No. 21-1167 (consolidated with No. 21-1166)

In the 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,

On Petition for Review of a Rule of the
United States Department of Energy

MOTION FOR STAY PENDING REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Seventh Circuit Rule 26.1, Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America (collectively, "Petitioners") submit the following corporate disclosure statement:

Petitioners are nonprofit corporations. None of the Petitioners has parent corporations or any publicly issued stock shares or securities. No publicly held corporation holds stock in any of the Petitioners.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

In summer 2020, President Trump announced his displeasure with conservation standards for showerheads, which prevent his "wash[ing][his] beautiful hair properly."[1] Congress established those standards, but respondents (collectively "DOE") rushed to find a way to loosen them. Despite nearly unanimous opposition, DOE redefined the word "showerhead" to mean each individual nozzle within a showerhead. Congress said a showerhead can use only 2.5 gallons per minute ("gpm") of water; in DOE's revision, a showerhead can use multiples of that amount, for however many nozzles it has. The redefinition is contrary to any reasonable understanding of "showerhead," and violates a statutory bar on loosening conservation standards. DOE also willfully ignored multiple important factors, and flouted the National Environmental Policy Act ("NEPA").

Petitioners represent water utilities managing scarce and dwindling water supplies; manufacturers that strive to make water-efficient products; and a public grappling with the consequences of water overuse. Showers are

[1] Remarks by President Trump at Whirlpool Corporation Manufacturing Plant (Aug. 6, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-whirlpool-corporation-manufacturing-plant/.

a major portion of residential usage, and DOE's rule will make this country's water problems significantly worse. The Court's immediate intervention is necessary because every showerhead sold while the case is pending will remain in use, consuming scarce water, for the rest of its lifetime.

BACKGROUND

I. EPCA Capped Water Usage for Showerheads.

DOE implements conservation standards under the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6291 *et seq.* EPCA specifies initial conservation standards—minimum energy efficiency, maximum water usage, or associated design requirements—for various products. *Id.* § 6295. It is unlawful to "distribute in commerce" a product that does not meet an applicable standard. *Id.* § 6302(a)(5). DOE must periodically assess whether to tighten each product's conservation standard. *Id.* § 6295(m). EPCA's "anti-backsliding provision" bars DOE from "prescrib[ing] any amended standard which increases the maximum ... water use." *Id.* § 6295(o)(1).

In 1992, Congress added a conservation standard for showerheads: maximum water flow of 2.5 gpm. *Id.* § 6295(j). "The term 'showerhead' means any showerhead (including a handheld showerhead), except a safety shower showerhead." *Id.* § 6291(31). To assess water flow, test procedures are

necessary; the "[t]est procedures for showerheads and faucets … shall be the test procedures specified in ASME A112.18.1M-1989 for such products." *Id.* § 6293(b)(7)(A). The reference is to a standard entitled "Plumbing Supply Fittings," developed by the American Society of Mechanical Engineers ("ASME-112.18"). If ASME-112.18 is revised, DOE "shall amend [its] test procedures … to conform … unless [DOE] determines" that the revised procedures would not reasonably measure "water use … of a covered product during a representative average use cycle." *Id.* § 6293(b)(7)(B), (3).

II. DOE Previously Believed the 2.5-gpm Limit Covers Multi-Nozzle Showerheads.

At first, DOE did not vigorously enforce the showerheads standard. *See* Ex. A (DOE Showerhead Enforcement Guidance (Mar. 4, 2011)). Over the years, some manufacturers developed multi-nozzle products that purported to comply with the 2.5-gpm limitation on a per-nozzle basis. *Id.* In 2011, DOE warned them that EPCA clearly does not permit that approach. "[M]ultiple spraying components sold together as a single unit designed to spray water onto a single bather constitutes a single showerhead for purposes of the maximum water use standard." *Id.*

In 2013, DOE updated its test procedures to reflect changes to ASME-112.18. 78 Fed. Reg. 62,970 (Oct. 23, 2013). That rule also revised DOE's

definition of "showerhead" to mean "[a] component or set of components … for attachment to a single supply fitting, for spraying water onto a bather, typically from an overhead position." *Id.* at 62,973; 10 C.F.R. § 430.2. ASME-112.18 uses the word "accessory" rather than "component." But commenters had worried that "accessory," in ASME-112.18, means something a user can readily remove, and therefore might not encompass built-in products such as body sprays. DOE responded by defining "showerheads" to be "components" rather than "accessories." 78 Fed. Reg. 62,973. DOE reiterated its previous view that any "system … that is packaged and/or distributed in commerce as a single 'accessory' or a single set of 'accessories,' designed to be attached to a single fitting, would be defined as a single showerhead." 77 Fed. Reg. 31,742, 31,748 (May 30, 2012) (proposed rule).

III. DOE Relaxed the Standard by Redefining "Showerhead."

In August 2020, DOE proposed to "revisit its prior interpretation" and adopt the exact ASME-112.18 definition of "showerhead." 85 Fed. Reg. 49,284 (Aug. 13, 2020). ASME-112.18 had not changed in any relevant way. But DOE asserted that the statutory term "showerhead" is "ambiguous in key respects." *Id.* at 49,287. "Under DOE's proposed definition, each showerhead included in a product with multiple showerheads"—*i.e.* nozzles—"would

separately be required to meet the 2.5 gpm standard established in EPCA." DOE offered this revision as an amendment to the test procedure, and proposed new specifications for testing "products with multiple showerheads." *Id.* at 49,288.

DOE's justification was that Congress, having directed DOE to use ASME-112.18 for its test procedure, intended the substantive standard to align as well. 85 Fed. Reg. 49,289-90. EPCA says that before adopting ASME-112.18 revisions, DOE must evaluate whether the revised procedures will properly measure the water usage of covered products. 42 U.S.C. § 6293(b)(7)(B), (3). DOE offered no such assessment.

Petitioners, alongside many other commenters, provided substantial criticism. Exs. B–E. Even industry representatives that favored aligning the textual definitions with industry standards did not want DOE to relax the substantive standard by treating each nozzle as its own 2.5-gpm showerhead. Exs. B & C.

DOE's Showerheads Rule, published on December 16, 2020, defined a "showerhead" as an "accessory." 85 Fed. Reg. 81,341. DOE reiterated that a multi-nozzle showerhead will count as multiple "showerheads" for

standards purposes. *Id.* DOE also explicitly excluded body sprays from the standard. *Id.* at 81,359.

Despite having offered the proposal as an amendment to test procedures and purporting to justify it on the basis of EPCA's test-procedure provisions, DOE abandoned the actual change to test procedures. 85 Fed. Reg. 81,349.

The Showerheads Rule took effect on January 15, 2021; as of that date, high-flow multi-nozzle showerheads can be lawful for sale.[2]

LEGAL STANDARD

EPCA section 336 and Administrative Procedure Act section 705, made applicable here by section 336, *see* 42 U.S.C. § 6306(b)(1); 5 U.S.C. § 705, empower the Court to stay DOE's rule. The standard for staying a rule pending appeal is like that for a preliminary injunction. *Cook Cty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). First, a movant must show it will suffer irreparable harm absent a stay, traditional legal remedies would be inadequate, and its claim has some likelihood of succeeding on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am. Inc.*, 549

[2] Procedurally, a manufacturer would first need to file a report certifying its product complies with the relaxed multi-nozzle standard. 10 C.F.R. § 429.12.

F.3d 1079, 1086 (7th Cir. 2008). If that is shown, the Court determines "whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id*. Greater harm can bolster a weaker showing on the merits, and a stronger likelihood of success can warrant a stay with less injury at stake. *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 607, 611 (7th Cir. 2012).

ARGUMENT

I. The Court Has Jurisdiction Over the Petition.

This Court has jurisdiction (upon a timely petition) to review a rule "prescribed under" EPCA section 323, 324, or 325 (42 U.S.C. §§ 6293, 6294, and 6295). 42 U.S.C. § 6306(b)(1). The action under review was such a rule. Section 325 establishes conservation standards, authorizes DOE to revise them, and sets procedures and principles for amending standards. 42 U.S.C. § 6295. Section 323 is the corresponding provision for test procedures. *Id.* § 6293.

The Rule amended the definition of "showerhead" in 10 C.F.R. § 430.2. That definition "applies to test procedures, standards, and labeling."[3] 85 Fed. Reg. 81,349. It delineates, among other things, the scope of DOE's regulatory

[3] Labeling is the topic of EPCA section 324, the third arena within this Court's direct review. 42 U.S.C. § 6306(b).

conservation standard, 10 C.F.R. § 430.32(p), and its showerheads test procedure, *id.* § 430.23 & subpart B app. S. The Rule changed the substance of those regulations, issued under sections 323 and 325.

Indeed, DOE said explicitly that the goal and the consequence of its redefinition was to change the meaning of the 2.5-gpm standard. 85 Fed. Reg. 81,342; 85 Fed. Reg. 49,284-85. Previously, DOE had firmly stated that the standard limits the flow from an entire showerhead. 85 Fed. Reg. 49,286. DOE now says the term "showerhead" is ambiguous and has been reinterpreted to apply only to individual nozzles. *Id.* at 49,287-88. DOE has thus changed the meaning of the 2.5-gpm standard.

Granted, DOE did not specifically characterize its rule as prescribed under section 323, 324, or 325. As authority, it cited EPCA title III part B as a whole. 85 Fed. Reg. 81,342-43. And DOE insists it was not amending the showerheads standard. *Id.* at 81,349 col. 3.

The rule is within this Court's jurisdiction nonetheless. "[M]ost acts undertaken by DOE under its grant of authority regarding home appliances are subject to review by the court of appeals." *NRDC v. Abraham*, 355 F.3d 179, 193 (2d Cir. 2004); *see Cal. Energy Comm'n v. DOE*, 585 F.3d 1143, 1148 (9th Cir. 2009) (similar). In *Abraham* DOE postponed a standard's effective date.

Though DOE had not cited EPCA as authority, the Second Circuit accepted jurisdiction because "altering the effective date … could be, in substance, tantamount to an amendment or rescission of the standards." 355 F.3d at 194. Here, changing the definition of "showerhead," a revision that DOE says outright will alter the meaning of the standard, is even more clearly "tantamount to an amendment." In *California Energy Commission* DOE refused to exempt California from preemption by a particular standard; the Ninth Circuit accepted jurisdiction because the denial was "closely intertwined" with section 325. 585 F.3d at 1148. Changing the definition used in DOE's section 325 regulations is not just "closely intertwined," it is indistinguishable from the standard.

Those cases relied on a presumption that under a direct-review provision like section 336, doubts should be resolved in favor of review by the court of appeals. 355 F.3d at 193; 585 F.3d at 1148. This Court has adopted the same principle. *Ind. & Mich. Elec. Co. v. U.S. EPA*, 733 F.2d 489, 491 (7th Cir. 1984).

The Court's jurisdiction depends also on petitioners' standing. The showing of irreparable harm below suffices to establish standing. *See League*

of Women Voters of U.S. v. Newby, 838 F.3d 1, 9 (D.C. Cir. 2016) (same injuries established standing and irreparable harm).

II. DOE Has Not Stayed the Showerheads Rule.

Petitioners asked DOE to stay the Rule. Ex. F. DOE refused, and is likely to oppose this motion. *See* Fed. R. App. P. 18(a).

III. Petitioners Will Face Irreparable Harm.

Products that used to be, and should still be, unlawful to distribute in commerce can now be sold to U.S. consumers. These products are showerheads that have multiple nozzles and can thus, under DOE's new interpretation, use multiples of the 2.5-gpm water-flow limit. Any consumer that buys a high-flow showerhead will be able to keep using it even if the Court vacates the rule as petitioners request, because EPCA generally does not regulate end-users. Ex. A, at 2. Every showerhead sold thanks to DOE's unlawful relaxation of standards will remain in place, consuming excessive amounts of water, for the rest of its durable lifetime.[4]

This excessive water consumption is a substantial and irreparable harm. Petitioner Alliance for Water Efficiency ("AWE") represents utilities responsible for supplying water in locations across the United States; its

[4] On average, a showerhead is replaced after 12 years. Ex. G, at 31.

mission, for its members, is to support and enhance water conservation efforts. Ex. H ¶ 3. Utilities in most states are already confronting serious water shortages. *Id.* ¶ 4; Ex. D. These pressures will only grow, due to population increases in areas like the Southwest where water has always been scarce, and climate change, which is causing long-term declines in rainfall in many regions. Ex. E. AWE's members are constantly working to manage and mitigate the scarcity of water. Ex. H ¶¶ 4-5. AWE and its members have consistently advocated for policies to foster water conservation, because, to supply growing populations from ever-tighter water sources, they need to reduce per-capita usage. *Id.* ¶ 4; Ex. I ¶¶ 7-14. The increased usage resulting from the Showerheads Rule will make it more difficult and costly for AWE's members to fulfill their customers' needs for water. Ex. H ¶¶ 8, 12; Ex. I ¶¶ 15-21.

Showers represent 17% of an average home's water use. Ex. G at 31. The Showerheads Rule will increase residential water consumption upwards of 160 billion gallons annually, and increase annual energy consumption by 25 trillion BTUs for each gpm increase in shower flow rate. Ex. E. Even the short-term operation of the rule, pending review, will exacerbate the burden on strained reservoirs and utilities. As noted above, *supra* n.4, an average

showerhead lasts 12 years. If this case takes one year and high-flow showerhead sales are allowed in the meantime, roughly one tenth of the increased water usage from the rule will be locked in before a decision.

Moreover, increased water flow in showers also increases energy consumption, both to heat the water and to produce the clean water. Ex. E, at n.6 & 7; Ex. D, at 3; *California v. BLM*, 286 F. Supp. 3d 1054, 1073 (N.D. Cal. 2018) (wasteful energy consumption constitutes irreparable harm). Petitioners U.S. Public Interest Research Group and Environment America represent hundreds of thousands of individuals affected by the consequences of energy production and consumption. Ex. J. The consumption of fossil fuels—a staple in the nation's energy diet—inevitably produces pollutants such as particulate matter and carbon dioxide. Petitioners' members suffer directly from those pollutants, through inhaling toxic byproducts, through experiencing the climate impacts, and more. Exs. K & L. DOE's decision to allow shower water consumption well in excess of the 2011 guidance will inevitably lead to increased energy usage. The byproducts will cause increased harm to petitioners' members. Exs. K & L.

Courts routinely consider harms like these to warrant injunctions. *Cf. Downstate Stone Co. v. United States*, 651 F.2d 1234, 1242 (7th Cir. 1981)

(environmental damage "constitutes irreparable harm of the greatest magnitude").

To be sure, petitioners cannot say with certainty whether any given distributor will sell high-flow showerheads or how many consumers will buy them. That lack of certainty is not an obstacle. For one thing, AWE and its member Plumbing Manufacturers International ("PMI") must now commit their limited resources to monitor the market for such products. Ex. E ¶ 11; Ex. M ¶ 12; *see Cook Cty.*, 962 F.3d at 233 ("[D]ivert[ing] resources away from existing programs to respond to the effects of [a] Rule" constitutes irreparable harm). This is necessary given their missions and memberships, which include domestic manufacturers threatened by new high-flow imports. If AWE or PMI discovers such products for sale, it must undertake immediate advocacy efforts to try to prevent those sales. Their monitoring cannot be comprehensive and may not find every product of concern. But it is something AWE and PMI are forced to do by DOE's precipitous elimination of standards.

Moreover, the significant risk of harmful product sales, on its own, warrants preliminary relief. *Baird v. Hodge*, 605 F. App'x 568, 572 (7th Cir. 2015); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d

1034, 1045 (7th Cir. 2017) (irreparable harm need not have actually occurred, or even be certain to occur, to deserve injunctive relief). DOE said it intended and expected its rule to enable sales of high-flow showerheads. *See* 85 Fed. Reg. 49,291 (noting proposal would free the market for multi-nozzle showerheads); 85 Fed. Reg. 81,342 (explaining each nozzle gets 2.5 gpm). At a minimum, the rule creates the very substantial risk that such sales will occur; and from those showerheads that are sold, the harmful consequences are inevitable and irreversible. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011) (harms that "are difficult—if not impossible—to reverse," are irreparable).

IV. Legal Remedies Are Inadequate.

The inadequacy of legal remedies—*i.e.*, money damages—is the natural consequence of irreparable harm. *E.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 990-91 (7th Cir. 2019). Money damages cannot make more rain to offset increased water consumption. Similarly, "environmental injury, by its nature, can seldom be adequately remedied by money damages and ... the balance of harms will usually favor the issuance of an injunction." *Amoco Prods. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Moreover, DOE bears sovereign immunity against damages to remediate an unlawful EPCA

policy. DOE will not compensate AWE and PMI for the monitoring work they must do.

Once a high-flow multi-nozzle showerhead is sold, neither DOE nor the Court can recover the product from the consumer. The showerhead will overconsume water and energy for the duration of its useful life. The longer the Showerheads Rule is operational, the greater the harm will be. A stay is the only way to prevent petitioners' harms.

V. Petitioners Are Likely to Succeed on the Merits

To obtain injunctive relief, a movant need only show its chances of success on the merits are "better than negligible"; likelihood of "absolute success" is not required. *Whitaker*, 858 F.3d at 1046. Petitioners easily clear this threshold. The rule has too many defects to cover in this motion; petitioners highlight some of the more glaring problems.

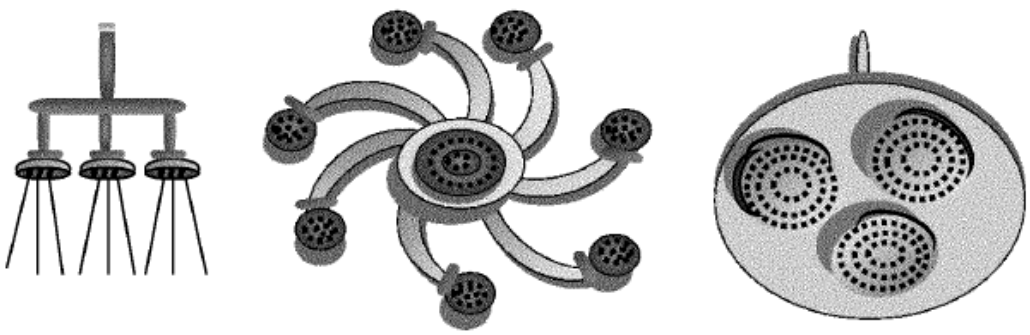
A. The Showerheads Rule Violates EPCA's Anti-Backsliding Provision.

EPCA prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable ... water use ... of a covered product." 42 U.S.C. § 6295(o)(1). Yet that is exactly what the Showerheads Rule did, contrary to the statute.

The violation is plain on the face of the rule. Showerheads are a covered product. *Id.* § 6292(a). The maximum allowable water use for what one conventionally calls a showerhead has long been 2.5 gpm, no matter many nozzles it has. Ex. A, at 1-2. DOE's rule increased the allowable water use of any such object that has multiple nozzles. 85 Fed. Reg. 81,342.

Consider, for example, the product on the left in DOE's Figure 1. 85 Fed. Reg. 49,290.

Figure 1. Products with multiple individual showerheads.



Previously, the maximum flow through that product was 2.5 gpm. 42 U.S.C. § 6295(j); Ex. A (2011 guidance with a similar figure). The Showerheads Rule allows it to use 7.5 gpm. And the middle product can now consume eight times the previous limit.

DOE insists the Rule does not violate the anti-backsliding provision because DOE did not "amend[] the current [water] conservation standard." 85 Fed. Reg. 81,349. That assertion blinks reality. The regulation sets the

standard for a "showerhead," 10 C.F.R. § 430.32(p); and the rule "revis[ed] the definition of 'Showerhead.'" 85 Fed. Reg. 81,359 (amendatory instructions). DOE explained that under the new definition, each nozzle is its own showerhead, and the multi-nozzle assembly gets a multiple of the 2.5-gpm standard. *Id.* at 81,342.

That amendment to the regulatory definition, on its own, violates the anti-backsliding provision. Moreover, DOE just as plainly amended the statutory standard. DOE says it exercised policy discretion to reinterpret ambiguous statutory language. 85 Fed. Reg. 81,345; 85 Fed. Reg. 49,288. That decision "amend[ed] the current ... standard" under any sensible reading of the phrase. *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2018), is instructive. That case addressed a provision in the Medicare Act that requires notice and comment before the Department of Health and Human Services ("HHS") "establishes or changes a substantive legal standard" regarding reimbursements. 42 U.S.C. § 1395hh(a)(2). HHS contended it had simply interpreted a pre-existing standard. 139 S. Ct. at 1811. The Supreme Court rejected that argument because the concept of a "legal standard" is not limited to legislative rules; an interpretative rule can change the substantive legal standards. *Id.* at 1813. Similarly here, the Showerheads Rule changed

the applicable legal standard even though DOE did not formally acknowledge the amendment.

DOE now believes its previous interpretation of the statute was not the best choice. 85 Fed. Reg. 81,344-45. An asserted error in the reasoning for a prior rule does not create an exemption from the anti-backsliding provision. *Cf. New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("EPA's disbelief that it would be prevented from correcting its own listing 'errors' ... cannot overcome the plain text enacted by Congress.").

DOE also noted it did not follow the EPCA procedures for amending a standard, either in this rule or in the previous interpretation. 85 Fed. Reg. 81,349. For this rule, that observation just shows another way DOE violated the law. It does not mean there was no amendment. *See Allina*, 139 S. Ct. at 1812 ("Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements."). Regarding the previous interpretation, it does not matter whether DOE had engaged in a formal EPCA standards amendment.[5] The anti-backsliding provision asks whether DOE is *currently* amending a standard in a way that increases maximum

[5] In fact, DOE's prior interpretation appeared in enforcement guidance. DOE notified manufacturers that the standard unambiguously applied across all nozzles, and then said it would exercise discretion to refrain from enforcement for two years. Ex. A, at 2-3.

permissible water use. Until now, each product shown in Figure 1, and others like them, was only permitted to consume 2.5 gpm, across all nozzles. The anti-backsliding prohibition does not change depending on how that came to be the rule.

B. "Showerhead" Means a Showerhead, and ASME-112.18 is not to the Contrary.

DOE's previous understanding, that EPCA unambiguously subjects a whole showerhead to the 2.5-gpm standard, was correct. The commonplace, ordinary meaning of "showerhead" is the primary guide to the statute's meaning. *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2017) ("[W]ords will be interpreted as taking their ordinary, contemporary, common meaning."). A "showerhead" is simply "a fixture for directing the spray of water in a bathroom shower." *Showerhead*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/showerhead (last visited Jan. 22, 2021).

In ordinary speech, each of the three objects depicted in Figure 1 above is a showerhead; it is a fixture directing a spray of water. You expect to find one showerhead in a shower—perhaps a couple if you have, say, a handheld and an overhead option, but not eight. The difficulty in speaking about the rule reveals the awkwardness of DOE's interpretation. If showerhead means

just each nozzle, what is the whole object called? Ordinarily one would call it a showerhead, but DOE eschews that common-sense manner of speech.

DOE maintains it should redefine the standard on a per-nozzle basis to align with ASME-112.18 by defining a "showerhead" as an "accessory." That rationale is contrary to the statute. EPCA tells DOE to use ASME-112.18 for its test procedures, 42 U.S.C. § 6293(b)(7), but the statute indicates DOE should *not* use that standard to determine the definition of "showerhead." Congress defined "water closet," "urinal," and several other terms by explicit reference to ASME-112.18. *Id.* § 6291(31). The same paragraph, enacted simultaneously, did not invoke ASME-112.18 in defining "showerhead." *Id.* That is a clear signal that DOE should not look to ASME-112.18 to understand what the covered product is. *Cf. United States v. Carnell*, 972 F.3d 932, 939 (7th Cir. 2020) ("When Congress includes particular language in one section of a statute but omits it in another a court must presume that Congress intended a difference in meaning.").

DOE's explanation is not even really founded in ASME-112.18. Nothing in it says *only* an individual nozzle is considered a showerhead. ASME-112.18 defines a "showerhead" as an "accessory"; an "accessory" is an object that is readily removable from a "supply fitting." 85 Fed. Reg. 81,343. Each object

depicted above—the whole showerhead, not just each nozzle—is readily removable from the supply fitting (*i.e.* the pipe) it is attached to. So, even under ASME-112.18, the whole thing is a "showerhead"—and thus, even if ASME-112.18 determined the standard, subject as a whole to the 2.5-gpm limit.

C. DOE Refused to Consider the Consequences of the Showerhead Rule.

The extra 160 billion gallons a year from high-flow showerheads will cost residential customers alone—not to mention commercial users—about $960 million a year. Ex. E, at 11. The energy required to heat that extra water will cost $1.7 billion. *Id.* Sewerage to drain it will cost around $1 billion. *Id.* These amounts represent just what showerhead users will pay. The societal costs will be even greater. Outside investment will be needed to support the additional water usage. *Id.* U.S. manufacturers will have to develop new high-flow products to compete with newly lawful imports from countries with laxer standards. *Id.* at 12.

DOE refused to discuss the costs or benefits of high-flow multi-nozzle showerheads. Commenters pointed out how important these considerations are. DOE responded that it did not have to think about the consequences

because it was simply "revis[ing] the regulatory definition of showerhead consistent with congressional intent." 85 Fed. Reg. 81,348.

Ducking these issues was irrational. The Showerheads Rule was a policy choice, DOE's interpretation of what it says is an ambiguous provision, for which DOE "must ... engage in 'reasoned analysis.'" *Good Fortune Shipping v. IRS*, 897 F.3d 256, 263 (D.C. Cir. 2018). "[A]gency action is lawful only if it rests on a consideration of the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

The economic and environmental consequences of DOE's choice are "relevant factors"—indeed central concerns. EPCA directs DOE to consider, in amending any standard, the economic impact on manufacturers and consumers; the savings in operating costs; projected changes in water usage; and the overall importance of water conservation. 42 U.S.C. § 6295(o). Even if DOE were right that it was not amending a standard, DOE must consider these economic and environmental factors when it interprets the standards. Decades ago, the D.C. Circuit held that DOE cannot claim its EPCA interpretations are "based on congressional intent" unless it has "reasonably accommodated the policies of [the] statute." *NRDC v. Herrington*, 768 F.2d

1355, 1377-83 (D.C. Cir. 1985). DOE's refusal to consider those policies here ignores that principle.

DOE's other excuse was that its new interpretation "does not impose costs on manufacturers or consumers." 85 Fed. Reg. 81,348. Nothing in EPCA limits the relevant economic and environmental costs to those imposed directly on the regulated parties. Indeed, EPCA rules usually don't impose costs on consumers, because EPCA does not regulate what consumers may buy and use—only what companies may sell. Yet DOE routinely considers the costs and benefits a standard will cause for consumers. *E.g., inter alia*, 85 Fed. Reg. 81,558, 81,580 (Dec. 16, 2020) (forecasting increased product prices and decreased operating costs from amending lamp-ballast standards). That DOE was relaxing, instead of tightening, the standard does not justify a refusal to assess the consequences.

D. The Showerheads Rule Violated NEPA.

Instead of assessing the rule's environmental impacts as NEPA requires, 42 U.S.C. § 4332(c), DOE relied on "categorical exclusion" A5 in its NEPA-implementing regulations. 85 Fed. Reg. 81,357-58.

Exclusion A5 is for a "rulemaking[] interpreting or amending an existing rule … that does not change the environmental effect of the rule." 10

C.F.R. part 1021 subpart D app. A. Invoking it here was irrational. DOE stated, without explanation, that the Showerheads Rule "will not result in a change to the environmental effect of the existing showerhead standards." 85 Fed. Reg. 81,356; *id.* at 81,358 (similar). "[M]erely ... asserting that an activity ... will have an insignificant effect" is not enough to qualify for a categorical exclusion. *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). "[A]n agency must provide a reasoned explanation of its decision." *Id.*

That is exactly what DOE refused to do. DOE said its rule would reopen the market for multi-nozzle showerheads with flows well above 2.5 gpm. 85 Fed. Reg. 81,355; 85 Fed. Reg. 49,288. That change has to alter the environmental effect of the standard, as commenters explained in detail. Exs. D, E & O. DOE did not respond to the substance of those observations; it just repeated its mantra that it was only revising a definition. DOE cannot rationally maintain both that the revision will permit higher-flow products that used to be prohibited and that it will have no consequences.

VI. The Balance of Harms Weighs Overwhelmingly in Petitioners' Favor.

In light of the significant harms petitioners face and the invalidity of the rule, the balance of harms need tip only slightly in petitioners' favor. *Whitaker*, 858 F.3d at 1054 (discussing the "sliding scale" approach to

balancing harms). That balance favors, by a wide margin, staying the Showerheads Rule.

A. A Stay Will Not Harm DOE.

Maintaining the status quo will have no harmful effect on DOE or on the manufacturers it regulates. DOE cited no evidence that manufacturers are unable to comply with the previous standard; and in fact industry representatives opposed the relaxation of standards. Exs. B & C.

B. The Public Interest Mandates a Stay.

Public comments nearly unanimously opposed the rule change. *See* 85 Fed. Reg. 81,345-56. DOE said the rule provides needed clarity. *Id.* at 81,344-45. But after DOE's 2011 pronouncement, Ex. A, there cannot have been confusion about how the 2.5-gpm limit operated; and the record reveals no such uncertainty. Manufacturers have been selling multi-nozzle products that comply with the pre-rule version of the 2.5-gpm standard. Ex. E, at 4 & n.6 (identifying example products).

DOE contended the rule beneficially promotes "consumer choice." 85 Fed. Reg. 81,355. The desire of some consumers to buy high-flow showerheads while the case is pending pales compared to the decade-long harms from their continued ability to use those showerheads even if the Court invalidates the rule.

Beyond the costs caused by people's buying and using the new high-flow showerheads, the rule's operation pending review will be costly to organizations such as AWE and domestic manufacturers and their workers. U.S. manufacturers were prohibited from making showerheads that use more than 2.5 gpm. So the first high-flow products on the market will be imported from countries without such standards, and domestic manufacturers will have to catch up. Ex. N ¶¶ 9-11; Ex. M ¶¶ 11-14. AWE and PMI must monitor for such products entering the market. Ex. H ¶ 11; Ex. M ¶ 12. A stay while the Court determines the fate of the Showerheads Rule will permit a more orderly transition. Ex. N ¶¶ 13-15.

Above all, "there is an overriding public interest" in "an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). DOE tried to maneuver around its statutory obligations to find a way to loosen water conservation standards; "faithful adherence" to EPCA calls for enjoining the Showerheads Rule.

CONCLUSION

For these reasons, the Court should stay the Showerheads Rule pending review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Keith Bradley
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