

Attachment A to
Comments of AGA, et al.
Docket No. EERE-2017-BT-STD-0019
RIN 1904-AD91
Filed May 16, 2022

Attachment A

Joint Comments of APGA-Sprie-NPGA-PHCC for

Docket No. EERE-2018-BT-STD-0018

(Oct. 12, 2021)

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

**COMMENTS OF THE
AMERICAN PUBLIC GAS ASSOCIATION,
SPIRE INC., SPIRE MISSOURI INC.,
NATIONAL PROPANE GAS ASSOCIATION AND PLUMBING-
HEATING-COOLING CONTRACTORS—NATIONAL ASSOCIATION**

In response to the Notification of Proposed Interpretive Rule and
Request for Comment Entitled Energy Conservation Program for Appliance
Standards: Energy Conservation Standards for Residential Furnaces and
Commercial Water Heaters

86 Fed. Reg. 48049 (Aug. 27, 2021)

Docket No. EERE-2018-BT-STD-0018
RIN 1904-AE39

October 12, 2021

INTRODUCTION

The American Public Gas Association, Spire Inc., Spire Missouri Inc., National Propane Gas Association, and the Plumbing-Heating-Cooling Contractors—National Association (collectively “Commenters”) appreciate the opportunity to comment on the above-captioned proposal (the “Proposal”).

The American Public Gas Association (“APGA”) is the trade association for approximately 1,000 communities across the U.S. that own and operate their retail natural gas distribution entities. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies, all locally accountable to the citizens they serve. Public gas systems provide safe, reliable, and affordable energy to their customers and support their communities by delivering fuel to be used for cooking, clothes drying, and space and water heating, as well as for various commercial and industrial applications.

Spire Inc. and Spire Missouri Inc. (collectively “Spire”) are in the natural gas utility business. Spire Inc. owns and operates natural gas utilities that distribute natural gas to over 1.7 million residential, commercial, and institutional customers across Missouri, Alabama, and Mississippi, and Spire Missouri Inc. is the largest natural gas utility serving residential, commercial, and institutional customers in Missouri.

The National Propane Gas Association (“NPGA”) is the national trade association of the propane industry with a membership of about 2,500 companies, and 38 state and regional associations that represent members in all 50 states. Membership in NPGA includes retail marketers of propane gas who deliver the fuel to the end user, propane producers, transporters and wholesalers, and manufacturers and distributors of equipment, containers, and appliances. Propane gas fuels millions of installations nationwide for home and commercial heating and cooking, in agriculture, industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks. Residents and businesses throughout the country utilize propane to fuel residential furnaces or commercial water heaters, respectively. Propane is uniquely popular in rural regions and regulatory actions that potentially impact residential furnaces, especially among low-income residents, is an important concern to members of NPGA.

The Plumbing-Heating-Cooling Contractors—National Association (“PHCC”) is a 138-year-old construction trades association representing over 3200 contractor members who employ approximately 60,000 technicians. These contractor members believe in providing the best products and services for their consumer clients and support a practical and achievable approach to energy conservation.

This proceeding is rooted in a petition that APGA, Spire and others filed on October 18, 2018,¹ asking DOE to issue an interpretive rule confirming that DOE’s proposed energy conservation standards for residential furnaces and commercial water heaters would result in the unavailability of “performance characteristics” within the meaning of the Energy Policy and Conservation Act of 1975, as amended 42 U.S.C. 6291 *et seq.* (“EPCA”).

Natural gas utilities, the propane industry, and associated contractors are critical stakeholders in rulemakings concerning standards for products that use gas and support energy efficiency (such as residential furnaces and commercial water heaters), including cost-effective efficiency improvements for gas products.² Commenters are guided by the congressional mandate that appliance efficiency standards should not impose unjustified costs on consumers or deprive them of gas products that are suitable for their needs. Such standards are not authorized by statute and would be harmful to Commenters, their members, and the consumers they serve.

COMMENTS

I. Background

The central issue raised by the Proposal is whether DOE should abruptly reverse an extensively debated and well-considered interpretive rule by adopting an alternative interpretation designed to evade an express statutory constraint on its rulemaking authority under EPCA. The broader issue is whether DOE should use its appliance and equipment efficiency program to pursue an objective not authorized by EPCA: the objective of electrification. In considering these issues, it is important first to understand the context in which they arise.

Condensing gas products are already available and increasingly dominate the market in regions where the economic justification for them is strong. Nonetheless, condensing products are not suitable for all installations because they lack important performance characteristics (or “features”) that many purchasers want or need due to the constraints of existing building configurations.

In 2016, DOE proposed efficiency standards for residential furnaces and commercial water heaters (the “2016 Proposals”)³ that would have required minimum efficiencies that cannot be achieved by products that are compatible with

¹ Document No. EERE-2018-BT-STD-0018-0063 in the docket for this proceeding (hereafter “Petition for Rulemaking”).

² As used herein, “gas products” include those fueled by natural gas and propane.

³ 81 Fed. Reg. 65720 (Sept. 23, 2016) (residential furnaces) and 81 Fed. Reg. 34440 (May 31, 2016) (commercial water heaters).

the standard atmospheric venting systems built into the majority of existing buildings in which such products are installed. Such standards would leave many purchasers without gas products suitable to their needs and – in some cases – without gas products they could reasonably use at all. This would be a desired outcome for electrification advocates: facing the need to modify existing buildings to accommodate products for which they were not designed, many purchasers would have little choice but to turn to electric alternatives.

Largely for this reason, the 2016 Proposals were highly controversial. One of the fundamental criticisms was that EPCA was intended to preclude the adoption of standards that would leave purchasers without products suitable to their needs. Most obviously, the statute includes provisions (hereafter the “Unavailability Provisions”)⁴ designed to ensure that standards do not deprive purchasers of “product choices and characteristics, features, sizes, *etc.*” and that energy savings are achieved “without sacrificing the utility or convenience of appliances to consumers.”⁵ In adopting these provisions, Congress understood that buildings are commonly designed for standard appliance installations and sought to ensure that standards would not deprive consumers of the utility and convenience of products that can be installed without the need to modify existing buildings to accommodate them. Just as standards must preserve “the availability of sizes that fit in standard building spaces,”⁶ so must they preserve the availability of products that are compatible with the built-in venting systems provided to serve the appliances installed in those spaces. In both cases, the principle is the same: *efficiency standards may not leave purchasers without the kinds of products that the utility infrastructure of their buildings was designed to accommodate.* DOE has recognized that this is true when standards would deprive purchasers of products that could not be installed without the need to expand the space provided for an appliance.⁷ Those space-constrained modifications often pale in comparison to the modifications that would be required if purchasers were left without products that are compatible with standard atmospheric venting systems.

During the development of its residential furnace and commercial water heater proposals, DOE argued that it could lawfully adopt standards that would result in the unavailability of atmospherically-vented gas products. DOE received extensive comment arguing that it could not, including comment that expressly invoked the

⁴ 42 U.S.C. §§ 6295(o)(4) and 6313(a)(6)(B)(iii)(II)(aa).

⁵ H.R. Rep. No. 100-11 at 22-23 (1987).

⁶ H.R. Rep. No. 100-11 at 23 (1987).

⁷ Notice of Partial Grant of Petition for Rulemaking and Proposed Interpretive Rule, Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 84 Fed. Reg. 33011 at 33016, 33020 (July 11, 2019) (acknowledging the need to maintain the availability of “space constrained” appliances and citing examples in which DOE has done so).

“unavailability” provisions of the statute.⁸ DOE did not respond to those comments, and took no final action to resolve the issue. Commenters subsequently sought to resolve the issue through a request for interpretation submitted on June 6, 2017.⁹ After another sixteen months passed without a resolution, commenters followed up with their Petition for Rulemaking.

DOE promptly published the Petition for Rulemaking and allowed 120 days for public comment. After receiving extensive substantive comment from numerous stakeholders representing a wide range of interests (including the interests of manufacturers of electric products), DOE issued a notice of proposed interpretation, allowing another sixty days for public comment.¹⁰ After receiving further robust stakeholder input, DOE deliberated for an additional year before issuing a supplemental request for comment.¹¹ Then – having deliberated for more than two years and allowed a combined total of roughly seven months for submission of public comments – DOE issued an interpretive rule (the “Interpretive Rule”) that finally resolved the issue on the merits.¹²

The Interpretive Rule recognized that the “unavailability” provisions of the statute preclude the adoption of standards—such as those DOE had proposed for residential furnaces and commercial water heaters—that would effectively ban atmospherically-vented gas products.¹³ The Proposal’s suggestion that “DOE has not implemented” this interpretation “in the context of any individual energy conservation standards rulemaking” (86 Fed. Reg. at 48052-53) is incorrect, because that interpretation was the stated basis for DOE’s withdrawal of its pending proposed rules for residential furnaces and commercial water heaters.¹⁴

With these actions, Commenters hoped that DOE’s efforts to impose standards effectively banning atmospherically-vented gas products would end.

Apparently not.

⁸ See e.g., Spire’s January 1, 2017 comments in the residential furnace rulemaking, identified as Document No. EERE-2014-BT-STD-0031-0309 in in Docket No. EERE-2014-BT-0031, at 18-20. This submission – consisting of a 107-page comment document accompanied by supporting attachments including a 122-page report providing a detailed technical review of DOE’s regulatory analysis – is incorporated as a part of these Comments as Attachment A.

⁹ A copy of that request is incorporated as a part of these Comments as Attachment B.

¹⁰ 84 Fed. Reg. 33011 (July 11, 2019).

¹¹ 85 Fed. Reg. 60090 (Sept. 24, 2020).

¹² 86 Fed. Reg. 4776 (January 15, 2021).

¹³ 86 Fed. Reg. at 48052.

¹⁴ See 86 Fed. Reg. 3873 (Jan. 15, 2021).

Without the benefit of any additional public stakeholder input—and with no new information or argument—DOE now proposes to reverse its position.

II. DOE Should Abandon Its Efforts to Adopt Standards Designed to Promote Electrification

The Proposal would repudiate an interpretive rule supported by a well-developed administrative record on the basis of arguments DOE made in proposed rules issued before that record existed. The impetus for this “blast” from the less-informed past is the suggestion that the Interpretive Rule is an impediment to Federal policy set forth earlier this year in Executive Order 13990 (apparently on the unstated premise that standards banning atmospherically-vented gas products would advance the policy of reducing greenhouse gas emissions).¹⁵

As explained below, Commenters reject that premise. However, DOE must do more than point to the terms of Executive Order 13990 as its justification for changing its position.¹⁶ It must follow the statute and not render “policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.”¹⁷ When DOE adopted the Interpretive Rule that the Proposal now seeks to reverse, it plainly relied upon “new and existing information (including the substantial evidence contained in existing rulemaking dockets).”¹⁸ Not so here.¹⁹

DOE is proposing to reverse its position to facilitate the use of the appliance and efficiency program as a means to promote electrification: not “natural” market-driven fuel switching as the proposed rule suggests,²⁰ but electrification driven by standards that are designed to deprive many consumers of gas products suitable to their needs and justified on the basis of purported benefits realized through fuel switching. While some advocates seek to define energy efficiency to include electrification,²¹ Congress has not done that as EPCA does not so provide. As explained below, EPCA authorizes standards designed to conserve energy by

¹⁵ See 86 Fed. Reg. at 48050-51.

¹⁶ *United States HHS*, 414 F. Supp. 3d at 505, 547 (S.D.N.Y. 2019) (HHS changed its policy pursuant to an executive order). See also *Gomez v. Trump*, 485 F. Supp. 3d 145, 177 (D.D.C. 2020) (“APA review of an Executive Branch Official’s actions is . . . not precluded merely because the official is carrying out an executive order”).

¹⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009)

¹⁸ 86 Fed. Reg. at 4810.

¹⁹ DOE’s reasoned explanation for its change in position should be based on new factual findings. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009).

²⁰ 86 Fed. Reg. at 48056.

²¹ See Berg, W., E. Cooper, and M. Molina. 2021. Meeting State Climate Goals: Energy Efficiency Will Be Critical. Washington, DC: American Council for an Energy-Efficient Economy. [aceee.org/research-report/u2104](https://www.aceee.org/research-report/u2104)

means of improvements in the efficiency of the products subject to those standards. Commenters urge DOE to not to use standards to promote electrification, and to withdraw the Proposal it has issued to facilitate such efforts.

Commenters respectfully submit that standards effectively banning atmospherically-vented products would do more to conflict with the policy objectives of Executive Order 13990 than to advance them. Specifically—as discussed in detail in the context of the residential furnace rulemaking—such standards are likely to do more to increase than decrease overall carbon emissions.²² Moreover, they would unquestionably have disproportionate adverse impacts on low-income consumers, thereby undermining another policy objective identified in Executive Order 13990.²³ Commenters urge DOE to give careful consideration to these issues before it commits itself to the same kinds of choices that were reflected in its 2016 Proposals.

Commenters also urge DOE to give careful consideration to the merits of the relevant legal issues. The issues addressed by the Interpretive Rule (and presented by the Proposal) are likely to be litigated and will likely need to be litigated in a challenge to a final standards rule. In that regard, it is important to recognize that electrification is not a legitimate objective of the appliance and equipment efficiency program and that the means through which DOE has sought to pursue that objective are inconsistent with EPCA’s provisions in several respects.

As discussed below, standards effectively banning atmospherically-vented products would run afoul of the Unavailability Provisions of EPCA and do not appear to be economically justifiable in the absence of significant analytical legerdemain and the use of a fuel switching analysis that is inconsistent both with the economic analyses EPCA directs DOE to consider and with the statutory purposes of the appliance and equipment efficiency program.

In view of these inherent problems with standards effectively banning atmospherically-vented products and the substantial delays in rulemaking that have already occurred as a result of the controversial nature of such standards, Commenters respectfully submit that it is particularly important for DOE to ensure that its regulatory approach is consistent with the purposes, authority, and constraints fairly specified by statute.

²² See Attachment A to these Comments at 20-31.

²³ See Attachment A to these Comments at 35-43.

A. The Unavailability Provisions of the Statute Preclude the Adoption of Standards Effectively Banning Atmospherically-Vented Products Such as Residential Furnaces and Commercial Water Heaters.

DOE has not provided sufficient time for comment to enable Commenters to prepare a point-by-point refutation of the justification offered for its precipitous proposal to reverse the outcome of the lengthy rulemaking that produced the Interpretive Rule. However, neither the facts nor the law have changed since the Interpretive Rule finally issued, and DOE's reliance on since-debunked assertions and arguments advanced in its 2016 Proposals provides no basis for its proposed about-face.

The material facts are beyond dispute:

- DOE's proposed standards for residential furnaces and commercial water heaters would have required efficiencies that can only be achieved by "condensing" products and would therefore result in the unavailability of atmospherically vented furnaces and water heaters;
- Most of the existing buildings in which gas furnaces and water heaters are installed were architecturally designed to accommodate standard atmospherically-vented products and have built-in atmospheric venting systems to serve such products, often with vents sized to serve two or more commonly-vented products (most commonly, a furnace and water heater, but in many cases including three or more products or multiple sets of appliances serving separately-occupied spaces on different floors of a single building such as a high-rise apartment building);
- Atmospherically vented products are compatible with these built-in atmospheric venting systems and can be commonly vented with other atmospherically-vented products;
- Condensing appliances are not compatible with atmospheric venting systems and – for reasons of safety and code compliance – cannot be served by such systems and cannot be commonly vented with atmospherically-vented products;
- Each year, many existing atmospherically-vented furnaces and water heaters need to be replaced;
- If atmospherically-vented products were unavailable, every replacement of an existing atmospherically vented product would require building modifications to facilitate the installation of condensing products in buildings that were not designed to accommodate them;

- Where the appliance being replaced is the only appliance being served by the existing atmospheric venting system, it is sometimes possible to run venting compatible with a condensing product through the existing vent(s), or to scrap the existing venting and run new venting through the same chase, but there are many common scenarios in which this would not be possible;
- Due to the differences in the venting requirements for atmospherically-vented products and condensing products, the former are typically located near the center of the building footprint, generally in basements where possible, with vertical venting through the roof of the structure, whereas condensing products normally need to be located where they can be vented laterally through an exterior building wall;
- As a result, replacements of existing atmospherically-vented products with condensing products often require relocation of the appliance space, the need to run new vents through occupied areas, the need to vent combustion products near windows, patio or balcony spaces, or other undesirable building modifications;
- Where the appliance being replaced is commonly vented with one or more other atmospherically-vented products, replacement of that product with a condensing product often compromises the ability of the existing venting system to serve the other commonly-vented products (leaving such products “stranded”);
- In some of these cases the existing venting system can reasonably be modified so that it can continue to serve otherwise stranded (or “orphan”) products, but there are many cases in which the only practical solution would be to scrap perfectly good stranded products to facilitate replacement of the product that actually needs to be replaced; and
- Scenarios in which the unavailability of atmospherically-vented products would tend to be especially problematic (*e.g.*, cases in which multiple commonly-vented products are involved, existing atmospherically-vented products are located in finished basements, or limited access to exterior walls makes it particularly difficult to vent condensing products) are extremely common.

As already explained on the record, there is no basis for any serious dispute about any of these facts.²⁴ Suggestions to the contrary are easily debunked as factually

²⁴ See *e.g.*, Affidavit of George L. Welsch (Attachment C to Document No. Document No. EERE-2018-BT-STD-0018-0044) at ¶¶ 7-14 (“Welsch Affidavit”); Petition for Rulemaking (Document No. EERE-

incorrect, inconsequential quibbling, or mischaracterizations of the relevant issues.²⁵ For example, claims that “there is a technological solution to accommodate virtually all of the difficult installation situations” that would be imposed by the unavailability of atmospherically-vented products (86 Fed. Reg. at 48055) are both false and beside the point.²⁶

Most of the factual arguments raised in opposition to the Interpretive Rule are non-responsive to the actual issues, and evidence submitted in support of such arguments simply provided further evidence confirming the relevant facts.²⁷ For example, the Proposal suggests that there may be technological advances that would address the problem of “orphan” (*i.e.*, stranded) appliances in “a greater variety of applications” but ignores the fact that the technology described represents only an incremental solution to a common—and sometimes insurmountable—problem.²⁸ In view of the record, suggestions that there is insufficient evidence supporting the Interpretive Rule²⁹ are hard to understand.

The Proposal—like DOE’s 2016 Proposals—suggests doubt where no basis for doubt exists and understates the problems the unavailability of atmospherically vented products would cause. The Proposal nevertheless recognizes the existence of the problems described above, acknowledges that they would be sufficient to cause many purchasers to abandon gas products in favor of electric alternatives, and considers this to be a salutary regulatory outcome.³⁰ In effect, the Proposal is not really based on the proposition that the facts outlined above are not *true*; it is based on the proposition that those facts *don’t matter*. That position is the product of erroneous statutory interpretation.

DOE’s Proposal rests on the proposition that the collateral damage caused by the unavailability of atmospherically-vented products can be characterized as a matter

2018-BT-STD-0018-0063) at 3-4; March 1, 2019 Joint Comments of *Spire et al.* (Document No. EERE-2018-BT-STD-0018-0044) (“March 1, 2019 Comments”) at 7-12; September 9, 2019 Joint Comments of *Spire et al.* (Document No. EERE-2018-BT-STD-0018-0080) (“September 9, 2019 Comments”) at 10-13 and 19-23; Comments of AHRI to the Proposed Rule Energy Proposed Rule Energy Conservation Standards for Residential Furnaces, Document No. EERE-2014-BT-STD-0031-0159, a copy of which is provided as Attachment C to these Comments.

²⁵ See *e.g.*, September 9, 2019 Comments at 19-23; March 1, 2019 Comments at 7-10.

²⁶ See September 9, 2019 Comments at 20-21; March 1, 2019 Comments at 9-10.

²⁷ See September 9, 2019 Comments at 20-21.

²⁸ 86 Fed. Reg. at 48055. See March 1, 2019 Comments at 10 (discussing the narrow practical application of such solutions); Welsch Affidavit at ¶12 (identifying a “relatively common” scenario in which common-venting issues would “often preclude the replacement of a non-condensing furnace with a condensing furnace”).

²⁹ See 86 Fed. Reg. at 48054-56.

³⁰ See 86 Fed. Reg. at 48054-56.

of “installation costs” and be dismissed as economically justified. As explained in previous submissions, that proposition is an unreasonable characterization of the facts and is inconsistent with the statutory scheme.³¹ Congress directed DOE to account for the “initial charges for” more efficient appliances,³² and it is absurd to characterize the cost of scrapping and replacing one perfectly good product as part of the “initial cost” of another. Similarly, it is absurd to characterize the need for undesired building modifications as a matter of “installation costs” that can be addressed merely by accounting for the out-of-pocket expenses for the work required.³³

Suggestions to the contrary make no sense in the context of the relevant statutory scheme. The Unavailability Provisions were intended to ensure that *even economically justified standards* achieve energy savings “without sacrificing the utility or convenience of appliances to consumers.”³⁴ DOE cannot evade this constraint on its authority simply by characterizing a loss of “utility or convenience” as a “cost consideration” for purposes of its economic justification. If the need to modify buildings to accommodate products for which they were not designed could be dismissed as a mere cost consideration, the ability of a product to “fit in standard building spaces” would not be protected under the Unavailability Provisions as Congress plainly intended.³⁵ This is not a matter of “double-counting” cost considerations as the Proposal seems to suggest;³⁶ it is a matter of recognizing that the unavailability of a product feature cannot simply be treated as a “cost consideration” to be addressed as a matter of economic justification. DOE understood this in the context of “space constrained” products; its failure to do so in the context of atmospherically-vented products would thus be arbitrary as well as contrary to law.

The legal arguments offered to justify the Proposal amount to the same arguments DOE had previously presented in its 2016 Proposals. Those arguments were not the product of consistent prior interpretation³⁷ and, as explained in detail in previous submissions,³⁸ they reflect strained efforts to do what an agency may not

³¹ See September 9, 2019 Comments at 9-13; March 1, 2019 Comments at 3-6.

³² 42 U.S.C. §§ 6295(o)(2)(B)(i)(II) and 6313(a)(6)(B)(ii)(II).

³³ See September 9, 2019 Comments at 10-12 and 20-21.

³⁴ H.R. Rep. No. 100-11 at 22-23 (1987).

³⁵ H.R. Rep. No. 100-11 at 23 (1987).

³⁶ See 86 Fed. Reg. at 48054.

³⁷ See Petition for Rulemaking at 6-7; Attachment A at 53-55.

³⁸ See Petition for Rulemaking at 7-9; September 9, 2019 Comments at 8-13; March 1, 2019 Comments at 3-6.

do: interpret a statute in a way that nullifies a provision intended to limit its discretion.³⁹

EPCA provides that DOE may not adopt standards that are “likely to result in the unavailability . . . of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those” currently available to consumers.⁴⁰ Characteristics or features that make products compatible with the existing utility infrastructure of a building are critical (and sometimes necessary) to the utility of an appliance, and no amount of saying so reduces them to a mere matter of “installation cost” that is “incidental to the appliance’s purpose” and thus undeserving of statutory protection.⁴¹ Nor is there any basis to assert that characteristics or features that are manifestly important to consumers can be excluded from statutory protection based on extra-statutory distinctions invented for no other purpose than to arbitrarily narrow the scope of protection the statute provides.⁴² Under the Unavailability Provisions, the legally relevant question is whether atmospherically-vented products have “performance characteristics” (or “features”) that are important to consumers, and they plainly do.

There is no basis to claim that the Interpretive Rule is inconsistent with EPCA’s statutory purposes, because a statutory constraint on an agency’s rulemaking authority is appropriately viewed as a part of what defines a statute’s purpose, not as an impediment to that purpose.⁴³ Contrary to the suggestion in the Proposal,⁴⁴ it is DOE’s evident desire to extend regulation beyond the reach Congress intended – not adherence to statutory constraints Congress imposed – that is inconsistent with EPCA’s statutory purposes.

³⁹ *Id.*; *See Hearth Patio & Barbecue Association v. DOE*, 706 F.3d 499, 506 (D.C. Cir. 2013); *NRDC v. EPA*, 489 F.3d 1364, 1373 (D. C. Cir. 2007).

⁴⁰ 42 U.S.C. §§ 6295(o)(4) and 6313(a)(6)(B)(iii)(II)(aa).

⁴¹ *See* September 9, 2019 Comments at 7-19; Attachment A at 11-16. *See also* White Paper Developed by the American Gas Association and American Public Gas Association, “In the Upcoming Rulemaking on Amendments to the Minimum Efficiency Standards for Non-Weatherized Residential Gas Furnaces, DOE Should Employ Separate Product Classes for Condensing and Noncondensing Furnaces” (Oct. 22, 2014) (filed as part of Attachment B to these Comments) (detailing the unique performance-related characteristics and consumer utility of non-condensing furnaces).

⁴² September 9, 2019 Comments at 8-9.

⁴³ The provisions of a statute must not be read in isolation, but as part of the statute as a whole, and interpreted in their context as part of a coherent and harmonious statutory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

⁴⁴ *See* 86 Fed. Reg. at 48054.

B. Standards Effectively Banning Atmospherically-Vented Products Would be Unauthorized Even in the Absence of the Unavailability Provisions.

Commenters urge DOE to recognize that efforts to impose standards banning atmospherically vented products are not just precluded by the Unavailability Provisions of the statute; they also conflict with the letter and statutory purpose of EPCA's provisions.

1. The Statutory Purpose of the Appliance and Equipment Efficiency Program is to Conserve Energy by Means of Economically Justified Improvements in the Efficiency of Regulated Products, not to Promote Electrification.

As explained in Attachment D to these Comments,⁴⁵ DOE's appliance and equipment efficiency program was authorized for the specific purpose of achieving energy conservation through economically justified improvements in the efficiency of regulated products. This is clear from an express "Congressional statement of purpose" incorporated in the statute, and is confirmed by the fact that DOE may not adopt energy conservation standards that "will not result in significant conservation of energy."⁴⁶ Although improvements in the efficiency of gas products provide environmental benefits that DOE may consider in determining whether standards are economically justified, the purpose of standards must be to conserve energy through improvements in the efficiency of products subject to the standards, not to advance environmental or other objectives – such as electrification – as such. As explained below, this is further confirmed by the nature of the economic justification contemplated under the statutory scheme.

2. DOE's Attempts To Provide An Economic Justification For Standards Eliminating Atmospherically Vented Gas Products Have Been Arbitrary And Contrary To Law.

In determining whether energy conservation standards are economically justified, EPCA expressly directs DOE to consider "the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard."⁴⁷ Similarly, DOE is directed to consider a payback analysis based on a comparison of "the additional cost to the consumer of purchasing a product

⁴⁵ Memorandum to Members of the Peer Review Committee from Barton Day (January 8, 2020) included as Attachment D hereto.

⁴⁶ 42 U.S.C. § 6295(o)(3)(B).

⁴⁷ 42 U.S.C. §§ 6295(o)(2)(B)(i)(II) and 6313(a)(6)(B)(ii)(II).

complying with an energy conservation standard level” and “the value of the energy . . . savings during the first year that the consumer will receive as a result of the standard.”⁴⁸ Both requirements expressly require comparison between the incremental additional cost of more efficient products sold as a result of the standards and the operating cost savings those more efficient products would provide.

Because standards effectively banning atmospherically vented products would be inherently difficult to justify on the basis of this kind of analysis, DOE’s efforts to justify such standards have deviated from these statutorily-specified analyses in several fundamental respects.

First, DOE has used an analytical approach that allows it to claim regulatory benefits in cases in which the basic premise of efficiency regulation – that more efficient products impose higher initial costs that might deter decisions to forego efficiency investments that would pay off over time – does not apply. Specifically, DOE’s analysis effectively assumes that purchasers acting on their own do not take economic considerations into account at all and would thus decline purchases of high-efficiency products *even in cases in which the initial cost of such products is lower than that of the less efficient alternatives*. The problem is that – with lower initial costs working as an incentive rather than a deterrent to selection of the more efficient product, these windfall benefit purchases generally would occur in the absence of new standards rather than *as a result* of them. Accounting for such purchases as though they would only occur as a result of new standards grossly overstates the potential for standards to provide economic benefits, and the impact of that error on the results of DOE’s analysis is dramatic: in the case of residential furnaces, over 55% of the total consumer benefits claimed to justify DOE’s proposed standards were attributed to installations of this kind.⁴⁹

Second, while claiming regulatory benefits for windfall-benefit purchases that would occur in the absence of new standards, DOE’s analysis uses two different methods to avoid accounting for cases in which new standards would impose disproportionate costs. The first method is the same method used to claim regulatory benefits in cases in which the theoretical justification for efficiency standards is lacking: DOE’s analysis assumes that—in the absence of regulation—buyers never consider the economics of their purchases at all. By assuming that purchasers acting on their own have *no tendency to decline economically disastrous efficiency investments*, DOE’s analysis assigns many such outcomes to the base case instead of accounting for them as bad economic outcomes that would be imposed as a result of new standards.

⁴⁸ 42 U.S.C. § 6295(o)(2)(B)(iii).

⁴⁹ See Attachment A at 60-66.

The other method employed to avoid accounting for the costs a ban on atmospherically vented products would impose is even more creative: DOE's analysis includes a "fuel switching" analysis that assumes that the same purchasers who *never* consider economic consequences when selecting gas products *do* consider economics when deciding whether to replace their gas products with electric alternatives. The result is that DOE selectively excludes bad economic outcomes from its analysis by assuming that purchasers left with no economically acceptable gas products would turn to electric alternatives instead.

DOE's assumption that purchasers acting on their own never consider the economics of investments in more efficient products is absurd and completely invalidates the results of DOE's economic analysis.⁵⁰ Importantly, the impact of this assumption is particularly pronounced in the context of standards that would make atmospherically vented products unavailable, because the venting issues involved have a significant tendency to produce the kinds of outcomes that do the most to skew the results of DOE's analysis: "windfall benefit" outcomes in cases in which modifications to existing buildings are not required and high net-cost outcomes in cases in which they are.

The fact that DOE's "fuel switching" analysis makes a virtue out of the need for unacceptable building modifications presents a different but equally serious problem. In short, DOE's fuel switching analysis is flatly inconsistent with the statutory direction that "*efficiency improvements*" must be economically justified⁵¹ and that it is the impacts on "*consumers of products subject to*" a standard that must be considered in determining whether standards are economically justified.⁵² By treating fuel switching in response to unjustified costs as a reason to ignore those unjustified costs, DOE's economic analysis fails to address the question of whether required efficiency improvements are economically justified by the operating cost savings they would provide. Instead, DOE's economic analysis seeks to show that it would be beneficial to impose standards requiring economically unjustified efficiency improvements.⁵³ Under this approach, a standard that would price a gas product completely out of the market could be justified on the theory that the result would be economically beneficial *even though no benefits would result from the improved efficiency of the regulated product*. Such a standard would not serve the statutory purpose of conserving energy through improvements in the efficiency of the regulated product, and it would not be economically justified based on the statutorily-specified comparison between the incremental additional cost of

⁵⁰ For detailed discussion of these issues, see Attachment D at 6-8; Attachment A at 4-6 and 58-62; September 9, 2019 Comments at 15-17.

⁵¹ 42 U.S.C. § 6295(o)(2)(A) (emphasis added).

⁵² 42 U.S.C. § 6295(o)(2)(B)(i)(I) (emphasis added).

⁵³ For detailed discussion of these issues, see Attachment D at 8-10. *See also* September 9, 2019 Comments at 13-15; Attachment A at 6-9, 62-64.

required efficiency improvements and the operating cost savings they would provide.

This flawed economic analysis undoubtedly contributes to the Proposal's bizarre suggestion that "there is insufficient evidence" that fuel switching caused by standards banning atmospherically vented products "would be greater than is typically encountered in DOE rulemakings."⁵⁴ While DOE's economic analysis unquestionably understates the extent to which fuel switching would occur,⁵⁵ standards depriving consumers of gas products suitable to their needs would plainly drive fuel switching in a way that economic considerations alone do not. That's why standards effectively banning atmospherically-vented products are so controversial and have attracted so much attention from parties whose only interest is in electrification.⁵⁶

III. Conclusion

Where it has been shown that buildings are architecturally designed to accommodate products with some characteristics but not others, the Unavailability Provisions of the statute require that standards be designed to preserve the availability of products with those characteristics so that purchasers will not be forced to modify existing buildings to accommodate products for which they were not designed. It is clear—both as a matter of fact and law—that this principle precludes the adoption of standards that would effectively ban atmospherically-vented products.

Standards effectively banning atmospherically-vented products also would be inconsistent with EPCA's statutory scheme in other important respects. The purpose of the appliance and equipment efficiency program is to achieve energy conservation through improvements in the efficiency of regulated products; it requires that standards be economically justified on the basis of the energy savings that result from such improved efficiency. EPCA does not authorize DOE to adopt standards in pursuit of other objectives—such as electrification—and does not permit standards to be economically justified on the grounds that burdensome standards for gas products would be good because they would cause purchasers to choose electric products instead.

Standards effectively banning atmospherically-vented products fall into the latter category: they are not reasonably directed at the objective of improved product efficiency, and they cannot be economically justified on the basis of the energy savings required efficiency improvements would provide.

⁵⁴ 86 Fed. Reg. at 48,056.

⁵⁵ See Attachment A at 23-24, 28-31 and 33-35.

⁵⁶ See September 9, 2019 Comments at 3-4.

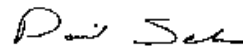
In short, standards effectively banning atmospherically-vented products would impose burdens that the Unavailability Provisions were intended to prevent, without the kind of economic justification contemplated by statute, for purposes not authorized by statute. Such standards would likely do more to increase than decrease overall energy consumption and carbon emissions and would certainly have disproportionate adverse impacts on low-income consumers.⁵⁷ This is not a path DOE should pursue.

Commenters respectfully submit that the Proposal should be withdrawn.

Respectfully submitted,



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Attachments

⁵⁷ See Attachment A at 20-28 and 35-43.