

EARTHJUSTICE
APPLIANCE STANDARDS AWARENESS PROJECT
NATURAL RESOURCES DEFENSE COUNCIL

December 7, 2010

VIA EMAIL TO GC_comments@hq.doe.gov

U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, SW
Washington, D.C. 20585

Re: Implementation of Large-Capacity Clothes Washer Waivers

Earthjustice, the Appliance Standards Awareness Project, and Natural Resources Defense Council respectfully submit these comments in response to the Department of Energy's (DOE's) solicitation of views on the implementation of test procedure waivers for large capacity clothes washers. We appreciate the opportunity to comment on this issue and thank the Department for its ongoing commitment to the effective and transparent enforcement of appliance efficiency standards.

The Department's request for comment indicates that DOE is seeking feedback on two questions related to the inability of the existing clothes washer test procedures to measure the efficiency of certain large capacity washers. The first is, "at what point companies who have been granted a waiver are required to re-test, re-rate, and recertify models covered by the waiver using the alternative test procedure." The second, related question is, how companies receiving a waiver should apply the waivers "to already manufactured units at various points along the distribution chain."

From these questions, it appears that the Department intends to accommodate manufacturers that have deviated from the required clothes washer test procedures without first obtaining a waiver from the Department. For the reasons explained below, this approach is inconsistent with a principle that is fundamental to the effectiveness of DOE's efficiency standards: manufacturers must receive a waiver *before* they may distribute in commerce products to which the required test procedure cannot be applied. Therefore, because the existing DOE regulations do not enable the testing of clothes washers with container volumes greater than or equal to 3.8 cubic feet, clothes washers with capacities above this level cannot

lawfully be distributed in commerce until the manufacturer certifies the product via testing pursuant to a waiver that has been lawfully granted to that manufacturer by DOE.

The problem of new product innovations that inhibit the ability of DOE's existing test procedures to depict a representative use cycle can be divided into two categories. One type of innovation provides attributes that merely augment the normal operations of a product. If these attributes can be deactivated when the existing test procedure is applied to the product, then application of the DOE test procedure will produce results that will likely be suitable for comparison to other products that lack this new attribute. Therefore, while the emergence of such attributes points to a need to update the existing DOE test procedures to more accurately depict product usage, they do not render the existing test procedures inapplicable.¹ The introduction of steam wash cycles on clothes washers is an example of this first kind of innovation, because while the present DOE test procedures do not measure the energy consumption of the steam cycle, they at least allow for a comparison of the energy consumption of steam-equipped washers with other, non-steam-equipped washers when the steam function is deactivated.

In contrast, the introduction of clothes washers with capacities beyond those which the existing test procedures can accommodate represents a second type of innovation – one which necessitates the granting of a waiver prior to the testing, rating, certification, and distribution of such products. The existing clothes washer test procedures require that “[m]aximum, minimum, and, when required, average test load sizes shall be determined using Table 5.1 and the clothes container capacity as measured in 3.1.1 through 3.1.5.” 10 C.F.R. Pt. 430, Subpt. B, App. J1 § 2.7. However, the referenced Table 5.1 does not provide maximum, minimum, or average test load sizes for any washers with container volumes at or above 3.8 cubic feet. In the absence of applicable test load criteria, clothes washer ratings obtained for such washers under the existing DOE test procedure provide no basis for a certification that the product complies with efficiency standards.

In other words, manufacturers who have administered the DOE test procedures without first obtaining a waiver to use approved alternative test load sizes have negated the chief value of the DOE test procedures – their ability to facilitate comparison of the efficiencies of different products. Without an approved test procedure waiver, neither members of the public nor DOE have any way of knowing what test load sizes manufacturers used when rating their products. Some manufacturers may have tested their products with the largest test load size specified in Table 5.1, while others may have used the extrapolated load sizes contained in the waiver which

¹ As Natural Resources Defense Council (NRDC) et al. have previously recommended, DOE should require manufactures to report the introduction of attributes which the manufacturer knows or has reason to know may result in a product using significantly more energy in normal, real-world performance than as reported in its certification for such product using the approved test procedure. Further, DOE should establish a protocol for consulting with the manufacturer in these instances to determine if a waiver is appropriate. See Comments of NRDC et al., Docket No. EERE-2010-BT-CE-0014-80.1 (Oct. 29, 2010) at 4.

DOE granted to a manufacturer in 2006. Still others may have used a different method of extrapolation. The point is that, absent a waiver, there is no way of knowing what test loads manufacturers have used and whether the products in fact meet the minimum standards. In addition, manufacturers who have played by the rules and received waivers may face an unlevel playing field as competitors select test loads without DOE approval.

The Energy Policy and Conservation Act (EPCA) does not permit such “on-the-fly” deviations from test procedures. Section 332(a)(5) of EPCA makes it unlawful “to distribute in commerce any new covered product which is not in conformity with an applicable energy conservation standard.” 42 U.S.C. § 6302(a)(5). In turn, section 325(s) provides that, “Compliance with, and performance under” EPCA standards “shall be determined using the test procedures and corresponding compliance criteria prescribed under [section 323].” 42 U.S.C. § 6295(s). DOE’s standards for clothes washer energy efficiency are expressed according to the metric of “Modified Energy Factor” (MEF), *see* 10 C.F.R. § 420.32(g)(3), and DOE’s regulations provide a specific procedure for determining the MEF of a basic model. *See* 10 CFR § 430.23(j)(2)(ii). Further, the C.F.R. appendix containing DOE’s clothes washer test procedures itself provides that manufacturers of “nonconventional clothes washers . . . must submit a petition for waiver pursuant to 10 CFR 430.27 to establish an acceptable test procedure for that clothes washer.” 10 C.F.R. Pt. 430, Subpt. B, App. J1 § 6.1. Therefore, although one might argue whether a deviation from the required test procedures is itself a separate violation of EPCA, such deviation negates the effect of any alleged demonstration of compliance with the applicable clothes washer standards.

DOE’s compliance regulations reinforce this point. Those regulations require that manufacturers’ compliance statements must certify that “[a]ll required testing has been conducted in conformance with the applicable test requirements prescribed in [10 C.F.R. § 430 Subpt. B].” 10 C.F.R. § 430.62(a)(3)(ii). Manufacturers who have certified large capacity clothes washers without a waiver may therefore have submitted materially false compliance statements to the Department and therefore may also have violated 18 U.S.C. § 1001, which prohibits certain “materially false, fictitious, or fraudulent statement[s] or representation[s].”

Moreover, DOE itself has recognized that manufacturers of products to which a test procedure is inapplicable face only two lawful options:

Manufacturers of covered products and covered equipment that are not covered under an existing test procedure, or that cannot meet a DOE conservation standard, have the option to either seek waivers of the test procedures under existing regulations or seek exception relief from the conservation standard from DOE’s Office of Hearings and Appeals (OHA).

75 Fed. Reg. 56,796, 56,800 (Sept. 16, 2010). DOE’s suggestion that it will permit clothes washer manufacturers to continue distributing in commerce washers which have been rated using

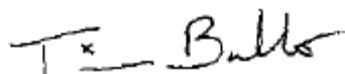
testing methods that DOE has not approved would create an unlawful and unwarranted third option.

Finally, it is important to note that DOE's regulations are designed to avoid the risk of large numbers of products needing a waiver due to the inability to apply a given test procedure. Pursuant to 10 C.F.R. § 430.27(m), DOE must propose a test procedure revision to eliminate the need for a waiver within one year after granting a waiver. For large capacity clothes washers, DOE granted the first interim waiver to a manufacturer more than four years ago, but only recently has the Department proposed amendments to the test procedure to address large capacity models. *See* 75 Fed. Reg. 57,556, 57,570-71 (Sept. 21, 2010). Had the Department acted in accordance with its own regulations, the need for multiple waiver petitions to address the inapplicability of the existing test procedures to large capacity washers could have been minimized.²

In sum, we urge DOE to move quickly to enforce the national clothes washer standards, including imposition of any necessary fines for violations. We further urge DOE to work with manufacturers to complete its update of the test procedure in order to provide a compliance path for larger washers which does not require a waiver application.

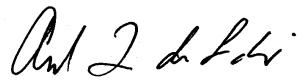
Thank you for considering these comments. We look forward to the Department's speedy resolution of this issue.

Sincerely,

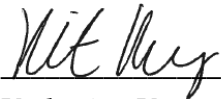


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² As NRDC et al. have previously recommended, regular updates to the test procedures for covered products will minimize the need for waivers and create greater uniformity in laboratory testing. Furthermore, DOE should expand its requirement to review the existing test procedure upon the granting of a waiver. For example, reports by manufacturers that test procedures underestimate the real-world energy consumption of products should provide a signal to DOE that a given test procedure may need updating. *See* Comments of NRDC et al., Docket No. EERE-2010-BT-CE-0014-80.1 (Oct. 29, 2010) at 4.



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