

**BEFORE THE
U.S. DEPARTMENT OF ENERGY
Washington, D.C. 20585**

In the Matter of:

Maxx Cold Food Service
(automatic commercial ice makers)

)
)
) Case Number: 2012-SE-4506
)
)
)

NOTICE OF PROPOSED CIVIL PENALTY

Date issued: February 13, 2013

Number of alleged violations: 8 Days after the required deadline that Maxx shipped units to the test facility

423 Number of noncompliant units of MIM450 distributed by Maxx

431 Total alleged violations

Maximum possible assessment: \$86,200

Proposed civil penalty: \$86,200

The Office of the General Counsel of the U.S. Department of Energy ("DOE") alleges that Maxx Cold Food Service has violated certain provisions of the Energy Policy and Conservation Act, 42 U.S.C. § 6291 *et seq.* ("the Act"), and 10 C.F.R. Part 429.

Specifically, DOE alleges:

1. Maxx Cold Food Service ("Maxx") manufactures and has manufactured a variety of automatic commercial ice makers that it distributes and has distributed in commerce in the United States of America, including basic model MIM450.
2. Maxx automatic commercial ice maker basic model MIM450 is "covered equipment" as defined in 42 U.S.C. § 6311(1)(F), 10 C.F.R. § 431.2 and 10 C.F.R. § 431.132.
3. DOE had reason to believe, based upon an assessment test conducted pursuant to 10 C.F.R. § 429.104, that basic model MIM450 may not meet the applicable energy conservation standard.

Failure to Supply Covered Equipment in Accordance with a Test Notice

4. Failure of a manufacturer to supply at the manufacturer's expense a requested number of covered products or covered equipment to a designated test laboratory in accordance with a test notice issued by DOE is a prohibited act under 10 C.F.R. § 429.102(a)(4) and subjects a manufacturer to civil penalties pursuant to 10 C.F.R. § 429.120.
5. In accordance with 10 C.F.R. § 429.110, DOE issued a Test Notice on July 25, 2012, requiring Maxx to obtain from a retail source selected by DOE and indicated in the Test Notice and provide to DOE three units of basic model MIM450 for enforcement testing. Pursuant to 10 C.F.R. § 429.110(b)(1)(iv), Maxx was required to ship the three units to Intertek Testing Services, Inc. ("ITS"), in Cortland, New York, within five working days of the issuance of the Test Notice—by August 1, 2012.
6. On July 26, 2012, Neal Asbury, a representative of Maxx, contacted DOE to discuss the Test Notice. During this conversation, Mr. Asbury asked whether Maxx could use a different retail source to provide the units to DOE. Mr. Asbury was informed that Maxx may use a different retail source provided that the units were received by ITS before the test initiation date—August 6, 2012—and the retail source provided information sufficient to show the units were in the retail source's possession prior to issuance of the Test Notice on July 25, 2012.
7. According to documentation provided to DOE by Maxx, the units of basic model MIM450 were not shipped to ITS until August 9, 2012, eight days after Maxx was required to ship the units under the Test Notice, and were not received by ITS until August 10, 2012, four days after enforcement testing was scheduled to begin.
8. Maxx's failure to supply units of automatic commercial ice maker basic model MIM450 to ITS in accordance with the July 25, 2012 test notice issued by DOE is a prohibited act under 10 C.F.R. § 429.102(a)(4), each day constituting an individual violation.

Distribution of Noncompliant Covered Equipment

9. Distribution in commerce by a manufacturer or private labeler of any new covered equipment that is not in compliance with an applicable energy conservation standard is a prohibited act under 10 C.F.R. § 429.102(a)(6) and subjects a manufacturer to civil penalties pursuant to 10 C.F.R. § 429.120.
10. Pursuant to the results of testing four units of Maxx automatic commercial ice maker basic model MIM450 at Intertek Testing Services in Cortland, New York, this model operates at an energy consumption rate of 7.875 kilowatt-hours per 100 pounds of ice (kWh/100 lbs ice), approximately five percent greater than the 7.5 kWh/100 lbs ice standard for the tested units, as required by 42 U.S.C. § 6313(d)(1) and 10 C.F.R. § 431.136 for units of this basic model manufactured on or after January 1, 2010.

11. Accordingly, on December 11, 2012, DOE found that basic model MIM450 is not in compliance with an applicable energy conservation standard when evaluated in accordance with Appendix B to Subpart C of 10 C.F.R. Part 429.
12. Maxx has unlawfully manufactured and distributed in commerce in the United States since January 1, 2010, at least 423 units of the non-compliant automatic commercial ice maker basic model MIM450.
13. As of the date of this Notice, Maxx continues to distribute in commerce automatic commercial ice maker basic model MIM450 by offering the product for sale on its web site. *See, e.g.,* <http://www.maxxcoldfoodservice.com/specs/mim450-final.pdf>.

The following information is provided in question and answer format to help explain your legal obligations and options.

What do I do now?

DOE is offering a settlement of \$85,400 (eighty-five thousand four hundred dollars) if you submit the signed compromise agreement and pay the fine within thirty (30) days of the date of an Adopting Order adopting the compromise agreement.

If you do not choose to settle the case, DOE may seek the maximum penalty authorized by law. You have other options as described below.

You have other options as described below.

What are my other options?

Within thirty (30) calendar days, you must select Option 1 or Option 2 below if you do *not* agree to DOE's settlement offer.

Option 1: You may elect to have DOE issue an order assessing a civil penalty. Failure to pay the assessed penalty within sixty (60) calendar days of the order assessing such penalty will result in referral of the case to a U.S. District Court for an order affirming the assessment of the civil penalty. The District Court has the authority to review the law and the facts de novo.

Option 2: You may elect to have DOE refer this matter to an Administrative Law Judge (ALJ) for an agency hearing on the record. Upon a finding of violation by the ALJ, DOE will issue an order assessing a civil penalty. This order may be appealed to the appropriate U.S. Court of Appeals.

When must I respond?

You must submit a signed compromise agreement within thirty (30) calendar days of the date of this notice to pay the lowest fine. If you do not wish to settle AND you wish to choose Option 1 as described above, you must notify DOE within thirty (30) calendar days of the date you received this notice of your selection of Option 1. Otherwise, if you do not settle the case, DOE will refer to the case to an ALJ as described in Option 2.

How should I submit my response?

To assure timely receipt, DOE strongly encourages you to submit your response by e-mail, fax, or an express delivery service. DOE accepts scanned images of signed documents (such as PDFs). Responses may be sent by any of the following methods:

By email to: david.case@hq.doe.gov

By fax to: (202) 287-6998

By mail to: David Case
U.S. Department of Energy
Office of the General Counsel (GC-32)
1000 Independence Ave., SW
Washington, DC 20585

What happens if I fail to respond?

If you fail to respond within thirty (30) calendar days after receiving this notice, or by the time of any extension granted by DOE, DOE will refer the case to an ALJ for a full administrative hearing.

What should I include in my response?

- 1) If you wish to accept DOE's settlement offer, you should submit the signed compromise agreement. If you do not wish to accept DOE's settlement offer, you should specify if you wish to elect Option 1; otherwise, DOE will proceed with Option 2, as described above.
- 2) Provide your Taxpayer Identification Number (TIN). The Debt Collection Improvement Act (DCIA) requires all Federal agencies to obtain the TIN in any case which may give rise to a debt to the government.

How did you calculate the maximum possible assessment?

Failure to Supply Covered Equipment in Accordance with a Test Notice

Federal law sets a maximum civil penalty per day for each commission of certain prohibited acts. You must supply a requested number of covered products or covered equipment to a designated test laboratory in accordance with a test notice issued by DOE. 42 U.S.C. 6316(a); 10 C.F.R. § 429.102(a)(4). The maximum penalty is \$200 per day. *Id.* at § 429.120.

Distribution of Noncompliant Covered Equipment

Federal law sets a maximum civil penalty for each unit of a covered product that does not meet an applicable energy or water conservation standard that is distributed in commerce in the U.S. 10 C.F.R. § 429.102(a)(6). In the maximum penalty calculation in this notice, DOE has determined that Maxx has distributed at least 423 units of automatic

commercial ice maker basic model MIM450 in the U.S. This number would be adjusted based on any additional information obtained if the case goes to hearing. The maximum penalty is \$200 per unit. Id. at § 429.120.

Issued by:

/S/

Laura L. Barhydt
Assistant General Counsel for
Enforcement