

Before the United States Department of Energy Washington D.C.

Proposed Determination of Miscellaneous Gas Products as a Covered Consumer Product

87 Fed. Reg. 6786 (February 7, 2022)

EERE-2021-BT-DET-0034

Comments of the Hearth, Patio & Barbecue Association

April 8, 2022

The Hearth, Patio & Barbecue Association ("HPBA") is the principal trade association representing the hearth products and barbecue industries in North America. HPBA's members include manufacturers, retailers, distributors, manufacturers' representatives, service installation firms, and other companies and individuals who have business interests related to the hearth, patio, and barbecue industries. HPBA's core purpose is to promote the welfare of the industries it serves, and one of its critical roles is to serve as an advocate representing the interests of these industries and of its individual members in matters involving the development or implementation of laws or regulations that affect them. HPBA's members include manufacturers of gas fireplaces, gas log sets, and other products that are the subject of the Department of Energy ("DOE") notice of proposed rulemaking entitled "Energy Conservation Program for Consumer Products: Proposed Determination of Miscellaneous Gas Products as a Covered Consumer Product," 87 Fed. Reg. 6786 (February 7, 2022) (the "Proposal").

HPBA respectfully requests that the Proposal be withdrawn and that DOE discontinue further regulatory efforts with respect to:

- Gas fireplaces of any description, including fireplace inserts and freestanding stoves;
- Gas log sets of any description;
- Any other outdoor gas products designed to have visual appeal (including fire pits, fire tables, tiki torches, patio heaters that double as outdoor lighting or flame art, and pure objects of flame art); and
- Strictly utilitarian portable patio heaters.¹

A determination of coverage for such products is neither "necessary" nor "appropriate" within the meaning of 42 U.S.C. § 6292(b)(1)(A) because there is no reasonable potential that efficiency standards for them would provide significant energy savings or be economically justified. Nor is it "appropriate" for DOE to

¹ HPBA does not believe that coverage is appropriate for any of the products that are the subject of the Proposal but has limited information concerning strictly utilitarian patio heaters (particularly non-portable infrared heaters).

divert attention from its long list of overdue statutorily-mandated regulatory activity to engage in a completely discretionary pursuit of products that – by their very nature and manner of use – are inherently unsuitable targets for DOE efficiency regulation. These products have previously been targeted for regulation as a result of regulatory accident, soft-muscle reflex, and inertia, and the Proposal provides no basis to conclude that coverage of them is justified. The Proposal simply asserts that the broad and diverse range of products at issue collectively consume enough gas to make them *legally permissible* targets for regulation and assumes that coverage is warranted. In fact, none of these products are covered products, none have ever been determined to be covered products, and none should be. Rather than issuing a final determination of coverage for any of these products, HPBA requests that DOE remove them its efficiency regulation agenda once and for all.

If DOE believes that coverage might be appropriate for any of the products at issue, it should withdraw the Proposal and convene a public meeting to provide an opportunity for dialogue to inform its consideration of the relevant issues.

Introduction and Regulatory Background

The premise that DOE efficiency regulation might be appropriate for the products at issue developed largely as a result of historical accident, and it is important to understand how that history unfolded and how it contributed to

counter-factual narratives and assumptions that have significantly distorted DOE's analysis of the relevant issues.

The first relevant regulatory activity started as an effort to develop heating efficiency standards for "heater-rated" vented gas fireplaces. This effort was initiated largely as the result of an unfortunate miscalculation by fireplace manufacturers believing that reasonable DOE efficiency standards would be beneficial in the promotion of such products. The resulting rulemaking focused on the development of heating efficiency standards for vented gas "fireplace heaters" (*i.e.*, products certified to the ANSI Z21.88 standard).² To assert jurisdiction over those products DOE characterized them as a species of "direct heating equipment" ("DHE"), a category of "covered products" identified by statute as being subject to appliance efficiency regulation. This characterization went unquestioned during the rulemaking proceeding, and the rulemaking proceeded on the premise that vented gas fireplace heaters were DHE and "decorative" vented gas fireplaces (i.e., products certified to the ANSI Z21.50 standard) were not DHE and thus were not a subject of the rulemaking proceeding. Accordingly – for the entire rule development through the issuance of a proposed rule in December of 2009 – DOE's information collection efforts and regulatory analysis were limited to vented gas fireplace heaters. Nevertheless, the resulting final rule, published on

² 74 Fed. Reg. 65852, 65867 (December 11, 2009).

April 16, 2010,³ covered *all vented gas fireplaces*, including decorative vented gas fireplaces certified to the ANSI Z21.50 standard. This change was made without any additional notice or opportunity for comment, and without DOE having collected even the minimum information required to identify the issues relevant to "decorative" vented gas fireplaces.

The 2010 final rule was based on the premise that *all vented gas fireplaces are DHE*. DOE achieved this result by excising the term "fireplace heater" from the regulatory definition of the products it was regulating (which it called "vented hearth heaters") and by reinterpreting descriptive text it had borrowed from the ANSI definition of products covered by the ANSI Z21.88 standard to *include* products it had been designed to *exclude*: decorative vented gas fireplaces.⁴ Having defined all vented gas fireplaces as "vented hearth heaters" subject to the heating efficiency standards it had developed for real vented gas fireplace heaters, DOE went on to mischaracterize decorative gas fireplaces as products that generate little or no heat in order to justify defining them as a category of products limited to a maximum energy input of only 9,000 Btu/Hr.⁵ Because it takes more than 9,000 Btu/Hr to produce a fire suitable for a fireplace, the result was that all vented

³ 75 Fed. Reg. 20112 (April 16, 2010).

⁴ See 75 Fed. Reg. at 20234; see 74 Fed. Reg. 65852 at 65,867 (December 11, 2009) (quoting the ANSI Z21.88 fireplace heater definition).

⁵ 75 Fed. Reg. at 20129 (April 16, 2010).

gas fireplaces were reclassified as heaters subject to heating efficiency standards and "decorative" fireplaces were effectively banned. The intended result was to deprive consumers fireplaces that burn any substantial amount of gas for purposes *other than* utilitarian heating. 75 Fed. Reg. at 20129. At that time, an estimated 70% of all vented gas fireplaces were decorative vented gas fireplaces, not one of which had a maximum energy input of 9,000 Btu/Hr or less. HPBA had no choice but to file suit to challenge the final rule.

In response to the challenge to its final rule, DOE issued a new proposed rule in July of 2011.⁶ DOE proposed to eliminate the input restriction that effectively banned decorative vented gas fireplaces, but it continued to characterize those products as DHE that – absent a definitional "exemption" – were subject to the heating efficiency standards imposed by the 2010 final rule. DOE took this position so that it could regulate decorative vented gas fireplaces through requirements imposed as conditions built into its definition of the products that would be exempt from the heating efficiency standards. These requirements included proposed labelling requirements and a ban on continuous pilot lights.⁷ However – having found a convenient way to impose a ban on pilot lights without

⁶ This proposed rule first appeared as an attachment to a DOE motion seeking to have HPBA's challenge to the 2010 rule held in abeyance pending further rulemaking and was subsequently published at 76 Fed. Reg. 43941 (July 22, 2011).

⁷ 76 Fed. Reg. at 43941, 43943, and 43953.

the need to justify it on the merits – DOE expanded the universe of products at issue to include another category of products that had never been the subject of data collection or analysis: vented gas log sets. To accomplish this, DOE took the position that its "vented hearth heater" definition could be interpreted to include vented gas log sets, and announced that this made such products retroactively subject to the heating efficiency standards imposed by its 2010 rule.⁸ Everyone knew that gas log sets had never been considered in the development of the 2010 rule and that the heating efficiency standards had never been – and could not be – justified for vented gas log sets. DOE's position was simply that the standards imposed in 2010 were applicable to any product arguably covered by its abstract definitional text, not just to the products for which the standards had been intended and justified. The point of this exercise was to create the the need to "exempt" vented gas log sets from the definition of of products subject to those standards. Having done that, DOE proposed to regulate gas log sets by conditioning their "exemption" from the heating efficiency standards on compliance with other requirements, including a ban on continuous pilot lights.⁹

DOE did not even attempt to justify its proposed bans on continuous pilot lights as energy conservation standards. Instead, it argued that it was merely

⁸ 76 Fed. Reg. at 43943, 43945 and 43948.

⁹ 76 Fed. Reg. at 43943, 43953.

proposing to "clarify" the applicability of the previously-adopted heating efficiency standards and to provide relief from those standards on what amounted to a "take it or leave it" basis. Accordingly, DOE's proposed ban on continuous pilot lights was issued without any attempt to justify it as a standard, and with no technical support document at all.

Despite understandably vigorous adverse public comment, DOE published a final rule less than four months later, in November 2011.¹⁰ The only significant change from the proposed rule was that DOE recognized that it did not have sufficient information about vented gas log sets to know how to regulate them; as a result, the final rule defined vented gas log sets as "vented hearth heaters" that would be subject to heating efficiency standards in the absence of an exemption, and adopted an "exemption" to which it could later attach whatever conditions it liked.¹¹ HPBA filed suit challenging this final rule as well.

HPBA's challenges to the 2010 and 2011 rules were consolidated before the United States Court of Appeals for the District of Columbia Circuit, and both rules were found unlawful and vacated in *HPBA v. DOE.*, 706 F.3d 499 (D.C. Cir. 2013). Among other things, the court found that DOE had acted unreasonably in characterizing the products at issue as DHE and that DOE would not even arguably

¹⁰ 76 Fed. Reg. 71836 (November 18, 2011)

¹¹ 76 Fed. Reg. at 71839-40 and 71846.

have the authority to regulate decorative vented gas fireplaces or vented gas log sets in the absence of a "coverage determination" designating them as "covered products" by rule. The court did not rule on the issue of whether DOE could have regulated vented gas fireplace heaters on the theory that they were DHE, because that issue was not before the court: HPBA had only challenged the heating efficiency standards as they applied to products *other than* vented gas fireplace heaters. Nevertheless – in view of the magnitude of DOE's errors – the Court concluded that no part of DOE's effort to regulate gas fireplaces or log sets could stand and vacated DOE's entire "vented hearth heater" definition.

DOE's response to this setback was to propose a "coverage determination" for "hearth products" in late 2013.¹² Having raised the stakes from fireplace heaters to all vented gas fireplaces in 2010 and having raised them again to include vented gas log sets in 2011, DOE went all out by proposing coverage for all "hearth products," a term for which it proposed an almost meaningless and openended definition. The intent – as one DOE official admitted – was to cast a broad enough net to cover "whatever it is that you guys manufacture." Despite the obvious objection that this proposed definition was too uncertain in scope to permit the analysis required to support a coverage determination or to inform interested

¹² 78 Fed. Reg. 79638 (December 31, 2013).

parties of the range of products at issue, DOE issued proposed standards for "hearth products" before it had even clarified the range of products at issue.¹³

The standards proposed in 2015 included the same sort of requirements DOE had previously sought to impose by definitional legerdemain, including a ban on continuous pilot lights. DOE had never previously attempted to gather the information or conduct the analysis required to justify such requirements for vented gas fireplaces or gas log sets, let alone any of the other products potentially at issue. Despite this fact, DOE elected to skip the entire pre-proposal rule development process specified by its own procedural rules and jumped straight to a proposed rule seeking to impose preconceived requirements on a still unspecified universe of products. Comments filed in response to that proposal represented the first (and only substantial) exchange of information on many of the issues presented and demonstrated that the analysis supporting the proposed rule was based almost entirely on inadequate data, arbitrary assumptions, and a lack of understanding of the products and issues involved.14

DOE had seventeen months before the end of the Obama Administration to proceed with final rules based on its "hearth products" proposals and elected not to

¹³ 80 Fed. Reg. 7082 (February 9, 2015).

¹⁴ See HPBA's May 11, 2015 submission in Docket No. EERE-2014-BT-STD-0036 ("HPBA's May 11, 2015 Comments"), a copy of which is provided as Attachment A to these comments.

do so. That decision was warranted, based not only on the extensive adverse comment DOE received, but on constructive discussions between HPBA and DOE that developed over the course of 2016. Subsequently, the Trump Administration formally withdrew those proposals, which appears to have created the impression that DOE's failure to pursue them was the product of a policy decision by an administration actively hostile to efficiency regulation rather than a merits-based response to comment and subsequent dialogue.

Unfortunately, the Proposal suffers from many of the same basic defects identified in the comments HPBA submitted in response to DOE's 2013 and 2015 proposals. It proceeds on the premise that coverage is a matter of abstract definitional text and proposes regulatory definitions susceptible to the same kind of definitional gamesmanship that occurred in the past. It employs counter-factual narratives that are relics of historic arguments that should have no continuing relevance. It is undermined by some of the same fundamental factual errors that undermined DOE's previous rulemaking proceedings. It ignores material differences between the various products at issue and erroneously assumes that information specific to some products is equally relevant to others. It incorrectly assumes – regardless of the product involved – that all continuous pilot lights are the same and that eliminating continuous pilots would provide meaningful energy

savings without unwarranted adverse impacts on product cost, performance, visual appeal, or safety.

HPBA had hoped that any renewal of interest in potential regulation of the kinds of products at issue would commence with a resumption of constructive discussion rather than a return to the unilateral approach of DOE's earlier rulemaking proceedings. Executive Order 13563 directs agencies to ensure that their regulations are "based upon an open exchange of information and perspectives" and to "seek the views of those who are likely to be affected" by a rule before a proposed rule is issued, 76 Fed. Reg. at 3821- 22, and that is the approach DOE should have taken here.

The Proposal is obviously problematic when viewed in the context of the relevant regulatory history. DOE nevertheless chose to issue it out of the blue and has since rebuffed HPBA's repeated requests for an opportunity to engage in constructive dialogue before written comment is due. Indeed, DOE has refused even to provide an extension of the comment period to allow HPBA the opportunity to review the basis for the Proposal in detail and gather useful data to provide in response.

Under these circumstances, HPBA has no alternative but to respond with written comment presenting arguments addressing issues that – in many cases – might have been resolved relatively gracefully if an opportunity for a constructive

exchange of information and ideas had been provided. Despite the resulting adversarial nature of these comments, it is HPBA's hope that – to the extent DOE gives further consideration to potential coverage for any of the products at issue – it will be possible to have the open exchange of information and ideas required to identify and efficiently resolve the relevant issues going forward.

I. <u>The Proposal is Based Upon a Faulty Understanding of the</u> Significance of – and Requirements for – Coverage Determinations.

The Proposal appears to view the issue of coverage as an insignificant administrative step on the way to inevitable test procedure and standards development rulemaking. In particular, the Proposal proceeds on the premise that a coverage determination can be used as a net to capture a broad range of materially different products, leaving all the details as to whether or how it might make sense to regulate such products to be hashed out in subsequent proceedings. This reflects a profound misunderstanding of the purposes the requirement for coverage determinations serve.

Congress determined that mandatory energy conservation standards are appropriate for certain specific consumer products – such as water heaters and furnaces – and identified those products by statute. See 42 U.S.C. §6292(a). However, Congress recognized that the endless grind of DOE efficiency regulation is not appropriate for all consumer products, and that there are products for which regulation is unwarranted. Accordingly, DOE was not given the authority to

subject additional products to the full weight of EPCA regulation indiscriminately. Instead, EPCA specifies a minimum household use restriction for the obvious purpose of ensuring that DOE does not use the elephant gun of efficiency regulation to hunt gnats. 42 U.S.C. § 6292(b)(1)(B). It also specifies that DOE should only consider the need to "cover" an additional product if it determines that it is "necessary" or "appropriate" to do so to carry out EPCA's statutory purpose. 42 U.S.C. § 6292(b)(1)(A). In addition, EPCA specifies circumstances in which the regulation of additional products is categorically *unwarranted*, and prohibits DOE from subjecting additional products to energy conservation standards unless it determines that none of those circumstances exist. 42 U.S.C. § 6295(1)(1). If DOE determines that those circumstances do not exist, it "may" impose energy conservation standards but is not required to do so; instead, it must exercise appropriate discretion in determining whether the full weight of EPCA regulation is warranted. Id. DOE's apparent presumption that it should issue indiscriminate coverage determinations to target as many products as possible is flatly inconsistent with the statutory scheme.

A coverage determination – in and of itself – is a consequential regulatory action, particularly for manufacturers that – like the overwhelming majority of HPBA's members – are small businesses not already subject to the overwhelming demands of DOE's regulatory scheme. The analysis required to develop and

justify test procedures and energy conservation standards under the Energy Policy and Conservation Act ("EPCA") is both extensive and information-intensive. As a result, the rule development process is a substantial burden in itself, requiring a substantial investment of resources by all concerned. Moreover, a coverage determination effectively commits both the Department and the manufacturers of the new covered product to an ongoing cycle of regulatory activity in which the need for standards – or ever more stringent standards – must be revisited over and over again.¹⁵ One of the core purposes of the requirement for coverage determinations is to ensure that manufacturers are not subjected to the considerable burdens of DOE rulemaking unnecessarily. Accordingly, a coverage determination must provide a reasonable basis to conclude that a product is worth regulating and must identify that product with sufficient clarity to enable manufacturers to determine whether they can or cannot ignore subsequent test procedure and standards rulemaking. The Proposal does neither.

II. <u>Coverage Determinations Must be Product-Specific.</u>

As the relevant regulatory history demonstrates, one of the core problems with DOE's previous efforts to regulate the products at issue was that DOE failed

¹⁵ 42 U.S.C. §6295(m) requires DOE to consider more stringent standards and publish a determination with respect to further regulation within six years of the issuance of any standard. Because DOE's proposed standard would take effect five years after they are issued, consideration of further regulation would likely commence before the proposed standard even takes effect.

to recognize that coverage extends to specific *products*, not to the arguable limits of abstract definitions. If DOE believes that coverage of a currently unregulated product is warranted, it needs to identify that product, demonstrate that the product is not "gnat" precluded from coverage under 42 U.S.C. § 6292(b)(1)(B), and explain why regulation of that product is "necessary" or "appropriate" to carry out EPCA's purposes under 42 U.S.C. § 6292(b)(1)(A).

DOE cannot avoid the need for a coverage determination by "interpreting" a category of currently regulated products to include previously unregulated products. Similarly, it cannot *justify* coverage for one product and *assert* coverage over another; either coverage for a particular product was justified – and can be legitimately asserted – or not. For this reason, the scope of coverage determinations cannot be defined in abstract definitional terms: it is defined by the scope of the justification for a coverage determination. If there is a subsequent question as to whether an otherwise unregulated product is within the scope of a previous coverage determination, the question cannot be whether that product "is covered" in the sense that it is arguably covered by a definitional term; it must be whether the product "was covered" in the sense that it is was, in fact, a product for which coverage was justified. In short, the question of whether a particular product is a "covered product" is fundamentally a question of fact rather than

linguistic interpretation. This basic principle has several important implications for purposes of the Proposal.

A. <u>DOE Should Abandon Its Definition-Based Approach to Coverage</u> <u>Determinations.</u>

HPBA is justifiably paranoid about DOE's focus on definitional text and urges DOE to change its approach.

Definitions can sometimes serve a useful purpose, but it is a mistake to assume that they are necessary and an even bigger mistake to ignore their potential to cause more problems than they solve. As a simple example, an extremely precise and unambiguous descriptor for a vented gas fireplace heater is "a vented gas product certified to the ANSI Z21.88 standard." No knowledge or incorporation of the standards referred to is necessary, because there is only one simple, binary question: is the product certified to the standard or not? To answer that question for any individual product, one need only look at its rating plate. It is important to recognize that any addition to this simple descriptor would detract from its clarity. Similarly, an attempt to state this descriptor differently – for example, by relying on the text of the ANSI definition of products subject to the Z21.88 standard – would be less clear and potentially subject interpretation (or reinterpretation, as occurred previously). Best of all, the descriptor suggested does not require any definition; it could simply serve as the name of the product: "Vented gas products certified to the ANSI Z21.88 standard."

What would work best depends on the product involved; an approach based on product certification may or may not make sense. However, clarity and precision is required and HPBA is prepared to work with DOE to ensure that it is achievable.

B. <u>DOE Can Only Make and Justify Coverage Determinations for Specific</u> <u>Products.</u>

DOE can only issue a coverage determination for a product if it demonstrates that coverage of the product is not precluded from coverage under 42 U.S.C. § 6292(b)(1)(B) and that there is a reasonable basis to conclude that regulation of that product would be sufficiently productive to make coverage "necessary" or "appropriate" to carry out EPCA's purposes under 42 U.S.C. § 6292(b)(1)(A). These determinations inherently require product-specific consideration of the issues. Otherwise, products not reasonably susceptible to EPCA regulation could be swept into coverage along with products that are, and the gas usage of different products could be combined to circumvent the prohibition on gnat-hunting embodied in 42 U.S.C. §6292(b)(1)(B), results Congress plainly would not have sanctioned. *See HPBA v. DOE*, 706 F.3d 499, 504-05 (D.C. Cir. 2013).

It follows that efforts to classify different products as a single "covered product" are inherently problematic and – at a minimum – serve to confound the regulatory analysis required to support coverage determinations. In particular,

DOE must ensure that it does not rely on data or perceived justifications for one product as a basis to assert coverage over materially different products, as the Proposal clearly does. For example, the Proposal claims that "71 percent of fireplaces and log sets use a standing pilot, 18 percent use intermittent ignition, and 12 percent are match lit." 87 Fed. Reg. at 6791. These figures are erroneous for several reasons, but the fact that they purport to address both fireplaces and log sets is – by itself – sufficient to render them useless. The problem – as DOE should already be aware – is that gas fireplaces and log sets are so materially different from each other that *combined ignition system data for both products would be wildly inaccurate as applied to either*. The only way to avoid problems of this kind – and to produce any credible regulatory analysis – is to identify each of the specific products of interest and consider each individually.

III. The Proposal is Undermined by Serious Legal and Factual Errors.

DOE's departure from the basic principles discussed above undermine virtually every aspect of the Proposal, including its initial premise that there are some gas fireplaces that are already covered products.

A. No Gas Fireplace Products Qualify as DHE.

The Proposal asserts that there are some gas fireplaces that are already covered products because they qualify as DHE. This is not an arguably permissible interpretation of EPCA: it is a misstatement of historical fact and a

transparent attempt to evade the requirement for a coverage determination. It is surprising that the Proposal claimed otherwise, for at least two reasons. First, because – to the extent EPCA regulation of the fireplace products supposedly qualifying as DHE is warranted – it should be easy for DOE to make a coverage determination for them. Second, because the products in question plainly are not DHE and do not even resemble any of the products that are.

When Congress subjected DHE to regulation, it specified the particular products that are DHE, specified an efficiency descriptor and minimum efficiency standards for those products, and banned the sale of all DHE not meeting the specified standards as of January 1, 1990. 42 U.S.C. §§ 6292(a)(9), 6291(22)(A) and 6295(e)(3). The specified products were limited to strictly utilitarian gas space heaters, consisting of sixteen specific categories of "wall," "floor" and "room" heaters, none of which include fireplaces of any kind. 42 U.S.C. § 6295(e)(3). The specified efficiency descriptor for DHE is heating efficiency as defined by a test method designed for utilitarian heating appliances that are turned on and off (and up and down) strictly in response to heating needs, which gas fireplaces are not. 42 U.S.C. §§ 6292(a)(9). The statute gives DOE no authority to create additional categories of DHE: to the contrary, DOE's only statutory charge with respect to DHE is to determine whether the standards for the sixteen specified categories of DHE should be amended. 42 U.S.C. §§ 6295(e)(3)-(e)(4).

As the Proposal acknowledges, gas fireplaces are currently unregulated products that do not fall into any of the 16 categories of DHE specified by statute. DOE has no statutory charge to create additional categories of DHE, and – if any fireplaces were *already* DHE – their sale would be prohibited by the plain language of the statute. 42 U.S.C. § 6295(e)(3). In short, the claim that any gas fireplaces qualify as DHE – and are thus already "covered products" – makes no sense at all. Any interpretation to the contrary would serve only to enable DOE to evade the requirement to make a coverage determination, and it is axiomatic that an agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. American Trucking Associations*, 531 U.S. 457, 485 (2001); *see e.g.*, *HPBA v. DOE*, 706 F.3d 499, 504-07 (D.C. Cir. 2013).

If DOE believes that efficiency regulation of any gas fireplaces is warranted, it must make a lawful coverage determination before can assert jurisdiction over them. The only reason the Court in *HPBA v. DOE* did not say so is that – as already discussed – it did not have that issue before it.

B. The Proposed Coverage Determination is Impermissible in Form.

DOE proposes coverage for "miscellaneous gas products," a category of products consisting of "decorative hearth products" and "outdoor heaters." 87 Fed. Reg. 6788. The decorative hearth products" category includes "for example, gas

log sets, gas fire pits, gas stoves, and gas fireplace inserts," presumably other unspecified products not identified as examples, and extends to both indoor and outdoor products. *Id*. The Proposal would define "decorative hearth product" as "a gas-fired appliance that:

- Simulates as solid fuel fireplace or presents a flame pattern;
- Includes products designed for indoor use, outdoor use, or either indoor or outdoor use;
- Is not designed to be operated with a thermostat;
- For products designed for indoor use, is not designed to provide space heating to the space in which it is installed; and
- For products designed for outdoor use, is not designed to provide heat proximate to the unit.

87 Fed. Reg. 6790. The Proposal describes outdoor heaters as products "used for heating outdoor areas," and would define "outdoor heater" as "a gas-fired appliance designed for use in outdoor spaces only, and which is designed to provide heat proximate to the unit."

One of the more obvious problems is that neither of these defined "products" is an identifiable product. Instead, both include a mishmash of materially different products that bear so little resemblance to one another that they cannot reasonably be treated as a single product for purposes of regulatory analysis or coverage. For example, the "decorative hearth product" category appears to include vented gas fireplaces, indoor log sets, and outdoor products such as fire tables, each of which is a different product that serves different consumer needs and is subject to materially different design requirements and constraints; similarly, strictly utilitarian patio heaters are materially different than patio heaters designed to provide lighting and visual appeal, and portable infrared patio heaters are materially different products than non-portable infrared patio heaters.

When Congress designated "covered products," it designated products, not amorphous categories of products. *See* 42 U.S.C. § 6292(a). For example, it did not designate "laundry equipment" as a covered product; it made clothes washers and clothes dryers separate covered products. Similarly, it did not designate "heating equipment" as a covered product; it designated furnaces, water heaters, pool heaters, and direct heating equipment as separate covered products. Nor did it designate "cooling equipment" as a single covered product; it designated room air conditioners as one "covered product" and central air conditioners and air conditioning heat pumps as others. *See* 42 U.S.C. §6292(a). It defies credulity to suggest that Congress – in giving DOE the authority to classify additional consumer products as "covered products" – authorized it to approach the classification of "covered products" in a completely different way.

The Proposal is fatally flawed for all of the reasons explained in Section II of these comments and should be withdrawn.

IV. <u>There is No Basis to Conclude that Coverage of Any of the Products</u> <u>at Issue is Warranted.</u>

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

One of the greatest challenges for analysis of the products at issue is that most of the basic information required for regulatory analysis is lacking. There are a number of reasons for this, one of which is that efforts to regulate gas fireplace products only go back a short span of years and have commonly consisted of hasty efforts to justify preconceived requirements without any of the front-end data collection and analysis that is normally the first step in rule development. Another is that the products at issue are complicated, the issues they raise are complicated, and the pace of relevant technological and market changes has been such that information concerning the prevalence of continuous pilot lights – for example – quickly becomes outdated.

HPBA has not had sufficient opportunity to review the basis for DOE's factual claims in detail or to identify and attempt to gather useful data. However, it

is obvious by inspection that the Proposal is based on inaccurate information, inadequate data, and arbitrary assumptions.

The Proposal – like DOE's 2015 "Hearth Products" proposal – is based on a serious misunderstanding of the basic facts concerning ignition systems. This much is clear from the inexplicable recitation that "ignition systems in hearth products are typically either standing pilots, where the pilot flame is continuously lit unless turned off by the user; intermittent systems, where the pilot is lit using an electric starter only when there is a need for a flame; or match lit, when the main burner is lit by a match." 87 Fed. Reg. at 6791. "Inexplicable" because - as HPBA explained in response to DOE's 2015 proposal – this basic understanding is incorrect: among other things, it omits the important category of "on demand" pilots, which were developed specifically for gas fireplace products as a means for eliminating standing (or "continuous") pilot lights.¹⁶ "On-Demand" pilots were already important in 2015 and have become far more so since then. As a result, DOE's breakdown of ignition systems for "gas fireplaces and log sets" fails to account (or incorrectly accounts) for what is now one of the most common of the relevant ignition systems. Unfortunately, it is hard to tell exactly what DOE did wrong, because (as already discussed) its breakdown conflates two materially

¹⁶ See HPBA's May 15, 2015 Comments at 14-15.

different categories of products, producing figures that would not be expected to be representative of the breakdown of ignition systems for either category of products.

Putting the basic lack of credible data aside, the most obvious inadequacy of the Proposal is that it identifies no basis to conclude that coverage of the products in question is necessary or appropriate. HPBA believes that no such basis exists, as explained below.

V. <u>Coverage of the Products at Issue is Not Necessary or Appropriate</u>

The premise any of the products at issue warrant regulation started with the false premise that it would be appropriate to regulate fireplace heaters as direct heating equipment and related notions that there is something wrong with the fact that decorative fireplaces produce heat. These ideas – by happenstance – led to the unrelated presumption that a global ban on pilot lights would be a good idea.

HPBA has addressed the pilot light issues in several previous submissions, explaining in detail that there is no basis for DOE's presumption that there is a continuous pilot light "problem" to be addressed or that significant energy savings could be had by "addressing" it.¹⁷ DOE's understanding of the relevant products and ignition systems was fundamentally flawed in 2015¹⁸ and is fundamentally

¹⁷ See HPBA's May 11, 2015 Comments at 6-11.

¹⁸ See HPBA's May 11, 2015 Comments at 11-16.

flawed now.¹⁹ In any event, there are obvious reasons to question DOE's authority to impose the kind of global ban on continuous pilots that it appears to be contemplating, particularly in view of some of the product utility and safety issues involved.²⁰

HPBA has more recently addressed many of these same issues – along with the issues with respect to heating efficiency standards – in a response to a California Energy Commission ("CEC") proceeding in 2019. While HPBA has not had the opportunity to update these materials, it has incorporated relevant content below.

A. <u>Heating Efficiency Standards are Inappropriate for Gas Fireplace</u> <u>Products.</u>

Heating efficiency standards are not warranted for any of the products at issue. The reason for this can be stated in simple terms: the purpose of heating efficiency standards is to make heating products better (or at least more efficient) heaters, and heating efficiency standards for vented gas fireplaces would not make such products better or more efficient gas fireplaces. Instead, heating efficiency standards for vented gas fireplaces would limit range of available products in a way that would leave many consumers without vented gas fireplaces appropriate to

¹⁹ See e.g., 87 Fed. Reg. at 6791 (getting the range of available ignition systems wrong).

²⁰ See HPBA's May 11, 2015 Comments at 20-21; see also id. at 30-31 (product utility).

their needs. To understand why this is the case, it is important to start with a clear understanding of what a fireplace is.

Fireplaces are architectural features that add to the appeal and market value of a home whether or not there is ever a fire in them. Many consumers purchase fireplaces (or homes with fireplaces) for those reasons alone, with the result that a substantial percentage of fireplaces see little or no active use.²¹ The other defining characteristic of fireplaces is that – when they are in use – they provide a source of enjoyment that has unique aesthetic, social, and cultural appeal: the beauty and warmth (both literal and figurative) of a fire in a fireplace. While fireplaces can have real heating utility, their core appeal lies not in their heating utility per se, but in the unique combination of features that make a fireplace a fireplace. That is why there is very little regional correlation between fireplace ownership and heating needs, and why the percentage of homes that have fireplaces is actually higher in San Diego, California than it is in either Chicago, Illinois or Buffalo, New York.²²

²¹ J. Houck, Residential Decorative Gas Fireplace Usage Characteristics (2010). This report was submitted with HPBA's November 15, 2010 comments in Docket No. EERE-2009BT-TP-0013, available at: <u>https://www.regulations.gov/document?D=EERE-2009-BT-TP-00130012</u>

²² J. Houck, Residential Decorative Gas Fireplace Usage Characteristics (2010) at pp. 2-4. This report was submitted with HPBA's November 15, 2010 comments in Docket No. EERE-2009BT-TP-0013, available at: <u>https://www.regulations.gov/document?D=EERE-2009-BT-TP-00130012</u>

Vented gas fireplaces are *fireplaces*. They may be preferred to solid fuel fireplaces for any of a variety of reasons: they can be cleaner and more convenient than traditional, open-faced solid fuel fireplaces and direct-vent fireplaces conserve energy – even if they are never used – simply by eliminating thermal exchange through the "hole in the house" that traditional fireplaces and chimneys represent. In addition, vented gas fireplaces do not produce the particulate emissions characteristic of many older solid fuel fireplaces, which makes them desirable alternatives from an air quality standpoint – particularly when vented gas products are used to change out older appliances. Vented gas fireplaces may also be a preferred alternative in the homes of individuals with respiratory problems such as asthma, and in jurisdictions in which air quality concerns have resulted in significant restrictions on the sale or use of solid fuel fireplaces.

It is true that vented gas fireplaces can have significant heating utility, and vented gas fireplace heaters are specifically marketed as products appropriate for heating use. Such products can be very effective when used as part of a zone heating strategy to limit reliance on central heating systems, and many consumers choose vented gas fireplace heaters because they want products that would be suitable for such use. However, fewer consumers regularly use their fireplace heaters for utilitarian heating purposes, and very few do so *exclusively*. For consumers interested *solely* in utilitarian space heating, there are other space heater

options that are both less costly and better tailored to strictly utilitarian heating use. Consumers only choose to invest in gas fireplaces – including vented gas fireplace heaters – if they want a *fireplace*: the kind of product that can be enjoyed during family gatherings and other social occasions, on romantic evenings, or when someone is simply curled up for the evening with a good book. Products that generate as much heat as possible so as to minimize main burner operation are obviously ill-suited to such use. Consequently, there is little or no demand for fireplaces that generate too much heat to permit a fireplace to be used as a *fireplace*, as high heating efficiency often would.²³ That's why the market for fireplaces with very high heating efficiency is small; as one HPBA member discovered, it is possible to make fireplaces that use condensing technology to reach very high levels of heating efficiency, it just isn't possible to sell very many such products.²⁴ By contrast, there is a market for very high-efficiency space heaters. In fact, Empire Comfort Systems, Inc. - the same HPBA member that found the market insufficient to sustain production of condensing gas fireplaces continues to produce condensing room heaters, which are strictly utilitarian heating products.

²³ HPBA had previously illustrated this point providing an example in which a fireplace with a heating efficiency of 67% would produce too much heat to permit more than relatively fleeting fireplace use.

²⁴ One HPBA member actually produced such fireplaces, but ultimately discontinued production due to lack of sales.

One of the inherent problems with heating efficiency standards for gas fireplaces stems from the fact that appearance is a critical concern in the selection of vented gas fireplaces, whether or not a fireplace is intended for any significant heating use. Because fireplaces are architectural features, they must provide an appropriate visual fit for the rooms in which they are installed – both as a matter of style and physical scale – and they must be capable of producing a volume of flame that will "look right" in relation to the size of the fireplace and the size of the room itself. Because flame volume is essentially proportional to Btu input, these important visual considerations effectively define a range of Btu inputs that would - with variations based on differences in individual taste - provide the appropriate visual "fit" for any given installation. Heating efficiency standards are problematic because – for fireplaces of any given size – increases in heating efficiency produce corresponding increases in heat output that would be excessive for some of the installations for which fireplaces of that size are desired. In fact, even moderately high heating efficiency standards would substantially limit the range of installations in which it would be reasonable to put "normal-sized" gas fireplaces into "normal-sized" rooms. In short, the percentage of fireplace heaters with very high heating efficiencies is not small because consumers are being ill-served by the market; it is small because the market for such products is small.

To illustrate the problem, consider what the proposed heating efficiency standard requiring a Fireplace Efficiency ("FE") of 70% would do to the market for gas fireplaces with an energy input of 35,000 Btu/Hr.²⁵ At a heating efficiency of 70%, such a product would have a nominal heat output of 24,500 Btu/Hr, and basic "rule-of-thumb" calculations are sufficient to show that this would be far too much heat output for installations in average-sized homes anywhere in the State of California.

For example, one basic formula for determining the "ideal fireplace heat output" for rooms of a given size²⁶ produces the following results for homes in the range of climate zones that exist in California:

Room Area	Ceiling Height	"Ideal" Gas Fireplace
(Square Feet)	(Feet)	Heat Output (Btu/Hr)
300	8	2,400-9,600
400	9	3,600-14,400
500	91/2	4,750-19,000
600	10	6,000-24,000

Another "rule of thumb" tool (a "Btu calculator")²⁷ employs a different approach

(accounting for differences in home insulation but not differences in climate zone)

²⁵ The CEC was considering a standard of 70% FE and specified 35,000 Btu/Hr. as the average input of fireplaces that would be subject to the standard.

²⁶ Under this formula, the "ideal heat output" for a gas fireplace is equal to the square footage of the room in which it is to be installed multiplied by the ceiling height (in feet) and a factor of one to four based on the applicable climate zones in California. *See* https://www.thisoldhouse.com/ideas/all-about-gas-fireplaces

²⁷ <u>https://www.northlineexpress.com/btu-calculator.html</u>

but provides comparable results for similar-sized rooms in homes with average insulation:

Room Area	Ceiling Height	Gas Fireplace
(Square Feet)	(Feet)	Heat Output (Btu/Hr)
300	9	6,075
400	91/2	11,400
500	10	12,000
600	11	13,300

According to the above results, a 35,000 Btu/Hr. gas fireplace with a heating efficiency of 70% FE would generate more heat than would be "ideal" even for a twenty-by-thirty square foot room with a ten-foot ceiling in a home in the Sierra Nevada Mountains. To put these numbers into further perspective, data from the National Association of Home Builders indicates that – in new homes built in 2012 – the only rooms with an average size of over 600 square feet were Great Rooms present in less than half (46%) of the largest category of new homes (*i.e.*, homes of 3,000 square feet and up).²⁸

This relatively simple analysis is sufficient to show that there are relatively few homes in which it would be reasonable to install a 35,000 Btu/Hr fireplace with a heating efficiency of 70% FE.

²⁸ <u>http://nahbclassic.org/generic.aspx?genericContentID=216616</u>

A standard requiring a minimum heating efficiency of 70% FE would not magically increase the number of homes in which the heat generated by such products would be a blessing rather than a curse; nor would it make materially smaller but more heat-efficient gas fireplaces look anything other than under-sized in installations for which a 35,000 Btu/Hr gas fireplace is desired. All such a standard would do is leave many of the consumers who want 35,000 Btu/Hr fireplace heater without any that they could reasonably use.

The reality is that consumers want fireplace heaters that give them the look they want and the ability to put their fireplace to heating use *as efficiently as possible without compromising their ability to use the product as a fireplace*. In each case, the ideal level of heating efficiency depends not just on the relevant installation conditions, but on the extent to which the consumer is willing to compromise core fireplace attributes for heating efficiency or vice versa. Heating efficiency standards would deny consumers the ability to make such choices on their own, and there is no sound basis to suggest that this would benefit consumers in any way.

Gas fireplaces generally are not operated strictly in response to heating needs; as a result, increases in heating efficiency cannot be expected to produce energy savings by reducing the burner operating hours required to satisfy heating needs.

B. <u>A Ban on Continuous Pilot Lights is Unwarranted.</u>

The premise that the elimination of continuous pilot lights would save energy and benefit consumers is the product of experience with products such as residential furnaces: products that lurk out of sight, cycle on and frequently under automatic control, had continuous pilot lights that could only be turned on by someone on their hands and knees with a flashlight and a screwdriver, and could be converted to intermittent pilot ignition ("IPI") systems with relative ease and without any substantial loss of utility for consumers. Gas Fireplace Products are not just different; they are different in every relevant respect:

- They are products that are prominently located in living areas with their combustion chambers intentionally displayed, with the result that the glow of a pilot light is likely to be visible every night when the lights are turned out;
- They are generally "attended appliances" with main burners that are used comparatively infrequently and only through the conscious action of the consumer;
- Their continuous pilot lights frequently have user-friendly dial and pushbutton pilot light controls;
- Their continuous pilot lights provide unique utility for many consumers; and
- They have inherent characteristics that make the use of IPI technology particularly challenging.

In short, the products at issue already give consumers the ability to eliminate unnecessary pilot light use, and:

- The premise that they will fail to do so because the products at issue are outof-sight, out-of-mind is invalid;
- The premise that they will fail to do so because the operation of pilot light controls is difficult and/or would be frequently required is significantly less valid; and
- The premise that continuous pilot lights could be eliminated relatively easily and without loss of consumer utility is also invalid, for reasons that differ depending on the type of product at issue.

While all three of these points undermine the case for a regulatory ban on continuous pilot lights, it is the third that has been the real impediment for the gas fireplace industry. The industry recognized that the elimination of continuous pilots could potentially produce energy savings and has invested considerable resources in efforts to develop alternatives to continuous pilots. As a result, there has been a dramatic trend away from the use of continuous pilots on vented gas fireplaces.

The challenges for other Gas Fireplace Products are more serious. HPBA explored the possibility of an industry initiative to eliminate continuous pilot lights on a wide range of outdoor gas products but determined that such an initiative had little potential to conserve energy and would have undesirable collateral safety impacts. For gas log sets, there are fundamental physical and mechanical challenges that limit the potential for electronic alternatives as replacements for continuous pilots. Work on electronic alternatives continue – and reliance on continuous pilots has declined, but – at this point – it appears that the elimination of continuous pilot lights on Vented Gas Log Sets would likely damage the market for those products.

1. Continuous Pilot Lights on Vented Gas Fireplaces.

HPBA does not believe a ban on continuous pilot lights on vented gas fireplaces is warranted. In short, the use of continuous pilot lights on vented gas fireplaces is already being phased out, and there is no need to impose regulatory burdens (including compliance certification requirements, *etc.*) to hasten market developments that are occurring anyway.

In assuming that a ban on continuous pilot lights is warranted – and that straight intermittent pilot ignition ("IPI") technology provides a ready alternative – the Draft Report fails to consider some important questions, among which are:

- Why hasn't there already been widespread adoption of straight IPI technology in the gas fireplace industry?
- Why were IPI systems with a continuous pilot ignition ("CPI") function and "on demand" ignition systems developed by the gas fireplace industry exclusively to provide an alternative to straight IPI systems for Vented Gas Fireplaces?
- And why have some retailers reported that they choose to activate the CPI function on IPI products they sell?

The basic answer is that it is difficult to ensure that vented gas fireplaces with straight IPI ignition systems will not experience potentially significant operational problems in some installations. The specific technical issues are – as already indicated – related to differences between vented gas fireplaces and the types of products for which IPI systems were designed.

Products such as furnaces are installed in out-of-the-way locations, have small, unobstructed combustion chambers, and are often power vented with prepurge and post-purge operating cycles. As a result, main burner ignition is easily accomplished, and relatively minor ignition issues tend to go unnoticed by the consumer. By contrast, vented gas fireplaces are located directly in living spaces where they can be seen and enjoyed, have large glass-fronted combustion chambers with burners and other features designed to create realistic, active yellow flames, and must typically operate with natural flue draft systems that can vary considerably based on individual product installation. When outside temperatures are low, the heat from a vented gas fireplace must initially overcome a column of cold air in the vent system, and this can present significant challenges with longervent installations, particularly with more heat-efficient designs that employ heat exchangers or flue restrictors to raise thermal efficiency and control excess air. With a cold start-up, these factors can cause serious operational problems such as start-up lag, flame lift, burner outage, draft reversal, and delayed main burner ignition. In vented gas fireplaces, any such issues would occur under the immediate observation of the consumer and – particularly in the case of delayed ignitions - can be quite alarming. A pilot light - by warming the flue and

establishing proper draw prior to main burner ignition – provides a means to address all of these issues, thereby significantly reducing the potential for operational and maintenance problems. IPI systems with a CPI (or "cold climate") function were created because of concerns that, in some installations, the ability to provide a continuous pilot flame would be needed to ensure proper product operation. Similarly, CPI functions are activated when installers fear that unnecessary operational problems are likely to occur if they are not, or (less ideally) to resolve operational problems after they have occurred.²⁹

The industry has been working to overcome these issues and to overcome significant consumer and dealer skepticism as to the adequacy of the solutions. As a result, the prevalence of continuous pilot lights in vented gas fireplaces has declined dramatically, and – with the development of "on demand" systems – it has become possible (and is rapidly becoming more common) for CPI functions on IPI systems to be converted into "on demand" functions. The premise that regulatory action is necessary to eliminate continuous pilot lights on vented gas fireplaces is questionable at best, and – in view of the challenges involved – there

²⁹ It should be noted that the importance of the ability to warm the vent system of a vented gas fireplace prior to main burner ignition depends in part on the combination of features and functions a product provides (including, as noted above, features designed to increase thermal efficiency). As a result, the inability to provide a pilot flame would effectively constrain design choices, thus limiting what product designers are able to achieve.

is a real possibility that exigencies imposed by regulatory deadlines for specified design standards could cause more problems than regulation would be worth.

2. <u>Continuous Pilot Lights on Vented Gas Log Sets.</u>

A ban on continuous pilot lights for vented gas log sets is not warranted, but the issues involved are materially different than they are in the context of vented gas fireplaces.

One of the key issues involves adverse impacts that a ban on continuous pilots would have on the performance and utility of vented gas log sets. Vented gas log sets are designed to be installed directly in the hearth of existing woodburning fireplaces, and one of the attributes that sets them apart from vented gas fireplaces is the unmatched realism they provide. That important attribute would obviously be compromised to the extent that a vented gas log set has visible hardware components sitting in plain view in the fireplace hearth. Log set manufacturers can and do work to minimize the visibility of hardware components that would otherwise mar the realism their products offer, but – with the constraint that their products must fit entirely inside an existing fireplace hearth – there are obvious challenges involved. Electronic ignition systems are problematic in this respect because they require significant additional hardware, some of which is sufficiently heat-sensitive to further constrain design options and compromise the ability to preserve the visual appeal of the product. In short, a requirement that

vented gas log sets be equipped with electronic ignition systems would undermine one of the primary features of contributing to the market appeal of such products: their realistic appearance.

Vented gas log sets are the most clearly "decorative" of all indoor gas fireplace products, but – like traditional wood-burning fireplaces that may have little net heating utility in a normally heated home – they offer considerable emergency heating utility when central heating systems are out. With the increasing prevalence of severe weather events associated with climate change, it is important to recognize that vented gas log sets with continuous pilot lights provide an emergency heating utility that products with ignition systems that require electricity do not: the ability to operate – reliably and indefinitely – without any electrical power supply. Products with battery power (or battery back-up) systems do not provide equivalent capability for the simple reason that they are dependent on batteries. While battery back-up systems are an excellent option for consumers who choose them, they impose a need for additional heat-sensitive hardware that can be problematic for vented gas log sets, and their effectiveness requires a degree of vigilance with respect to battery replacement that is too often found wanting when an emergency actually arises.

This is not an issue to be casually dismissed, because – as experience has shown – battery shortages are a serious problem whenever weather-related disasters occur. As the *New York Times* reported in the wake of Hurricane Sandy:

Even now, nearly two weeks after the superstorm made landfall in New Jersey, batteries are a hot commodity in the New York area. Win Sakdinan, a spokesman for Duracell says that when the company gave away D batteries in the Rockaways, a particularly hard-hit area, people "held them in their hands like they were gold."³⁰

When the grid is down, the even better "gold" would be a fireplace that needs no electricity and no solid fuel: a vented gas log set with a continuous pilot light.

An additional concern is that a ban on continuous pilot lights for vented gas log sets would impose regulatory burdens (at a minimum, compliance certification requirements) on a large population of products for which the ban would provide no regulatory benefits. In particular, vented gas log sets certified to the ANSI Z21.84 standard operate by direct main burner ignition. By definition, these products cannot have continuous pilot lights and should not be subject to regulation designed to eliminate features they do not have to begin with.

3. Continuous Pilot Lights on Outdoor Gas Log Sets.

A ban on continuous pilot lights for outdoor gas log sets is unwarranted, again for a unique combination of reasons.

³⁰ http://www.cnbc.com/id/49774891

As is the case with vented gas log sets, outdoor gas log sets are designed to be installed in the hearths of existing wood-burning fireplaces. As a result:

- Requirements for electronic ignition would create the same issue discussed in the context of vented gas log sets with respect to adverse impacts on the appearance of outdoor gas log sets: additional hardware would be required that would be difficult to conceal and difficult to shield from excessive heat;³¹ and
- Although compromises in emergency heating utility would not be an issue for outdoor products, requirements for electronic ignition could by increasing the cost or decreasing the appeal of outdoor gas log sets cause adverse environmental impacts by leaving conventional wood-burning fireplaces in operation.

In addition, a ban on continuous pilot lights could – in the case of outdoor gas log sets – have adverse safety impacts. When HPBA considered an initiative to eliminate the use of continuous pilot lights on products such as outdoor fire pits, it discovered that the principal ignition alternative for such products was direct main burner ignition and that – in the relatively few cases in which continuous pilots were used on such products – they provided a means to minimize the risk of delayed main burner ignition involving the sudden ignition of a significant amount of gas. In this regard, outdoor gas log sets are a category of products that differ from vented gas log sets in three significant respects:

• It includes propane-fueled "match-lit" products (which are not permitted indoors due to safety concerns);

³¹ In addition, in the case of Outdoor Gas Log Sets, electrical ignitions systems would also be more costly due to the need for them to survive exposure to weather (including precipitation and low temperatures) and by the need to install an outdoor electrical line.

- It consists of products suitable for operation under the more variable conditions likely to be encountered outdoors; and
- It consists of products that are not necessarily installed in existing fireplaces with functioning flue systems (in particular, outdoor gas log sets can be used in a broader range of installations, including installations that are essentially fire pits).

In short, it appears that outdoor gas log sets – in at least some installations – may be little different than the products HPBA was considering at the time it concluded that a ban on continuous pilot lights on products such as gas fire pits could potentially have negative safety consequences.

For practical purposes, there is reason to doubt that such a ban would produce significant energy savings. In particular, continuous pilot lights have a tendency to blow out in exposed outdoor environments, and – although some outdoor gas log sets that do have continuous pilot lights – there is no basis to conclude that substantial numbers of such products are sold and actually left with their pilot lights burning indefinitely. At best, a ban on continuous pilot lights for outdoor gas log sets would impose compliance obligations for a large population of products while providing uncertain benefits for a far smaller population of products. In any event, HPBA does not believe that there is sufficient credible evidence for the analysis required to justify a ban on continuous pilot lights for outdoor gas log sets.

4. Continuous Pilot Lights on Outdoor Gas Fireplaces.

HPBA does not believe that there is any basis to conclude that a ban on continuous pilot lights for outdoor gas fireplaces would produce any significant energy savings, because both the prevalence of continuous pilot lights in such products and the potential for such pilot lights to be left burning is unknown but likely to be limited. There are several factors involved.

First, many outdoor gas fireplaces have open combustion chambers in which continuous pilot lights would have a tendency to blow out. As a result, both the prevalence of continuous pilot lights and the potential for continuous pilot lights to be left burning is likely to be low.

Second, many prefabricated outdoor fireplaces have simple dial and pushbutton pilot light controls that make it easy for consumers to avoid unnecessary pilot light use.

Third, many prefabricated outdoor fireplaces are designed to be fueled by propane cylinders, in which case the standard procedure would be to turn off the flow of gas at the cylinder when the product is not in use and the potential for unnecessary pilot light use would be limited by the volume of the cylinder.

For these reasons, a ban on continuous pilot lights on outdoor gas fireplaces could be expected to impose compliance obligations on a relatively substantial

population of products that includes a relatively small percentage of products for which there would be any significant potential for regulatory benefits.

Responses to Specific Issues on Which Comment is Requested

The Proposal requests comment on ten specific issues. *See* 87 Fed. Reg. at 6794-95. Because several issues provide useful opportunities to illustrate some of the systemic problems with DOE's regulatory approach, HPBA believes it would be useful to address each in turn.

Issue 1: DOE requests comment on whether there are other industry standards that should be reviewed for this coverage determination for decorative hearth products and outdoor heaters.

HPBA has not had sufficient time to consider or address this issue.

Issue 2: "Whether the presence of a thermostat would indicate that a hearth product is intended to provide heat to the space in which it is installed rather than being purely decorative."

Whether "a hearth product is intended to provide heat to the space in which it is installed" is irrelevant. Fireplaces and similar products inherently produce heat, and in that sense could be characterized as being "intended to provide heat." As the preceding discussion of vented gas fireplaces shows, the premise that products that produce heat are "heaters" – in the sense that they would be improved by higher heating efficiency – is completely invalid. Similarly, the premise that there are gas fireplaces or similar products that are "purely decorative" – in the sense that they are somehow not supposed (or "intended") to provide heat – is incorrect.

Thermostats on fireplaces and similar products can be used to turn a product on and off in response to heating demands or simply to prevent unintended overheating from non-utilitarian use. While thermostats are not permitted on products certified to the Z21.50 standard, the presence of a thermostat on fireplaces or similar products is not an indication that such products are "heaters" that would be improved by higher heating efficiency. As already discussed, such products are designed to *be suitable for utilitarian use*, but they are still fireplaces that are typically used as fireplaces and cannot reasonably be regulated as utilitarian heating products.

Issue 3: DOE seeks feedback from interested parties on its proposed definition for "outdoor heater."

The proposed definition of "outdoor heater" is unacceptably vague and susceptible to potential abuse. The products apparently targeted for coverage include gas-fired outdoor infrared patio heaters subject to the ANSI Z83.26 standard. To the extent that DOE intends to cover any other products it must identify those products and provide a justification for their coverage. Otherwise, such products will not be the subject of the proposed coverage determination and – as a matter of historical fact – will not be "covered products" under any final coverage determination. Because the proposed definition is plainly broader than

"gas-fired outdoor infrared patio heaters subject to the ANSI Z83.26 standard" it is overbroad and unjustified.

The proposed definition of "outdoor heater" is also overbroad in that it includes both portable and non-portable units subject to the ANSI Z83.26 standard. As such, it includes two categories of products that are so different – and subject to such materially different design requirements and constraints – that they cannot reasonably be considered to be a single product for purposes of regulatory analysis.

To the extent DOE is contemplating heating efficiency standards for any of these products, the "covered product" should be limited to strictly utilitarian heating products (*i.e.*, products designed *solely* to provide heat to outdoor areas). This would exclude "patio heaters" for which heating efficiency standards would be unjustified: products that – rather than being strictly utilitarian heating appliances – provide other value (outdoor lighting or visual appeal) likely to be compromised by high heating efficiency.

To the extent DOE is contemplating pilot light restrictions, it should exclude all portable units, for which such restrictions are unwarranted for reasons explained in response to Issue 9 below.

HPBA is not familiar with non-portable infrared patio heaters, but doubts that coverage of such products as consumer products can be justified. It appears that such products are overwhelmingly used by commercial purchasers,

particularly with the massive increase in outdoor restaurant dining and the like since the advent of the COVID pandemic. Based on the nature of these products, it appears that they are rarely purchased and very infrequently used by household consumers.

Issue 4: DOE requests comment on whether outdoor hearth products exist that are designed to provide a large amount of heat as their primary function, and thus would meet the definition of outdoor heater.

The fact that DOE raised this issue is proof – if any was needed – that DOE's "outdoor heater" definition is unacceptably vague.

There is no such thing as a fireplace or similar product that is "designed to provide a large amount of heat as [its] primary function." The "primary function" of any such product is to be a fireplace or similar product. Typically, part of the appeal of such products is that they do produce heat. However, the purpose of the product *is to be enjoyed*, and that purpose is generally undermined when products produce so much heat that they can only be enjoyed from afar. There are exceptions: products that are sufficiently spectacular to be enjoyed from afar, but those products produce "a large amount of heat" for the "primary purpose" of looking spectacular. As further discussed in response to Issue 7 below, the heat output of fireplaces and similar products does not provide any reasonable basis to characterize such products as "heaters" for purposes of efficiency regulation.

Issue 5: DOE seeks feedback from interested parties on its proposed scope of coverage of miscellaneous gas products, which would include decorative hearth products and outdoor heaters.

The scope of the proposed coverage determination is uncertain and susceptible to abuse, because – rather than specifying new "covered products" – the Proposal is designed to assert coverage over abstract definitional categories of products that include materially different products and could easily be interpreted to include other products that DOE has not considered in making its coverage determination. This approach is unlawful, because coverage determinations – by their nature – must be product-specific, with each covered product being clearly specified and the determination of coverage for product being justified.

DOE could not make any lawful coverage determination for "miscellaneous gas products" unless it perversely defined that term to include some *specific* product. DOE can reasonably use the "miscellaneous" term as heading under which specific covered products are listed, but that is a different matter: it must be clear that coverage extends only to specifically identified "covered products." Similarly, DOE cannot make any lawful coverage determination for "decorative hearth products" or "outdoor heaters," because these are amorphously-defined categories of products, both of which include materially different products and potentially unspecified additional products.

Issue 6: DOE requests comment on whether propane-fueled decorative hearth products and outdoor heaters should be within the scope of this coverage determination.

HPBA does not believe that coverage of any of the products apparently

targeted by the Proposal is warranted, but – for at least most of these products –

coverage of propane-fueled products would be even harder to justify.

Issue 7: DOE requests comment on whether unvented hearth products designed for indoor installation exist that are designed to be purely decorative, or if an unvented hearth product would always provide enough heat to the space in which it is installed to be classified as an unvented heater. If such products exist, DOE seeks information on the features or characteristics that differentiate them from unvented heaters.

The idea that fireplaces and similar products can reasonably be classified as "heaters" or "purely decorative" products on the basis of their heat output is an entirely specious stepchild of the false narrative adopted to justify the 9,000 Btu/Hr. input limit DOE imposed on "decorative" gas fireplaces in 2010. High heat output provides no basis to confuse a spectacular piece of flame art with a utilitarian heating appliance; nor does it provide any meaningful distinction between purportedly different categories of vent-free fireplaces or log sets.

For purposes of DOE efficiency regulation, the only reason to differentiate "heaters" from other products is to subject the "heaters" to heating efficiency standards. There is no need for DOE to make such distinctions in the case of fireplaces or similar products, because – as already discussed – heating efficiency standards for such products are unwarranted. This is most obviously true in the case of vent-free gas fireplaces and log sets, which necessarily release all of their heat to the space in which they are installed and thus have inherently high heating efficiency. However, consumers often choose vent-free fireplaces for the simple reason that they can be significantly easier to install or – in some cases – because they are the only practical option for a particular (existing or desired) floor plan. For example, vent-free fireplaces have been installed in the middle of condominium units – to maximize available window and balcony space – where venting requirements made it impractical to install vented gas fireplaces.

Issue 8: DOE requests comment on the assumption that burner operating hours for outdoor heaters are similar to the main burner operating hours of decorative hearths. In addition, DOE requests any data available regarding the operating hours of outdoor heaters.

DOE's assumption is completely arbitrary, because the two categories of products are completely different and are used under different circumstances and for different purposes. In any event, this amounts to a trick question for at least two reasons.

First, it isn't clear exactly what either category of products includes, so any comparison between the burner operating hours for either category of products is confounded by "representative burner operating hours for what?" questions for both categories.

Second, there is no point in comparing DOE's burner operating hours for "decorative hearths" to anything at all, because DOE defines "decorative hearths" to include a smorgasbord of products as diverse as vented gas fireplaces and outdoor fire tables, which have almost nothing in common. Accordingly, the estimate of burner operating hours for that mishmash of products – like an average weight or density for round objects including golf, tennis, and bowling balls – cannot be expected to be representative of any particular product.³²

Issue 9: DOE requests feedback on the breakdown of ignition systems for outdoor heaters as well as any data on standing pilot operating hours for outdoor heaters.

The patio heaters HPBA is familiar with – both strictly utilitarian portable patio heaters and patio heaters that provide lighting and visual appeal – are overwhelmingly propane-fueled products supplied by small propane cylinders with valves consumers are directed to close when the product is not in use. These products typically have simple push-button and dial controls, and – although they generally have pilot lights – these pilots are simple ignition devices designed to be turned on manually to facilitate safe main burner ignition and to be turned off when the main burners are off. Because these pilot lights are not designed to be left burning indefinitely, they are not designed to tolerate such use and would typically burn out if left burning for an extended period of time. HPBA is not aware of any data concerning pilot light operating hours for these products, and

³² Unless the purported average for the category is based on an arbitrary assumption that the burner operating hours for one particular product is representative of the entire category of products, in which case the purported "average" would not be an average at all.

there is no obvious reason to collect such data for products that are not designed to be left with their pilot lights burning and are generally served by propane cylinders that are intended to have their valves closed when the products they serve are not in use.

Issue 10: DOE requests comment on whether classifying miscellaneous gas products as a covered product is necessary or appropriate to carry out the purposes of EPCA.

HPBA does not believe that classification of any of the products at issue is necessary or appropriate to carry out EPCA's purposes, and the Proposal provides no basis to conclude otherwise.

There is no reasonable prospect that EPCA regulation of the products in question would provide significant energy savings. DOE has no obligation to regulate these products and is far behind on statutory deadlines for regulatory actions on numerous products that it has a mandatory duty to complete. Under the circumstances, it is absurd to suggest that it is "necessary" or "appropriate" for DOE to turn its attention from its statutorily mandated tasks to a purely discretionary pursuit of products that most consumers don't own, few use heavily, and that – with the limited exception of strictly utilitarian patio heaters – exist principally to satisfy architectural, cultural, and aesthetic desires for which no efficiency metric exists.

Conclusion

HPBA respectfully requests that the Proposal be withdrawn. To the extent that DOE believes that it is appropriate to consider coverage of any of the products at issue, HPBA requests that it start by providing an opportunity for dialogue.

Respectfully submitted,

all

Ryan Carroll Vice President – Government Affairs Hearth, Patio & Barbecue Association