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HPBA Comments NOPR on Energy Conservation Standards for Direct Heating Equipment

Docket No. EERE-2011-BT-STD-0047
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The Hearth, Patio & Barbecue Association (HPBA) provides these comments in response to the Department of Energy (DOE) Notice of Proposed Rulemaking entitled "Energy Conservation Program: Energy Conservation Standards for Direct Heating Equipment," published at 76 Fed. Reg. 43941 (July 22, 2011) (the NOPR).

HPBA is the North American industry association for 2500 member manufacturers, retailers, and distributors of hearth products. The vast majority of these entities are small businesses struggling to survive in economic conditions in which their industry's product shipments have declined by more than two thirds, with correspondingly massive job losses occurring over just the last few years, due largely to the collapse of the housing market. Although this is no time for these businesses to be targeted by hasty and ill-considered rulemaking, DOE appears to be in an unprecedented and unwarranted rush to impose new and unjustified regulatory burdens upon them. Indeed, DOE issued the NOPR without any supporting documentation or prior rule development process – in disregard not only of its own rulemaking policy as set forth in Appendix A to Subpart C of 10 C.F.R. Part 430, but of the letter and spirit of Executive Order 13563 – and with the stated intent of producing a final rule by November of this year. Even after extending the comment period so that it could populate the rulemaking record with support for the proposal, DOE has failed to do so.

There is no excuse for the Department's precipitous approach to this rulemaking or for its remarkable departure from DOE's standard rulemaking policy and procedure. The NOPR was ostensibly issued to address issues that HPBA has raised in its pending petition for review challenging the April 16, 2010, final rule in which DOE made an uninformed and unlawful decision to effectively ban decorative vented gas fireplaces. However, the proposed rule would do nothing to resolve that litigation or the issues that it raises; it would simply compound the issues in dispute by imposing equally uninformed and unlawful regulations on an even broader range of hearth products. DOE should address the problems created by its April 16, 2010, final rule in a manner consistent with Executive Order 13563, as HPBA expressly requested in its May 21, 2011 response to DOE's request for information (RFI) concerning implementation of

that Order.[1] Unfortunately, the NOPR offers no such solution and was not intended to provide one. See 76 Fed. Reg. 40646 at 40647 (July 11, 2011). Moreover, the proposed rule and the rulemaking process itself are fatally defective and clearly cannot support the lawful adoption of any final rule. Accordingly, HPBA urges DOE to withdraw the NOPR, terminate this rulemaking proceeding, and take appropriate action to address the defects of its April 16, 2010 final rule in accordance with Executive Order 13563 and HPBA's March 21, 2011 request for relief.

A. THIS RULEMAKING IS HIGHLY IRREGULAR AND FATALLY FLAWED.

HPBA has already expressed serious concerns with respect to this rulemaking. Such concerns were expressed in HPBA's testimony at DOE's September 1, 2011 public meeting concerning the NOPR (the Public Meeting),[2] and in a September 13, 2010 letter directed to Secretary Chu.[3] HPBA's concerns remain, and – as further explained below – clearly warrant withdrawal of the NOPR and termination of this rulemaking proceeding.

1. The NOPR was issued without adequate basis.

Issuance of the NOPR contravened the explicit policy of this Administration. Executive Order 13563 specifically directs that proposed regulations be issued "only upon a reasoned determination that its benefits justify its costs," and the NOPR was issued without any such determination. Indeed, discussion at the Public Meeting demonstrates that the NOPR was issued without any significant investigation or analysis and was based almost entirely on profoundly uninformed (and wildly inaccurate) estimates and assumptions.[4] A "reasoned assessment" of the benefits and costs of a proposed rule clearly requires a reasonable understanding of the relevant facts and issues. It is clear that the NOPR was issued without any such understanding. Sound policy now demands that the NOPR – having been issued without adequate basis – be withdrawn.

Issuance of the NOPR was also contrary to law. The Energy Policy and Conservation Act (EPCA) authorizes DOE to propose energy conservation standards only upon a determination that the standards proposed are "technologically feasible." 42 U.S.C. §6295(p)(1). The proposed rule would make decorative vented gas fireplaces and gas log sets subject to minimum heating efficiency standards unless they satisfy alternative requirements in the form of proposed

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[1] DOE's RFI was published at 76 Fed. Reg. 6123 (February 3, 2011). HPBA's comments in response to that notice (HPBA's RFI Comments) are attached, for consideration in this rulemaking and for inclusion in the rulemaking record, as Appendix I to these comments.

[2] See Transcript of DOE's September 1, 2011 Public Meeting on Direct Heating Equipment Energy Conservation Standard Notice of Proposed Rulemaking (Public Meeting Transcript).

[3] A copy of HPBA's September 13, 2010 letter directed to Secretary Chu is attached and incorporated in these comments as Exhibit A.

[4] See Public Meeting Transcript at 43-55; HPBA's September 13, 2010 letter to Secretary Chu (Exhibit A).

"exclusions." 76 Fed. Reg. at 43943. However, DOE has never even attempted to determine whether those heating efficiency standards would be "technologically feasible" with respect to such products. In fact, the heating efficiency standards were developed for heaters, and were justified on the basis that heaters have a weighted average annual fuel utilization efficiency (AFUE) of 64%, and that the slightly higher minimum AFUE efficiencies imposed by the standards could be achieved through relatively modest modifications to such products.[5] This analysis did nothing to address decorative products – for which no AFUE efficiency data was available and no basis for consideration of technological feasibility existed – and is plainly inapplicable to them. Indeed, decorative hearth products are designed for aesthetic appeal rather than heating utility, and many such products have very low efficiencies and could not possibly be modified to achieve the standards imposed for fireplace heaters.[6] The NOPR provides no discussion at all as to whether the heating efficiency standards would be "technologically feasible" for decorative products, nor does any analysis of this issue – much less a determination that heating efficiency standards *would be* "technologically feasible" for decorative products – appear anywhere in the administrative record. Because DOE made no determination that heating efficiency standards would be technologically feasible for decorative products at the time it issued the NOPR, issuance of the NOPR was itself unlawful. 42 U.S.C. §6295(p)(1). Accordingly, the only appropriate action would be for DOE to withdraw the NOPR.

2. The NOPR is inadequate to satisfy the notice and comment requirements.

In adopting energy conservation standards, DOE is required to publish a proposed rule articulating the basis for the proposal and allowing opportunity for public comment. 42 U.S.C. §6295(p)(1)-(2); 42 U.S.C. §6306 (a); 5 U.S.C. §553(b). Notice-and-comment procedures are designed to ensure that the basis for agency regulations is tested through exposure to public comment. Accordingly, agencies are required to provide notice and opportunity for comment on the evidence upon which they rely,[7] and are guilty of "serious procedural error" if they fail to "reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[8]

The NOPR is inadequate to satisfy the requirements for notice and comment rulemaking because it completely fails to provide a cogent explanation of the basis for the regulations proposed. Indeed, the NOPR offers no evidence at all for most of the key assertions, estimates, and assumptions that DOE relied upon to justify the proposed rule, and fails to explain most of the key aspects of DOE's analysis. As a result, it is impossible for commenters to determine how or on what basis key conclusions were reached. Remarkably, the NOPR does not even articulate

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[5] See Appendix I (HPBA's RFI Comments) at 4.

[6] See Appendix I (HPBA RFI Comments) at 5-7; 75 Fed. Reg. 20112 at 20129 (April 16, 2010)(recognizing that some decorative vented gas fireplaces produce "no significant heat").

[7] Chamber of Commerce v. SEC, 443 F.3d 890 (D.C.Cir. 2006).

[8] Owner-Operator Independent Drivers Association, Inc., v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 199 (D.C.Cir 2007).

any legal or regulatory basis for some of the core elements of the proposed rule. Commenter's thus cannot comment on the justification for many of the key decisions underlying the proposed rule, because – for many of those decisions – the NOPR offers no justification at all.

The lack of technical information supporting the proposed rule is truly striking. As already indicated, the NOPR itself provides little more than unsubstantiated assertions and conclusions, and is virtually bereft of explanation as to the technical information and analysis on which the proposed rule is based. Even more remarkably, the administrative record – which would normally be home to voluminous technical support documents outlining the basis for a proposed rule – provides almost nothing to explain the basis for the proposed rule as necessary to inform public comment. Indeed, as of the date of the Public Meeting – which was held 41 days into a 60-day comment period – DOE had placed exactly one supporting document in the rulemaking record: a two-page statement dismissing the need for any substantial environmental review of the proposed rule under the National Environmental Policy Act (NEPA). There was thus *nothing* in the record to inform comment at the Public Meeting as to the technical basis for the proposed rule. During the Public Meeting, HPBA noted the complete lack of documentation explaining the technical basis for the proposed rule, and DOE responded by extending the comment period on the NOPR (from September 20, 2011, to October 14, 2011) and indicating that it would populate the record with supporting documentation to facilitate comment. 76 Fed. Reg. 56125-26 (2011). To date, however, DOE has provided nothing but a single ill-formatted document displaying (but not explaining the basis for) product shipment assumptions apparently used in development of the NOPR. As a result, the public and the regulated community remain completely in the dark as to the technical basis for the proposed rule and are left to comment on nothing but assumptions, assertions, and conclusions drawn from "black box" analyses.

For example, the proposed rule provides a quantitative assessment of the impacts of the proposed rule that consists almost entirely of a summary of unexplained conclusions. See 76 Fed. Reg. at 43949. Given the many gross factual inaccuracies in the information and assumptions the NOPR does disclose, it is impossible to believe that there could be any merit to this analysis or the conclusions drawn. However, meaningful comment on the analysis itself is impossible, because neither the record nor the NOPR disclose it. Instead, the NOPR simply states conclusions, suggesting that the proposed rule would affect 42 vented gas fireplace "product lines" and 35 log set "product lines." See 76 Fed. Reg. at 43949. The NOPR does nothing to explain what a "product line" is, how DOE defined or counted them, or even whether the type of analysis reportedly performed has any validity at all in the context of decorative vented gas hearth products. Similarly, the NOPR does not explain how or on what basis DOE quantified the compliance costs for the 77 "product lines" allegedly at issue. As a result, it is impossible to understand – much less critique – DOE's analysis.

In any event, it likely is not the basis of the proposed rule that really matters. Comment provided at the Public Meeting was sufficient to demonstrate that the proposed rule was based on wildly inaccurate assertions, indefensible assumptions, and a profound misunderstanding of basic issues.[9] Accordingly, it seems certain that DOE will have to make significant changes both in

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[9] See Public Meeting Transcript at 43-55; HPBA's September 13, 2010 letter to Secretary Chu (Exhibit A).

the rules it seeks to impose and in the evidence and analysis needed to justify any final rule. This creates an obvious problem: commenters have no way to know what new evidence DOE might rely on, what new assumptions DOE might make, or what new analysis and conclusions might be offered to justify a final rule. As a result, commenters are left with no meaningful opportunity to comment on the evidence and analysis upon which any final rule would be based, because – as of the close of the comment period – there is no way to know what that evidence and analysis might be. The significance of this problem cannot be overstated, because HPBA has literally no idea what real evidence DOE has – if any – with respect to most of the core factual issues critical to this rulemaking. Without a meaningful opportunity to comment on the basis of a rulemaking decision, the notice and comment process is reduced to nothing but an empty – and legally inadequate – exercise.[10]

HPBA is particularly concerned by the fact that – although DOE's announced intent is to produce a final rule before the end of the year – it had only recently *commenced* efforts to gather information to justify the requirements it seeks to impose. Indeed, it is clear that the NOPR was issued without the benefit of any meaningful factual inquiry. Although the NOPR states that DOE had *attempted* to contact four manufacturers of gas log sets, 76 Fed. Reg. at 43948, it did not actually contact *any manufacturers* before it issued the NOPR. In fact, it appears that no significant effort to contact manufacturers occurred until a few weeks ago, when employees of Navigant – a DOE contractor – contacted several manufacturers of gas log sets seeking to arrange interviews and facility visits. Navigant provided interview guides designed to elicit the kind of basic information that DOE should have had in hand before it developed a proposed rule, and asked to schedule interviews and visits in October.[11] However, it was apparent that the comment period on the proposed rule would be closed before any product of the data collection exercise could be expected to appear in the administrative record. Concerned by the prospect that DOE might (a) seek to justify a final rule based on extra-record data and analysis that had never been tested through public review and comment, or (b) collect information that it would not use to inform the rulemaking process, HPBA wrote to Secretary Chu on September 28, 2011, seeking clarification as to how DOE intended to proceed and whether there would ever be any

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[10] The critical need to ensure that evidence relied upon in agency decision-making is tested through review and comment was demonstrated that the Public Meeting by discussion of one of the very few estimates for which the NOPR provided any evidence at all: the estimate of pilot light gas consumption for vented gas log sets. The NOPR stated that DOE's estimate was based upon information from five specific internet sources. 76 Fed. Reg. at 43946 n.9. Armed with this information, one of HPBA's members was able to assess the evidence on which the NOPR relied and inform DOE – before it has already promulgated a final rule – that the information on which it was relying did not even address vented gas log sets, as DOE had mistakenly assumed. <u>See</u> Public Meeting Transcript at 43-44.

[11] A copy of the interview guide Navigant provided is attached and incorporated in these comments as Exhibit B.

opportunity for comment on the data Navigant was seeking.[12] To date, HPBA has received no response to this correspondence.

Again, HPBA's concerns do not relate to information supplementing an existing body of information since DOE has presented almost no credible data with respect to any of the core issues involved in this rulemaking. A data collection effort with respect to gas log sets was not even commenced until just before the close of the comment period, and DOE has never even attempted that level of data collection effort with respect to decorative vented gas fireplaces.[13] As a result, HPBA can only imagine what evidence and data might be relied upon in an effort to justify a final rule and there is simply no way in which the purposes of notice and comment rulemaking can be adequately served.

3. The Public Meeting was not conducted in accordance with law.

DOE has a statutory obligation under EPCA to allow interested parties an opportunity to question DOE officials presenting information with regard to disputed issues of material fact. 42 U.S.C. §6306(a)(2). At the September 1, 2011, public meeting, industry representatives repeatedly sought to question DOE's presenter as to the basis for disputed factual assertions or assumptions, but the DOE official refused to provide any substantive response. The statutory right to question DOE officials clearly imposes an obligation for DOE officials to respond in some meaningful way, particularly with respect to core substantive issues upon which the information requested is required to facilitate effective comment. Yet DOE officials repeatedly refused to respond to basic questions as to the basis and rationale for provisions of the proposed rule on which comment had been expressly invited.[14] This refusal to respond to questions concerning the basis for the proposed rule was a violation of DOE's statutory obligations that compounded the inadequacy of the NOPR itself and directly frustrated the ability of commenters to understand and comment on the basic rationale for the proposed rule.

4. The proposed regulations are facially unlawful.

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[12] A copy of HPBA's letter of September 28, 2011, is attached and incorporated in these comments as Exhibit C.

[13] It is inaccurate to suggest that the development of the April 16, 2010 final rule involved any significant information gathering or technical analysis with respect to decorative vented gas fireplaces. The information collected in the rulemaking – and the technical analysis in support of the final rule – was based entirely on fireplace heaters, and manufacturers interviewed in the course of that rulemaking uniformly report that information on decorative vented gas fireplaces was neither requested nor provided. See Appendix I (HPBA's RFA Comments) at 2-4.

[14] See Public Meeting Transcript at 100-101 (basis for DOE's reversal of position as to whether gas log sets are DHE), 104 (basis for compliance deadline); 110-111 (basis for conditions of proposed exclusions), 112 (basis for imposing standards without any determination that they are technologically feasible or economically justified).

In addition to the gross procedural deficiencies of this rulemaking, there are fundamental substantive problems with the regulations proposed. In fact the proposed rule is patently unlawful in at least all of the following respects:

- As discussed in Section C.1 below, decorative products plainly aren't DHE and cannot lawfully be regulated as such. Both the language of the statute and its intent are clear: DHE includes only utilitarian heating products. Decorative products are not utilitarian heating products and it would be irrational for DOE to classify them as such.

- The proposed rule would make decorative products subject to minimum AFUE efficiencies unless they qualify for an "exclusion" by complying with alternative requirements. 76 Fed. Reg. at 43948. However, it would be unlawful – for several independent reasons – for DOE to impose minimum AFUE efficiencies on decorative products. First, as discussed in Section C.3.a below, it is unlawful for DOE to impose energy conservation standards in the absence of an applicable test method, and no AFUE method is applicable to decorative products. Second, as discussed in Section A.1 above, it is unlawful for DOE to impose heating efficiency standards without a determination that such standards would be technologically feasible, and DOE has not made – and could not rationally make – a determination that heating efficiency standards are technologically achievable for decorative products. Third, as discussed in Section B.2 below, it is unlawful for DOE to impose heating efficiency standards without a determination that such standards would be economically justified, and DOE has not made – and could not rationally make – a determination that heating efficiency standards for decorative products are economically justified. For each of these reasons, heating efficiency standards cannot lawfully apply to decorative products. Accordingly, there is no basis to regulate such products on the premise that they must qualify for an "exclusion" from heating efficiency standards.

- As discussed in Section 2 below, DOE cannot make the terms of a purported "exclusion" applicable to gas log sets by April 16, 2013. The premise of the April 16, 2013 compliance deadline is that gas log sets will become subject to the heating efficiency standards imposed by DOE's April 16, 2010 final rule on that date. This is a false premise, because the April 16, 2010 final rule did not apply to gas log sets and cannot be amended to include them retroactively. Consequently, there will be no need for any purported "exclusion" on the date the April 16, 2010 final rule takes effect. Even if heating efficiency standards could lawfully be imposed on gas log sets (which they cannot), such standards could only become effective five years after the date of a final rule imposing them.

- As discussed in Section 2 below, DOE cannot impose a July 1, 2014 compliance deadline for its proposed pilot light restrictions. Such restrictions would be new energy conservation standards, and could only become effective five years after the date of a final rule imposing them.

Given these profound and fundamental defects in the proposed rule, the NOPR should be withdrawn and this rulemaking should be terminated.

B. DOE HAS NOT PROVIDED ANY REMOTELY ADEQUATE JUSTIFICATION FOR THE RESTRICTIONS IT SEEKS TO IMPOSE.

The proposed rule seeks to ban standing pilot lights on decorative vented gas fireplaces and gas log sets. There is, however, no reason to conclude that a ban on standing pilot lights would produce any significant energy conservation benefits, and the NOPR provides no credible basis to conclude that it would.

1. DOE failed to consider alternatives to its proposed ban on standing pilot lights.

Both Executive Order 13563 and DOE's own policy with respect to rulemaking[15] require DOE to consider non-regulatory alternatives before regulatory requirements are imposed, yet the NOPR reflects no consideration at all of any non-regulatory alternatives to DOE's proposed ban on standing pilot lights on decorative hearth products. This is remarkable, because there are obvious reasons to believe that a non-regulatory approach aimed at pilot light use would provide far greater and more immediate energy conservation benefits than a ban on standing pilot lights. In particular:

- **It is generally easy for consumers to reduce pilot light use.** Unlike heating and cooking appliances, decorative hearth products are used on an infrequent and seasonal basis; indeed many decorative hearth products – like fireplaces in general – are not used at all.[16] Consequently, the owners of such products – unlike the owners of typical home cooking and heating appliances – can dramatically reduce pilot light usage without having to turn pilot lights on and off more than a few times throughout the year.

- **Consumers already have direct and easily-understood incentives to reduce pilot light use.** Gas costs money, and it is intuitively obvious that it makes no sense to leave a pilot light burning on a product that is used only seasonally, infrequently, or not at all. which is why many consumers already have the pilot lights on such products turned off all or virtually all of the time. This kind of behavior should be easy to encourage; it cannot be very difficult to persuade consumers to save their own money when little if any effort or inconvenience is required and the same behavior provides the opportunity to conserve energy and reduce carbon emissions.

- **Changes in pilot light use can make a bigger and faster difference than a ban on standing pilot lights.** The overwhelming majority of decorative hearth products with pilot lights are already in homes. Efforts to influence pilot light use

[15] See Appendix A to Subpart C of Part 430 at 5(e)(3)(i)(D).

[16] See Appendix I (HPBA's RFI Comments) at Attachment C.

can reach these existing products – as well as new products – almost immediately. By contrast, a pilot light ban would only have an impact on the relative trickle of new products entering the market after the effective date of the ban. Even with respect to new products, efforts to reduce pilot light use could be expected to provide most of the energy conservation benefits that a ban on standing pilot lights would provide.

- **Efforts to reduce pilot light use are already underway and can be expected to increase.** These efforts plainly have far more potential to produce meaningful energy conservation benefits than a ban on standing pilot lights would, and create serious questions – questions DOE has not even considered – as to whether there is any need or justification for any regulation with respect to standing pilot lights on decorative hearth products.

The industry has extensive experience with the use of non-regulatory initiatives to achieve more substantial and immediate benefits than regulatory alternatives. HPBA, in fact, has been working with the U.S. Environmental Protection Agency (EPA) for over 15 years on "wood stove changeouts" to supplement New Source Performance Standards (NSPS) and improve air quality.

NSPS for wood stoves were effective in 1992, and were designed to drastically reduce particulate emissions from wood stoves through requirements that all new models be designed to reduce particulate emissions. The industry, given years to redesign their products, has been able to achieve reductions of up to 90%. Given the durability of old wood stoves, however, the aggregate reduction of particulate matter emitted by wood stoves, as a result of the NSPS, was low, since there was little replacement of existing units.

EPA ultimately decided that the best approach for achieving significant reductions in particulate matter emissions would be to focus on the existing population of wood stoves, which is estimated at over 10 million units. The hearth industry and EPA began to work on "wood stove changeouts," in which the public was encouraged – often through discounting – to trade in their old, high-emitting units for new, low-emitting units. The program, while expensive, has proven results. In fact, towns with a high proportion of homes heated with wood stoves, such as Crested Butte, Colorado, and Libby, Montana, have experienced significant air quality improvements as a result of wood stove changeout programs. More information on these programs can be found at http://www.epa.gov/burnwise/pdfs/EPA_stove_emis_reduct.pdf.

A similar approach can be used for reducing pilot light gas usage for decorative gas fireplaces and gas log sets. There will be more success in targeting existing units – with the economic payoff of lower natural gas bills – than waiting for the turnover of existing units into new units mandated by government regulation. The hearth industry, in partnership with EPA, has proven the wisdom of this kind of approach.

2. **<u>DOE has not made any reasoned determination that its proposed pilot light restrictions are economically justified.</u>**

DOE has a statutory obligation to determine that any energy conservation standards imposed are "economically justified," considering the economic impact of the standard on manufacturers and consumers and the savings in operating costs over the average life of a product as compared to any increases in product price and maintenance costs associated with the standard. 42 U.S.C. §6295(o)(2). In addition, Executive Order 13563 emphasizes the need for agencies to make a reasoned determination that the benefits of a regulation outweigh its costs, and to consider the cumulative burdens of regulation. Nevertheless, DOE has failed to provide any reasoned assessment of the benefits or costs of the ban on standing pilot lights that it seeks to impose.

a. DOE's assessment of energy conservation benefits is unreasonable.

The NOPR reflects significant calculations designed to show energy conservation benefits sufficient to justify DOE's proposed ban on standing pilot lights. The first problem with this analysis is that DOE has no real numbers to to use for its calculations. This is not be surprising, because there was no rule development process during which the necessary data could have been assembled, let alone applied, and it appears that no one had studied the relevant issues before the NOPR was suddenly and unexpectedly issued. As a result, the data needed to calculate the purported energy conservation benefits of the proposed rule – and thus to make any reasoned determination that the proposed rule is economically justified – does not appear to exist. There is certainly no credible basis for the numbers used in the analysis the NOPR provides. For example:

- DOE estimated that 38% of decorative vented gas fireplace models and 20% of gas log sets have standing pilot lights. 76 Fed. Reg. at 43946. It isn't clear what this estimate for decorative vented gas fireplaces is based on (or how the number of models might relate to the number of units actually sold for purposes of determining purported gas savings), but – as far as HPBA is aware – a significant data collection effort would be needed before there would be a basis for anything more than guesswork. There is a similar lack of credible data with respect to gas log sets: the only evidence the NOPR cites is a fourteen year-old study that provides pilot light information for a non-representative sample of only 49 gas log sets.[17]

- On the basis of internet research, DOE assumed that the pilot lights on vented gas log sets consume an average of 1,250 Btu/h. 76 Fed. Reg. at 43946. As already indicated, however, the information DOE consulted does not actually relate to vented gas log sets. Information from vented gas log set manufacturers suggests that DOE's assumption is wildly inaccurate, and that the number is less than 800 Btu/h. See Public Meeting Transcript at 44, 81-82.

- DOE assumes that 75% of all standing pilots are left on 24 hours per day, 365 days/year, and that the remaining 25% are left on for about one-fourth of the year.

[17] See Menkedick, J., Hartford, P., Collins, S., Chumaker, S., Wells, D. Topic Report: Hearth Products Study (1995-1997). Gas Research Institute (GRI), September 1997. GRI-97/0298 at p. 4-6 (indicating that the study was based on a small sample that was heavily biased toward cold climate areas).

76 Fed. Reg. at 43946. DOE cites no evidence in support of these assumptions, and they are plainly unreasonable. Indeed, while there appears to be nothing but anecdotal information as to the extent of pilot light use for decorative hearth products, such information suggests that DOE's estimate wildly overstates pilot light use.[18]

- Further, DOE states that, according to its market research, "[M]ore than half of the decorative hearth product market and more than three-quarters of the vented gas log market would not be impacted, because the products already utilize alternatives to a standing pilot light, such as an intermittent pilot or electronic ignition." 76 Fed. Reg. at 43946. In point of fact, the incidence of intermittent pilots and electronic ignition in the gas log industry is estimated at less than 5%.[19]

There is simply no credible data to sufficient to permit a reasoned assessment of the energy conservation benefits – if any – that a ban on standing pilot lights for decorative hearth products would provide. The NOPR simply piled unjustified assumption upon unjustified assumption to produce a result that has no known connection to reality.

b. DOE's assessment of the costs is unreasonable.

As already discussed in Section A.2 of these comments, DOE's assessment of the costs imposed by its regulation is a "black box" analysis upon which no methodological comment is possible. However – as more fully explained in Section B.2.a of these comments – there are a number of stated assumptions underlying that analysis, a number of which are unreasonable and conspicuously erroneous. As a result, DOE has failed to provide any reasonable basis for an assessment as to whether its proposed pilot light restrictions would be economically justified.

C. RESPONSE TO SPECIFIC REQUESTS FOR COMMENT.

1. DOE cannot lawfully categorize decorative hearth products as DHE.

By statute, DHE is a category of "covered products" subject to energy conservation standards. 42 U.S.C. §§6292(a)(9) and 6295(e)(3). Provisions addressing this particular category of "covered products" were adopted in the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12. NAECA required that DHE meet minimum heating efficiency standards, and specified annual fuel utilization efficiency (AFUE) as the "efficiency descriptor" for that class of products. 42 U.S.C. §§6295(e)(3) and 6291(22)(A). The statutorily-imposed energy conservation standards for DHE provided separate standards specific to three categories

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[18] See Public Meeting Transcript at 45, 82-82. In fact, even the anecdotal information is likely to overstate pilot light usage considerably, because such information tends to be based primarily upon service call experience that is unlikely to account for products that are used rarely or not at all: the category of products least likely to be left with standing pilot lights burning. Data suggests that something on the order of half of all fireplaces are used rarely or not at all. Attachment I (HPBA's RFI Comments) at Attachment C, p. 10. Even is the percentage of gas fireplace products in this category is somewhat lower, it is still substantial. Id. at Table 5.

[19] See, e.g., Public Meeting Transcript at 147.

of products: "wall," "floor" and "room" vented gas space heaters, each of which were well-defined product categories for which specific American National Standards Institute (ANSI) standards existed.[20] At the time this statutory scheme was adopted, decorative vented gas fireplaces and gas log sets existed, but they were recognized as entirely different categories of products,[21] and neither were categorized as DHE or regulated as such under the statute.

a. Decorative Hearth Products Were Not Intended to be Classified as DHE.

As a matter of historical fact, decorative vented gas fireplaces and gas log sets were not intended to be classified as DHE or regulated as such. The facts are clear, because the relevant statutory provisions were enacted through legislative adoption of agreed-upon provisions developed through negotiations between industry and energy conservation advocates. DOE was not represented in the negotiations, but manufacturers of decorative hearth products were, and they would have objected to any suggestion that decorative hearth products be classified or regulated as DHE. There was no such suggestion, and Robert Bauer, President and Chief Executive Officer of HPBA member Empire Comfort Systems, Inc., testified in support of legislation adopting the product of the negotiations.[22] Public interest advocates involved in the negotiations also clearly equated DHE with conventional, utilitarian space heaters – not decorative hearth products – as written testimony in support of the legislation shows.[23] Other individuals and organizations that participated in the negotiations have recently confirmed that decorative vented hearth products were not considered to be DHE or intended to be classified as such.[24] As one of

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[20] The ANSI Z21.44 and Z21.49 standards applied to vented wall furnaces, the ANSI Z21.48 standard applied to vented floor furnaces, and the ANSI Z21.11.1 standard applied to vented room heaters. These ANSI standards were harmonized in, and replaced by the ANSI Z21.86 ("vented gas-fired space heating appliances") standard in 1998.

[21] Decorative vented gas fireplaces were subject to the ANSI Z21.50 standard, which had been developed specifically for products "intended to be decorative rather than a source of heat" and applied to a class of products ("vented decorative gas appliance") defined as "a vented appliance whose only function lies in the aesthetic effect of the flames." ANSI Z21.50-1986 Standard at ii and 48 (copy provided as Exhibit D). There was also a separate ANSI standard for vented gas log sets: the ANSI Z21.60-84 standard for "decorative gas appliances for installation in vented fireplaces."

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

[23] S. Hrg. 99-943, Statement of Howard S. Geller, American Council for an Energy-Efficient Economy, at 147 (identifying direct heating equipment as "space heaters").

[24] See Transcript of September 1, 2011 Public Meeting on Direct Heating Equipment Energy Conservation Standard, Notice of Proposed Rulemaking, at 91-95; April 7, 2011 Comments of the Air-Conditioning, Heating, and Refrigeration Institute on Regulatory Reduction RFI (copy provided as Exhibit E).

the direct participants in the negotiations recently testified, "decorative equipment certainly was not included. We were talking about room heaters, wall furnaces, and floor furnaces."[25] Given the actual intent of the statute, DOE is wrong to search for "ambiguity" in an effort to impose a contrary result.

b. The statute unambiguously precludes DOE's interpretation

In its July 22, 2011 proposed rule, DOE states that the statute does not define the term DHE and asserts that "in the absence of an unambiguous statutory definition, DOE has discretion to establish a reasonable regulatory definition." 76 Fed. Reg. at 43944. DOE further suggests that DHE is a broad term "that signals that the definition is open to accommodate future technological changes in the marketplace." Id. Neither of these assertions have merit.

First, when interpreting a statute, DOE must give effect to the unambiguously expressed intent of Congress.[26] The absence of a statutory definition does not itself leave DOE with "discretion," because "the absence of a statutory definition does not render a word ambiguous."[27] Rather, in determining whether Congress has unambiguously expressed its intent, DOE "must place the provision in context, interpreting the statute as a 'symmetrical and coherent regulatory scheme' and fitting all parts 'into a harmonious whole."[28] Read as a whole, the statute unambiguously precludes the interpretation DOE would impose upon it. Indeed, as explained below, the statute not only defines DHE as strictly utilitarian space heating appliances through the efficiency descriptor it specifies for such products; it actually lists the specific categories of products that qualify as DHE.[29]

Second, the suggestion that that the definition of DHE should be "open to accommodate future technological changes in the marketplace" is both inapposite and contrary to the structure of the statute itself. "[F]uture technological changes in the marketplace" are not relevant here, because – as already indicated – *both decorative vented gas fireplaces and gas log sets existed at the time Congress addressed DHE in the statute*. Accordingly, these products are nothing new. Congress could easily have identified them as DHE and regulated them as such, but it did not. In any event, the means for DOE to expand the range of products subject to regulation under the statute – to accommodate change or not – is not creative interpretation. Indeed, it is clear that Congress did *not* give DOE discretion to interpret statutory categories of "covered products" to include products the statute did not regulate as such. Instead, Congress provided a specific statutory mechanism through which DOE can seek to identify and regulate – as new "covered products" –

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[25] Transcript of September 1, 2011 Public Meeting on Direct Heating Equipment Energy Conservation Standard, Notice of Proposed Rulemaking, at 94.

[26] Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 104 S.Ct. 2778, 2781 (1984); Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 642 F.3d 234, 238 (D.C. Cir. 2011).

[27] Natural Resources Def. Council, Inc. v. EPA, 489 F.3d 1364, 1371 (D.C. Cir. 2007).

[28] NRDC v. Abraham, 355 F.3d 179, 195 (2d Cir. 2004), quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 132-33 (2000).

[29] See 42 U.S.C. §§6291(22)(A) and 6295(e)(3).

products that the statute did not address. 42 U.S.C. §§6292(b) and 6295(l). Having provided such a mechanism – which includes express statutory standards and procedures to guide DOE's discretion – Congress clearly did not intend to permit DOE to end-run its statutory scheme through the expedient of an "interpretation" adding new products to an existing statutory category of "covered products."[30] Yet it is precisely such an end-run that DOE seeks to accomplish. Congress did not regulate decorative hearth products, and now DOE seeks to do so, but without following the procedures required by law.

Rather than starting from the premise that it has broad discretion to impose its own meaning on the statute, DOE should start by reading the statute itself, applying the "fundamental cannon of construction that words of a statute must be read in their context with a view to their place in the overall statutory scheme,"[31] and with the presumption that Congress "says in a statute what it means and means in a statute what it says."[32] Such a reading makes it abundantly clear that DHE does not include decorative hearth products. Indeed, the term "direct heating equipment" – certainly as used in the context of an appliance efficiency statute – can only mean "equipment" designed for the purpose of "heating." After all, statutory interpretation must begin with the language of the statute itself, and "the presumption that the legislative purpose is expressed by the ordinary meaning of the words used."[33] Giving effect to "the ordinary, plain-English meaning" of words of the statute,[34] it seems inescapable that "direct heating equipment" is limited to "heating equipment" in the ordinary sense of the term. Indeed, this is the only reading that makes any sense in the context of an energy efficiency law, because – both as a matter of "plain English" and actual legislative intent – the "efficiency" of a product can be determined only by reference to its actual purpose.[35] Decorative hearth products are not intended for utilitarian heating use, often have little or no heating utility, and are sometimes expressly advertised on the basis of how *little* heat they generate.[36] The suggestion that such products are

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[30] See Whitman v. Am. Trucking Assocs., 531 U.S. 457, 485 (2001) (an agency "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion"); NRDC v. Harrington, 768 F.2d 1355, 1396 (D.C.Cir. 1985) (DOE "may not ignore the decisionmaking procedure Congress specifically mandated because [it] thinks it can design a better procedure").

[31] FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291, 1231 (2000).

[32] Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 642 F.3d 234, 238 (D.C. Cir. 2011), quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); see Carcieri v. Salazar, 129 S.Ct. 1058, 1066-1067 (2009).

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

[34] American Mining Congress v. EPA, 824 F.2d at 1184.

[35] See H.R. Rep. No. 100-11, at 20 (1987) ("the energy conservation standards specified in the Act apply to the principal function of an appliance.").

[36] HPBA addressed the purpose, design, function, and usage characteristics of decorative vented gas fireplaces in its March 21, 2011 comments submitted in response to DOE's Regulatory

"heating equipment" is "an extraordinary distortion of the English language" that cannot be squared with the statutory text.[37]

In any event, a reading of the statute as a whole leaves no question what DHE does and does not include, because the statute expressly tells us: it divides DHE into sixteen specific subcategories of "wall," "floor" and "room" vented gas space heaters, and imposes specific energy efficiency standards for each. 42 U.S.C. §6295(e)(3). There is no suggestion in the statute that any other products might qualify as DHE; to the contrary, the sale of DHE not meeting the specified standards was prohibited by statute effective January 1, 1990, and the only standards provided were specific to the sixteen identified subcategories of DHE. Id. Had Congress intended decorative vented gas fireplaces or gas log sets to be considered DHE, standards would obviously have been provided for them, and the sale of products not meeting those standards would have been banned in 1990. Having itself declined to regulate decorative vented gas fireplaces or gas log sets as DHE, Congress gave DOE no authority to do so. DOE's only charge was to determine by 1992 whether the statutory efficiency standards for the sixteen subcategories of DHE should be amended, and then to determine by 2000 "whether the standards in effect for such products" should be amended. 42 U.S.C. §§6295(e)(3)-(e)(4). Again, if DOE wants to regulate other products on its own motion it may do so, but *not by identifying them as DHE when Congress did not*. Instead, DOE may regulate new "covered products" only by identifying them as such pursuant to – and subject to the conditions of – the authority Congress expressly provided for that purpose in 42 U.S.C. §§6292(b) and 6295(l).

The fact that DHE was intended to include only strictly utilitarian heating appliances is also clear from the "efficiency descriptor" expressly provided for such products. 42 U.S.C. §6291(22)(A). As explained in HPBA's RFI Comments, this "efficiency descriptor" – annual fuel utilization efficiency (AFUE) – is based entirely on heating efficiency as determined by the application of a test method designed for products that are used strictly for utilitarian heating purposes.[38] This test method is clearly the "wrong yardstick" for measuring the performance of decorative hearth products, because it does not measure efficiency by reference to the actual purpose and use of decorative products.[39] In fact, the design of the method is such that it is inapplicable to

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Burden RFI, 76 Fed. Reg. 6123 (February 3, 2011) (HPBA's RFI Comments), which HPBA is submitting separately for the record in this proceeding.

[37] Association of Battery Recyclers, 208 F.3d 1047, 1053 (D.C. Cir. 2000); see Amoco Prod. Co. v. Watson, 410 F.3d 722, 734 (D.C. Cir. 2005) ("No canon of construction justifies construing actual statutory language beyond what terms can reasonably bear").

[38] Indeed, the method generates heating efficiency numbers based on built-in assumptions that presume that the product to be tested is used solely for utilitarian heating purposes, being cycled on and off – and turned up and down – strictly in response to heating needs. See HPBA's RFI Comments at Attachment C.

[39] Under 42 U.S.C. §6293, the test procedure prescribed for a covered product must be "reasonably designed to produce test results which measure energy efficiency, energy use . . . or estimated annual operating cost of a covered product during a representative average use cycle or period of use . . . ." 42 U.S.C. §6293(b)(3). The test procedure must therefore reflect the actual purpose of the product and the manner in which it is used.

decorative vented gas fireplaces[40] and cannot even be mechanically applied to vented gas log sets.[41] Congress obviously would not have specified an exclusive efficiency descriptor for DHE that could not be appropriately applied to the entire range of DHE products.[42] Indeed, the efficiency descriptor for DHE was plainly intended as a means to specify the intended basis for the regulation of all DHE products; any other interpretation would render the efficiency descriptor meaningless, in contravention of the fundamental principle that statutes must be interpreted to give effect to all of their provisions.[43] In short, it is clear that DHE can only include products to which the specified efficiency descriptor – and efficiency standards based upon that efficiency descriptor – could appropriately be applied. By imposing the efficiency descriptor for DHE that it did, Congress unambiguously expressed the actual intent of the statute: that DHE is limited to strictly utilitarian heating appliances such as those the statute expressly identifies as DHE and regulates as such. 42 U.S.C. §6295(e)(3).

In short, the actual intent of the statute is clear as a matter of historical fact, and – consistent with that intent – the language and structure of the statute unambiguously foreclose DOE's proposed "interpretation" adding decorative hearth products to the statutory category of "covered products" known as DHE. The statute provides a mechanism for DOE to seek to regulate products that Congress did not, and DOE should not seek to end-run that mechanism though the expedient of an "interpretation" calling its target products something they are not.

c. DOE's proposed interpretation that decorative vented hearth products are DHE is unreasonable.

As already indicated, decorative vented gas fireplaces and gas log sets are not heating equipment: they are decorative products. In arguing otherwise, the NOPR grossly mischaracterizes the nature of the products at issue. Indeed, the NOPR states that "[a] vented hearth product can be intended to be used as only a heating appliance or as a heat source with an aesthetic appeal," and that "the primary difference between the two types of vented hearth heaters is that decorative units provide ambiance and aesthetic utility associated with a solid fuel (e.g., wood-burning) fireplace in addition to heat output to the living space, whereas heating hearth products tend to focus on providing heat to the living space." NOPR at 43944. There is absolutely no basis for these statements, and they are false. In fact, the core appeal of all vented hearth products is aesthetic. Consumers interested in products that are "intended to be used as only a heating appliance" do not buy vented hearth products. Conversely, vented hearth products – no matter how effective they might be as utilitarian heating products – will not sell if they lack aesthetic appeal. In short, heater-rated vented hearth products are decorative heaters that

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[40] See HPBA's RFI Comments at Attachment C.

[41] Vented gas log sets are designed to be installed in existing fireplaces, and thus lack key physical features required for gas sampling to be performed as necessary to apply the AFUE test method.

[42] See United States v. Wilson, 290 F.3d 347, 361 (D.C. Cir. 2002) (statutory interpretations that yield absurd results are strongly disfavored).

[43] See, e.g., Natural Resources Def. Council, Inc. v. EPA, 489 F.3d 1364, 1373 (D.C. Cir. 2007).

“provide ambiance and aesthetic utility associated with a solid fuel (e.g., wood-burning) fireplace in addition to heat output to the living space," while decorative vented hearth products are intended for decorative rather than utilitarian heating use.

The NOPR further suggests that it is "difficult to differentiate between" heating and decorative hearth products. NOPR at 43944. This is misleading. While many vented gas hearth products share some broadly similar features, many decorative and heating hearth products have features that easily distinguish them as either heating or decorative products. Appendix I (HPBA’s RFI Comments) at p. 5. More broadly, heating hearth products and decorative hearth products serve different purposes and have different – often dramatically different – performance characteristics. Id. In particular, heating hearth products are designed and sold as aesthetically appealing products that can also serve as efficient utilitarian heating appliances. These products are designed for heating efficiency, are heater-rated, and are sold on the basis of heating efficiency as well as aesthetic appeal. By contrast, decorative hearth products are designed and sold for aesthetic appeal and *not* for heating efficiency. Many such products – including both gas log sets and decorative vented gas fireplaces – are not a significant source of heat and would not be effective for utilitarian heating use. Decorative products are not heater-rated, are not sold on the basis of heating efficiency, and are not used for utilitarian heating purposes.[44] Indeed, some of these products are expressly marketed on the basis that they provide all the ambiance of a traditional wood-burning fireplace ***without producing too much heat***. Appendix I (HPBA’s RFI Comments) at p.8

The distinction between heating and decorative products only truly becomes difficult when it is confounded by DOE’s proposed interpretation of what does and does not qualify as DHE. Under that interpretation, the status of products as DHE is not “dependent on a manufacturer’s principal intention in designing, manufacturing or marketing such products,” and products may be classified as DHE simply because they “provide some amount of heat to the living space.” NOPR at 43945. This interpretation is confounding for the simple reason that it makes no sense at all. Why – particularly in the context of energy efficiency regulation – should products that “provide some amount of heat to the living space” be considered heating appliances even if heating is not their function? Kitchen ovens, refrigerators and desktop computers all produce heat in this sense – and kitchen ovens have even been known to be used for emergency heating – yet none of these products can reasonably be characterized as “heating appliances” (or DHE), and it would be irrational to regulate any of them as such for energy efficiency purposes. The reason for this is intuitively obvious: as already discussed, the efficiency of a product can only be determined by reference to the purpose that product is intended to serve, and none of these products are intended to serve as heating appliances. The same is true of decorative hearth products: they are designed to provide aesthetic appeal rather than heating utility, and – especially in the context of efficiency regulation – it would be irrational to disregard the function of these products in order to categorize them as DHE.

DOE should understand that decorative hearth products are not really space heaters for which the statutory efficiency descriptor for DHE – AFUE heating efficiency – is appropriate. As a result, the NOPR is designed not to regulate decorative products as heaters, but to impose requirements

[44] Appendix I (HPBA’s RFI Coments) at p. 5 and Attachment C.

including disclaimers stating that these products are *not* heating appliances and a prohibition on standing pilot lights. Why, then, categorize these products as DHE? There is an obvious answer: DOE seeks not to *regulate* these products as DHE, but to *call them* DHE so that it can regulate them from that point forward without having to comply with the statutory requirements for identifying and regulating new categories of "covered products." This is the only answer that does anything to explain the basis for DOE's interpretation with respect to DHE, and it is not an explanation that makes that interpretation reasonable.

The proposed interpretation classifying gas log sets as DHE is particularly unreasonable, because it would conflict directly with DOE's prior interpretation to the contrary. Such a reversal of position requires cogent explanation, and the NOPR offers none. Instead, it reviews the objectively reasonable basis that DOE provided for its earlier determination that gas log sets are not DHE, then argues that it can classify gas log sets as DHE without notwithstanding the fact that these products are not heating products and are inherently unsuited for heating use. 76 Fed. Reg. at 43945. What the NOPR fails to do is provide any explanation as to why such an interpretation would make any sense in the context of efficiency regulation. Again, the basis for DOE's position is painfully clear: DOE does not propose to regulate gas log sets as heating appliances: indeed it seeks to require disclaimers stating that these products are *not* heating appliances. What DOE does seek to do is *call* gas log sets DHE so that it may regulate them without without having to comply with the statutory requirements for identifying and regulating new categories of "covered products."[45]

2. Compliance Deadline

The proposal appears to proceed from the premise that the heating efficiency standards for vented hearth heaters adopted in DOE's April 16, 2010 final rule apply or can be made to apply to gas log sets when those requirements take effect on April 16, 2013. This is an erroneous premise, because the April 16, 2010 Final Rule does not apply to gas log sets. This is a matter of historical fact that is clear from the rulemaking record and the scope of legally-required analysis

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[45] It should be noted that the NOPR also announces a proposed "interpretation" expanding the definition of DHE to include decorative hearth products that currently are not subject to regulation because they are not "designed to furnish warmed air, with or without duct connections, to the space in which [they] are installed" and thus do not qualify as "vented home heating equipment" as defined in 10 C.F.R. §430.2. DOE proposes to accomplish this expansion through a newly-announced "interpretation" that would effectively excise the words "designed to furnish warmed air" from the regulatory text. Specifically, the NOPR asserts (a) that the concept denoted by the words "designed to furnish warmed air" is "not limited to furnishing warmed air" but instead includes any form of heat transfer whether warmed air is being furnished or not, and (b) that "all hearth products create heat," and therefore "furnish warmed air" within the meaning of the "vented home heating equipment" definition. 76 F.2d at 43944. This obviously is not a meaning the regulatory text will bear, and again there is no explanation as to why the proposed interpretation would make any sense. Again, it appears that the sole "justification" for the proposed interpretation is that it will enable DOE to regulate still more decorative hearth products on the premise that they are DHE.

provided to justify adoption of the final rule. No requirements for gas log sets were proposed in the rulemaking, none of the technical analysis justifying the requirements of the rule addressed gas log sets, and no requirements for gas log sets were or could have been imposed. Gas log sets were appropriately recognized as decorative products that were not "covered products" considered in the rulemaking. Subsequent DOE guidance stating that gas log sets are not subject to the April 16, 2010 final rule confirmed what the record already plainly showed.

DOE obviously cannot make the April 16, 2010 final rule retroactively applicable to gas log sets through announcement of a new "interpretation" of the rule or of the range of products it considers to be DHE. There has been no regulation imposing heating efficiency standards for gas log sets, and if any such standards could be lawfully imposed, they would not become effective until five years after publication of the final rule adopting them. 42 U.S.C. §6395(l)(1)(2) and (m)(4)(a)(ii).

As discussed in Section C.3.a of these comments below, compliance with the terms of any purported "exclusion" from heating efficiency requirements could only be required once applicable and lawfully-adopted heating efficiency standards take effect. Consequently the earliest date upon which compliance with the terms of an "exclusion" for gas log sets could be required would be five years after publication of any final rule lawfully imposing heating efficiency standards for such products. Accordingly, there is no legal basis for any of the proposed compliance dates for gas log sets. [46]

The proposed July 1, 2014 compliance date for pilot light restrictions is also contrary to law as to all decorative hearth products. The NOPR appears to proceed on the premise that an energy conservation standard dressed up in the cloth of a definitional "exclusion" can be considered something other than an energy conservation standard for EPCA purposes. The NOPR offers no explanation as to how or why this might be so, but it difficult to imagine any credible theory under which the proposed pilot light prohibitions could be considered to be anything other than new energy conservation standards. Accordingly, the earliest any such prohibitions could take effect would be five years after publication of any final rule adopting them. 42 U.S.C. §6395(l)(1)(2) and (m)(4)(a)(ii).

The proposed July 1, 2014 compliance date for pilot light restrictions is also patently arbitrary. The NOPR provides no rational basis for this proposed deadline, nor did DOE officials at the Public Meeting (indeed, DOE officials at the Public Meeting refused to respond to questions concerning this issue).[47] The date appears to be completely arbitrary, and appears to have been selected without any reasoned consideration of the impacts it would be likely to impose on the regulated community. Executive Order 13563 (February 2, 2011) directs agencies to consider the cumulative impact of regulations, and DOE's own rulemaking policy specifically recognizes

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[46] The same analysis would apply with respect to any decorative vented gas fireplaces that might become subject to regulation as a result of any lawful regulatory changes expanding the universe of regulated hearth products to include products that are not "designed to furnish warmed air, with or without duct connections, to the space in which [they] are installed" within the meaning of 10 C.F.R. §430.2 as adopted on April 16, 2010.

[47] Public Meeting Transcript at 104.

the need to adequately pace rulemakings – and hence the statutorily-mandated effective dates of new standards – to mitigate cumulative regulatory burdens. Appendix A to Subpart C of Part 430 at 10(g). In this case, DOE has already imposed burdensome regulations with respect to heater-rated vented gas fireplaces, and now it is rushing to impose new requirements, not just on decorative vented gas fireplaces as per the April 16, 2010 Final Rule, but also on vented gas log sets under the NOPR.

In proposing the impermissibly-shorten compliance deadline, DOE failed to consider, among other things, the limitations on testing laboratories that the industry must go through in meeting new standards. Requiring the entire industry to go through recertification in such a limited timeframe will lead to a bottleneck of products going through the recertification process, making it both costly and unlikely that the compliance deadline could be met. Lab capacity is currently based on the industry's turning over products over a period of years – so that there is capacity for only a fraction of all of industry's products at any one time. In addition, lab capacity cannot grow appreciably in the limited time to the 2014 deadline because these labs are certified as third-party labs, and expansion is tempered by the cost and the effort required in certifying additional capacity. The bottleneck is exacerbated by an independent regulation affecting solid-fuel hearth appliances – the impending New Source Performance Standards that the Environmental Protection Agency is expected to publish in the first quarter of 2013. The effect of a laboratory bottleneck will be to prevent companies from being able to bring compliant products to the market in time – a serious development that will further challenge the survival of some companies.

3. <u>Proposed Exclusions</u>

There are a number of issues with respect to the various conditions of the proposed exclusions. These will be discussed below. There is, however a more fundamental issue: there is no legal basis for DOE to impose any conditions for "exclusions" at all.

a. There is no legal basis for the conditional exclusions proposed.

The premise of the proposed exclusions is that decorative hearth products can be required to satisfy various conditions in order to be excluded from the requirement to comply with minimum AFUE heating efficiency requirements. This premise rests in turn on the presumption that minimum AFUE heating efficiency standards can themselves be imposed on decorative hearth products. There are, however, several independently sufficient reasons why such standards have not and cannot be lawfully imposed on decorative hearth products.

First, as discussed in Section C.1 of these comments, decorative vented gas fireplaces and gas log sets are not DHE and cannot lawfully be regulated as such. DOE's premise that AFUE heating efficiency standards may be imposed on such products is based squarely on the premise that they are DHE, and is therefore arbitrary and contrary to law.

Second, DOE cannot impose energy efficiency standards for products unless there are applicable efficiency test methods for them,[48] and – as explained in detail in HPBA's RFI Comments –

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[48] 42 U.S.C. §6295(o)(3)(A).

there is no applicable test method for decorative vented gas fireplaces. The AFUE efficiency test method provides the basis for the heating efficiency standards at issue, and this method was designed to measure the efficiency of strictly utilitarian space heating appliances operating solely in response to heating needs. This test method provides no basis to measure the efficiency of decorative products during representative use, because it measures efficiency based on the wrong performance measure and a completely unrepresentative use. Measuring the efficiency of decorative products by means of the AFUE method is the equivalent of measuring the efficiency of an emergency flashlight by determining how efficiently it would serve as a carpenter's hammer. As applied to decorative products, the AFUE method simply considers the wrong performance characteristic in the context of completely unrepresentative use. This is not the kind of measure efficiency test methods are required by law to provide. To the contrary, efficiency standards were obviously intended to "apply to the principal function of an appliance,"[49] and efficiency test methods must be "reasonably designed to produce test results which measure energy efficiency . . . of a covered product during a representative average use cycle or period of use."[50] The AFUE method was designed to be appropriate for strictly utilitarian space heaters; it was not designed to be applied to decorative hearth products and is clearly inapplicable to them.[51]

Third, DOE may not impose energy conservation standards without a determination that such standards are technologically feasible and economically justified, and DOE has never even attempted to make such a determination with respect to either decorative vented gas fireplaces or gas log sets. As already discussed, the April 16, 2010 final rule was adopted without any consideration of whether the heating efficiency standards for hearth heaters would be technologically feasible for decorative products, nor does the NOPR present any analysis whatsoever of this issue.[52] Similarly, the April 16, 2010 final rule addressed the economic justification of heating efficiency standards only with respect to fireplace heaters,[53] and the NOPR does not attempt to address the issue at all. In any event, it must be recognized that heating efficiency standards can be economically justified – if at all – only with respect to products that are actually used as heating appliances; otherwise it cannot be assumed that

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[49] H.R. Rep. No. 100-11, at 20 (1987).

[50] 42 U.S.C. §6293(b)(3).

[51] See Appendix I (HPBA's RFI Comments) at Attachment C. Although the same analysis applies to both decorative vented gas fireplaces and gas log sets, there is an additional and even more obvious reason why the AFUE method is not applicable to gas log sets. In particular, because gas log sets are designed to be installed in existing fireplaces, they do not even have key physical features required to permit gas sampling to be performed as required by the AFUE method. In short, the AFUE method *cannot even be physically applied* to gas log sets.

[52] Again, it is clear that the heating efficiency standards would not be technologically achievable. The heating efficiency standards for hearth heaters require heating efficiencies that gas log sets and many decorative vented gas fireplaces simply can not achieve, and in many cases the required heating efficiencies – if achieved – would make decorative products too hot for their intended use. See Appendix I (HPBA's RFI Comments) at 5.

[53] See Appendix I (HPBA's RFI Comments) at 4.

increased heating efficiency would provide actual benefits as opposed to detriments in the form of excess or undesired heat. See Appendix I (HPBA's RFI Comments) at 5.

For each of these reasons, there is no lawful basis to impose heating efficiency standards on decorative vented gas fireplaces. Because DOE cannot impose conditions on an "exclusion" from requirements that it cannot lawfully impose in the first place. Accordingly, the entire basis of the proposed rule is flawed.

b. The conditions of the proposed exclusions are unreasonable.

The conditions of the proposed exclusions are individually problematic in a number of respects.

First and most significantly, the NOPR reflects serious misunderstandings as to the consequences of its proposed requirement that decorative vented hearth products be certified to the ANSI Z21.50 or Z21.60 standard. The core of the problem is that the NOPR reflects a very poor understanding of the hearth products market and the range of products it includes. In particular, the NOPR states that "DOE is not aware of any vented hearth products that on the market that are not already certified to" one of these two standards. 77 Fed. Reg. at 43948. This is false: Indeed, HPBA submitted information earlier this year indicating that there are decorative vented gas fireplaces currently on the market that are not certified to the ANSI Z21.50 standard (the Z21.60 standard does not apply to vented gas fireplaces). More importantly, a very substantial proportion of the gas log sets currently on the market are not certified to either the ANSI Z21.50 or Z21.60 standard. In many cases, these gas log sets are "match light" systems that do not have standing pilot lights, but that would be banned outright by the terms of the proposed rule because they cannot be certified to the ANSI Z21.60 standard (which – by definition – does not apply to match-light log sets). The proposed rule would have similar unintended consequences for a number of other categories of products; indeed the gas log set market is particularly complex, with many very small manufacturers and an wide range of products and significant geographic variations in certification patterns and practices, product characteristics, and market conditions. It would be a significant challenge to gather sufficient information to identify and understand all of the relevant issues relating to these products. Given the truncated procedures employed in this rulemaking, there was simply no way to develop sufficient information for informed decision-making.

Second, there is no basis for the proposed condition imposing a warranty restriction related to thermostats. This proposed requirement is expressly designed to "discourage evasion of energy conservation standards by those who seek to purchase decorative products and seek to use them as heaters." 76 Fed. Reg. at 43946. This is a curious goal, because the energy conservation standards for consumer appliances apply to manufacturers, not consumers. Accordingly, consumers would seem to have no standards to "evade." In any event, there is no factual basis for DOE's premise that consumers would purchase decorative products and seek to use them as heaters, especially in view of disclaimer requirements intended to ensure that consumers are adequately informed.

Third, pilot light prohibitions (in particular) do nothing to distinguish decorative hearth products from heaters-rated products, and thus should not be part of any purported definitional distinction

between decorative and heater products. The pilot light prohibitions are plainly substantive energy conservation standards being imposed on decorative products, and should be codified and justified – if at all – as such.

4. <u>Small Business Impacts</u>

All but three of the manufacturers in the entire vented gas hearth products industry are small businesses, as defined by the Small Business Administration. With product shipments in the industry having dropped by more than two thirds in just the past few years, virtually all of these businesses are struggling. Nevertheless, the extent of DOE's fact-finding efforts on small business impact, as with so many of the issues raised by the proposed rule, was quite limited and not well-explained. Indeed, the NOPR provides almost no data or analysis supporting DOE's conclusions with respect to small business impacts and DOE has provided no supporting materials to indicate the data relied upon or the means it used to reach its conclusions. The NOPR's assessment of small business impacts is thus profoundly inadequate. Nevertheless, there are at least two factors that indicate that NOPR grossly understates the impact the proposed rule would have on small business.

The first obvious problem relates to the number of businesses that would be affected by the proposed rule. The NOPR suggests that only 14 small business manufacturers would be affected. 76 Fed. Reg. at 43948. This estimate is low by a wide margin; probably by a factor of three or more. In addition to these small business manufacturers, a substantial majority of the distributors and retailers who are dependent on the health of the hearth products industry are small businesses that will be extremely vulnerable to the impact of the proposed rule.

The second obvious problem is that – in addition to understating the number of companies that would be affected by the proposed rule – the NOPR systematically ignores or mischaracterizes the impacts the proposed rule would have. Accordingly, it is clear that the NOPR provides a seriously skewed assessment of small business impacts that fails to provide any basis for reasoned assessment of the costs and other impacts the proposed rule would have on small businesses. Specific problems with DOE's analysis include the following.

- DOE assumes that there will be no regulatory burdens associated with the requirement that decorative products be certified to the ANSI Z21.50 or Z21.60 standards because it claims that <u>all</u> existing decorative products are certified to the Z21.50 or Z21.60 standards. 76 Fed. Reg. at 43948-49. In fact, there are a significant number of decorative vented hearth products that are not certified to either standard, and there is a major category of gas log products that *cannot* be certified to either standard. Due to the lack of basic research needed to understand the products and industry at issue, the NOPR completely neglected the prevalence – and more fundamentally, the existence of – other major certifications for vented gas log sets, such as ANSI Z21.84 and RADCO/City of Los Angeles standards to which many gas log sets must be certified. In fact, it appears that only a fraction of all gas log sets are certified to the ANSI Z21.60 standard and would thus survive the requirements of the proposed rule.

- DOE assumes that there would be essentially no burdens associated with the need to modify product labeling and literature, because it assumes that product labeling and literature would have to be modified in any event to comply with the April 16, 2010 Final Rule. This reasoning is specious. First, the April 16, 2010 Final Rule would require little, if any, modification of product labeling and literature for gas log sets, because the

rule does not apply to gas log sets at all. There is therefore no basis to assume that modifications to product labeling and literature for gas logs would have been required absent the requirements of the proposed rule. Second, decorative vented gas fireplaces were covered by the Final Rule, but for most of these products the NOPR provides no feasible compliance option. See Appendix I (HPBA's RFI Comments) at __. Consequently very few of these products could be expected to survive the April 16, 2010 final rule and changes in product labeling and literature would be necessary only to the extent they are imposed through the proposed rule.

- DOE states that the compliance costs for gas log sets "can be reasonably assumed to be largely the same as the compliance costs for small business manufacturers of vented gas hearth products." 76 Fed. Reg. at 43948. The NOPR provides no basis for this assertion, and it is plainly inaccurate. Gas log sets differ significantly from vented gas fireplaces in a number of ways that have impacts on compliance options and costs. One of the most fundamental differences is that gas log sets are designed to be installed inside an existing fireplace. As a result, such products generally do not have any available external supply of electricity and lack any surrounding cabinet in which the components of an electronic ignition system could be installed. Instead, the components of an electronic ignition system – some of which are quite heat-sensitive – would have to be part of a self-contained unit that can be placed directly into an existing fireplace chamber. In view of these differences, it cannot simply be assumed that the compliance costs for log sets will be "largely the same" as for an entirely different product, i.e. vented gas fireplaces.

- Another DOE assertion is that "the elimination of standing pilot [lights] would only result in product conversion costs associated with testing and recertification to the ANSI safety standards." 76 Fed. Reg. at 43949. This assumption, too, is incorrect for a number of reasons. First, many companies would have to engage in extensive and expensive redesign work to make the physical, technological, and safety modifications that would be required to facilitate changing from a standing pilot light to an alternative ignition system. Second, the elimination of a standing pilot light would frequently have an appreciable impact on product pricing, which could lead to an appreciable reduction in sales, margin, or both.

In addition, DOE's "determination" of the small business impact of the proposed rule ignores a number of factors acting in concert to severely harm the vented gas hearth product industry. The industry on the whole is inextricably linked to new home sales. Prior to the recession, half of all sales of gas fireplaces were to new home builders. The other half of sales were to the remodel market, which, because of the average cost of a new fireplace – $3,000 to $5,000 – requires financing, very often with equity lines based on appreciating home values. Since 2008, with home values plummeting, many homeowners are "under water," let alone able to use equity lines to fund home improvements.

In DOE's analysis, the agency estimates that new home sales will reach 1.1 million in 2011. These estimates wildly defy all current indicators – which show almost unanimous consensus that there will be a much slower recovery of the housing industry, and a much longer period before the industry reaches sustainable levels. For example, the National Association of

Homebuilders (NAHB) reported that new home starts "continued to bounce along the bottom in August, with a slight decline to a seasonally adjusted annual rate of 295,000." Further, NAHB projects that new single-family home sales will be 304,000 in 2011 – not 1.1 million. NAHB also projects new single-family home sales to increase to only 363,000 units in 2012, and to only 533,000 units in 2013.[54] Given the condition of the housing industry, it should be no surprise that shipments of vented gas hearth products have dipped by roughly two-thirds in recent years due to the combination of weakened economy, the deflated housing market, and other factors.

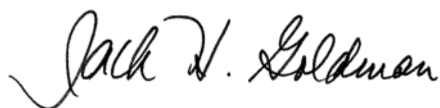
The behind-the-scenes nature of DOE's analysis – failing to conduct or provide meaningful data collection – essentially equates to a "black box" result. Industry and the public have been handed rushed, wholly inaccurate results, are not informed as to how the results were reached, and are offered no chance to submit comments to correct the inadequacies and inaccuracies in the findings. The manner in which DOE has conducted their small business impact analysis, and indeed the rulemaking as a whole, violates many federal and agency requirements.

CONCLUSION

HPBA believes that the NOPR in this proceeding was prepared without adequate preliminary investigation and study, and that it was issued without sufficient information and analysis to justify a proposed rule or provide a sufficient basis for meaningful public comment as required by law and sound public policy. The rulemaking process has been far too compressed to facilitate the development of supplemental information and information and analysis sufficient to support a viable rulemaking process, and indeed the record in this rulemaking proceeding remains insufficient to justify the issuance of a proposed rule, let alone any final rule. In short, this rulemaking proceeding is fatally flawed, and – under the circumstances – HPBA believes that DOE's only responsible option is to withdraw the NOPR and terminate the rulemaking.

Accordingly, HPBA renews its request that DOE terminate this rulemaking proceeding and commence appropriate efforts to address the underlying issues consistent with Executive Order 13563 and HPBA's request for relief filed March 21, 2011.

Sincerely,



Jack Goldman
President & CEO
Hearth, Patio & Barbecue Association

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[54] NAHB'sHousingEconmics.com: http://www.nahb.org/fileUpload_details.aspx?contentID+168369+channel|ID=311