Civil Penalties for Energy Conservation Standards Program Violations – Policy Statement

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The U.S. Department of Energy (DOE or the Department) issues this policy statement regarding civil penalties for violations of energy and water conservation standards and requirements under the Energy Policy and Conservation Act of 1975, as amended (EPCA or the Act).[1] This policy statement provides background on DOE's penalty authority and sets forth its basic approach to assess penalties for violations of DOE's standards and certification requirements.

I. Background

EPCA authorizes the Department to enforce compliance with the energy and water conservation standards for certain consumer products and commercial and industrial equipment. 42 U.S.C. §§ 6291–6317. To ensure that all covered products and equipment distributed in commerce comply with the applicable energy and water conservation standards, DOE promulgated enforcement regulations, which include specific requirements for manufacturers to certify compliance with those standards, that stem from the enforcement procedures outlined in 42 U.S.C. § 6303(d). *See* 42 U.S.C. § 6303(d); 10 C.F.R. Part 429, Subpart B; 10 C.F.R. § 431.36. The Department enforces these regulations to, among other things, reduce energy consumption and pollution, encourage technological innovation to increase the efficiency of covered products and equipment, and save money for consumers. In addition, the Department's enforcement program helps to ensure a level playing field in the marketplace by disincentivizing the manufacture, including importation,[2] of noncompliant products and equipment.

[1] The procedures set forth in this document are intended solely as guidance. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party. The Department reserves its right to act at variance with this guidance and to change it at any time without public notice.

[2] "Manufacture" means to manufacture, produce, assemble, or import. 42 U.S.C. § 6291(10)

The Department is authorized to assess civil penalties for certain knowing violations. *See* 42 U.S.C. §§ 6295(i)(6)(A)(v), 6302(a), 6303; 10 C.F.R. §§ 429.102, 429.120, 430.32(dd), 431.382. For purposes of assessing penalties, EPCA defines knowingly as "(1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care." 42 U.S.C. § 6303(b). The maximum civil penalty is adjusted annually for inflation.[3] *See* 10 C.F.R. §§ 429.120, 431.382(b) (providing the current maximum penalty).

II. DOE Policy for Civil Penalty Assessments

In assessing penalties, DOE's goals are to punish past violation(s), prevent future violations by the same party, and deter violations by other parties. The Department's approach to penalty assessments for the two most common types of violations—failure to comply with applicable energy or water conservation standards and failure to certify covered products or equipment properly—are described in greater detail below.[4]

A. Penalty for Violating Conservation Standards or Test Procedure Provisions

Ensuring compliance with energy and water conservation standards and compliance with DOE test procedures[5] are core elements of DOE's regulatory framework and, more broadly, the

[3] The Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the Improvements Act), requires Federal agencies to adjust each civil monetary penalty provided by law within the jurisdiction of the agency. 28 U.S.C. § 2461 note (codified as amended). DOE publishes the adjusted maximum civil penalty annually in the Federal Register. The Inflation Adjustment Act provided that civil penalty adjustments applied "only to violations which occur after the date the increase takes effect." Pub. L. No. 101–410 § 4(5)(b). The Improvements Act specifically amended this limitation such that the inflation adjustment now applies to "civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect." Pub. L. No. 114-74 § 701(b)(3). Therefore, violations for which a penalty has not yet been assessed (i.e., the DOE General Counsel has not issued an order) are subject to the adjusted penalty amount.

[4] Prohibited acts are listed in 42 U.S.C. § 6302(a); 10 C.F.R. § 429.102(a); 10 C.F.R. § 430.32(dd).

[5] Except for design standards authorized in EPCA, compliance with the applicable test procedure and corresponding compliance criteria is integral to ensure that a basic model complies with the pertinent conservation standard. 42 U.S.C. § 6295(s). Therefore, a failure to test according to the test procedure is akin to a basic model failing the applicable standard.

Department's mission. The Department is authorized to assess civil penalties against any manufacturer or private labeler for knowingly distributing in commerce covered products or equipment that do not conform to applicable conservation standards. *See* 42 U.S.C. §§ 6295(s), 6302(a)(5); 10 C.F.R. §§ 429.13, 429.102(a).

DOE assesses penalties for these violations for each unit of a basic model that a manufacturer or private labeler has distributed in commerce. 42 U.S.C. § 6303(a). EPCA defines "distribute in commerce" as "to sell in commerce, to import, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 42 U.S.C. § 6291(16). DOE interprets this to include, among other things, all units sold and all units available for sale (e.g., units held in inventory).

The Department typically proposes the maximum civil penalty against manufacturers and private labelers that knowingly distribute in commerce covered products or equipment that violate the federal energy or water conservation standards. DOE generally believes that proposing the maximum penalty is both appropriate and necessary, as such violations directly undermine the regulatory regime and prevent consumers from achieving the energy and cost savings intended by the energy conservation standards program.

B. Penalty for Violating Certification Requirements

DOE is authorized to assess penalties against any manufacturer that fails "to make reports or provide other information required to be supplied." 42 U.S.C. § 6303(a)(3). The Department's implementing regulations require that, before distributing models in commerce and annually thereafter,[6] each manufacturer file a report with the Department certifying that each basic model meets all applicable federal energy and/or water conservation standards. 10 C.F.R.

[6] The certification requirements for electric motors differ from the requirements for other covered product and equipment types. 10 C.F.R. § 431.36.

§§ 429.102(a)(1); 431.382(a)(3). A manufacturer fulfills each such obligation upon the submission of a valid certification report that complies with the requirements of 10 C.F.R. Part 429. This reporting provides the Department with information to assess whether the products and equipment available to American consumers deliver the energy, water, and cost savings envisioned by EPCA and DOE's regulations and through posting on DOE's public database, provides consumers with information about that performance. Certification requirements demonstrate the imperative for a manufacturer to test and make an assessment that each basic model complies with the applicable conservation standard(s). Accordingly, the Department has implemented a rigorous enforcement program for certification reporting requirements.

The maximum civil penalty for violations of the certification regulations is computed based on each day the manufacturer fails to submit to DOE the required certification report for each basic model of a covered product or equipment. When the Department lacks specific information as to the number of days that a basic model of a covered product or equipment has been distributed in commerce without proper certification, DOE adopts a rebuttable presumption of one year (365 days) in computing the number of violations.

DOE most commonly seeks penalties for a failure to submit a certification report, for significant inaccuracies in certification reports, and for submissions of invalid certification reports. The Department recognizes that certification violations do not necessarily mean that the product or equipment itself fails to meet the applicable energy or water conservation standard. DOE therefore believes that it is important to distinguish penalties for certification violations from violations of energy or water conservation standards. As a result, DOE generally assesses penalties for failure to comply with certification requirements at less than the statutory maximum. Based on aggravating factors, however, DOE may seek a higher penalty, up to and including the maximum civil penalty.

III. Settlement

The Department may reduce penalties as appropriate to encourage the prompt and comprehensive resolution of cases. If a respondent is interested in settlement, the respondent should tender a reasonable offer to DOE to initiate settlement discussions. To encourage complete and timely resolution of enforcement actions, DOE considers a number of additional factors, including, but not limited to, the nature and scope of the violation; whether the respondent has a history of noncompliance; whether the respondent is a small business; a demonstrated inability to pay; the type of product or equipment at issue; whether the respondent timely self-reported the potential violation(s); whether the respondent conceded that a basic model fails to comply with the applicable conservation standard; and the respondent's corrective action, if any. The Department seeks to ensure consistency and equity in settlements by accounting for legitimate differences among violations; however, each settlement relates to the specific case at issue. Conclusions about an appropriate penalty in one case cannot be based on the results of a previous matter. Each case is considered in light of that case's specific facts and circumstances.

1. Nature and Scope of Violation

DOE's consideration of the nature and scope of a violation encompasses many factors, including, but not limited to, the following:

a. The regulatory provision violated (e.g., failure to submit a certification report, submission of an invalid certification report, manufacture and distribution of a noncompliant product, failure to test in accordance with the applicable test procedure, failure to provide units for testing);
b. In cases alleging violations of conservation standards, the product or equipment type at issue;
c. The degree of noncompliance; and

d. The length of time the noncompliance persisted (to the extent not factored into the penalty amount directly – i.e., penalties calculated per day).

2. Inability to Pay

To claim an inability to pay a proposed civil penalty, the respondent must provide at least the following: (1) three years of its most recent financial statements; (2) three years of its most recent U.S. Federal tax returns, including any statements referenced within the tax returns; and (3) three years of its most recent State tax returns, if applicable, including any statements referenced within the tax returns. DOE may request additional supporting documentation, which may include, for example, balance sheets, income statements, cash flow statements, and other documents. DOE may consider payment plans in limited instances.

3. Self-Reporting

With respect to self-reporting violations, DOE may consider a significant penalty reduction when (1) the entity affirmatively notifies the Department in writing that it has violated DOE regulations; (2) such notification occurs before the Department otherwise learns of the potential noncompliance of the basic model/entity; and (3) the entity immediately ceased the noncompliant activity upon discovery. The affirmative notification to DOE should, at a minimum, identify the noncompliant basic model, the estimated number of units of the noncompliant basic model distributed in commerce, and how long the noncompliant basic model was distributed. DOE does not consider submitting a certification report revealing noncompliance to be self-reporting a violation.

4. Corrective Action

DOE may consider a penalty reduction when an entity takes corrective action, beyond mere compliance with existing DOE regulations, to help prevent future noncompliance. Any corrective action must be documented and must result in full compliance with all applicable DOE regulations.

DOE, in its sole discretion, will determine whether any corrective action taken will help prevent any future noncompliance.

5. Concession

Upon receiving a Test Notice, a manufacturer or private labeler may concede, in writing, that the basic model does not comply with the applicable energy or water conservation standard, thus saving the Department the time and expense of enforcement testing. DOE considers a concession to be a mitigating factor in settlement and will consider a concession when determining the appropriate civil penalty.

6. Cooperation

DOE does not consider cooperation as a mitigating factor in determining settlement offers. DOE expects regulated entities to cooperate with DOE investigations and provide, in a timely manner, all information that DOE requests in its investigations, as mandated by law. As noted above, EPCA authorizes DOE to assess penalties against any manufacturer that fails "to make reports or provide other information required to be supplied." 42 U.S.C. § 6303(a)(3); *see* 10 C.F.R. § 429.102(a)(1). DOE regulations require entities to take certain actions in cases involving potential noncompliance or a DOE finding of noncompliance, *e.g.*, 10 C.F.R. § 429.110 (entities must provide test units upon request); 10 C.F.R. § 429.114(a) (entities must provide DOE with sales and related records within 30 calendar days).

If an entity fails to cooperate fully, DOE may allege additional, separate violations or may consider the lack of cooperation an aggravating factor. Examples of non-cooperation include, but are not limited to, failing to provide full information that DOE has requested to investigate a respondent's compliance with DOE requirements, failing to comply with the terms of a Test Notice, and failing to fulfill the terms of a Notice of Noncompliance Determination.