

**Supplemental Comments of the Plumbing Manufacturers Institute
Regarding the Economic Impacts of the Proposed Definition of “Showerhead”
Docket No. EERE-2010-BT-NOA-0016**

Pursuant to discussions with the Department of Energy (DOE) Office of the General Counsel, which has permitted this filing to be made after the original deadline for submission of comments, the Plumbing Manufacturers Institute (PMI) respectfully submits these supplemental comments regarding the economic impacts of the DOE’s draft interpretation of the term “showerhead” in 10 C.F.R. § 430.2 (the “Interpretive Rule”).

INTRODUCTION

In its prior submissions, PMI argued that DOE’s proposed Interpretive Rule should be subject to the rulemaking procedures in the Administrative Procedures Act (APA), and that the Interpretive Rule is inconsistent with language and intent of the Energy Policy Act of 1992. PMI still adheres to those positions. Promulgation of the Interpretive Rule would violate both the APA’s procedural requirement that substantive regulatory changes be made through a notice-and-comment rulemaking, and the APA’s substantive prohibition against agency actions that are arbitrary, capricious or contrary to law.

This submission, however, focuses on a different issue: the economic impact of implementing the Interpretive Rule. PMI contends that this issue should be central to DOE’s decision-making process. Unfortunately, the Department has never studied the economic ramifications of its proposed rule. The purpose of these comments is to provide some evidence of these important harms, thereby demonstrating that the Interpretive Rule will have material adverse effects on plumbing manufacturers, retailers, home builders, contractors and installers. These adverse effects include hundreds of millions of dollars in transaction costs and lost revenues, as well as the loss of numerous jobs. Ultimately, a full review of the evidence shows that these costs of the Interpretive Rule greatly exceed its benefits.

EXECUTIVE SUMMARY

PMI,¹ the trade association for the plumbing products manufacturing industry, is submitting supplemental comments to DOE that discuss in great detail the adverse economic impacts that would result from the Department's proposed redefinition of the term "showerhead" in an "Interpretive Rule" that is not subject to the provisions of the APA.

Although the Interpretive Rule is broadly worded, PMI assumes for purposes of its economic calculations that DOE will tailor the final rule to accomplish narrower objectives. If the Interpretive Rule were finalized, manufacturers would be forced to completely remove noncompliant products from the market, including products that have already been inventoried.

The process of withdrawing targeted products from the market would impose a substantial burden on manufacturers. A survey conducted by an outside consultant hired by PMI estimates that costs would exceed \$100 million. In addition, manufacturers would have to replace at least \$220 million, and as much as \$300 million, in lost revenues.

Plumbing manufacturers would not be the only ones harmed by the Interpretive Rule. Retailers of plumbing products would have to assist in the removal of nonconforming products from the market, thereby increasing their costs. Because the plumbing products targeted by the Interpretive Rule generate significant revenues, retailers, home builders, contractors and installers would all face a substantial drop in incomes if the rule moves forward.

These costs—which the Department has never studied—are significant enough that DOE must ask the Office of Management and Budget to review the Interpretive Rule. Such a review will reveal that the costs of the proposed rule far exceed its potential water-efficiency benefits.

¹ PMI is the leading not-for-profit trade association of plumbing products manufacturers in the United States. Its more than 30 member companies employ thousands of workers in more than 20 states, and manufacture more than 95% of all the plumbing products sold in this country. PMI's companies are committed to protecting the future of the national and local water supply through water-efficient plumbing products and practices.

COMMENTS

I. DOE's Proposed Interpretive Rule Will Apply To Numerous Products Currently On The Market

Some confusion has existed from the beginning about precisely which products would be covered by the Interpretive Rule's definition of "showerhead." PMI recognizes that DOE is continuing to refine the rule based on the comments it has received. So uncertainty may still exist at the margins about precisely which products would be impacted by the Interpretive Rule. But it is beyond debate that a number of products currently available in the market would violate the standards for "showerheads" proposed in the Interpretive Rule. With regard to those products, the Interpretive Rule would preclude the sale of units that have already been manufactured.

A. The Interpretive Rule plainly targets existing products

It is no secret that DOE intends for the Interpretive Rule to apply to products that are currently being produced, marketed, sold and installed throughout the United States, and have been for the past 18 years. Naturally, the size of the Interpretive Rule's economic impact hinges on exactly how many of those products would be affected. As explained below, PMI is justifiably concerned that the language of the draft Interpretive Rule is overly-broad and ambiguous. But for purposes of calculating economic impacts, an examination of the Interpretive Rule's language and context is the best means of predicting which products a final version of the rule would likely prohibit. To ensure that its estimates of economic impacts are conservative—the bare minimum impacts that the Interpretive Rule would cause—PMI has attempted to discern the core products that DOE appears to be targeting, and has focused its discussion of harm on what would result from the prohibition of those products.

1. *The language of the Interpretive Rule would have broad applicability*

As currently worded, the Interpretive Rule would define “showerhead” to include “any plumbing fitting”—*i.e.*, “any device designed to control and/or guide the flow of water”—“designed to direct water onto a bather.” According to the Interpretative Rule, this means that “a showerhead may incorporate one or more sprays, nozzles or openings.” Whenever components are “supplied standard together and function from one inlet,” they “form a single showerhead” for purposes of DOE’s regulations.

PMI explained the breadth of this definition in its prior comments. To take one example, the Interpretive Rule on its face would apply to the diverter valve in a combination tub-shower installation, an absurd result that presumably was unintentional. Yet the language of Interpretive Rule does not currently contain any exceptions. A “plumbing fitting” that “function[s] from one inlet” must conform to the 2.5 gpm flow rate standard. Clearly, a large number of products currently on the market would fail to meet this requirement, and thus be prohibited by the terms of the Interpretive Rule.

2. *The preface to the Interpretive Rule explicitly mentions specific products that are currently on the market*

The prefatory paragraphs in the Interpretive Rule give some more specific indication of the products on which DOE is focused. Describing the diversity of the “showerhead” market, the Interpretative Rule notes the existence of “products marketed under names such as waterfalls, shower towers, rainheads and shower systems.” The rule implicitly identifies these types of existing products as the primary targets of DOE’s new “guidance” on the regulatory definition of the term “showerhead.” Indeed, numerous products like those described in the preface of the Interpretative Rule are in fact designed to allow up to 2.5 gpm of water from each individual “spray, nozzle or opening.” Those products therefore appear to be prohibited under the

Interpretive Rule, and would almost certainly have to be removed from the market if and when the rule is finalized.

3. *DOE has publicly indicated that existing products would be prohibited by the Interpretive Rule*

DOE's General Counsel has given several interviews that further clarify which products would (and which might not) be covered if the Interpretive Rule is implemented. During one of those interviews, published on July 26 by *Supply House Times*, the DOE General Counsel indicated that DOE's focus was on "showerheads [that] are in 1 to 4 percent of homes." (PMI has estimated that 1% to 4% of new homes built in the United States has a multi-head shower system, but those products account for a much greater proportion of the revenues generated by the showerhead market.) In the same article, the DOE General Counsel is reported to have said that the Department will "draft the rule" so that "devices that provide handheld nozzles that the elderly and disabled use will be treated in a different way than a showerhead that has half-a-dozen nozzles."

Given these and other similar public statements by DOE officials, PMI has prepared these comments on the assumption that the language of the Interpretive Rule will be modified in some manner that excludes diverter valves, handheld devices commonly used by the elderly and other products that may have been unintentionally swept in by the rule's broad and ambiguous wording.² These same public statements make clear that the Department is still targeting the kind of multi-head shower systems referenced in the Interpretive Rule's prefatory language. Thus, if the final Interpretive Rule carries out DOE's stated intentions, it will prohibit the manufacture of these products, which are now freely available for purchase in the marketplace. As discussed in more detail below, the economic impact of such a prohibition will be substantial,

² PMI maintains that revising the Interpretive Rule to accomplish these objectives will be difficult, if not impossible, from a technical standpoint. Nevertheless, it is setting aside those issues for purposes of its economic calculations.

not only for manufacturers, but also for retailers, home builders, contractors, installers and other stakeholders.

B. The Interpretive Rule explicitly allows DOE to take enforcement action against units that have already been manufactured

1. *As an “interpretation,” the Interpretive Rule applies to products that have already been manufactured*

As a general matter, agency rules apply prospectively. *Orion Reserves Ltd. P’ship v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009). Future behavior of regulated parties may be affected by a new rule, but there is no penalty for past activities. But such is not the case with the Interpretive Rule here at issue. DOE has framed the Interpretive Rule as “the Department’s interpretation of *existing* regulations.” (Emphasis added.) From DOE’s perspective, then, the requirements described in the Interpretive Rule are not “new.” Put another way, DOE contends that the term “showerhead” in the regulations has always meant what the Interpretive Rule now says it means.

Although the Interpretive Rule is promulgated as a simple clarification of rules that have long been in place, manufacturers have operated for years in accordance with the unchallenged understanding that multi-head shower systems were permitted so long as each nozzle satisfied the rule’s 2.5 gpm flow rate requirement.³ The Interpretive Guidance says that this was actually a “misunderstanding,” and that such shower systems are actually a single “showerhead” that must have a combined flow rate of 2.5 gpm. In this way, manufacturers’ failure to discern the Department’s regulatory definition of “showerhead” becomes their responsibility—regardless of the fact that DOE has never enforced the definition that now appears in the Interpretive Rule.

³ As several commenters have pointed out, products like the ones now being targeted by DOE were available when the relevant DOE regulations were first promulgated, and even when the Energy Policy Act of 1992 became law. Comments of Masco Corp. at 1-2. Still, the Department had not engaged in any efforts to enforce the definition of “showerhead” in the Interpretive Rule until quite recently. *Id.* This demonstrates that the Interpretive Rule is actually changes the longstanding interpretation of the term “showerhead” in the DOE regulations.

2. *The Interpretive Rule states that DOE has “discretion” to “apply[] its enforcement authority” to past “production decisions”*

Consistent with DOE’s claim that it is simply clarifying the originally-intended meaning of the regulations, the Interpretive Guidance states that “the Department will exercise discretion in applying its enforcement authority to account for manufacturers’ production decisions that may have been based on a misunderstanding of the term ‘showerhead.’” Although this sentence is worded in a way that could suggest DOE will offer some leniency to the manufacturers of products that do not conform to the Interpretive Rule’s definition of “showerhead,” it at the same time implies that DOE has full authority to penalize those manufacturers for actions taken before the issuance of the Interpretive Rule. In other words, the Department believes that it can punish a manufacturer for producing a “showerhead” that does not conform to the Interpretive Rule’s definition, even if the specific units at issue were on retail shelves before the rule was announced.

C. Manufacturers will have no choice but to remove existing products from the market that may violate the standards set out in the Interpretive Rule

As the Interpretive Rule is currently worded, manufacturers will have no choice but to conduct a nationwide effort to remove from the market all products that do not meet the 2.5 gpm flow standard under the rule’s definition of “showerhead.” No company can take the risk that DOE will exercise its discretion not to enforce the Interpretive Rule. The failure to remove nonconforming products from store shelves could result in significant civil fines or other penalties. Like a product recall, the removal of “showerheads” from retail markets will have significant costs for manufacturers, which will be discussed in greater detail below. Moreover, the retailers themselves will incur substantial economic losses, because they will have to assist in the effort to remove nonconforming products from the market. Those costs will also be discussed more fully in what follows.

II. The Interpretive Rule Will Have A Substantial, Adverse Economic Impact On Manufacturers, Retailers, Homebuilders and Installers

Based on the above analysis, it is indisputable that the Interpretive Rule is at least intended to prohibit all future sales of the multi-head shower systems that are currently being installed in approximately 1 to 4 percent of new homes, including those units that have already been manufactured. To the extent they are already inventoried, these products would have to be proactively removed from the market. The elimination of these product lines would obviously have an adverse effect on manufacturers. But the Interpretive Rule would also cause ripples in the market that would harm the retailers who sell multi-head shower systems, the homebuilders who are putting these products in new houses, and the contractors and installers who physically do the work of setting up these systems. Commenters representing all of these groups accordingly have expressed their opposition to the Interpretive Rule.⁴ In this section, PMI will show how these economic harms are interrelated, and where possible, will provide reasonable dollar-value estimates of such harms. What emerges from this discussion should paint a fuller picture of the substantial economic damage that the Interpretive Rule will inflict on this sector of the economy.

A. Showerhead manufacturers would face substantial economic losses if the Interpretive Rule were implemented

Earlier this year, PMI hired an independent consultant to gather data from its member companies about the economic impact the Interpretive Rule. Declaration of Chuck Wodrich (Wodrich Decl.) ¶ 4. The consultant sent questionnaires to PMI members, reviewed the responses it received, and entered the data into an application of its own design. Wodrich Decl.

⁴ The docket for this matter on regulations.gov shows that several hundred comments were submitted in opposition to the Interpretive Rule—even though the affected parties had no advance warning about DOE’s guidance, and were only given 30 days to comment. This level of interest in the Department’s proposal strongly argues for the use of additional process before the rule is finalized, including a full notice-and-comment rulemaking with submission of the final proposal to the Office of Management and Budget for review.

¶ 5-7. No PMI members or staff had access to this data. Wodrich Decl. ¶ 6. The results of this study offer a good indication of the magnitude of the economic damage that the Interpretive Rule would inflict on plumbing manufacturers.

1. *Manufacturers would face the costs of recalling prohibited products and replacing them with new, compliant products*

If the Interpretive Rule goes into effect, the first order of business for plumbing manufacturers will be to recall their noncompliant products and replace them with products that would satisfy the Interpretive Rule. PMI's consultant broke these costs into three separate categories: (1) *inventory costs*, which are the basic costs of taking noncompliant products out of retail stores where they can be purchased by contractors, installers or the public; (2) *capital costs*, which include the costs of retooling manufacturing equipment and processes, repackaging some products in a manner consistent with the Interpretive Rule, and restocking retail shelves with compliant products; and (3) *training costs*, which account for the cost of reeducating salesmen and workers about new products, as well as the production of new literature describing those products. Wodrich Decl. ¶ 10.

The data collected by PMI's consultant demonstrates that the economic impacts in these three categories would represent a significant dislocation in the market. The inventory, capital and training costs reported by plumbing manufacturers would exceed *\$108 million* dollars. Wodrich Decl. ¶ 11. (Given that the manufacturers who responded to the survey constitute approximately 80% of the market, it is reasonable to assume that the full impact from inventory, capital and training costs would be 20% higher, or more than \$130 million. Wodrich Decl. ¶ 12.) While it is true that these costs would be one-time expenditures, \$108 million in losses could do significant damage to the industry, especially at a time when the economy as a whole is in a

fragile state. Yet the Interpretive Rule evinces no concern about the possible harm that a large-scale removal of products from the market would inflict on plumbing manufacturers.

2. *Manufacturers' revenues would decline because sales of prohibited showerheads would be lost*

The lost revenues that the industry would face under the Interpretive Rule are more difficult to estimate than one-time inventory, capital and training costs. Ultimately, however, those lost revenues are even more damaging to plumbing manufacturers. PMI's consultant asked member companies to report their annual sales of products that might be affected by the broadly-worded Interpretive Rule, including: (1) shower-only products that where the total flow from all products sold in a single package exceeds 2.5 gpm; (2) certain high flow shower valves; (3) modular components from custom showers or therapy spas; (4) tub/shower combos; (5) diverter valves not primarily designed for tub/shower combos; and (6) gang showers. Wodrich Decl. ¶ 13. When the total revenues from all of these products were combined, they amounted to more than \$303 million. Wodrich Decl. ¶ 14. As discussed above, PMI is assuming for present purposes that the final Interpretive Rule will not prohibit items like diverter valves and tub/shower combos. If those items are removed from the calculation, the Interpretive Rule would still prohibit the sale of products that generate over **\$220 million** in revenues for plumbing manufacturers. Wodrich Decl. ¶ 15. These potential lost revenues are *in addition* to the \$108 million in costs that would have to be spent to remove nonconforming products from the market.

Of course, calculating the revenues generated by products subject to withdrawal from the market under the Interpretive Rule is not the same thing as measuring economic harms. Consumers who would have been among those to install a multi-head shower system in their new homes prior to the Interpretive Rule may still put in a new, simpler showerhead. So some of the revenues lost as a consequence of the Interpretive Rule could in theory be replaced by

alternative purchases. But DOE has not conducted a study that would be able to predict economic losses by accounting for those types of decisions, as it should have done—and would have been required to do in a rulemaking.

3. *To the extent products remain on the market, manufacturers could also face civil fines or other enforcement actions from DOE*

Finally, it is important to note that withdrawing and replacing all noncompliant products is no simple matter. At least some manufacturers do not package the products they produce, which makes it difficult to know if a consumer or contractor is using those products in a manner that would qualify them as a single “showerhead” under the Interpretive Rule. Issues like these can make it difficult to effectively prevent improper use of a manufacturers’ products. Nevertheless, DOE has threatened to use its “enforcement authority”—which includes the imposition of civil fines—against manufacturers, as opposed to contractors, installers or consumers. In some cases, the civil fines imposed by DOE can be significant. Especially because efforts to remove a product from the market are rarely 100% effective, the economic costs of applying the Interpretive Rule should also include the costs manufacturers would inevitably face in enforcement actions brought by DOE.

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The data discussed above demonstrate that the Interpretive Rule would impose on plumbing manufacturers approximately ***\$108 million*** in inventory, capital and training costs; prohibit the sale of products that generate more than ***\$220 million*** in revenues; and leave manufacturers vulnerable to civil fines and other enforcement actions. Although these economic harms would be a devastating blow to PMI’s members, DOE does not appear to have taken them into account when it promulgated the Interpretive Rule. If this were a rulemaking—as PMI and other commenters have argued it should be—the Department would bear the burden of

measuring the costs and benefits of the proposed action. DOE should not be able to circumvent this requirement by couching its action as “guidance” rather than an informal rule.

B. Showerhead retailers would also suffer economic harm if the Interpretive Rule were implemented

The comments submitted in response to the Interpretive Rule make clear that showerhead manufacturers are not the only ones who would be adversely impacted. Numerous showerhead retailers of all sizes—from retail giant The Home Depot to individually-owned specialty stores—wrote to express their opposition to the Interpretive Rule. Although none of these comments attempted to quantify economic losses in the retail plumbing fixture sector, they do provide a good qualitative picture of the Interpretive Rule’s potential impacts.

1. Retailers have their own costs of removing prohibited products from store shelves

As an initial matter, retailers would obviously bear a substantial economic burden if manufacturers were forced to remove from the market specialty shower products that may not comply with flow rate regulations in light of the Interpretive Rule. The retailers’ employees would be the ones who physically remove the noncompliant products from store shelves and warehouses, and who refill those same shelves and warehouses with compliant products when they become available. Retail employees may also require retraining, and retailers’ advertising materials may also need to be revised. These activities represent added *inventory* and *training* costs for retailers, many of whom already operate on razor thin margins. Given that neither the Interpretive Rule nor the accompanying Federal Register notice mentions the rule’s downstream economic consequences, it does not appear that DOE considered these costs when it effectively decided to release its definition of “showerhead” as a guidance document.

2. *Retailers would also lose revenues as a result of losing sales of products that would be prohibited*

Eliminating retailers' ability to sell multi-head shower systems would also cause a substantial drop in their revenues. The comments of Forte Buying Group, whose membership includes over 300 independent retailers of plumbing and fine hardware products, indicate that the Interpretive Rule's definition of "showerhead" would "*reduce revenues by approximately 20%.*" A number of smaller or independent retailers also wrote in response to the Interpretive Rule. These businesses uniformly warned that prohibiting the sale of multi-head shower systems would deal a serious blow to their businesses. *See, e.g.,* Comments of Gessi USA, Inc; Comments of Barry Goldberg, VP, Union Hardware; Comments of Ed Burlison, Guilford Plumbing Supply, Inc. As with manufacturers, these products bring in more revenues for the retailers than their single showerhead counterparts. If they are removed from the market, retailers will lose revenues that cannot be replaced with sales of other products.

The loss of retail revenues and profits has another serious implication that a number of commenters raised: lost jobs. Especially for smaller retailers whose sole focus is on selling specialty plumbing products, the Interpretive Rule would likely mean a significant, long-term drop in sales. The Forte Buying Group says that its members would have no choice but to "cut their workforces in response to declining sales that almost assuredly would result" from the Interpretive Rule. Other retailers delivered the same message—without the ability to sell multi-head shower systems, they will have to eliminate jobs. *See, e.g.,* Comments of James Balmer, Pres., Plumbers Supply Co.; Comments of Kristena Wyatt, VP, Jerry Sibley Plumbing, Inc. Once again, the Department has made no attempt to calculate precisely how many people would lose their jobs as a result of the "showerhead" definition contained in the Interpretive Rule. But the consistent message of retailers who sent in comments is that layoffs would be inevitable.

Nothing in the record suggests that DOE considered this impact to retail employment when it drafted the Interpretive Rule.

C. Homebuilders, showerhead contractors and installers would also face economic hardship if the Interpretive Rule were implemented

In addition to the manufacturers and retailers who commented in opposition to the Interpretive Rule, DOE received a strong message from homebuilders, plumbing contractors and installers who oppose the Department's action. Like their counterparts farther up the supply chain, these groups warned that implementing the Interpretive Rule would cause significant economic damage to their businesses.

The National Association of Home Builders (NAHB), a trade association that is known as the "voice of the housing industry," expressed strong opposition to the Interpretive Rule. Like almost all of the companies with a stake in the definition of the term "showerhead," NAHB urged the Department to consider the Interpretive Rule's "significant burdens for the industry," and to proceed using the "traditional rulemaking process."

The Plumbing-Heating-Cooling Contractors – National Association (PHCC) likewise warned that the Interpretive Rule "would cost jobs and hinder the opportunity for plumbing contractors to grow their businesses and hire more technicians." As PHCC explained, the "intricate installations" that are required for multi-head shower systems "have a higher value to the contractor in terms of time spent installing the fixtures and revenue generated by this installation." Losing these revenues, PHCC says, would have a direct impact on contractors' ability to "maintain their workforce or add employees to the payroll." PHCC puts it bluntly: The Interpretive Rule would "drastically reduce if not eliminate luxury bathroom installations," which would "further hurt" jobs in an industry already suffering from high unemployment rates.

PHCC's warnings are substantiated by dozens of comment letters from individual plumbing contractors and installers. *See, e.g.*, Comments of Paul J. Episcopo, Pres., VIP Plumbing, Inc.; Comments of Michael McGraw, Registered Master Plumber; Comments of John Olivero, Pres., Olivero Plumbing Co., Inc. Each of these individuals or small business owners urges DOE to reconsider the Interpretive Rule in light of its adverse impacts on their industry segment. These impacts are another part of the overall economic harm that would be caused by the Interpretive Rule. There is no evidence in the record that the Department has considered these ramifications, especially the potential for lost jobs among plumbing contractors and installers.

III. The Interpretive Rule Warrants OIRA Review

At this time, PMI does not know whether the Department will submit the final Interpretive Rule to the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA), which has responsibility to review the overall costs and benefits of agency actions. For several reasons, discussed in more depth below, such review is called for in this case. DOE cannot avoid its responsibilities to OIRA by framing its action as an interpretation or a guidance document. OIRA should review all agency actions that will have a significant, adverse impact on the economy, including the Interpretive Rule here at issue.

A. OIRA has the responsibility to review the impacts of agency guidance documents, as well as rulemakings

In 2007, President George W. Bush amended Executive Order 12866, which authorizes OIRA review of agency actions. Among other things, these 2007 amendments explicitly encourage OIRA review of significant guidance documents such as interpretive rules. Shortly after President Obama took office in January 2009, he rescinded the 2007 changes to the Executive Order. This change initially led to some debate about whether OIRA should continue

reviewing agency guidance documents. The Director of OMB attempted to end this confusion by issuing a March 2009 memo that states “significant policy and guidance documents . . . remain subject to OIRA’s review”

In light of OMB’s 2009 memo and past practice, it seems clear that guidance documents like the Interpretive Rule remain subject to OIRA review, at least when they qualify as “significant.” Of course, the definition of “significant guidance documents” that was added to the Executive Order in 2007 was removed in 2009. But since that definition created standards for significance identical to those that have always been part of the Executive Order’s definition of “significant agency action,” it is reasonable to conclude that the same definition should still be applied to guidance documents. In this case, the definition of “significant” in Executive Order 12866 would plainly cover the Interpretive Rule.

B. The impacts of the Interpretive Rule are “significant” under Executive Order 12866

Executive Order 12866 describes a number of ways in which agency actions may qualify as “significant.” Among these are agency actions that “have an annual effect on the economy of \$100 million or more,” and agency actions that “adversely affect in a material way the economy, a sector of the economy” or “jobs.” DOE’s Interpretive Rule’s definition of “showerhead” qualifies as “significant” under each of these thresholds.

First of all, the survey conducted by PMI’s independent consultant demonstrates that the economic impact of the Interpretive Rule on plumbing manufacturers alone far exceeds the \$100 million threshold for significance. As explained above, plumbing manufacturers will face more than \$100 million in inventory, capital and training costs if multi-head shower systems are defined to be a single “showerhead.” On top of that, plumbing manufacturers would lose substantial amounts of revenue from sales of these products, which account for more than \$200

million in income for manufacturers each year. Plumbing retailers, contractors and installers would also face lost revenues if multi-head shower systems were taken off the market as a result of the Interpretive Rule. Data on the size of these revenue losses is more difficult to collect, but it is safe to assume that taken together, the actual economic costs of lost revenues to showerhead manufacturers, retailers, contractors and installers would far exceed \$100 million.

Given the size of the markets involved, the costs that would be imposed, the Interpretive Rule certainly qualifies as “a material adverse effect.” As noted by PHCC, the Interpretive Rule would “drastically reduce if not eliminate luxury plumbing installations.” Every company involved in that market would feel the impact if these products were taken off the shelves. Lost revenues would inevitably mean lost jobs, especially in an economy where many companies (and individuals) are already struggling to get by.

As discussed above in more detail, PMI has not seen evidence that DOE attempted to study or quantify these effects on the market prior to issuing the draft Interpretive Rule. Before the rule is finalized, PMI urges the Department to carefully consider the likely harm it will inflict on the economy, including the many lost jobs that would result.

C. The benefits of the Interpretive Rule do not outweigh its significant costs

The costs of the Interpretive Rule must be weighed against whether the change in the definition of “showerhead” would result in significant conservation of water and energy. The members of PMI all believe that water conservation is a laudable goal, and have taken numerous steps over the years to improve the water efficiency of their products. But the simple fact is that even the complete elimination of multi-head showers from the market will not conserve much water or energy. There is no dispute that the products primarily targeted by the Interpretive Rule are being installed in only a small fraction of U.S. homes. Even under the most conservative assumptions, the total daily water savings would amount to just 0.2% of publicly supplied water.

The water savings that could be achieved by the Interpretive Rule pale in comparison to the conservation that other common sense measures could produce. For example, PMI and its members participate in EPA's WaterSense program. WaterSense labeled plumbing products reduce water consumption by up to 30%. PMI members are also in the process of converting all of their toilets to 1.28 gallons per flush (gpf). Every time a household replaces an old 3.5 gpf toilet with a 1.28 gpf model, it saves approximately 16,500 gallons of water per year. PMI companies are also working to produce more water-efficient lavatory faucets, urinals and showerheads that will generate tremendous long-term water and energy savings. Moreover, numerous other water uses are far less efficient than showers. Pools, for instance, use three times more water and 20 times more energy. From this perspective, the decision to target showerheads appears arbitrary and inefficient.

The water conservation measures being implemented by PMI's members do not cost any jobs; indeed, it is easy to imagine how they might actually create new jobs for retailers, contractors and installers. PMI urges the Department to focus its efforts on these practical steps that can be implemented in cooperation with industry, rather than imposing an unnecessary and economically damaging measures in the Interpretive Rule.

CONCLUSION

For all the reasons discussed above, the Interpretive Rule will impose substantial costs on plumbing manufacturers, retailers, contractors and installers, and will not provide significant water or energy conservation benefits. PMI accordingly asks the Department to withdraw the proposed Interpretive Rule.

PMI is prepared to answer any questions DOE may have, and to discuss these comments in more detail at the Department's convenience.