

**DEPARTMENT OF ENERGY****[Docket Number EERE–BT–PET–0024]****Energy Conservation Program for Consumer Products: Commonwealth of Massachusetts Petition for Exemption From Federal Preemption of Massachusetts' Energy Efficiency Standard for Residential Non-Weatherized Gas Furnaces****AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.**ACTION:** Notice of Denial of a Petition for Waiver from Federal Preemption.

**SUMMARY:** This notice announces the U.S. Department of Energy's (DOE) denial of a petition filed by the Commonwealth of Massachusetts seeking an exemption from Federal preemption of certain energy conservation standards affecting residential non-weatherized natural gas furnaces.

**DATES:** A request for reconsideration of the denial must be received by DOE not later than November 8, 2010.

**ADDRESSES:** A request for reconsideration must be submitted, identified by docket number EERE–BT–PET–0024, by one of the following methods:

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

2. *E-mail:* [MAExemptPetition@ee.doe.gov](mailto:MAExemptPetition@ee.doe.gov). Include either the docket number EERE–BT–PET–0024, and/or "Massachusetts Petition" in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

5. *Instructions:* All submissions received must include the agency name and docket number for this proceeding. For detailed instructions on submitting comments and additional information on the proceeding, *see* section II. C of this document (Submission of Comments).

*Docket:* For access to the docket to read background documents, or comments received, go to the *Federal eRulemaking Portal* at

[www.regulations.gov](http://www.regulations.gov). In addition, electronic copies of the Petition are available online at DOE's Web site at the following URL address: [http://www.eere.energy.gov/buildings/appliance\\_standards/state\\_petitions.html](http://www.eere.energy.gov/buildings/appliance_standards/state_petitions.html).

**FOR FURTHER INFORMATION CONTACT:**

Mohammed Khan, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–7892, or *e-mail:*

[Mohammed.Khan@ee.doe.gov](mailto:Mohammed.Khan@ee.doe.gov).

Michael Kido, U.S. Department of Energy, Office of General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–8145, *e-mail:* [Michael.Kido@hq.doe.gov](mailto:Michael.Kido@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

## I. Summary of Notice

## II. Background

## A. Applicable Legal Standard

## B. Previous Preemption Waiver Requests

## III. Massachusetts' Petition Summary

## IV. DOE Analysis and Discussion

## A. Massachusetts Has More Heating

Degree-Days than the National Average

## B. Massachusetts Has Higher Gas Rates

than the Nation as a Whole

## C. Massachusetts Residential Heating

Loads Compete with Power Plant Loads

## D. The High Percentage of Rental Housing

Creates Market Barriers

## E. Massachusetts Has a Unique Set of

Statutes and Policies Promoting

Increased Energy Efficiency and

Reductions in Greenhouse Gas Emissions

## F. Potential Impacts on Manufacturers

## G. Potential Impacts on Consumers from

Installation Issues

## H. Current Energy Conservation Standards

Rulemaking and the Consensus

Agreement

## V. Conclusion

## VI. Denial

## VII. Approval of the Office of the Secretary

**I. Summary of Notice**

This notice addresses a petition received by the U.S. Department of Energy (DOE) regarding a request from the Commonwealth of Massachusetts ("Massachusetts," "the Commonwealth," or, in context, "the State") for a waiver from Federal preemption of a State law pertaining to the energy efficiency of a certain type of consumer product. Specifically, Massachusetts sought an exemption to permit it to set a minimum efficiency level for non-weatherized natural gas furnaces that would exceed the stringency prescribed by the minimum Federal level set by DOE. After carefully considering the Commonwealth's request, supporting materials accompanying the request, submitted comments, and the current

rulemaking activities underway that would be likely to have a direct impact on the issues raised in the petition, DOE is declining to grant this request.

**II. Background**

On October 6, 2009, DOE received a petition from Massachusetts (dated October 1, 2009) seeking a preemption waiver to permit it to impose a 90-percent annual fuel utilization efficiency ("AFUE") requirement on all natural gas furnaces sold within the State. (Commonwealth of Massachusetts, No. 4.1) AFUE is a thermal efficiency measurement used to rate combustion equipment such as furnaces and represents the actual season-long average efficiency of a particular piece of equipment. Under the Energy Policy and Conservation Act of 1975, as amended (EPCA), any local or state regulation concerning the energy efficiency or energy use of a product covered under EPCA is preempted if DOE has established an energy conservation standard for that product. States may seek a waiver from preemption provided that certain criteria are met. *See* 42 U.S.C. 6297(d)(5). In this instance, if DOE were to grant the waiver, all non-weatherized natural gas furnaces sold in Massachusetts would need to satisfy a 90-percent AFUE level starting three years after the publication of the decision by DOE (*i.e.*, approximately October 2013). (The three-year lead time is a statutory requirement under 42 U.S.C. 6297(d)(5) that can be extended to a period of five years if DOE determines that retooling, redesign, or distribution burdens merit the additional time.) The current Federal standards require that these products satisfy an AFUE level of 78%. 10 CFR 430.32(e).

In support of its petition, Massachusetts provided supplemental information, including a report prepared by Optimal Energy, Inc. ("the Optimal Report"). This supplemental information consisted of the relevant text setting out the furnace efficiency requirements that the Commonwealth proposed to adopt, the Commonwealth's energy plan, a projected forecast of natural gas furnace sales, an analysis of the Commonwealth's energy situation, and the projected impacts of other, non-regulatory-based alternatives. DOE published a notice announcing the receipt of this petition and to solicit public comment. 75 FR 4548 (Jan. 28, 2010). As required under EPCA, the agency provided the public with a reasonable opportunity to provide comments (in this instance, 60 days) and a subsequent rebuttal period of 30

days, which closed on July 7, 2010. 75 FR 32177 (June 7, 2010).

The agency received comments from 19 different organizations and the Commonwealth of Massachusetts. Commenters included local governments (the City of Boston, including separate comments filed by the City of Boston's Environmental and Energy Services, and the City of Cambridge), energy and consumer advocacy groups (joint and individual comments filed by Environment Northeast (ENE), the Consumer Assistance Council, the Massachusetts Consumers' Council, the Massachusetts Consumers' Coalition, and the Massachusetts Public Interest Research Group (MASSPIRG); Conservation Law Foundation; Appliance Standards Awareness Project (ASAP); National Consumer Law Center (NCLC); Northeast Energy Partnership (NEEP); Massachusetts Climate Action Network; and the Massachusetts Union of Public Housing), industry organizations (Air-Conditioning, Refrigeration, and Heating Institute (AHRI) and American Gas Association (AGA)), utilities (Bay State Gas Company; Berkshire Gas; Nationalgrid; the New England Gas Company; NSTAR Electric Gas; and Unitil), and others (the Cape Light Compact) (an inter-municipal regional energy services organization). The agency has reviewed and docketed these materials. See <http://www.regulations.gov> (search under "DOE" and enter "PET-0024").

In general, energy and consumer advocacy groups, as well as local governments and utility companies, supported the petition. These commenters stated their collective belief that Massachusetts faces "unusual and compelling" energy-related circumstances due to its geography, climate, and energy markets. (ENE, No. 6 at pp. 1–2; the Consumer Assistance Council, the Massachusetts Consumers' Council, the Massachusetts Consumers' Coalition, and MASSPIRG, No. 7 at pp. 2–3; Bay State Gas Company, No. 8 at pp. 2–3; the Conservation Law Foundation, No. 11 at pp. 2–3; NEEP, No. 13 at pp. 2–3; the Massachusetts Climate Action Network, No. 14 at pp. 2–3; the Cape Light Compact, No. 15 at pp. 1–2; the City of Boston, No. 16 at pp. 1–2; the City of Cambridge, No. 17 at p. 1; the Massachusetts Union of Public Housing, No. 18 at pp. 1–2; the City of Boston Environmental and Energy Services, No. 20 at pp. 1–2; Nationalgrid, No. 26.1 at pp. 1–2; NCLC, No. 25 at pp. 1–3; Unitil, No. 24.1 at pp. 1–2; Berkshire Gas, No. 27 at pp. 1–2; NSTAR Electric Gas, No. 28 at pp. 1–2;

and the New England Gas Company, No. 29 at p. 1)

AHRI and AGA opposed the petition. AHRI held the view that the Massachusetts waiver fails to satisfy the waiver justification criteria set forth in EPCA and presented a variety of arguments in response to Massachusetts' claims. (AHRI, No. 9 at pp. 2–6) Specifically, AHRI noted that: (1) DOE should proceed with the current energy conservation standards rulemaking for residential furnaces and adopt the consensus agreement presented to DOE by certain industry and energy-efficiency organizations; (2) Massachusetts does not have unusual or extreme climates; (3) Massachusetts does not have any projected shortage of natural gas; (4) more stringent furnace standards for Massachusetts should not be allowed to override preemption of the Federal standards; and (5) the petition overstates the energy savings that would result from granting the waiver request and does not consider the high percentage of condensing furnaces already shipped to Massachusetts. (AHRI, No. 9 at pp. 3–4)

In addition, AHRI questioned whether the waiver petition applied to other types of residential heating equipment, including oil-fired furnaces, gas-fired boilers, and oil-fired boilers. Specifically, AHRI pointed out that the petition refers to the Commonwealth's furnace efficiency regulation, which AHRI believes encompasses other product classes of residential furnaces. (AHRI, No. 9 at p. 1) DOE notes that the petition centers on a 90-percent AFUE standard for natural gas furnaces. Consequently, based on the discussion presented in the petition, DOE believes that the petition applies only to this one particular product class of residential furnaces.

Similarly, AGA also opposed the petition. It asserted that DOE should deny the petition and proceed with the current energy conservation standards rulemaking for residential furnaces as the more appropriate means to address the issues raised by AGA in response to the petition. AGA specifically pointed out the potential impacts to Massachusetts consumers seeking to replace their furnaces and noted that consumers would likely face additional costs to vent the condensing furnace to permit safe operation in the field. (AGA, No. 12 at pp. 2–4) Implied in this comment is AGA's view that using a condensing furnace system is the only way for a furnace manufacturer to meet a 90-percent AFUE level. (A condensing furnace system is one that recovers more heat from the combustion products such

that the water vapor in the exhaust condenses.)

#### A. Applicable Legal Standard

To obtain a waiver from Federal preemption, a State must meet the specified criteria laid out in 42 U.S.C. 6297(d)(1). In particular, a State must face "unusual and compelling" State or local energy interests in order to obtain a preemption waiver. For purposes of meeting this requirement, a State needs to demonstrate that these interests are "substantially different" in nature or magnitude from those prevailing in the United States generally and that the costs, benefits, burdens, and reliability of energy savings that would result from the State regulation make that regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy savings or production. (42 U.S.C. 6297(d)(1)(C)) By statute, these factors are to be evaluated within the context of the State's energy plan and forecast. *Id.*

#### B. Previous Preemption Waiver Requests

DOE previously addressed preemption waiver issues in two contexts. The first dealt with a waiver request related to standards for residential clothes washers. See 71 FR 78157 (Dec. 28, 2006) (denying a California petition seeking a waiver from preemption for standards related to residential clothes washers). The second instance involved amended energy conservation standards for furnaces and boilers. See 71 FR 59204, 59209–10 (Oct. 6, 2006) (notice of proposed rulemaking addressing the preemption waiver factors and noting the possibility of contiguous States availing themselves of the preemption waiver provision to help establish standard levels tailored to their particular circumstances while helping to lessen manufacturer burdens) and 72 FR 65136, 65150–52 (Nov. 19, 2007) (final rule declining to develop separate standards based on geography due to an absence of statutory authority but explaining how multiple contiguous States could use the waiver process to create a regionally-based standard). In both instances, the agency explained how a petitioning State could help demonstrate that it meets the statutory criteria to obtain a waiver from preemption.

In the case of the California petition, the State sought a waiver to enable it to set more stringent standards for residential clothes washers. DOE denied that petition, citing three primary reasons: (1) The petition did not provide DOE with sufficient information to enable the agency to promulgate a final rule that would comply with the

scheduling requirements prescribed under EPCA; (2) the petition did not establish by a preponderance of the evidence that the State faced unusual and compelling circumstances as contemplated under the statute; and (3) other interested parties who commented on the petition sufficiently demonstrated by a preponderance of the evidence that the State's regulation would likely result in the unavailability of a class of residential clothes washers in California. Although the State filed suit over this denial and DOE's decision was ultimately vacated, see *California Energy Comm'n v. DOE*, 585 F.3d 1143 (9th Cir. 2009), the Court in that case did not address whether the information furnished by the State, if evaluated, would have satisfied the statutory criteria. See *id.* at 1153.

DOE also addressed the application of waivers in its 2007 rulemaking considering amended energy conservation standards for furnaces. That rulemaking occurred prior to the enactment of the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110-140 (Dec. 19, 2007), which granted DOE with the authority to establish geographically-based regional standards for furnaces. EISA 2007, sec. 306(a). In the 2007 rulemaking, DOE explained that in evaluating a State's supporting evidence, the agency would consider whether regional climatic effects would have a significant impact on the technological feasibility and economic justifiability of a particular energy conservation standard. DOE noted that those states having higher-than-average, population-weighted heating degree days "would seem to have the best prospects" for demonstrating the presence of "unusual and compelling" interests required under EPCA. 71 FR at 59209. DOE also offered other examples of how a State might be able to satisfy these criteria. *Id.* at 59210. Possible factors included identifying the saturation of homes with products that already satisfy the higher standard being sought and the existence of any subsidies and other incentives currently offered by the State and to show how mandatory regulations would be preferable to these current programs.

Additionally, DOE explained that States seeking a waiver would need to address the extent of potential impacts on manufacturers—specifically, the likelihood of cost increases of manufacturers, distributors, and others. The agency noted that one way of addressing this requirement would be to show how current shipments to the petitioning State already vary from

current DOE-prescribed efficiency levels. *Id.*

Through its accompanying attachments, Massachusetts provided supplemental information to help support its view that it faces unusual and compelling circumstances. These attachments, along with the accompanying petition, attempted to address each element noted above.

### III. Massachusetts' Petition Summary

The Massachusetts petition makes several points in favor of a waiver from Federal preemption.

First, the petition claims that Massachusetts experiences more heating degree days than the nation as a whole. A heating degree day (HDD) is an index that reflects the demand for energy required to heat a home or business. HDDs compare the average outdoor temperature to a standard of 65 degrees Fahrenheit. The heating requirements for a particular structure at a specific location are directly proportional to the number of HDDs at that location. The more extreme the temperature, the higher the degree-day number and the more energy needed for in-door space heating. Massachusetts contends that it exceeds the national average of HDDs by approximately 50%. (Mass. Petition, No. 4 at 4)

Second, the petition contends that the rates of natural gas prices within the Commonwealth are higher than the Nation as a whole. According to its supplemental information, natural gas price rates in Massachusetts are approximately 20% higher than the median and average prices found throughout the United States as a whole. (Mass. Petition (Attachment D), at 3-4).

Third, the petition states that its residential heating loads compete with power generation loads. In other words, the demand for residential heating faces competition from the demands of natural gas-fired electric generators. In the Commonwealth's view, because natural gas supplies are scarce, in part, because Massachusetts depends on natural gas to produce electricity, the amount of gas available for residential heating is limited by the demands of electricity generating plants. These demands would then cause residential consumers to face the prospect of potentially higher prices as utilities that rely on natural gas use this fuel in increased amounts to generate electricity.

Fourth, the petition argues that Massachusetts has a higher percentage of rental housing than the rest of the United States. In its view, this fact creates market barriers that prevent the introduction of more efficient furnaces.

As a result, those individuals who rent their residences are less likely to benefit from the introduction of more efficient furnaces (e.g. lower utility bills) because of their higher costs when compared to less efficient (but Federally-compliant) furnaces and the unwillingness of owners to pay these initial up-front costs. In effect, Massachusetts argues that without the mandatory introduction of more energy efficient furnaces, these consumers, who are more likely to be price sensitive to utility price increases than individuals who own their residences, will be more likely to face increased utility costs as natural gas prices rise.

Fifth, the petition notes that the statutory framework and policies put into place by Massachusetts, which are designed in part to promote increased energy efficiency and reduce greenhouse gas emissions, have helped to create "unusual and compelling interests" because a decrease in natural gas consumption is necessary to help satisfy these State-imposed requirements. Examples of these requirements cited by Massachusetts include its Global Warming Solutions Act (2008 Mass. Acts, Ch. 298) and Clean Communities Act (2008 Mass. Acts, Ch. 169). These laws, among other things, required Massachusetts to take steps to improve energy efficiency and, in collaboration with other States, to reduce greenhouse gas emissions. In short, Massachusetts asserts that it needs a 90-percent AFUE standard to help it meet its own self-imposed obligations under these laws.

### IV. DOE Analysis and Discussion

In its petition for waiver, Massachusetts cited five "interests/characteristics" to bolster its claim of "unusual and compelling interests." These five areas are addressed below with the most recent statistics compiled from the Energy Information Administration's (EIA) State Energy Data System (SEDS). See [http://www.eia.doe.gov/emeu/states/\\_seds.html](http://www.eia.doe.gov/emeu/states/_seds.html). DOE used the EIA data to make its comparisons because EIA collects the same data for all states, including Massachusetts, which allows for consistent cross-comparisons between individual States and national averages.

#### A. Massachusetts Has More Heating Degree-Days Than the National Average

DOE agrees that Massachusetts generally experiences more heating degree-days (HDDs) than the national average. In 2008, Massachusetts experienced 38-percent more heating degree-days than the national average.

The petition points to the Optimal Report and notes that “there is a direct correlation between HDD and fuel use.” However, even with 38-percent more HDDs, Massachusetts residential natural gas customers consumed only 7 percent more natural gas per household than the national average. By comparison, in the same year, Connecticut experienced 30-percent more HDDs than the national average, and its residents consumed 17 percent more natural gas on a per residential customer basis. While Massachusetts generally experiences more HDDs than the U.S. average, the available data indicate that the weather has far less influence on its residential natural gas use than in neighboring states. In fact, the EIA data indicate that less than half (44 percent) of Massachusetts homes rely on natural gas for space heating. Massachusetts ranks 25th highest in natural gas use per residential customer, and 15th highest in total gas consumed by residences. These factors suggest that energy efficiency, among other factors, results in Massachusetts residents using natural gas much less intensively than states with similar climates.

#### *B. Massachusetts Has Higher Gas Rates Than the Nation as a Whole*

DOE agrees with Massachusetts in that the natural gas rates seen by consumers are higher than the U.S. average. Higher gas rates are, in part, responsible for Massachusetts ranking 9th highest in natural gas expenditures per residential customer. DOE compared the citygate prices, which track the price of the natural gas at the point which a distributing gas utility receives gas from a natural gas pipeline company or transmission system, to the residential prices published by EIA. For this comparison, DOE used a time series of data from EIA spanning January 2010 to June 2010. While DOE found there was only a 3 percent increase in the citygate price of natural gas supplied to Massachusetts as compared to the national average, the residential prices over the same period were 30 percent higher than the national average. In addition, Massachusetts ranked 10th highest in 2008 in percentage markup in residential natural gas rates in the U.S. at 67 percent, compared to the U.S. average of 51 percent. While DOE is unable to point to a specific cause for these pricing differences, these data suggest that factors (such as taxes and related surcharges) rather than natural gas prices alone, likely play a role in affecting the prices consumers pay for natural gas in Massachusetts. (Natural gas pricing data from EIA are available

at: [http://www.eia.gov/dnav/ng/ng\\_pri\\_sum\\_dcu\\_nus\\_m.htm](http://www.eia.gov/dnav/ng/ng_pri_sum_dcu_nus_m.htm).)

#### *C. Massachusetts Residential Heating Loads Compete With Power Plant Loads*

While residential heating loads in Massachusetts compete with current power plant loads, this fact is mitigated by the fact that 44 percent of Massachusetts homes are heated using natural gas (compared to over 51 percent for the Nation as a whole). Approximately 40 percent of the electricity used in Massachusetts is generated from natural gas (compared to only 17 percent for the Nation); however, the volume of natural gas used in Massachusetts to generate this electricity ranks the State as the 12th highest in volume. Furthermore, three of the Nation’s ten liquefied natural gas (LNG) terminals are located in Massachusetts, which bolsters the Commonwealth’s ability to supply natural gas relative to other areas of the country. (See the EIA State Energy Profiles at [http://www.eia.gov/state/state\\_energy\\_profiles.cfm?sid=MA](http://www.eia.gov/state/state_energy_profiles.cfm?sid=MA) and natural gas consumption data [http://www.eia.gov/dnav/ng/ng\\_cons\\_sum\\_dcu\\_nus\\_m.htm](http://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_m.htm).)

#### *D. The High Percentage of Rental Housing Creates Market Barriers*

While Massachusetts has a significant percentage of rental housing, rental houses are smaller (apartments) and require less fuel on a per unit basis. EIA data from 2005 (RECS 2005) suggest that multifamily housing units in New England that rely on natural gas furnaces for heating purposes consumed 22 percent less natural gas than the average for all natural gas furnace-equipped houses in New England. Furthermore, renters in multifamily housing in the U.S. used 22 percent less natural gas for space heating per unit in 2005 than did owners. These facts indicate that multifamily units, which comprise the majority of the rental market, use significantly less natural gas per unit. Consequently, DOE believes the available data seem to show that renters spend less annually on natural gas and would be less impacted by a 90-percent AFUE standard than residents who own their homes. Consequently, renters are likely to see smaller benefits from the granting of the waiver than those projected by Massachusetts.

#### *E. Massachusetts Has a Unique Set of Statutes and Policies Promoting Increased Energy Efficiency and Reductions in Greenhouse Gas Emissions*

DOE recognizes that Massachusetts may have certain self-imposed legal

requirements to improve energy efficiency and reduce greenhouse gas emissions. The imposition of these requirements, however, does not create circumstances that would otherwise enable Massachusetts to demonstrate that it faces unusual and compelling interests that would justify a waiver from Federal preemption. As DOE indicated previously, the types of interests of most relevance under the statute are those that are of a substantially different nature or magnitude and that make regulation preferable to other measures when considering the costs, benefits, burdens and reliability of the projected energy savings. (42 U.S.C. 6297(d)(1)(C)) State legal requirements to improve energy efficiency and reduce greenhouse gas emissions, which any State could impose on itself, do not satisfy these criteria.

DOE does not make this decision lightly. Were DOE to make its decision based on these circumstances, any State could conceivably pass legislation that would impose stringent energy efficiency requirements and argue that it faced unusual and compelling circumstances. Such an outcome would undermine the general purpose behind a broad Federal regulatory framework for energy efficiency standards. See *Geier v. American Honda Motor Company*, 529 U.S. 861, 870 (2000) (declining to apply savings clauses where doing so would upset careful regulatory schemes established by Federal law). Accordingly, in order to give meaning to the authority granted by Congress to permit a waiver from preemption to individual States, the circumstances faced by a given State must be sufficiently unusual and compelling as to warrant an exception from the regulatory scheme developed under Federal law.

#### *F. Potential Impacts on Manufacturers*

DOE examined the potential impacts on manufacturers if the Massachusetts petition were granted. Massachusetts argued that there will be no impact to the furnace manufacturing industry doing business in Massachusetts. AHRI points out that 80 percent of the average annual residential gas furnace shipments going to the state of Massachusetts were already at or above 90-percent AFUE. (AHRI, No. 19 at p. 5) Using the voluntary measures already in place, these numbers point to the ability of manufacturers to readily produce, market, and sell residential gas furnaces in Massachusetts that satisfy the 90-percent AFUE level that the Commonwealth seeks to make mandatory. This situation suggests that

rather than having an adverse impact on the industry, applying a higher level may have little or no impact on the industry's ability to manufacture and sell its furnaces in Massachusetts. These numbers are consistent with national data, which show increasing national shipments of high efficiency furnaces. (See DOE's shipments model from the 2007 rulemaking Chapter 9 of the final rule technical support document) at [http://www1.eere.energy.gov/buildings/appliance\\_standards/residential/pdfs/fb\\_fr\\_tsd/chapter\\_9.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/fb_fr_tsd/chapter_9.pdf).) These data are also supported by Federal ENERGY STAR program data confirming that high efficiency furnaces are readily available in the market. (See the ENERGY STAR product list for residential furnaces at [http://downloads.energystar.gov/bi/qplist/gas\\_furnaces\\_prod\\_list.pdf](http://downloads.energystar.gov/bi/qplist/gas_furnaces_prod_list.pdf).) Thus, collectively, these data demonstrate that manufacturers of non-weatherized natural gas furnaces are already capable of producing at a level to meet the demands of the Massachusetts housing market.

After evaluating the arguments raised by AHRI and the information provided, DOE does not believe that AHRI has sufficiently demonstrated under the statute that there is likely to be an adverse impact on the industry. Based on the slim evidence provided by the commenters opposing the petition, neither commenter provided sufficiently useful evidence in support of such a finding. Accordingly, although DOE is declining to grant a waiver in this instance, the information provided by these groups, in DOE's view, indicates that it is unlikely that an adverse impact on the industry would result if such a waiver were granted.

#### *G. Potential Impacts on Consumers From Installation Issues*

AGA explained that moving to a mandatory 90-percent AFUE level would require substantial changes to existing homes in order to properly install high-efficiency furnaces into homes. It noted that in order to accommodate the positive pressure characteristics found in typical high-efficiency furnaces, many structures would need to be modified—for example, the chimney may need relining to accommodate the gas water heater that would need to be installed to work in conjunction with the furnace. Additionally, a given structure may need a dedicated vent to discharge by-products of combustion away from the furnace. These changes would be likely to raise the installation costs of these products and may, in AGA's view,

significantly impact manufacturers' sales. (AGA, No. 12 at pp. 2)

DOE agrees with AGA that additional consideration should be given to any potential impacts of existing residences as a result of installing condensing furnaces, especially in cases where safety issues could arise. DOE plans to further evaluate these issues in the existing furnace energy conservation standards rulemaking and believes that venue is the more appropriate one in which to address the variety of installations that may need to be modified to accommodate a condensing furnace in homes across the U.S.

#### *H. Current Energy Conservation Standards Rulemaking and the Consensus Agreement*

On January 26, 2010, AHRI, American Council for an Energy Efficient Economy (ACEEE), Alliance to Save Energy (ASE), ASAP, Natural Resources Defense Council (NRDC), and NEEP submitted a joint comment (hereafter referred to as the Joint Comment) to DOE recommending minimum energy conservation standards for residential central air conditioners, heat pumps, and furnaces. (Docket Number EE-2009-BT-STD-0022, AHRI, ACEEE, ASE, ASAP, NRDC, and NEEP, the Joint Comment, No. 1 at pp. 1-33) In describing the negotiating process that led to these recommended standards, the Joint Comment explains that the original consensus agreement was completed on October 13, 2009 and had 15 signatories, including AHRI, ACEEE, ASE, NRDC, ASAP, NEEP, Northwest Power and Conservation Council (NPCC), California Energy Commission (CEC), Bard Manufacturing Company Inc., Carrier Residential and Light Commercial Systems, Goodman Global Inc., Lennox Residential, Mitsubishi Electric & Electronics USA, National Comfort Products, and Trane Residential.

The Joint Comment recommends standards that divide the nation into two regions for residential furnaces based on the population-weighted number of heating degree days (HDD) of each state. States with 5000 HDDs or more are considered as part of the northern region, while states with less than 5000 HDDs are considered part of the southern region. The Joint Comment further recommends a 90-percent AFUE standard for the northern region, which includes the Commonwealth of Massachusetts, with a compliance date of May 1, 2013 for non-weatherized natural gas furnaces.

DOE notes that it is currently conducting a rulemaking to consider amending the energy conservation

standards for residential furnaces. While DOE is examining a variety of options for consideration, including the levels recommended by the Joint Comments, the agency has not yet decided which set of options it plans to propose. Among the options that the agency is considering is the possible exercise of DOE's recently granted statutory authority to develop and implement geographically-based regional standards. See EISA 2007, sec. 306(a). The agency notes, however, that, when comparing the potential benefits to Massachusetts that would be likely to flow from the adoption of the levels recommended by the Joint Comments against the potential benefits from granting the petition, DOE believes that any additional benefits from granting the petition are likely to be small. Specifically, if DOE were to grant the waiver, the earliest compliance date under the waiver would be October 2013, compared to the May 2013 compliance date prescribed under the consensus agreement. The full consensus agreement can be found at [http://www1.eere.energy.gov/buildings/appliance\\_standards/residential/pdfs/furnaces\\_framework\\_joint\\_stakeholdercomments.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/furnaces_framework_joint_stakeholdercomments.pdf). A potential Federal standard for the northern regions of 90-percent AFUE through adoption of the consensus agreement will provide slightly more energy savings (*i.e.*, an estimated 0.000002 quads) as compared to granting the waiver. The small energy savings difference can be attributed to the small heating energy use over the period spanning May to October, which accounts for only 7% of the annual heating energy use in Massachusetts. Consequently, given the on-going rulemaking, DOE believes that addressing this issue in one collective rulemaking action, rather than on a piece-meal basis, would be more likely to offer a comprehensive solution should DOE decide to adopt a regionally-based approach.

#### **V. Conclusion**

Taking into account all of the factors discussed above, DOE is declining to grant the Commonwealth's request. DOE also emphasizes that it will give consideration to those levels proposed in the consensus agreement presented by industry and environmental advocacy groups. These levels are currently being evaluated within the context of the agency's rulemaking to address standards for furnaces. See [http://www1.eere.energy.gov/buildings/appliance\\_standards/residential/furnaces\\_nopm\\_rulemaking\\_analysis.html](http://www1.eere.energy.gov/buildings/appliance_standards/residential/furnaces_nopm_rulemaking_analysis.html).

## VI. Denial

In light of the reasons noted above, and consistent with the requirements under EPCA, DOE is denying the Commonwealth's petition for a waiver from Federal preemption.

## VII. Approval of the Office of the Assistant Secretary

The Assistant Secretary of DOE's Office of Energy Efficiency and Renewable Energy has approved publication of this notice of denial.

Issued in Washington, DC, on September 30, 2010.

**Cathy Zoi,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. 2010-25324 Filed 10-6-10; 8:45 am]

**BILLING CODE 6450-01-P**

---

## DEPARTMENT OF ENERGY

### Notice of Availability of Draft Basis for Determination Under Section 3116 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA) for Closure of the F-Tank Farm at the Savannah River Site

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice of availability.

**SUMMARY:** The Department of Energy (DOE) announces the availability of the "Draft Basis for Section 3116 Determination for Closure of the F-Tank Farm at the Savannah River Site" (Draft FTF 3116 Basis Document) for public review and comment. DOE prepared the Draft FTF 3116 Basis Document pursuant to Section 3116(a) of the NDAA, which provides that the Secretary of Energy may, in consultation with the U.S. Nuclear Regulatory Commission (NRC), determine that certain waste from reprocessing of spent nuclear fuel is not high-level waste if the provisions set forth in Section 3116(a) are satisfied. To make this determination, the Secretary of Energy must determine that the waste in the FTF: (1) Does not require permanent isolation in a deep geologic repository for spent fuel or high-level radioactive waste; (2) has had highly radioactive radionuclides removed to the maximum extent practical; and (3)(A) does not exceed concentration limits for Class C low-level waste and will be disposed of in compliance with the performance objectives in 10 CFR Part 61, Subpart C and pursuant to a State approved closure plan or State-issued permit; or (3)(B) exceeds concentration limits for Class C low-level waste but will be disposed of in compliance with the performance objectives of 10 CFR Part

61, Subpart C; pursuant to a State-approved closure plan or State-issued permit; and pursuant to plans developed by DOE in consultation with the NRC. Although not required by the NDAA, DOE is making the Draft FTF 3116 Basis Document available for public review and comment.

**DATES:** The comment period will end on January 7, 2011. Comments received after this date will be considered to the extent practicable.

**ADDRESSES:** The Draft Basis for Determination is available on the Internet at [http://sro.srs.gov/f\\_htankfarmdocuments.htm](http://sro.srs.gov/f_htankfarmdocuments.htm), and is publicly available for review at the following locations:

#### District of Columbia

*U.S. Department of Energy, Freedom of Information Act Public Reading Room, 1000 Independence Avenue, SW., Room 1G-033, Washington, DC 20585, (202) 586-5955.*

#### South Carolina

*University of South Carolina-Aiken, Gregg-Graniteville Library, 471 University Parkway, Aiken, SC 29801, (803) 641-3320.*

Written comments on the Draft FTF Section 3116 Basis Document may be submitted by U.S. mail to the following address: Ms. Sherri Ross, DOE-SR, Building 704-S, Room 43, U.S. Department of Energy, Savannah River Operations Office, Aiken, SC 29802 (ATTN: F-Tank Farm Draft Basis).

Alternatively, comments may also be filed electronically by e-mail to [sherri.ross@srs.gov](mailto:sherri.ross@srs.gov), or by Fax at (803) 208-7414.

**SUPPLEMENTARY INFORMATION:** The FTF is a 22-acre site, located at the Savannah River Site near Aiken, South Carolina. The FTF consists of 22 underground radioactive waste storage tanks and supporting ancillary structures. Two of those waste tanks, Tanks 17 and 20 were cleaned and operationally closed in 1997, prior to enactment of NDAA Section 3116. Accordingly, Tanks 17 and 20 are not within the scope of this Draft FTF Section 3116 Basis Document. The major FTF ancillary structures are two evaporator systems, transfer lines, six diversion boxes, one catch tank, a concentrate transfer system, three pump pits, three pump tanks and eight valve boxes. There are three waste tank types in FTF with operating capacities ranging from 750,000 gallons (Type I tanks) to 1,300,000 gallons (Type III/IIIA and Type IV tanks). The waste tanks have varying degrees of secondary containment and in-tank structural features such as cooling coils and

columns. All FTF waste tanks are constructed of carbon steel. The FTF was constructed to receive waste generated by various SRS production, processing and laboratory facilities.

DOE has initiated waste removal and cleaning of tanks and ancillary structures in the FTF using a process that includes removing bulk waste from tanks and ancillary structures and then deploying tested technologies to removing the majority of the remaining waste. After completing cleaning operations, a small amount of residual radioactive waste will remain in the tanks, ancillary equipment and piping. DOE plans to stabilize the residuals in the tanks and certain ancillary structures with grout. Tank waste storage and removal operations in the FTF are governed by a South Carolina Department of Health and Environmental Control (SCDHEC) industrial wastewater operating permit. Removal of tanks from service and stabilization of the FTF waste tanks and ancillary structures will be carried out pursuant to a State-approved closure plan, the *Industrial Wastewater General Closure Plan for F-Area Waste Tank Systems* (GCP). Specific Closure Modules for each tank or ancillary structure or groupings of tanks and ancillary structures will be developed and submitted to SCDHEC for approval. Subsequent to SCDHEC's approval of the specific and final closure configuration documentation and grouting, the tank/system will be removed from the State's industrial wastewater permit. This Draft FTF Section 3116 Basis Document applies to stabilized residuals in the waste tanks and ancillary structures, the waste tanks, and the ancillary structures in the FTF at the time of closure.

The Draft FTF Section 3116 Basis Document is being issued in draft form to facilitate public review and comment. DOE anticipates it will take approximately 9 months to complete consultation with the NRC, before the Secretary makes a potential determination under Section 3116 (a) of the NDAA.

Issued in Washington, DC, on September 30, 2010.

**Frank Marcinowski,**

*Deputy Assistant Secretary for Technical and Regulatory Support.*

[FR Doc. 2010-25341 Filed 10-6-10; 8:45 am]

**BILLING CODE P**