

For Your Information

The Department of Energy's Office of General Counsel has issued Enforcement Guidance on Showerheads and announced publically that they have withdrawn the draft interpretive rule on showerheads. The attached guidance explains how the Department intends to enforce the 1992 law and provides manufacturers a two-year grace period before certain enforcement action will be taken.

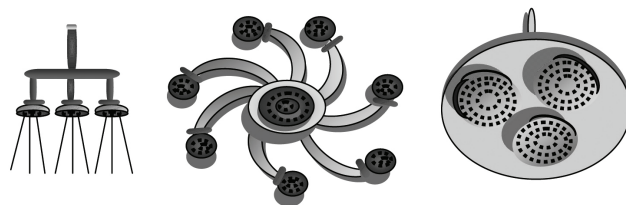
Showerhead Enforcement Guidance

Issued: March 4, 2011

On February 3, 2011, the Department of Energy withdrew from OMB review, as unwarranted, the draft interpretive rule setting out the Department's views on the definition of a "showerhead" under the Energy Policy Conservation Act (EPCA) – and we formally withdraw that draft interpretive rule from consideration today. Nevertheless, to provide certainty to all stakeholders, the Department has decided to issue this brief enforcement guidance setting forth how it intends to enforce the law enacted by Congress in 1992 – yet do so in way that avoids needless economic dislocation.

In May 2010, the Department of Energy issued a draft interpretive rule on the definition of a "showerhead" under EPCA. Over the prior year, the Department had received several complaints alleging that certain showerhead products exceed EPCA's maximum water use standard of 2.5 gallons of water per minute (gpm) for a showerhead, defined by statute as "any showerhead (including a hand held showerhead), except a safety shower showerhead." Both the water use standard and the all encompassing definition of a showerhead were written into law by Congress in 1992. *See* 42 U.S.C. §§ 6295(j)(1), 6291(31)(D). DOE simply adopted the statutory language in its regulations in 1998. *See* 10 CFR §§ 430.32(p), 430.2.

In the course of investigating these complaints, the Department learned that some had come to believe that a showerhead that expels water from multiple nozzles – like a trident with three nozzles or an octopus with eight – constituted not a single showerhead but rather multiple showerheads and thus could exceed the maximum permitted water use by a multiple equal to the number of nozzles on the showerhead. Some examples are pictured below.



We cannot reconcile the view that a showerhead with multiple nozzles is actually multiple showerheads with EPCA's language or intent. Indeed, it has always been the Department's view that when Congress used the term "any showerhead" it actually meant "any showerhead" – and that a showerhead with multiple nozzles constitutes a single showerhead for purposes of EPCA's water conservation standard. Thus, the Department's existing authority to enforce EPCA's water conservation requirements authorizes DOE to take enforcement action against the manufacturers of such products that exceed the 2.5 gpm maximum. *See* 42 U.S.C. 6302-04; 10 CFR Part 430, Subpart F.

Nevertheless, we were keenly aware that the Department had never taken any enforcement action whatsoever in the almost nineteen years since the law was enacted, and that this failure could certainly have contributed to the misinterpretation of the law. So, to ensure fairness to all concerned, the Department decided not to take immediate enforcement action but instead to issue a draft interpretative rule on the definition of the term “showerhead.” We further set out a comment period in order to ensure public participation. In response, DOE received numerous comments, many of which provided useful technical, engineering, and market information. DOE has reviewed the record closely, with the goal of balancing our obligation to enforce Congress’s 1992 requirement and our determination to avoid any needless economic disruption.

After careful consideration, the Department removed the interpretative rule from OMB review in early February, and we formally withdraw it today. We have come to the conclusion that the term “any showerhead” has been, and continues to be, sufficiently clear such that that no interpretive rule is needed. In essence, multiple 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. As such, it does not apply to tub spouts, locker room showers, emergency showers, or to nozzles where water can be diverted to a hand sprayer but the sprayer cannot run at the same time as the main nozzle. Thus, consistent with the Department’s test procedure, to determine whether a manufacturer’s showerhead complies with the 2.5 gpm standard set by Congress, the Department will measure a showerhead’s water use by turning all of a unit’s sprays and nozzles to their maximum flow settings. This is consistent with the industry standard incorporated in the statute, and with Congress’s plain language and intent in establishing a maximum water use requirement for showerheads.

While EPCA affords DOE broad authority to enforce compliance with the showerhead standard, we believe it is crucial to strike the right balance between DOE’s obligation to enforce the law, and our determination to avoid any needless economic disruption. To begin, we note that, as with all EPCA-covered products, the Department’s regulations apply only to the manufacture of products and the sale of products by manufacturers or private labelers. The Department *does not regulate the behavior of consumers* or how they, an architect, or a homebuilder may wish to design a shower. Nor do DOE’s showerhead regulations reach either retail market inventories or the after-market installation of showerheads by plumbers.

We further understand that some manufacturers may have made design and production decisions based on their apparent misunderstanding of how to measure compliance with Congress’s 2.5 gpm standard. Needless to say, requiring manufacturers to remove from the market (and perhaps destroy) products based on this misunderstanding would be wasteful both economically and in terms of a variety of resources. In recognition of this, the Department will exercise its inherent discretion in applying its enforcement authority to manufacturers who were measuring the water flow from each spraying component separately to determine compliance with Congress’s 2.5 gpm standard. *Specifically, the Department will provide an enforcement grace period of two years* from today to allow such manufacturers to sell any remaining non-compliant multi-nozzle products, and to give manufacturers the opportunity to adjust their product designs in order to ensure compliance with EPCA and the Department’s regulations.