BEFORE THE OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY
UNITED STATES DEPARTMENT OF ENERGY
WASHINGTON, D. C.

Energy Conservation Program for Consumer Products: Proposed Determination of Hearth Products as a Covered Consumer Product

Docket No. EERE-2013-BT-DET-0057

COMMENTS OF THE AMERICAN PUBLIC GAS ASSOCIATION

The American Public Gas Association (APGA) respectfully submits these comments on the Proposed Determination of Hearth Products as a Covered Consumer Product issued by the Department of Energy (DOE) in this proceeding.[1] As discussed below, APGA opposes the proposed determination of coverage on several grounds.

Introduction

APGA is the national association for publicly-owned natural gas distribution systems. There are approximately 1,000 public gas systems in 37 states, and over 700 of these systems are APGA members. Publicly-owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

DOE seeks comment on its tentative determination that "hearth products" qualify as a covered product under Part A of Title III of the Energy Policy and Conservation Act (EPCA). DOE proposes to define "hearth product" as "a gas-fired appliance that simulates a solid-fueled fireplace or presents a flame pattern (for aesthetics or other purpose) and that may provide space heating directly to the space in which it is installed."[2]

Comments

APGA objects to the proposed determination of coverage for hearth products because (i) the issuance of the proposal is premature; (ii) the proposed definition of hearth product is vague and therefore denies interested parties the opportunity to provide meaningful comment; (iii) DOE has not adequately supported its determination that coverage of hearth products is necessary or appropriate to carry out the purposes of the EPCA; (iv) DOE has not logically supported its determination regarding the average annual per-household energy use of hearth products; and (v) the exclusion of electric products from the proposed definition of hearth product is arbitrary and capricious and inconsistent with the purposes of the EPCA.

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[1] *Energy Conservation Program for Consumer Products: Proposed Determination of Hearth Products as a Covered Consumer Product*, 78 Fed. Reg. 79,638 (Dec. 31, 2013).

[2] *Id.* at 79,640.

The Proposal Is Premature

Executive Order 13563 makes clear that, "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking."[3] To the knowledge of APGA, affected parties were afforded no such opportunity prior to the issuance of the proposed determination of coverage in this docket.

Consistent with the goals of Executive Order 13563, APGA believes that DOE and all affected parties would benefit from an exchange of information and viewpoints prior to the formal issuance of a proposal on hearth products. Many of the issues that could be addressed and resolved through such a procedure are discussed below. Accordingly, APGA respectfully requests that the proposed determination of coverage in this proceeding be withdrawn as premature.

The Proposed Definition of Hearth Product Is Vague

DOE's proposed definition of hearth product is broad enough to include any gas-fired product with a "flame pattern." Read literally, it could encompass such wide-ranging products as gas lamps, gas grills and gas tiki torches. While that is presumably not the intent of DOE, the failure to clearly limit the universe of possible products makes it nearly impossible for parties to provide meaningful comment on the definition.

The Administrative Procedure Act (APA) requires that a notice of proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved,"[4] and the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[5] The D.C. Circuit has explained that "[a]gency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The proposed definition of "hearth product" does not provide reasonable specificity as to the range of products being considered. Nor does the explanatory paragraph immediately following it help. In fact, that paragraph aggravates the lack of clarity by indicating that the definition is "not necessarily limited to" the universe of "vented and unvented hearth products."[6] In short, this open-ended definition fails to meet the specificity requirement of the APA and therefore must be withdrawn.

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[3] *Improving Regulation and Regulatory Review*, Exec. Order No. 13563, 76 Fed. Reg. 3,821, 3,822 (Jan. 18, 2011).

[4] 5 U.S.C. § 553(b)(3).

[5] 5 U.S.C. § 553(c).

[6] 78 Fed. Reg. at 79,640.

DOE Has Not Demonstrated the Need for the Proposal

The first determination DOE must make in order to classify a type of consumer product as a covered product is that doing so "is necessary or appropriate to carry out the purposes" of the EPCA.[7] DOE has not adequately supported its determination that hearth products meet this criterion.

DOE's discussion of this issue is limited to a single paragraph that states some of the purposes of the EPCA and asserts that (i) the aggregate national energy use of hearth products is estimated to be 0.11 quad; (ii) coverage of hearth products "will further the conservation of energy supplies through both labeling programs and the regulation of energy efficiency"; and (iii) there is "significant variation in the annual energy consumption of otherwise comparable models currently available, indicating that technologies exist to reduce the energy consumption of hearth products."[8]

This analysis is insufficient in multiple respects. First, DOE provides no explanation or support for its assertion that "labeling programs" will further energy conservation. Second, DOE's only apparent support for its claim that the proposal will further conservation through energy-efficiency regulation is its conclusory statement that there is significant variation in energy consumption of otherwise comparable models of hearth products. But DOE provides no examples of such "comparable models." Nor does it attempt to quantify the supposed "significant variation" in energy consumption. These unsupported assertions cannot meet the requirements of reasoned decision making. *See Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1499 (D.C. Cir. 1989); *Brae Corp. v. United States*, 740 F.2d 1023, 1047 (D.C. Cir. 1984).

Moreover, DOE cannot cure this deficiency by waiting until it issues the final rule to fill in the gaps with the necessary support, as doing so would deprive the public of the opportunity to meaningfully comment on such support:

> The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making. In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.

Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 530 (D.C. Cir. 1982). DOE's conclusory statements do not provide an "accurate picture" of its reasoning. Nor, as noted, has DOE provided *any* data to support its claim regarding comparable models of hearth products and their variations in energy use. Hence, the agency's failure to adequately support its assertion that

[7] 42 U.S.C. § 6292(b)(1).

[8] 78 Fed. Reg. at 79,640.

coverage of hearth products is necessary or appropriate to carry out the purposes of the EPCA is yet another reason the proposal must be withdrawn.

DOE Has Not Logically Demonstrated the Per-Household Energy Use of Hearth Products

The second determination DOE must make in order to classify a type of consumer product as a covered product is that "the average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours."[9] The path DOE used to reach this determination with respect to hearth products is flawed and cannot withstand scrutiny.

DOE purportedly determined the average per-household energy use of *all* hearth products by using a weighted average of five *specified* types of hearth products: vented heater hearth products, ventless hearth products, vented decorative hearth products, vented gas logs, and outdoor units.[10] The problem with this method is that, even if the numbers with respect to the specified types of hearth products are correct, they cannot logically serve as the basis for determining the average for all hearth products because, as discussed above, the proposed definition of hearth product is broad enough to cover many other products. In fact, DOE indicates that the definition is "not necessarily limited to" vented and unvented hearth products, and that that it includes gas stoves.[11] It is quite possible that the per-household energy use of products that DOE will seek to include in the definition will be much lower.

Under the arbitrary and capricious standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). There is no rational connection between the purported energy usage statistics for certain specified hearth products and DOE's general conclusion regarding *all* hearth products.

The Exclusion of Electric Hearth Products Is Arbitrary and Capricious

The proposed definition of hearth product includes only "gas-fired" hearth products. DOE provides no explanation as to why electric products are excluded from the definition. This exclusion is arbitrary and capricious, particularly given the fact that, on a source-to-site basis, gas is far more efficient than electricity.[12] Moreover, the likely result of excluding electric hearth products from efficiency standards is that such products will proliferate at the expense of gas products, which will undermine – rather than advance – the purposes of the EPCA.

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[9] 42 U.S.C. § 6292(b)(2).

[10] 78 Fed. Reg. at 79,640-41.

[11] *Id.* at 79,640.

[12] *See Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Statement of Policy for Adopting Full-Fuel-Cycle Analyses Into Energy Conservation Standards Program*, 76 Fed. Reg. 51,281, 51,285 (Aug. 18, 2011) ("In the national impacts analyses and environmental assessments of future energy conservation standards rulemakings, DOE intends to include impact estimates based on [full-fuel-cycle] energy and emissions, rather than the previous practice of estimating such impacts based on the likely effects on primary energy and emissions.").

Respectfully submitted,

THE AMERICAN PUBLIC GAS ASSOCIATION

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