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**BEFORE THE OFFICE OF THE GENERAL COUNSEL,
DEPARTMENT OF ENERGY
WASHINGTON, D.C.**

January 4, 2012

Reducing Regulatory Burden
76 Fed. Reg. 75798

5 CFR Chapter XXIII
10 CFR Chapters II, III, X

COMMENTS OF THE HEARTH, PATIO & BARBECUE ASSOCIATION

The Hearth, Patio & Barbecue Association (HPBA) is pleased to submit for your consideration the following comments in response to the U.S. Department of Energy's (DOE's) Request for Information (RFI) published at 76 Fed. Reg. 75798 (December 5, 2011). The December RFI is an effort by DOE to better implement President Obama's Executive Order 13563 (January 18, 2011). The stated purpose of the RFI is to solicit "comments and information from interested parties to assist DOE in reviewing its existing regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed. The purpose of DOE's review is to make the agency's regulatory program more effective and less burdensome in achieving its regulatory objectives." Executive Order 13563 directs agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." The Executive Order also reiterates principles of Executive Order 12866 of September 30, 1993, specifically that:

Each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

HPBA is the North American trade association for manufacturers, retailers, distributors, representatives, service firms, and associates for all types of hearth, patio and barbecue appliances, fuels and accessories, and represents the interests of its members in legislative, regulatory, and other governmental policy matters of concern to them. HPBA has been actively commenting in an attempt to assist DOE with review of its existing regulations since the opportunity was first presented by DOE's earlier RFI inviting comment on this subject.¹ HPBA filed comments in response to that notice on March 21, 2011 and provides the current submission in a further effort "to assist DOE in reviewing its existing regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed."

The issues HPBA has identified concern the regulation of decorative vented gas hearth products as "direct heating equipment" (DHE) under DOE's energy efficiency regulations for consumer appliances. As discussed in HPBA's March 21, 2011, comments, DOE issued an April 16, 2010, final rule classifying decorative vented gas fireplaces as DHE subject to heating efficiency standards designed for heating appliances.² This rule was adopted without adequate public airing of the issues as required by law and contemplated under Section 2 of Executive Order 13563, and without any information or analysis remotely sufficient to justify the requirements imposed. DOE more recently rushed through an amendment to this final rule.³ However, in amending the regulation, DOE apparently disregarded hundreds of public comments from industry and affected businesses by persisting in classifying decorative vented gas fireplaces as DHE subject to heating efficiency standards – again, without any effort to provide the explanation or analysis required by law to justify the imposition of heating efficiency standards for decorative gas fireplaces.

HPBA's ongoing concerns with DOE's "Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment" are outlined below.⁴

1. DOE's Improper Classification of Decorative Products as Direct Heating Equipment.

DOE persists in classifying decorative vented gas fireplaces – which are not heating appliances and were plainly never intended to be regulated as such – as DHE. This interpretation is unreasonable on its face and is irreconcilable with the plain language, history, and structure of the Energy Policy and Conservation Act (EPCA). Indeed, DOE's most recent final rule compounds this error by announcing that DOE also considers vented gas log sets – another category of products that are not heating

¹ 76 Fed. Reg. 6123 (February 3, 2011).

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

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

⁴ Many of HPBA's concerns are detailed in comments it submitted in the rulemaking that produced the November 18, 2011 final rule. A copy of those comments is attached and incorporated in full as a part of these comments.

appliances and were plainly never intended to be regulated as such – to be DHE.⁵ This position directly contradicts the position DOE took in its April 16, 2010, final rule, in which it recognized that vented gas log sets are not DHE. As DOE explained in a policy statement posted to the DOE’s website shortly after publication of the April 2010 final rule:

DOE believes that gas log sets have specific characteristics that differentiate them from gas fireplaces, gas fireplace inserts, and gas stoves. The primary differentiating feature of gas log sets is that they are not constructed as part of an entire enclosure (i.e., there is no surrounding box or viewing pane) or a sealed system. DOE recognizes that by the nature of gas log set construction, they do not provide the same heating function as gas fireplaces, gas fireplace inserts, and gas stoves, which are constructed as enclosed systems, and, thus, DOE believes that gas log sets products are intended to be installed for decorative purposes. DOE’s definition states that a vented hearth heater may be “freestanding, recessed, zero clearance, or a gas fireplace insert or stove.” DOE does not believe that any of these terms include gas log sets, which DOE considers as different products from freestanding, recessed, and zero clearance gas fireplaces, gas fireplace inserts, and gas stoves. As a result, DOE interprets its definition of a ‘vented hearth heater’ as not covering vented gas log sets.⁶

DOE’s decision to characterize decorative vented gas hearth products as DHE is nothing but a transparent attempt to manufacture jurisdiction over these products by calling them DHE although Congress plainly did not. EPCA provides an express statutory mechanism through which DOE can identify products as a new category of “covered products” and regulate them as such.⁷ DOE simply seeks to circumvent this statutory process – and the need to justify the need to regulate decorative hearth products at all – through the expedient of unilaterally classifying them as a product category they plainly are not. This regulatory approach is clearly improper, and HPBA urges DOE to abandon it.

2. DOE’s Improper Imposition of Heating Efficiency Standards on Non-Heating Products.

The April 16, 2010, final rule imposed heating efficiency standards on decorative vented gas fireplaces without any effort to determine – as EPCA expressly requires⁸ – whether such standards would be technologically feasible or economically justified for such products. Indeed, the April 16, 2010, final rule imposed heating efficiency standards on

⁵ 76 Fed. Reg. at 71843.

⁶ http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_faq.pdf

⁷ See 42 U.S.C. §§ 6292(b) and 6295(l).

⁸ 42 U.S.C. § 6295(o)(2)(A)-(B).

decorative vented gas fireplaces without providing any notice or opportunity for comment – as EPCA expressly requires⁹ – as to whether such standards would be technologically feasible or economically justified.

By now, at least, DOE certainly knows that heating efficiency standards are not technologically feasible for many decorative gas fireplaces and cannot be economically justified for *any* of them. Yet DOE's most recent final rule continues to use these unjustified and unjustifiable heating efficiency standards for decorative vented gas fireplaces as the linchpin of its regulatory scheme, using them as a gun to the head of the manufacturers of such products to compel compliance with alternative regulatory requirements.¹⁰ This regulatory approach is clearly improper, and, again, HPBA urges DOE to abandon it.

3. The Lack of Justification for Alternative Requirements DOE has Imposed.

As already indicated, DOE has never provided any technical justification for the imposition of heating efficiency standards on decorative hearth products, and in fact could not justify such standards on the merits. Having adopted such standards illegitimately, however, DOE appears to believe that it can now impose any alternative compliance requirements it likes, without any legal constraints at all. Its most recent rule took this position quite clearly in response to comment that a pilot light prohibition it ultimately imposed for decorative vented gas fireplaces is unlawful because it is a design standard, and EPCA does not authorize design standards for DHE. DOE did not reject this comment on the theory that a design standard for DHE would be lawful, but on the theory that it wasn't bound by the law, because the standard it imposed was only an "optional" standard manufacturers were free to ignore.¹¹ This is presumably the same reason why DOE made no effort to determine that a ban on standing pilot lights for decorative vented gas fireplaces would be economically justified, and why it believed that it could impose a completely arbitrary July 1, 2015, compliance deadline.

Compliance with DOE's pilot light prohibition is "optional" in precisely the same way that acceptance of an "offer [one] can't refuse" in "The Godfather" was "optional." In either case, the supposedly "optional" choice is one imposed through the threat of unacceptable consequences. DOE knows that manufacturers of decorative vented gas fireplaces cannot reasonably comply with heating efficiency standards; no doubt this is why DOE has studiously ignored the issue of whether such standards are technologically feasible or economically justified for such products. Accordingly, the "optional" compliance alternative is, for practical purposes, the *only* compliance alternative for most manufacturers. Even if it were not, there is simply no basis to say that the existence of one compliance alternative eliminates all legal constraints on the Department's authority to impose another. EPCA requires that standards be lawful and

⁹ 42 U.S.C. § 6295(p)(1)-(2).

¹⁰ See 76 Fed. Reg. at 71847 (November 18, 2011).

¹¹ 76 Fed. Reg. at 71847.

lawfully justified; there is no loophole available where alternative standards are imposed.

EPCA does not authorize design standards for DHE.¹² Nor does it authorize standards that have not been determined to be technologically feasible and economically justified.¹³ It certainly does not allow standards to become applicable to products sold after an arbitrarily-determined date; to the contrary, EPCA provides that standards can only lawfully take effect with respect to products “manufactured after the date that is 5 years after publication of the final rules establishing” them.¹⁴

DOE’s practice of imposing unjustified and plainly unlawful requirements cloaked as “optional” compliance alternatives is clearly improper, and, as before, HPBA urges DOE to abandon it.

4. Procedural Irregularities in DOE’s Rulemaking Proceedings.

Despite the second chance to cure the procedural issues in the rulemaking during the comment period and drafting of the second (November 2011) final rule, DOE still failed to obtain and rely upon the “objective scientific evidence” in the final rule required by the Executive Order. DOE ultimately left the docket virtually devoid of any supporting materials backing the issuance and increased scope of coverage for the final rule, declined to respond to essentially any substantive questions regarding its data collection efforts at the September 1st Public Meeting, and made no attempt to directly contact any member of the industry – until early October, with an October 14th comment period closing date looming. In fact, DOE even sought to conduct interviews after the October 14th close of the comment period. DOE provided absolutely no opportunity for industry or the public to view or comment on its findings or the basis for those findings.

DOE also received (and seemingly ignored) nearly 50 requests from members of the U.S. House of Representatives and U.S. Senate, the professional staff of the U.S. Senate Committee on Energy and Natural Resources and representatives and staff from the Appliance Standards Awareness Project, the American Council for and Energy-Efficient Economy, and the Natural Resources Defense Council asking either that (i) the agency stay the rulemaking and allow Congress to consider legislative language addressing definitional concerns or (ii) the interested parties be given the opportunity to make recommendations on mutually agreed-upon regulatory language. These entities also agreed that decorative gas products cannot rightly be classified as DHE and expressed this opinion to DOE.

¹² See 42 U.S.C. 6291(5)(B) (defining energy conservation standards for DHE to exclude design standards).

¹³ See 42 U.S.C. § 6295(o)(2)(A)-(B).

¹⁴ 42 U.S.C. § 6295(m)(4)(A)(ii).

Rather than allowing for “an open exchange of views” and the promulgation of a regulation “only upon a reasoned determination that its benefits justify its costs,” as directed by the Executive Order, the department insisted on engaging in an unjustifiable – and unnecessarily expedited – issuance of the November 2011 final rule. Particularly in light of the nearly-unanimous opposition to the inclusion of either decorative vented gas fireplaces and vented gas log sets as DHE, the process can be viewed as a transparent attempt by DOE to further deny industry a procedural right and runs counter to the purpose, spirit, and stated goals of Executive Order 13563.

We remain available to more fully discuss these comments with the department in more detail.

Respectfully submitted,
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