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Nos. 10-1113, 10-1181, 12-1010, 12-1014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARTH, PATIO & BARBECUE ASSOCIATION AND
NATIONAL PROPANE GAS ASSOCIATION,
Petitioners,

v.
UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE U.S.
DEPARTMENT OF ENERGY

REPLY BRIEF FOR PETITIONERS HEARTH, PATIO & BARBECUE ASSOCIATION AND NATIONAL PROPANE GAS ASSOCIATION

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GLOSSARY

AFUE	**Annual Fuel Utilization Efficiency**
ANSI	**American National Standards Institute**
DHE	**Direct heating equipment**
DOE	**Department of Energy**
VHH	**Vented hearth heater**

STATUTES AND REGULATIONS

Except those regulations found in the separately bound addendum to this reply brief, all other applicable statutes and regulations are contained in the addendum to Petitioner's principal brief.

SUMMARY OF THE ARGUMENT

DOE goes to extraordinary lengths to confuse the basic issues presented in this litigation, but cannot obscure multiple independently-sufficient bases for the relief Petitioners seek. DOE's actions were arbitrary and unlawful, and its arguments to the contrary are meritless.

ARGUMENT

I. DOE'S INTERPRETATION THAT DECORATIVE HEARTH PRODUCTS ARE DIRECT HEATING EQUIPMENT IS UNREASONABLE AND CONTRARY TO LAW.

DOE's characterization of the facts, issues, and positions of the parties is so tortured as to render the questions actually presented in this litigation unrecognizable. Clarification is therefore required.

DOE has asserted regulatory jurisdiction over decorative hearth products by adopting a regulatory "vented hearth heater" ("VHH") definition adding such products to a statutorily-identified category of "covered products" – direct heating equipment ("DHE") – that does not include them. DOE defines a VHH as 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.

10 C.F.R. § 430.2. This definitional text was adopted in the 2010 rule at issue in this litigation. 75 Fed. Reg. 20,112, 20,234 (April 16, 2010). The "designed to furnish warm air" language was retained from the proposed rule, in which it had been used to denote products designed for heating use: fireplace heaters, not decorative fireplaces. Petitioner's Brief ("Pet. Br.") at 9-11. In the 2010 rule, DOE expanded the scope of its VHH definition by reinterpreting this language to include not just products designed for heating use, but also "purely decorative" products that – regardless of their function – have a flame and thus, in "nearly all" cases, have the effect of putting some amount of heat, "no matter how small," into a living space. 75 Fed. Reg. at 20,129; Pet. Br. at 12-13. This interpretation makes the design function and intended use of a product irrelevant: products are DHE even if they exhaust warm air – like a desktop computer – simply to avoid overheating. DOE adopted this interpretation in order to regulate "purely decorative" products that have only "unintended heat loads." 75 Fed. Reg. at 20,128-29.

DOE claims that its 2011 rule, 76 Fed. Reg. 71,836 (Nov. 18, 2011), adopted a completely new VHH definition that superseded the 2010 definition "in its entirety." Respondents' Brief ("DOE Br.") at 51 n.21. In fact, it did not change a

word of the text defining what a VHH is. Indeed, DOE went to extraordinary lengths to *avoid* any definitional change, apparently on the theory that – by "interpreting" the language adopted in 2010 to include log sets (thereby reversing its 2010 decision as to such products) – it could claim that log sets require an "exclusion" from heating efficiency standards the 2010 rule imposed for VHHs.[1] However, the rule as written did not cover log sets, because such products lack any mechanism to "furnish warm air" as specified by the definition. Pet. Br. at 19-20. To capture log sets, DOE therefore had to interpret the "designed to furnish warm air" language into oblivion, which it did by asserting that the phrase "designed to furnish warm air" is "not limited to furnishing warmed air." 76 Fed. Reg. at 71,839-40. Under this interpretation, hearth products are defined as DHE on the basis that – like incandescent light bulbs – they produce at least some amount of radiant heat, no matter how small. Id. Indeed, DOE presumes radiant heat from the mere presence of a flame – and ignores the net heating effect of a product – so its interpretation is simply a definitional *ipse dixit* under which all hearth products

[1] See 76 Fed. Reg. 43,941, 43,943, 43,945 (July 22, 2011); 76 Fed. Reg. at 71,843, 71,846.

are VHHs (and hence DHE), period. Id. This interpretation was designed to capture products that provide little or no heat at all.[2]

This is the nature and breadth of the statutory interpretation actually at issue. It is not an interpretation limited to heaters, products that are designed to produce heat, or dual-purpose products that serve a heating function. DOE's many misleading suggestions to the contrary – such as its assertion that "the products at issue in fact perform both heating and aesthetic functions," DOE Br. at 34 – sound like factual assertions, but are not. Instead, they reflect only linguistic contortions through which DOE describes *all* hearth products – regardless of their design purpose, function, utility, performance, or representative use – as "heaters" that are "designed" to provide heat and that have a heating "function."[3]

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[2] Decorative products often have little or no actual heating utility, Com. II201 at 15-16 (JA__), and – as DOE recognized – *not all* decorative products put heat into a living space. 75 Fed. Reg. at 20,129.

[3] DOE creates further confusion by ignoring its marked and arbitrary changes in word use over time. For example, DOE's 2010 rule recognized that there are "purely decorative" products as well as fireplace heaters having a "duality of purpose," 75 Fed. Reg. at 20,128-29, but subsequently DOE asserted that *all* hearth products provide "space heating," characterized *decorative products* as having a dual function, and pretended that fireplace heaters are intended "only as a heating appliance." 76 Fed. Reg. at 43,944. What changed over time was not the facts, but the meanings DOE imposed on the words it used to describe those facts. DOE's use of nearly identical words to describe different categories of products over time creates significant potential for misunderstanding. See e.g., DOE Br. at 7 (quoting language describing fireplace heaters); DOE Br. at 11 (quoting very similar language later used to describe decorative fireplaces).

DOE also seeks to obscure the nature of its statutory interpretation through suggestions that its VHH definition serves to distinguish decorative products from heaters, and that the real dispute in this litigation concerns distinctions DOE drew. False: the central dispute over DOE's VHH definition relates not to any distinctions DOE drew, but its refusal to draw *any definitional distinction at all*. DOE defined *all* hearth products as VHHs, and hence DHE that it can regulate by rule without need of justification or procedure otherwise required by law. See Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6292(b), 6295(l).

DOE's arguments to the contrary mischaracterize the so-called "exclusions" it tacked onto the end of its VHH definition. DOE describes these "exclusions" as part of its VHH definition, but that is true only as a description of their location. The exclusions do not function as a part of the definition, because products that are VHHs under the definitional text quoted above are VHHs *whether or not* the so-called "exclusions" apply. DOE *could have* drawn a definitional distinction between heaters that are DHE and decorative products that are not. Had it done so, arguments with respect to its line-drawing would be relevant to its statutory interpretation. But DOE chose to define *all hearth products* as DHE. Its "exclusions" are therefore irrelevant to its interpretation of EPCA.

Moreover, DOE's so-called "exclusion" for decorative fireplaces has never been designed either to distinguish decorative products from heaters or to exclude

them from regulation. It has instead served to *regulate* decorative fireplaces. This is clear from the nature of the "exclusions" themselves. The energy input limit imposed by the 2010 rule did not identify fireplaces as decorative; indeed, it did not identify any fireplace-sized products at all, because no such products met the limit imposed. Com. II226 at 5-6 (JA__). The input limit was instead designed to *regulate* decorative fireplaces for the express purpose of limiting their "unintended heat load" and restricting the use of gas for non-heating purposes. 75 Fed. Reg. at 20,129. Similarly, the "exclusion" provided by the 2011 rule serves not merely to describe what decorative fireplaces are, but to regulate them through requirements including a ban on standing pilot lights. As the 2011 rule explains, no decorative fireplaces are "excluded" from anything: manufacturers must "choose" to be regulated under Column A (the heating efficiency performance standards) or Column B (alternative requirements, including a ban on standing pilot lights, imposed as conditions for relief from the performance standards). 76 Fed. Reg. at 71,837, 71,839.

DOE *could have tried* to distinguish decorative products from heaters, but instead it defined decorative products as DHE so that it could claim jurisdiction over them as statutory "covered products," thereby gaining the authority to regulate them by rule without need of the justification or procedure EPCA would otherwise require. 42 U.S.C. §§ 6292(b), 6295(l). If DOE lacks the authority to

define decorative hearth products as DHE, it had no business regulating decorative fireplaces under the rules at issue, and had no business staking out its jurisdiction to regulate all hearth products as DHE the next time the standards for DHE come up for review.[4]

A. DOE's *post hoc* arguments provide no basis to uphold its interpretation.

In adopting the rules at issue, DOE confined its consideration of EPCA's language and structure entirely to the observation that "direct heating equipment" is not a defined term under the statute; it then asserted that the absence of such a definition renders the statute ambiguous and ignored the language and structure of the statute entirely. Pet. Br. at 36-38; 75 Fed. Reg. at 20,128-29; 76 Fed. Reg. at 71,839-40. DOE's litigation counsel now devotes pages of discussion to efforts to dismiss statutory language and provisions that DOE declined to consider at all in

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[4] DOE's claim that log set manufacturers have no stake in the 2011 rule is absurd. DOE has defined log sets as DHE, thus denying manufacturers of such products the procedural and substantive protections EPCA entitles them to before their products can be designated as "covered products" subject to DOE's rulemaking authority. Moreover, by designating these products as DHE, DOE has condemned them to future rulemaking required by law, see 42 U.S.C. § 6295(e)(4)(B), at which time manufacturers will have no right to contest DOE's jurisdiction over their products unless DOE unilaterally re-opens its determination that they are DHE to comment at that time. DOE's stated intent is not only to regulate log sets as DHE, but – now that such products have been defined as VHHs requiring an "exclusion" from heating efficiency standards – to regulate them through "conditions" imposed on that "exclusion." 76 Fed. Reg. at 71,846. DOE's otherwise gratuitous inclusion of log sets in the 2011 rule serves no other purpose.

the rulemaking process. DOE's arguments are meritless, but they should be dismissed in any event as *post hoc* rationalizations that cannot be substituted for the defective reasoning upon which DOE's rulemaking decisions were based. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

B. DOE's interpretation that decorative hearth products are DHE is unambiguously foreclosed by statute.

The first question in determining whether DOE's regulation is contrary to law is "whether Congress has delegated to the agency the legal authority to take the action that is under dispute." Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001). DOE proceeds from the premise that it has the authority to identify new categories of DHE by rule, but such authority "may not be lightly presumed," id. at 1082, and – in the absence of any delegation of such authority – deference to DOE's statutory interpretation is unwarranted. ABA v. FTC, 430 F.3d 457, 468 (D.C. Cir. 2005) (quoting Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994)).

It is undisputed that decorative hearth products are not regulated as DHE by statute. EPCA provided statutory efficiency standards specific to sixteen categories of DHE expressly identified by statute, and only charged DOE with the task of reviewing and amending those standards. 42 U.S.C. § 6295(e)(3)-(4). DOE suggests that EPCA lists only "some" categories of DHE, thus leaving a

"gap" giving DOE free reign to identify additional categories of DHE by rule. DOE Br. at 23. However, DOE fails to consider EPCA's provisions in context: EPCA banned the sale of DHE not meeting efficiency standards effective January 1, 1990, provided efficiency standards only for the categories of DHE specifically identified by statute, and directed DOE only to review and amend those standards. 42 U.S.C. § 6295(e)(3)-(4). There is no provision for additional categories of DHE to be created by rule, nor for the creation of standards to enable other categories of DHE to survive the 1990 compliance deadline. There is thus no "gap" for DOE to fill. See API v. EPA, 198 F.3d 275, 278 (D.C. Cir. 2000) ("if Congress makes an explicit provision for apples, oranges and bananas, it is most unlikely to have meant grapefruit").

Remarkably, DOE continues to ignore express statutory provisions governing its authority to regulate products the statute does not address. 42 U.S.C. §§ 6292(b), 6295(l). Indeed, DOE argues that Congress must have intended to provide it with the authority to regulate products the statute does not, as though the provisions expressly providing such authority did not exist. It is absurd to suggest that Congress used the term "direct heating equipment" – not simply as a collective term for the products EPCA regulates as such – but as an invitation for DOE to regulate new categories of products by rule without observance of the statutory

provisions otherwise expressly governing its authority to do so. Yet that is what DOE suggests.

DOE simply seeks to end-run express statutory constraints on its authority to regulate new categories of products by rule; indeed, its efforts to define non-heating products as heaters serve no purpose but to expand its rulemaking jurisdiction without the procedure and justification EPCA requires. Pet. Br. at 39-40. However, DOE cannot ignore specific provisions governing its authority to regulate new products,[5] and appeals to EPCA's broad mandate and DOE's general rulemaking authorities provide no basis for it to do so. API v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995); Ethyl Corp. v. EPA, 51 F.3d 1053, 1060-61 & n.9 (D.C. Cir. 1995). Accordingly, its efforts to define decorative products as DHE are foreclosed by statute.[6]

[5] Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d at 667-68; see Michigan v. EPA, 268 F.3d at 1082; NetCoalition v. SEC, 615 F.3d 525, 534 (D.C. Cir. 2010).

[6] DOE seeks to manufacture concessions from the fact that Petitioners do not seek to have the heating efficiency standards for fireplace heaters (as opposed to decorative products) set aside. However, Petitioners neither contend nor concede that DOE regulated such products lawfully. Petitioners simply do not oppose heating efficiency standards for fireplace heaters. To the contrary, Petitioners' members have been waiting for years for enforceable standards for fireplaces that are certified as heating appliances and sold as heater-rated products. It would be unfortunate if the standards for such products cannot be salvaged from the wreck of DOE's unlawful efforts to regulate decorative hearth products (as Petitioners have suggested), but relief for decorative products is necessary and warranted in any event.

DOE's interpretation that decorative products are DHE is also foreclosed by the fact that EPCA unambiguously limits the DHE category to utilitarian heating products. Indeed, EPCA specifies heating efficiency, as measured by the annual fuel utilization efficiency ("AFUE") test method, as the "efficiency descriptor" for DHE, thereby limiting the DHE category to heating appliances that – like every example of DHE identified by statute – are used strictly in response to heating needs. Pet. Br. at 34-35. It is undisputed that decorative hearth products are not used in that manner; indeed, the AFUE method is not even applicable to them. Pet. Br. at 54. Further, there is simply no basis to read the statutory term "heating equipment" to mean anything other than "heating equipment." DOE claims that Congress did nothing to suggest that the design purpose or intended, likely, or typical use of a product should be relevant, arguing that these are "extra-statutory concepts" offered to span a gap Congress left for DOE to fill. DOE Br. at 19-20. However, statutory interpretation starts with the assumption that Congress expresses its intent through "the ordinary meaning of the words used,"[7] and it is the "ordinary, plain-English meaning" of the words Congress used that forecloses the purported gap DOE seeks to fill. The word "heating" – as a modifier for the term "equipment" – unambiguously identifies "heating" as the purpose served by the subject "equipment." DOE claims that the statutory language could "instead refer

[7] American Mining Congress v. EPA, 824 F.2d 1177, 1183-84 (D.C. Cir. 1987).

to the objective characteristics of a product, such as whether a product, by the nature of its design (including the presence of a gas flame) generates" some amount of heat, however small,[8] but in plain English neither gas lights nor the spectacular Olympic flame from the 2010 Winter Olympics can be described as "heating equipment," and the fact that both have gas flames is irrelevant. DOE simply seeks to read "heating" out of "heating equipment" so that it can claim the authority to regulate non-heating products. Its interpretation is "an extraordinary distortion of the English language" that should be dismissed as such. Assoc. of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1053 (D.C. Cir. 2000).

C. DOE's interpretation that decorative hearth products are DHE is arbitrary.

DOE failed to address any of EPCA's relevant language or structure when it adopted the rules at issue, failed to respond to substantial argument challenging its authority to regulate decorative products as DHE, and failed to provide any cogent explanation as to how its interpretation that decorative hearth products are DHE is reasonable in the context of EPCA's statutory scheme. Each of these failures is sufficient to warrant the relief Petitioners seek. Pet. Br. at 36-40.

As already discussed, DOE's arguments that its statutory interpretation reasonably differentiates decorative products from heaters is specious, because its

[8] DOE Br. at 20; 75 Fed. Reg. at 20,129.

interpretation involves no differentiation at all. DOE suggests that it needed to assert jurisdiction over all hearth products *in order to* differentiate decorative products from heaters, DOE Br. at 18, but this too is specious: DOE claims that its so-called "exclusion" criteria serve only to differentiate decorative products from heaters, and – if this were true – there would be no reason it could not have drafted its "exclusion" as an exclusion from the VHH definition. In any event, DOE cannot reasonably assert jurisdiction over all hearth products on the basis of claimed difficulty in determining where the limits of its jurisdiction lie. Michigan v. EPA, 268 F.3d at 1084.

DOE's efforts to justify its VHH definition as a permissible interpretation of its own regulations fare no better. DOE argues its case as though this litigation involved a challenge to an agency interpretation of its own regulation (DOE Br. at 31-36), but Petitioners challenge DOE's interpretation *of EPCA*. DOE's prior "vented home heating equipment" definition is of no relevance at all: that regulatory definition was not adopted as an interpretation of the statutory provisions at issue, nor (until the 2010 rule) had it ever applied to hearth products. In any event, DOE's claim that its statutory interpretation is "consistent" with its prior regulatory interpretation (DOE Br. at 14, 36) is false. Not until the 2010 rule did DOE claim that products can be classified as heaters without regard to their design purpose or intended use, and not until the 2011 rule did it suggest that

products can be heaters without at least having vents or fans to circulate warm air. Rather than reflecting any longstanding agency position, DOE's interpretation is both unprecedented and unique to hearth products. DOE admits this in attempting to dismiss the fact that even desktop computers and refrigerators qualify as heaters under the absurd interpretation it applies to hearth products: it states that "DOE has not sought to regulate other products as vented heaters" under that interpretation. DOE Br. at 36. Regardless, DOE's interpretation can only survive as an interpretation *of EPCA*, and its continued reliance on a parsing of regulatory language that appears nowhere in EPCA – coupled with its continued disregard of relevant statutory provisions – provides no basis to uphold its statutory interpretation.

II. THE HEATING EFFICIENCY STANDARDS FOR VENTED HEARTH HEATERS SHOULD BE VACATED EXCEPT AS THEY APPLY TO FIREPLACE HEATERS.

EPCA expressly prohibits the adoption of energy conservation standards absent a determination that such standards are technologically feasible and economically justified; indeed, it requires a demonstration that standards are feasible at the proposed rule stage, and requires DOE to allow a minimum of sixty days for public comment on the justification for a standard before it can be adopted. 42 U.S.C. §§ 6295(o)(2)(A)-(B)(i), 6295(p)(1)-(2). DOE never proposed heating efficiency standards for decorative hearth products; it proposed such

standards for VHHs defined to include only "fireplace heaters," and its proposal only sought to justify standards for fireplace heaters. Pet. Br. at 9-12, 41-43. In the 2010 rule, DOE subjected decorative fireplaces to the heating efficiency standards simply by expanding its VHH definition to include them. Id. at 12-13.

Heating efficiency standards for decorative fireplaces are not technologically or economically justified, and no one argues that they are. DOE did not even attempt to determine that heating efficiency standards for decorative fireplaces are technologically and economically justified, id. at 14-15, and no one argues that it did. Nor did DOE provide *any* opportunity for comment on any technological or economic justification for such standards (much less the minimum sixty-day comment period EPCA requires), and no one argues that it did. The standards should be vacated for these reasons alone. Pet. Br. at 48-50, 42-44.

Rather than defend the heating efficiency standards for decorative fireplaces on the merits, DOE spares no misstatement in its efforts to shield them from judicial review. It states that the heating efficiency standards "are not directly at issue in this case," though they are. DOE Br. at 5. It states that "the relevant provisions of the April 2010 rule are no longer in effect" – and that the entire 2010 rule has been superseded – despite the fact that neither the text defining decorative fireplaces as VHHs nor the heating efficiency standards for VHHs have ever been amended. Id. at 14, 46. It even argues that the heating efficiency standards no

longer apply to any decorative fireplaces, and that manufacturers suffer no cognizable harm attributable to them. DOE Br. at 14-15, 45, 48.

DOE could have taken action in its 2011 rule to moot its unlawful decision to impose heating efficiency standards on decorative fireplaces, but it did not. It did not limit its VHH definition to the fireplace heaters its justification for the heating efficiency standards had addressed, and it did not amend the standards to make them applicable only to fireplace heaters. Nor did it attempt to justify heating efficiency standards for products other than fireplace heaters. Instead, DOE took the position that the standards for VHHs apply to any products it defines as VHHs – despite its knowledge that such standards are not justified for decorative products[9] – so that it could continue to use its Scylla and Charybdis regulatory scheme to back-door other regulatory requirements for fireplace heaters. All DOE did was replace the alternative requirements it sought to impose; accordingly, decorative fireplaces remain subject to the heating efficiency standards imposed by the 2010 rule, and those standards continue to supply the sole compliance driver for DOE's regulatory scheme. As a result, manufacturers of decorative fireplaces must comply either with the standards or with alternative requirements including a ban on standing pilot lights. If they fail to comply with

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[9] In the 2011 rule, DOE made – but arbitrarily ignored – factual findings confirming that heating efficiency standards for decorative fireplaces are not economically justified. Pet. Br. at 52-54.

either, sale of their products will be unlawful *as a violation of heating efficiency standards that were never lawfully imposed on such products*. If the heating efficiency standards *did not* apply to decorative fireplaces as DOE claims, manufacturers of such products would face no compliance obligations at all.

DOE's "exclusion" cannot possibly moot the unlawful heating efficiency standards, because it does not even address many of the products to which the standards apply. DOE never proposed or attempted to justify heating efficiency standards for products other than fireplace heaters, a relatively small but well-recognized category of hearth products that are certified as heating appliances and sold on the basis of AFUE efficiency claims. Pet. Br. at 8-12, 41-43. Accordingly, it did not justify heating efficiency standards for decorative fireplaces with standing pilot lights, yet such products will be subject to the standards under the terms of DOE's rules.

DOE insists that the heating efficiency standards for VHHs are generally applicable to all hearth products, despite the fact that it has never even attempted to justify such standards for products other than fireplace heaters. There is an obvious and appropriate remedy: the Court can and should vacate the standards except as they apply to fireplace heaters *as defined by the scope of DOE's purported justification for the standards*. See National Maritime Safety Ass'n v. OSHA, 649 F.3d 743, 753-55 (D.C. Cir. 2011) (vacating inspection requirement as

applied to activities for which they were not lawfully justified). This is precisely the relief Petitioners have requested. The proposal for DOE's 2010 rule was expressly limited to fireplace heaters, a category of products appropriately certified as heating appliances under the ANSI Z21.88 standard upon which DOE's proposed VHH definition was based.[10] The technological and economic justification for the standards was based on AFUE data for products actually being sold on the basis of AFUE efficiency claims; again, the category of products appropriately certified as fireplace heaters under the ANSI Z21.88 standard.[11] Accordingly, there is no basis for heating efficiency standards to remain in place for products other than fireplace heaters certified to the ANSI Z21.88 standard.

DOE and NRDC suggest that the distinction between fireplace heaters and decorative products is far more problematic than it is, and overstate the potential for confusion and disruption in the market. Available data indicate that less than twenty-five percent of gas fireplaces are used even for supplemental heating, and that fireplace heaters aimed at this market account for roughly the same percentage

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[10] Pet. Br. at 8-12, 41-43. DOE's effort to distance its proposed VHH definition from the ANSI Z21.88 fireplace heater definition (DOE Br. at 35 & n. 14) is disingenuous. As the proposed rule explained, DOE modified the ANSI definition only to address a non-relevant drafting issue related to ducting. 74 Fed. Reg. 65,852, 65,867-68 (Dec. 11, 2009).

[11] Pet. Br. at 11, 14; Com. 107 at 3-48 (AFUE data relied on); 75 Fed. Reg. at 20,129, 20,131.

of fireplace sales.[12] Such products are generally certified as heaters and sold as heater-rated products on the basis of AFUE efficiency claims, but – with heating efficiency standards finally in place – all products certified as heaters would have to meet the standards, and "heater rated" claims would be enforceable. This would provide a clear, objective, and enforceable market distinction identifying legitimate fireplace heaters as heater-certified, AFUE-rated appliances. It is difficult to how this obvious market distinction is likely to be overlooked by the relatively small percentage of consumers interested in using gas fireplaces as utilitarian heaters. However, even if this distinction is somehow imperfect, it is the only distinction DOE's justification for its heating efficiency standards reasonably supports.

III. PROCEDURAL AND SUBSTANTIVE ERRORS IN THE 2010 RULEMAKING JUSTIFY THE RELIEF PETITIONERS SEEK.

The justification for the 2011 rule presumed the validity of the 2010 rule, and the terms of the 2011 rule cannot operate independently of the definitional text and heating efficiency standards adopted in the 2010 rule. Accordingly, the 2011 rule – rather than curing the errors of the 2010 rule – is itself fatally undermined by them. The defects in DOE's 2010 rulemaking thus provide sufficient basis to vacate both rules as Petitioners have requested. See Pet. Br. at 51-52.

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[12] J. Houck, *Residential Decorative Gas Fireplace Usage Characteristics*, at 5-9, Com. II226, Att. C (JA__).

Moreover, the 2010 rule was designed as a means to back-door an unlawful energy input limit for decorative fireplaces that DOE does not even attempt to defend on the merits. DOE claims that its decision to impose an input limit is moot, DOE Br. at 45-46, but it ignores the fact that it has never even attempted to justify heating efficiency standards for decorative fireplaces independent of its conclusion that the energy input limit would provide an easy compliance alternative that would "maintain the availability of decorative products" in the face of such standards. 75 Fed. Reg. at 20,128-29. Accordingly, it was not merely the input limit – but also DOE's decision to impose heating efficiency standards – that was based on the premise that decorative fireplaces can reasonably operate at or below the input limit imposed (and that existing products could be modified to meet that standard at essentially no cost). Id. That premise was arbitrary and unsupported by substantial evidence, Pet. Br. at 16, 50-51, and was the product of decision-making undertaken without notice or opportunity for comment. Id. at 46. These errors in the 2010 rulemaking fatally undermine the basic rationale for DOE's decision to regulate decorative fireplaces and subject them to heating efficiency standards. They therefore provide independently-sufficient bases to vacate the 2010 rule.

NRDC seeks to explain away the procedural defects of the 2010 rule through a claim that Petitioners had actual notice of DOE's intentions. Its argument fails

not only as a transparent effort to "bootstrap notice from comment,"[13] but also as an effort to bootstrap a mountain of notice from a molehill of comment. NRDC relies entirely on two brief oral comments at a public meeting following the issuance of DOE's proposed rule. By that time, DOE's rule development process had been underway for three years, and its subject matter throughout had been limited exclusively to heating efficiency standards for heaters. Pet. Br. at 8-12. As a result, DOE had focused its information gathering activities exclusively on fireplace heaters, and had made no effort to collect the information it would have needed to regulate decorative fireplaces. Id. at 42-43. DOE had then issued a proposed rule with a new VHH definition confirming that fireplace heaters – not decorative fireplaces – were the subject of the rule, id. at 41-42, and proposing heating efficiency standards on the basis of justifications specific to fireplace heaters. Id. at 9-12. The public meeting was held just thirty days later, and – NRDC's suggestion to the contrary notwithstanding – DOE presented its new VHH exactly as it had appeared in the proposed rule.[14] Against this backdrop, NRDC points to two brief oral comments from a single commenter suggesting that DOE regulate products that had never been a subject of the rulemaking (decorative

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[13] Fertilizer Institute v. EPA, 935 F.2d 1303 (D.C. Cir. 1991); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

[14] Com. 57.3 at 11 (JA__); Com 57.4 at 47 (JA__).

fireplaces) to address a concern that had never been a subject of the rulemaking (impacts on air conditioning demand) by means of a requirement that had never been considered in the course of the rulemaking (a heating capacity limit). Com. 57.4 at 51 and 86-87 (JA__). Petitioners provided the obvious response to this out-of-scope comment: they made the point that decorative products are not DHE under EPCA and cannot be regulated as such. Com. 75 (JA__), 91 at 14 (JA__), 100 (JA__).

NRDC's claim that the mere fact of this comment gave Petitioners all of the notice to which they were entitled is absurd. Petitioners had no notice that DOE might actually launch off to regulate decorative fireplaces in order to limit their "unintended heat load" and restrict the use of gas for non-heating purposes; DOE had never suggested such a possibility and did not have even the basic information necessary to pursue it. Even if Petitioners had known that DOE was considering such an approach, the most they could reasonably have anticipated was a notice requesting information and comment as to all the new and previously unexplored legal, technical, and economic issues involved. DOE's decision to go straight to a final rule without even the basic information it needed to understand the consequences of its actions was patently unreasonable and certainly not a "logical

outgrowth" of its proposed rule.[15] The fact that there was no comment as to any of the relevant technical issues confirms that notice was inadequate. Sprint Corporation v. FCC, 315 F.3d 369, 377 (D.C. Cir. 2003); Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991).

NRDC's suggestion that interested parties have an obligation to provide an avalanche of response to every snowflake of comment has no basis in law. Instead, the adequacy of notice must be addressed "functionally by asking whether 'the purposes of notice and comment have been adequately served.'" American Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (quoting Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991)). Here they were not. Petitioners had no opportunity to comment on the basic information and assumptions underlying DOE's decisions. In this respect, it is important to note that DOE did not adopt the idea suggested in the meeting: instead of imposing a heating capacity limit, it imposed an energy *input* limit, 75 Fed. Reg. at 20,129, a concept raising significantly different factual and technical issues.[16] As a result,

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[15] Petitioners certainly had no notice that DOE might go straight to a final rule imposing heating efficiency standards on decorative fireplaces without either the information necessary to justify such standards or the notice and opportunity for comment as to the justification for such standards that EPCA expressly requires. 42 U.S.C. § 6295(p)(1)-(2).

[16] While neither approach is justifiable, the facts and technical issues are different. For example, many decorative products produce little or no heat output, but no

even a scorched-earth technical response to the brief oral comments would have failed to prevent the gross factual errors underlying DOE's 2010 rule, because DOE failed to provide "notice of its intent to adopt, much less an opportunity to comment on," an input limit[17] and unquestionably failed to "reveal portions of the technical basis for" its decision as necessary to permit meaningful comment.[18] The 2010 rule – and the 2011 amendment based upon it – should therefore be vacated.

IV. DOE'S RULES ARE AN UNLAWFUL SCHEME TO IMPOSE UNAUTHORIZED AND UNJUSTIFIED STANDARDS IN THE GUISE OF "EXCLUSIONS."

In 2015, manufacturers must eliminate standing pilot lights for decorative fireplaces or lose their so-called "exclusion" from heating efficiency standards that were never lawfully imposed upon them. This ban on standing pilot lights is transparently a design standard for decorative fireplaces, yet DOE has never even attempted to justify it as such. Pet. Br. at 59. Moreover, DOE imposed this

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fireplace-sized products could survive the input limit DOE imposed. Com. II226 at 5-6 (JA__). The issues associated with product redesign would also be substantially different in the case of a heating capacity limit than in the case of an input limit.

[17] Int'l Union, United Mine Workers of Am. v. MSHA, 407 F.3d 1250, 1261 (D.C. Cir. 2005).

[18] Owner-Operator Independent Drivers Ass'n, Inc., v. Federal Motor Carrier Safety Admin., 494 F.3d 188, 199 (D.C. Cir. 2007) (citations and internal quotation marks omitted).

standard on decorative fireplaces – products it regulates as DHE – despite the fact that EPCA prohibits design standards for DHE. 42 U.S.C. § 6291(6).

DOE justified this design standard in the 2011 rule on the grounds that it is "completely optional and at the manufacturers' discretion" and thus not a "design requirement." 76 Fed. Reg. at 71,847. DOE has understandably abandoned this argument, but – besides simply denying that the standard is what it is – it offers nothing but inadequate *post hoc* rationalizations to justify its rule.

DOE's denials are easily addressed, because the 2011 rule confirms that the ban was designed and intended to function as a design standard. The rule states that the ban "requires manufacturers to eliminate standing pilot lights,"[19] recognizes that products "would need to be redesigned to eliminate" standing pilot lights, id. at 71,849, assumes that the ban will be effective in eliminating standing pilot lights in "all" decorative fireplaces, id. at 71,837, and expressly justifies the ban as a means to achieve energy savings. Id. at 71,836-37. Nothing could be clearer than that the pilot light ban is a design requirement imposed as an energy conservation standard. In fact, the standard imposed is indistinguishable from a pilot light ban DOE imposed as an energy conservation design standard for gas cooking appliances without electrical supply cords. 10 C.F.R. § 430.32(j)(2). DOE has authority to impose design standards for kitchen ranges and ovens, see 42

[19] 76 Fed. Reg. at 71,857; id. at 71,847, 71,848.

U.S.C. §§ 6291(6), 6292(a)(10), and it imposed the pilot light ban for gas cooking appliances without electrical supply cords as a design standard that it justified it such.[20] The design standard DOE imposed on decorative fireplaces is the same; all that is missing is the statutory authority and justification needed to impose it. Pet. Br. at 57, 59. DOE, in effect, claims that it can impose such a standard *without* statutory authority or required justification simply by slipping it into the definitions section of its rule.

DOE's arguments suggesting that the pilot light ban is justifiable as a means of definitional distinction or as a means to prevent "evasion" of the standards for heaters are not justifications it relied on in adopting the 2011 rule, and are thus mere *post hoc* rationalizations to be dismissed as such.[21] DOE's efforts to suggest that the pilot light ban was intended to prevent "evasion" of standards simply misrepresents points discussed in the 2011 rule, none of which involved any effort to justify the pilot light ban on that basis. See 76 Fed. Reg. at 71,847-49. Claims that DOE's pilot light ban serves some legitimate definitional function are also transparently false, because the presence or absence of a pilot light does nothing to distinguish decorative products from heaters. As DOE acknowledges, a substantial

[20] See 74 Fed. Reg. 16,040 (April 8, 2009); 10 C.F.R. § 429.23(b)(2) ("design requirements").

[21] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

percentage of decorative fireplaces have pilot lights,[22] and such products will obviously be no less "decorative" when DOE's pilot light ban takes effect in 2015 than before, when DOE considers the other three criteria to be sufficient for product differentiation. DOE simply seeks to eliminate "the use of standing pilot lights in all primarily decorative [fireplaces]" as a means to achieve "a significant increase in overall energy savings." Id. at 71,837. More specifically, it seeks to do so without statutory authority and without the need to justify either the standard or the effective date of the standard as EPCA requires. Pet. Br. at 59-60.

DOE argues that "the convenience and reliability" of standing pilot lights are "less necessary" for decorative products than for heaters[23] and therefore should not be allowed, but it does not explain the source of its authority to dictate what features decorative fireplaces may or may not have. It argues that nothing in EPCA *specifically prohibits* it from inserting a pilot light ban (which it calls an "energy-use characteristic") into a regulatory definition, but its authority to do so cannot be presumed on the grounds that a statute does not expressly negate it. Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995); Michigan v. EPA, 268

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[22] 76 Fed. Reg. at 71,849, 71,857.

[23] DOE Br. at 42. Significantly, DOE's statement concedes that standing pilot lights are beneficial for convenience and reliability of a decorative product.

F.3d at 1082; Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d at 659, 666-67.

EPCA clearly defines DOE's authority to impose standards by rule. It authorizes DOE to regulate products not addressed by statute only upon appropriate findings and with observance of required procedure, prohibits design standards for DHE, and prohibits any standards adopted without technical and economic justification. Id. §§ 6292(b), 6295(l), 6291(6), 6295(o)(2)(A)-(B). DOE cannot circumvent all of these specific statutory constraints on its rulemaking authority through a simple wave of its definitional wand,[24] and neither arguments about the salutary effects of the requirements imposed nor appeals to its general rulemaking authorities or the broad statutory purposes of EPCA provide any basis for it to do so.[25] DOE lacks the authority to expand its own jurisdiction and impose whatever regulation it wants through simple definitional gamesmanship. DOE's regulatory scheme for VHHs should therefore be vacated except as it applies to fireplace heaters.

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[24] Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d at 667-68; see Michigan v. EPA, 268 F.3d at 1082; NetCoalition v. SEC, 615 F.3d at 534.

[25] API v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995). The other regulatory definitions touted by DOE (DOE Br. at 44) do not provide precedent for end-running specific statutory constraints on its rulemaking authority.

CONCLUSION

DOE's entire regulatory scheme for decorative hearth products is the product of arbitrary and procedurally defective efforts to regulate decorative hearth products without regard to EPCA's requirements. Consistent with the justification offered for the heating efficiency standards for VHH's, DOE's 2010 rule and its 2011 amendment should be vacated as to all hearth products other than fireplace heaters certified to the ANSI Z21.88 standard.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,924 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

/s/ John A. Hodges

CERTIFICATE OF SERVICE

I, John A. Hodges, hereby certify that on June 20, 2012, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I further certify that six copies of the foregoing will be filed by hand with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit. Participants in the case, listed below, are registered CM/ECF users will be served by the CM/ECF system.

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