



Texas Public Policy Foundation

Sept. 26, 2023

ATTN: RIN 1904-AD91
VIA ELECTRONIC SUBMISSION (<https://www.regulations.gov>)

Jennifer Granholm
Secretary
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

RE: *Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters*, 88 Fed. Reg. 49,058 (July 28, 2023), Docket No. EERE-2017-BT-STD-0019

Dear Secretary Granholm:

On July 28, 2023, the Department of Energy (the “Department”) proposed new standards for water heaters. *See Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters*, 88 Fed. Reg. 49,058 (July 28, 2023) (“Proposed Rule”). The Texas Public Policy Foundation submits this comment in response.

The Texas Public Policy Foundation is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. To advance these aims, it provides academically sound research, policy recommendations, and advocacy, and it files lawsuits to enforce constitutional and statutory limits on government power. The Texas Public Policy Foundation writes to urge the Department to reconsider the Proposed Rule, which would be unlawful and harmful policy if finalized.

BACKGROUND

Traditional water heaters heat water and store it in a tank for future use. “Instantaneous” or “tankless” water heaters were subsequently developed, which heat water by quickly running it through a heating element before it runs through a

faucet.¹ Based on current technology, these tankless heaters are more efficient and have secured a significant market share. In the gas water-heater market, for example, tankless water heaters have increased from only 8% in 2012 to 21% in 2022.²

Tankless water heaters use either “condensing” or “non-condensing” technology. Proposed Rule, 88 Fed. Reg. at 49,078-79. Condensing water heaters heat the water rapidly as it flows through an internal pipe, capturing and reusing heat from the exhaust gases produced during water heating.³ Non-condensing water heaters similarly heat water as it flows through the device, but do not capture and reuse exhaust heat.⁴ Both types of tankless water heaters are more efficient than traditional water heaters. Condensing water heaters, however, are more efficient than non-condensing water heaters.⁵

Currently, the Department has one efficiency standard for tankless water heaters, which is set to accommodate non-condensing water heaters. Proposed Rule, 88 Fed. Reg. at 49,068. The Department could easily create two different standards for condensing and non-condensing water heaters. The Proposed Rule, however, would raise the single standard for both types of tankless water heater to 91%, *id.* at 49,060. This standard is impossible for non-condensing heaters to meet, and would remove non-condensing tankless water heaters from the market.

ARGUMENT

The Proposed Rule will not only hurt American consumers and companies by reducing competition and depriving them of options, but it is also unlawful. Among the Proposed Rule’s legal flaws, it exceeds the Department’s statutory authority under the Energy Policy and Conversation Act (the “Act.”).

“Administrative agencies are creatures of statute.” *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022). That means they “possess only the authority that Congress has provided” in statutes. *Id.* When an agency promulgates a rule, the “question, then, is whether the [statute] plainly authorizes the [agency’s] mandate.” *Id.*

¹ Timothy Dale, *All the Pros and Cons You Need to Know About Tankless Water Heaters*, BETTER HOMES & GARDENS (Mar. 2, 2023), <https://www.bhg.com/tankless-water-heater-pros-and-cons-6832602>.

² Proposed Rule, 88 Fed. Reg. 49,069; BRG BUILDING SOLUTIONS, *THE NORTH AMERICAN HEATING & COOLING PRODUCT MARKETS* (2023 ed.) (“2023 BRG Report”).

³ *Condensing Tankless Water Heaters*, NAVIEN, INC., <https://www.navieninc.com/residential/tankless-water-heaters/condensing>.

⁴ *Non-Condensing Tankless Water Heaters*, NAVIEN, INC., <https://www.navieninc.com/residential/tankless-water-heaters/non-condensing>.

⁵ See Ian Hugo, *Condensing vs. Non-Condensing Tankless Water Heater: Which Is Better?*, MONEY (Sept. 1, 2023), <https://money.com/condensing-vs-non-condensing-water-heater/>; *Condensing Tankless Water Heater 101*, INTELLIHOT, <https://www.intellihot.com/condensing-tankless-water-heater/>; NAVIEN, INC., *supra* n.4.

Even assuming the relevant power can be delegated to the Department under the Act, the Department is constrained by the Act. Accordingly, it must abide by 42 U.S.C. § 6295 when promulgating standards for energy use and efficiency. That section directs the Department to set different standards for a subset of appliances when that subset has features that justify a different standard. Specifically, it provides that:

A rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group . . . have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class).

42 U.S.C. § 6295(q)(1). The Act also specifies that, in making such a determination, the Department “*shall* consider such factors as the utility to the consumer of such a feature. . . .” *Id.*; see *California v. Texas*, 141 S. Ct. 2,104, 2,137 (2021) (“‘Shall’ typically means must, not should.”).

Thus, the Act requires the Department to create a different standard for consumer products with distinct features that are useful to consumers. Such is the statutory directive. The Department, however, ignored this statutory directive and did not set a different standard for non-condensing water heaters, much less even properly consider the features of those water heaters that are useful to consumers.

Here, the Proposed Rule would fail to impose a different standard for non-condensing water heaters. Proposed Rule, 88 Fed. Reg. at 49,060. Instead, it would set a single standard that is impossible for non-condensing water heaters to achieve. But the differences between these two types of tankless heaters are numerous, especially where the utility to the consumer is concerned. For example, a condensing heater requires a drain, is harder to install, and occupies more space.⁶ A non-condensing heater, by contrast, is more compact, easier to install, and lower-maintenance.⁷ The non-condensing feature of a tankless water heater therefore bears

⁶ NAVIEN, INC., *supra* n.4; Hugo, *supra* n.5; INTELLIHOT, *supra* n.5; RHEEM, *Never Run Out of Hot Water with Rheem Tankless Water Heaters* (Jan. 12, 2021), <https://www.rheem.com/water-heating/articles/never-run-out-of-hot-water-with-rheem-tankless-water-heaters/>.

⁷ NAVIEN, INC., *supra* n.4; Hugo, *supra* n.5; INTELLIHOT, *supra* n.5; Allie Ogletree, *Comparing Condensing vs. Non-Condensing Tankless Water Heaters*, ANGI (Sept. 7, 2023), <https://www.angi.com/articles/condensing-vs-non-condensing-water-heater.htm>.

directly on the heater’s utility to the consumer, and the Department is statutorily required to specify distinct levels of energy use or efficiency between for two products.

The Proposed Rule takes none of this into account. Illustrating that it does not believe consumers are astute enough to identify the benefits of non-condensing water heaters, the Department summarily concludes that:

the type of technology (non-condensing or condensing) or venting used by the appliance, does not provide any utility to the consumer that is accessible to the layperson, which is based upon the consumer’s operation of or interaction with the appliance. Therefore, there is no difference in the utility derived from the appliance based on these factors.

Proposed Rule, 88 Fed. Reg. at 49,079.

Nowhere in § 6295(q) indicates that the “utility to the consumer” the Department must consider is limited to that which “is accessible to the layperson” or “based upon the consumer’s operation of or interaction with” the product. However, even if it did, the non-condensing feature of a tankless heater provides utility that is directly experienced by “layperson[s],” such as compact size, ease of installation, cost-effectiveness, and energy efficiency. Indeed, a simple Google search can inform any consumer of the relative advantages and disadvantages—that is, the relative utility—of each type of tankless heater.⁸ Consumers recognize these obvious differences, which is why they purchase each product at a different price point. Indeed, because condensing heaters are significantly more expensive than non-condensing,⁹ and because the Proposed Rule still accommodates heaters with tanks at a lower efficiency standard, *id.* at 49,060, the preclusion of non-condensing heaters from the market will push many consumers who cannot afford a condensing heater toward purchasing an altogether less efficient heater with a tank—the opposite result of what the Department claims to desire. These economic tradeoffs illustrate that condensing and non-condensing water heaters are not interchangeable.

In short, the Proposed Rule assumes that American consumers are too unsophisticated to choose the water-heating solution that works for them best. This

⁸ See, e.g. NAVIEN, INC., *supra* n.4; Hugo, *supra* n.5; INTELLIHOT, *supra* n.5; *What Is the Difference Between A Condensing and Non-Condensing Tankless Water Heater*, CLIMATECARE (Feb. 21, 2023), <https://www.climatecare.com/blog/difference-condensing-non-condensing-tankless-water-heater/>; *Comparing Condensing vs. Non-Condensing Tankless Water Heaters*, ANGI (Sept. 7, 2023), <https://www.angi.com/articles/condensing-vs-non-condensing-water-heater.htm>; *Outdoor Tankless Gas Water Heater – Condensing vs Non Condensing*, REDDIT, https://www.reddit.com/r/Plumbing/comments/qbtve7/outdoor_tankless_gas_water_heater_condensin_g_vs/?rdt=33006.

⁹ See, e.g., *Tankless Gas Water Heaters*, HOME DEPOT, <https://tinyurl.com/24faw26w> (last visited Sept. 14, 2023).

condescending paternalism is not only offensive, but it also unlawful. The Department cannot evade its statutory command to consider utility to consumers when deciding whether to set a different efficiency standard for different products.

Conclusion

For the reasons described, the Proposed Rule is unlawful executive overreach that will harm the market it regulates, and the many citizens seeking affordable energy-efficient options to heat their homes. The Department should change course and refrain from finalizing the Proposed Rule.

Respectfully submitted,

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