MEMORANDUM

To: Sean Lev, Acting General Counsel, United States Department of Energy

From: Katherine Kennedy, Andrew DeLaski, Benjamin Longstreth

Re: Six-Year Review of Covered Products

Date: April 11, 2011

I. Introduction

This memorandum explains that the Energy Independence and Security Act of 2007 (EISA) requires the Department of Energy to re-evaluate efficiency standards for all covered appliances and products every six years. Through EISA, Congress specifically mandated that the Department review any final rule setting standards every six years. 42 U.S.C. §§ 6295(m)(1); 6313(a)(6)(C). As discussed below, the terms Congress used in this amendment sweep broadly and include all products for which the Department has issued a final rule, including water efficiency standards for plumbing products. Moreover, such regular reviews represent sensible energy policy because as technologies continue to evolve, the Department will be able to continue to raise standards, achieving substantial energy, water and consumer bill savings.

The EISA six-year review provision requires that within six years of a final rule setting efficiency standards, the Department must either publish a notice indicating that new standards are not required or commence a proposed rulemaking including new proposed standards. 42 U.S.C. §§ 6295(m)(1); 6313(a)(6)(C). As discussed below, it may be reasonable for the Department to be given some extra time to come into compliance with this requirement for products, such as the appliances and plumbing products listed in Table 1, which are subject to final rules that predated passage of EISA in 2007. However, EISA was passed more than three years ago and the Department has still not included many of the products subject to pre-2007 rules on its schedule of regulatory actions. The Department must do so promptly in order to

comply with EISA. At this point, prompt action to commence review of these products is required simply to ensure that all of these products are reviewed within six years of EISA's passage.

II. Substantial Energy and Cost Savings Can Be Achieved Through Compliance with EISA's Mandate to Review Standards For All Covered Products Every Six Years.

For most products covered by national standards, Congress established initial standards for products in legislation. In general, these initial standards, typically based on existing state standards, have been relatively modest. The biggest efficiency gains for most products have been realized in the subsequent Department rulemakings. The rulemakings deliver larger savings because they take into account technical and market developments. In addition, the Department's statutory obligation to design amended standards "to achieve the maximum improvement in energy efficiency, or, in the case of [plumbing products], water efficiency, which the Secretary determines is technologically feasible and economically justified" tends to yield strong, cost-effective standards. 42 U.S.C. 6295(o)(2)(A). For virtually every standard reviewed since enactment of the National Appliance Energy Conservation Act in 1987 (NAECA), the Department has found significant savings. In 2001, the Department updated standards for various products whose standards had been initially enacted in NAECA and the 1988 amendments. The revised 2001 standards delivered roughly *double the savings* of the initial statutory standards.[1] Even for products like refrigerators, which have been subject to multiple rounds of standard increases, large incremental savings are still achievable. The Department's recent refrigerator standards review has shown cost-effective savings of 20% to 25% for the main product classes. These cost-effective standards are critical to our Nation's effort to combat climate change. For

[1] *Opportunities for New Appliance and Equipment Efficiency Standards: Energy and Economic Savings Beyond Current Standards Programs*, ACEEE, September 2001.

example, the proposed refrigerator standards would reduce cumulative carbon dioxide emissions by 305 million metric tons between 2014 and 2043, while also saving customers as much as 18.6 billion dollars.

Potential water efficiency gains are similarly large and important.[2] The initial standards for the water efficiency of plumbing fixtures and fittings, which were established by Congress in 1992, have never been updated. As demonstrated by the voluntary WaterSense program, water efficiency gains of between 20% to 50% are possible, with minimal incremental cost. New efficiency standards would reduce consumers' water and sewer bills, which average 700 to 900 dollars a year.[3] Water efficiency is particularly important because climate change will make our already-strained water supplies even more vulnerable. In addition, saving water saves electricity. According to EPA, public water supply and treatment facilities use 56 billion kilowatt-hours per year.[4] Thus, taking advantage of the significant opportunities to increase water efficiency is also an important means of reducing electricity use and greenhouse gas and other pollution.

Despite EISA's requirements, we understand that the Department has not yet made plans to review standards contained in at least two final rules published more than six years ago and a third published nearly six years ago: the 1998 final rule codifying standards for various plumbing products (63 Fed. Reg. 13308 (March 18, 1998)); the 2001 final rule containing standards for certain commercial space and water heating products (66 F.R. 3336 (Jan. 12, 2001)); and the 2005 final rule codifying standards enacted in the Energy Policy Act of 2005 (EPAct) (70 Fed. Reg. 60407 (Oct. 18, 2005)). None of the products for which the 1998 and 2001 final rules established or amended standards have been scheduled for review. Finally, most of

---

[2] Conserving water is one of EPCA's statutory purposes. 42 U.S.C. 6201.
[3] *2008 Water and Wastewater Rate Survey*, Exh. 2 and 5, American Water Works Association.
[4] http://www.epa.gov/owm/water-efficiency/water_efficiency/benefits_of_water_efficiency.html

the products included in the 2005 final rule are not subject to product-specific review schedules. For these products, the six-year review schedule provides the only review deadline. Table 1 below summarizes the products from each of these categories due for review under the six-year review provision.

Table 1. Products due for 6-year reviews

Product	Last final rule issued
Water closets	1998
Urinals	1998
Faucets	1998
Showerheads	1998
Commercial warm air furnaces	2001
Commercial water heaters	2001
Commercial packaged air conditioning and heating equipment (water-source and evaporatively-cooled)[5]	2001
Commercial packaged air conditioning and heating equipment (air source)	2005
Ceiling fans and ceiling fan light kits	2005
Low voltage dry-type distribution transformers	2005
Unit heaters	2005
Commercial prerinse spray valves	2005
Torchieres (light fixtures)	2005
Medium-base compact fluorescent lamps	2005
Illuminated exit signs	2005
Traffic signal and pedestrian modules	2005

[5] The most recent revision to the ASHRAE standard 90.1 strengthens the efficiency standards (EER) for this equipment, so the ASHRAE-related trigger for review has also been tripped. In addition, revised standard 90.1 includes new part load standards (IEER) for air-source products, which we believe creates an additional trigger for review.

We expect that when the Department reviews these products, the data will show that updated standards will result in significant, cost effective savings for many of them. As noted, the voluntary WaterSense levels save 20% to 50%. The American Council for an Energy-Efficiency Economy (ACEEE) and the Appliance Standards Awareness Project (ASAP) have estimated that updated standards for low-voltage dry type distribution transformers could save 8.2 terawatt hours annually by 2030 with a net present value benefit of $5.6 billion.[6] For unit heaters, standards based upon condensing technology could yield very large savings. It may be the case that for certain products the potential savings are not significant. Where this is the case, the six-year review provision allows the Department to issue such a determination and avoid a full standard-setting rulemaking. 42 U.S.C. § 6295(m)(1)(A).

As Secretary Chu has pointed out, "energy-conserving appliance standards are a critical part of the Administration's overall efforts to save energy in homes and businesses nationwide."[7] We applaud the Department for moving forward with standards for products not previously covered. However, it is equally important that the Department revisit old standards, many of which are at least ten years old and no longer achieve the maximum potential savings. Indeed, President Obama emphasized the importance of meeting the statutory deadlines for issuing efficiency standards in a memorandum to the Department of Energy issued soon after he took office.[8] Thus, as a matter of both sensible policy and the Department's legal obligations, it is critical that the Department immediately commence review of existing standards such that it can achieve the significant savings available and comply with the six-year review provision.

---

[6] *See* "Ka-Boom! The Power of Appliance Standards: Opportunities for New Federal Appliance and Equipment Standards," ACEEE and ASAP, July 2009.
[7] http://www.energy.gov/news/8816.htm.

[8] February 5, 2009 Memorandum From President Obama to Secretary of Energy, available at http://www.whitehouse.gov/the_press_office/ApplianceEfficiencyStandards/.

III. EISA Requires A Six-Year Review of Efficiency Standards For All Products and Does Not Exclude Efficiency Standards Last Issued Before 2007

In the Energy Independence and Security Act of 2007, Congress amended the Energy Policy Conservation Act (EPCA) to require that "[n]ot later than 6 years after issuance of any final rule establishing or amending a standard, as required for a product under this part, the Secretary shall" either (A) publish a notice that new standards are not required; or (B) commence a "proposed rulemaking including new proposed standards." 42 U.S.C. § 6295(m)(1); *see also* 42 U.S.C. § 6313(a)(6)(C) (requiring same for covered industrial equipment).[9] This memorandum addresses the question of which products are covered by the six-year review requirement. In a July 22, 2009 notice proposing standards for certain commercial appliances, the Department commented on this question, suggesting that the provision does not apply to products whose final rules were issued more than six years before passage of the amendments.[10] As described below, we disagree because the plain text of this amendment encompasses all final rules, including those issued more than six years prior to the 2007 amendment.

The six-year review requirement applies to "any final rule" regarding a covered product. "Any final rule" includes all of the final rules the Department has issued. As the Supreme Court has frequently observed, "the word 'any' has an expansive meaning" that encompasses all species of whatever category it modifies. *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002); *see also*, *e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 528 (2007) (interpreting the use of "any" to mean "all airborne compounds"); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (holding that "[r]ead

[9] Pub. L. 110-140 §§ 301-325.

[10] Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards and Test Procedures for Commercial Heating, Air-Conditioning, and Water-Heating Equipment, 74 Fed. Reg. 36312, 36321 (July 22, 2009).

naturally, the word 'any' has an expansive meaning"). Accordingly, the six-year review amendment must be applied to all products for which there is a final rule.

"Any final rule" includes all final rules for a covered product no matter when they were finalized. Nothing in the amendment provides any temporal limitation on the final rules that are included in "any final rule" and, in the absence of such a limitation, all final rules must be included regardless of whether they were issued in 2005, 2001 or 1998. Likewise, this expansive language encompasses final rules that have been issued since the provision was passed and those that will be issued in the future.

The fact that the amendment applies to all covered appliances is further supported by changes made to the prior version of subsection (m) of 42 U.S.C. § 6295. The prior version, which governed when a new standard would be applied to products, was limited to "final rules required under subsections (b) through (i) of this Section . . . ." 42 U.S.C. § 6295(m) (2007). When Congress amended section (m), it deleted this restrictive language and, in section (m)(1), replaced it with the broad reference to "any final rule." The previous version of subsection (m) was moved into a new subsection (m)(4). Aside from the deletion of the (b)-(i) limitation, the prior provision, now at (m)(4), was unchanged. Congress retained the same lists of specific products and their respective lag times between final rules and compliance dates, which had been negotiated in the 1980s.

The fact that Congress retained these lists of specific products in subsection (m)(4)(A)(i) and (ii) does not alter the scope of "any final rule" in section (m)(1). There is no reason for the scope of the six-year review provision to be identical to the products in subsection (m)(4)(A); indeed, since at least the enactment of the Energy Policy Act of 1992, subsection (m)(4)(A) (then designated subsection (m)(1)) always referred to only a subset of the products whose efficiency standards the Department had the authority to revise. For example, the standards contained in subsection (i)

were clearly within the scope of the Department's review authority prior to EISA's enactment yet minimum lag times between final rules and compliance dates were not specified.

Furthermore, nothing in the text suggests that Congress intended subsection (m)(1) to be limited to the products enumerated in subsection (m)(4). Rather, the difference between the broad "any final rule" language used in (m)(1) and the limited enumeration of (m)(4) indicates just the opposite. "[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon*, 534 U.S. 438, 452 (2002) (*quoting Russello v. United States*, 464 U.S. 16, 23 (1983)). Accordingly, the Department should "refrain from concluding . . . that the differing language in the two subsections has the same meaning in each." *Id.*

IV. The Six-Year Review Provision Creates Only Prospective Obligations

In its July 22, 2010 federal register notice, the Department suggested that the six-year review provision should be interpreted narrowly to avoid imposing a retroactive duty, and should thus exclude rules that were already six years old in 2007. 74 Fed. Reg. 36,321. This concern is misplaced because the provision is not retroactive. It simply establishes a prospective requirement that the Department review efficiency standards for products within a certain period.

A law is retroactive when "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). The purpose of the doctrine is to prevent, at least where Congress has not spoken clearly, the "unfairness of imposing new burdens on persons after the fact."

Id. at 270. As the Supreme Court has noted, "the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties" and the Court has only applied the presumption to protect the government "in cases involving new monetary obligations that fell only on the government." *Id.* at 272 n.25

The present situation meets none of these criteria. The amendment has not changed the law governing any past action nor created any unfairness to private parties. Rather, the six-year review amendment simply establishes a new requirement that the Department – a federal agency – must, from that point forward, review appliance efficiency standards at six-year intervals.

The trigger Congress used to start the six-year review clock is the last "final rule" for a product. It is true that the final rules for some products were already more than six years old when the amendment was enacted. However, even in such cases, there is still no retroactivity as Congress has not changed the law governing those rules. Congress has simply used those rules as the date which triggers the new, prospective mandate to review the standards. Although Congress did not explicitly provide a transition period for products that were already more than six-years old, any reasonable interpretation of the amendment must recognize that the Department needs a period of time to review products whose final rules are already more than six years old. No one is making the absurd – and pointless – argument that the Department was out of compliance with the six-year review requirement the moment the provision was enacted. Rather, EISA imposes a requirement that the Department promptly begin the process of reviewing efficiency standards for products whose standards were last issued or reviewed more than six years ago.

Moreover, the problem of initial compliance with the six-year requirement cannot justify excluding from the provision all final rules that are more than six years old. Such a reading is barred by the unambiguous terms Congress used to define the

products covered, namely that it applies to "any final rule." *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (plain language governs even if effect is retroactive). Indeed, excluding the oldest efficiency standards would be particularly perverse and contrary to the purpose of the statute because it is the oldest standards that are most outdated and, therefore, are likely to present the largest potential efficiency gains. Accordingly, the six-year provision does apply to all final rules no matter when they were issued.

V. The Six-Year Review Applies to All Products, Including Those Also Subject to ASHRAE or ASME/ANSI Triggers

"Any final rule" includes products that are also subject to mandatory review when ASHRAE or ASME/ANSI amends their standards. It is our understanding that the Department concurs in this view. In its July 22, 2009 Federal Register Notice, the Department indicated that the six-year review provision does apply to a number of products that are also subject to an ASHRAE-trigger. 74 Fed. Reg. 36,321. Nonetheless, we explain below why the contrary view – that the ASHRAE or ASME/ANSI provision is the exclusive trigger for an amended standard – is incorrect.

First, as discussed above, the broad terms of the six-year review provision encompass "any final rule" for any "product under this part." 42 U.S.C. § 6295(m)(1); 42 U.S.C. § 6313(a)(6)(C)(i). Products that also have an ASHRAE or ASME/ANSI review trigger are "products under this part" of the statute and have been subject to final rules. Accordingly, by its plain language, the six-year provision encompasses these products.

This interpretation is supported by the fact that the amendment of section 6295(m) deleted the reference in the prior version of 6295(m) to "final rules required under subsections (b) through (i) of this Section . . . ." 42 U.S.C. § 6295(m) (2007). This is because this limited range had excluded plumbing products – subsections (j)

and (k). By deleting this restricted range and replacing it with the all-inclusive "any final rule," Congress confirmed that the plumbing products, for which an ASME/ANSI trigger is also provided, are to be included by the new amendment.

Second, the contrary view depends on the existence of a conflict between the more specific ASHRAE or ASME/ANSI triggers and the general six-year review provision. However, there is no conflict and certainly none that justifies limiting the statute's plain language. As the Supreme Court has held, the principle that a specific statutory provision governs over a general one applies only where "applying a general provision . . . would undermine limitations created by a more specific provision." *Varity Corp. v. Howe*, 516 U.S. 489, 510 (1996). This is not the case here. The ASHRAE and ASME/ANSI triggers do not function as limitations; they are simply triggers that require the Department to act. Moreover, the two provisions are complementary. If ASHRAE or ASME/ANSI amends the standard for a covered product and trigger the Department to set a new final rule before the six-year review requirement runs, then the clock for the six-year review is simply reset by the new rule. Conversely, if ASHRAE or ASME/ANSI does not act for six years, then the six-year review provision appropriately triggers the Department to review the standard. In fact, the considerable history of inaction by ASHRAE and ASME/ANSI was well established when Congress considered the six year review requirement and was likely one of the factors that contributed to its passage.

VI. Conclusion

In summary, we believe that both as a matter of good policy and as a matter of law, the Department of Energy must apply the six-year review provision to all products covered by sections 6295 and 6313. This includes all of the products included in Table 1. At this point, the Department must promptly start the process of determining whether standards should be revised and, if so, prepare a notice of proposed rulemaking. 42 U.S.C. § 6295(m)(1). As noted, EISA was passed more than

three years ago and prompt action to commence review of these products is required simply to ensure that the Department can complete its review within six years of EISA's passage. We look forward to the opportunity to discuss this with you further.