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August 31, 2011

Ms. Brenda Edwards
U.S. Department of Energy
Building Technologies Program, Mailstop EE-2J
1000 Independence Avenue, SW
Washington, DC 20585-0121

Re: NOPR on Energy Conservation Standards for Direct Heating Equipment
Docket Number EERE-2011-BT-STD-0047
RIN 1904-AC56

HPBA COMMENTS
September 1, 2011 ♦ DOE Public Meeting

I am Jack Goldman, President and CEO of the Hearth, Patio & Barbecue Association (HPBA).

A. This rulemaking process is fatally defective, and the Hearth, Patio & Barbecue Association (HPBA) requests that it be terminated immediately. HPBA will be submitting this request, in writing, to Secretary Chu.

1. Agencies have a clear legal obligation to provide a cogent explanation of the legal and factual basis for their proposed actions, and in particular, Executive Order 13563 specifically directs that a proposed rule should be issued "only upon a reasoned determination that its benefits justify its costs."

It is obvious that Department of Energy (DOE) issued this proposed rule without even the basic information necessary to understand the consequences of the results it seeks to impose. In particular:

a. The proposed rule is based upon a materially inaccurate understanding of the nature, characteristics, and use of the products at issue, and upon key assumptions and factual assertions that are unsubstantiated, and in some cases, clearly false.

b. Consequently, the assessment of the purported benefits and costs of the proposed rule are entirely without basis.

Moreover, the notice itself fails to provide any adequate explanation of DOE's analysis. DOE has filed exactly two pages in the rulemaking record to support this rule – and those pages deal with whether the proposal must be subject to the provisions of the National Environmental

Protection Act. The proposal was published 41 days ago; as of today, the day of the hearing – a deadline for the regulated community in the process – and with only 19 more days until comments are due, the department's placing absolutely no backup materials – including, but not limited to, supporting data, technical support documents, and the economic impact analysis – in the rulemaking record is legally inadequate to satisfy the requirements of notice and comment rulemaking. Indeed, how can we adequately comment on DOE's analysis of regulatory impacts when no analysis is provided?

HPBA will continue its testimony at this hearing, bearing in mind that it is responding solely to the information in the *Federal Register* notice published on July 22nd. HPBA reserves its rights to submit comments on the rulemaking record when – or if – DOE's analyses are ever made available.

2. Given DOE's unexplained departure from its normal rulemaking procedures – as outlined in Appendix A to Subpart C of 10 C.F.R. Part 430 - there is no reasonable way for DOE to overcome the lack of information and analysis reflected in the proposed rule. The asserted factual basis of the proposed rule is so riddled with error that any final rule would have to rest on evidence and conclusions entirely different than those presented in the proposed rule.

3. There is simply no justification for this expedited rulemaking:

a. The proposed rule will not provide an adequate remedy for the problems created by the April 16, 2010, final rule.

b. The proposed rule will not eliminate the need to resolve HPBA's pending petition for review of the April 16, 2010, final rule.

c. DOE is simply rushing to adopt a rule that would be based on a *status quo ante* – the April 16, 2010, final rule – that is unlikely to survive judicial review.

d. By rushing through this rulemaking, DOE is denying the regulated community and the public their access to the department's data and analyses undergirding the proposal.

e. DOE created enormous problems for this industry by making a precipitous and uninformed decision to regulate decorative gas fireplaces as though they were direct heating equipment. DOE should not compound its error with a precipitous and uninformed decision to regulate gas log sets as direct heating equipment. DOE should terminate this rulemaking immediately.

B. At this point, HPBA will provide comments on the four questions posed by DOE in the proposal – under protest because of the total lack of background information – based on our limited understanding of DOE's thinking and reasoning. HPBA reserves the right to amend its testimony and comments when – or if – DOE files the background information that it is obligated to file as part of this rulemaking.

1. Direct Heating Equipment (DHE). Decorative vented gas fireplaces and gas log sets plainly are not DHE.

a. The statute specifically identifies the categories of products that are DHE, and provides specific energy efficiency standards for each of these categories. Both decorative gas fireplaces and gas log sets existed at the time of the amendments to the statute, and were not identified or regulated as DHE by the statute. The statute provides standards and procedures through which DOE can regulate consumer products not covered by the statute. DOE is circumventing the statutory process to regulate products that are not covered by the statute.

b. The proposal grossly mischaracterizes the nature of the products. DOE says that "hearth products are intended to be used either as only a heat source or as a heat source with aesthetic appeal" is patently false. NO hearth products at issue here are intended solely for heating. ALL of the products are all intended for their aesthetics; heater-rated products are intended for providing heat AND aesthetic appeal. I ask the department to produce a vented gas hearth product intended for heating but NOT aesthetic purposes. There is no such product.

c. DOE also states that DHE is not dependent on a manufacturer's principal intention in designing, manufacturing, or marketing the product. This interpretation is irrational in the context of efficiency regulation, because by definition, the efficiency of a product can be determined only by reference to how efficiently it serves its intended function. Similarly, DOE asserts that products can be classified by DHE simply because they provide "some amount of heat to the living space," but many products, such as kitchen stoves, refrigerators, incandescent light bulbs, circulating air fans, and desktop computers provide some amount of heat to the living space, but cannot be reasonably considered to be DHE.

2. Compliance Date. The proposed compliance dates are illegal and not achievable.

a. The proposal effectively makes the regulations applicable to gas log sets as of April 16, 2013. The April 16, 2010, final rule did NOT apply to gas log sets, so the April 2013 deadline does not apply.

b. The pilot light restriction would be a new energy conservation standard that could only take effect five years from the date of any final rule imposing it.

c. With respect to both decorative gas fireplaces and gas log sets, there is absolutely no basis provided by DOE for the July 1, 2014 effective date for its proposed pilot light restrictions. It is a completely arbitrary date.

d. Further, Executive Order 13563 emphasizes the need for agencies to consider the cumulative impact of regulations. DOE has already imposed burdensome regulations on the hearth industry – for heater-rated products – and is now adding regulations for gas log sets as well. The proposed effective date would be an issue for the industry due to an anticipated backlog at the few independent testing labs that certify hearth products. More products would have to be certified, and the current capacity of the labs is insufficient to absorb a significant increase in the number of products that have to be certified. Although labs can currently keep up with demand created by the U.S. Environmental Protection Agency's New Source Performance

Standards (NSPS) for wood-burning products and the fraction of gas appliances currently listed, the labs will simply not be able to handle the surge in requests that will occur when the new NSPS goes into effect and if more gas products have to be certified or recertified to comply with ne DOE regulations. As a result, some products will be significantly delayed in getting to market – which by itself could be a fatal blow to the future of a product (since, under the proposal, it could not be sold after July 2014 without a certification) and to the companies that make them. DOE has not taken into account this critical checkpoint, which by itself will be a huge impediment.

3. Proposed Exclusion.

a. DOE has no lawful basis to impose heating efficiency standards for decorative gas fireplaces and gas log sets. Accordingly, it has no basis to impose conditions for any exclusion from such requirements.

i. Since decorative gas fireplaces and gas log sets are not DHE, the products cannot reasonably be subjected to energy efficiency standards.

ii. Further, DOE cannot impose an energy efficiency standard for a product unless there is an applicable efficiency test method for the product – and there are no such tests for decorative gas fireplaces and gas log sets. The AFUE methodology is inapplicable to decorative gas fireplaces and gas log sets, and cannot even be conducted on a gas log set.

iii. DOE may not impose heating efficiency standards without determining that such standards are technologically feasible and economically justified, and DOE has NEVER made such a determination for decorative gas fireplaces or gas log sets. In fact, the heating efficiency standards are not achievable for gas log sets and many decorative gas fireplaces.

b. The terms of the proposed exclusion are unreasonable and unjustified.

i. There is a serious misstatement of the consequences of the requirement to list decorative gas fireplaces to Z21.50 and gas log sets to Z21.60. DOE states that, "DOE is not aware of any vented hearth products on the market that are not already certified to" one of these two standards. HPBA submitted information to DOE that there are decorative gas fireplaces that are NOT certified to Z21.50, the standard covering decorative gas fireplaces. Further, a substantial proportion of gas log sets are not and cannot be certified to Z21.60. The market – and products manufactured – is more complex than for decorative gas fireplaces, and there are products that are regulated to Z21.60, Z21.84, the "Radco" standard, and many are not certified at all. If the proposal is finalized, requiring Z21.60 for all gas log sets would result in match light systems, which do not use a standing pilot light and cannot be certified to Z21.60, being outlawed.

ii. There is no credible basis for the purported energy conservation benefits cited in the proposal.

- There is no basis provided regarding pilot light use. DOE makes the premise that 75% of pilot lights on decorative gas fireplaces are on all of the time –

and that none are off most or all of the time. DOE's assertion is baseless, unreasonable, and arbitrary. Information and experience in the industry indicate that DOE's assumption is absurdly high.

- DOE failed to fulfill its obligation to consider other less costly conservation alternatives to the prohibition of standing pilot lights. The department does not even appear to have considered the possibility that equal or even greater energy conservation benefits might be achieved by providing information to the public to make appropriate energy conservation decisions.

4. Impacts on Small Business Manufacturers

a. The proposed rule cites 14 small business manufacturers that will be adversely affected by the new regulation. The estimate is not credible and appears to be low by at least a factor of three. In addition, there are thousands of small-business retailers and distributors who would be adversely affected by the proposed regulation.

b. There is no reasoned assessment of costs and other impacts in the proposal or the record.

i. DOE assumes that there will be no regulatory burdens associated with certification to Z21.50 or Z21.60 – because it claims that all existing decorative products are already certified to those standards. This is a false assumption. There are a significant number of decorative vented hearth products that are not certified to either standard, including a substantial number of gas log sets that cannot be certified to Z21.60, and hence would be banned outright. For those companies that can certify their products to one of the standards – even if they have to recertify their products – the assumptions in the proposal are incorrectly low.

ii. DOE states that compliance costs for gas log sets "can be reasonably assumed to be largely the same as the compliance costs of small business manufacturers" of decorative gas fireplaces. There is no basis for this assumption. In fact, gas log sets are significantly different from decorative gas fireplaces – the market is more complex (in terms of geography, types of products, and certifications obtained), there are a variety of ignition systems, and the gas log sets are designed to be installed into preexisting wood-burning fireplaces, which create a host of installation and design problems not faced by decorative gas fireplaces.

DOE appears to have no understanding of these issues. The department states that it "attempted to contact" four manufacturers. DOE did not attempt to consult HPBA, and did not communicate with any gas log set manufacturers. HPBA would like to know the identity of those four manufacturers that DOE attempted to contact, how DOE attempted to contact them, and when those contacts were attempted.

iii. DOE also erroneously understates that economic impact on the hearth industry by stating that 80% of gas log sets already have electronic or other intermittent ignition systems. In fact, fewer than 5% of gas log sets have electronic ignition systems, and the balance is approximately evenly distributed between match light systems and standing pilot lights. DOE has not even identified match light systems as a major ignition system used in the industry. The

reality is that the overwhelming majority – 95% – of the gas log set market will have to be re-engineered and certified – and match light systems cannot be listed to the Z21.60 standard. As a result, there will be a substantial cost to the industry to come into compliance with the proposal.

iv. DOE states that "the elimination of standing pilot [lights] would only result in product conversion costs associated with testing and recertification to the ANSI safety standards." The assumption is unreasonable and incorrect. First, design changes will be needed, especially for gas log sets. If electronic ignition is required for gas log sets (whether or not it is feasible), over 90% of the products in the market would need to be redesigned. The costs of redesign – and all at once to meet an arbitrary compliance date – are not insignificant, especially for an industry that has not yet recovered from the recession. Second, there will be backlogs in getting product recertified, with the potential for many products not being able to reach market in time. Third, as discussed earlier, the costs of recertification are not insignificant. Fourth, elimination of standing pilot lights would in some cases have a significant effect on product pricing, causing reduction in sales, margins, or both. The assumption by DOE in the proposal is again a clear example of the department having not done the proper due diligence before it regulates an industry. Finally, DOE has not looked at the cumulative regulatory impacts and costs on small businesses, as the Executive Order directs it to do.

v. In considering the economic justification of any new requirements, DOE must consider the economic condition of the hearth industry. The industry is highly and directly dependent on the health of the housing market. Total product shipments for vented gas hearth products fell by a third from 2005 to 2007, and by two-thirds from 2005 to 2009. The industry's sales have not recovered from the weak 2009 levels. This industry is struggling to survive, and the potential elimination of a large market will result in even more job losses in this industry and the general economy.

C. Conclusion

When one testifies at a hearing, it is common practice for the person testifying to thank the agency for the opportunity to testify. I cannot thank DOE for that opportunity today. I cannot do so because DOE has not provided the regulated community and the public with the information they need – and that DOE is required by law to provide – to facilitate effective comment on the proposal. We have been put in the position of responding to "black boxes" and items "behind the curtain." This is not what the Administrative Procedure Act or DOE's own regulations governing rulemaking require. We again request that DOE terminate the rulemaking.

The Hearth, Patio & Barbecue Association (HPBA) is an international trade association first established in 1980 to represent and promote the interests of the hearth products industry in North America. In 2002, the Hearth Products Association (HPA) merged with the Barbecue Industry Association (BIA) to form HPBA. The association includes manufacturers, retailers, distributors, manufacturers' representatives, service and installation firms and other companies and individuals -- all having business interests in and related to the hearth, patio and barbecue products industries.

HPBA's members manufacture, import, distribute, sell, service and represent products that include factory-built fireplaces, gas log sets, inserts and accessories; wood, pellet, coal, gas and electric stoves; barbecues, grills, smokers and accessories; and patio furniture and accessories.