Oral Argument Not Yet Scheduled

Case No. 10-1113

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

HEARTH, PATIO & BARBECUE ASSOCIATION,

Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

Consolidated with 10-1181

On Petition for Review of Final Action of the U.S. Department of Energy

OPENING BRIEF OF PETITIONER HEARTH, PATIO & BARBECUE ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties, Intervenors and Amici.

Petitioner: The Petitioner is Hearth, Patio & Barbecue Association.

Respondent: Respondents are the United States Department of Energy and Secretary Steven Chu.

Intervenor: The Natural Resources Defense Council is an Intervenor.

Amici in this Case**:** There are currently no *amici curiae* in this case.

(B) Rulings under Review

Petitioner seeks review of the final rule issued by the United States Department of Energy at 75 Fed. Reg. 20,112 (Apr. 16, 2010) entitled "Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters; Final Rule."

(C) Related Cases

There are currently no related cases other than Case No. 10-1181, which has been consolidated with this case.

CORPORATE DISCLOSURE STATEMENTS

The Hearth, Patio & Barbecue Association ("HPBA") is the national trade association representing the interests of the hearth, patio and barbecue industries, including manufacturers of decorative gas fireplaces, heater-rated gas hearth products, and decorative gas log sets. HPBA is a is a not-for-profit corporation

organized under the laws of the District of Columbia, and has no parent companies, subsidiaries, or affiliates whose listing is required by Rule 26.1.

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GLOSSARY

AFUE	**Annual Fuel Utilization Efficiency**
DHE	**Direct Heating Equipment**
DOE	**Department of Energy**
EPCA	**Energy Policy and Conservation Act**
FRTSD	**Final Rule Technical Support Document**
HPBA	**Hearth, Patio and Barbecue Association**
NAECA	**National Appliance Energy Conservation Act**
NPR	**Notice of Proposed Rulemaking**
PRTSD	**Proposed Rule Technical Support Document**

JURISDICTIONAL STATEMENT

The HPBA seeks judicial review of a final rule of the United States Department of Energy ("DOE") issued pursuant to the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6291 *et seq*. The final rule, "Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters" (the "Final Rule"), was published at 75 Fed. Reg. 20,112 (April 16, 2010). This Court has jurisdiction over this matter and venue is proper pursuant to 42 U.S.C. § 6306(b). DOE and Secretary Chu are the proper respondents under Rule 15(a) of the Federal Rules of Appellate Procedure. The Petition for Review in Case No. 10-1113 was timely filed on May 27, 2010, and the Petition for Review in Case No. 10-1181 was timely filed on May 28, 2010.

AFFIDAVITS, STATUTES AND REGULATIONS

Affidavits supporting standing and prejudice, as well as pertinent statutes and regulations, are provided in a separately-bound addendum.

STATEMENT OF THE ISSUES

1. Whether the Final Rule was adopted without observance of procedure required by law in that DOE decided to regulate decorative gas fireplaces and subjected those products to heating efficiency standards or the alternative of an energy input limit without notice and opportunity for comment required under EPCA, 42 U.S.C. § 6295(p), and the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq*., and without having issued a notice of proposed rulemaking supported by a

determination that the standards imposed were technologically feasible as EPCA, 42 U.S.C. § 6295(p)(1), requires.

2. Whether the Final Rule is contrary to law in that DOE's decision to classify decorative gas fireplaces as direct heating equipment ("DHE") for purposes of 42 U.S.C. §§ 6292(a)(9) and 6295(e) is foreclosed by EPCA's unambiguously-expressed intent or was unreasonable and unsupported by cogent explanation.

3. Whether the Final Rule was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in that DOE imposed heating efficiency standards for decorative gas fireplaces without reasoned consideration of whether such standards were technologically feasible and economically justified as EPCA, 42 U.S.C. § 6295(o)(2)(A)-(B), requires.

4. Whether the Final Rule was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in that DOE's decision to regulate decorative gas fireplaces as DHE subject to heating efficiency standards or the alternative of an energy input limit was unsupported by any reasoned articulation of the legal or technical basis for the requirements imposed or of the impacts such requirements would have.

5. Whether the Final Rule arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence as required by EPCA, 42 U.S.C.

§ 6306(b)(2), in that DOE's decision to regulate decorative gas fireplaces as DHE subject to heating efficiency standards or the alternative of an energy input limit was based upon assertions and conclusions that were unsupported by substantial evidence in the record.

STATEMENT OF FACTS

A. The Statute

EPCA was enacted to improve the energy efficiency of "thirteen named home appliances that Congress determined contributed significantly to domestic energy demand." See NRDC v. Abraham, 355 F.3d 179, 185 (2nd Cir. 2004) (discussing EPCA's background and structure). As amended, EPCA now applies to nineteen statutory categories of "covered products." 42 U.S.C. § 6292(a). EPCA authorizes DOE, upon required justification, to identify additional "covered products" by rule. 42 U.S.C. § 6292(b).

Direct Heating Equipment ("DHE") is one of the statutory categories of "covered products" under EPCA. 42 U.S.C. § 6292(a)(9). EPCA's provisions addressing DHE were the product of negotiations between industry and energy efficiency advocates, and were adopted by Congress as the National Appliance Energy Conservation Act of 1987, Pub. L. 100-12 1987 U.S.C.C.A.N. (101 Stat.) 103 ("NAECA"). NRDC v. Abraham, 355 F.3d at 186-87. In addition to identifying DHE as "covered products," those provisions impose a specified

"energy efficiency descriptor" and minimum energy efficiency standards for DHE. 42 U.S.C. §§ 6292(a)(9), 6291(22)(A), and 6295(e)(3). The statutory efficiency descriptor for DHE is "annual fuel utilization efficiency" ("AFUE"), a measure of heating efficiency that invokes a test procedure designed specifically for utilitarian heating appliances (i.e., products that are used strictly in response to heating needs).[1] The efficiency standards EPCA specifies for DHE are minimum AFUE heating efficiencies for each of sixteen separate subcategories of appliances. 42 U.S.C. § 6295(e)(3). All sixteen subcategories of DHE are conventional vented gas space heaters – wall furnaces, floor furnaces, and room heaters – with the subcategories being defined by differences in the style and energy input of these products. Id. EPCA prohibited the manufacture of DHE not meeting the statutory efficiency standards, effective January 1, 1990. Id.

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[1] 42 U.S.C. § 6291(22)(A). The AFUE test method is set forth at 10 C.F.R. Part 430 Appendix O. The method presumes that the appliance being tested is used strictly in response to heating needs and – based on assumed average heating needs of 2,950 Heating Degree Days per year – appliance use amounting to 1,416 burner operating hours per year. See 10 C.F.R. pt. 430, subpt. B, Appendix O at Section 4.6.1. The method further assumes that appliances will be turned up and down during use in response to heating needs, so that it is appropriate to determine a "weighted-average steady-state efficiency" based on measurements taken when the appliance is operating at a relatively low fuel input rate. Manually-operated appliances, for example, must generally be tested during steady-state operation at 50% of their maximum fuel input rate. See 10 C.F.R. pt. 430, subpt. B, Appendix O at Section 4.2.4.1.

EPCA required DOE to revisit the statutory efficiency standards for DHE and to determine by rule whether they should be amended. 42 U.S.C. § 6295(e)(4)-(5). DOE can adopt amended standards only if it determines that such standards are "technologically feasible" and "economically justified." 42 U.S.C. § 6295(o)(2)(A)-(B)(i). The rulemaking at issue was DOE's first effort to amend the statutory efficiency standards for DHE.

B. The Products

Vented gas[2] fireplaces are substitutes for traditional wood-burning fireplaces, and are typically designed to provide a realistic simulation of a log fire. EPCA does not identify these products as DHE (or as any other type of "covered product") and the statutory efficiency standards for DHE do not apply to them. See 42 U.S.C. § 6295(e)(3). When the provisions relating to DHE were negotiated and adopted through NAECA, virtually all gas fireplaces were strictly decorative products, not heaters.[3] As a matter of historical fact, these products were not

[2] Because only vented products (i.e., products designed to vent combustion gasses to the outdoors) are at issue, the term "vented" is hereafter generally omitted as unnecessary. The term "gas" as used herein includes both natural gas and propane.

[3] Comment 75 (JA __); Comment 91 at 14 (JA __); Comment 100 at 3 (JA __). DOE identified all documents in the administrative record as "comments" regardless of the nature of the documents themselves. In the interests of consistency and brevity, all documents in the administrative record are referred to herein by their comment number.

considered to be DHE or intended to be regulated as such.[4] Manufacturers of decorative gas fireplaces were represented in the negotiations in which the statutory provisions relating to DHE were developed, and Robert Bauer, President and Chief Executive Officer of HPBA member Empire Comfort Systems, Inc., testified in support of legislation to adopt the product of those negotiations.[5] As written testimony in support of the legislation shows, DHE was a term used to denote "space heaters."[6]

Decorative gas fireplaces are covered by the American National Standards Institute (ANSI) Z21.50 safety standard.[7] Gas fireplaces designed for heating utility were introduced much later than decorative gas fireplaces, leading to the development of a separate ANSI Z21.88 standard for "vented gas fireplace heaters."[8] Like decorative gas fireplaces, "fireplace heaters" provide the aesthetic

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[4] Id.

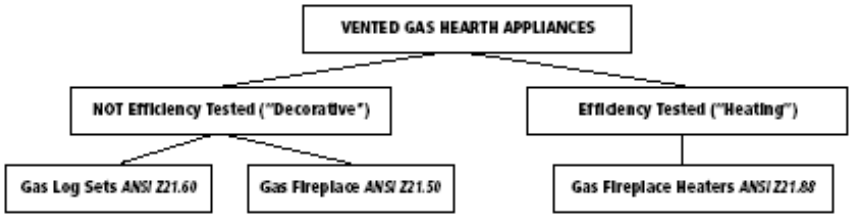
[5] S. Hrg. 99-943, Hearing on S. 2781 Before the Subcommittee on Energy Regulation and Conservation of the Senate Committee on Energy and Natural Resources, 99th Congress, 2nd Sess. (1986) at 107-114; see also SEN. REP. NO. 100-6, at 4-5 (1987) (indicating that S. 2781 is the same legislation as S. 83 except for issues unrelated to appliance efficiency).

[6] S. Hrg. 99-943, Statement of Howard S. Geller, American Council for an Energy-Efficient Economy, at 147.

[7] Comment 121 (JA __).

[8] Comment 91 at 14 (JA __); Comment 100 (JA __).

appeal of a traditional wood-burning fireplace; however, fireplace heaters are also designed for heating use and are often equipped with thermostatic controls. 75 Fed. Reg. at 20,128-29 (April 16, 2010). Most importantly, fireplace heaters are "heater rated": i.e., they are tested as heating appliances using the AFUE test method and sold on the basis of their AFUE heating efficiency ratings. Comment 121 (JA __). By contrast, decorative gas fireplaces are intended for aesthetic enjoyment; they are not equipped with thermostats, and are not AFUE tested. Id. There are thus two well-established categories of gas fireplaces as shown in the figure below: *fireplace heaters*, which are considered heating appliances and are tested as such, and *decorative gas fireplaces*, which are not.[9]



[9] Comment 121 (JA __). Gas log sets are designed to be installed in existing wood-burning fireplaces to convert them from solid fuel to gas. Gas log sets were considered strictly decorative and were not covered by the Final Rule. See Final Rule Technical Support Document (FRTSD) at 3-28, Table 3.2.20 (JA __) (stating that gas log sets "are not covered products"); Comment 114 (JA __).

C. The Rulemaking

The Final Rule was the product of a lengthy rulemaking process that started late in 2006 with a notice announcing the release of a "Framework" document.[10] DOE indicated from the start that – in addition to revisiting the statutory heating efficiency standards for DHE – it intended to impose AFUE heating efficiency standards for some, but not all, vented gas hearth products. At its first public meeting in the rule development process, DOE indicated that it believed it should regulate some hearth products because "they are used to provide residential space heating" and "are tested using the vented home heating equipment test procedure" (i.e., the AFUE method). Comment 2.6 at 26 (JA __). By definition, vented gas hearth products designed for heating use and tested using the AFUE method are *fireplace heaters*, not *decorative gas fireplaces*. See e.g., Comment 121 (JA __). Accordingly, the principal trade association representing gas appliance manufacturers responded to DOE with the stated understanding that DOE's intent was to include "fireplace heaters in the rulemaking," and suggested that DOE use the term "fireplace heater" to denote "this new type of" DHE.[11] This suggestion reflected industry's already-stated understanding that "hearth heating products are

[10] See 71 Fed. Reg 67,825 (November 24, 2006).
[11] Comment 16 at 2 (JA __); see also Comment 17 (JA __).

part of this rulemaking" but "[d]ecorative vented hearth products are not."[12] This understanding was a direct product of the way DOE had described the intended scope of the rulemaking from the start. See Comment 14 (JA __)("all of the products in the categories that are mentioned in the DOE Framework" as targets for regulation are AFUE-tested "heater rated" products).

By the time of its second public meeting – held on February 9, 2009 – DOE had adopted the "fireplace heater" terminology as industry comments had suggested. DOE again explained that it proposed to regulate "fireplace heaters" because it believed such heaters "function similarly to gas wall and gas room heaters," and because "[m]anufacturers test fireplace heaters with DOE's" AFUE test method. Comment 34.3 (DOE's presentation materials) (JA __) at 14. DOE did not request comment on whether decorative gas fireplaces should also be covered by the rulemaking, but only on where "fireplace heaters" should fall under the product classification scheme for DHE.[13] Comments at the public meeting identified the ANSI Z21.88 standard as providing an appropriate definition for these products. See Comment 34.4 at 36 (JA __). Not surprisingly, subsequent industry comment continued to express the understanding that fireplace heaters

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[12] Comment 4.5 (JA __); see Comment 17 (JA __).

[13] Comment 34.3 at 15-16 (JA __); see Comment 34.4 (Transcript of February 9, 2009 Public Meeting) at 33-37 (JA __).

were covered by the rulemaking and decorative hearth products were not. See Comment 54 (JA __).

When the notice of proposed rulemaking ("NPR") followed in December 2009, the proposed regulatory text was explicit in scope: it defined "vented hearth heater" – the class of hearth products covered by the rule – as a:

> vented freestanding, recessed, zero clearance *fireplace heater*, a gas fireplace insert or a gas-stove, which simulates a solid fuel fireplace and is designed to furnish warm air, without ducts to the space in which it is installed.[14]

The NPR confirmed that DOE's use of the term "fireplace heater" was deliberate, explaining that DOE had accepted industry suggestions that it should "establish a separate definition for 'hearth direct heating equipment' to allow manufacturers to easily determine coverage under DOE's regulations," and that the proposed text of the definition was based on the ANSI definition for "vented fireplace heaters" covered by the Z21.88 fireplace heater standard. 74 Fed. Reg. 65,852 at 65,867 (December 11, 2009). The technical support document for the NPR also indicated that the rule was intended to apply only to fireplace heaters:

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[14] 74 Fed. Reg. 65,852 at 65,995 (December 11, 2009) (emphasis added). Gas stoves are the gas-fueled equivalent of wood stoves, which are traditionally free-standing heating products. "Fireplace inserts" are similar to stoves, but are designed to be installed inside existing wood-burning fireplaces (which generally have little or no actual heating utility) to convert them to effective heating use. These products – like true fireplaces – can be certified to the ANSI Z21.88 standard for heater-rated products or the ANSI Z21.50 standard for decorative products. Comment 121 (JA __).

i.e., to hearth products that are "designed to provide the same function and utility as" space heaters, "used for space heating," and generally equipped with a "burner control thermostat." Proposed Rule Technical Support Document ("PRTSD") at 3-6, 3-7, and 3-2 (JA __).

Consistent with the proposed coverage of the rule, the NPR justified proposed heating efficiency standards for "vented hearth heaters" on the premise that such products are actually used for heating, so that increased heating efficiency would produce energy conservation benefits by enabling consumers to satisfy their heating needs while consuming less fuel.[15] The NPR's analysis of the burdens that the proposed efficiency standards would impose was also specific to fireplace heaters. DOE relied on data for fireplaces heaters (the only gas fireplaces for which AFUE efficiency data is available) to produce a shipment-weighted average AFUE efficiency for the products subject to the proposed rule.[16] On the basis of this "baseline" AFUE efficiency, DOE concluded that the proposed

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[15] See 74 Fed. Reg. at 65,932 and 65,934. As the NPR explained, "DOE quantified the energy savings attributable to" proposed standards by comparing "the difference in energy consumption" between the baseline efficiency of the products and the efficiency that would be required under the proposed standards. 74 Fed. Reg. at 65,862. DOE's stated assumption was that "energy conservation . . . depends directly on efficiency." 74 Fed. Reg. at 65,913.

[16] 74 Fed. Reg. at 65,931; see PRTSD at 3-47 (JA __) (showing the distribution of the AFUE data and indicating an average AFUE efficiency of over 67%). The NPR stated that DOE "estimated the market shares of different energy efficiency levels within each product class in the base case using data" from an industry directory of products with certified AFUE efficiency ratings. 74 Fed. Reg. 65,908.

standards would require only a modest increase in heating efficiency that could be achieved relatively easily. 74 Fed. Reg. at 65,945. On the basis of the same AFUE efficiency data, DOE concluded that many existing products already met the proposed AFUE efficiency standards and that "most products that do not meet" those standards "could be upgraded with inexpensive purchased parts." 74 Fed. Reg. at 65,973; see 74 Fed. Reg. at 65,991 ("the proposed standard levels do not require substantial redesign to existing product lines that do not meet" the proposed standards, because "most . . . could be upgraded with relatively minor changes"); PRTSD at 12-114 (JA __).

In sum, the text of the proposed rule indicated that the rule applied to fireplace heaters – not decorative gas fireplaces or fireplaces in general – and the entire technological and economic justification for the proposed rule was based on the premise that the rule applied only to fireplace heaters. The hearth products industry generally supported the proposed rule; the principal concern was whether the proposed "vented hearth heater" definition was clear enough to avoid potential confusion between the fireplace heaters that would be covered by the rule and the decorative gas fireplaces that would not.[17]

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[17] See Comment 91 at p. 14 (JA __) ("While we support the decision to establish vented hearth heater as a separate type of [DHE], we do not agree with the definition proposed. . . .. The term being defined should be "vented fireplace heater" to directly connect this product to the applicable safety standard, ANSI

D. The Final Rule

The rulemaking process had a surprise ending of which O. Henry would be proud. The Final Rule did not only adopt the proposed heating efficiency standards for heating appliances; it also regulated decorative gas fireplaces, imposing requirements designed to regulate their "unintended heat load" and to restrict the use of gas for non-heating purposes. 75 Fed. Reg. 20,112 at 20,128-30 (April 16, 2010).

To accomplish this fundamental change in the scope of the rule, DOE excised the term "fireplace heater" from the text of its "vented hearth heater" definition and added the broader term "vented appliance" as follows: "*Vented hearth heater* means a vented appliance which simulates a solid fuel fireplace and is designed to furnish warm air . . .." 75 Fed. Reg. at 20,234. DOE then reinterpreted the words "designed to furnish warm air" – a paraphrase of language the ANSI Z21.88 standard uses to define products designed *for heating use*[18] – to include products that are *not* designed for heating use, including products that have

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Z21.88, and to better distinguish fireplace heaters from decorative gas appliances."); Comment 75 (JA __).

[18] Under the ANSI definitions, a "vented appliance which simulates a solid fuel fireplace and furnishes warm air" is a product intended for heating use; i.e., a fireplace heater. See 74 Fed. Reg. at 65867 (quoting the ANSI Z21.88 fireplace heater definition).

only "unintended" heating loads.[19] This new interpretation expanded the scope of the rule beyond products "designed to provide the same function and utility as space heaters,"[20] sweeping in decorative gas fireplaces along with fireplace heaters, and subjecting both categories of products to the heating efficiency standards proposed for fireplace heaters. Having thus defined decorative gas fireplaces as "heaters," DOE regulated them not just through the heating efficiency standards it had proposed for fireplace heaters, but through an "exclusion" imposing a 9,000 BTU/h energy input capacity limit for any "heaters" not meeting those standards. 75 Fed. Reg. at 20,129 (discussion), 20,234 (rule text). In effect, *decorative* gas fireplaces with a maximum input capacity over 9,000 BTU/h were banned.

The input limit for decorative gas fireplaces was an entirely new concept: rather than being directed at the efficiency of heating equipment, it was expressly designed to limit the "unintended heat loads" of products *not used for heating*. 75 Fed. Reg. at 20,129. It was also specifically designed to ban decorative products that "use a lot of energy" even if they do not produce much heat. Id. In explaining this new feature of the rule, DOE acknowledged that decorative fireplaces are used for aesthetic enjoyment rather than in response to heating needs, and expressed concern that the "unintended" heating load of such products could *add to home*

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[19] See 75 Fed. Reg. at 20,129.

[20] PRTSD at 3-6, 3-7 (JA __).

cooling needs, particularly in warmer climates. Id. However, DOE wanted to do more than limit "unintended" heating loads of products not being used for heating: it also wanted to limit the amount of gas that decorative gas fireplaces can use, no matter how modest their "unintended" heating load might be. It therefore decided to impose an *energy input* limit rather than a *heat output* limit for decorative gas fireplaces, explaining that only an input limit would serve to ban "very inefficient" decorative products that "could have a very high input capacity and use a lot of energy" without producing much heat. Id.

Despite this fundamental change in the scope and impact of the rule, there was virtually no change in DOE's basic analysis of the burdens the rule would impose or the benefits it would provide. DOE continued to quantify the benefits of the rule on the premise that the heating efficiency standards would apply to products actually used for heating purposes, so that improved heating efficiency would provide actual energy savings by enabling consumers to satisfy their heating needs with less fuel consumed. See 75 Fed. Reg. at 20,185-86, 20,188. Similarly, DOE's assessment of the burdens that the rule would impose on manufacturers was the same as it had been in the NPR: DOE relied on AFUE efficiency data for fireplace heaters to conclude that "manufacturers offer a wide range of product lines that meet the required efficiencies" and that "most products" that do not meet

the standards could easily be modified to meet them.[21] Indeed, DOE continued to rely on the analysis presented in the NPR as an accurate assessment of the impact the final rule would have on small manufacturers. 75 Fed. Reg. at 20,231.

DOE addressed the impact of the final rule on manufacturers of *decorative gas fireplaces* only by asserting that the new energy input limit for such products would impose hardly any burdens at all, because there are existing decorative gas fireplaces that "operate at or below" the new input capacity limit and manufacturers could easily meet the new limit through the use of simple measures such as restrictor plates. See 75 Fed. Reg. at 20,129. In effect, DOE assumed that it had created a Scylla and Charybdis for manufacturers of decorative gas fireplaces: while manufacturers could attempt to comply with either the heating efficiency standards or the energy input limit, DOE assumed that the threat of the heating efficiency standards would drive manufacturers toward the purportedly less burdensome alternative of the energy input limit.[22]

DOE does not appear to have understood the consequences of its decision to sweep decorative gas fireplaces into the Final Rule and regulate them as it did. Decorative gas fireplaces account for the substantial majority of all gas fireplace

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[21] 75 Fed. Reg. at 20,219; see FRTSD at 3-48 (showing the distribution of the AFUE efficiency data and indicating an average AFUE efficiency of 67%).

[22] 75 Fed. Reg. at 20,129. Faced with Scylla and Charybdis, Odysseus chose the loss of six of his crew to the monster Scylla rather than risk the loss of his entire ship to the whirlpool of Charybdis. Homer, *The Odyssey*, Book 12.

sales, and few of these products can readily be modified to meet either the heating efficiency standards or the 9,000 BTU/h input limit the Final Rule imposed. Thayer Aff. ¶ 7. DOE presumably understood that compliance with the heating efficiency standards generally would not be practical for decorative gas fireplaces; after all, it had determined that only relatively modest increases in heating efficiency were economically justified for *fireplace heaters*,[23] and the required efficiency increases for lower-efficiency decorative gas fireplaces would self-evidently be greater.[24] In fact, efforts to modify decorative gas fireplaces to satisfy the heating efficiency standards – where practicable at all – would require substantial redesign efforts and would generally produce products that are significantly more costly and less suitable for their intended aesthetic use, and in many cases the resulting products would not be viable in the market.[25] What DOE seems not to have understood is that the "alternative" of a 9,000 BTU/h energy

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[23] In considering more demanding efficiency standards than it imposed for fireplace heaters, DOE found that "most of the current products would have to be redesigned to meet" higher efficiency standards, that "higher component costs . . . could significantly harm profitability," and that such standards thus were "not economically justified." 75 Fed. Reg. at 20,218. This was the same basic analysis that had been provided in the NPR. See 74 Fed. Reg. at 65,973.

[24] As DOE was aware, many decorative gas fireplaces are designed to produce relatively little heat, and thus – if tested as though they were heaters – would have very low heating efficiencies. See 75 Fed. Reg. at 20,129; Belding Supp. Aff. ¶ 10.

[25] Thayer Aff. ¶¶ 6-7; Hawkinson Aff. ¶¶ 9-10; Baldwin Aff. ¶ 8.

input limit was actually no alternative at all: the limit is simply too low for any product simulating a conventional wood-burning fireplace.[26] As a result, rather than "adopting an approach that would maintain the utility and availability of decorative hearth products" as it had intended, 75 Fed. Reg. at 20,129, DOE had effectively banned them.

E. Subsequent History

In early 2011, DOE issued a request for information seeking comment identifying regulations warranting retrospective review. 76 Fed. Reg. 6123 (February 3, 2011). HPBA responded with comments detailing serious substantive errors underlying the Final Rule and requesting that the rule be amended to eliminate the regulation of decorative gas fireplaces.[27] On June 30, 2011, DOE responded to HPBA's request by citing the pendency of this litigation and indicating that "any retrospective review of these regulations will depend upon the outcome of this litigation." 76 Fed. Reg. 40,646 at 40,647 (July 11, 2011). However, on July 8, 2011, HPBA filed a motion seeking issuance of a briefing schedule to facilitate a timely decision in this case. Six days later – ironically, only three days after publication of its July 11, 2011 notice indicating that it would *not*

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[26] Belding Supp. Aff. ¶ 11; Thayer Aff. ¶ 6.

[27] HPBA's comments ("HPBA's March 21, 2011 RFI Comments") may be found at: http://energy.gov/sites/prod/files/gcprod/documents/RFIRegReview_HPBAComments_03212011.pdf.

revisit the Final Rule pending the outcome of litigation – DOE issued a notice proposing to amend the Final Rule. This notice first appeared as an attachment to a July 15, 2011 motion to this court in which DOE sought an order continuing to hold this litigation in abeyance pending further rulemaking. The notice was subsequently published at 76 Fed. Reg. 43,941 (July 22, 2011), and – despite HPBA's vigorous opposition – a final rule followed in what appears to be record time. 76 Fed. Reg. 71,836 (November 18, 2011).

The amendment did nothing to justify or revise the heating efficiency standards the Final Rule imposed on decorative gas fireplaces. Instead, DOE again employed those standards in a Scylla and Charybdis scheme designed to compel compliance with alternative requirements for decorative gas fireplaces. In particular, the amendment replaced the 9,000 BTU/h input limit for decorative gas fireplaces with a new set of requirements – including a ban on standing pilot lights – imposed as the price of "exemption" from the heating efficiency standards adopted in the Final Rule. See 76 Fed. Reg. at 71,843-49.

SUMMARY OF ARGUMENT

DOE's decision to regulate decorative gas fireplaces – and to do so as it did – was adopted without notice and opportunity for comment required by law, was not supported by substantial evidence, and was arbitrary, capricious, and contrary

to law. The Final Rule should therefore be vacated as it applies to decorative gas fireplaces.

DOE adopted the Final Rule without providing notice that it was considering requirements for decorative gas fireplaces and without providing opportunity for comment on core issues central to the approach it ultimately adopted. The proposed rule text applied to fireplace heaters – products designed for heating use – not to decorative gas fireplaces or fireplaces in general.[28] Moreover, the entire logic of the rulemaking – including both the technical and economic analysis justifying the proposal – applied only with respect to fireplace heaters.[29] DOE's last minute decision to add decorative gas fireplaces to the Final Rule and regulate them as it did came without warning, and was a completely *illogical* extension of the proposed rule. This decision was a sea change that dramatically expanded the universe of products subject to the rule and profoundly altered the nature and extent of the rule's impacts on the hearth products industry. Indeed, this change extended the basic subject matter of the rulemaking into completely unexplored territory: rather than simply regulating the heating efficiency of heating products,

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[28] See 74 Fed. Reg. 65,852 at 65,995 (December 11, 2009).

[29] See 74 Fed. Reg. at 65932, 65934 (benefits analysis assuming regulated products are used strictly in response to heating needs), 74 Fed. Reg. at 65945, 65973, 65991 (analysis of compliance burdens based on high baseline AFUE efficiency and AFUE efficiency data for fireplace heaters).

DOE launched a surprise effort to regulate decorative gas fireplaces on the basis of concerns it had never expressed, through means it had never suggested, on the basis of conclusions with respect to entire subjects upon which comment had never been requested or received, and on the basis of information and assertions that it had never disclosed and exposed to refutation through public comment.[30] Had DOE provided notice that it was considering the approach it adopted, HPBA and its members would have submitted comment identifying gross errors with regard to the core assumptions and conclusions underlying DOE's decision to regulate decorative gas fireplaces and to do so as it did. DOE's failure to provide any meaningful opportunity for such comment was egregious, profoundly prejudicial to HPBA and its members, and is by itself sufficient reason for the court to vactate the Final Rule as it applies to decorative gas fireplaces. See International Union, United Mine Workers of Am. v. Mine Safety and Health Administration, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

DOE's decision was also unlawful because decorative gas fireplaces are not "covered products" and thus are not subject to regulation under EPCA. DOE did not purport to make the determinations necessary to regulate decorative gas fireplaces as a new category of "covered products." Instead, it sought to do what Congress plainly had not done: add decorative gas fireplaces to the statutory

[30] See 75 Fed. Reg. at 20128-29.

category of "covered products" identified as DHE. DOE's attempt to classify decorative gas fireplaces as DHE is unambiguously foreclosed by EPCA's plain language and structure, which limit DHE to products that are designed for heating use and used in response to heating needs as contemplated by the statutory "efficiency descriptor" for such products. DOE's contrary interpretation was unreasonable because it was unsupported by any explanation reflecting reasoned consideration of the terms of the statute or its purpose. Chemical Mfrs. Ass'n v. EPA, 217 F.3d 861, 866-67 (D.C. Cir. 2000).

DOE's decision to regulate decorative gas fireplaces as it did was also arbitrary and contrary to law in that it subjected decorative gas fireplaces to the heating efficiency standards for fireplace heaters without even attempting to determine – as EPCA requires – whether those standards would be technologically feasible or economically justified with respect to such products. Indeed, DOE only addressed the technological feasibility of the heating efficiency standards for fireplace heaters: a class of products with an average AFUE efficiency of over 67%, and for which DOE had determined that the new standards would require only modest and easily achievable efficiency increases.[31] Similarly, DOE's economic justification for the heating efficiency standards rested on the premise that those standards applied to products that are actually used in response to

[31] See FRTSD at 3-48 (AFUE data relied upon); 75 Fed. Reg. at 20219, 20231.

heating needs, so that increases in heating efficiency would provide energy conservation benefits by reducing the amount of energy consumed for heating.[32] DOE had no basis to conclude that this analysis was applicable to decorative gas fireplaces, and it did not argue that it did: indeed, it provided no analysis at all concerning the technological feasibility or economic justification of heating efficiency standards for decorative gas fireplaces. DOE's failure to address these issues – issues EPCA expressly requires it to address – was arbitrary, and provides sufficient basis by itself to vacate the Final Rule as it applies to decorative gas fireplaces. Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004).

DOE's decision to expand the scope of the Final Rule to include decorative gas fireplaces was also arbitrary in that it hinged on the unreasonable premise that a 9,000 BTU/Hr. input limit for decorative products would provide a meaningful alternative to compliance with heating efficiency standards so that DOE's regulatory approach would effectively "maintain the utility and availability of decorative hearth products" as DOE intended. 75 Fed. Reg. at 20,129. This premise was based on arbitrary factual assertions for which there is no substantial evidence in the record, and depends upon on the application of an alternative energy conservation standard that was arbitrarily imposed without cogent

[32] See 75 Fed. Reg. at 20185-86, 20188

explanation or any substantial evidence in the record. Again, this is a sufficient basis by itself to warrant vacatur.

PETITIONER'S STANDING

HPBA has standing to challenge the Final Rule because it has "associational" standing under the principles enunciated in Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977). In particular, HPBA has standing because its members would clearly have standing to sue in their own right, the interests it seeks to protect are germane to its organizational purpose, and neither the claim asserted nor the relief requested requires the participation of HPBA's individual members. See Id. at 342-43; Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002).

HPBA is the national trade association for the hearth, patio and barbecue products industries. HPBA's members include manufactures of decorative gas fireplaces that are directly subject to regulation under the Final Rule. Affidavit of Jack Goldman ("Goldman Aff.") ¶ 7; Affidavit of Eric Hawkinson ("Hawkinson Aff.") ¶¶ 4, 7; Affidavit of Kenneth Belding ("Belding Aff.") ¶¶ 4, 7; Affidavit of Jeffrey Thayer ("Thayer Aff.") ¶¶ 4, 7; Affidavit of Jesse Baldwin ("Baldwin Aff.") ¶ 6; see Comment 100 (JA __); FRTSD at 3-13 (JA__) (identifying HPBA members Empire Comfort Systems, Home and Hearth Technologies, Inc., and Monessen Hearth Systems Company as manufacturers subject to the Final Rule).

Because these manufacturers are the "object of the action . . . at issue," there can be "little question" that they are injured by that action and that their injury will be redressed by a judgment vacating that action. Sierra Club, 292 F.3d at 898, quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992); see Fund for Animals, Inc. v. Norton, 322 F.3d 728, 733-34 (D.C. Cir. 2003). Indeed, the Final Rule imposed heating efficiency standards for decorative gas fireplaces that generally could not be achieved without costly redesign efforts and adverse impacts on the cost and – in many cases – the performance of such products. Thayer Aff. ¶¶ 7-8; Hawkinson Aff. ¶¶ 9-10; Supplemental Affidavit of Kenneth Belding ("Belding Supp. Aff.") ¶¶ 9-10. Manufacturers of decorative gas fireplaces – including HPBA members Empire Comfort Systems, Home and Hearth Technologies, Inc., and Monessen Hearth Systems Company – can only avoid the need to comply with these heating efficiency standards by complying with alternative regulatory requirements, now including new labeling, warranty, and design restrictions. 76 Fed. Reg. 71836 at 71859 (November 18. 2011). These alternative requirements will impose compliance burdens and costs on manufacturers seeking to avoid the impact of the heating efficiency standards for decorative gas fireplaces.[33] Accordingly, HPBA members are and remain injured

[33] Affidavit of Gregg Achman ("Achman Aff.") ¶ 8; Belding Supp. Aff. ¶ 12; Baldwin Aff. ¶ 9.

by the heating efficiency standards imposed by the Final Rule. That injury would be redressed by a judgment vacating the Final Rule as it applies to decorative gas fireplaces, because – with relief from those requirements – neither they nor any alternative compliance requirements would apply. Accordingly, HPBA's members would self-evidently have standing to challenge the Final Rule in their own right. See Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002).

The interests HPBA seeks to protect are clearly germane to its organizational purpose, because one of HPBA's core purposes is to protect and promote the welfare of the industries it serves and of its individual members in matters involving the development or implementation of laws and regulations that affect them. Goldman Affidavit at 6. HPBA represented the interests of its members by participating actively in the rulemaking at issue. See, e.g., Comment 75; (JA__) Goldman Aff. ¶ 7. Accordingly, HPBA has shown sufficient evidence that the interests it seeks to protect are germane to its organizational purpose. See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 286 (1986).

Neither the claim asserted nor the relief requested requires the participation of HPBA's individual members, because an order vacating the Final Rule as it applies to decorative gas fireplaces would provide HPBA's members with relief from the heating efficiency standards imposed and would thus eliminate the need

for HPBA's members to comply either with those standards or any of the alternative requirements DOE has imposed.

ARGUMENT

Under the APA, courts will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is undertaken "in excess of statutory jurisdiction, authority, or limitations" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C)-(D). Further, EPCA requires that a record of the rulemaking proceeding be assembled and submitted to a reviewing court, and provides that "no rule" imposing energy conservation standards "may be affirmed unless supported by substantial evidence." 42 U.S.C. § 6306(b)(1)-(2).

A. The Final Rule was adopted without required notice or opportunity for comment.

In adopting energy conservation standards, DOE is required to publish a proposed rule and allow opportunity for public comment. 42 U.S.C. § 6295(p)(1)-(2); 42 U.S.C. § 6306(a); 5 U.S.C. § 553(b). Notice-and-comment procedures "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." Environmental Integrity Project v. EPA, 425 F.3d 992 at 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)). If a final rule "deviates too sharply" from the proposed rule, "affected parties will be deprived of notice and an opportunity to respond to the proposal." Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983); Shell Oil Co. v. EPA, 950 F2d 741, 759 (D.C. Cir. 1992). Consequently, a final rule may deviate from a proposal only to the extent that it qualifies as a "logical outgrowth" of the proposed rule; i.e., "only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005) (internal quotations omitted).

Here DOE proposed regulations for "fireplace heaters," not for decorative gas fireplaces or gas fireplaces in general. 74 Fed. Reg. at 65,995 (proposed rule text). This proposal was consistent with the scope of the rulemaking as DOE had described it in outreach leading up to the issuance of the NPR.[34] DOE knew from comment previously received that industry understood that the rulemaking did not cover decorative gas fireplaces,[35] and the NPR acknowledged that prior industry

[34] See e.g., Comment 2.6 at 26 (JA __), Comment 34.3 at 14 (JA __).

[35] See e.g., Comment 16 at 2 (JA __), Comment 17(JA __); Comment 54 (JA __).

comment had been premised on the understanding that decorative gas fireplaces *would not be covered* by the rule. In particular, DOE acknowledged industry concern that DOE draw a clear distinction between fireplace heaters and decorative gas fireplaces so that manufacturers could "easily determine coverage under DOE's regulations."[36] DOE also acknowledged industry concern that overly-stringent efficiency standards for fireplace heaters "could cause customers to switch to non-covered products, such as . . . strictly decorative units."[37] Yet the NPR raised no question as to the premise that decorative products were not covered by the rulemaking. To the contrary, it confirmed that premise: it explained that DOE's proposed "vented hearth heater" definition was based on the ANSI

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[36] 74 Fed. Reg. at 65,867. DOE was referring to comment concerning the need for DOE to draw a clear distinction between the fireplace heaters covered by the rule and decorative products not covered by the rule. See Comment 54 (JA __). Commenters recommended that the ANSI Z21.88 definition be used to define the category of hearth products covered by the rule, indicating that use of this established definition would "help clarify the difference between vented fireplace heaters, which are heating appliances, and decorative gas appliances, which not heaters and which are covered by different Z21 safety standards." Id.; see Comment 17(JA __); Comment 4.7 at p. 63 (JA __).

[37] 74 Fed. Reg. at 65,922.

Z21.88 fireplace heater definition as industry had suggested,[38] and acknowledged that strictly decorative products "are not covered by this rulemaking."[39]

In any event, it was clear that the rulemaking *had* to be limited to heaters as opposed to decorative products, because – despite the lengthy process leading to the issuance of the NPR – there was virtually no technical information concerning decorative gas fireplaces in the administrative record. DOE had not even attempted to gather the kind of information it would have needed to perform the analysis required to justify the regulation of such products,[40] and nothing in the administrative record suggested otherwise. Indeed, the few documents indicating that DOE had any interest in information concerning decorative gas fireplaces appear to have been added to the record after the final rule had been adopted.[41]

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[38] 74 Fed. Reg. at 65,867-68.

[39] 74 Fed. Reg. at 65,922, 65,942.

[40] One of DOE's principal information-gathering activities was to employ a consultant to conduct fairly extensive interviews with product manufacturers. See 74 Fed. Reg. at 65893. Although there is nothing in the record documenting the information actually collected through this process, it appears that the effort was limited to the collection of information concerning heater-rated products, and that no information concerning decorative gas fireplaces was sought or obtained. Belding Supp. Aff. ¶ 13.

[41] The record does reflect some limited, apparently last-minute, internet research concerning decorative gas fireplaces. In particular, Comment 117 (JA __) is a data compilation that lists some basic information concerning both fireplace heaters and decorative gas fireplaces. That document is listed in the Certified Index to the Administrative record as having been dated (or received) on March 15, 2010: after

Moreover, the entire technological and economic justification for the proposed rule was based on information and analysis specific to fireplace heaters.[42] The AFUE data DOE relied upon to characterize existing products – and hence its conclusion that the proposed heating efficiency standards were technologically feasible – was, by definition, data for fireplace heaters.[43] There was no basis to suggest that this data would be representative of decorative products as well as fireplace heaters, and the NPR did not suggest that there was. Accordingly, DOE would have had to have offered some additional or different analysis in order to justify heating efficiency standards – or any other energy conservation requirements – for decorative gas fireplaces. Indeed, DOE would have had to have presented such an analysis *in its NPR*, because EPCA specifically requires a determination that proposed efficiency standards are technologically feasible at the proposed rule stage, and that at least 60 days be allowed for public comment on the technological feasibility and economic justification of any proposed standard. 42 U.S.C.

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the comment period on the NPR had closed and only seven days before the Final Rule was signed. *During the comment period itself*, there was nothing in the record to suggest that DOE was even attempting to gather data concerning decorative gas fireplaces.

[42] See 74 Fed. Reg. at 65932, 65934 (benefits analysis assuming regulated products are used strictly in response to heating needs), 74 Fed. Reg. at 65945, 65973, 65991 (analysis of compliance burdens based on high baseline AFUE efficiency and AFUE efficiency data for fireplace heaters).

[43] See Comment 121 (JA __) (noting that decorative fireplaces are not AFUE tested); Comment 117 (JA __) (showing lack of AFUE data).

§ 6295(p)(1)-(2). The NPR provided no such analysis for decorative gas fireplaces. Accordingly, the NPR did not provide any lawful basis for the adoption of standards for decorative gas fireplaces, and interested parties could not reasonably have anticipated that such standards might nevertheless be imposed.

For notice to be adequate, an agency "must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making."[44] DOE proposed a rule imposing heating efficiency standards for fireplace heaters, but the rule it adopted was dramatically broader in scope, purpose, and impact. This result was unlawful, because the outcome achieved did not fall within any "range of alternatives" described in the NPR. Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994). Indeed, the NPR gave "no indication that [DOE] was considering a different approach" than it had proposed before the final rule revealed its dramatic change in course. CSX Transp. Inc. v. Surface Transp. Board, 584 F.3d 1076, 1081 (D.C. Cir. 2009). Rather than regulating products identified as "fireplace heaters" designed to furnish warmed air to a living space, DOE decided to regulate any gas fireplace that – regardless of its

[44] 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)); Owner-Operator Indep. Drivers Ass'n, Inc., v. Federal Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C.Cir 2007).

function or use – generates heat and vents it (like a refrigerator or desktop computer) into the space in which it is installed.[45] DOE gave no notice that it was contemplating such a change, and there was certainly no way to anticipate that DOE would start with the ANSI definition used to *distinguish* fireplace heaters from decorative fireplaces and perversely reinterpret it to include both. See Am. Water Works Ass'n v EPA, 40 F.3d 1266, 1275 (D.C. Cir. 1991) (inadequate notice that the agency would adopt a novel definition of a key term made its action unlawful). This lack of notice was especially egregious given the "marked shift" in DOE's regulatory approach and the considerable expansion in the scope and economic impact of the final rule that resulted. See Shell Oil Co. v. EPA, 950 F2d 741, 752-53 (D.C. Cir. 1992).

DOE had an obligation to "provide sufficient factual detail and rationale . . . to permit interested parties to comment meaningfully."[46] Yet it never even suggested that it was concerned about the "unintended" heating load of decorative products or that it was considering any regulation to address such a concern. It never requested any comment on whether the "unintended" heating load of

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[45] See 75 Fed. Reg. at 20,129. DOE now interprets the "designed to furnish warm air" qualifier to mean nothing at all. See 76 Fed. Reg. 43,941 at 43,944 (July 22, 2011) (because "all hearth products create heat," the qualifying language excludes no products at all from coverage as "vented hearth heaters").

[46] Am. 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)).

decorative gas fireplaces is a legitimate concern or how such a concern might be addressed. The NPR did not even hint at the possibility of an energy input limit, let alone suggest that DOE might rely on such a limit as a means to "maintain the utility and availability of decorative hearth products" in the face of a decision that heating efficiency standards would otherwise apply. 75 Fed. Reg. at 20,129. The NPR raised no issue as to whether such an input limit might be practicable, how manufacturers might be able to comply with such a limit, or what the impact of such a limit might be. The Final Rule preamble represented that DOE had gathered information with respect to at least some of the relevant issues, 75 Fed. Reg. at 20129, but the NPR had identified no such evidence and had not even suggested any of the conclusions underlying DOE's decision to adopt its Scylla and Charybdis approach for regulating decorative gas fireplaces. Accordingly, there was never any opportunity to comment on such information, and – for notice to be adequate – the basis for an agency decision must be made public and "exposed to refutation" *during the rulemaking process*.[47] Here DOE "fail[ed] to reveal portions of the technical basis for a proposed rule in time to allow for

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[47] Owner-Operator Indep. Drivers Ass'n, Inc., v. Federal Motor Carrier Safety Admin., 494 F.3d 188, 209 (D.C.Cir 2007)(quoting Ass'n of Data Processing Serv. Orgs. v. Bd. Of Governors of the Fed. Reserve Sys., 745 F.2d 6778, 684 (D.C. Cir. 1984)); see Chamber of Commerce of the United States v. SEC, 443 F.3d 890, 900-02 (D.C. Cir. 2006) (vacating regulation where extra-record materials supplied basic assumptions the agency relied upon).

meaningful commentary."[48] Indeed – with respect to a number of key issues – HPBA and its members were "deprived of the opportunity to present relevant information by lack of notice that the issue was there." Am. Radio Relay League v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008), quoting WJG Tel. Co. Inc. v. FCC, 675 F.2d. 386, 389 (D.C. Cir. 1982).

In short, DOE "did not afford . . . notice of its intent to adopt, much less an opportunity to comment on" the regulatory scheme it ultimately adopted for decorative gas fireplaces.[49] Because the logical outgrowth doctrine "does not extend to a final rule that finds no roots in the agency's proposal,"[50] the Final Rule – rather than being a "logical extension" of the proposal – was an unlawful "surprise switcheroo." Envtl. Integrity Project v. EPA, 425 F.3d 992 at 996 (D.C. Cir. 2005).

There can be no question that DOE's failure to provide adequate notice and comment was prejudicial to HPBA. Had DOE suggested that it might impose heating efficiency standards on decorative gas fireplaces and attempt to preserve

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[48] Id. (quoting Solite Corp. v. EPA, 952 F.2d 473, 484 (D.C.Cir. 1991)).

[49] Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1261 (D.C. Cir. 2005).

[50] Envtl. Integrity Project v. EPA, 425 F.3d 992 at 996 (D.C. Cir. 2005); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259-60 (D.C.Cir. 2005).

the availability of decorative hearth products through the alternative of a 9,000 BTU/h. energy input limit, HPBA and its members would have offered comment identifying gross errors in the core assumptions and conclusions DOE relied on in adopting the Final Rule. For example, HPBA would have had the opportunity to show that:

1. Heating efficiency standards for decorative gas fireplaces are unjustifiable, because decorative gas fireplaces are generally used for aesthetic enjoyment rather than utilitarian heating purposes, and are only used – on average – for less than 100 total hours per year.[51]

2. DOE's assertion that many existing products already meet the proposed AFUE efficiency standards and that "most products" that do not meet those standards could easily be modified to meet them was based on data for fireplace heaters,[52] and is categorically false with respect to decorative gas fireplaces. Instead, few if any decorative gas fireplaces meet the heating efficiency standards imposed, and efforts to modify such products to satisfy those standards would, at best, require substantial redesign efforts that – in many cases – would yield products that would not be viable in the market.[53] Accordingly, heating efficiency

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[51] HPBA's March 21, 2011 RFI Comments (see supra note 26) at 2, 6-7.

[52] See 75 Fed. Reg. at 20129, 20231; FRTSD at 3-48 (JA__) (AFUE data).

[53] Thayer Aff. ¶¶ 6-7; Hawkinson Aff. ¶¶ 9-10; HPBA's March 21, 2011 RFI Comments at 5.

standards clearly are not economically justified for decorative gas fireplaces. See 75 Fed. Reg. at 20,218 (concluding that standards were "not economically justified" because "most of the current products would have to be redesigned to meet" them and "higher component costs . . . could significantly harm profitability"); 74 Fed. Reg. at 65,973 (same).

3. A 9,000 BTU/h input limit is too low for any viable product simulating a conventional wood burning fireplace. Thayer Aff.¶ 6; Belding Supp. Aff. ¶ 12. Of more than 700 hearth products listed in the data compilation DOE belatedly added to the record, see supra note 41, only two have input limits this low, and neither is designed to simulate a wood-burning fireplace. Contrary to DOE's assertions in the Final Rule preamble, 75 Fed. Reg. at 20129, the maximum energy input limit of a vented gas fireplace is a key design parameter that is not subject to "field adjustment" and that cannot be reduced through use of a restrictor plate or otherwise without invalidating the safety certification for the product. Belding Supp. Aff. ¶ 12. As a result, DOE's alternative requirement did nothing to "maintain the utility and availability of decorative hearth products" in the face of otherwise-applicable heating efficiency standards. Id.; Thayer Aff. ¶¶ 6-7; HPBA's RFI Comments at 5-6.

4. The Final Rule was so profoundly misinformed that it could be expected to be counterproductive from an overall energy conservation standpoint. HPBA's March 21, 2011 RFI Comments at 6-7.

There can be no doubt that such comment would have had an impact on the outcome of the rulemaking, because DOE – having subsequently received such comment – has amended the Final Rule to replace the input limit for decorative gas fireplaces with an entirely different set of requirements that it believes will provide a feasible alternative to compliance with the heating efficiency standards imposed by the Final Rule. See 76 Fed. Reg. 71836 at 71859 (November 18, 2011). While the heating efficiency standards for decorative gas fireplaces remain in place – still as a means to force compliance with *other* requirements – it is doubtful that DOE would have imposed such standards if had it received meaningful comment while it still faced the need to justify them on the merits.[54] At a minimum, it is clear that HPBA could have mounted a "credible challenge" to the factual basis for the Final Rule if only it had known what issues to comment on, and that HPBA was therefore prejudiced by DOE's failure to provide adequate notice and opportunity for comment. Chamber of Commerce of the United States v. SEC, 443 F.3d 890,

[54] It is interesting to note that – no doubt as the result of a missed edit – DOE's final technical support document notes that "gas log sets and decorative products . . . are not covered products." See Final Rule Technical Support ("FRTSD") at 3-28 (JA __).

904-05 (D.C. Cir. 2006); see Owner-Operator Indep. Drivers Ass'n, Inc., v. Federal Motor Carrier Safety Admin., 494 F.3d 188, 202-03 (D.C.Cir. 2007).

Because HPBA had no opportunity to comment on issues central to the outcome of the Final Rule, the purposes of notice and comment rulemaking plainly were not served, and the Final Rule should accordingly be set aside. Environmental Integrity Project v. EPA, 425 F.3d 992 at 998 (D.C. Cir. 2005); Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1261 (D.C. Cir. 2005); Am. Water Works Ass'n v EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

B. DOE unlawfully categorized decorative gas fireplaces as "covered products" subject to EPCA regulation.

EPCA authorizes DOE to identify products as "covered products" that EPCA does not itself identify as such. 42 U.S.C. §§ 6292(b). However, DOE did not seek to exercise this authority or to make the determinations necessary to do so with respect to decorative fireplaces. Instead, it sought to identify decorative fireplaces as DHE when EPCA plainly had not. This decision to define decorative gas fireplaces as DHE was both contrary to law and unreasonable.

1. The statute unambiguously precludes DOE's interpretation that decorative fireplaces are DHE.

Both agencies and courts must give effect to the unambiguously expressed intent of Congress. Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.,

476 U.S. 837, 842-43 (1984); Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 642 F.3d 234, 238 (D.C. Cir. 2011). A determination of Congress' intent must begin with the language of the statute itself, applying "the presumption that the legislative purpose is expressed by the ordinary meaning of the words used"[55] and the principles that that the "words of a statute must be read in their context"[56] and that a statute is to be interpreted "as a 'symmetrical and coherent regulatory scheme'" in which all provisions fit together as parts of "'a harmonious whole.'" NRDC v. Abraham, 355 F.3d 179, 195 (2d Cir. 2004) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 132-33 (2000)).

Giving effect to "the ordinary, plain-English meaning" of the words of the statute,[57] it seems inescapable that "direct heating equipment" means "equipment" designed for the purpose of "heating." This is the only reading that makes sense in the context of an energy efficiency statute, because the "efficiency" of a product can be determined only by reference to the purpose it serves; indeed, EPCA expressly defines "energy efficiency" as the "ratio of the useful output of services

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[55] Am. Mining Congress v. EPA, 824 F.2d 1177, 1183 (D.C. Cir. 1987); see Hardt v. Reliance Std. Life Ins. Co., 130 S.Ct. 2149, 2156 (2010).

[56] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

[57] Am. Mining Congress v. EPA, 824 F.2d at 1184.

from" a product to its energy use.[58] Decorative fireplaces use gas flames to provide an attractive simulation of a log fire. Like gas lights or the eternal flame at John F. Kennedy's tomb, however, they are not intended for heating use and are not designed for heating efficiency.[59] Accordingly, the claim that such products are "heating equipment" is "an extraordinary distortion of the English language" that should be dismissed as such. Ass'n of Battery Recyclers v. EPA, 208 F.3d 1047, 1053 (D.C. Cir. 2000).

The conclusion that DHE is limited to true heating appliances is confirmed by the "efficiency descriptor" EPCA expressly provides for such products: AFUE heating efficiency. 42 U.S.C. § 6291(22)(A). That descriptor calls for efficiency to be measured solely in terms of *heating* efficiency, as determined by a method (AFUE) designed for products that are turned on and off strictly in response to heating needs.[60] This descriptor obviously provides the wrong yardstick for measuring the performance of decorative gas fireplaces; indeed, the AFUE method

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[58] 42 U.S.C. § 6291(5); See also H.R. Rep. No. 100-11, at 20 (1987) ("the energy conservation standards specified in the Act apply to the principal function of an appliance").

[59] 75 Fed. Reg. at 20,128-29.

[60] See Supra n.1.

is not even applicable to such products.[61] The efficiency descriptor for DHE was clearly intended to provide the basis for regulation of all DHE products; any other interpretation would render the efficiency descriptor meaningless, in contravention of the fundamental principle that statutes must be interpreted to give effect to all of their provisions. See, e.g., Natural Resources Def. Council, Inc. v. EPA, 489 F.3d 1364, 1373 (D.C. Cir. 2007). By imposing the efficiency descriptor for DHE that it did, Congress unambiguously expressed the intent that DHE includes only utilitarian heating appliances.

In any event, a reading of the statute as a whole leaves no question as to what DHE does and does not include, because the statute expressly divides DHE into sixteen specific subcategories of "wall," "floor" and "room" heaters and imposes specific energy efficiency standards for each. 42 U.S.C. § 6295(e)(3). There is no suggestion in the statute that any other products might qualify as DHE; to the contrary, the sale of DHE not meeting the specified standards was prohibited

[61] The test method for a covered product must be "reasonably designed to produce test results which measure energy efficiency, energy use . . . or estimated annual operating cost of a covered product during a representative average use cycle or period of use." 42 U.S.C. § 6293(b)(3). The test procedure must therefore reflect the actual purpose of the product and the manner in which it is used. Because the AFUE method presumes that the product being tested will be operated strictly in response to heating needs, it is not "reasonably designed to produce test results which measure energy efficiency" of decorative gas fireplaces during a "representative average use cycle or period" of their use as 42 U.S.C. § 6293(b)(3) requires.

by statute effective January 1, 1990, and the only standards provided were specific to the sixteen listed subcategories of DHE. Id. Had Congress intended decorative vented gas fireplaces to be considered DHE, standards would have been provided for them, and the sale of products not meeting those standards would have been banned in 1990.

Having itself declined to regulate decorative vented gas fireplaces as DHE, Congress gave DOE no authority to do so. DOE's only charge was to determine by 1992 whether the statutory efficiency standards for the sixteen subcategories of DHE should be amended, and then to determine by 2000 "whether the standards in effect for such products" should be amended. 42 U.S.C. §§ 6295(e)(3)-(e)(4). EPCA does provide a means for DOE to regulate other products on its own motion, but not by identifying them as DHE when Congress did not. Instead, DOE may regulate new "covered products" only by identifying them as such and justifying the need for regulation pursuant to – and subject to the conditions of – authority EPCA expressly provides for that purpose in 42 U.S.C. §§ 6292(b) and 6295(l). DOE cannot end-run these statutory provisions through the expedient of an "interpretation" adding new products to an existing statutory category of "covered products," because agencies are bound "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." Netcoalition v. SEC, 615 F.3d 525, 534

(D.C.Cir. 2010)(quoting Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 139 (D.C.Cir. 2006)); see Whitman v. Am. Trucking Assocs., 531 U.S. 457, 485 (2001) (an agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion").

2. DOE's interpretation that decorative vented hearth products are DHE was arbitrary and unreasonable.

Even if EPCA could bear the interpretation that decorative fireplaces are DHE, DOE's decision to classify them as such must be set aside as arbitrary and unreasonable. DOE did not point to any evidence that decorative fireplaces are actually used for heating purposes; indeed, it recognized that such products are not intended for such use, are not turned on and off in response to heating needs, and may not be a significant source of heat.[62] Instead, DOE asserted that such products can be categorized as DHE because they vent heat into the space in which they are installed. 75 Fed. Reg. at 20,128-29. Oddly, this argument is not based on any of EPCA's provisions: DOE's consideration of the provisions of the statute started and ended with the observation that no definition of DHE is provided among EPCA's statutory definitions. 75 Fed. Reg. at 20128. DOE then turned

[62] 75 Fed. Reg. at 20,128-29 (citing the "unintended" heating load of such products, their use for non-heating purposes, and concern that decorative products may consume "a lot of energy" without producing much heat).

immediately to the language of its own regulatory definition of "vented home heating equipment," parsing its language as though it were itself a provision of the statute. 75 Fed. Reg. at 20,128. DOE then sought to justify its determination that decorative gas fireplaces are DHE on the basis that this is a linguistically possible interpretation *of its own regulatory definition*, as though that somehow made it a permissible interpretation of EPCA. Id.

The defects in DOE's reasoning were profound. "[T]he absence of a statutory definition does not render a [term] ambiguous," and therefore gave DOE no license to ignore the terms of the statute itself. Natural Resources Def. Council, Inc. v. EPA, 489 F.3d 1364, 1371 (D.C.Cir. 2007). Nevertheless, having found no statutory definition, DOE chose to ignore the language and structure of EPCA entirely. It did not consider *any* statutory language or *any* statutory provision. It did *nothing* to consider the structure of the statute as a whole. Instead, DOE focused only on whether the words "designed to furnish warmed air to the living space of a residence" – words that appear nowhere in EPCA – could be stretched far enough to include products not designed for heating use. 75 Fed. Reg. at 20,128-29. Accordingly, DOE's interpretation cannot be sustained as a permissible interpretation of EPCA, because it was not an interpretation *of EPCA* at all. See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 476 U.S. at 843 (where the statute is silent or ambiguous, "the question for the court is

whether the agency's answer is based on a permissible *construction of the statute*") (emphasis added).

DOE's failure to interpret the statute itself is particularly remarkable in view of multiple comments it received indicating that decorative gas fireplaces existed when EPCA's relevant provisions were enacted and that – as a matter of historical fact – they were not categorized or intended to be categorized as DHE.[63] DOE acknowledged such comment, but did nothing to respond to it. 75 Fed. Reg. at 20,128. It did not contest the fact that decorative gas fireplaces existed when the statutory provisions addressing DHE were adopted. It did not argue that such products were actually intended to be regulated as DHE. Nor did it explain how it could categorize decorative gas fireplaces as DHE when Congress had not done so. It ignored all such issues. DOE's complete failure to address comments on issues of such central importance was arbitrary, and hence is by itself "fatal to its defense" of the Final Rule. Int'l Union, United Mine Workers of Am. v. MSHA, 626 F.3d 84, 90 (D.C. Cir. 2010); Home Box Office, Inc. v. F.C.C., (567 F.2d 9, 35-36 (D.C. Cir. 1977).

Even if DOE had proffered an interpretation of the statute itself, it failed to recognize that it is not enough for an agency to argue that an interpretation is *possible*; it must provide a reasonable explanation as to why the particular

[63] See Comments 75, 91 and 100 (JA __).

interpretation it chose makes sense in the context of the statute. Cont'l Air Lines Inc. v. DOT, 843 F.2d 1444, 1452 (D.C. Cir. 1988); see AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 388 (1999); PDK Laboratories Inc. v. DEA, 362 F.3d 786, 797-98 (D.C. Cir. 2004); Chemical Mfrs. Ass'n v. EPA, 217 F.3d 861, 866-67 (D.C. Cir. 2000). DOE did nothing to explain why – particularly in the context of energy efficiency regulation – its interpretation makes any sense at all. Kitchen ovens, refrigerators, and desktop computers all "furnish warmed air to the living space of a residence" – and ovens have even been known to be used for emergency home heating – yet DOE has never taken the position that such products are "designed to furnish warmed air to the living space of a residence" – and are therefore DHE – because heating is not the purpose of such products. Decorative fireplaces are no different, yet DOE offered no cogent explanation as to why it makes sense – in the context of the statute – to ignore the purpose of these products in order to characterize them as DHE. Nor did DOE address obvious respects in which its interpretation *does not* make sense in the context of the statute. DOE did not characterize decorative gas fireplaces as DHE because they are heaters and should thus be required to be reasonably heat-efficient as the statutory efficiency descriptor for DHE requires; it did so precisely because these products are *not heaters*, and – as DOE itself explained – it wanted to regulate the "unintended" heating loads of such products and restrict the use of gas for non-heating purposes.

75 Fed. Reg. at 20,129. DOE called these products DHE so that it could regulate them through a condition on their exclusion from the normal efficiency standards for DHE, thereby circumventing EPCA's statutory constraints on DOE's authority to create (and regulate) new categories of "covered products." 42 U.S.C. §§ 6292(b) and 6295(l). DOE provided no explanation as to how an approach so manifestly at odds with EPCA's provisions[64] could nevertheless be considered a reasonable interpretation of the statute.

The explanation DOE did offer for its interpretation was self-contradictory and incoherent. Having started with a focus on whether products are "designed to furnish warmed air to a living space" – at least in such a counterintuitive sense that a desktop computer would qualify – DOE repeatedly suggested that it was seeking to distinguish decorative products from DHE. 75 Fed. Reg. at 20,128-29. However, DOE's statutory interpretation clearly makes no such distinction: a product that complies with DOE's energy input limit DOE is still DHE; it is simply DHE that need not meet the otherwise-applicable heating efficiency standards. 75 Fed. Reg. at 20130. DOE defined even "purely decorative" gas fireplaces as "heaters." Id. (quoting rule text). Accordingly, DOE's explanation that its interpretation somehow distinguishes decorative products from heaters is contrary

[64] See Whitman v. Am. Trucking Assocs., 531 U.S. 457, 485 (2001).

to the result it actually achieved, and thus provides no basis to conclude that its interpretation is reasonable.

C. DOE's decision to regulate decorative fireplaces and subject them to heating efficiency standards was arbitrary and contrary to law.

In reviewing agency rulemaking under the "arbitrary and capricious" standard, the court reviews "the adequacy of the agency's reasoning"[65] and ensures public accountability "by requiring the agency to identify relevant factual evidence" and "to explain the logic and policies underlying any legislative choices."[66] Accordingly, an agency "must cogently explain why it has exercised its discretion in a given manner,"[67] and – in reviewing that explanation – the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

DOE's decision to subject decorative gas fireplaces to the heating efficiency standards proposed for fireplace heaters was arbitrary and contrary to law in that it

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[65] Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004).

[66] Am. Iron and Steel Inst. V. OSHA, 939 F.2d 975, 982 (D.C. Cir. 1991); see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[67] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. at 48.

was unsupported by any reasoned determination that such standards would be technologically feasible and economically justified. EPCA expressly requires that a decision to impose efficiency standards be supported by such a determination,[68] but DOE did not even attempt to consider the relevant issues. DOE's assessment of the economic benefits of the heating efficiency standards it imposed was based entirely on the assumption that the products subject to those standards are actually used as heaters, so that increases in heating efficiency would reduce the amount of energy needed to meet heating needs. See 75 Fed. Reg. at 20,186-88, 20188. DOE knew that this analysis was irrational as applied to decorative fireplaces, because it knew that decorative gas fireplaces are not used strictly in response to heating needs.[69] DOE therefore had no basis to presume that increases in the heating efficiency of decorative vented gas fireplaces would translate into gas savings, and did not suggest otherwise; it simply ignored the manifest illogic of its decision to impose heating efficiency standards on products that are not actually used for heating. DOE's economic justification of the Final Rule was therefore irrational, and its resulting "failure to 'apprise itself – and hence the public and the Congress – of the economic consequences of'" the Final Rule "makes promulgation of the

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[68] 42 U.S.C. § 6295(o)(2)(A)-(B)(i).

[69] See Id. (citing concern concerns over "unintended" heating load from decorative products).

rule arbitrary and capricious and not in accordance with law." Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011), (quoting Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005)).

Similarly, DOE only addressed the technological feasibility of the heating efficiency standards – and the impact such standards would have on manufacturers – with respect to fireplace heaters: a class of products characterized by relatively high AFUE efficiencies and for which DOE had determined that the new standards would require only modest and easily achievable efficiency increases.[70] DOE knew that AFUE efficiency data for decorative fireplaces is not available.[71] It also knew that AFUE efficiency data for fireplace heaters is not representative of decorative gas fireplaces.[72] It therefore had no basis to conclude that heating efficiency standards for decorative gas fireplaces would require only modest efficiency increases that would be easy to achieve, as its justification for the Final Rule asserted.[73] DOE did not suggest otherwise: it simply swept decorative gas

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[70] See 74 Fed. Reg. at 65945, 65973, 65991 (proposed rule); 75 Fed. Reg. at 20219, 20231 (final rule); FRTSD at 3-48 (JA__) (AFUE data).

[71] See Comment 121 (JA __) (noting that decorative fireplaces are not AFUE tested); Comment 117 (JA __) (showing lack of AFUE data).

[72] Indeed, DOE was specifically concerned about "very inefficient" decorative products. 75 Fed. Reg. at 20,129.

[73] 75 Fed. Reg. at 20219, 20231.

fireplaces into the category of products subject to heating efficiency standards without any analysis at all. Indeed, DOE added decorative gas fireplaces to the range of products subject to heating efficiency standards without making any change to its analysis of the impact the standards would have on small manufacturers. See 75 Fed. Reg. at 20,231 (relying directly on the analysis provided in the NPR). DOE thus failed to consider whether its heating efficiency standards for decorative gas fireplaces were technologically feasible or economically justified, and its failure to consider these issues – issues EPCA expressly requires it to address – is, by itself, "sufficient to establish an arbitrary-and-capricious decision requiring vacatur of the rule." Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004); see United Mine Workers v. Dole, 870 F.2d 662, 673 (D.C.Cir. 1989)(complete absence of any discussion of a statutorily-mandated factor renders decision arbitrary and capricious).

DOE's decision to regulate decorative gas fireplaces was also arbitrary in that it hinged on the unreasonable premise that manufacturers of decorative gas fireplaces could survive a rule imposing heating efficiency standards because they could easily comply with the alternative of a 9,000 Btu/h input limit. 75 Fed. Reg. at 20,129. This premise was unreasonable because it was based on core assertions for which there is no basis in the record. In particular, DOE's belief that its

regulatory approach for decorative gas fireplaces would "maintain the utility and availability of decorative hearth products" was based on the assertion that there are existing decorative gas fireplaces that operate at or below an input limit of 9,000 Btu/h, and that existing decorative products can readily be modified to operate at such a limit through simple and inexpensive methods such as the use of restrictor plates. 75 Fed. Reg. at 20,128-29. These claims were false,[74] and there is no evidence in the record to support them. The rule cannot stand without such evidence: as EPCA's judicial review provision states, "no rule" imposing energy conservation standards "may be affirmed unless supported by substantial evidence." 42 U.S.C. § 6306(b)(2). "Substantial evidence" certainly requires *some* evidence in the record, and there is none. See Ass'n of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys., 745 F. 2d 677, 682-86 (D.C. Cir. 1984).

The premise of DOE's regulatory approach was also unreasonable in that DOE failed to provide any reasoned explanation as to its legal basis. In particular, the 9,000 BTU/h input limit for decorative gas fireplaces was clearly an energy conservation standard, but DOE did not even attempt to justify it as such. DOE argued that compliance would be easy, but it did not consider whether the input limit was economically justified; indeed, it did not consider or address any of the

[74] Belding Supp. Aff. ¶ 11; Thayer Aff. ¶ 6.

factors EPCA requires it to consider in imposing any energy conservation standard. See 42 U.S.C. §6295(o)(2). In short, DOE explained why it *wanted* to impose an energy input limit, but it offered no cogent explanation as to how it lawfully could. This basic "failure to 'articulate a satisfactory explanation for its action'" renders it arbitrary and capricious. Cablevision Systems Corp. v. F.C.C., 649 F.3d 695 722 (D.C.Cir. 2011) (quoting State Farm Mut. Auto. Ins. Co., 463 U.S. at 43).

CONCLUSION

DOE's decision to regulate decorative gas fireplaces under the Final Rule was arbitrary and capricious, not in accordance with law, and in excess of statutory authority. That decision was adopted without observance of procedure required by law, and was manifested by a rule that was not supported by substantial evidence. DOE's errors were profound and unquestionably prejudicial, and its decision should therefore be set aside. See 5 U.S.C. § 706(2)(A)-(C); 42 U.S.C. § 6306(b)(1)-(2).

DOE's unlawful action is embodied in the provisions of the Final Rule regulating hearth products: specifically, the regulatory definition of "vented hearth heater" (10 C.F.R. §430.2) and the efficiency standards imposed for products encompassed by that definition (10 C.F.R. §430.32(i)(2)). HPBA has not challenged these provisions as they apply to heater-rated products certified to the ANSI Z21.88 standard; DOE's error was in extending regulation to products that

are not heater-rated. In order to tailor relief appropriately, HPBA respectfully requests an Order vacating those provisions of the Final Rule *except as they apply to heater-rated products certified to the ANSI Z21.88 standard*. Such an Order would leave the Final Rule undisturbed with respect to vented gas fireplace heaters, vented gas stoves, and vented gas fireplace inserts designed for heating use, while providing relief with respect to decorative hearth products to which the Final Rule unlawfully applied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,068 number of words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii),

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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