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Washington, DC 20548

B-319741

May 26, 2010

The Honorable Jeff Bingaman
Chairman
The Honorable Lisa Murkowski
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Energy: Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Energy (DOE), entitled “Energy Conservation Program: Energy Conservation Standards for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters” (RIN: 1904-AA90). It was published in the *Federal Register* as a final rule on April 16, 2010. 75 Fed. Reg. 20,112. We received the rule on May 11, 2010. The final rule has an effective date of June 15, 2010, although compliance with the amended standards for residential water heaters is not required until April 16, 2015, and compliance with the amended standards for direct heating equipment and pool heaters is not required until April 16, 2013.

The final rule amends the existing energy conservation standards for residential water heaters (other than tabletop and electric instantaneous models), gas-fired direct heating equipment, and gas-fired pool heaters. DOE determined that the amended standards for these products would result in significant conservation of energy and are technologically feasible and economically justified.

The final rule, a major rule under the Congressional Review Act (CRA), has an announced effective date of June 15, 2010. CRA requires a 60-day delay in the

effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. 801(a)(3)(A). The rule was published in the *Federal Register* on April 16, 2010, but we did not receive the rule until May 11, 2010. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of DOE's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that, with the exception of the effective date, DOE complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Daniel Cohen
Assistant General Counsel for Legislation,
Regulation, and Energy Efficiency
Department of Energy

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF ENERGY
ENTITLED
"ENERGY CONSERVATION PROGRAM:
ENERGY CONSERVATION STANDARDS FOR
RESIDENTIAL WATER HEATERS,
DIRECT HEATING EQUIPMENT, AND POOL HEATERS"
(RIN: 1904-AA90)

(i) Cost-benefit analysis

DOE prepared a cost-benefit analysis in conjunction with the final rule. DOE determined that the standards adopted in the final rule will save approximately 2.81 quads Btu of energy over a 30-year period, and eliminate the need for approximately three new 250 MW power plants. The energy savings will result in cumulative greenhouse gas emission reductions of approximately 164 million tons of carbon dioxide, and alleviate air pollution by resulting in cumulative emissions reductions of approximately 124 kilotons of nitrogen oxides and 0.54 tons of power plant mercury. DOE determined that the annualized monetized benefits of the rule would be \$1,676 million per year, using a 7-percent discount rate, and \$2,020.5 million per year using a 3-percent discount rate. The costs are estimated to be \$1,284.9 per year using a 7-percent discount rate, and \$1,249.3 per year using a 3-percent discount rate.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

DOE determined that the final rule may have a significant economic impact on a substantial number of small entities, and therefore prepared a final regulatory flexibility analysis. DOE determined that two of the three major manufacturers that control nearly 100 percent of the traditional direct heating equipment (DHE) market are small business manufacturers. There are ten small business manufacturers of gas hearth DHE, but none of the three major manufacturers is considered a small business.

DOE determined that a typical small business manufacturer of traditional DHE will have 6.5 product lines requiring conversion with an estimated total conversion cost of \$1.92 million, while a typical large business manufacturer of traditional DHE will have 4 product lines requiring conversion with an estimated total conversion cost of \$790,000. DOE also notes that regardless of the standard adopted, small business manufacturers are more likely to be disproportionately harmed because they have a much smaller volume across which to spread similar costs. DOE concluded that gas

hearth DHE manufacturers, including small business manufacturers, will be able to maintain a viable number of product offerings following the compliance date of the amended energy conservation standard.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DOE determined that the final rule does not contain a federal intergovernmental mandate, but that it may impose expenditures of \$100 million or more on the private sector.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DOE commenced the rulemaking on September 27, 2006, by publishing on its Web site a “Rulemaking Framework for Residential Water Heaters, Direct Heating Equipment, and Pool Heaters.” On November 24, 2006, DOE published a notice announcing the availability of the framework document and a public meeting and requesting comments on the matters raised in the document. 71 Fed. Reg. 67,825. DOE held the framework document public meeting on January 16, 2007. On January 5, 2009, DOE announced an informal public meeting and the availability on its Web site of a preliminary technical support document, which was published in the *Federal Register* on January 13, 2009. 74 Fed. Reg. 1,643. DOE held a public meeting on February 9, 2009. On December 11, 2009, DOE published a notice of proposed rulemaking to consider amending the existing residential water heater, direct heating equipment, and pool heater energy conservation standards. 74 Fed. Reg. 65,852. DOE held a public meeting on January 7, 2010, to hear oral comments and solicit information related to the proposed rule. DOE responded to those comments and written comments in the final rule. 75 Fed. Reg. 20,112.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains an information collection requirement subject to the Paperwork Reduction Act, which has been approved by the Office of Management and Budget (OMB) under control number 1910-1400. DOE estimated that the public reporting burden for compliance reporting for energy and water conservation is to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Statutory authorization for the rule

The final rule is authorized by Part A of Title III of the Energy Policy and Conservation Act, as amended, codified at 42 U.S.C. § 6295.

Executive Order No. 12,866 (Regulatory Planning and Review)

The final rule was determined by DOE to be a significant regulatory action under Executive Order 12,866 and was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

The final rule does not address Executive Order No. 13,132.