



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

John A. Hodges
202.719.3377
jhodges@wileyrein.com

October 5, 2007

**PRODUCT CATEGORIES UNDER
THE ENERGY POLICY AND CONSERVATION ACT**

The Energy Policy and Conservation Act, 42 U.S.C. § 6291 et seq. (EPCA), governs the Energy Star Program. A fundamental concept under EPCA is the recognition of categories (i.e., classes) within types of products due to characteristics of different products, including technologies. This concept has been well-recognized by the Department of Energy (DOE) and the Environmental Protection Agency (EPA).

Despite this policy, EPA's Draft 2 of Energy Star Program Requirements for Televisions, Partner Commitments (at 6) states that "[i]rrespective of technology, all TVs serve the same fundamental purpose" and that for this reason a one-size-fits-all Energy Star criterion should apply to televisions. Such an approach is contrary to EPCA and discriminates against technologies with characteristics that bear on energy consumption.¹

¹ Thus, the assertion in Draft 2 (at 6) that the proposed Energy Star Program requirements for televisions are "technology neutral" is a serious mischaracterization.



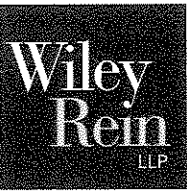
Numerous categories within product types have been recognized pursuant to EPCA based on technological differences and related considerations. That is so despite the fact that products within a type may fundamentally serve the same purpose. For example:

- Twenty separate product classes have been recognized for refrigerators, refrigerator-freezers, and freezers. These are provided for in regulations, 10 C.F.R. § 430.32(a), and in agency decisions for products not considered when the regulations were issued.² The classes recognize such things as different technologies for defrosting (manual defrost, partial automatic defrost, and automatic defrost).
- Sixteen separate product classes have been recognized for room air conditioners. Id. § 430.32(b).
- Nine separate product classes have been recognized for central air conditioners and heat pumps. Id. § 430.32(c).
- Six separate classes have been recognized for water heaters, including separate classes for gas-fired, oil-fired and electric water heaters. Id. § 430.32(d).
- Six separate classes have been recognized for furnaces, including classes for gas steam and other than gas steam boilers. Id. § 430.32(e).

² See, e.g., DOE Office of Hearings and Appeals, Decision and Order TEE-0025 (Nov. 9, 2005) (LG Electronics, automatic defrost refrigerator-freezer, with bottom mounted freezer and through-the-door ice service); TEE-0012 (Sept. 13, 2004) (Electrolux Home Products; frost-free chest freezer).

- Five separate classes have been recognized for clothes washers, including classes for top-loading and front-loading clothes washers. Id. § 430.32(g).
- Four separate classes have been recognized for clothes dryers, including classes for electric and gas clothes dryers. Id. § 430.32(h).
- Sixteen classes have been recognized for direct heating equipment, including classes for fan and gravity type equipment. Id. § 430.32(i).
- Separate classes have been recognized for gravity tank-type, flushometer tank, electromechanical, hydraulic, and blowout toilets. Id. § 430.32(q).
- Separate classes have been recognized for air-cooled and water-cooled commercial air conditioning equipment. Id. § 431.97.
- Separate classes have been recognized for water and air cooling automatic commercial ice makers. Id. § 431.136.
- Separate classes have been recognized for liquid-immersed and dry-type distribution transformers. Id. § 431.196.

The Energy Star Program has recognized numerous categories based on considerations such as technology. Thus, for example, the Energy Star Program Requirements for Residential Refrigerators and/or Freezers (at 3) states that the Energy Star criteria are based on the federal standards by product class:



National Appliance Energy Conservation Act (NAECA) [a part of EPCA]: signed into law in 1987, this act gave the US Department of Energy the power to set federal standards for maximum energy consumption on household appliances. The ENERGY STAR criteria for residential refrigerators and freezers are based on the NAECA appliance standards. . . . The ENERGY STAR criteria for residential refrigerators and freezers are set at a percentage below the federal maximum energy consumption standard by product class. [Emphasis added.]

The Energy Star Program’s Refrigerators & Freezers Key Product Criteria similarly states that the Energy Star qualifying efficiency level for refrigerators is a specified percentage above the minimum federal standard under EPCA for the particular category.³

The categories for Energy Star qualified room air conditioners are also keyed to the categories used for federal minimum efficiency standards. See Energy Star Criteria for Room Air Conditioners (as of November 16, 2006) (Energy Star criteria are “at least 10% more energy efficiency than the minimum federal government standards”).

³ “On January 1, 2004, the ENERGY STAR criteria for refrigerators changes to require all full-size models to be at least 15% above the minimum federal standard to qualify for ENERGY STAR. The National Appliance Energy Conservation Act (NAECA) dictates minimum standards for energy consumption in refrigerators and freezers. The standard varies depending on the size and configuration of the refrigerator or freezer.” EPA, Refrigerators & Freezers Key Product Criteria. It goes on to discuss how “[r]efrigerators and freezers are categorized.” These are equivalent to the classes recognized by DOE.



The Energy Star Program for clothes washers includes separate categories for standard sized front- or top-loading clothes washers. Energy Star Program Requirements and Criteria for Clothes Washers (as of December 20, 2005) (at 3). In addition, the Energy Star Program recognizes separate categories for gas furnaces and oil furnaces. Energy Star Program Requirements for Furnaces Eligibility Criteria (Version 2).

The proposed Energy Star Set Top Box specification revision also recognizes categories based on differences in technologies. It provides categories for Cable, Satellite, Digital (“Terrestrial”), and Internet Protocol (IP), as well as considers additional technologies (DVR, DVD + Reader, DVD, extra tuner(s) and HD resolution). The data in the EPA dataset for the ON Mode specification contains televisions without tuners, with or without HD resolution, etc. Energy Star Program Requirements for Set-top-Boxes, Eligibility Criteria, Draft 1 – Version 2.0, June 29, 2007.

Recognition of separate categories within product types pursuant to EPCA has been explained repeatedly. For example, DOE has stated that under EPCA “[c]lasses are differentiated by the type of energy use (oil, natural gas, or electricity) or capacity or performance-related features that provide utility to the consumer and affect efficiency.” 59 Fed. Reg. 56423, 56425 (Nov. 14, 1994); 58 Fed. Reg. 47326, 47329 (Sept. 8, 1993) (same). It has also stated, “In its standards rulemakings, the Department establishes a separate ‘class’ with its own efficiency standard for a product when the record indicates that the product



includes a utility or performance-related feature that affects energy efficiency.” 64 Fed. Reg. 33431, 33435 (June 23, 1999).

Thus, DOE has stated that, in recognizing classes in the rulemaking on standards for refrigerators, refrigerator-freezers, and freezers, “to the extent that comments or research showed that a product included a utility or performance-related feature that inherently lowers energy efficiency, a separate class with a different efficiency standard was created for that product.” 62 Fed. Reg. 23102, 23110 (April 28, 1997).⁴ As discussed above, Energy Star has adopted these categories.

EPA has stated that one of the criteria used in relation to Energy Star specifications is that “Specifications do not unjustly favor any one technology.” Energy Star Product Specification Development and Revision Process.⁵ EPA has also stated:

In some cases, EPA and DOE have determined that it is preferable to develop multiple specifications, by dividing up a product category that has a wide range of performance functionality, each requiring different amounts of energy. This approach allows consumers to find an efficient model in a product size, speed, or other sub-category without unnecessarily limiting choice.

⁴ Elsewhere DOE has stated: “[T]o the extent that comments, or DOE’s own research, indicated that a product included a utility or performance-related feature that affected energy efficiency, a separate class with a different efficiency standard was created for that product.” 56 Fed. Reg. 22250, 22254 (May 14, 1991); 54 Fed. Reg. 47916, 47921 (Nov. 17, 1989) (same).

⁵ http://www.energystar.gov/index.cfm?c=prod_development.prod_development_spec_rev



The Energy Star Label: A Summary of Product Labeling Objectives and Guiding Principles 5-6.⁶

The discriminatory proposed approach in EPA's Draft 2 of Energy Star Requirements for Televisions, Partner Commitments, which refuses to recognize separate categories for televisions, violates these important policies.

EPA's Draft 2 (at 6) offers an additional inappropriate justification for the proposed non-recognition of separate categories for televisions. It states that the proposed approach "provides flexibility in the future for manufacturers wanting to qualify TVs that utilize screen technologies that that not currently mainstream, such as OLED." To the contrary, imposition of a one-size-fits-all rule is the opposite of "flexibility." And, Energy Star can address the future by updating categories as warranted, as has been done repeatedly under EPCA.

It bears emphasis that the Energy Star requirements are federal "rules" under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4),⁷ even though a manufacturer has the option not to participate in the Energy Star Program.⁸ Therefore, the Energy Star criteria, including

⁶ This is found at the same website as Energy Star Product Specification Development and Revision Process (supra note 5).

⁷ The APA defines "rule" to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).



those for recognizing categories, are required to meet APA standards of lawfulness.⁹ Hence, imposition of Energy Star criteria for televisions that ignore differences in technology for recognition of categories, while other rules under EPCA recognize technological differences, would be unjustifiable.


John A. Hodges

(Continued . . .)

⁸ See, e.g., Mitchell Energy & Dev. Corp. v. Fain, 311 F.3d 685 (5th Cir. 2002) (rejecting contention that, because “states have the option whether to participate” in a program, Department of Labor methods of program administration were not a “rule or regulation”).

⁹ The APA, 5 U.S.C. § 706, provides, in part, that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”