at p. 3; Davis, No. 0064; the Joint Commenters, No. 0085 at p. 4; AWE, No. 0080 at p. 2; ASAP, No. 0086 at p. 5; CEC, No. 0083 at p. 7) CEC also argued that the rule changes how DOE tests products currently subject to the standard and lead to increases in water and energy use. As such, categorical exclusion A5 is not applicable for this rulemaking. (CEC, No. 0083 at p. 7).

DOE maintains that this rulemaking, once finalized, will only revise the definition of “showerhead” and define the terms “body spray” and “safety shower showerhead.” Further, DOE is not finalizing the proposed changes to the test procedure. Finalization of the rule will not result in adverse environmental impacts and is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D. This categorical exclusion applies to rulemakings that interpret or amend an existing rule without changing the environmental effect of that rule. This rulemaking will not result in a change

to the environmental effect of the existing showerhead standards.

The Center for Biological Diversity argues that the proposed rule violates the Endangered Species Act. (Center for Biological Diversity, No. 0071 at pp. 2–4). This rulemaking only revises the definition of showerhead and defines “body spray” and “safety shower showerhead”. It does not set a standard that has impacts on endangered or threatened species.

Some commenters argued that the proposal will impact plumbing codes. (Gassaway, No. 0009; Malatesta, Public Meeting Transcript at p. 27; Klein, Public Meeting Transcript at p. 30; IAMPO, No. 0087 at p. 2) Specifically, Klein stated that piping will need to get bigger as plumbing codes have limitations on the maximum velocity that’s allowed in a certain sized pipe. (Klein, Public Meeting Transcript at pp. 30) The CA IOUs noted that new construction is built to meet minimum code requirements and these higher flow rate showerhead accessories come with a myriad of additional requirements. (CA IOUs, No. 0084 at p. 7) The IAPMO states that the plumbing codes assume a maximum flow rate of 2.5 gpm for showerheads to determine the right size for water piping. The installation of showerhead devices that flow far in excess of those values will cause problems in right sized plumbing systems resulting from excessive flow velocities. (IAPMO, No. 0087 at p. 2) Gassaway further stated that the regulation and proper labeling of the products is necessary because the purchaser or warranty holder may not be interested or invested in ensuring the showerhead meets engineering standards and the local plumbing code at the time of installation. (Gassaway, No. 0009) DOE notes that this rulemaking is solely a definitional change and does not alter the current standards or any applicable labeling requirements for showerheads.

Commenters also discussed innovation regarding showerheads. A commenter stated that the higher standards promote innovation. (Rivet, No. 0003) Another commenter stated that showerhead engineering has developed to a point that 2.5 gpm gives a very good shower stream and that many showerheads use less than 2.5 gpm. (Fetting, No. 0004) PMI stated that, since the issuance of the 2011 Guidance Document, manufacturers have spent millions of dollars to meet current DOE Guidelines and regulations. PMI also noted a shift in the showerhead marketplace where consumers have embraced water efficiency highlighting the 9,000 WaterSense showerhead

models compared to 3,500 models in 2015 and a PMI commissioned study finding that 45.4% of installed residential showerheads have a flow rate of 2.0 gpm or less. (PMI, No. 0073 at pp. 4–5) Another commenter stated that limiting the flow of water to 2.5 gpm total, restricted innovation in the showerhead industry. (Bell, No. 0016). DOE encourages innovation in showerhead engineering.

Commenters also discussed their perspective on the current standard. Some commenters stated that there is no problem with the current standard, which has worked for decades. (Moir, No. 0021; Rivet, No. 0003; Fisseler, No. 0032; Fetting, No. 0004; Gooch, No. 0043) Another commenter stated that the current home appliance regulations prioritize efficiency and time consuming designs. (Battig, No. 0044) DOE notes that this rulemaking does not alter the current showerhead energy conservation standards, rather it revises the definition for “showerhead” and defines the terms “body spray” and “safety shower showerhead.”

Commenters question why DOE was pursuing this proposal, suggesting it was a waste of time and resources. (Anonymous, No. 0008; Interested Citizen, No. 0005; Center for Biological Diversity, No. 0071 at p. 1) This rulemaking will provide clarity to regulated entities and the public concerning terms such as “showerhead”, “body spray”, and “safety shower showerhead.”

DOE also received a comment related to other current rulemakings. (Hare, No. 0012) DOE also received a comment suggesting that DOE’s Office of Congressional and Intergovernmental Affairs urge Congress to revisit EPCA. (Strauch, No. 0067) DOE appreciates all comments on its rulemakings, but these comments are outside of the scope of this rulemaking.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This regulatory action is a “significant regulatory action” under the criteria set out in section 3(f) of Executive Order 12866, “Regulatory Planning and Review.” 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was subject to review under the Executive order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The definitional change in this rule is not expected to have a material impact on costs. Similarly, the final rule is expected to result in minimal increase

in benefits, primarily through clarifying the showerhead definition.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (E.O.) 13771, “Reducing Regulation and Controlling Regulatory Costs.” 82 FR 9339 (Jan. 30, 2017). More specifically, the order provides that it is essential to manage the costs associated with the governmental imposition of requirements necessitating private expenditures of funds required to comply with Federal regulations. In addition, on February 24, 2017, the President issued Executive Order 13777, “Enforcing the Regulatory Reform Agenda.” 82 FR 12285 (March 1, 2017). The order requires the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO is tasked with overseeing the implementation of regulatory reform initiatives and policies to ensure that individual agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law.

DOE has determined that this final rule is consistent with these Executive orders. The final rule amends the definition of showerhead such that each showerhead in a product with multiple showerheads would constitute a single showerhead for purpose of compliance with the 2.5 gpm standard and define and exclude body sprays and safety shower showerheads from the regulatory definition of showerhead. In this final rule, DOE is reinterpreting the definition of “showerhead” and adopting definitions for “body spray” and “safety shower showerhead.” DOE has designated this rulemaking as “deregulatory” under E.O. 13771 because it is an enabling regulation pursuant to OMB memo M–17–21.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the

rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website at: <http://energy.gov/GC/office-general-counsel>.

DOE reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The head of this agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The Small Business Administration (SBA) considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulation us size standards codes established by the North American Industry Classification System (NAICS) that are available at: <https://www.sba.gov/document/support-table-size-standards>. Plumbing equipment manufacturers are classified under NAICS 332913 “Plumbing Fixture Fitting and Trim Manufacturing,” and NAICS 327111 “Pottery, Ceramics, and Plumbing Fixture Manufacturing.” The SBA sets a threshold of 1,000 employees or less for an entity to be considered a small business within these categories.

DOE notes that this final rule would amend the definition of showerhead such that each showerhead in a product with multiple showerheads would constitute a single showerhead for purposes of compliance with the 2.5 gpm standard. The final rule would also specifically define and exclude body sprays and safety shower showerheads from the regulatory definition of showerhead. This rule does not require or prohibit any specific action. Rather, manufacturers may choose to develop products as a result of this definitional change that comply with the EPCA 2.5 gpm standard, but no manufacturer would incur compliance costs as a

result of this rule. Accordingly, this rule would not have a significant economic impact on any businesses that met the SBA definition of a small business. For these reasons, DOE certifies that this final rule would not have a significant economic impact on a substantial number of small entities, and the preparation of a FRFA is not warranted.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of showerheads must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including showerheads. (See generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (“PRA”). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This rule reinterprets the definition of “showerhead” but does not set energy conservation standards or establish testing requirements for showerheads, and thereby imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this action in accordance with NEPA and DOE’s NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical

exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or environmental impact statement.

F. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. EPCA governs and prescribes Federal preemption of State regulations that are the subject of DOE's regulations adopted pursuant to the statute. In such cases, States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) Therefore, Executive Order 13132 requires no further action.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that each Executive agency make every reasonable effort to

ensure that when it issues a regulation, the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and has determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at <http://www.energy.gov/GC/office-general-counsel> under "Guidance & Opinions" (Rulemaking)) DOE examined the rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the

expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), DOE has determined that this rule will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with the applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and is likely to have a significant adverse effect on the supply,

distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected effects on energy supply, distribution, and use.

DOE has concluded that the regulatory action in this document, reinterpreting the definition of "showerhead", is not a significant energy action because it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rule.

M. Description of Materials Incorporated by Reference

In this final rule, DOE incorporates by reference the industry standard published by ISEA, titled "American National Standard for Emergency Eyewash and Shower Equipment," ANSI/ISEA Z358.1-2014. ANSI/ISEA Z358.1 is an industry-accepted standard that established use and performance requirements for eyewash and emergency shower equipment. DOE incorporates by reference this industry consensus standard at 10 CFR 430.2, which defines term associated with energy conservation standards and test procedures for consumer products.

Copies of ANSI/ISEA Z358.1-2014, can be obtained from the International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209, www.safetysafetyequipment.org or American National Standards Institute, 25 West 43 St., 4th Floor, New York, NY 10036. http://ansi.org.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation,

Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on December 8, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the Federal Register.

Signed in Washington, DC, on December 8, 2020.

Treana V. Garrett, Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE amends part 430 of title 10 of the Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291-6309; 28 U.S.C. 2461 note.

2. Section 430.2 is amended by: a. Adding, in alphabetical order, definitions for "Body spray" and "Safety shower showerhead"; and b. Revising the definition of "Showerhead".

The addition and revision read as follows:

§ 430.2 Definitions.

* * * * *

Body spray means a shower device for spraying water onto a bather from other than the overhead position. A body spray is not a showerhead.

* * * * *

Safety shower showerhead means a showerhead designed to meet the requirements of ISEA Z358.1 (incorporated by reference, see § 430.3).

* * * * *

Showerhead means any showerhead (including a handheld showerhead)

other than a safety showerhead. DOE interprets the term "showerhead" to mean an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.

* * * * *

- 3. Section 430.3 is amended by: a. Redesignating paragraphs (c)(3)(iii) through (v) as paragraphs (c)(3)(iv) through (vi); b. Redesignating the second paragraph (c)(3)(ii) as new paragraph (c)(3)(iii); c. Redesignating paragraphs (q) through (u) and paragraphs (r) through (v); and d. Adding new paragraph (q). The addition reads as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(q) International Safety Equipment Association, 1901 North Moore Street, Suite 808, Arlington, Virginia 22209, (703) 525-1695, www.safetysafetyequipment.org.

(1) ANSI/ISEA Z358.1-2014 ("ISEA Z358.1"), American National Standard for Emergency Eyewash and Shower Equipment, ANSI-approved January 8, 2015, IBR approved for § 430.2.

(2) [Reserved]

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DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE-2020-BT-STD-0001]

RIN 1904-AE86

Energy Conservation Program: Establishment of New Product Classes for Residential Clothes Washers and Consumer Clothes Dryers

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

ACTION: Final rule.

SUMMARY: The Energy Policy and Conservation Act, as amended ("EPCA"), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including residential clothes washers and consumer clothes dryers. In this final rule, the U.S. Department of Energy ("DOE" or "the Department") establishes separate product classes for top-loading consumer clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I electronically filed the foregoing **PETITION FOR REVIEW** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following:

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