

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, as amended.¹ This policy statement provides background on DOE's penalty authority and sets forth our basic approach to imposing penalties for violations of DOE's standards and certification requirements. This revision reflects a statutory change,² which resulted in changes to the maximum civil penalty.

I. Background

The Energy Policy and Conservation Act of 1975, as amended, (EPCA or the Act) 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 in the United States comply with the applicable energy and water conservation standards, the Department has promulgated enforcement regulations, which include specific requirements for manufacturers to certify compliance with those standards. *See* 10 C.F.R. Part 429, Subpart B; 10 C.F.R. § 431.36. The Department enforces these regulations to, among other things, reduce

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 The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note ("the Inflation Adjustment Act"), as further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Public Law 114-74) ("the 2015 Act"), requires Federal agencies to adjust each civil monetary penalty provided by law within the jurisdiction of the agency. *See also* 81 Fed. Reg. 41790 (June 28, 2016).

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 creating a disincentive for the manufacture of noncompliant products.

Section 333 of EPCA, codified at 42 U.S.C. § 6303, authorizes the Department to assess civil penalties for knowing violations of certain prohibited acts. *See* 42 U.S.C. § 6302(a)(2)–(6); 10 C.F.R. § 429.102; 10 C.F.R. § 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, adjusted for inflation, is now \$440 per violation for all covered products and covered equipment. 10 C.F.R. §§ 429.120, 431.382(b).³

II. DOE Policy for Civil Penalty Assessment

In assessing penalties under EPCA, the Department's goals are: to punish the past violation(s), to prevent repeat violations by the same party, and to deter violations by other parties. The Department's approach to penalty assessments for two of the acts prohibited by EPCA—failure to comply with applicable EPCA energy and water conservation standards and failure to submit valid certification reports—are described in greater detail below.

³ DOE notes that in enacting the 2015 Act, Congress expanded the scope of violations that are subject to an inflation adjustment. The Federal Civil Penalties Inflation Adjustment Act of 1990 provided that civil penalty adjustments applied “only to violations which occur after the date the increase takes effect.” (Public Law 101–410) The 2015 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.” Therefore, violations occurring prior to December 30, 2016, 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.

A. Penalty for Violating EPCA Standards

Ensuring compliance with energy and water conservation standards is a core element of EPCA's regulatory framework and, more broadly, the Department's mission. EPCA authorizes the Department 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 EPCA conservation standards. *See* 42 U.S.C. § 6303(a)(5).

Pursuant to EPCA, penalties for standards violations are assessed for each unit of a noncompliant 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 in the U.S.).

Generally, the Department seeks the maximum civil penalty against manufacturers and private labelers that knowingly distribute in commerce products or equipment that violate the federal energy or water conservation standards. DOE believes the maximum penalty is both appropriate and necessary, as such violations directly undermine the EPCA 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

EPCA also authorizes the Department 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, manufacturers file reports with the Department certifying that each basic model meets all applicable federal energy and/or water conservation standards. 10 C.F.R. § 429.102(a)(1); 10 C.F.R. § 431.382(a)(3). These reporting requirements provide the Department with information necessary to ensure that the products available to American consumers deliver the required energy or water savings and cost savings consistent with EPCA regulations. Accordingly, the Department has implemented a rigorous enforcement program for conservation standards reporting requirements.

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

In general, DOE intends to set penalties for failure to comply with the certification requirements below the statutory maximum. We believe it is generally appropriate to distinguish penalties for certification violations from violations of energy conservation standards. Although DOE's reporting requirements are crucial to EPCA's regulatory framework, this reduction in the penalty reflects that certification violations do not necessarily mean that the product itself fails to meet the applicable energy conservation standard. Therefore, in cases where a manufacturer does not have a history of noncompliance, DOE will seek a civil penalty that is about 25% of the maximum civil penalty authorized by law. Based on the current maximum of \$440 per day, we initially propose a penalty of \$100 per day for each basic model that has not been certified.

Based on aggravating factors, however, DOE may determine that a significantly higher penalty – including the maximum penalty – is appropriate.

DOE's penalty structure for certification violations reflects the importance of certification in the overall regulatory framework. Certification of a basic model reflects the imperative for a manufacturer to test and make an assessment that a product is compliant with standards prior to distribution in commerce. DOE seeks penalties for a failure to submit a certification report, for significant inaccuracies in certification reports, and for repeated submissions of invalid certification reports.

III. Settlement

The Department also adjusts penalties as appropriate to encourage the prompt and comprehensive resolution of cases. To encourage complete and timely resolution of enforcement actions, we consider a number of additional factors, including, but not limited to, the nature and scope of the violation; a history of noncompliance; whether the entity is a small business; demonstrated inability to pay; the type of product at issue; whether the entity timely self-reported the potential violation; and the entity's self-initiated corrective action, if any. The Department seeks to ensure consistency and equity in settlements by taking into account legitimate differences among EPCA violations, including specific mitigating and aggravating circumstances in individual cases.

Penalty amounts in settlements are and will continue to be higher than in cases involving violations prior to 2010, in which DOE made reductions to reflect DOE's enforcement transition.

1. Nature and Scope of Violation

DOE's consideration of the nature and scope of a violation encompasses many different factors. The following is a non-exhaustive list of some examples of the many factors DOE considers:

- a. The regulatory provision violated (e.g., failure to submit a certification report, submittal of an invalid certification report, manufacture and distribution of a noncompliant product, failure to provide units for testing);
- b. The degree of noncompliance;
- c. The cause of noncompliance (e.g., flawed design, manufacturing drift, installation instructions, supplier changes);
- d. The number of individual models in the basic model and the degree of similarity between those models; and
- e. 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 establish an inability to pay a proposed civil penalty, the respondent in a case must provide at least three years of financial statements or three years of U.S. Federal tax returns. DOE may request additional supporting documentation before reducing a penalty based on an inability to pay. DOE may consider payment plans in limited instances.

3. Type of Product

Because the types of products subject to energy or water conservation standards range from external power supplies to commercial air conditioners, DOE considers the type of product involved when determining an appropriate settlement amount. DOE does not, however, scale

penalties directly based on product cost or the profitability of either an individual model or a product line.

4. Self-Reporting

With respect to self-reporting of violations, DOE only considers a penalty reduction where (1) the entity affirmatively notifies the Department that the company has violated DOE regulations, (2) such notification occurs before the Department begins an investigation into the compliance of the product at issue, and (3) the entity immediately ceased the noncompliant activity upon discovery. DOE does not consider submitting a certification report revealing noncompliance to be self-reporting a violation.

5. Self-Initiated Corrective Action

DOE only considers a penalty reduction for corrective action when the entity began corrective actions before the Department begins an investigation into the compliance of the entity. Corrective actions must be well documented and must result in full compliance with all applicable DOE regulations; actions that meet these criteria are a mitigating factor that DOE may consider in settlement. DOE will determine in its sole discretion whether the actions taken were effective in remedying past noncompliance.

To limit liability by modifying a basic model, a manufacturer must submit a certification report indicating modification of the individual models in the basic model such as to create a new basic model, which must be supported by test data demonstrating that the new basic model performs materially better than the old basic model; DOE will consider the new basic model as units manufactured on or after the date the certification report is submitted. DOE also notes that, under a notice of noncompliance determination, a manufacturer must change the individual

model number of the noncompliant product to avoid consumer confusion between the noncompliant model and the compliant model.

6. Other Mitigating/Aggravating Factors

“Cooperation” is not a mitigating factor DOE considers in determining settlement offers. DOE expects companies to provide in a timely manner all information that DOE requests in its investigations, as required 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). DOE regulations require companies to take certain actions in cases involving potential noncompliance or a DOE finding of noncompliance, *e.g.*, 10 C.F.R. §§ 429.102(a)(4)–(5) (companies must provide test units upon request and permit DOE to observe testing); 10 C.F.R. §§ 429.114(a) (companies must immediately notify customers of the determination of noncompliance and provide DOE with sales and related records within 30 days).

If a company fails to cooperate fully with DOE, DOE may allege additional, separate violations or may consider the lack of cooperation an aggravating factor, resulting in a higher settlement offer. Examples of non-cooperation include failing to provide full information that DOE has requested to investigate respondent’s compliance with federal law, failing to comply with the terms of a Test Notice, or failing to fulfill the terms of a Notice of Noncompliance Determination.