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URGENT! HPBA NEEDS YOUR HELP – NOW!

MEMO

TO: Manufacturers and Affiliates
FROM: Jack Goldman and Allan Cagnoli
DATE: September 20, 2011

RE: Contacting Members of Congress and Soliciting Industry Comments (on DOE's Notice of Proposed Rulemaking (NOPR) on Direct Heating Equipment)

Dear Manufacturers and Affiliates:

WE KNOW THIS IS A VERY LONG MEMO, BUT IT IS VERY IMPORTANT!

HPBA needs your help now in our fight against the anti-industry rulemakings by the U.S. Department of Energy (DOE). This memo will give you the background and directions on how you and your colleagues can help HPBA and the industry fight the DOE rulemakings – **and probably save your livelihood** – by doing two simple things:

1. **BY SEPTEMBER 27** – Contact your U.S. Representative to ask them to sign on to a letter from Members of Congress to DOE Secretary Steven Chu; and
2. **BY OCTOBER 14** – Send comments to DOE in opposition to this proposed rule on Direct Heating Equipment Rulemaking.

Background

As you know, in April 2010, the DOE issued regulations that would effectively ban most decorative gas fireplaces as of April 2013. (75 Fed. Reg. 20112) The regulation covered decorative and heater-rated vented gas fireplaces, but not gas log sets; this was confirmed by a FAQ subsequently posted to the DOE website.¹ The regulation was a surprise because at no time during the development of the rule did DOE state that it was considering the regulation of decorative gas fireplaces – something that it should have done. Simply put, by failing to provide notice that it might regulate decorative products and opportunity to comment on the issues, DOE denied the industry its rights.

HPBA hired an attorney specializing in administrative law and sued DOE in the D.C. Circuit Court of Appeals. Settlement negotiations went on for over a year and the court

¹ http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_faq.pdf.

case was put on hold during the negotiations. Unfortunately, DOE was unwilling to address the problems with its final rule without exacting concessions the industry could not afford to accept. With negotiations at an impasse, we went back to the court and asked it to put the case back on the calendar. We did this because we need to get a decision from the court early enough to give our industry sufficient time to comply with whatever requirements we would have to meet. Our motion to the court was opposed by DOE, which stated that it had a new proposed regulation that would eliminate the need for any prompt decision from the court.

On July 22, 2011, DOE issued its completely new Notice of Proposed Rulemaking (NOPR) (76 Fed. Reg. 43941). The NOPR would replace the ban on decorative vented gas fireplaces with requirements that – though clearly unlawful – industry might have been willing to accept to remove decorative products from DHE coverage.² However, the NOPR would also retroactively extend the regulation to gas log sets – imposing essentially the same requirements on them³ – despite the fact that DOE had agreed that these products were not covered by the April 16, 2010 final rule and were not at issue in the negotiations. In addition, the NOPR would set both categories of products up for additional inappropriate regulation by unreasonably categorizing them as DHE.

DOE has publicly stated that the NOPR regulation is on a fast track, and will be made final by November of this year. DOE held a public meeting on the NOPR on September 1st in Washington, D.C. Statements were made by Jack Goldman, as well as others, in opposition to the NOPR. Written comments on the NOPR are due to DOE by October 14th. You can find a copy of the statements made at this public meeting on our website at <http://www.hpba.org/members/news-updates/hpba-staff-and-members-attend-doe-hearing>. The hearing transcript is at http://www2.eere.energy.gov/buildings/appliance_standards/pdfs/dhe_publicmtg_nopr_transcript.pdf.

This new NOPR represents further bad faith by DOE. First, it would extend regulation to an entirely new product category – gas log sets – despite earlier statements that the category was not covered by DOE’s rules. Second, DOE is interfering with our opportunity and right to present our arguments in court by arguing that its new rulemaking will make it unnecessary for the court to resolve our challenge to the April 16, 2010 final rule. Finally, DOE has not done any of the work needed to justify its regulation – in fact, DOE made outrageous mistakes. As one of our commenters said, DOE’s “errors are so large that random guessing would have been twice as close on average.”

² A decorative fireplace would not be subject to DHE energy efficiency regulations if: (i) it is listed to Z21.50, (ii) the rating plate and marketing materials state that the unit is not intended for heating, (iii) there is no thermostat, and an aftermarket-installed thermostat will void the warranty, and (iv) standing pilot lights are prohibited. A key problem is that the proposal is unclear as to what an acceptable alternative to standing pilot lights would be.

³ The only difference is to the first requirement, i.e., that the unit would have to be listed to Z21.60 instead of Z21.50.

Contacting Congress

As a result of these recent developments, HPBA is now fighting a multi-front war to protect the industry: lobbying the U.S. Congress, submitting comments to DOE, and continuing our litigation on the original rule. We are continuing our litigation in order to preserve our rights to overturn the April 16, 2010 final rule, and because a victory for the industry – in addition to providing relief from the final rule – would also eliminate some of DOE’s claimed justifications for its new proposal. However, HPBA believes that with the failure of DOE to agree to any reasonable compromise **we must seek legislative relief from the U.S. Congress.**

Over the last few months, HPBA has been visiting with many influential Members of Congress who, without exception, understand and agree with our position and express astonishment at what DOE is doing to our industry: banning products without any valid technical, energy or economic justification. In short, it will kill our industry and its jobs.

HPBA needs you to **contact – by Tuesday, September 27th – the office (district or Washington, D.C.) of your Representative** in the U.S. House of Representatives to (i) voice your concerns about what the U.S. Department of Energy is doing to our industry and (ii) ask that your Representative cosign a letter to DOE Secretary Steven Chu that is being circulated by Representative Cathy McMorris Rodgers. (See “Guidance to HPBA Members” at the end of this memo for directions and a copy of the “Dear Colleague”.)

Filing of NOPR Comments with DOE

We must also aggressively confront DOE on its new proposal, which we did at the hearing and must continue to do so in written comments submitted by the members of our industry – **YOU!** – in opposition to DOE’s new NOPR. Again, these comments are **due by October 14, 2011.** (See the “Guidance” section.) We are asking you and your employees/distributors/retailers/members to submit to DOE, on your own personal or company letterhead, comments that will express – in as few or many sentences as you want – your opinions, concerns or questions about the proposed rule in general or the following four (4) issues on which DOE has requested comment. (Again, a review at <http://www.hpba.org/members/news-updates/hpba-staff-and-members-attend-doe-hearing> of the HPBA statements submitted to date may be helpful.) Although DOE indicated specific interest in comments on the following four issues (which are copied from DOE), comments on any aspect of the proposed rule are welcomed and encouraged. These “Issues” are explained in the “Guidance” section of this memo.

Issue #1: Given the lack of statutory definition for “direct heating equipment,” whether DOE’s interpretation that decorative vented hearth products and vented gas log sets are types of direct heating equipment is reasonable.

Issue #2: The proposed compliance date for vented gas hearth products and vented gas log sets, including specific rationales and accompanying data as to why a different timeline for eliminating standing pilots or other continuously-burning ignition sources from decorative gas hearth products may or may not be warranted.

Issue #3: The proposed exclusion as a decorative vented hearth product or vented gas log set from the energy conservation standard.

Issue #4: Impacts of the proposed amended definition of “vented hearth heater” on small business manufacturers of decorative vented hearth products or vented gas log sets.

REMEMBER:

No matter how long or short, detailed or brief, **every comment helps the HPBA cause!**

Thank You!

Simply put, thank you for supporting HPBA during our work on these very serious issues, and for your contacting your Representative and submitting comments to the DOE.

GUIDANCE TO HPBA MEMBERS

1. Contact your Representative in the U.S. Congress by September 27th and ask them to cosponsor a letter to DOE Secretary Chu (offered by Rep. McMorris Rodgers)
2. Submit comments by October 14th to the Department of Energy (DOE) on the NOPR

1. CONTACT YOUR REPRESENTATIVE IN THE U.S. CONGRESS

HPBA needs you to do something that actually works when done properly: contact the office of your own Representative in the U.S. House of Representatives **by Tuesday, September 27, 2011** to express your concerns about the two DOE rulemakings discussed in this memo. This contact can either be with a call or by an email done through the website of that Representative. TWO CAUTIONS: You must be a constituent of the Representative you are contacting for your comments to matter and, if calling, you will be giving your opinion to an aide, not the Representative, a practice which is standard and acceptable. Again, please call **by September 27th**. Remember, this works!

Finding Your U.S. Representative

If you do not know the identity of your member of the U.S. House of Representatives, or how to contact them, you can find your representative by going to <http://www.house.gov/> and following the “FIND YOUR REPRESENTATIVE” directions in the upper right hand corner, by dialing (202) 224-3121 and asking for your Representative, or by emailing HPBA at governmentaffairs@hpba.org with your zip code.

When you connect with the office of your Representative, remember to:

- Speak slowly and clearly so the person taking your message can transcribe your message correctly;
- Be calm and respectful, but speak honestly, as the person taking your comments is used to listening and will not argue with you;
- Give your personal opinion, based on knowledge and experience; and
- Keep your comments as brief and succinct as possible.

Key Points to Make

- My name is _____.
- I live at _____ in your congressional district.
- I work for/represent/own _____.
- [Company name] is located in _____.
- We make _____.
- I work with or employ _____ people directly and approximately _____ people indirectly.
- The DOE has enacted a regulation that will ruin my industry/company/job by banning decorative gas fireplaces and log sets as though they are space heaters, which they are not! They are decorative products, not heaters.
- I ask that Representative [name] please cosponsor the letter to DOE Secretary Chu sponsored by **Rep. Cathy McMorris Rodgers** of Washington State.
- Give a phone number where you can be reached.
- Ask to get a written response to your comments.
- Offer to provide them with any more information they need (let HPBA Government Affairs Department staff know at governmentaffairs@hpba.org if they need to contact an office).

The more House offices contacted by HPBA members about signing this important letter to DOE, the better chance HPBA has of getting the decorative vented gas appliance ban reversed. (While we are now working with the U.S. Senate, we will let you know in the near future when to contact them in this similar fashion.)

2. SUBMIT COMMENTS TO DOE ON THE NOPR BY OCT. 14

See http://www.hpba.org/members/news_updates/DOECommentsInstructions.pdf.

Comments may be sent to DOE by email, postal or courier delivery. In all correspondence, please refer to the Direct Heating Equipment rulemaking as:

Direct Heating Equipment Rulemaking
Docket Number EERE-2011-BT-STD-0047
Regulatory Identification Number (RIN) 1904-AC56

Due Date: The comment period closes OCTOBER 14, 2011.

(NOTE: this is an extension of the original due date of 9/20/11.)

Email: DHE-2011-STD-0047@ee.doe.gov

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

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

BASICS FOR NOPR COMMENTS

Please identify yourself with some basic statements before you go into your comments on the four (4) issues and speak respectfully but honestly. DOE needs to have your personal opinion, based on your knowledge and experience.

- My name is _____.
- My address is _____.
- I work for/represent/own _____.
- [Company name] is located in _____.
- We make _____.
- I work with or employ _____ people directly and approximately _____ people indirectly.

THE FOUR (4) NOPR ISSUES TO REVIEW AND ANSWER BY OCT. 14

(Feel free to answer any or all of these specific issues; comments on any aspect of the NOPR are welcomed; please copy HPBA at governmentaffairs@hpba.org on any email you send.)

Issue #1: Given the lack of statutory definition for “direct heating equipment,” whether DOE’s interpretation that decorative vented hearth products and vented gas log sets are types of direct heating equipment is reasonable.

Issue #1 means: DOE is asking whether its interpretation that decorative vented gas fireplaces and vented gas log sets are “direct heating equipment” is reasonable.

DOE says: DOE interprets the term “vented hearth heater” as including vented heating hearth products, decorative hearth products, and gas log sets; DOE believes that because these products provide heat to the living space, they meet the definition of “direct heating equipment (DHE).”

HPBA responds: DOE's interpretation that decorative vented gas fireplaces and gas log sets are "direct heating equipment" is unreasonable. Decorative vented gas fireplaces and gas log sets are designed for aesthetic appeal, not heating utility. While heating appliances are sold on the basis of their heating utility, decorative products are sold on the basis of their aesthetic appeal, not on the basis of their heating utility.

Because decorative products are not intended to provide heating utility, heating efficiency is not a reasonable measure of their performance. Products can only be considered "heating equipment" if their intended function is to provide heat. Especially for purposes of efficiency regulations, it makes no sense to call products "heating equipment" unless heating efficiency is a fair measure or how efficiently they serve their intended function.

Issue #2: The proposed compliance date for vented gas hearth products and vented gas log sets, including specific rationales and accompanying data as to why a different timeline for eliminating standing pilots or other continuously-burning ignition sources from decorative gas hearth products may or may not be warranted.

Issue #2 means: DOE is asking whether the July 1, 2014 proposed effective date for its proposed ban on standing pilot lights for decorative vented gas fireplaces and gas log sets is reasonable.

DOE says: DOE says that decorative products will become subject to heating efficiency standards designed for heaters on April 16, 2013 unless they meet requirements imposed as the conditions for an “exclusion.” DOE further says that – effective July 1, 2014 – decorative products can no longer have standing pilot lights, and that it should be easy for industry to eliminate standing pilot lights on decorative vented gas fireplaces and gas log sets by that date.

HPBA responds: DOE’s compliance deadlines are arbitrary and unreasonable for both decorative vented gas fireplaces and gas log sets. Even if the products can meet the four parts of the exclusion, which themselves are unreasonable (see Issue #3), the deadlines cannot be met by the industry, which must redesign and recertify most of its products. Given the current economic conditions in the hearth industry, manufacturers don’t have the funds for research and development, testing, and recertification. Even if enough funds were available, the testing labs would not be able to handle the surge in requests for testing the modified products.

Issue #3: The proposed exclusion as a decorative vented hearth product or vented gas log set from the energy conservation standard.

Issue #3 means: Under the proposed rule, decorative vented gas fireplaces and gas log sets would be subject to heating efficiency standards (effective April 16, 2013) unless they qualify for “exclusions.” DOE appears to be asking for comments both (1) on whether the proposed “exclusions” are appropriate, and (2) on the requirements of the “exclusions” themselves.

DOE says: The proposed definition of “Vented Hearth Heater” reads as follows:

Vented Hearth Heater means a vented appliance which simulates a solid fuel fireplace and is designed to furnish warm air, with or without duct connections, to the space in which it is installed. The circulation of heated room air may be by gravity or mechanical means. A vented hearth heater may be freestanding, recessed, zero clearance, or a gas fireplace insert or stove. The following products are not subject to the energy conservation standards for vented hearth heaters:

- (1) Vented gas log sets that meet all of the following four criteria:
 - (i) Certified to ANSI Standard Z21.60;
 - (ii) Sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat;
 - (iii) Expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a "Decorative Product: Not For Use As A Heating Appliance"; and

(iv) With respect to products manufactured after July 1, 2014, not equipped with a standing pilot light or other continuously-burning ignition source; and

(2) Vented gas hearth products that meet all of the following four criteria:

(i) Certified to ANSI Standard Z21.50 and not to ANSI Standard Z21.88;

(ii) Sold without a thermostat and with a warranty provision expressly voiding all manufacturer warranties in the event the product is used with a thermostat;

(iii) Expressly and conspicuously identified on its rating plate and in all manufacturer's advertising and product literature as a "Decorative Product: Not For Use As A Heating Appliance"; and

(iv) With respect to products manufactured after July 1, 2014 not equipped with a standing pilot light or other continuously-burning ignition source.

HPBA responds: DOE's proposed exclusions to the energy efficiency standards are also unreasonable, especially for vented decorative gas log sets. Most gas log sets are not certified to Z21.60 and cannot be certified to the standard, and none of the requirements of the exclusions are necessary or justifiable on the basis of energy savings.

There should be no need for an "exclusion" at all, because heating efficiency standards make no sense for decorative products and should never apply. These products are not heaters, and heat is not the measure their performance. Gas log sets don't need to qualify for an "exclusion" from the requirements of the April 16, 2010 final rule, because that rule did not even apply to them.

Issue #4: Impacts of the proposed amended definition of “vented hearth heater” on small business manufacturers of decorative vented hearth products or vented gas log sets.

Issue #4 means: DOE is seeking comment on the impact its proposed rule would have on small businesses (the size threshold for small businesses is 500 employees or fewer).

DOE says: Residential direct heating equipment (including hearth product) manufacturing is classified under NAICS 333414, “Heating Equipment (except Warm Air Furnaces) Manufacturing.”

The proposed rule would not have a substantial impact on small businesses. It says that only 14 small business manufacturers will be affected, that all decorative products are already certified to the ANSI Z21.50 or Z21.60 standard, and that the primary cost of compliance will be the cost of recertifying products

as necessary to eliminate standing pilot lights. DOE estimated the total compliance costs for the entire industry will be approximately \$693,000.

HPBA responds: The impact of the proposal on small business manufacturers – as well as distributors and retailers dependent on these products, including me – will be significant. We will no longer be able to sell a large number of products that we currently sell, either because they cannot meet the requirements of the DOE proposal or will be too expensive to be viable in the marketplace. This will occur at the same time that the industry is at historic lows due to the still-ongoing recession in the housing industry.

More Information Available for Your Comments

Along with this memo and the links referred to, attached to the email is an August 16, 2011 Memo from Barton Day, our attorney in the DOE matter, entitled “Guidance Regarding NOPR Comment Preparation” which should be an additional guide to you in preparing your comments.

Contact Us

If you have any questions about this very lengthy email, or anything related to what we are asking you to do, please do not hesitate to contact us by sending an email to Allan Cagnoli with HPBA at governmentaffairs@hpba.org with “HELP WITH COMMENTS” or “HELP WITH THE HILL” in the subject line and we will either answer you directly or get you the help you need.

And Finally

Thank you for taking the time and effort to do this for HPBA, the industry, you and our government’s attempt to improve itself.

Jack Goldman, President & CEO
Allan Cagnoli, Director of Government Affairs

DEAR COLLEAGUE

Save American Jobs and Small Businesses

From: The Honorable Cathy McMorris Rodgers

Sent By: kimberly.betz@mail.house.gov

Date: 9/6/2011

Dear Colleague:

Please join me in urging the Department of Energy (DOE) not to proceed with recently issued regulations that place in jeopardy thousands of U.S.-based jobs related to the manufacturing, distribution, and sale of decorative vented gas fireplaces and fireplace log sets.

In April 2010, the Department issued a final rule (75 Fed. Reg. 20112) that effectively classifies decorative vented gas fireplaces as "direct heating equipment" (DHE). Decorative vented gas fireplaces are intended for aesthetic enjoyment, not utilitarian heating use, and therefore should not be considered DHE. However, DOE's final rule subjects these ornamental fixtures to increased energy efficiency standards more appropriately applied to hot water heaters, furnaces, and space heaters. These standards are not appropriate for decorative gas products. If implemented, they will result in companies ceasing to manufacture and sell these decorative gas products, leading to lost American jobs.

What makes this regulatory action even more troubling is that the Department did not classify decorative vented gas fireplaces as DHE in the proposed rule, nor did DOE even mention the possibility of defining these gas products as DHE in the future. Current law did not require DOE to make this policy change. The Department simply imposed it unilaterally without offering consumers or hearth industry stakeholders any notice or opportunity for comment. In addition, earlier this summer the Department issued a new proposed rule that would broaden the definition of DHE to include fireplace gas log sets, another highly popular gas product not intended to heat a home or even a room.

DOE's rulemaking threatens to create a serious economic problem for the decorative gas appliance industry. Decorative vented gas fireplaces account for approximately 70 percent of all gas fireplaces sold in the U.S. This small industry is already distressed due to the substantial down-turn in new home construction and the national economy as a whole. At a time when America needs jobs, the federal government should support small businesses by giving them opportunities to grow and thrive. We should not be improperly regulating these products and businesses to the point that they can no longer remain in business.

Please join me in urging DOE not to implement any regulations until Congress enacts legislation that provides the Department with statutory definitions for decorative gas products. Contact Kimberly Betz (5-2006) in my office by Monday, September 26 with any questions or to sign on to the letter.

Sincerely,

Cathy McMorris Rodgers