



October 14, 2020

The Honorable Daniel R. Simmons
Assistant Secretary
Office of Energy Efficiency & Renewable Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585-0121

Appliance and Equipment Standards Program
U.S. Department of Energy
Building Technologies Office
950 L'Enfant Plaza, SW., Suite 600
Washington, DC, 20024

RE: COMMENTS ON DOCKET ID NO. EERE-2020-BT-TP-0002 ENERGY CONSERVATION PROGRAM: TEST PROCEDURE FOR SHOWERHEADS

Dear Assistant Secretary Simmons:

This letter is a supplement to the October 14, 2020 stakeholder letter the Alliance for Water Efficiency (AWE) already filed relating to the above referenced proceeding.

In this letter we focus on three legal issues that we believe are problematic with this showerhead test procedure rulemaking. The three legal issues are as follows:

- 1. DOE did not provide the mandatory 60-day public comment period until petitioned by numerous stakeholders, and DOE still does not comply with its own process rule which mandates a minimum of 75 days.***

This proceeding, despite two separate time extensions requested by stakeholders, still resulted in only a 62-day public comment period. This is a process violation and not typical of DOE past practice in other similar proceedings. Excellent documentation of these process violations has been outlined in the extension request letter filed by several parties on September 15, including AWE (see the attached letter). We will not repeat them here.

The statutory language on the mandatory 60-day period is as follows:

42 USC 6293(b)(2): **(2)**If the [Secretary](#) determines, on his own behalf or in response to a petition by any interested [person](#), that a test procedure should be prescribed or amended, the [Secretary](#) shall promptly publish in the Federal Register proposed test procedures and afford interested [persons](#) an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period **shall not be less than 60 days** and may be extended for good cause shown to not more than 270 days. In prescribing or amending a test procedure, the [Secretary](#) shall take into account such information as the [Secretary](#) determines relevant to such procedure, including technological developments relating to [energy use](#) or [energy efficiency](#) of the type (or class) of [covered products](#) involved.

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2. DOE should prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) before adopting the proposed rule.

The National Environmental Policy Act (NEPA) and its accompanying regulations provide that a federal agency must identify alternatives to its proposed action, and analyze the impacts of the action and alternatives, as well as any necessary mitigation measures. Both the longstanding NEPA regulations and the newly adopted regulations (effective Sept. 14, 2020 unless enjoined) provide that unless a “categorical exclusion” applies, the agency must prepare an EA or EIS. (See 40 CFR 1501.4.)

In this proposed test procedure rule, DOE states that it intends to rely on DOE Categorical Exclusion A5 (CATEX A5), which covers “Interpretive Rulemaking with No Change in Environmental Effect.” (85 Fed. Reg. at 49294, citing 10 CFR Part 1021, Subpart D, Appendix A.) That categorical exclusion, adopted by DOE after public process and approval by the Council on Environmental Quality, applies only to a rulemaking “interpreting or amending an existing DOE rule or regulation that does not change the environmental effect of the rule or regulation being amended.” AWE believes that the current proposed test procedure rule does not meet the standard for use of this categorical exclusion and DOE has provided no information to support its conclusion that its action will have no change in environmental effects.

The proposed test procedure rule changes the definition of “showerhead” adopted in 2013¹ and changes the related test procedures such that multi-headed showerheads would be able to deliver far more than 2.5 gpm of water when all open and in use. In fact, the illustrations and explanations of the proposed regulations show that volumes of water could be used that well exceed pre-1992 fixtures – fixtures whose water use prompted Congress nearly 30 years ago to adopt the statutory regulation of showerheads and the 2.5 gpm limit, as well as a prohibition on backsliding. Presumably DOE understands that its new regulation will result in increased water use with respect to any multiple-outlet showerhead array over the current standards; accordingly, the proposed rule change cannot have “no environmental effect.” DOE is thus obliged to determine what that environmental effect is – and unless it is zero, it cannot use CATEX A5.

In 2019, a study determined that approximately 311 million showerheads were in place in American homes². On average, residential showerheads are replaced every 12.5 years. Since the Energy Policy Act (EPAc) standards were passed in 1992, there have been at least two replacement cycles and now approximately 89 percent of all showerheads in place meet or are better than the federal 2.5 gpm standard. If even a small fraction of these 311 million compliant showerheads are replaced by multiple-headed showerhead units, annual water use will increase by hundreds of billions of gallons. In a companion letter filed by AWE in this proceeding, AWE estimates that this definitional change could increase national water use by 161 billion gallons in just 1 year.³

Thus, DOE cannot determine that CATEX A5 is usable without determining, via alternative installation scenarios based on data, just what the increase in water consumption will be. The 1992 EPAc added the requirements related to showerheads and added a new subsection to the purposes of EPCA, 42 U.S.C.

¹ Both the definition of showerhead and the 2.5 gpm standard were added to EPCA by the Energy Policy Act of 1992 (Public Law 102–486; Oct. 24, 1992, “EPAc 1992”). From 1992 to 2013, DOE regulations did not contain a separate definition of “showerhead.”

² GMP Research, US Market Penetration of WaterSense Shower Heads, Lavatory Faucets and Toilets (July 2019).

³ Mitchell D. (June 2020) Showerhead Water & Energy Savings. M.Cubed. Oakland, CA. Available from AWE.

6201(8): “to conserve water by improving the water efficiency of certain plumbing products and appliances.”

In summary, DOE cannot rely on a categorical exclusion through an approach that makes no attempt to determine whether its action does or does not meet the conservation purposes of the law and merely assumes no effect.

3. DOE has not met its duty to justify its change in direction.

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 Administrative Procedure Act unless fully explained and the implication of the change fully set forth. [Encino Motorcars v. Navarro](#) (2016). This is particularly the case where there has been reliance by the industry and others on the prior interpretation, which is certainly the case here.

Thank you for this opportunity to provide further comments.

Sincerely,



Mary Ann Dickinson
President and CEO

**Appliance Standards Awareness Project
Alliance for Water Efficiency
American Council for an Energy-Efficient Economy
Consumer Federation of America
Natural Resources Defense Council
Northwest Energy Efficiency Alliance**

September 15, 2020

Mr. John Cymbalsky
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Building Technologies Office, EE-2J
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Ms. Elizabeth Kohl
U.S. Department of Energy
Office of the General Counsel, GC-33
1000 Independence Ave. SW
Washington, DC 20585-0121

**RE: Energy Conservation Program: Test Procedures for Showerheads - Notice of Proposed Rulemaking
(EERE-2020-BT-TP-0002)**

Dear Mr. Cymbalsky and Ms. Kohl:

We are writing to request that DOE extend the comment period for the notice of proposed rulemaking related to the showerhead test procedure published in the Federal Register on August 13, 2020 (85 Federal Register 49284) to a total of 90 to 120 days. Such an extension is necessary to comport with statute, DOE's process rule, DOE's typical practice and to provide adequate time for comment development given DOE's unorthodox approach to this rule change.

DOE must comply with statutory minimums.

Under the Energy Policy and Conservation Act (42 U.S. Code 6293(b)(2)), DOE must provide a comment period of not less than 60 days and up to 270 days on a proposed test procedure. Statute provides for comment periods longer than 60 days for good cause.

DOE must comply with the process rule.

DOE's revised process rule requires 75-day comment periods for pre-NOPR rulemaking stages and for proposed standards rules (10 CFR Part 430, Appendix A to Subpart C, stating, "The length of the public comment period for pre-NOPR rulemaking documents will vary depending upon the circumstances of the particular rulemaking, but will not be less than 75 calendar days." and "There will be not less than 75 days for public comment on the NOPR, with at least one public hearing or workshop."). In this instance, DOE neglected to carry out any preliminary rulemaking stage (another apparent violation of the process rule,)¹ so application of the 75-day period would make sense. Moreover, although the proposed rule would change definitions in the test procedure, these definitional changes are designed by DOE to narrow the application of DOE's existing standards. Therefore, DOE must extend the comment period to at least 75 days to comply with the process rule.

DOE must comport with its typical practice.

DOE's appliance standards program has issued 38 notices in 2020, yet only failed to pre-release two – this one and another related to clothes washers and clothes dryers released on the same day. DOE's typical practice is to pre-release rules by posting to the agency website and providing email distribution to lists accessible to any person soon after rules are signed by the responsible official. Since sending the notice to the Office of the Federal Register (OFR) and formatting and publication by OFR have typically taken 15 to 30 days or more, this practice extends the effective comment period considerably. It is a welcome practice that provides all stakeholders additional time beyond the officially noticed comment period to consider DOE actions and formulate their responses. DOE has provided no reason for diverging from this practice in this case. DOE cannot directly remedy its departure from normal practice, but DOE should compensate by extending the official comment period by an additional amount beyond 75 days to achieve a period equal to DOE's typical practice).

DOE's failure to include a preliminary rulemaking stage or any impact analysis requires that the agency provide more than the typical comment period.

DOE's approach to this docket has been unorthodox. As noted, DOE's process rule requires a preliminary stage prior to issuing a proposed rule which DOE inexplicably skipped for this topic. Moreover, in contrast to DOE's typical practice, the agency has provided no estimate of the impact of the rule, even though the rule is clearly designed to allow for greater water and energy use by some products. The lack of any government analysis puts the burden on stakeholders to develop their own, which takes time. (DOE also provided an unprecedentedly short 3-day advance notice of the public webinar.) The absence of a preliminary stage and any impact analysis have impaired the ability of all stakeholders to consider and provide input on this proposal. Therefore, DOE must extend the comment period to at least 90 -120 days to provide adequate time for commenters to develop and submit their responses.

¹ 10 CFR Part 430, Appendix A to Subpart C, states in part, "As with the early assessment process for energy conservation standards, DOE believes that early stakeholder input is also very important during test procedure rulemakings. DOE will follow an early assessment process similar to that described in the preceding sections discussing DOE's consideration of amended energy conservation standards. Consequently, DOE will publish a notice in the FEDERAL REGISTER whenever DOE is considering initiation of a rulemaking to amend a test procedure. In that notice, DOE will request submission of comments, including data and information..."

Thank you for considering this request. We look forward to your prompt response.

Sincerely,



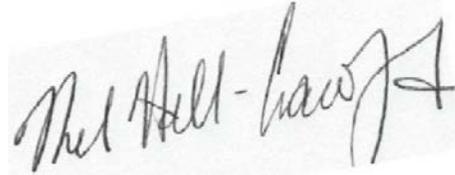
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