

**National Association of Home Builders**

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Friday, June 18, 2010

Ms. Laura Barhydt  
Energy Efficiency and Renewable Energy  
Office of Building Technologies Programs  
U.S. Department of Energy  
Forrestal Building, 1000 Independence Ave. S.W.  
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Via Electronic Submission

RE: Notice of Availability for Interpretive Rule on the Applicability of Current Water Conservation Standards for Showerheads [*Docket No. EERE-2010-BT-NOA-0016*]

Dear Ms. Barhydt:

On behalf of the National Association of Home Builders (NAHB), I respectfully submit the follow comments on the *Notice of Availability for Interpretive Rule on the Applicability of Current Water Conservation Standards for Showerheads* published in the *Federal Register* (Volume 75, No. 95) on May 19, 2010.

NAHB is a Washington, D.C.-based trade association representing more than 175,000 members involved in the home building, remodeling, multifamily construction and property management, building product manufacturing, supply, subcontracting, design, housing finance and all other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 700 state and local home builders associations (HBAs) around the country. NAHB's builder members will construct about 80 percent of the new housing units projected for 2010.

In addition, more than 7,000 remodeling firms belong to NAHBRemodelers, comprising about one-fifth of all firms that specify remodeling as a primary function. NAHB's membership also includes the National Council of the Housing Industry (NCHI), which comprises more than 100 leading manufacturers, suppliers, and industry-related trade associations. Many NCHI members manufacture and/or supply the showerheads affected by this interpretive rule.

NAHB's concerns focus mainly on the regulatory process the Agency has chosen to employ, namely, an interpretive rule vs. typical notice and comment process, the unknown ramifications that this definition will have on consumer choice, and the

accessibility needs of an aging population and those with physical disabilities. NAHB believes DOE can address these concerns in a more equitable and informed manner by following the more typical notice and comment process envisioned by the Administrative Procedure Act (APA). DOE's proposed regulatory definition of a showerhead is a clearly "substantive rule" in the context of the APA, because it would impose new regulatory burdens on showerhead manufacturers and directly impact suppliers, builders, remodelers and ultimately, consumer choice.

Importantly, NAHB's concerns should not be construed as opposition to any effort by DOE to improve the water efficiency or performance of showerheads. NAHB has demonstrated leadership in the area of water efficiency for both new construction and remodeling activities through the development of the American National Standards Institute (ANSI)-approved National Green Building Standard™ (NGBS) and participation in the development of EPA's WaterSense® program. These voluntary programs are intended to allow consumers to choose among building products, designs, and construction materials which combine demonstrated functional performance with superior environmental performance. Both programs address water conservation from showerheads<sup>1,2</sup> and both do so at a level beyond current DOE water conservation standards. However, unlike the voluntary WaterSense and NGBS, DOE's regulatory definition for showerheads, once finalized, is mandatory and has the full force and effect of federal law on all showerhead manufacturers and suppliers in the United States.

Furthermore, both the WaterSense and NGBS voluntary showerhead standards were developed following several rounds of public notice and comment, including the direct participation of manufacturers, suppliers, builders, and interested members of the public. It is not clear why DOE would not afford affected parties and the public the opportunity to participate in a similar process in crafting what could be a significant and problematic requirement. DOE is strongly urged to withdraw its proposed interpretive rule and replace its efforts with a rulemaking process that is consistent with the mandates of the APA.

### ***Today's Action***

On May 19, 2010, DOE published in the *Federal Register* a so-called "interpretive rule," that if adopted by DOE as proposed, would significantly change prior

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<sup>1</sup> U.S. EPA, WaterSense® Specification for Showerheads, Version 1.0. Office of Wastewater Management. March 4, 2010.pg

<sup>2</sup> National Association of Home Builders (NAHB) and International Code Council (ICC), National Green Building Standard™ (ICC 700-2008), 2008 Edition. BuilderBooks.com. Washington D.C..2009. Page 65

interpretations of the regulatory definition of "showerhead."<sup>3</sup> Prior to today's action, manufacturers interpreted "showerhead" to mean a device that directs water onto the bather. Thus a single showerhead device could have more than one spray, nozzle, or opening (e.g., multiple showerheads on a single showerhead assembly). DOE's proposed definition, however, considers all device components after the mixing valve to be considered part of the "showerhead." When considered in combination with DOE's existing federal showerhead water conservation standard<sup>4</sup> as authorized under the Energy Policy and Conservation Act (EPCA), (2.5 gallons per minute (gpm) at 80 pounds per square inch (PSI)), today's action means that the total flow from all of the showerhead components, taken together, cannot exceed this threshold. The Agency's decision to apply EPCA's water conservation standard to the entire device will have a significant impact on determining what types of showerheads can be manufactured and sold in the U.S. and how they must be packaged. DOE's proposed definition effectively requires all manufacturers to meet DOE's interpretation of EPCA's showerhead water conservation standard based on the entire showerhead assembly and not just individual components, or face threats of enforcement.

Obviously, DOE's new interpretation will have a significant impact on the manufacture and sale of multi-functional showerhead devices. DOE realizes this fact and states in its interpretive rule the Agency will employ significant enforcement discretion and take this definitional uncertainty into account when interacting with manufacturers who have made what DOE deems to be incorrect EPCA certification decisions for showerheads based upon their prior interpretations of the definition of a showerhead.<sup>5</sup>

Finally, because DOE has issued an "interpretive rule," DOE has claimed that it is not required under the APA to take or accept public comment; however, the Agency will accept public comment until June 18, 2010.

### ***DOE's Proposal Fails to Comply With the Administrative Procedure Act***

DOE's stated intent is to provide DOE officials and the regulated community with its interpretation of the regulatory definition of the term "showerhead" as it will be applied to the congressionally mandated water conservation standard for showerheads set out under EPCA.<sup>6</sup> While DOE claims that today's interpretative

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<sup>3</sup> 10 CFR §430.2

<sup>4</sup> 42 U.S.C. §6295(j)(1)

<sup>5</sup> 75 Fed. Reg. § 27926, Wednesday, May 19, 2010

<sup>6</sup> 42 U.S.C. §6295 (j)(1)

rule represents the Department's interpretation of its existing regulation and, thus, is exempt from the notice and comment requirements of the APA, NAHB disagrees. First, DOE has issued an interpretive rule where there is no prior DOE rulemaking concerning a regulatory definition for showerheads. Second, contrary to DOE's claims, this new definition creates a new regulatory standard upon which an existing statutory water conservation standard for showerheads under EPCA will be applied, thereby demonstrating that today's action is a substantive rule subject to public notice and comment.

#### Clarifications Cannot Be Provided Where No Prior Definition Existed

DOE claims that today's action simply clarifies its existing regulations. An important fact DOE acknowledges within the *Federal Register* notice, however, is that DOE has never before promulgated any regulatory definition for the term "showerhead" beyond what Congress codified into the EPCA statute itself.<sup>7</sup> The fact that DOE has never conducted any prior formal rulemaking is an important point: Interpretive rules are traditionally used by federal agencies to clarify the Agency's views of an *existing regulation* (emphasis added). Lacking a prior definition, there is little that an interpretative rule can do to clarify a blank page, so a claim of interpretation is merely frivolous. Nor are interpretative rules meant as a substitute for substantive rules that impose regulatory requirements on private entities. Therefore they are required under APA to follow public notice and comment rulemaking processes.

#### The Exemption is Inappropriate, as Substantive Rules Must Comply with APA

Recognizing that not all agency actions need to undergo the burdensome and lengthy open rulemaking process, APA allows for a few exceptions. One is for the issuance of "interpretive rules" and allows an agency to exempt itself from APA's public notice and comment requirement and issue an immediate interpretive rule that the Agency can enforce.<sup>8</sup> While there is no standard definition of what constitutes an interpretative rule, they are generally thought of as rules issued by administrative agencies that clarify or explain existing laws or regulations.<sup>9</sup> Furthermore, the APA's interpretative rule exemption has been construed by the courts as to "allow agencies to explain ambiguous terms within legislation without

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<sup>7</sup> 75 Fed. Reg. 27926

<sup>8</sup> 5 U.S.C. §553(b)(A).

<sup>9</sup> See Merriam-Webster's Dictionary of Law, accessed at <http://dictionary.getlegal.com/interpretive%20rule> on June 17, 2010.

having to undertake cumbersome proceedings.”<sup>10</sup> Today's action is not concerned with clarifying an interpretation of an existing definition, but with creating a wholly new one. As such, today's undertaking represents a substantive rule for which notice and comment must be provided.

DOE's proposed new definition is not only the Agency's first attempt to define the universe of devices that must meet the EPCA showerhead flow requirements, but it also represents a significant shift of federal policy on how manufacturers of showerheads are to demonstrate compliance. In doing so, DOE's proposed showerhead regulatory definition establishes a “legal effect,<sup>11</sup>” as viewed by the court, because it arguably creates new law by shifting the federal water conservation compliance focus away from the single device that has traditionally been viewed as the “showerhead” to the totality of the suite of components that are installed beyond the mixing valve. Such a position is at odds with Congress's stated intent under EPCA to regulate water flow from *showerhead,s* not *mixing valves* (emphasis added) and is clearly new and different from standard practice.<sup>12</sup>

DOE states in its rationale for the proposed definition that some manufacturers have interpreted the term “showerhead” in a manner inconsistent with Congress' intent to conserve water under EPCA's showerhead water conservation standard.<sup>13</sup> However, manufacturers have informed DOE they do not view the common use of the term “showerhead” (e.g., as found in the dictionary) as ambiguous. Likewise, NAHB is not aware of any problems with manufacturers misinterpreting EPCA's water conservation standard for showerheads, as EPCA clearly states, “The maximum water use allowed for any showerhead manufactured after January 1, 1994, is 2.5 gallons per minute when measured at a flowing water pressure of 80 pounds per square inch.”<sup>14</sup> Finally, there are numerous product lines that include multidevice showerheads that have been manufactured, considered compliant and made available for decades. It is unclear what has now changed to compel the Agency to potentially eliminate these

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<sup>10</sup> Am. Hosp. Ass'n supra note 51, at 1045.

<sup>11</sup> Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952), “Generally speaking, it seems to be established that ‘regulations,’ ‘substantive rules’ or ‘legislative rules’ are those which create law, usually complementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.”

<sup>12</sup> 42 U.S.C. §6291 (31)(D)

<sup>13</sup> 75 Fed. Reg. 27926, DOE states in the regulatory definition for “showerhead”, “This approach furthers the goal of EPCA to “conserve water by improving the water efficiency” of showerheads. The contrary approach would effectively abrogate EPCA by permitting showerheads to use water in excess 2.5 gpm at 80 psi.

showerheads and create significant burdens for the industry. Indeed, several manufacturers have expressed concern to DOE that the proposed definition would make EPCA's water conservation standard impossible to meet for assemblies with multiple showerheads.

The marked change in Agency policy, coupled with the new legal ramifications and broad impacts that will accrue by the adoption of this new definition, demonstrate the substantive nature of this undertaking. As such, rather than relying on the unfounded and unstable foothold of the APA's interpretative rule exemption, DOE is strongly urged to commence a traditional APA rulemaking process that includes public notice and comment.

***The Interpretation Has Negative Ramifications on Consumer Choice While Providing Limited Water Savings***

NAHB routinely surveys prospective homebuyers to gain insights into what building products, features, and design elements they may find desirable in their next home.<sup>15</sup> NAHB's 2007-2008 survey found a majority (57%) of prospective homebuyers rated a bathroom shower equipped with multiple showerheads as either a "desirable" or "essential feature" in their next home.<sup>16</sup> However, this popularity does not yet translate directly into the instillation of a significant number of multiple showerhead devices.

The economic recession and corresponding U.S. housing market downturn has compelled builders to focus on building smaller homes with fewer amenities at a lower cost. According to NAHB analysis of U.S. Census data, the average size of new homes declined, including a decrease in the number of bathrooms, with less than 24 percent having three or more bathrooms, down from a peak of 28 percent in 2007 and 2008.<sup>17</sup> This decrease is the first since 1992.<sup>18</sup> Furthermore, a survey of NAHB members found that one feature that builders are most likely to cut back on is multiple showerheads in the master bathroom.<sup>19</sup> These ongoing and dynamic market pressures demonstrate that while multiple showerhead devices may be popular with consumers, the total number being installed remains low. As a result, cutting back on the number of openings on showerheads and/or

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<sup>15</sup> NAHB Economics. Consumer Preferences Survey. BuilderBooks.com. Washington, D.C. 2007-2008.

<sup>16</sup> Ibid. page 74.

<sup>17</sup> "New Homes Getting Smaller...Smaller." The Wall Street Journal, 14 June 2010, <http://blogs.wsj.com/developments/2010/06/14/new-homes-getting-smallersmaller/>

<sup>18</sup> Quint, Rose. "The New New Home." Lecture at International Builders Show, 20 January 2010.

<sup>19</sup> Ibid.

enforcing an unrealistic flow rate of 2.5 gallons at 80 psi on multispray showerheads will not yield a significant reduction in water usage. It will, however, make it extremely difficult for many older Americans and people with disabilities to have access to a safe and effective showering facility.

***The Interpretation Adversely Affects the Elderly and Those with Physical Disabilities***

As the U.S. population continues to age, a significant focus for both the residential construction and residential remodeling industries has been incorporating design modifications that assist aging homeowners to remain independent and fully functional in their own homes. According to the 2000 U.S. Census, over 35 million people were 65 years old or older, a 12 percent increase from the 1990 U.S. Census.<sup>20</sup> Furthermore, the Census Bureau reported the fastest growing segment of the older population was people 85 years and older.<sup>21</sup> These two rapidly growing segments are the focus of an industrywide effort led by NAHB commonly known as the aging-in-place initiative. This program focuses on design elements that can be incorporated into both new construction and remodeling activities to help the homeowners and tenants maintain their independence as they age. Individuals with physical disabilities who live independently in their own homes also benefit from the design elements created under this aging-in-place movement.

One specific focus of NAHB's initiative is a professional educational designation called the "Certified Aging in Place Specialist" or CAPS, which NAHB developed in conjunction with AARP. The CAPS professional designation program is administered by NAHB Remodelers and is offered nationwide to builders and professional remodelers focused on the needs of older homebuyers and homeowners. To date, over 3,000 remodelers, design professionals, and health-care professionals have achieved CAPS designation. A core component of training and instruction is identifying and removing all barriers within the home that can restrict the ability of older homeowners to live independently. Modifying traditional shower stalls that have a single showerhead is one such improvement that CAPS professionals are strongly urged to address.

Specifically, NAHB's CAPS designation recommends, "installing an accessible shower equipped with (at least) two showerheads such as one fixed showerhead

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<sup>20</sup> U.S. Department of Commerce, Census 2000 Brief: The 65 Years and Over Population. Economics and Statistics Administration, Washington, D.C.. October 2001.

<sup>21</sup> Ibid.

and one showerhead with a flexible hose for hand use. Both showerheads should be fed with fully pressure-controlled and anti-scald control valves, with individual shutoffs easily accessible from inside and outside the (shower) chamber.”<sup>22</sup> Unfortunately, DOE's interpretive rule, which defines a showerhead as “all components that are supplied standard together and function from one inlet (i.e., after the mixing valve) form a single showerhead for the purposes of the maximum water use standards under [EPCA],” could result in manufacturers either ceasing production of popular multiple showerhead devices or significantly reducing overall water pressure and performance for devices with more than one showerhead. Either outcome would pose a significant barrier to CAPS professionals and their clients seeking solutions that will enable them continue to live independently in their own homes. These same limitations apply to many people with disabilities, as well. For these reasons, DOE must continue to allow the manufacture and sale of multi-unit showerheads.

DOE's proposal is inappropriate and problematic, as the Agency has failed to follow the processes required by the APA and has not fully studied the impacts of its proposed action on those who require the use of multidevice showerheads. Any regulatory definition of showerhead must be consistent with Congress' intent under EPCA and must be subject to the APA's public notice and comment process if the regulatory definition of showerheads is to be binding upon manufacturers, labelers, and suppliers.

Thank you for consideration of our comments. If you have any questions or would like to discuss any of our observations or recommendations, please contact Michael Mittelholzer at (202) 266-8660 or [mmittelholzer@nahb.org](mailto:mmittelholzer@nahb.org)

Sincerely,



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<sup>22</sup> National Association of Home Builders (NAHB). Certified Aging-in-Place Specialist (CAPS) Design, Build Solutions for Aging and Accessibility (CAPSII). BuilderBooks.com. Washington D.C., 2008. Page 7-80.