Suite 600, 1901 North Moore Street
Arlington, VA 22209 USA
Phone: (703) 522-0086 • Fax: (703) 522-0548
Email: governmentaffairs@hpba.org
Web Site: www.hpba.org

January 30, 2014

Docket No.: EERE-2013-BT-DET-0057

Mr. John Cymbalsky
U.S. Department of Energy
Building Technologies Program, Mailstop EE-2J
1000 Independence Avenue SW
Washington, DC 20585-0121

(Submitted electronically via Federal eRulemaking Portal – www.regulations.gov)

Re: Comments on the Department of Energy's Proposed Determination of Hearth Products as a Covered Consumer Product

Docket EERE-2013-BT-DET-0057; RIN 1904-AD14

Dear Mr. Cymbalsky:

On behalf of the Hearth, Patio & Barbecue Association (HPBA) and its members, I am submitting comments on the Department of Energy's "Proposed Determination of Hearth Products as a Covered Consumer Product," published at 78 Fed. Reg. 79638 (December 31, 2013). Please feel free to contact me if you have any questions.

Sincerely,

Ryan Carroll
Associate Director of Government Affairs

Cc: Jack Goldman, President & CEO, Hearth, Patio & Barbecue Association
Barton Day, Shareholder, Polsinelli PC

Department of Energy
Docket No. EERE-2013-BT-DET-0057
RIN 1904-AD14

Comments of the Hearth, Patio & Barbecue Association

Energy Conservation Program: Proposed Determination of Hearth Products As a Covered Consumer Product 78 Fed. Reg.76639 (December 31, 2013)

January 30, 2014

The Hearth, Patio & Barbecue Association ("HPBA") appreciates the opportunity to comment on the Department of Energy ("DOE") proposed rule entitled "Energy Conservation Program for Consumer Products: Proposed Determination of Hearth Products as a Covered Consumer Product" and published at 78 Fed. Reg. 79638 (December 31, 2013) (the "Proposed Rule"). HPBA is the principal trade association representing the hearth products and barbecue industries in North America, and its members include manufacturers, retailers, distributors, manufacturer representatives, service installation firms, and other companies and individuals who have business interests related to the hearth, patio and barbecue industries. HPBA's members include manufactures of fireplaces, gas log sets, and other products that are the subject of the proposed rule, and one of HPBA's core missions is to represent the interests of its members in regulatory and public policy matters such as those at issue in the Proposed Rule.

As indicated in HPBA's correspondence of January 20, 2014, HPBA believes that the Proposed Rule is premature and should be withdrawn. DOE's stated intention is to proceed with other rulemaking proceedings to address products that are the subject of the Proposed Rule, 78 Fed. Reg. at 79639, and it would be far more appropriate to address coverage determinations in the context of such future rulemaking, when the issues involved would be far clearly defined and decisions could be fully informed. An additional notice and opportunity for comment as to coverage determinations would be required in any event, because the Proposed Rule is too deficient in information and analysis to provide the notice and opportunity required for the lawful adoption of any final rule.[1] Accordingly, there is no reason for DOE to proceed to a final rule on the basis of the Proposed Rule, nor could it do so without violating the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §553.

If DOE intends to consider test procedures and energy conservation standards for products manufactured by HPBA's members, it should proceed in a manner consistent with Executive Order 13563, 76 Fed. Reg. 3821 (January 21, 2011). Under that Order, regulations should be

[1] In fact, the rulemaking record, at the time of the filing of these comments, contains only one entry: HPBA's January 20, 2014 letter requesting that the Proposed Rule be withdrawn because it was issued prematurely, without basis, and without any supporting documentation in the docket.

"based upon an open exchange of information and perspectives," and agencies should "seek the views of those who are likely to be affected" *before* a proposed rule is issued. 76 Fed. Reg. at 3821-22. HPBA has been anticipating the opportunity for a constructive exchange of information and views ever since the court decision in HPBA v. DOE, 706 F.3d 499 (D.C. Cir. 2013), and urges DOE to withdraw the Proposed Rule and forego any rulemaking activity pending such an exchange.

Request for Meeting

The Proposed Rule raises and requests comment on a number of issues that cannot be adequately addressed in the time available for comment or on the basis of the information the notice provides. HPBA does not believe that the Proposed Rule is an appropriate vehicle to address these issues (and is obliged to explain why for the record), but it is not unwilling to address them. Accordingly, HPBA reiterates its January 20, 2014 request that the Proposed Rule be withdrawn and requests a meeting with DOE to establish a dialogue through which the relevant issues might be clarified and addressed in an orderly and constructive way.

Comment

A. DOE's proposal to classify "hearth products" as "covered products" pursuant to 42 U.S.C. §6292(b) is premature and should be withdrawn.

1. The Proposed Rule was improperly issued without sufficient factual investigation and analysis.

Agencies cannot issue proposed rules without having a reasonable basis to do so, particularly where – as here – specific agency determinations are required as a precondition to the exercise of the authority the agency proposes to assert. To propose to classify products as "covered products," DOE must identify the products at issue with reasonable specificity and have a reasonable basis to propose such classification. In particular, DOE must have sufficient information – and must have engaged in sufficient analysis – to provide a non-arbitrary basis for the determinations required to justify such classification under 42 U.S.C. §6292(b).

It is clear that the Proposed Rule was issued without any such basis. Indeed, it appears that DOE proposed to classify a vague and expressly open-ended universe of products as "covered products" before it had even gathered sufficient information to understand the range of products, manufacturers, and issues involved.[2] As a result – as discussed below – the universe of products at issue is unclear, and the proposed determinations required to justify classification are based on unjustified assertions and assumptions that can only serve as place-holders for information and analysis to be substituted later, after appropriate data collection and analysis has been completed. In effect, the Proposed Rule amounts to a proposal to classify a range of products to be identified later on the basis of information and analysis to be provided later.

Agencies can appropriately signal their interests and solicit information through the publication of information requests or advance notices of proposed rulemaking. However, a proposed rule

[2] For example, based on HPBA's membership alone, DOE's estimate that there are only 16 small business manufacturers of the products at issue appears to be low by an order of magnitude.

must be the *product* of agency information collection and analysis, not a means to solicit basic information required for regulatory analysis. The reason for this distinction is straight-forward: the right to notice and opportunity for comment under the APA includes the right to comment on the core information and analysis upon which any final rule is based.[3] As a result, proposed rules cannot be issued on the basis of "straw man" justifications and place-holder assertions that are destined to be replaced in the wake of public comment; otherwise the notice-and-comment process would be reduced to an unlawful exercise of "bait and switch" in which key evidence and analysis underlying final rules would never be tested by exposure to public comment and opportunity for rebuttal as the APA requires.[4]

The Proposed Rule was issued as a prelude to, rather than a product of, appropriate factual investigation and analysis. It was issued before DOE had sufficient basis to justify a proposed rule, and should therefore be withdrawn.

2. Issuance of the proposed rule was inconsistent with Executive Order 13563.

As already discussed, Executive Order 13563 directs agencies to ensure that their regulations are "based upon an open exchange of information and perspectives" and to "seek the views of those who are likely to be affected" by a rule *before a proposed rule is issued*. 76 Fed. Reg. at 3821-22. The Order further specifies that proposed rules should provide opportunity for "meaningful" comment with "a comment period that should generally be at least 60 days" and timely access to underlying "scientific and technical findings." 76 Fed. Reg. at 3821-22. The Proposed Rule could hardly be more at odds with the above principles.

First – and despite the fact that it addresses products that have never been the subject of any substantial discussion in the energy conservation context – the proposed rule was issued without any prior exchange of information or views as to its subject matter. Indeed, issuance of the proposed rule came completely out of the blue as a surprise to HPBA and its members.

Second, as a simple matter of time and timing, the Proposed Rule fails to provide an adequate opportunity for comment. The Proposed Rule first appeared the day after Christmas, was published in the *Federal Register* on New Year's Eve, and provides only a total of thirty days for comment, with no provision for a public meeting. Because of the uncertain scope of the proposal and the many novel issues it presents, HPBA simply cannot respond effectively in the time allowed.

Third, the Proposed Rule provides little substantive basis for meaningful comment. As discussed below, DOE has proposed a coverage determination for a range of products that is both vaguely-defined and expressly open-ended; as a result, it is impossible to determine the full scope of DOE's proposed coverage determination or the range of issues the Proposed Rule presents. As also discussed below, the information and analysis provided in the Proposed Rule is far too limited to clarify either the scope of DOE's proposed coverage determinations or the basis for those determinations, nor are there any supporting documents of any kind in the rulemaking

[3] Chamber of Commerce v. SEC, 443 F.3d 890, 900-02 (D.C. Cir. 2006); Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984).

[4] Id.

docket. Consequently, the Proposed Rule fails to provide the opportunity for meaningful comment with timely access to underlying information and analysis that Executive Order 13563 requires.

3. The proposed rule is insufficient to satisfy DOE's legal obligation to provide notice and opportunity for comment.

The notice and comment procedures of the APA "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[5] For notice to be adequate, an agency "must describe the range of alternatives being considered with reasonable specificity,"[6] and must "provide sufficient factual detail and rationale . . . to permit interested parties to comment meaningfully."[7]

The Proposed Rule is substantively inadequate to satisfy notice-and-comment requirements for the same reasons it is substantively inadequate under the terms of Executive Order 13653: as explained below, the Proposed Rule identifies the range of products at issue in terms so sweeping and ambiguous terms that leave commenters to guess at the range of products and issues involved, and is based on unjustified assertions and assumptions that can serve only as place-holders for information and analysis to be developed later (presumably in response to adverse comment) and revealed only after all opportunities for critical review and rebuttal have passed. Any final rule based on the Proposed Rule would be unlawful because the lack of adequate notice as to the range of products and issues involved would deprive commenters "of the opportunity to present relevant information,"[8] and because new information substituted for the place-holder assertions and assumptions in the Proposed Rule would never have been "exposed to refutation" during the rulemaking process as the APA requires.[9]

---

[5] Environmental Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005)).

[6] Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam) (quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)).

[7] American Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1991) (quoting Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988).

[8] Am. Radio Relay League v. FCC, 524 F.3d 237 (D.C. Cir. 2008) (quoting WJG Tel. Co. Inc. v. FCC, 675 F.2d 386, 389)).

[9] Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA, 494 F.3d 188, 209 (D.C. Cir. 2007) (quoting Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984)); see Chamber of Commerce v. SEC, 443 F.3d 890, 900-02 (D.C. Cir. 2006).

B. DOE's "hearth product" definition is unreasonable.

1. DOE's "hearth product" definition is unreasonable because it fails to identify the range of products DOE seeks to classify as "covered products" with reasonable clarity.

DOE's stated intent is to assert jurisdiction over "all hearth products," and it appears that it proposed to cast this broad jurisdictional net without any specific understanding of the universe of products it might catch. As a result, the Proposed Rule – rather than specifying the range of products at issue – provides only a list of ill-defined product categories, noting that even that list may be incomplete. 78 Fed. Reg. at 79640. Accordingly, it seems clear that DOE's proposed assertion of jurisdiction starts with gas fireplaces, but there is no telling where it ends.

The text of DOE's proposed "hearth product" definition is startlingly broad. It starts with a clause that includes any "gas appliance" that "simulates a solid-fueled fireplace or presents a flame pattern (for aesthetics or other purpose)." 78 Fed. Reg. at 79640. Stripped of surplus words, this clause includes literally any gas appliance that "presents a flame pattern" for any purpose. The second clause of the definition superficially suggests DOE's assertion of jurisdiction is limited to products that "may provide space heating to the space in which [they] are installed." Id. However, this appears to be no limitation at all: under prior DOE interpretation, it seems clear that any product that "presents a flame pattern" for any purpose would be deemed to provide some amount of space-heating, "no matter how small," regardless of the product's design purpose and intended or actual use.[10] As a result, the "space heating" language would only "limit" the definition to precisely the same universe of products the definition otherwise includes: gas appliances that "present a flame pattern" for any purpose whatsoever. Even if the words "present a flame pattern" require a visible flame – which seems likely but is unclear – the proposed regulatory text would be broad enough to cover an enormous range of products, including products such as stovetop burners and gas lights that DOE presumably does not intend to classify as "hearth products." Consequently, the proposed "hearth product" definition appears to be overbroad, and it is impossible to determine where DOE's assertion of jurisdiction is intended to end.

The Proposed Rule preamble provides no meaningful clarification. DOE starts with the term "hearth products," but this is a general and relatively vague term that – as already discussed – the Proposed Rule expressly defines to include a facially broader range of products than it would commonly be considered to include. DOE then invokes various modifiers such as "decorative," "vented," "ventless," and "outdoor," none of which are particularly helpful until there is an identifiable noun (e.g., "fireplace") to be modified. 78 Fed. Reg. at 79640. As a result, the descriptors DOE employs in an effort to identify the range of products at issue (e.g., "outdoor hearth products, and ventless hearth products") do not denote clearly-defined product categories. Again, it is clear that DOE seeks to cover fireplaces (indoor vented and vent-free fireplaces and outdoor fireplaces); what isn't clear is where the proposed universe of new "covered products"

[10] See 76 Fed. Reg. 43941, 43944-45 (July 22, 2011); 76 Fed. Reg. 71836, 71839-40 (November 18, 2011).

would end. Not even DOE seems to know. 78 Fed. Reg. at 79640 (the "proposed definition includes (but is not necessarily limited to) all vented and unvented hearth products").

2. DOE's "hearth product" definition is unreasonable and unlawful because it covers an intentionally open-ended universe of products including unidentified products for which DOE cannot make rational coverage determinations.

DOE cannot lawfully adopt an open-ended definition for a new "covered product" category created pursuant to 42 U.S.C. §6292(b). The reason for this is clear: DOE can only classify products as "covered products" after it has made specific determinations required by statute, and it cannot make rational determinations with respect to products it has not even identified. Indeed, product-specific information is clearly required as the basis for the determinations required under 42 U.S.C. §6292(b); otherwise the express statutory preconditions to the identification of new covered products would mean nothing at all. DOE clearly cannot end-run the express requirements of 42 U.S.C. §6292(b). HPBA v. DOE, 706 F.3d 499, 504-07 (D.C. Cir. 2013). As a result, it cannot define a new "covered product" in sweeping terms designed to miss nothing; it must instead limit any such definition to identified products for which required coverage determinations have actually been made. DOE plainly has not done so here, because its proposed "hearth product" definition – being intentionally open-ended – amounts to a blank check that would enable it to assert jurisdiction over products to be named later.

3. DOE's "hearth product" definition is unreasonable and unlawful because it covers products for which DOE lacks sufficient information make to make rational coverage decisions.

DOE's "hearth products" definition is not unlawful *simply* because it is open-ended; it is also unlawful because it clearly does include products for which DOE lacks any rational basis to make coverage determinations. Indeed, DOE's "hearth products" definition is plainly designed to include a broader range of products than the vented gas fireplaces and vented gas log sets that DOE sought to address in prior rules, and – no matter how that broader universe of products is defined – DOE has little, if any, information with respect to the range of products at issue. Indeed, as explained below, DOE's proposed coverage determinations appear to be based almost entirely on outdated and inaccurate information with respect to vented gas fireplace heaters, the only category of products for which DOE has ever made any systematic effort to collect data. DOE has no basis to apply such data to vented gas log sets, much less the vent-free gas log sets, vent-free indoor gas fireplaces, and outdoor gas fireplaces that DOE clearly intends to include in its "hearth products" definition. Nor can DOE simply lump all these products together for an *en masse* determination; product-specific information to justify determinations for each category of products is required, or the express statutory requirement for such determinations under 42 U.S.C. §6292(b) would amount to no requirement at all.

Again, the legal point should be clear: DOE cannot justify coverage determinations pursuant to 42 U.S.C. §6292(b) for one category of products and define its new "covered product" category to include additional categories of products for which no credible coverage determinations have been made. In this regard, the arbitrariness of the proposed coverage determinations (the fact

that they are based on inadequate information that fails to address the range of products at issue) and the impermissible overbreadth of the proposed "hearth product" definition (the fact that the definition includes products for which no credible coverage determination has been offered) are effectively two sides of the same coin. As to the definitional issue, the key point is the same as it is with respect to the open-ended nature of DOE's definition: the definition of a new "covered product" category adopted pursuant to 42 U.S.C. § 6292(b) can be no broader than the category of products for which DOE has actually made coverage determinations as expressly required under that statutory provision. DOE's proposed "hearth product" definition plainly includes products for which DOE lacks the information to make rational coverage determinations, and is therefore overbroad.

4. DOE's "hearth product" definition is unreasonable and unlawful because it would combine multiple categories of products that cannot reasonably be viewed as a single "covered product."

DOE's proposed "hearth product" definition plainly is not limited to products characterized by any common functional utility; indeed it is expressly intended to cover a wide range of functionally different products and is so broadly worded that it would cover any gas product that produces a "flame pattern" for any purpose at all (including products designed for heating, lighting, and purely aesthetic purposes). 78 Fed. Reg. at 79640. As a result, the proposed "hearth product" definition would create a new "covered product" category that combines several different types of products.

Such a definition is unreasonable and unlawful. Under EPCA, a "covered product" is type of product defined by a common functional utility and for which a common efficiency descriptor can be applied. This is true for all of the nineteen "covered products" identified by statute, and there is no reason to presume that 42 U.S.C. §6292(b) authorizes DOE to create new "covered product" categories that are different in kind than any Congress specified by statute. To the contrary, it is absurd to suggest that – under a statute that carefully distinguishes clothes washers from clothes dryers, and pool heaters from water heaters – DOE's authority to classify "a type of consumer product"[11] as a "covered product" would allow it to casually lump fireplace heaters together with purely ornamental articles of flame art.

In fact, the premise that a "covered product" must be defined by a common functional utility is the only premise that makes sense in EPCA's context, because the "efficiency" of a product can be determined only by reference to its function. HPBA v. DOE, 706 F.3d 499, 505 (D.C. Cir. 2013). Consequently, the statute defines "energy efficiency" as the "ratio of the useful output of services from" a product and its energy use, 42 U.S.C. §6291(5), and all of the energy conservation standards specified by statute "apply to the principal function of an appliance." H.R. Rep. No. 100-11 at p. 20. Moreover, it is easy to see that Congress could not have intended to allow DOE to lump different types of products together as a single "covered product," because – if it could do so – DOE could easily combine the gas usage of different products to circumvent express usage-based statutory limits on its authority to classify "a type of consumer product" as a new covered product under 42 U.S.C. §6292(b)(1) or to impose standards for new "covered

[11] 42 U.S.C. §6292(b)(1).

products" under 42 U.S.C. §6295(l). Such a result is clearly not one that Congress would have sanctioned. See HPBA v. DOE, 706 F.3d 499, 504-05 (D.C. Cir. 2013).

C. DOE's coverage determinations are unreasonable and lack justification required by law.

1. DOE lacks the basic information needed to reasonably determine that the classification of "hearth products" as "covered products" is "necessary or appropriate" to carry out EPCA's purposes as required under 42 U.S.C. §6292(b)(1)(A).

DOE may only classify a product as a "covered product" if it determines that such classification is "necessary or appropriate" to carry out EPCA's purposes. 42 U.S.C. §6292(b)(1)(A). DOE's proposed determination appears to amount to nothing more than the assertion that there is "significant variation in the annual energy consumption of otherwise comparable" products, and that this somehow establishes that "technologies exist to reduce the energy consumption of hearth products." 78 Fed. Reg. at 79640. No evidence or analysis is presented in support of this assertion. No "comparable" products or energy-saving "technologies" are identified. In fact, there is no indication that DOE made any serious effort to consider the relevant issues on the merits, and it certainly did not do so for the full range of products potentially covered by its proposed determination.

To make any non-arbitrary determination that the classification of products as "covered products" is "necessary or appropriate" to carry out EPCA's purposes, DOE must at least identify the products at issue with reasonable specificity and have some reasonably specific explanation as to how those particular products could and should be regulated to carry out EPCA's purposes. Whatever this minimally requires, it certainly requires more than a mere suggestion that a targeted universe of products includes some unspecified products that DOE might reasonably be able to regulate in some unspecified way. Otherwise, the express requirement for a determination under 42 U.S.C. §6292(b)(1)(A) would be rendered meaningless, and it is clear that an agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." Whitman v. American Trucking Associations, 531 U.S. 457, 485 (2001).

The range of products DOE seeks to classify as "covered products" appears broad enough to include products that cannot reasonably be regulated under EPCA and for which classification as "covered products" is neither necessary nor appropriate to carry out EPCA's purposes. In this regard, DOE's focus on decorative products is especially disturbing, because there is no efficiency metric that can reasonably be applied to products designed primarily for aesthetic enjoyment. DOE appears to presume that it could reduce the energy consumption of some decorative products through a ban on standing pilot lights, but that premise is dubious for several reasons and – as DOE discovered in the wake of its 2011 proposal to ban vented gas log sets with standing pilot lights[12] – there is no basis to assume that such a solution could reasonably be implemented for the diverse range of products at issue.

[12] See HPBA's October 14, 2011 Comments on DOE's Notice of Proposed Rulemaking on Energy Conservation Standards for Direct Heating Equipment published at 76 Fed. Reg. 43941

If DOE believes that there are products that it should seek to regulate under EPCA, it must identify those products with reasonable specificity and provide a reasonably specific explanation as to why it believes those particular products could and should be regulated in furtherance of EPCA's purposes. Because the Proposed Rule does neither, DOE's proposed determination under 42 U.S.C. §6292(b)(1)(A) is arbitrary.

2. DOE lacks the basic information needed to make a rational coverage determination as required by 42 U.S.C. §6292(b)(1)(B).

DOE appears to have little reliable information concerning "hearth products," however that category of products is defined. As a result, DOE's estimate of the energy use associated with "hearth products" is based entirely on inadequate information and unjustified – and in some cases wildly inaccurate – assumptions. For example, DOE refers to HPBA data on "disaggregated shipments" from 2002 to 2003 to determine the mix of "hearth products" at issue and somehow reaches the conclusion that "ventless hearth products" account for 51% of the total. 78 Fed. Reg. at 79641. It should be noted that reliance on data from 2002-2003 makes no sense to start with, because the combined markets for the kinds of products at issue have declined by approximately two thirds since that time, and – in view of the magnitude of the changes involved – there is no reason to assume that the mix of products within those markets is the same now as it was then. In any event, DOE's conclusions appear to be wildly inaccurate. Most obviously, it is hard to see how the percentage of "ventless hearth products" could be even close to 51% of all "hearth products," no matter what the universe of "hearth products" (or "ventless hearth products") is considered to include.

DOE's assumption that "hearth products" have an average input capacity of 35,000 BTUs per hour is no better. The proposed rule suggests that this figure is based on "hearth models offered in 2010," 78 Fed. Reg. at 79640, but that is not the case: the figure in question is drawn from a DOE technical background document for a 2010 final rule that only addressed heater-rated vented gas fireplace heaters, which account for only a small fraction of the products DOE seeks to define as "hearth products."[13] The cited figure appears to be unrealistically high for vented gas fireplace heaters and vented gas fireplaces in general,[14] but the more serious problem is that it has no application at all to any products other than vented gas fireplace heaters. In the absence

---

(July 22, 2011). http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-STD-0047-0201

[13] See HPBA's March 21, 2011 Comments on DOE's Regulatory Burden RFI published at 76 Fed. Reg 6123 (February 3, 2011). http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-STD-0047-0226

[14] In fact, existing information is not sufficient to determine the average energy input capacity for available vented gas fireplace heater products, let alone the sales-adjusted average for vented gas fireplace heaters actually being sold. Data collected by HPBA in 2011 suggests that the average input capacity for available vented gas fireplace heater products is lower than 35,000 BTU/hr, and HPBA believes that the sales-weighted average for such products would be lower still.

of any data for other products, DOE simply – and arbitrarily – filled in its informational blanks with the only figure it had. There is clearly no basis to assume that the average input capacity of all "hearth products" is the same as the average input capacity for vented gas fireplace heaters, because there are relatively obvious differences in the design and function of the different categories of products DOE would define as "hearth products," including differences that have obvious potential to influence the range and distribution of the input capacity for each category of products. Nor is there any basis to assume that all hearth products would be operated at their maximum input capacity during the entire time they are operating, which is presumably what DOE assumed in developing its energy use estimates. Lacking information it needed, DOE once again simply filled in the blanks.

Similarly, DOE's operational use assumptions are based entirely on information specific to vented gas fireplaces. 78 Fed. Reg. 79640. DOE does not assume that this information can be applied directly to other types of products because it has a reasonable basis to do so; to the contrary, different types of products serve different purposes and have different design features, so there is no reason to think that they would all be used in the same way. DOE made the assumptions it did because it has no information at all for most of the products at issue and thus had conspicuous informational blanks to fill.

DOE's assumptions with regard to pilot light use appear to be similar, though they are not disclosed in any detail. DOE cites little current evidence on the prevalence or use of pilot lights in decorative vented gas fireplaces and vented gas log sets, and no information at all for any other products. DOE presumably made some arbitrary assumption as to the prevalence of pilot lights in other products, despite having discovered the hazards of such assumptions during its abortive effort to regulate gas log sets in 2011.[15] It then arbitrarily applied pilot light use assumptions it developed for decorative vented gas fireplaces and vented gas log sets to all other "hearth products," whatever that universe of products might include. 78 Fed. Reg. at 79640-41. The pilot light use numbers are not credible to start with: DOE assumes some significant pilot light use for all gas fireplaces despite multiple sources of information that suggest that a substantial percentage of fireplaces are turned on rarely or not at all, in which case any pilot light use would be unlikely.[16] In any event, DOE had no more basis to make cavalier "one size fits all" assumptions with respect the broad range of products at issue than it did to make similar demonstrably erroneous assumptions with respect to vented gas log sets in 2011.[17]

---

[15] See HPBA's October 14, 2011 Comments on DOE's Notice of Proposed Rulemaking on Energy Conservation Standards for Direct Heating Equipment published at 76 Fed. Reg. 43941 (July 22, 2011).

[16] See Houck, James E., Residential Decorative Gas Fireplace Usage Characteristics (November 3, 2010) at p. 10 and Table 5. http://energy.gov/sites/prod/files/gcprod/documents/RFIRegReview_HPBAAttachC_03212011.pdf

[17] See HPBA's October 14, 2011 Comments on DOE's Notice of Proposed Rulemaking on Energy Conservation Standards for Direct Heating Equipment published at 76 Fed. Reg. 43941 (July 22, 2011).

Again, DOE cannot properly issue proposed rules without an adequate basis to do so. Nor can DOE use arbitrary assumptions as place-holders and require commenters to bear the burden of supplying credible information by way of rebuttal. DOE must instead do the work necessary to provide a non-arbitrary basis for determinations required to classify products as "covered products" pursuant to 42 U.S.C. §6292(b). Because it has not done so, its proposed coverage determination is arbitrary.

Conclusion

The Proposed Rule provides no appropriate or lawful basis for adoption of any final rule, and should promptly be withdrawn. If the Department intends to address potential regulation of "hearth" products under EPCA, HPBA requests the opportunity for the dialogue and open exchange of information and ideas that Executive Order 13563 identifies as the appropriate foundation for the development of a proposed rule. With that purpose in mind, HPBA reiterates its request a meeting with DOE to clarify the issues and establish a constructive dialogue going forward.