

alternatively, to consolidate this litigation with pending challenges to a subsequent rule and hold this litigation in abeyance pending litigation over the subsequent rule. See Respondents' Motion to Dismiss as Moot or Consolidate with Pending Cases (hereafter "DOE's Motion"). HPBA has already filed an Opposition addressing DOE's Motion insofar as it seeks to consolidate this litigation with other pending cases and hold it in abeyance and requests leave to file a dispositive motion out of time.¹ In this Initial Opposition, HPBA reserved its right to address the merits of DOE's dispositive motion until such time as leave to file such a motion is granted. See Circuit Rule 27(g)(4). However, on January 30, 2012 the court issued an order holding the completion of briefing on the merits in abeyance pending a ruling on DOE's Motion. Accordingly, in the interest of expedition – and without prejudice to its opposition to DOE's request for leave to file a dispositive motion out of time – HPBA files this Opposition addressing the merits of DOE's Motion insofar as it seeks to have this litigation dismissed as moot.

1. This litigation challenges the April 16, 2010 rule in that DOE's decision to regulate decorative vented gas fireplaces as heaters – defining them as "vented hearth heaters" and subjecting them to heating efficiency standards designed for utilitarian heating appliances – was arbitrary, capricious, contrary to

¹ See Petitioners' Opposition to Respondents' Motion to Consolidate with Pending Cases and Request for Leave to File a Motion to Dismiss Out of Time (HPBA's "Initial Opposition").

law, unsupported by substantial evidence, and adopted without observance of procedure required by law. See Opening Brief of Petitioner Hearth, Patio & Barbecue Association (“HPBA’s Brief) at, e.g., 2-4, 20-25. DOE argues that this litigation has been rendered moot by a subsequent rule entitled “Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment,” 76 Fed. Reg. 71836 (November 18, 2011)(the “November 18, 2011” rule).

2. A dispute may be rendered moot when subsequent action has "completely and irrevocably eradicated the effects of" a challenged action, Motor and Equipment Manufactures Association v Nichols, 142 F.3d 449, 459 (D.C. Cir. 1998), or events have made it “impossible for the court to grant any effectual relief whatever.” Honeywell International Inc. v. NRC, 628 F.3d 568, 576 (2010) quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (citation and internal quotation marks omitted). The burden of establishing that a case is moot rests upon the party asserting that it is, and that burden is a heavy one. Honeywell International Inc. v. NRC, 628 F.3d 568, 576 (2010); Motor and Equipment Manufactures Association v Nichols, 142 F.3d 449, 459 (D.C. Cir. 1998).

3. It is clear that this litigation has not been rendered moot by the November 18, 2011 rule. The April 16, 2010 rule defined decorative vented gas fireplaces as

respect to DOE's "vented hearth heater" definition: it also expressly seeks to have the heating efficiency standards of the April 16, 2010 rule vacated as to products for which they were never justified or lawfully adopted.⁵ DOE's argument that this litigation is moot can be dismissed for this reason alone.

6. DOE quotes HPBA's statement that it does not challenge the heating efficiency standards as applied to fireplace heaters, suggesting that HPBA therefore does not challenge the heating efficiency standards at all. DOE's Motion at ¶ 1. However, HPBA does expressly challenge the heating efficiency standards imposed on decorative vented gas fireplaces, and the court can grant effective relief by vacating those standards as they apply to products for which they were never lawfully adopted, just as HPBA has requested. See, e.g., National Maritime Safety Ass'n v. Occupational Safety & Health Admin., 649 F.3d 743, 754 (D.C. Cir. 2011) (vacating regulation as applied in circumstances for which it had not been lawfully adopted); Quest Services Corp. v. FCC, 509 F.3d 531, 534, 541 (D.C. Cir. 2007) (vacating FCC order to the extent that it produced a particular unlawful result); Association of Battery Recyclers Inc., v. EPA, 208 F.3d 1047, 1050, 1064 (D.C. Cir. 2000) (vacating rule found valid in some applications and invalid in others "insofar as it" applies unlawfully). [American Water Works

⁵ See HPBA Brief at 55-56.

Association v. EPA, 40 F.3d 1266, 1275 (D.C. Cir. 1994) (vacating rule “insofar as it” imposes a particular result found unlawful).]

7. In any event, DOE’s assertion that its 2010 “vented hearth heater” definition has been “superseded”⁶ is inaccurate, because the current regulatory text defining what a “vented hearth heater” is was adopted in the April 16, 2010 rule and has never been amended at all. In particular, the April 16, 2010 rule defined a vented hearth heater as:

[Quote]

HPBA has challenged this definition, the November 18, 2011 rule did not change a word of it, and “[a] challenge to a portion of a regulation that is unaffected by intervening amendments does not become moot by reason of those amendments.” Motor and Equipment Manufactures Association v Nichols, 142 F.3d 449, 459 (D.C. Cir. 1998). DOE’s argument that this litigation is moot can be dismissed for this reason alone.

8. Rather than amending the regulatory text defining decorative vented gas fireplaces as “vented hearth heaters” and subjecting them to heating efficiency standards, the November 18, 2011 rule amended only an alternative compliance provision. In the April 16, 2010 final rule, DOE’s decision to regulate decorative

⁶ Motion to Dismiss at ¶ 5.

vented gas fireplaces and subject them to heating efficiency standards was animated by a desire to impose an alternative compliance requirement: a maximum energy input limit designed to restrict the use of gas for aesthetic enjoyment rather than utilitarian heating purposes. HPBA's Brief at ___; see 75 Fed. Reg. 20112, 20129 (April 16, 2010). DOE thus defined decorative vented gas fireplaces as "vented hearth heaters" and subjected them to heating efficiency standards so that it could impose an energy input limit as the price of "exclusion" from those standards. Id. DOE's assumption was that the energy input limit would provide an easy and inexpensive means of compliance, and that the manufacturers of decorative vented gas fireplaces would therefore choose to comply with the input limit rather than the more burdensome heating efficiency standards. Id. The November 18, 2011 rule did nothing to amend the basic rule structure DOE adopted in the April 16, 2010 rule. Decorative vented gas fireplaces are still defined as "vented hearth heaters" and are still subject to heating efficiency standards. DOE simply changed the *alternative* requirements imposed as the price of relief from the heating efficiency standards. In particular, the November 18, 2011 rule replaced the energy input limit with new labeling, warranty, and design requirements including a ban on standing pilot lights. DOE characterizes the amended language as "definitional," DOE's Motion at ¶¶ 2-3, but that language has no bearing on what is or is not a "vented hearth heater," and – rather than

defining a category of products that is exempt from regulation – it imposes substantive regulatory requirements that manufacturers are expected to accept as an alternative to compliance with the heating efficiency standards imposed by the April 16, 2010 rule. Indeed, the November 18, 2011 rule was based on the premise that all decorative vented gas fireplaces are “vented hearth heaters” subject to heating efficiency standards, and that the new alternative requirements imposed amount to nothing more than a “strictly optional” alternative to compliance with the heating efficiency standards.⁷ However, as DOE explained in adopting the November 18, 2011 rule, “[m]anufacturers of vented hearth products who choose not to avail themselves of” the new alternative requirements “will be subject to the energy conservation standards for vented hearth heaters promulgated in the April 2010 final rule.” 76 Fed. Reg. 71836 at 71837 (November 18, 2011). The “energy conservation standards for vented hearth heaters promulgated in the April 2010 final rule” thus continue to present a serious problem for manufacturers of decorative vented gas fireplaces, and HPBA’s challenge to those standards has not been rendered moot.

WHEREFORE, DOE’s motion to dismiss this litigation as moot should be denied.

⁷ [Cite preamble].

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2012, I caused the foregoing to be electronically filed 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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