



[6450-01-P]

**DEPARTMENT OF ENERGY**

**10 CFR Part 430**

**[EERE-2020-BT-TP-0002]**

**RIN 1904-AE85**

**Energy Conservation Program: Test Procedure for Showerheads**

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

**ACTION:** Notice of proposed rulemaking and announcement of public meeting.

**SUMMARY:** The U.S. Department of Energy (“DOE”) proposes to amend the existing test procedure for showerheads to revise the definition of a showerhead consistent with the most recent standard developed by the American Society of Mechanical Engineers (“ASME”) in 2018. DOE’s current definition considers all of the individual showerheads (which DOE has termed variously as sprays, openings, or nozzles) in a product containing multiple showerheads together for purposes of compliance with the water conservation standard established in the Energy Policy and Conservation Act (“EPCA”). DOE proposes instead to define showerhead as that term is defined in the 2018 ASME standard, such that each showerhead in a product containing multiple showerheads would be considered separately for purposes of determining standards compliance, and only one of them would need to be turned on for testing. DOE has determined that the proposed definition is consistent with EPCA and, unlike the current definition, compliant with Office of Management and Budget (“OMB”) Circular A-119. In addition, the proposed definition is consistent with DOE’s treatment of other products, such as body sprays. DOE also proposes to define the terms “body spray” and “safety shower showerhead” to clarify which products are not subject to the current energy conservation standard. DOE invites comment on

all aspects of this proposal, and announces a public webinar to collect comments and data on its proposal.

**DATES:** Written comments and information are requested on all aspects of this proposal and will be accepted before and after the public meeting, but no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. See section IV, “Public Participation,” for details.

**ADDRESSES:** Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2020–BT–TP–0002, by any of the following methods:

- 1) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- 2) *E-mail:* [Showerheads2020TP0002@ee.doe.gov](mailto:Showerheads2020TP0002@ee.doe.gov). Include the docket number and/or RIN in the subject line of the message.
- 3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 287-1445. If possible, please submit all items on a compact disc (“CD”), in which case it is not necessary to include printed copies.
- 4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza, SW., Suite 600, Washington, DC, 20024. Telephone: (202) 287-1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (“faxes”) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV of this document.

*Docket:* The docket, which includes *Federal Register* notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the <http://www.regulations.gov> index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at: <http://www.regulations.gov/docket?D=EERE-2020-BT-TP-0002>. The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section IV of this document for information on how to submit comments through <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-2J, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 287-1692. E-mail: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 586-7796. E-mail: [Elizabeth.Kohl@hq.doe.gov](mailto:Elizabeth.Kohl@hq.doe.gov).

For further information on how to submit a comment, review other public comments and the docket, or participate in the webinar, contact the Appliance and Equipment Standards Program staff at (202) 287-1445 or by e-mail: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

**SUPPLEMENTARY INFORMATION:** DOE proposes to incorporate by reference the following additional industry standards into 10 CFR part 430:

ASME A112.18.1-2012, “Plumbing supply fittings,” approved December 2012.

ASME A112.18.1-2018, “Plumbing supply fittings,” approved July 2018.

Copies of A112.18.1-2018 can be obtained from the American Society of Mechanical Engineers, 1828 L St., NW, Suite 510, Washington, DC 20036-5104; (800) 843-2763, or go to <https://www.asme.org/codes-standards/find-codes-standards/a112-18-1-csa-b125-1-plumbing-supply-fittings>.

See section III.N of this document for a more detailed discussion of this industry standard.

## **Table of Contents**

- I. Authority and Background
  - A. Authority
  - B. Background
- II. Synopsis of the Notice of Proposed Rulemaking
  - A. The Term “Showerhead” in EPCA Is Ambiguous and Does Not Mandate DOE’s Prior Interpretation
  - B. DOE’s Current Definition of Showerhead With Regard to EPCA and the ASME Standard
  - C. DOE’s proposed definition with regard to EPCA and the ASME Standard
  - D. Discussion of the Proposed Rule With Regard to Consistency in Treatment of Related Products
  - E. Current Proposal and the Definition of “Safety Shower Showerhead”
  - F. Testing Requirements
- III. Procedural Issues and Regulatory Review
  - A. Review Under Executive Order 12866
  - B. Review Under Executive Orders 13771 and 13777
  - C. Review Under the Regulatory Flexibility Act
  - D. Review Under the Paperwork Reduction Act of 1995
  - E. Review Under the National Environmental Policy Act of 1969

- F. Review Under Executive Order 13132
  - G. Review Under Executive Order 12988
  - H. Review Under the Unfunded Mandates Reform Act of 1995
  - I. Review Under the Treasury and General Government Appropriations Act, 1999
  - J. Review Under Executive Order 12630
  - K. Review Under Treasury and General Government Appropriations Act, 2001
  - L. Review Under Executive Order 13211
  - M. Review Under Section 32 of the Federal Energy Administration Act of 1974
  - N. Description of Materials Incorporated by Reference
- IV. Public Participation
- V. Approval of the Office of the Secretary

## **I. 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.<sup>1</sup> 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 showerheads, the subject of this proposed 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. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for (1) certifying to DOE that their products comply with the applicable energy and water conservation standards adopted under EPCA (42 U.S.C.

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<sup>1</sup> 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).

6295(s)), and (2) making representations about the efficiency of those products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

EPCA states that the procedures for testing and measuring the water use of showerheads shall be ASME/ANSI<sup>2</sup> standard A112.18.1M–1989, “Plumbing Fixture Fittings.” EPCA further specifies that if ASME/ANSI revises these requirements, the Secretary shall adopt such revisions if they conform to the basic statutory requirements for test procedures. (42 U.S.C. 6293(b)(7)) The most recent version of the ASME/ANSI standard, A112.18.1M-2018, was adopted in 2018.

### *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 (Public Law 102-486; Oct. 24, 1991, “EPAAct 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 the design of showerheads had diversified into a myriad of products

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<sup>2</sup> “ANSI” refers to the American National Standards Institute. *See also* 42 U.S.C. 6291(31)(C).

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. 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](https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf)).<sup>3</sup> 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

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

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.<sup>4</sup>

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

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<sup>4</sup> DOE 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.

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 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; Apr. 8, 2013) 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; Apr. 8, 2013) 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 SNOPR, 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 SNOPR. 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; Oct. 23, 2013) 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.

## **II. Synopsis of the Notice of Proposed Rulemaking**

In this proposed rule, DOE proposes to revisit its prior interpretation of the EPCA definition of showerhead and to interpret the term showerhead using the definition of the term in

ASME A112.18.1-2018. DOE proposes to define showerhead as follows: “Showerhead means 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). DOE then proposes to include in its regulations 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 NOPR, 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 proposes to interpret the statutory term “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 – “an accessory to a supply fitting for spraying water onto a bather, typically from the overhead position.”

Under DOE’s proposed definition, each showerhead included in a product with multiple showerheads would separately be required to meet the 2.5 gpm standard established in EPCA. As explained in the discussion that follows, DOE concludes that its proposed 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 proposal is also consistent with the requirements of the National Technology Transfer and Advancement Act of 1995, 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, and the associated OMB Circular A-119, which directs Federal agencies to use voluntary

consensus standards unless inconsistent with applicable law or otherwise impracticable.<sup>5</sup> In addition, DOE's proposal treats products with multiple showerheads in a manner that is consistent with DOE's treatment of similar products, such as body sprays.

DOE also proposes to define 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.

*A. The Term "Showerhead" in EPCA Is Ambiguous and Does Not Mandate DOE's Prior Interpretation*

EPCA defines the term "showerhead" generically, and somewhat circularly, 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

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<sup>5</sup> 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/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_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.

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.

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; and (3) the two-year grace period DOE provided in the enforcement guidance in recognition of these products. In short, the unadorned statutory definition does not require that the term be construed as DOE had interpreted the term in the 2011 guidance and the October 2013 final rule.

Moreover, the text of the statutory definition itself, in one respect, seems difficult to square with the interpretation set forth in the 2011 guidance and the 2013 final rule. The statute

defines the term to “mean[] any showerhead (*including a handheld showerhead*), except a safety shower showerhead.” (Emphasis added.) As a general matter, handheld showerheads are not multiple spraying accessories (or “components,” to use the language of the 2011 guidance and the 2013 rule) but are individual spraying accessories (or “components”). This is an important consideration weighing in favor of DOE’s proposed interpretation, and a reason why DOE believes that this interpretation is more appropriate than the alternative set forth in the 2011 guidance and the 2013 final rule. Indeed, assuming *arguendo* that the term “showerhead” is not ambiguous, DOE proposes to conclude in the alternative that the proposed interpretation set forth herein is the appropriate and correct interpretation of the term. At all events, DOE has authority under the statute to adopt the proposed interpretation.

*B. DOE’s Current Definition of Showerhead With Regard to EPCA and the ASME Standard*

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).

Despite Congressional reliance on the ASME standard in developing the provisions of EPCA 1992 with regard to showerheads and direction for DOE to adopt updates to the ASME standard, when DOE established the current definition of “showerhead,” it deviated significantly from the ASME definition by determining that products with multiple showerheads constitute only one showerhead for purposes of EPCA. The current DOE regulatory definition of “showerhead” went beyond the ASME concept of what a showerhead is without any explanation as to why DOE was not following the statutory construct based on ASME. While water conservation is obviously a purpose of EPCA, DOE did not take into account congressional reliance on the ASME standard when DOE determined in its 2011 enforcement guidance what was meant by the term showerhead. While it is true that the ASME standard did not specifically define the term “showerhead” when EPCA was amended in 1992, commenters on DOE’s draft interpretive rule and its proposed and supplemental rulemakings made abundantly clear that DOE was going beyond ASME’s concept of that term. Moreover, products available on the market between 1992 and issuance of DOE’s 2011 enforcement guidance included those with multiple water outlets manufactured to comply with statutory water efficiency standards construed as applying to individual spraying accessories (not to sets of such accessories), suggesting substantial industry reliance on the understanding that this was the appropriate construction of the statutory definition. Given EPCA’s reliance on the ASME standard in amending EPCA to prescribe a definition, test procedure, energy conservation standard, and



labeling provisions for showerheads, DOE concludes that if Congress had intended to significantly deviate from the ASME definition of what constitutes a showerhead, it would have done so explicitly. It did not. DOE is therefore entitled to give significant weight to the ASME definition in construing and applying the statutory standard, even if DOE is not required to adhere to the ASME definition.

In its prior rulemaking to establish a definition of “showerhead”, DOE proposed to adopt a new definition for the term that it stated was based on the definition included in ASME/ANSI A112.18.1-2011. 77 FR 31747 (May 30, 2012, “May 2012 NOPR”). DOE proposed definitions of “accessory” and “fitting” that were the same as the ASME definitions. In proposing the definition of “showerhead”, however, DOE went beyond the ASME definition of “showerhead.” The ASME standard defined, and continues to define, a “showerhead” as “an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.” DOE’s proposal included the terms “or set of accessories” and “distributed in commerce for attachment to a single” supply fitting. DOE expanded the ASME definition not only, as required by EPCA, to include handheld showerheads and exclude safety shower showerheads (which it did not propose to define), but also to “more clearly define the extent of DOE’s coverage for these products” – in other words, to ensure that products with multiple showerheads would be considered a single showerhead for purposes of compliance with the DOE standard, as well as to include body sprays as showerheads. (77 FR 31742, 31747-13748; May 30, 2012)

In response to comments urging DOE to adopt the definition in the industry standard, DOE noted in the April 2013 SNOPR only that the ASME definition did not sufficiently address

DOE's regulatory coverage of showerheads to include hand-held showerheads and exclude safety showerheads. (78 FR 20832, 20834; Apr. 8, 2013). DOE did not reference the fact that the ASME definition did not include "set of accessories" or "distributed in commerce for attachment to a single" supply fitting, terms that DOE used to classify products with multiple showerheads as a single showerhead for purposes of compliance with the 2.5 gpm standard. In the April 2013 SNO PR, DOE also proposed not to include body sprays as showerheads pending further investigation of the issue. DOE further proposed to eliminate use of the standard term "accessory" in favor of the undefined term "component". DOE did not offer an explanation for this change, other than that it was in response to comments. *Id.* Comments suggesting that DOE not define a showerhead as an accessory indicated that to do so would distinguish body sprays from showerheads and would lead DOE to exclude body sprays from coverage. But 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.

In the October 2013 final rule, DOE did not adopt the ASME definition and instead adopted a definition of showerhead with minor changes from that proposed in the April 2013 SNO PR. The definition continued to use the terms "component", "set of components", and "distributed in commerce for attachment to a single" supply fitting to ensure that products with multiple showerheads would be considered a single showerhead for purposes of compliance with the 2.5 gpm standard. DOE did not, however, adopt a definition of body spray and did not

specifically include body sprays within the definition of “showerhead”. Presumably, this meant that body sprays were not included as showerheads, though the Department’s discussion of this point stated only that DOE was not adopting a definition of the term. (78 FR 62970, 62972-62973; Oct. 23, 2013) DOE also did not adopt a definition of “safety shower showerhead”, so the products specifically exempted by Congress remained undefined and subject to DOE’s discretion as to what it determined was a safety shower showerhead. *Id.*

The definition of showerhead adopted by the Department in the October 2013 final rule did not reference the purpose of water conservation, and it was also inconsistent with the ASME standard upon which Congress relied heavily in establishing the definition, test procedures, energy conservation standard, and labeling requirements for showerheads. The current DOE definition -- which uses the additional and undefined terms “component,” “set of components” and “distributed in commerce for attachment to a single” supply fitting to include as one showerhead a product with multiple showerheads -- is also inconsistent with the requirements of the NTTAA (section 12(d)) and the associated OMB Circular A-119 (available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revise\\_d\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revise_d_circular_a-119_as_of_1_22.pdf)). As explained previously at the beginning of Section II, the NTTAA and OMB’s Circular A-119 direct that Federal agencies use voluntary consensus standards unless inconsistent with applicable law or otherwise impracticable.<sup>6</sup>

While Congress did not specifically direct DOE to define showerhead according to the ASME standard, Congress relied on the ASME standard in all of the provisions by which it

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<sup>6</sup> See fn 5, *supra*.

included showerheads within the scope of DOE's authority – definitions, where Congress specifically defined both ASME and ANSI directly preceding and in the same paragraph as the definition of showerhead, test procedures, labeling requirements and the applicable energy conservation standard. That reliance further suggests that DOE should have considered the directives of the NTTAA and OMB Circular A-119 with regard to the use of voluntary consensus standards in developing its definition. EPCA certainly does not preclude DOE from using such standards; the statutory text of EPCA does not make compliance with the NTTAA, and compliance with OMB Circular A-119, either inconsistent with applicable law or otherwise impracticable.

The Department did not provide discussion of the NTTAA and OMB Circular A-119 in any of its rulemaking documents in support of its decision not to adopt the voluntary consensus standard developed by ASME. This omission may have been a result of DOE's prior conclusion that the term "showerhead" should be read to encompass products that constituted sets of individual showerheads (which it termed variously as sprays, openings or nozzles). However, DOE has reconsidered this issue and proposes to reach a different conclusion, as explained in this proposed rule.

As to practicability, DOE stated in the May 2012 NOPR only that the ASME standard did not clearly exclude safety shower showerheads (which DOE did not propose to define) or include body sprays, and that DOE modified the ASME definition to "more clearly define the extent of DOE's coverage". (77 FR 31742, 31747; May 30, 2012). DOE's failure to adopt the ASME

definition does not appear to have been based on an appropriate analysis of practicability per the NTTAA and OMB Circular A-119.

*C. DOE's proposed definition with regard to EPCA and the ASME Standard*

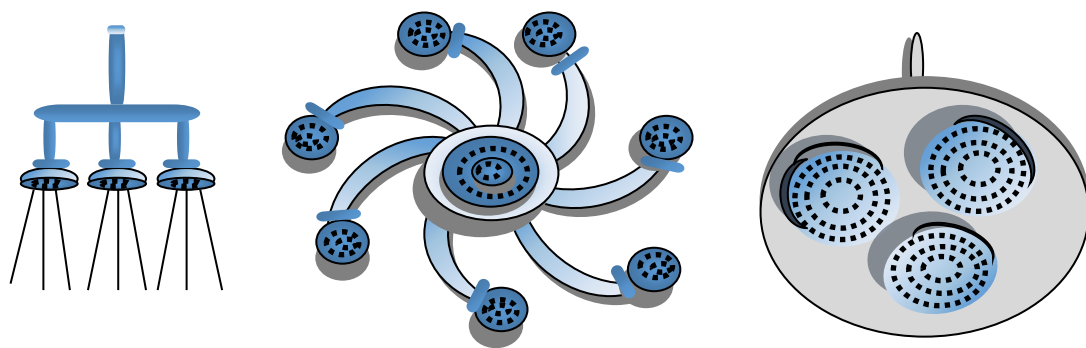
DOE proposes in this rulemaking to set forth in its regulatory text the definition of showerhead established in EPCA. In particular, DOE proposes to interpret the term using the definition in ASME A112.18.1-2018 (Section 3.1) – “an accessory to a supply fitting for spraying water onto a bather, typically from an overhead position.”

DOE's proposed definition is consistent with EPCA. DOE stated in its 2011 enforcement guidance that it could not “reconcile the view that a showerhead with multiple nozzles is actually multiple showerheads with EPCA's language or intent” and that (in a somewhat circular fashion) “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.” *See Showerhead Enforcement Guidance at 1 (Mar. 4, 2011).*

*[https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead\\_Guidancel.pdf](https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf)*. The Department had, however, prior to the draft interpretive rule that preceded the enforcement guidance, never provided its view on what was meant by the term “showerhead”. In addition, what the guidance had characterized as “a showerhead with multiple nozzles” could just as rationally, if not more so, be considered multiple showerheads. Looking at the depictions in Figure 1 (taken from page 1 of the 2011 enforcement guidance), a rational person might well

have counted three, eight, and three showerheads, respectively, rather than simply one showerhead for each configuration.

Figure 1. Products with multiple individual showerheads.



And, while one of the purposes of EPCA is to “conserve water by improving the water efficiency of certain plumbing products and appliances” (42 U.S.C. 6201(8)), as noted in section II.B. of this NOPR, EPCA relied on the ASME standard for measuring the water use of showerheads at 42 U.S.C. 6293(b)(7) and included references to ASME and the ASME standard in the definitions related to showerhead at 42 U.S.C. 6291(31), the energy conservation standard at 42 U.S.C. 6295(j), and the labeling requirements at 42 U.S.C. 6294(a)(2)(E). Presumably, if Congress intended to establish a definition of the term “showerhead” significantly more expansive than that contemplated by ASME (which would have eliminated many products then manufactured by the industry), it would have done so explicitly.

DOE also concludes that by referencing the ASME standard in the statute as described in the preceding paragraph, and requiring DOE to update its test procedures in response to action by ASME, Congress was expressing an intent that DOE’s actions with regard to showerheads be consistent with those of ASME. As described in section II.B of this NOPR, DOE’s definition of

showerhead adopted in 2013 was not consistent with ASME’s definition in place at that time. Nor is it consistent with ASME’s definition in ASME A112.18.1-2018, which was adopted by ASME subsequent to, and presumably with knowledge of, DOE’s 2013 rulemaking. This proposal by DOE to harmonize its definition of “showerhead” with that of ASME is meant to ensure that DOE’s regulations comport with congressional intent to rely on ASME’s standards for specific water-using products, including showerheads.

In addition, EPCA was amended in 1987 to insert a provision into 42 U.S.C. 6295 prohibiting DOE from establishing a new or amended standard under this section if DOE finds that the standard is likely to result in the unavailability of performance characteristics, features, sizes, capacities and volumes substantially the same as those generally available in the U.S. at the time of the finding. See Public Law 1001-2 (Mar. 17. 1987); 42 U.S.C. 6295(o)(4). While DOE is prohibited from taking such an action, Congress can pass subsequent legislation that removes products with certain performance characteristics and features from the market, such as products with multiple showerheads. If Congress had intended to establish a provision in EPCA in 1992 that eliminated these products from the market, it would have done so explicitly given the 1987 amendment. Again, it did not. Nor did the 1992 EPCA provision impliedly repeal the 1987 amendment. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974) (repeals by implication are disfavored; “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”), *cited in Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

It is clear that DOE cannot regulate or otherwise act to remove products with certain performance characteristics and features from the market given the prohibition in 42 U.S.C. 6295(o)(4). While DOE did not undertake a standards rulemaking to eliminate products with multiple showerheads, which can easily be viewed as a “feature” for purposes of the EPCA provision (for example, other aspects of products that DOE has identified as features include the window in an oven door and the top loading clothes washer configuration), such an elimination is exactly the outcome of DOE’s 2011 enforcement guidance and 2013 regulatory interpretation of the term “showerhead” in EPCA. As discussed earlier in this document, the number of multi-headed showerheads in the market decreased significantly from the “myriad of products” cited by DOE in 2010.

Specifically, in its 2011 enforcement guidance, DOE stated that it interpreted the term “showerhead” in EPCA such that each individual showerhead (alternatively called nozzles, sprays, or openings) in a product with multiple showerheads would need to be turned on for testing to determine compliance as measured by aggregating the water use of all showerheads in the product. As a result, DOE was authorized to take enforcement action against manufacturers of such products that exceed the 2.5 gpm maximum, as measured by aggregating the water use of all showerheads in a product, rather than by applying the 2.5 gpm requirement to each individual showerhead (*See [https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead\\_Guidancel.pdf](https://www.energy.gov/sites/prod/files/gcprod/documents/Showerhead_Guidancel.pdf)*). DOE acknowledged the existence on the market of these multi-showerhead products, reasoning, however, that it may have been the Department’s failure to enforce the law for 19 years that led manufacturers to misunderstand the law. As a result, DOE gave manufacturers two years to sell



any products that the Department deemed noncompliant. In issuing the 2011 enforcement guidance, it appears that DOE effectively banned the vast majority of products with multiple showerheads from the market. This action runs contrary to the current directives established for DOE by Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents”, issued on Oct. 9, 2019. (84 FR 55235; Oct. 15, 2019). Following issuance of the 2011 enforcement guidance, DOE engaged in a rulemaking to define “showerhead” in a manner that would codify in DOE regulations its effective ban on products with multiple showerheads from the market. (78 FR 62970; Oct. 23, 2013) As an alternative argument for its proposal to change its interpretation of the term “showerhead” in this rulemaking, DOE proposes to conclude that EPCA’s prohibition on the removal of product characteristics or features from the market through a standards rulemaking also rendered impermissible DOE’s actions to effectively ban these products through a definition in a test procedure rulemaking.

For all of these reasons, considered singly and together, DOE proposes to conclude that its proposed interpretation of the term showerhead is more consistent with congressional intent in establishing the definition of the term “showerhead” and the associated energy conservation standard. DOE’s proposed definition also complies with the congressional directive to preserve performance characteristics and features that were available on the market at the time the Department originally acted to eliminate them. DOE seeks data and information on any basic models or shipments of showerheads with multiple heads manufactured prior to issuance of DOE’s 2011 enforcement guidance, or data and information on basic models or shipments of

such showerheads currently on the market, or basic models that manufacturers may be planning to introduce.

DOE has also considered the requirements of the NTTAA and OMB Circular A-119 in developing its proposed definition. The NTTAA and OMB Circular A-119 require DOE (and all other Federal agencies) 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/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf)). As described earlier in this section, DOE has initially concluded that its proposed definition, which is the same as the ASME definition, is compliant with EPCA. DOE has also initially 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 prior rulemaking, it is not necessary that the ASME definition specifically exclude safety showerheads, because EPCA already does so. In this rulemaking, DOE also proposes to define safety shower showerhead, so that it is clear what products are subject to the EPCA standard. It is also not necessary to explicitly include or exclude body sprays in the definition of showerhead. In the ASME standard, body spray is defined separately from showerhead, indicating that the two terms are different and that a body spray is not considered a showerhead. In this proposal, DOE similarly defines “body spray” separately from “showerhead,” to clarify that a body spray is not included within the definition of a showerhead.

Thus, DOE concludes that it is practicable to define showerhead as it is defined in the voluntary consensus standard developed by ASME in ASME/ANSI A112.18-1-2018.

*D. Discussion of the Proposed Rule With Regard to Consistency in Treatment of Related Products*

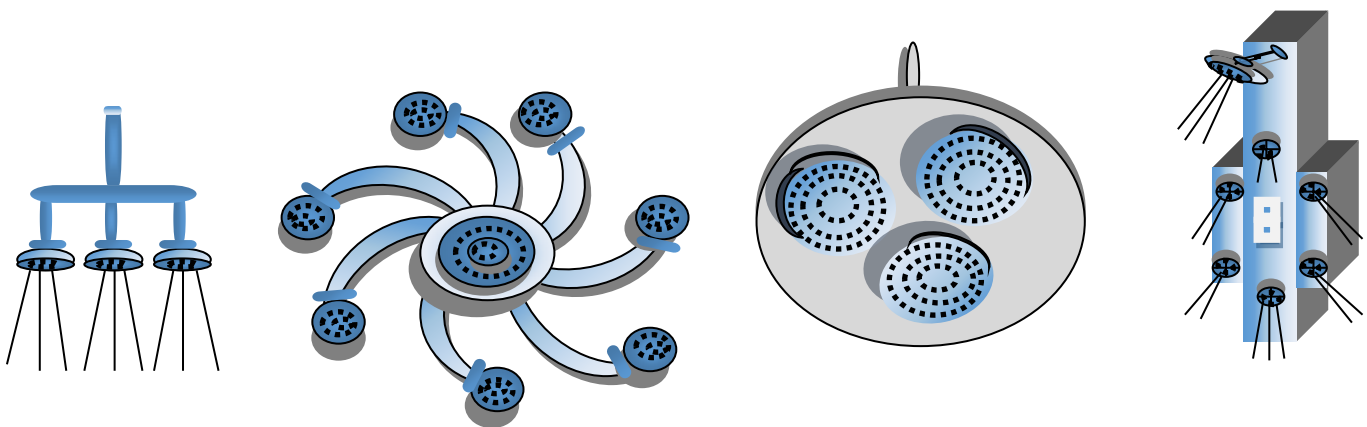
In this proposal, DOE's regulations would specifically define the term "body spray" separately from the definition of showerhead, defining "body spray" as a "shower device for spraying water onto a bather other than from the overhead position." Thus, DOE's regulations would make clear that body sprays are not covered by DOE's test procedure or the energy conservation standard applicable to showerheads. Doing so would be consistent with DOE's proposed interpretation of the term "showerhead."

This definition would be consistent with the current ASME standard, ASME A112.18.1-2018, which defines a body spray as a "shower device for spraying water onto a bather other than from the overhead position." In DOE's May 2012 NOPR, DOE proposed to use this definition for the term "body spray," and also proposed to include body sprays in the definition of showerhead. Industry commenters stated that body sprays were not accessories because they cannot be readily added or removed by the user. (78 FR 20832, 20834; Apr. 8, 2013). Some commenters expressed the view that showerheads should not be defined as "accessories" and that body sprays should be included in the definition of showerhead. *Id.* As a result of these comments, DOE proposed in a supplemental proposal and ultimately finalized a definition of showerhead that used the term "component" rather than "accessory". While DOE did not define "body spray" in the final test procedure rule, the definition of "showerhead" – unlike the May

2012 NOPR – did not specifically include (or exclude) body sprays. This omission may have introduced uncertainty for regulated parties.

DOE believes that it is appropriate to clarify explicitly that body sprays are not showerheads. As illustrated in Figure II (where the product at the far right represents a body spray), products with multiple showerheads are more akin to body sprays because of the multiple nozzles that each product has, regardless of the overhead configuration. DOE has determined that its proposed definition, which considers each showerhead in a product with multiple showerheads as a showerhead for purposes of standards compliance, is more consistent with its previous (and current) treatment of body sprays, which are not included in its regulatory definition of showerhead.

Figure II. Products with multiple individual showerheads and a body spray (far right).



DOE notes that the October 2013 final rule establishing the definition for showerhead did not define body spray, leaving it to the Department’s discretion to determine whether a given

product was required to comply with the standard. In this proposed rule, DOE requests comment on its proposal to include in its regulations the definition of body spray originally presented in the May 2012 NOPR and contained within the current ASME definition – “a shower device for spraying water onto a bather other than from the overhead position.” The ASME standard gives an example of a device mounted on a wall below the bather’s head that sprays water in an approximately horizontal direction and can be fixed or allowed to swivel on a ball joint. (ASME A112.18.1-2018, Section 3.1). Under this proposal, DOE’s regulations would specifically define body sprays separately from the definition of showerhead, so as to explicitly provide that body sprays are not covered by DOE’s test procedure or the energy conservation standard applicable to showerheads.

*E. Current Proposal and the Definition of “Safety Shower Showerhead”*

In this rulemaking, DOE proposes to adopt the following 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.” Defining this term is important, because the statute provides that “[t]he term “showerhead” means any showerhead (including a handheld showerhead), except a safety shower showerhead.” 42 U.S.C. 6291(31)(D).

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, causes more confusion than establishing a regulatory definition consistent with the existing ANSI standard. 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.

DOE seeks comment on its proposal to adopt the ANSI standard as the definition of “safety shower showerhead”, whether there is currently uncertainty regarding which products are “safety shower showerheads”, and whether that definition would provide clarity as to those showerheads that are not subject to the DOE standard.

#### *F. Testing Requirements*

DOE proposes amendments to the testing provisions at 10 CFR part 430, subpart B, appendix S to address the testing of a single showerhead in a product with multiple showerheads. 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 proposes 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.

DOE emphasizes that if an existing product manufactured pursuant to DOE's current definition of showerheads is compliant with the 2.5 gpm standard, that product would remain compliant under the definition of showerhead in this proposed rule, if finalized. Specifically, if a product with multiple showerheads currently available is compliant with the 2.5 gpm standard when considering all showerheads together, it must be the case that each individual showerhead is compliant separately with the standard. Because DOE's focus is standards compliance, should DOE finalize this proposal, manufacturers would not be required to retest and recertify that product, and could continue to report the same flow rate to DOE that they report currently for purposes of demonstrating compliance with the standard. DOE may consider whether updates to its certification regulations at part 429 are appropriate if it were to finalize the definitional change in this proposed rule.

According to data in DOE's certification database (CCMS database, as of March 2020), there are 7,221 basic models of showerheads. Of those, DOE estimates that only 3% are multi-

head showerheads. For 97 percent of showerheads currently on the market, testing requirements would not change. For the very small percentage of remaining products that do have more than one showerhead, and any new products manufactured with more than one showerhead, the testing requirement would still be to test the flow rate pursuant to section 5.4 of the ASME standard, but instead of measuring the flow from all of the showerheads or outlets, the flow rate of only one of these would be measured. In other words, the same test would be performed, but the water from only one showerhead would be measured to determine compliance with the DOE water conservation standard.

### **III. Procedural Issues and Regulatory Review**

#### *A. Review Under Executive Order 12866*

The Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that the proposed regulatory action is a significant regulatory action under section (3)(f) of Executive Order 12866. Accordingly, this action was reviewed by 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 proposed 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.” E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public



and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, “Enforcing the Regulatory Reform Agenda.” E.O. 13777 required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that 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. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

For the reasons stated in the preamble, DOE has preliminarily determined that this action is a deregulatory action for purposes of EO 13771.

### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (Aug. 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: <http://energy.gov/gc/office-general-counsel>.

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed 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 proposal would also specifically define and exclude body sprays and safety shower showerheads from the regulatory definition of showerhead. As explained in section II of this proposed rule, DOE does not expect a change in the test burden as a result of this proposed

rule, if adopted. Specifically, the same test would be performed, but the water from only one showerhead would be measured to determine compliance with the DOE water conservation standard. The updates to the testing procedures maintain the current testing requirement that only one showerhead per product would need to be tested, and current products with multiple showerheads that meet the energy conservation standard would not need to be retested. Based on the foregoing, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### *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.

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*

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act of 1969 (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, Subpart D, Appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

*F. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on 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. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. 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)) No further action is required by Executive Order 13132.

#### *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. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that 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 determined that, to the extent permitted by law, the proposed 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 small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at <http://energy.gov/gc/office-general-counsel>. DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

*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 proposed rule would 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*

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

*K. Review Under 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 agencies to review most disseminations of information to the public under 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 proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with 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 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 promulgated 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 (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) 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 benefits on energy supply, distribution, and use.

The proposed regulatory action to reinterpret the definition of “showerhead” and revise the test procedure for measuring the energy efficiency of showerheads is a significant regulatory action under Executive Order 12866. Moreover, 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.

*M. Review Under Section 32 of the Federal Energy Administration Act of 1974*

Under section 301 of the Department of Energy Organization Act (Pub. L. 95-91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of



1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; “FEAA”) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the FTC concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedure for showerheads in this proposed rule incorporate definitions and testing methods contained in certain sections of the following commercial standards: ASME A112.18.1-2018, “Plumbing supply fittings.” DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA (*i.e.*, whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE will consult with both the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition, prior to prescribing a final rule.

#### *N. Description of Materials Incorporated by Reference*

In this NOPR, DOE proposes to incorporate by reference the test standards published by ASME, ASME A112.18.1-2012, Plumbing supply fittings (approved December 2012), and ASME A112.18.1-2018, Plumbing supply fittings (approved July 2018).

The proposed amendments in this proposed rulemaking include updating the reference to ASME A112.18.1-2012 to incorporate by reference the standard in its entirety. Currently, only section 5.4 of ASME A112.18.1-2012 is incorporated by reference at 10 CFR 430.3. ASME

A112.18.1-2012 is an industry standard that contains performance guidelines and test procedures, and is intended to cover plumbing supply fittings and accessories between the supply stop and terminal fitting, including showerheads. This proposed rule would continue to reference Section 5.4, “Flow rate” of ASME A112.18.1-2012 in the test procedure for faucets.

The proposed amendments in this proposed rule include updating references to the definition of showerhead in ASME A112.18.1-2018. ASME A112.18.1-2018 is a more current version of A112.18.1-2012 and remains an industry standard that contains performance guidelines and test procedures, and is intended to cover plumbing supply fittings and accessories between the supply stop and terminal fitting, including showerheads. Specifically, the test procedures for showerheads as defined in this proposed rule would reference Section 5.4, “Flow rate” of ASME A112.18.1-2018.

Copies of both ASME A112.18.1-2012 and ASME A112.18.1-2018 may be purchased from the American Society of Mechanical Engineers, 1828 L St., NW Suite 510, Washington, DC 20036-5104; (800) 843-2763, or by going to <https://www.asme.org/codes-standards/find-codes-standards/a112-18-1-csa-b125-1-plumbing-supply-fittings> and selecting the appropriate Edition (2012 or 2018).

#### **IV. Public Participation**

DOE invites comment on all aspects of this proposal. DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

*Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.*

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

*Submitting comments via email, hand delivery, or mail.* Comments and documents submitted via email, hand delivery, or mail also will be posted <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No faxes will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

*Campaign form letters.* Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

*Confidential Business Information.* According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email to [Showerheads2020TP0002@ee.doe.gov](mailto:Showerheads2020TP0002@ee.doe.gov) or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

## **V. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this proposed 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 July 16, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency, 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 July 16, 2020.

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

For the reasons stated in the preamble, DOE is proposing to amend part 430 of Chapter II of Title 10, 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 adding, in alphabetical order, definitions for “Body spray” and “Safety shower showerhead,” and by revising the definition of “Showerhead” to 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 device specifically designed and intended to deliver a flushing fluid in sufficient volume to cause that fluid to cascade over the entire body.

\* \* \* \* \*

*Showerhead* means any showerhead (including a handheld showerhead) other than a safety shower 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. Revising paragraph (h)(1);
- a. Redesignating paragraph (h)(2) as paragraph (h)(3); and
- b. Adding new paragraph (h)(2).

The revision and addition read as follows:

**§430.3 Materials incorporated by reference.**

\* \* \* \* \*

(h) \* \* \*

(1) ASME A112.18.1-2012, (“ASME A112.18.1-2012”), “Plumbing supply fittings,” approved December, 2012, IBR approved for appendix S to subpart B.

(2) ASME A112.18.1–2018, (“ASME A112.18.1-2018”), “Plumbing supply fittings,” approved July 2018, IBR approved for appendix S to subpart B.

\* \* \* \* \*

- 4. Appendix S to subpart B of part 430 is amended by:
  - a. Removing the note after the appendix heading;
  - b. Adding section 0, “Incorporation by Reference”; and
  - c. Revising section 2.b, “Flow Capacity Requirements”.

The addition and revision read as follows:

**APPENDIX S TO SUBPART B OF PART 430—UNIFORM TEST METHOD FOR MEASURING THE WATER CONSUMPTION OF FAUCETS AND SHOWERHEADS**

Section 0. Incorporation by Reference



DOE incorporated by reference ASME A112.18.1-2012 and ASME A112.18.1-2018 in their entirety in §430.3; however, only enumerated provisions of these documents are applicable to this appendix, as follows:

(a) ASME A112.18.1-2012, Plumbing supply fittings, section 5.4, Flow rate,” as specified in section 2.a. of this appendix.

(b) ASME A112.18.1-2018, Plumbing supply fittings, section 5.4, Flow rate,” as specified in section 2.b. of this appendix.

\* \* \* \* \*

2. \* \* \*

\* \* \* \* \*

b. *Showerheads*—(1) The test procedures to measure the water flow rate for showerheads, expressed in gallons per minute (gpm) and liters per minute (L/min), shall be conducted in accordance with the test requirements specified in section 5.4, Flow Rate, of ASME A112.18.1-2018 (incorporated by reference, *see* §430.3). Measurements shall be recorded at the resolution of the test instrumentation. Calculations shall be rounded off to the same number of significant digits as the previous step. The final water consumption value shall be rounded to one decimal place. If the time/volume method of section 5.4.2.2(d) is used, the container must be positioned as to collect all water flowing from the showerhead, including any leakage from the ball joint.

(2) For products with multiple showerheads, test one showerhead if each showerhead has an identical flow control mechanism attached to or installed within the supply fitting and identical water-passage design features that use the same path of water in the highest flow mode. If all showerheads are not identical, test the showerhead with the maximum water flow rate. Where it

is not possible to isolate the showerhead under test, test with all showerheads flowing at the maximum rate and measure the flow rate of only the showerhead under test.

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