

GC Enforcement Guidance on the Application of Waivers and on the Waiver Process

Issued: December 23, 2010

In response to questions from manufacturers, on November 30, 2010, the Department of Energy sought views on the implementation of recently granted waivers establishing an alternative test procedure for large-capacity clothes washers. After reviewing the comments, relevant provisions of the Energy Policy and Conservation Act (EPCA), as amended, and applicable regulations, the Department has decided to issue this guidance both to resolve the questions posed and to explain how it will exercise its enforcement authority in the future.

As to the specific questions posed, the Department has concluded that clothes washers with clothes containers larger than 3.8 cubic feet cannot be tested using DOE's current test procedure and, thus, such large-capacity models cannot be sold unless they are covered by a waiver establishing an alternative test procedure. Moreover, the test procedure specified in the waiver must be used to test, rate, and certify all of the models it covers.

The Department understands that some manufacturers misunderstood this obligation and sold large-capacity clothes washers before seeking a waiver, and in some cases, may have tested them in a way that produced unrepresentative energy ratings. We also recognize that the Department, which had notice of the sale of large-capacity clothes washers for years and failed to communicate its views or fix the test procedure, is more than partly to blame. Accordingly, as a matter of equity and fairness, the Department will apply its views on large-capacity clothes washers prospectively only and give manufacturers sixty days to come into compliance.

As to the waiver process more generally, the Department intends to make it more effective so as to prevent these kinds of problems in the future. **First**, the Department commits to act promptly on waiver requests and to update its test procedures to address granted waivers going forward. **Second**, *to prevent the administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, the Department, as a matter of enforcement policy, will refrain from enforcement actions related to pending waiver requests.*

Discussion

Pursuant to EPCA and the Department's regulations, all covered products – including large-capacity clothes washers – must be tested using an approved DOE test procedure, and certified as compliant based on that test procedure, before they can be sold in the United States. Section 42 U.S.C. § 6302(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 6295(s) provides that, “[c]ompliance with, and performance under” the federal conservation standards “shall be determined using the test procedures and corresponding compliance criteria prescribed under section 6293,” pursuant to which DOE promulgates test procedures for covered products. *Id.* § 6295(s). In addition, section 6293(c) bars manufacturers from representing the energy or water use of a product unless it “has been tested in accordance with [DOE's] test procedure.” *Id.* § 6293(c). Further, the Department's regulations require manufacturers to certify basic models as compliant with applicable standards using the established test procedure. In particular, manufacturers' legally required 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).¹ In short, the requirement to test using the DOE procedure provides the basis for both determining a model’s compliance with the standard and comparing representative energy or water use across different manufacturers and models.

Fully recognizing that product development occurs faster than the test procedure rulemaking process, the Department’s rules permit manufacturers of models not contemplated by the test procedures, such as large-capacity clothes washers, to petition for a test procedure waiver in order to certify, rate, and sell such models.² *Without a waiver establishing an alternative test procedure for such models, there is no way to know how a model should be tested, whether a model complies with the standard, and how the model’s energy use compares to others with similar features.* Moreover, if models not contemplated by the existing test procedure could be sold without a waiver, manufacturers could simply make alterations to models that prevent them from being tested and thereby remove them from EPCA’s regulatory requirements altogether. This would quickly undermine the statutory scheme enacted by Congress.

It is, thus, plain that the law requires residential clothes washers to be tested and certified using the test procedure set forth at 10 C.F.R. Pt. 430, Subpt. B, App. J1 – or be subject to a waiver – before they are sold in commerce. But DOE’s test procedure, which establishes the test load size based on the size of the clothes washer container, simply does not contemplate clothes washers with capacities larger than 3.8 cubic feet. See 10 C.F.R. Pt. 430, Subpt. B, App. J1, Table 5.1. This makes sense because such washers did not exist when the rule was adopted. But as a result, without a waiver for such a machine, there is no way to know what test load to use, whether it complies with the federal efficiency standard, and how its energy use compares to other residential clothes washers. On the other hand, the test procedure specifically states that “[m]anufacturers of non-conventional clothes washers . . . must submit a petition for waiver pursuant to 10 C.F.R. § 430.27 to establish an acceptable test procedure for that clothes washer.” *Id.*, Sec. 7.1. Accordingly, clothes washers with capacities greater than 3.8 cubic feet require a waiver to be sold.

Properly recognizing the need for a waiver, Whirlpool sought one in November 2005. DOE granted Whirlpool’s interim waiver in August 2006³ and just granted Whirlpool a permanent waiver last month, establishing an alternative test procedure that extrapolated the test load size in Table 5.1 based on capacities up to 6 cubic feet. Samsung, GE, LG, and Electrolux did not seek

¹ The Department interprets the existing statutory and regulatory provisions to require that products be tested using an approved DOE test procedure. Though this seems obvious, to make it explicit, the Department has proposed to clarify in its regulations that the failure to test any covered product in accordance with DOE regulations is a prohibited act subject to enforcement action. 75 Fed. Reg. 56,825.

² Under 10 C.F.R. § 430.27(a), manufacturers can seek a waiver when “the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy [or water] consumption characteristics . . . as to provide materially inaccurate comparative data.” The petition must include any alternative test procedure known to the petitioner that would evaluate the energy or water characteristics of the model in a representative manner. *Id.* § 430.27(b)(iii).

³ Whirlpool’s interim waiver expired 180 days after DOE granted it. The Department’s regulations permit DOE to extend it, but we failed to do so. 10 C.F.R. § 430.27(h). Thus, technically, from that date until DOE granted its permanent waiver, Whirlpool was also selling large-capacity clothes washers without an approved waiver.

waivers for their large-capacity models until 2010. DOE recently granted these on an interim basis. The comments suggest that, in some cases, these manufacturers may have tested and certified their large-capacity clothes washers using the extrapolated alternative procedure approved for Whirlpool, albeit without seeking or obtaining a waiver to do so. In other cases, manufacturers may have tested clothes washers with containers larger than 3.8 cubic feet using the maximum test load size for a 3.8 cubic foot container. As the comments point out, such testing would yield inaccurate, unrepresentative energy use results – misleading consumers and distorting the market.⁴

Several commenters suggest that the Department take aggressive enforcement action against companies that failed to seek a waiver or test products appropriately. Comments filed by EarthJustice, Appliance Standards Awareness Project, and the Natural Resources Defense Council jointly (“EarthJustice”), Whirlpool, and GE urged the Department to prohibit the sale of large-capacity washers that are not covered by a waiver.⁵ GE argues that the Department should remove all large-capacity washers not covered by a waiver from the marketplace and require that they be retested, relabeled, and recertified, with penalties assessed as warranted.⁶ For models not tested using the extrapolated test load sizes, Whirlpool contends that DOE should require manufacturers to cease sales, retest, rerate and recertify the models subject to independent lab verification, correct Energy Guide and other representations, suspend ENERGY STAR participation, and compensate consumers for significant excess operating costs.⁷

As the comments point out, however, DOE is largely to blame for the inconsistent treatment of large-capacity clothes washers. Alliance Laundry Systems cites “DOE’s failure to properly communicate,” and painstakingly details DOE’s failure to act in a timely manner.⁸ The Department has been aware that the test procedure did not appropriately address large-capacity clothes washers since Whirlpool’s November 2005 petition. It took DOE *nine months* to grant Whirlpool an interim waiver and *five years* to grant a permanent waiver. Meanwhile, the Department stood silently by while other manufacturers began selling large-capacity clothes washers without seeking a waiver and made no inquiries into how manufacturers were testing such models. The Department’s own regulations require DOE to initiate a proceeding within one year of granting a waiver to revise the test procedure to address issues in the waiver and eliminate the need for it.⁹ But DOE did not propose an amendment to the test procedure to accommodate large-capacity machines until September 2010. As EarthJustice concludes, “[h]ad the Department acted in accordance with its own regulations, the need for multiple waiver petitions to address the inapplicability of the existing test procedure to large capacity washers could have been minimized.”¹⁰

⁴ See, e.g., EarthJustice at 2-3; Whirlpool at 4.

⁵ See EarthJustice at 2-3 (arguing that manufacturers must receive a waiver before they distribute large-capacity washers in commerce); Whirlpool at 5-6.

⁶ See GE at 3.

⁷ Whirlpool at 6-7.

⁸ Alliance Laundry Systems at 1-2.

⁹ 10 C.F.R. § 430.27(m).

¹⁰ EarthJustice at 4.

The Department takes seriously manufacturers' failure to request a waiver setting forth an approved method of testing large-capacity clothes washers before certifying and selling these products. And we do not take lightly the possibility that some manufacturers may have tested clothes washers larger than 3.8 cubic feet with the test load sizes capped at the level for 3.8 cubic feet, resulting in misrepresentations of energy use, inaccurate certifications, and marketplace distortions. DOE cannot responsibly continue to do nothing and wait for the rulemaking to resolve these issues at some time in the future.¹¹ But, in light of DOE's failure to fulfill its regulatory responsibilities, neither can we retroactively enforce the federal standards and DOE regulations, as clarified today, on products that were previously manufactured and sold without a waiver. Therefore, as a matter of equity, the Department will enforce its views on this issue prospectively and give manufacturers 60 days to come into compliance. Specifically, after 60 days from today, clothes washers with container capacities larger than 3.8 cubic feet cannot be sold in the United States without a waiver and all large-capacity clothes washers must be tested, rated, and certified using the test procedure set forth in the waiver.

More generally, the Department intends to improve the waiver process. Because new models that cannot be tested using the existing test procedure must obtain a waiver before they are sold, DOE must do better in processing waivers quickly and appropriately. First, we renew our commitment to act swiftly on waiver requests and to update our test procedures promptly to address issues raised by waivers. The Department will also—for the first time—accept waiver requests submitted electronically via email to AS_Waiver_Requests@ee.doe.gov. Second, we recognize that product innovations will always outpace DOE's rulemaking efforts. Thus, to encourage waivers and prevent the Department's administrative waiver process from delaying or deterring the introduction of novel, innovative products into the marketplace, we also announce that the Department, as a matter of policy, will refrain from enforcement actions related to waiver requests pending with the Department.

Finally, we note that the Department's authority on this matter is limited to compliance with the federal efficiency standard and DOE's implementing regulations. The Federal Trade Commission, which has regulatory authority over manufacturers' representations of energy use, may wish to take additional actions. In addition, the U.S. Environmental Protection Agency, as the brand manager for ENERGY STAR, may have more flexibility to take actions and negotiate remedies, particularly in light of the voluntary nature of the ENERGY STAR Program.

¹¹ See LG at 1-2 (suggesting that the most appropriate way to resolve these issues is to adopt a rule amending the test procedure effective 180 days after its publication).