



BY E-MAIL

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Re: Energy Star verification testing proposal

Earthjustice submits the following comments on DOE's proposed verification testing program for Energy Star certified appliances.

1. Introduction

We are pleased to see DOE moving forward with a plan to verify Energy Star certifications. A strong program of verification testing is necessary to protect consumers, to fully realize the potential energy savings from the program, and to restore confidence in a brand that has suffered from problems related to lack of oversight,¹ manipulation,² and sell-through of products that no longer meet revised standards.³

The proposal takes important steps toward accomplishing this. We support the comments of Consumers Union endorsing DOE's proposals to acquire units for testing from retail locations rather than directly from manufacturers, *see* Section 5.3, and to require that verification testing be conducted in accredited labs. *See* Section 6.2.⁴

However, the proposal can be improved in important ways. As discussed below, the proposed 5-percent tolerance for high-volume products covered by federal mandatory efficiency standards threatens to significantly undermine the benefits of the Energy Star standard for certain of these products, especially if a single test can suffice to verify compliance. The

¹ See "Energy Star Program: Covert Testing Shows the Energy Star Program Certification Process Is Vulnerable to Fraud and Abuse," GAO Report 10-470, March 2010, *available at* <http://www.gao.gov/products/GAO-10-470>, last visited May 5, 2011.

² See, e.g., "Tests find more Energy Star glitches," Consumer Reports, February 2010, *available at* <http://www.consumerreports.org/cro/magazine-archive/2010/february/appliances/energy-star-glitches/overview/energy-star-glitches-ov.htm>, last visited May 5, 2011.

³ See "What the Energy Guide label doesn't tell you," Consumer Reports, March 2011, *available at* <http://www.consumerreports.org/cro/magazine-archive/2011/march/appliances/washers-dryers/energyguide-label/index.htm>, last visited May 5, 2011.

⁴ We also support NRDC's suggestion that DOE add sales volume to its criteria for selecting models for testing.

proposal also fails to make clear that manufacturers notified of failed test results should not be able to rebut those test results by conducting additional testing.

2. A 5-percent tolerance is inappropriate for those products whose Energy Star standard is only 10 percent more efficient than the minimum federal standard.

The importance of precision in verifying compliance with the Energy Star standard increases the closer the Energy Star standard gets to the minimum standard. And for room air conditioners and dishwashers, the Energy Star standard is only 10 percent more efficient than the mandatory federal efficiency standard.⁵ The proposed 5-percent tolerance for verification testing of such products, Section 6.4.2, means that DOE will only be verifying half of the benefit consumers are supposedly getting from an Energy Star-certified product.

The government endorsement embodied by the Energy Star label is less valuable to consumers if the energy efficiency benefits it is supposed to represent can only be partially verified. To ensure that consumers can trust that Energy Star-labeled room air conditioners and dishwashers actually are substantially more efficient than other models, DOE should reduce or eliminate the tolerance for verification testing of these products.

3. A single initial spot check that fails to meet the Energy Star standard should not suffice to verify compliance

A proposed 5-percent tolerance is also inappropriate when conducting initial spot checks. The proposed tolerance for initial spot checks, Section 6.4.2, effectively treats a single unit that fails to comply with the standard as sufficient evidence that other units of the product do comply with the standard. This will weaken consumer confidence in the Energy Star program, as it renders Energy Star standards more fungible than federal mandatory efficiency standards.

The requirement that an initial test only be within 5 percent of the standard to verify compliance is far less stringent than testing requirements in similar situations. For example, DOE requires manufacturers to test “no less than two” units in order to certify their products as meeting mandatory federal efficiency standards. 10 C.F.R. § 429.11. Verifying those certifications requires testing an initial sample of at least four units. 10 C.F.R. Part 429 Subpart C Appendix A. And the proposed verification testing program for products not covered by mandatory efficiency standards requires that the test results be at least equal to or better than the Energy Star standard. Section 6.4.1.

It is unclear why claims that a product meets the Energy Star standard require less proof than do claims that the same product meets a minimum federal efficiency standard, or why a single test result that is within 5 percent of the Energy Star standard is good enough for some products but not others. While less stringent testing requirements for Energy Star verification may help conserve testing resources, they may also lead to a greater number of false positives. For reasons discussed above, this is particularly concerning where the difference between the Energy Star standard and the minimum standard is relatively small, because a product that does not meet the Energy Star will likely be no more efficient than any other product.

⁵ *But see* ENERGY STAR Draft 1 V3.0 Room Air Conditioners Cover Memo (proposing requirement for room air conditioners be 15 percent more efficient than minimum efficiency standards in order to qualify for Energy Star) *available at* http://www.energystar.gov/index.cfm?c=revisions.room_air_conditioners_spec, last visited May 9, 2011.

Balancing these concerns against each other, we suggest that an initial spot check only suffice to verify compliance if the first unit tested actually meets the standard. If it does not, but is within 5 percent, DOE should test at least one more unit. If the sample of two units is also within 5 percent of the standard, DOE would be more justified in assuming that the product complies, or at least come within 5 percent of the standard. However, if either the initial test or the sample of two units misses by more than 5 percent, the entire sample of four should be tested.

4. Manufacturers' opportunity to respond in writing should not involve the opportunity to conduct additional testing

The proposal to allow manufacturers 20 days to respond in writing to notification of failed test results, Section 6.6, would benefit from additional detail. The process afforded to manufacturers by DOE's recent certification, compliance and enforcement rulemaking is an appropriate model. *See* 76 Fed. Reg. 12422, 1243, 12438. In that rulemaking, DOE eliminated a provision allowing manufacturers to respond to findings of noncompliance with additional testing at their expense. *Id.* at 12438. DOE found that such additional testing would not improve fairness or accuracy, but would serve only to delay enforcement. *Id.* The same is true with respect to Energy Star verification testing. While manufacturers should have the ability to identify and inform DOE of any mistakes or problems in its test procedures, DOE should not consider additional test results to rebut a finding of noncompliance.

5. Conclusion

Earthjustice urges DOE to adopt a verification testing plan for the Energy Star program similar to the plan proposed. However, DOE can improve the program by making the changes described above: reducing or eliminating the tolerances for room air conditioners and dishwashers; requiring more than just a single close-enough test to verify compliance; and clarifying that manufacturers cannot rebut a finding of noncompliance with additional testing.

Respectfully submitted,

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