

A question was raised in the January 30-31, 2014 meeting of the Appliance Standards and Rulemaking Federal Advisory Committee Commercial/Industrial Pumps Working Group (working group) regarding the applicability of EPCA's preemption provision to pumps.

Section 6297(b) of EPCA, made applicable to certain types of industrial equipment, including pumps, through section 6316(a) of EPCA, sets forth the general rule of preemption for energy conservation standards before a Federal standard becomes effective for a particular type of covered equipment. That provision states that "no State regulation [] concerning the energy efficiency, energy use or water use of the covered equipment shall be effective with respect to such covered [equipment]", unless certain enumerated exceptions apply. The listed exceptions are inapplicable to pumps.

Section 6311(1)(A) of EPCA states that a "pump" is a type of covered industrial equipment. Therefore, any state regulation of pumps is currently preempted by law. Preemption for pumps would continue after any Federal standard becomes effective pursuant to section 6297(c) of EPCA.

The working group discussed whether DOE could "phase-in" standards for pumps by defining "pump" as including only those types of pumps for which DOE would set standards in any individual rulemaking. However, EPCA does not provide DOE with such authority. The statute uses the broad term "pumps" to establish the scope of coverage as applicable to all pumps. In some instances, Congress defined certain types of equipment and specifically enumerated exceptions to the stated definition.<sup>1</sup> For pumps, however, Congress did not specify a definition with enumerated exceptions and instead simply listed the "pump" as the type of covered equipment for which DOE had authority to consider standards. The agency cannot decide that a pump is not a pump until a time at which it becomes convenient to do so.

We note that section 6297(d) of EPCA sets forth a process for a state to file a petition requesting that a state regulation be effective with respect to a particular type of covered equipment. EPCA requires DOE to waive Federal preemption if, after the solicitation and consideration of public comment, DOE finds that the state has established by a preponderance of the evidence that the state regulation is "needed to meet unusual or compelling State or local energy or water interests." In addition, DOE must find that the state regulation does not "significantly burden manufacturing, marketing, distribution, sale or servicing of the covered [equipment] on a national basis", and that the state regulation will not be "likely to result in the unavailability in the State of any covered [equipment] type...generally available in the state..."

We also note that to the extent the working group determines not to set standards for certain pump types as part of this negotiation, DOE is willing to commence a subsequent rulemaking to consider whether standards are appropriate for those additional types as expeditiously as possible following the conclusion of a rule resulting from these negotiations. Alternatively, if approved by the ASRAC, the existing pumps working group may consider the excluded pumps as part of a follow on negotiation.

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<sup>1</sup> See, e.g., the definition of "commercial package air conditioning and heating equipment", which is defined as "air cooled, water-cooled, evaporatively-cooled, or water source (**not including ground water source**) electrically operated, unitary central air conditioners and central air conditioning heat pumps for commercial applications". (42 U.S.C. 6311(8)(A) (emphasis added). See also, e.g., the definitions of "commercial refrigerator, freezer and refrigerator-freezer" and "walk-in cooler; walk-in freezer", which do not include such equipment "designed and marketed exclusively for medical, scientific or research purposes" 42 U.S.C. 6311(9)(A) and (20). See also, e.g., the definition of "warm air furnace" that "does not include unit heaters and duct furnaces", and the definition of "storage water heater", which "does not include units with an input rating of 4000 Btu per hour or more per gallon of stored water". 42 U.S.C. 6311(11)(A) and (12)(A).