



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters

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

ACTION: Notice of supplemental proposed interpretive rule; request for comment.

SUMMARY: In response to a petition for rulemaking submitted on October 18, 2018 (Gas Industry Petition), the Department of Energy (DOE) published that petition in the *Federal Register* on November 1, 2018, for public review and input, and DOE subsequently published a proposed interpretive rule in the *Federal Register* on July 11, 2019, which tentatively determined that in the context of residential furnaces, commercial water heaters and similarly-situated products/equipment, use of non-condensing technology (and associated venting) may constitute a performance-related “feature” under the Energy Policy and Conservation Act (EPCA) that cannot be eliminated through adoption of an energy conservation standard. After carefully considering the public comments on its proposed interpretive rule, DOE has tentatively determined to consider a more involved class structure which turns on maintenance of compatibility with existing venting categories, and the Department seeks further information on the potential feasibility, burdens, and other implications of implementing such a venting-

compatibility approach. DOE requests comments limited in scope to this issue, after which DOE will respond to not only this matter, but also to all of the other topics raised in comments on the July 2019 notice of proposed interpretive rule.

DATES: Written comments and information are requested on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested persons are encouraged to submit comments, identified by “Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters,” by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: ResFurnaceCommWaterHeater2018STD0018@ee.doe.gov. Include Docket No. EERE-2018-BT-STD-0018 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE-5B, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. 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: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza, SW., Suite 600, Washington, DC,

20024. Telephone: (202) 287-1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information, see section IV of this document (Public Participation).

Docket: For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at: <http://www.regulations.gov/docket?D=EERE-2018-BT-STD-0018>.

FOR FURTHER INFORMATION CONTACT: Ms. Lysia Bowling, Senior Advisor, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 1000 Independence Avenue, SW, Washington, DC 20585. Telephone: (202) 430-1257. Email: Lysia.Bowling@ee.doe.gov.

Mr. Eris Stas, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW, Washington, DC 20585. Telephone: (202) 586-5827. Email: Eric.Stas@hq.doe.gov.

SUPPLEMENTARY INFORMATION

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V. Approval of the Office of the Secretary

I. Background

On October 18, 2018, the Department received a petition for rulemaking submitted by the American Public Gas Association (APGA), Spire, Inc., the Natural Gas Supply Association (NGSA), the American Gas Association (AGA), and the National Propane Gas Association (NPGA), collectively referred to as the “Gas Industry Petitioners,” asking DOE to: (1) issue an interpretive rule stating 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 1975¹ (EPCA; 42 U.S.C. 6291 *et seq.*), as amended (*i.e.*, by setting standards which can only be met by products/equipment using condensing combustion technology and thereby precluding the distribution in commerce of products/equipment using non-condensing combustion technology) and (2) withdraw the proposed energy conservation standards for residential furnaces² and commercial water heaters³ based upon such findings. DOE published the petition in the *Federal Register* on November 1, 2018 (83 FR 54883) and requested public comment, with a comment period scheduled to close on January 30, 2019. DOE received two requests from interested parties seeking an extension of the comment period in order to develop additional data relevant to the petition. DOE granted those requests through publication in the *Federal Register* of a

¹ All references to EPCA in this document refer to the statute as amended through America’s Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

² Standards for non-weatherized residential furnaces were published in a notice of proposed rulemaking at 80 FR 13120 (March 12, 2015) (Docket No. EERE-2014-BT-STD-0031-0032) and in a supplemental notice of proposed rulemaking at 81 FR 65720 (Sept. 23, 2016) (Docket No. EERE-2014-BT-STD-0031-0230).

³ Standards for commercial water heating equipment were published in a notice of proposed rulemaking at 81 FR 34440 (May 31, 2016) (Docket No. EERE-2014-BT-STD-0042).

notice extending the comment period on the notice of petition for rulemaking until March 1, 2019. 84 FR 449 (Jan. 29, 2019).

The 90-day public comment period, including the 30-day extension to submit comments, invited public input in order to better understand stakeholder perspectives and increase transparency around a complex issue involving DOE's legal authority. DOE received comments from a variety of stakeholders, including representatives from gas industry associations, the manufactured housing industry, efficiency advocates, consumer advocates, State organizations and Attorneys General, and individuals (mostly form letter comments). In general, the gas industry associations and the manufactured housing industry supported the petition, and the advocates and State officials opposed it.

After carefully considering the comments on the petition, DOE published a notice of proposed interpretive rule in the *Federal Register* on July 11, 2019 to provide the public additional information about DOE's tentative interpretation of EPCA's "features" provision⁴ in the context of condensing vs. non-condensing furnaces and water heaters, as informed by public comments. 84 FR 33011. Once again, DOE received comments from a variety of stakeholders, including representatives from gas industry associations, the housing industry, appliance manufacturers, utilities, environmental and efficiency advocates, consumer advocates, State organizations and Attorneys General, and individuals. DOE plans to respond to these comments,

⁴ See 42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); and as applicable in certain cases through 42 U.S.C. 6316(a)).

and the issues raised therein, fully in a subsequent document, after receiving comment on the topic presented in this supplemental notice of proposed interpretive rule.

II. Summary Description

A. Relevant Statutory Provisions

In this notice, DOE explains its historical interpretation regarding the evaluation of what constitutes a product “feature” which cannot be eliminated under EPCA, specifically in the context of residential furnaces and commercial water heaters. For covered consumer products, the key statutory provision at issue can be found at 42 U.S.C. 6295(o)(4), which provides that the Secretary may not prescribe an amended or new standard under this section if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary’s finding.

Where the Secretary finds such “performance characteristics (including reliability), features, sizes, capacities, and volumes” (collectively referred to hereafter as “features”) to exist, the statute provides a remedy at 42 U.S.C. 6295(q)(1), which states that a rule prescribing an energy conservation standard for a type (or class) of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) for such type (or class) for any group of covered products which have the same function or intended use, if the Secretary determines that covered products within such group – (A) consume a different kind of

energy from that consumed by other covered products within such group (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class). In making a determination under 42 U.S.C. 6295(q)(1) concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate.

These provisions also apply to covered non-ASHRAE⁵ commercial and industrial equipment through the crosswalk provision at 42 U.S.C. 6316(a). (Under the statute, “ASHRAE equipment” refers to small commercial package air conditioning and heating equipment, large commercial package air conditioning and heating equipment, very large commercial package air conditioning and heating equipment, packaged terminal air conditioners (PTACs), packaged terminal heat pumps (PTHPs), warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, or unfired hot water storage tanks, which are addressed by ASHRAE in ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings*.)

ASHRAE equipment has its own separate statutory scheme under EPCA, with the default situation being that DOE must adopt the level set forth in ASHRAE Standard 90.1, unless the Department has clear and convincing evidence to adopt a more-stringent standard (*see* 42 U.S.C. 6313(a)(6)). Under 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa), there is a similar “features” provision

⁵ “ASHRAE” refers to the American Society of Heating, Refrigerating and Air-Conditioning Engineers.

which states, “The Secretary may not prescribe an amended standard under this subparagraph if the Secretary finds (and publishes the finding) that interested persons have established by a preponderance of the evidence that a standard is likely to result in the unavailability in the United States in any product type (or class) of performance characteristics (including reliability, features, sizes, capacities, and volumes) that are substantially the same as those generally available in the United States at the time of the finding of the Secretary.” However, it is noted that this provision contains the specific limitation that it applies to an amended standard prescribed *under this subparagraph* (i.e., when DOE is acting under its authority to set a more-stringent standard). There is no companion “features” provision under 42 U.S.C. 6313(a)(6)(A), which is the provision that would apply when DOE is adopting the levels set by ASHRAE. Congress was clearly aware of the features issue, and it chose to act in the context of DOE standard setting, but not ASHRAE standard setting. There is likewise no companion provision to 42 U.S.C. 6295(q)(1) for ASHRAE equipment.

B. DOE’s Historical Interpretation

With this statutory background in mind, in the March 12, 2015, notice of proposed rulemaking (NOPR) for energy conservation standards for residential furnaces, DOE set forth in detail its rationale for why it did not considering the venting of non-condensing furnaces to constitute a product “feature” under 42 U.S.C. 6295(o)(4). 80 FR 13120, 13137-13138.

As discussed previously, when evaluating and establishing energy conservation standards, the statute requires DOE to divide covered products into product classes by the type of energy used, by capacity, or by other performance-related features that justify a different

standard. In making a determination whether a performance-related feature justifies a different standard, DOE must consider factors such as the utility to the consumer of the feature and other factors DOE determines are appropriate. (42 U.S.C. 6295(q)) Historically, DOE has viewed utility as an aspect of the product that is accessible to the layperson and is based on user operation, rather than performing a theoretical function. This interpretation has been implemented consistently in DOE's previous rulemakings by determining utility through the value the item brings to the consumer, rather than through analyzing more complicated design features, or costs that anyone, including the consumer, manufacturer, installer, or utility companies may bear. DOE reasoned that this approach is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)(A)–(B) and (3)).

Under EPCA, DOE has typically addressed consumer utility by establishing separate product classes or otherwise taken action when a consumer may value a product feature based on the consumer's everyday needs. For instance, DOE has determined that it would be impermissible under 42 U.S.C. 6295(o)(4) to include elimination of oven door windows as a technology option to improve the energy efficiency of cooking products.⁶ DOE reached this conclusion based upon how consumers typically use the product: Peering through the oven window to judge if an item is finished cooking, as opposed to checking the timer and/or indicator light or simply opening the oven door (which could waste more energy) to see if the item is finished cooking. DOE has also determined that consumers may value other qualities such as

⁶ 63 FR 48038, 48041 (Sept. 8, 1998).

ability to self-clean,⁷ size,⁸ and configuration.⁹ This determination, however, can change depending on technological developments and shifts in consumer behavior/preferences, and it is conceivable that certain products may disappear from the market entirely due to shifting consumer demand. DOE stated that it has determined such value on a case-by-case basis through its own research, as well as public comments received.

DOE offered a cautionary note that disparate products may have very different consumer utilities, thereby making direct comparisons difficult and potentially misleading. For instance, in a 2011 rulemaking, DOE created separate product classes for vented and ventless residential clothes dryers based on DOE's recognition of the "unique utility" that ventless clothes dryers offer to consumers. 76 FR 22454, 22485 (April 21, 2011). This utility could be characterized as the ability to have a clothes dryer in a living area where vents are impossible to install (*e.g.*, an apartment in a high-rise building). As explained in that April 2011 direct final rule technical support document, ventless dryers can be installed in locations where venting dryers would be precluded due to venting restrictions.

But in another rulemaking, DOE found that water heaters that utilize heat pump technology did not need to be put in a separate product class from conventional types of hot water heaters that utilize electric resistance technology, even though water heaters utilizing heat

⁷ 73 FR 62034, 62048 (Oct. 17, 2008) (separating standard ovens and self-cleaning ovens into different product classes).

⁸ 77 FR 32307, 32319 (May 31, 2012) (creating a separate product class for compact front-loading residential clothes washers).

⁹ 75 FR 59469, 59487 (Sept. 27, 2010) (creating a separate product class for refrigerators with bottom-mounted freezers).

pumps require the additional installation of a condensate drain that a hot water heater utilizing electric resistance technology does not require. 74 FR 65852, 65871 (Dec. 11, 2009). DOE found that regardless of these installation factors, the heat pump water heater and the conventional water heater still had the same utility to the consumer: Providing hot water. *Id.* In both cases, DOE made its finding based on consumer type and utility type, rather than product design criteria that impact product efficiency.

DOE expressed concern that tying the concept of “feature” to a specific technology would effectively lock-in the currently existing technology as the ceiling for product efficiency and eliminate DOE’s ability to address technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality for the consumer. DOE stated that it was very concerned that determining features solely on product technology could undermine the Department’s Appliance Standards Program. DOE reasoned that if it is required to maintain separate product classes to preserve less-efficient technologies, future advancements in the energy efficiency of covered products would become largely voluntary, an outcome which seems inimical to Congress’s purposes and goals in enacting EPCA.

Turning to the product at issue in that rulemaking, DOE noted that residential furnaces are currently divided into several product classes. For example, furnaces are separated into product classes based on their fuel source (gas, oil, or electricity), which is required by statute. In the most recent rulemaking for that covered product, DOE analyzed only two product classes for residential furnaces: (1) Non-weatherized gas-fired furnaces (NWGFs) and (2) mobile home

gas-fired furnaces (MHGFs). DOE did not additionally separate NWGFs and MHGFs into condensing and noncondensing product classes.

In that rulemaking, DOE tentatively concluded that the methods by which a furnace is vented did not provide any separate performance-related impacts, and, therefore, that DOE had no statutory basis for defining a separate class based on venting and drainage characteristics. DOE reasoned that NWGF and MHGF venting methods did not provide unique utility to consumers beyond the basic function of providing heat, which all furnaces perform. Using this logic, the possibility that installing a non-condensing furnace may be less costly than a condensing furnace due to the difference in venting methods did not justify separating the two types of NWGFs into different product classes. Unlike the consumers of ventless dryers, which DOE had determined to be a performance-related feature based on the impossibility of venting in certain circumstances (*e.g.*, high-rise apartments), DOE reasoned that consumers of condensing NWGFs are homeowners that may either use their existing venting or have a feasible alternative to obtain heat. In other words, homeowners would still be able to obtain heat regardless of the venting. In contrast, DOE reasoned that a resident of a high-rise apartment or condominium building that is not architecturally designed to accommodate vented clothes dryers would have no option in terms of installing and enjoying the utility of a dryer in their home unless he or she used a ventless dryer.

As explained previously, DOE's conclusion in the March 12, 2015, NOPR was that the utility of a furnace involves providing heat to a consumer. DOE reasoned that such utility is provided by any type of furnace, but to the extent that a consumer has a preference for a

particular fuel type (*e.g.*, gas), improvements in venting technology may eventually allow a consumer to obtain the efficiency of a condensing furnace using the existing venting in a residence by sharing venting space with water heaters. DOE postulated that this update in technology would significantly reduce the cost burden associated with installing condensing furnaces and reduce potential instances of “orphaned” water heaters, where the furnace and water heater can no longer share the same venting (due to one unit being condensing and the other noncondensing). In other words, when mature, this technology could allow consumers to switch from a non-condensing furnace to a condensing furnace in a greater variety of applications, such as urban row houses. For more information, interested parties were asked to consult appendix 8L of the NOPR TSD.

C. The Gas Industry Petition

As noted previously, on October 18, 2018, DOE received a petition from the Gas Industry Petitioners asking DOE to: (1) issue an interpretive rule stating 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 (*i.e.*, by setting standards which can only be met by products/equipment using condensing combustion technology) and (2) withdraw the proposed energy conservation standards for residential furnaces and commercial water heaters based upon such findings. In their petition, the Gas Industry Petitioners argue that DOE misinterpreted its mandate under section 325(o)(4) of EPCA by failing to consider as a “feature” of the subject residential furnaces and commercial water heating equipment the compatibility of a product/equipment with conventional atmospheric venting systems and the ability to operate

without generating liquid condensate requiring disposal via a plumbing connection.

Consequently, the Gas Industry Petitioners assert that DOE's proposals would make unavailable non-condensing products/equipment with such features, which currently exist in the marketplace, in contravention of the statute. The petition makes a number of technical, legal, and economic arguments in favor of its suggested interpretation, and it points to DOE's past precedent related to space constraints and differences in available electrical power supply (and associated installation costs) as supporting its call to find that non-condensing technology amounts to a performance-related "feature." Based upon these arguments, the Gas Industry Petitioners concluded that DOE should issue an interpretive rule treating non-condensing technology as a "feature" under EPCA, withdraw its rulemaking proposals for both residential furnaces and commercial water heaters, and proceed on the basis of this revised interpretation.

D. DOE's Proposed Interpretive Rule

As discussed in section I of this document, DOE published a notice of proposed interpretive rule in the *Federal Register* on July 11, 2019. 84 FR 33011. In consideration of public comments and other information received on the Gas Industry Petition, DOE proposed to revise its interpretation of EPCA's "features" provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances (where permitted by EPCA). Based on those comments and for the reasons set forth fully in that document, DOE proposed to interpret prospectively the statute to provide that adoption of energy conservation standards that would limit the market to natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that use condensing combustion technology would result in the unavailability of a

performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)).

As explained in the proposed interpretive rule, the statute accords the Secretary of Energy considerable discretion in terms of determining whether a performance characteristic of a covered product/equipment amounts to a performance-related feature which cannot be eliminated through adoption of an energy conservation standard. DOE stated that it has taken the opportunity presented by the Gas Industry Petition to reconsider its historical interpretation of EPCA's "features" provision in the context of condensing and non-condensing technologies used by certain gas appliances. Contrary to the petitioners' assessment, DOE found this to be a close case, with persuasive arguments on both sides of the issue. However, a number of factors convinced DOE to propose a revision to its interpretation.

First, DOE acknowledged that it has, in the past, taken space constraints and similar limitations into account when setting product classes (*e.g.*, PTACs, ventless clothes dryers). For example, DOE was sensitive to the costs associated with requiring expensive building modifications when it decided to set separate equipment classes for standard size PTACs and non-standard size PTACs. 73 FR 58772 (Oct. 7, 2008). DOE stated that it expects that similar expenses would occur here, if DOE were to hold to its historical interpretation, at least for some subset of installations. Although limited data were provided to address the actual costs that consumers and commercial customers would face to modify their existing category I venting, there is little doubt that some number of such installations would be quite costly. These more complicated/costly installations are documented as part of DOE's analysis of the venting costs for residential furnaces, which considered potential venting modifications that could be required

when replacing an existing category I furnace with a condensing (category IV) furnace (see appendix 8D of the 2016 SNO PR TSD for further details).

Second, DOE stated that it has in the past focused on the consumer's interaction with the product/equipment in deciding whether a performance feature is at issue. In the context of residential furnaces and commercial water heaters, DOE has focused on the primary function of the appliance (*e.g.*, providing heat to a home or potable hot water) in establishing the nexus to the consumer. In the past, DOE opined that consumers were only interested in obtaining heat or hot water from the appliance, so they would not care about the mechanism for generating that end product. However, commenters have made clear that in at least some cases, the physical changes associated with a condensing appliance may change a home's aesthetics (*e.g.*, by adding new venting into the living space or decreasing closet or other storage space), thereby impacting consumer utility even under DOE's prior approach.

Third, DOE noted that it has been its policy to remain neutral regarding competing energy sources in the marketplace. As certain commenters have pointed out and as DOE's own analyses have shown, some enhanced level of fuel switching is likely to accompany standard setting using DOE's prior interpretation. Many consumers who are currently gas customers may show a proclivity for that fuel type and would be negatively impacted by a standard that requires the purchase of a condensing unit to the extent they feel compelled to change to a different fuel type. DOE explained that it seeks neither to determine winners and losers in the marketplace nor to limit consumer choice.

Finally, DOE stated that it is very concerned about ensuring energy affordability, particularly for persons with low incomes. Although energy efficiency improvements may pay

for themselves over time, there is typically a significant increase in first-cost associated with furnaces and water heaters using condensing technology. For consumers with difficult installation situations (*e.g.*, inner-city row houses), there would be the added cost of potentially extensive venting modifications. In certain cases, commenters have argued that accommodating condensing products may not even be possible. Although DOE continues to believe that costs are properly addressed in the economic analysis portion of its rulemakings, it stated that it remains cognizant of such issues. DOE stated that it has tentatively concluded that the other reasons discussed immediately above are sufficient in and of themselves to justify the Department's proposed change in interpretation, but it acknowledged these cost impacts in order to be fully transparent in terms of the agency's thinking.

The agency reasoned that creating separate product classes for condensing and non-condensing furnaces, water heaters, and similarly-situated products/equipment (where permitted by EPCA) would prevent many of these potential problems. Although DOE's proposed revised approach may have some impact on overall energy saving potential as a result of establishing separate product/equipment classes, the Department noted that that is not the touchstone of EPCA's "features" provision; through that provision, Congress expressed its will that certain product utilities will take priority over additional energy-saving measures. (For example, DOE did not eliminate the oven window which consumers found useful, despite the potential for further energy savings.) With that said, DOE expressed its belief that any potentially negative programmatic impacts of its revised interpretation are likely to be limited. DOE reasoned that the proposed interpretation would be likely to impact only a limited set of appliances, and DOE noted that market trends have favored the growing reach of condensing furnaces, even as non-

condensing alternatives have remained available. DOE stated that it has every reason to believe that such trends will continue.

DOE sought to clarify the limitations of its proposed revised interpretation, based upon the existing statutory provisions. As discussed previously, DOE can effect this change for all relevant consumer products, all non-ASHRAE commercial and industrial equipment, and ASHRAE equipment in those instances where DOE has clear and convincing evidence to adopt levels higher than the levels in ASHRAE Standard 90.1.

As noted, additional, subsequent DOE action would be required before the interpretation in the proposed interpretive rule could be implemented. The proposed interpretive rule, even once finalized, would not alter the Department's current regulations. This interpretation does not and will not be used to abrogate DOE's responsibilities under existing laws or regulations, nor does it change DOE's existing statutory authorities or those of regulators at the Federal, State, or local level. DOE anticipates continued engagement and productive involvement of members of the public and the regulated community in subsequent activities that may follow this interpretation.

As discussed in the proposed interpretive rule, DOE decided to grant the Gas Industry Petition to the extent that it proposed to prospectively interpret the statute to provide that adoption of energy conservation standards that would limit the market of natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) to appliances that use condensing combustion technology would result in the unavailability of a performance related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C.

6316(a)). The proposal clarified that such interpretation would apply to all applicable residential products, non-ASHRAE commercial equipment, and ASHRAE equipment where DOE adopts a level more stringent than the ASHRAE level.

DOE stated that it is denying the Gas Industry Petition as it pertains to those rulemakings where ASHRAE sets standard levels that trigger DOE to consider and adopt those level (unless DOE finds clear and convincing evidence to adopt more-stringent levels), due to lack of authority. DOE also denied the Gas Industry Petition's request for DOE to withdraw the proposed rules for residential furnaces and commercial water heaters as unnecessary. DOE stated that if the interpretive rule were to be finalized, it would anticipate developing supplemental notices of proposed rulemaking (SNOPRs) that would implement the new legal interpretation for those two rulemakings that were the subject of the petition for rulemaking.

III. Discussion of Issues Regarding Structuring of Potential Product/Equipment Classes

DOE received a number of comments with diverse views on the Department's proposed interpretive rule related to the Gas Industry Petition, with some supporting the proposal and others in opposition. Once again, all of those comments will be addressed by DOE in a subsequent document. Consequently, there is no need to repeat those arguments, and interested parties are instead asked to limit the scope of their comments to the specific issue raised in this supplemental notice of proposed interpretive rule.

As noted previously, in its proposed interpretive rule, DOE explored the issue of whether non-condensing technology (and associated venting) constitutes a performance-related "feature"

under 42 U.S.C. 6295(o)(4),¹⁰ as would support a separate product/equipment class under 42 U.S.C. 6295(q)(1).¹¹ 84 FR 33011, 33015 (July 11, 2019). DOE initially assumed that if it were to adopt an interpretation consistent with the Gas Industry Petition, it would suffice to set product/equipment classes largely based upon the key distinction of whether an appliance utilizes condensing or non-condensing combustion technology. However, a number of comments on the proposed interpretive rule suggested that such approach may not adequately resolve the issue at hand, as presented in the petition.

More specifically, while U.S. Boiler (USB) generally agreed with DOE's revised interpretation, the commenter argued that DOE has erred in focusing on "non-condensing" technology as the performance-related feature, suggesting that the agency should instead focus on Category I venting. According to USB, Category II, III, and IV (as well as non-categorized direct vent furnaces and boilers) are currently available using non-condensing technology, but many of the same problems identified in the Gas Industry Petition still may arise. USB stated that non-condensing Category II, III, and IV appliances generally share the same venting consumer utility issues as condensing appliances and equipment, and that they can theoretically operate at higher efficiencies than Category I. However, the commenter argued that elimination of models using Category I venting (under a standard level that could only be met by products/equipment using Category II, III, or IV venting) would create the same problems which DOE has sought to address through its proposed revised interpretation. USB commented that vent categorization has been recognized for over 20 years by manufacturers, utilities, and code

¹⁰ 42 U.S.C. 6316(a) for non-ASHRAE equipment; 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) for ASHRAE equipment where DOE is setting more-stringent standards.

¹¹ 42 U.S.C. 6316(a) for non-ASHRAE equipment.

enforcement officials as the best way to determine how to safely vent appliances. (USB, No. 78 at pp. 1-2) Burnham Holdings, International (BHI) made essentially identical arguments to those raised by USB, and Crown Boiler offered a similar comment that DOE should focus product classes based upon type of venting used, rather than the use of condensing or non-condensing technology. (BHI, No. 83 at pp. 1-2; Crown Boiler, No. 79 at pp. 1-2)

In response to the comments from USB, BHI, and Crown Boiler suggesting that DOE focus on the type of venting as the performance related feature rather than non-condensing operation, DOE notes that, while separate from the product/equipment, the venting system is inextricably linked to the design of the product. Because the venting system is a separate component from the product, DOE initially sought to focus on non-condensing operation as the performance-related characteristic of the product itself. However, after further considering these commenters' concerns, DOE understands that interpreting non-condensing operation to be a feature could still result in a reduction of utility for certain consumers, because some non-condensing appliances require connection to venting systems other than Category I and would likely result in many of the installation issues that DOE seeks to address through this interpretive rulemaking.

As a result, DOE further considered what constitutes a "feature" or "performance-related characteristic" under EPCA, and in particular, whether such feature might be based on venting system compatibility of the product. Because the most significant concerns regarding venting system compatibility involve use of gas appliances that are not compatible with Category I venting in place of gas appliances that are compatible with Category I venting, DOE considered

whether compatibility with Category I venting should be a protected feature under EPCA. Moreover, DOE also considered whether *any* impact to venting system compatibility resulting from increasing product or equipment efficiency standards would cause the aforementioned issues. For example, it is conceivable that if a more-stringent standard results in an appliance compatible with Category III venting systems being replaced with an appliance that is only compatible with Category IV venting systems, many of the same issues might arise as have been identified for the replacement of appliances compatible with Category I venting systems. Thus, compatibility with venting systems of any type could conceivably be a feature that consumers desire and which DOE must consider when evaluating more-stringent standards. Under such an interpretation, compatibility with each existing venting technology would be a feature under EPCA that could require separate classes based on compatibility with venting systems for each venting category, and uncategorized venting systems could also require separate classes.

The first approach (*i.e.*, considering only Category I venting compatibility as a performance-related feature) has the benefit of potentially simplifying the regulatory scheme in comparison to the latter approach, which could require classification of products in each venting category separately. The first approach would result in more streamlined regulations and product/equipment classes for gas appliances, as compared to the latter approach, while resolving the most significant issues involved with venting system compatibility. The latter approach potentially would address more comprehensively possible issues related to the compatibility of an appliance with venting systems, but it would make the regulatory scheme more complex and could create extra compliance burdens, as the number of product/equipment classes for vented appliances could increase greatly (*e.g.*, each current class of gas appliance could require further

segmentation by each of the four categories of venting and also could need to account for gas appliances that are compatible with uncategorized venting systems). Both approaches would have the benefit of not limiting DOE to consideration of the combustion technology that provides the function of the appliance (*e.g.*, condensing, non-condensing), about which some commenters have expressed concerns. Instead, DOE's focus would be to ensure compatibility with existing venting, thereby allowing DOE to be responsive to potential future technological advances in venting system compatibility.

Based on these considerations, DOE is considering a proposed alternative interpretation, in addition to the interpretation proposed in the July 2019 notice of proposed interpretive rule. As discussed previously, the July 2019 notice of proposed interpretive rule proposed that adoption of energy conservation standards that would limit the market to natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that use condensing combustion technology would result in the unavailability of a performance-related feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). In this document, DOE is also proposing an interpretation that an appliance's compatibility with a venting system is a performance-related characteristic of that appliance under EPCA. Specifically, DOE is also considering an interpretation that, based on current appliance/venting system compatibility limitations, the adoption of energy conservation standards that would limit the market to natural gas and/or propane gas furnaces, water heaters, or similarly-situated products/equipment (where permitted by EPCA) that are incompatible with any existing venting systems available on the market would result in the unavailability of a performance related

feature within the meaning of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) (and as applicable in certain cases through 42 U.S.C. 6316(a)). DOE considered limiting its proposal to include only that compatibility with Category I venting systems is a feature, as suggested by the commenters, and seeks comment on doing so. In addition, DOE is considering a broader approach taking into consideration all venting categories since concerns similar to those that gave rise to the petition could conceivably occur for appliances that are compatible with venting systems other than Category I. The Department welcomes input on both potential approaches, and it will consider adopting either or the original proposed approach in its final interpretation, in light of the information received both previously and in response to today's request.

DOE will consider all comments received on the issue of the potential utility associated with ensuring venting system compatibility, as well as comments on the potential for added regulatory complexity from the alternative approaches, before making a final decision.

IV. Public Participation

Submission of Comments

DOE invites all interested parties to submit in writing by the date listed in the **DATES** section of this document, comments and information regarding this supplemental proposed interpretive rule.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> webpage will require you to provide your name and contact information prior to submitting comments. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names,

organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or postal mail. Comments and documents via email, hand delivery, or postal mail will also be posted to <http://www.regulations.gov>. If you

do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information in your cover letter each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and free of any defects or viruses. Documents should not include any special characters or any form of encryption, and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. 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 via email, postal mail, or hand delivery two well-marked 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 the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of its process for considering regulatory actions. DOE actively encourages the participation and interaction of the public during the comment period. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in determining how to proceed with a regulatory action. Anyone who wishes to be added to DOE mailing list to receive future notices and information about this matter should contact Appliance and Equipment Standards Program staff at (202) 287-1445 or via e-mail at ApplianceStandardsQuestions@ee.doe.gov.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this supplemental notice of proposed interpretive rule.

Signing Authority

This document of the Department of Energy was signed on September 16, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, D.C. on September 16, 2020.

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

[FR Doc. 2020-20773 Filed: 9/23/2020 8:45 am; Publication Date: 9/24/2020]