

TO: HPBA Members
FROM: Barton D. Day
SUBJECT: Guidance Regarding NOPR Comment Preparation
DATE: August 16, 2011

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

The following is intended as guidance for the submission of comments on DOE's Notice of Proposed Rulemaking (NOPR) published on July 22, 2011 (PDF attached). Comments are due by **September 20, 2011**.

HPBA asks that draft comments be provided to HPBA staff for review **no later than Thursday, September 15**. This review step will be important as a means to ensure that any potential inconsistencies with HPBA's comments on behalf of the industry are identified and resolved prior to the submission of comment.

Format of Comments

There is no standard format for rulemaking comments, and you can organize your points in whatever way makes sense to you. A simple letter or memo format is perfectly acceptable. However, you should indicate that you are submitting comment on the NOPR and must identify the NOPR (e.g., on the subject line if you are using a letter or memo format) as follows:

NOPR on Energy Conservation Standards for Direct Heating Equipment
Docket No. EERE-2011-BT-STD-0047
RIN 1904-AC56

Content

DOE has identified four specific issues for comment but indicates that it welcomes comment on all aspects of the proposed rule (see page 43953 of the attached NOPR). Accordingly, you are not limited in any way to the four issues DOE has identified and can address any relevant issues. By the same token, however, you should not feel obliged to comment on everything. HPBA will be submitting a comprehensive set of comments, so you can "pick your shots" as desired for purposes of your own comments. The following outline simply suggests topics for comment. Accordingly, it is not a summary of every potential topic for comment and is not intended to discourage comment on other issues.

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Core Issues

DOE's proposed rule would classify decorative vented gas fireplaces and gas log sets as "direct heating equipment" (DHE) for purposes of the energy efficiency laws. Under the enabling statute, only utilitarian space heater products (wall furnaces, floor furnaces, etc) are categorized as DHE, and such products are subject to heating efficiency standards based on the AFUE test methodology. 42 U.S.C. §6295(e)(3). The central issue presented by the NOPR is DOE's proposed "interpretation" of the statute under which decorative vented gas fireplaces and gas log sets would be classified as DHE and would be subject to the energy efficiency standards imposed by the April 16, 2010 final rule. DOE would provide an "exclusion" for decorative products that meet certain requirements, most notably the requirement that the products be certified to the ANSI Z21.50 or Z21.60 standards (for fireplaces and gas log sets respectively), and that – effective July 1, 2014 – the products not have a standing pilot light or "other continuously burning ignition source." The core issues are as follows:

1. Is DOE's interpretation that decorative vented gas fireplaces and log sets are "direct heating equipment" reasonable?

This is the first of the four issues upon which DOE requests comment, and the answer is that DOE's position is unreasonable. The fundamental problem is that decorative products are not heaters, and it makes no sense for DOE to regulate them as though they are. There are a number of specific arguments that can be made in this regard, including the following:

- a. Decorative vented gas fireplaces and log sets were never intended to be considered DHE for purposes of energy conservation regulation.
 - i. The products regulated as DHE under the enabling statute are strictly utilitarian heating appliances (wall furnaces, floor furnaces, etc.). Decorative products existed at the time the statute was passed, and if they had been intended to be classified as DHE the statute would have regulated them as such (which it did not).
 - ii. Under the statute, the efficiency standards for DHE are based on heating efficiency as determined by a test method (AFUE) that is only appropriate for strictly utilitarian heating appliances. Because decorative products are used for different purposes and have a completely different pattern of use than the utilitarian heating appliances for which the AFUE method was designed, the method does not provide an appropriate means to measure the performance of decorative products and cannot reasonably be applied to them. HPBA has previously submitted comment providing a technical explanation as to why the AFUE method is not applicable to decorative vented gas

fireplaces; **comment on why the AFUE method is inapplicable to gas log sets would be helpful.**

- iii. The legislation governing DHE was the product of negotiations between industry and the environmental NGOs, and everyone understood that "direct heating equipment" included only the traditional utilitarian space heating products (wall furnaces, etc.) that were specifically covered by the energy conservation standards included in the law. **If you can support these arguments based on your own knowledge of the negotiations leading to adoption of the statute or the development of the Z21.88 standard, it would be helpful for you to comment with respect to that knowledge.**
- b. The "efficiency" of a product can only be determined by reference to its intended use; after all, the whole issue is how "efficiently" a product does whatever it is supposed to do. The purpose of a decorative product is to provide aesthetic enjoyment, generally by providing a realistic simulation of a traditional wood-burning fireplace. These products are not designed or intended to serve as an efficient source of heat, so it makes no sense to classify them as DHE for purposes of efficiency regulation. (Note that this is the direct response to DOE's argument that it can interpret DHE to include essentially anything that produces heat, whether or not that is the intended purpose of the product; that approach makes absolutely no sense in a regulatory scheme relating to product efficiency).
- c. The proposed rule seriously misstates the facts. In particular:
 - i. DOE says that heater-rated gas fireplaces serve no decorative function and that decorative vented gas fireplaces serve a dual decorative and heating function (see page 43944 of the NOPR). **If you manufacture heater-rated products, it would be helpful to make the argument that heater-rated products serve both a heating and decorative function, and that there is really no such thing as a strictly utilitarian gas fireplace heater.** In short, it is the heater-rated gas fireplaces that serve a dual function; decorative vented gas fireplaces are strictly decorative.
 - ii. DOE says that there is it is "difficult to differentiate" between heater-rated and decorative gas fireplaces (see page 43944 of the NOPR). In fact, heater-rated products are heater-rated and designed to be aesthetically pleasing but also effective as utilitarian heating appliances. Heater-rated products are sold on the basis of their heating efficiency and are in fact relatively efficient heaters. Decorative products are

simply decorative: they are not sold on the basis of their heating efficiency, may not be sold with thermostats, and in many cases are not a significant source of heat. **If you manufacture vented decorative gas fireplaces that are not a significant source of heat – especially products that are marketed as not being a significant source of heat – it would be helpful to identify a specific example.**

- iii. DOE says that gas log sets "provide both heat and aesthetic appeal" (see page 43945 of the NOPR). **If you manufacture gas log sets, it would be helpful to make the point that the purpose of gas log sets is to provide a realistic simulation of a traditional wood fire, not to provide heat, and to emphasize that gas log sets are not designed, intended, or effective for use as heating appliances.**

The point that decorative products are decorative and are not designed for utilitarian heating purposes is a critical element to almost all of the arguments on this issue. Specific examples can be especially useful in demonstrating how illogical it is to classify decorative products as heaters. Particularly useful examples would include (a) products that are specifically advertised on the basis that they provide a beautiful fire without producing too much heat; (b) products that provide no significant amount of heat; and (c) products that would be "worse" decorative products (e.g., because they would be too hot for use) if they were required to be heat-efficient (the point being that a product can't reasonably be considered to be a heater if making it a "better heater" would make it a worse product). **It would be helpful for manufacturers to point to specific examples of this kind.**

2. Justification for the proposed regulation of decorative products.

DOE does request comment on the impact its proposed rule would have on small business manufacturers, but not on the broader issue of whether the proposed requirements are reasonably justified. By statute, DOE must determine that energy conservation standards "economically justified," considering the economic impact of the standard on manufacturers and consumers 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 ("Improving Regulation and Regulatory Review"), signed by President Obama on January 18, 2011, 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.

- a DOE's claimed gas savings from pilot light restrictions are based upon questionable assumptions.
 - i. DOE estimates that 38% of decorative vented gas fireplaces and 20% of gas log sets have standing pilot lights and that the remainder have "an intermittent pilot or electronic ignition" (see page 43946 of the NOPR).

Although individual manufacturers may have difficulty commenting on these figures, it would be extremely helpful if you could provide information to enable HPBA to comment on this issue as appropriate.

- ii. Based on some internet research, DOE assumes that the pilot lights on gas log sets consume an average of 1,250 Btu/h. As an average, this appears to be high. **It would be extremely helpful if you could provide information to enable HPBA to comment on this issue as appropriate.**
 - iii. DOE assumes that 75% of all standing pilots are left on 24 hours per day, 365 days/year, and that the remaining 24% are left on for about one-fourth of the year (see page 43946 of the NOPR). DOE cites no evidence in support of these assumptions, and they appear to be absurd. **Comment questioning this assumption – and any information or experience to the contrary – would be helpful.**
- b. DOE fails to make any reasoned assessment of the costs and other impacts of its proposed requirements.
- i. DOE assumes 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 all existing decorative products are certified to the Z21.50 or Z21.60 standards (see pages 43948-49 of the NOPR). DOE knows this is false with respect to decorative vented gas fireplaces (we addressed the point in a previous written submission), and appears to be completely ignorant with respect to gas log sets. **Manufacturers of gas log sets that are not certified to the ANSI Z21.60 standard should provide comment indicating that such products exist and should address the burdens/infeasibility of certifying these products to the Z21.60 standard by April 16, 2013 (this would be the effective date of the certification requirement).**
 - ii. DOE assumes that "the elimination of standing pilot [lights] would only result in product conversions costs associated with testing and recertification to the ANSI safety standards" (see page 43949 of the NOPR). **Manufacturers of gas log sets should comment on the engineering difficulties involved in eliminating standing pilot lights, the costs associated with the elimination of standing pilot lights, and the impact on product price (and sales) that could be expected to result.**

- iii. DOE ignores the cumulative impact of regulation. **Comments on the cumulative burdens of the efficiency standards for heaters, the proposed requirements for decorative vented gas fireplaces, the proposed requirements for gas log sets, and other regulation the industry faces would be helpful.**
- iv. DOE ignores the fact that the industry is especially vulnerable given the impact of the significant down-turn in new home construction as well and the recession as a whole. **Comment on the economic difficulties the industry and individual companies face would be helpful.**

3. The proposed compliance dates for the pilot light restrictions for decorative products.

This is the second specific issue upon which DOE requests comment. DOE requests "specific rationales and accompanying data" as to why a different timeline for the pilot light restriction may be warranted. Potential responses include the following:

- a. DOE's proposed July 1, 2014 deadline is completely arbitrary; DOE has provided no data and no credible rationale supporting its proposed compliance date.
- b. DOE's proposed compliance deadline would be unlawful. The pilot light restriction is an energy conservation standard, and – by statute – new energy conservation standards become effective no earlier than three years after the date they are adopted by rule.
- c. DOE is ignoring the “bottleneck” at testing laboratories that will be created by the need to recertify products to comply with the requirements for heaters, decorative vented gas fireplaces, gas log sets, and products subject to new EPA regulation. **It would be helpful for manufacturers to comment generally on the “bottleneck” problem and the uncertainties involved in determining how much time would ultimately be required for compliance.**
- d. DOE’s proposed compliance deadline is particularly inappropriate because it would add yet another set of regulatory burdens at a time when the industry is already being burdened as it struggles to survive extremely difficult economic conditions.

4. The proposed "exclusion" from the heating efficiency standards for decorative products.

This is the third issue upon which DOE specifically requests comment. The issue is obviously intertwined with the issue of whether decorative products are DHE in the first place, and the short answer is that decorative products obviously should not be subject to minimum AFUE

heating efficiency requirements. An "exclusion" should not even be necessary, because the products in question obviously are not DHE, and this is true whether or not they have pilot lights or warranty restrictions as specified in the terms of the "exclusions." (Again, DOE's basic rule is that decorative products are appropriately viewed as heaters subject to minimum AFUE heating efficiency requirements; decorative products avoid this fate only to the extent they qualify for the "exclusions" DOE is using as the means to impose substantive regulation on these products.) **It would be appropriate to submit comment stating that decorative products should never be subject to heating efficiency requirements under any circumstances, and that DOE has no basis to require that products qualify for an "exclusion" from such requirements.** One of the issues in this regard is the fact that 42 U.S.C. §6295(o)(3)(A) provides that DOE may not impose a new or amended standard for a product unless a test procedure for that product has been adopted. As already discussed, the AFUE test method is not properly applicable to decorative products, so it is unlawful for DOE to make them subject to minimum AFUE requirements as an "alternative" to compliance with the conditions of a proposed "exclusion" for decorative products. **In this context, comment explaining why the AFUE method is inapplicable to gas log sets would be especially effective.**

Comment on the proposed "exclusions" could also address the individual elements of the "exclusions," including:

- a. The requirement that products be certified to the ANSI Z21.50 or Z21.60 standard. **As already discussed, it would be helpful for manufacturers to explain that there are decorative products that are not certified to the ANSI Z21.50 or Z21.60 standard and to discuss the difficulties certification would pose (especially in the case of gas log sets).**
- b. The fact that the pilot light restrictions (in particular) do not serve to distinguish decorative products from heaters and thus should not be part of a purported definition of decorative products. Instead, the pilot light restrictions are a substantive energy conservation standard being imposed on decorative products, and must be justified as such. In this context, **it would be helpful for manufacturers to explain that there is no technical basis to conclude that products with standing pilot lights should be considered to be heaters rather than decorative products.**

5. Impacts on small business manufacturers.

This is the fourth issue upon which DOE requests comment. The issue could be addressed in comment as a separate issue, or more broadly in comments regarding the lack of justification for the proposed rule (as discussed above). **Either way, specific comment on the impact that the proposed rule would have on small businesses would be extremely helpful. In particular it would be helpful to have comment on:**

- a. How the requirements of the proposed rule might particularly disadvantage small business manufacturers, and**
- b. How the requirements of the proposed rule could be expected to have an adverse impact on other small businesses including retailers, distributors and suppliers.**