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[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No EERE-2013-BT-DET-0057]

RIN: 1904-AD14

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

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Proposed determination of coverage.

SUMMARY: The U.S. Department of Energy (DOE or the “Department”) has tentatively determined that hearth products qualify as a covered product under Part A of Title III of the Energy Policy and Conservation Act (EPCA), as amended. More specifically, DOE has tentatively determined that hearth products meet the criteria for covered products because classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA (which is to improve the efficiency of covered consumer products to conserve the energy resources of the Nation), and the average annual U.S. household energy use for hearth products is likely to exceed 100 kilowatt-hours (kWh) per year.

DATES: DOE will accept written comments, data, and information on this notice, but no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested persons are encouraged to submit comments electronically. However, interested persons may submit comments, identified by docket number EERE-2013-BT-DET-0057 or Regulatory Information Number (RIN) 1904-AD14, by any of the following methods:

- Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.
- Email: HearthHtgProd2013DET0057@ee.doe.gov. Include EERE-2013-BT-DET-0057 and/or RIN 1904-AD14 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, portable document format (PDF), or American Standard Code for Information Exchange (ASCII) file format, and avoid the use of special characters or any form of encryption.
- Postal Mail: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, Mailstop EE-2J, Proposed Determination for Hearth Products, EERE-2013-BT-DET-0057 and/or RIN 1904-AD14, 1000 Independence Avenue SW, Washington, D.C. 20585-0121. Telephone: (202) 586-2945. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- Hand Delivery/Courier: Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Office, 6th Floor, 950 L'Enfant Plaza SW, Washington, D.C. 20024. Telephone: (202) 586-2945. If possible, please submit all items on a CD, in which case it

is not necessary to include printed copies.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section VI of this document (Public Participation).

Docket: The docket is available for review at www.regulations.gov, including Federal Register notices, comments, and other supporting documents/materials (search EERE-2013-BT-DET-0035). All documents in the docket are listed in the www.regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket web page can be found at:

<http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-DET-0057>. This web page contains a link to the docket for this notice on the www.regulations.gov site. The www.regulations.gov web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-2J, 1000 Independence Avenue SW, Washington, D.C. 20585-0121. Telephone: (202) 287-1692. Email: hearth_products@ee.doe.gov.

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue SW, Washington, D.C. 20585-0121. Telephone: (202) 586-9507 Email: Eric.Stas@hq.doe.gov.

For information on how to submit or review public comments, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, Mailstop EE-2J, 1000 Independence Avenue, SW, Washington, DC 20585-0121. Telephone: (202) 586-2945. Email: Brenda.Edwards@ee.doe.gov.

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I. Statutory Authority

Title III of the Energy Policy and Conservation Act of 1975 (EPCA), as amended (42 U.S.C. 6291 et seq.), sets forth various provisions designed to improve energy efficiency for consumer products and certain commercial and industrial equipment. Title III, Part B¹ of EPCA,² Pub. L. 94-163 (42 U.S.C. 6291–6309, as codified) established the “Energy Conservation Program for Consumer Products Other Than Automobiles,” a program covering most major household appliances (hereafter referred to as “covered products”). In addition to specifying a list of covered residential and commercial products, EPCA contains provisions that enable the Secretary of Energy to classify additional types of consumer products as covered products. (42 U.S.C. 6292(a)(20)) Specifically, for a given product to be classified as a covered product, the Secretary must determine that:

- (A) Classifying the product as a covered product is necessary or appropriate for the purposes of carrying out EPCA; and
- (B) The average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (kWh) per year.

(42 U.S.C. 6292(b)(1)(A) and (B))

For the Secretary to prescribe an energy conservation standard pursuant to 42 U.S.C. 6295(o) and (p) for covered products added pursuant to 42 U.S.C. 6292(b)(1), the Secretary must also determine that:

¹ For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

² All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112-210 (Dec. 18, 2012).

- (A) The average household energy use of the products has exceeded 150 kWh (or its Btu equivalent) per household for any 12-month period;
- (B) The aggregate 12-month household energy use of the products has exceeded 4.2 TWh;
- (C) Substantial improvement in energy efficiency is technologically feasible; and
- (D) Application of a labeling rule under 42 U.S.C. 6294 is unlikely to be sufficient to induce manufacturers to produce, and consumers and other persons to purchase, covered products of such type (or class) that achieve the maximum energy efficiency that is technologically feasible and economically justified.

(42 U.S.C. 6295(l)(1)(A)-(D))³

Hearth products are gas-fired equipment that provide space heating and/or provide an aesthetic appeal to the living space. If DOE issues a final determination that hearth products are a covered product, DOE will consider test procedures and energy conservation standards for hearth products, including an initial determination as to whether hearth products satisfy the provisions of 42 U.S.C. 6295(l)(1).

³ DOE notes that a drafting error arose at the time Congress adopted the amendments to EPCA contained in the Energy Independence and Security Act of 2007 (EISA 2007), Pub. L. 110-140. As part of the EISA 2007 amendments, Congress added metal halide lamp fixtures to the list of specifically enumerated covered products at 42 U.S.C. 6292(a)(19) and shifted the provision for the Secretary to classify “any other type” of a consumer product as a covered product to 42 U.S.C. 6292(a)(20). However, Congress did not similarly amend the criteria and other requirements for setting energy conservation standards for “other” covered products in 42 U.S.C. 6295(l)(1) and (2). The provisions in 42 U.S.C. 6295(l) continued to refer to standards for “any type” of covered product, while continuing to refer to 42 U.S.C. 6292(a)(20). Clearly, the provisions at 42 U.S.C. 6295(l) were intended to apply more broadly than to metal halide lamp fixtures, so DOE continues to apply this provision as if the drafting error had not occurred. To do otherwise would render the provision at 42 U.S.C. 6295(l) a nullity, thereby thwarting DOE’s ability to set energy conservation standards for newly covered products, an outcome which Congress could not have intended.

II. Current Rulemaking Process

On April 16, 2010, DOE published a final rule in the Federal Register (hereafter referred to as the “April 2010 final rule”) in accordance with the relevant statutory provisions discussed in that final rule, which, in relevant part, promulgated definitions and energy conservation standards for vented gas hearth products. 75 FR 20112. Following DOE's adoption of the April 2010 final rule, the Hearth, Patio & Barbecue Association (HPBA) sued DOE in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to invalidate the April 2010 rule and an amendment to that rule published on November 18, 2011 (76 FR 71836) as those rules pertained to vented gas hearth products. Statement of Issues to Be Raised, Hearth, Patio & Barbecue Association v. Department of Energy, et al., No. 10-1113 (DC Cir. filed July 1, 2010). On February 8, 2013, the D.C. Circuit issued its opinion in the HPBA case and ordered that the definition of “vented hearth heater” adopted by DOE be vacated, and remanded the matter to DOE to interpret the challenged provisions in accordance with the Court’s opinion. Hearth, Patio & Barbecue Association v. Department of Energy, et al., 706 F.3d 499 (D.C. Cir. 2013).

DOE has not previously conducted an energy conservation standards rulemaking for hearth products with the exception of the vented hearth heaters, which are no longer covered products as a result of the Court ruling. If, after public comment, DOE issues a final determination of coverage for this type of product, DOE will consider both test procedures and energy conservation standards for all hearth products.

With respect to test procedures, DOE would consider a proposed test procedure for measuring the energy efficiency, energy use, or estimated annual operating cost of hearth products during a representative average use cycle or period of use that is not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) In a test procedure rulemaking, DOE initially prepares a notice of proposed rulemaking (NOPR) and allows interested parties to present oral and written data, views, and arguments with respect to such procedures. In prescribing new test procedures, DOE would take into account relevant information including technological developments relating to energy use or energy efficiency of hearth products.

With respect to energy conservation standards, DOE is required to publish a NOPR that would provide DOE's proposal for potential energy conservations standards and a summary of the results of DOE's supporting technical analysis. The details of DOE's energy conservation standards analysis would be provided in a technical support document (TSD) that describes the details of DOE's analysis of both the burdens and benefits of potential standards, pursuant to 42 U.S.C. 6295(o). Because hearth products would be a product that is newly covered under 42 U.S.C. 6292(b)(1), DOE would also consider as part of any energy conservation standard NOPR whether hearth products satisfy the requirements of 42 U.S.C. 6295(l)(1). After the publication of the NOPR, DOE would afford interested persons an opportunity during a period of not less than 60 days to provide oral and written comment. (42 U.S.C. 6295(p)(2)) After receiving and considering the comments on the NOPR and not less than 90 days after the publication of the NOPR, DOE would issue the final rule prescribing any new energy conservation standards for hearth products. (42 U.S.C. 6295(p)(3))

III. Proposed Definition

DOE proposes to add a definition for “hearth products” in the Code of Federal Regulations (CFR) to clarify coverage of any potential test procedure or energy conservation standard that may arise from today’s proposed determination. There currently is no statutory definition of “hearth products.” As discussed in section IV of this notice, DOE has preliminarily determined that adding hearth products as a covered product is justified under the relevant statutory criteria. Accordingly, DOE proposes to adopt the following definition of “hearth products” to consider in the context of any subsequent test procedures and energy conservation standards for hearth products, and to provide clarity for interested parties as it continues its analyses:

Hearth product means 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.

This proposed definition includes (but is not necessarily limited to) all vented and unvented hearth products. More specifically, it includes vented decorative hearth products, vented heater hearth products, vented gas logs, gas stoves, outdoor hearth products, and ventless hearth products.

DOE seeks comments from interested parties on its proposed definition of “hearth products.”

IV. Evaluation of Hearth Products as a Covered Product

The following sections describe DOE's evaluation of whether hearth products fulfill the criteria for being added as a covered product pursuant to 42 U.S.C. 6292(b)(1). As stated previously, DOE may classify a consumer product as a covered product if: (1) classifying products of such type as covered products is necessary or appropriate to carry out the purposes of EPCA; and (2) the average annual per-household energy use by products of such type is likely to exceed 100 kWh (or its Btu equivalent) per year.

A. Coverage Necessary or Appropriate to Carry Out Purposes of EPCA

Coverage of hearth products is necessary or appropriate to carry out the purposes of EPCA, which include: (1) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses; and (2) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products. (42 U.S.C. 6201) The aggregate national energy use of hearth products is estimated to be 0.11 quads (31.2 TWh).⁴ Coverage of hearth products will further the conservation of energy supplies through both labeling programs and the regulation of energy efficiency. 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.

Therefore, DOE has tentatively determined that coverage of hearth products is necessary and

⁴ The aggregate national energy use of hearth products is based on energy use estimates for hearth products provided in section IV.B, Energy Information Administration, 2009 Residential Energy Consumption Survey (Available at: <http://www.eia.doe.gov/emeu/recs>), US Census, 2011 American Housing Survey (Available at <http://www.census.gov/housing/ahs/data/national.html>), 2002 to 2012 HPBA US hearth shipments (Available at <http://www.hpba.org/statistics/hpba-us-hearth-statistics>), and. 2010 report prepared for HPBA by J. Houck, Residential Decorative Gas Fireplace Usage Characteristic (Available at: http://energy.gov/sites/prod/files/gcprod/documents/RFIRegReview_HPBAAttachC_03212011.pdf).

appropriate to carrying out the purposes of EPCA, thereby satisfying the provisions of 42 U.S.C. 6292(b)(1)(A).

B. Average Household Energy Use

DOE calculated average household energy use for hearth products, in households that use the product, based on a study prepared for HPBA.⁵ Based on this study, vented heater hearth products operate on average 75 hours per year, while vented decorative hearth products operate half that number (or 37.5 hours per year). DOE assumes that ventless hearth products operate 75 hours per year (similar to vented heater hearth products), while vented gas logs and outdoor units operate 37.5 hours per year (similar to vented decorative hearth products). Based upon a review of available information, DOE has tentatively determined that the average input capacity for all hearth products is 35,000 Btu/h, based on hearth models offered in 2010.⁶ DOE also took into account the energy use from a standing pilot light or other continuously-burning ignition source. DOE estimated that on average, continuous pilot energy use is about 800 Btu/h.⁷ DOE assumed

⁵ Houck, James. Residential Decorative Gas Fireplace Usage Characteristic. Report prepared for HPBA (2010) (Available at: http://energy.gov/sites/prod/files/gcprod/documents/RFIRegReview_HPBAAttachC_03212011.pdf).

⁶ U.S. Department of Energy-Office of Codes and Standards, Analytical Tools: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters (April 27, 2010) (Available at: http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/htgp_finalrule_correction.pdf).

⁷ This value was derived from data collected on the following manufacturer websites:

GRI 1997 Study: Menkedick, J., Hartford, P., Collins, S., Chumaker, S., Wells, D. "Topic Report: Hearth Products Study (1995-1997)". Gas Research Institute (GRI). September 1997. GRI-97/0298.

Intertek Testing Service. NOPR Comment # 0198 to Hearth Products NOPR. (Available at:

<http://www.regulations.gov/#%21docketDetail;dct=FR+PR+N+O+SR+PS;rpp=50;so=DESC;sb=postedDate;po=0;D=EERE-2011-BT-STD-0047>).

Heatilator. Common Questions. (URL: <http://www.heatilator.com/customerCare/searchFaq.asp?c=Gas>).

EER Consulting, "Input Rate of Pilot Burners on Gas Fireplaces" (Consultant Report). EER Consulting (Nov. 6, 2011).

NRCAN. Personal: Residential: Chapter 3 - All About Gas Fireplaces (Available at URL:

http://oe.nrcan.gc.ca/Publications/infosource/Pub/home/all_about_gas_fireplaces_chapter3.cfm?text=N&printview=N).

Pittsburg Gas Grill and Heater Co. Frequently Asked Questions. (Available at URL:

<http://www.pittsburghgasgrill.com/faq.html>).

Leonard's Stone & Fireplace. Frequently Asked Questions. (Available at URL:

<http://www.leonardsstoneandfireplace.net/faq.html>).

that pilot lights operate year round (i.e., 8,760 h/yr) for 25 percent of the installations, only during the heating season (about one-fourth of the year, or 2,190 h/yr) for 25 percent of the installations, and only when the burner is on for the remaining 50 percent of the installations. Based on these combined estimates, vented heater hearth products and ventless hearth products are estimated to consume 4.82 MMBtu/yr (1,411 kWh/yr) per hearth product, while vented decorative hearth products and vented gas logs and outdoor units are estimated to consume 3.49 MMBtu/yr (1,022 kWh/yr) per hearth product.

Based on disaggregated shipments provided by HPBA from 2002-2003, vented decorative hearth products account for 30 percent of total shipments, vented heater hearth products account for 13 percent, vented gas logs and outdoor units account for 7 percent, and ventless hearth products account for 51 percent. Using the distribution of shipments from the data provided by HPBA results in a weighted average energy use of 4.33 MMBtu/yr (1,269 kWh/yr) per hearth product. Therefore, DOE has tentatively determined that the average annual per-household energy use for hearth products is likely to exceed 100 kWh/yr, thereby satisfying the provisions of 42 U.S.C. 6292(b)(1)(B).

Based on the above, DOE has determined tentatively that hearth products qualify as a covered product under Part A of Title III of the EPCA, as amended.

Fireside Hearth & Home. Frequently Asked Questions. (Available at URL: <http://www.firesidehearhandhome.com/faq.php>).

Fireplace Professionals. Frequently Asked Questions. (Available at URL: <http://www.fireplaceprofessionals.com/faqs.htm>).

V. Procedural Issues and Regulatory Review

DOE has reviewed its proposed determination of hearth products under the following Executive Orders and Acts.

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that coverage determination rulemakings do not constitute “significant regulatory actions” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993). Accordingly, this proposed action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in OMB.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis for any rule that, by law, must be proposed for public comment, unless the agency certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003 to ensure that the potential impact of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990 (Feb. 19, 2003). DOE makes its procedures and policies available on the Office of the General Counsel’s website at www.gc.doe.gov./gc/office-general-counsel.

DOE reviewed today's proposed determination under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003.

For manufacturers of hearth products, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as "small businesses" for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description, which are available at: http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf. There is no specific NAICS code for hearth products, so DOE applied the size threshold used for NAICS 333414, "Heating Equipment (except Warm Air Furnaces) Manufacturing." The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for this category

DOE surveyed available information, including the HPBA membership directory, Air-conditioning, Heating, and Refrigeration Institute (AHRI) product databases, SBA databases, and individual company websites, to identify potential small manufacturers of "hearth products," as defined in this notice. DOE screened out companies that did not offer products covered by this rulemaking, did not meet the definition of a "small business," or are foreign-owned and operated. DOE identified 16 domestic, small business manufacturers of hearth products that are to be considered in this regulatory flexibility analysis.

If adopted, today's proposed determination would set no standards; it would only positively determine that future standards may be warranted and should be explored in subsequent energy conservation standards and test procedure rulemakings. Economic impacts on small entities would be considered in the context of such rulemakings. On the basis of the foregoing, DOE certifies that the proposed determination, if adopted, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this proposed determination. DOE will transmit this certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This proposed determination, which proposes to determine that hearth products meet the criteria for classification as a covered product for which the Secretary may prescribe an energy conservation standard pursuant to 42 U.S.C. 6295(o) and (p), will impose no new information or record-keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 et seq.)

D. Review Under the National Environmental Policy Act of 1969

In this notice, DOE proposes to positively determine that hearth products meet the criteria for classification as a covered product. Environmental impacts would be explored in any future energy conservation standards rulemaking for hearth products. DOE has determined that review under the National Environmental Policy Act of 1969 (NEPA), Pub. L. 91-190, codified at 42

U.S.C. 4321 et seq. is not required at this time. NEPA review can only be initiated “as soon as environmental impacts can be meaningfully evaluated” (10 CFR 1021.213(b)). This proposed determination would only determine that future standards may be warranted, but would not itself propose to set any specific standard. DOE has, therefore, determined that there are no environmental impacts to be evaluated at this time. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to assess carefully the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in developing regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735 (March 14, 2000). DOE has examined today’s proposed determination and concludes that it would not preempt State law or have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the product that is the subject of today’s proposed determination. States can petition DOE for exemption from such preemption

to the extent permitted, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the duty to: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation specifies the following: (1) the preemptive effect, if any; (2) any effect on existing Federal law or regulation; (3) a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) the retroactive effect, if any; (5) definitions of key terms; and (6) other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether these standards are met, or whether it is unreasonable to meet one or more of them. DOE completed the required review and determined that, to the extent permitted by law, this proposed determination meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, codified at 2 U.S.C. 1501 et seq.) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any 1 year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) UMRA requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate.” UMRA also requires an agency plan for giving notice and opportunity for timely input to small governments that may be potentially affected before establishing any requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820 (March 18, 1997). (This policy also is available at www.gc.doe.gov/gc/downloads/unfunded-mandates-reform-act-intergovernmental-relations).

DOE reviewed today’s proposed determination pursuant to these existing authorities and its policy statement and determined that the proposed determination contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year, so the UMRA requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed determination would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 15, 1988), DOE determined that this proposed determination would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriation Act, 2001 (44 U.S.C. 3516 note) requires agencies to review most disseminations of information they make to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. The OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today’s proposed determination under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates a final rule or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the proposal is implemented, and of reasonable alternatives to the proposed action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today’s regulatory action proposing to determine that hearth products meet the criteria for a covered product for which the Secretary may prescribe an energy conservation standard pursuant to 42 U.S.C. 6295(o) and (p) would not have a significant adverse effect on the supply, distribution, or use of energy. This action is also not a significant regulatory action for purposes of Executive Order 12866, and the OIRA Administrator has not designated this proposed determination as a significant energy action under Executive Order 12866 or any successor order. Therefore, this proposed determination is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects for this proposed determination.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. DOE has determined that the analyses conducted for this rulemaking do not constitute "influential scientific information," which the Bulletin defines as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." 70 FR 2667 (Jan. 14, 2005). The analyses were subject to pre-dissemination review prior to issuance of this rulemaking.

DOE will determine the appropriate level of review that would be applicable to any future rulemaking to establish energy conservation standards for hearth products.

VI. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this notice of proposed determination no later than the date provided at the beginning of this notice. After the close of the comment period, DOE will review the comments received and determine whether hearth products are a covered product under EPCA.

Comments, data, and information submitted to DOE's e-mail address for this proposed determination should be provided in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format. Submissions should avoid the use of special characters or any form of encryption, and wherever possible comments should include the electronic signature of the author. No telefacsimiles (faxes) will be accepted.

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document marked "confidential" including all the information believed to be confidential, and one copy of the document marked "non-confidential" with all the information believed to be confidential deleted. DOE will make its own determination as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) a description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known or available from public sources; (4) whether the information has previously been made available to others without obligations concerning its confidentiality; (5) an explanation of the competitive injury to the submitting persons which would result from public disclosure; (6) a date after which such information might no longer be considered confidential; and (7) why disclosure of the information would be contrary to the public interest.

B. Issues on Which DOE Seeks Comments

DOE welcomes comments on all aspects of this proposed determination. DOE is particularly interested in receiving comments from interested parties on the following issues related to the proposed determination for hearth products:

- Definition(s) of “hearth product”;
- Whether classifying hearth products as a covered product is necessary or appropriate to carry out the purposes of EPCA;
- Calculations and values for average household energy consumption of hearth products; and
- Availability or lack of availability of technologies for improving the energy efficiency of hearth products.

The Department is interested in receiving views concerning other relevant issues that participants believe may affect DOE’s ability to establish test procedures and energy conservation standards for hearth products. The Department invites all interested parties to submit in writing by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, comments and information on matters addressed in this notice and on other matters relevant to consideration of a determination for hearth products.

After the expiration of the period for submitting written statements, the Department will consider all comments and additional information that is obtained from interested parties or through further analyses, and it will prepare a final determination. If DOE determines that hearth products qualify as a covered product, DOE will consider a test procedure and energy conservation standards for hearth products. Members of the public will be given an opportunity to submit written and oral comments on any proposed test procedure and standards.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

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Energy Efficiency and Renewable Energy