

**THE STATES OF NEW YORK, CALIFORNIA, COLORADO,
CONNECTICUT, ILLINOIS, MARYLAND, MAINE, MICHIGAN,
MINNESOTA, NEW JERSEY, NORTH CAROLINA,
OREGON, VERMONT, WASHINGTON, THE COMMONWEALTH OF
MASSACHUSETTS, THE DISTRICT OF COLUMBIA AND
THE CITY OF NEW YORK**

August 10, 2020

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Dan Brouillette, Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: 60-Day Notice Letter Regarding DOE Failure to Meet Mandatory
Deadlines for Reviewing and Amending Product Efficiency
Standards Pursuant to Energy Policy and Conservation Act ("EPCA"),
42 U.S.C. §§ 6291, *et seq.*

Dear Secretary Brouillette:

We write to express our deep concerns regarding the failures by the Department of Energy ("DOE"), and by you as DOE Secretary, to meet EPCA's mandated deadlines for reviewing and amending energy efficiency standards for 25 categories of consumer and commercial or industrial products. We request that you and DOE immediately comply with your non-discretionary duty to update standards for the products identified below, as required by 42 U.S.C. §§ 6295 and 6313. In the event you refuse or fail to do so within 60 days, the undersigned state and municipal officers provide you with this notice of our intent to commence litigation seeking, among other things, an order enjoining you and DOE to fulfill your statutory obligations in accordance with a court-ordered schedule, along with our costs and attorneys' fees.

I. Background

A. Energy Policy and Conservation Act, 42 U.S.C. §§ 6291, *et seq.*

EPCA created a comprehensive approach to federal energy policy. Congress' primary goals in adopting EPCA included reducing domestic energy demand and increasing energy efficiency. EPCA and its amendments authorize DOE to set minimum energy conservation standards for approximately 60 categories of appliances and equipment used in residences and businesses. A key part of EPCA's framework is its mandate that DOE periodically review and update established energy conservation standards to ensure that they are as stringent as

technologically feasible and economically justified.¹ EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), prohibits DOE from weakening an energy efficiency standard once it has been established by Congress or DOE.²

B. DOE's Statutory Duty to Update Energy Efficiency Standards

EPCA imposes a non-discretionary duty on DOE to periodically review and update efficiency standards for covered consumer and commercial or industrial products. As provided in relevant part by 42 U.S.C. § 6295(m):

Amendment of standards.

(1) In general. Not 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 publish--

(A) a notice of the determination of the Secretary that standards for the product do not need to be amended, based on the criteria established under subsection (n)(2); or

(B) a notice of proposed rulemaking including new proposed standards based on the criteria established under subsection (o) and the procedures established under subsection (p).

For consumer products, DOE must first determine whether amendment of a product standard is warranted based on whether an amended standard will result in significant energy conservation, is technologically feasible and cost-effective.³ If DOE determines that amendment of the standard is warranted, it must issue a proposed rule with the amended standard within the six-year review period.⁴ It must also complete the rulemaking and issue a final rule amending the product standard within two years of the issuance of the proposed rule.⁵ Alternatively, if DOE determines that amendment of the standard is unwarranted, it must revisit that determination within three years.⁶ Similar requirements for regular, periodic review and amendment of standards apply to commercial or industrial equipment covered under 42 U.S.C. § 6313.⁷

For certain product categories, DOE is subject to specific deadlines for issuance of final rules updating current standards.⁸ Furthermore, EPCA requires that upon amendment of the ASHRAE/IES Standard 90.1 for certain products (i.e., the standard or design requirement of a

¹ 42 U.S.C. § 6295(m)(1); *see also*, § 6313(a)(6)(C)(i).

² *See NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

³ 42 U.S.C. § 6295(n)(2).

⁴ 42 U.S.C. § 6295(m)(1)(B).

⁵ 42 U.S.C. § 6295(m)(3)(A).

⁶ 42 U.S.C. § 6295(m)(3)(B).

⁷ *See, e.g.*, 42 U.S.C. §§ 6313(a)(6), (b)(4), (c)(6), (d)(3), (e)(2), (f)(5).

⁸ *See, e.g.*, 42 U.S.C. § 6295(hh)(3) (metal halide lamp fixtures); § 6313(f)(5) (walk-in coolers); § 6313(c)(6)(B) (commercial refrigeration equipment).

product covered under the American Society of Heating, Refrigerating and Air-Conditioning Engineers (“ASHRAE”) energy standard for buildings), DOE must update the national standard for such product either at a level equivalent to the ASHRAE standard within 18 months⁹ or at a more stringent level within 30 months.¹⁰

II. DOE’s Missed Deadlines

DOE has missed mandatory deadlines imposed under 42 U.S.C. §§ 6295 and 6313 for updating efficiency standards applicable to 25 product categories. The table below lists the product categories for which DOE has missed EPCA’s deadline for DOE to act.

Product	Current Standard/Rule	Statutory Requirement	Deadline
Six Year Review Overdue			
Small electric motors	75 Fed. Reg. 10,874 (Final Rule, Mar. 9, 2010).	42 U.S.C. § 6313(a)(6)(C) (requiring DOE to publish, every six years, a notice of determination that standards do not need to be amended or of proposed rulemaking including new proposed standards)	March 9, 2016
Pool heaters	75 Fed. Reg. 20,112 (Final Rule, Apr. 16, 2010).	42 U.S.C. § 6295(m)(1) (requiring DOE to publish, every six years, a notice of determination that standards do not need to be amended or of proposed rulemaking including new proposed standards)	April 16, 2016
Water heaters	75 Fed. Reg. 20,112 (Final Rule, Apr. 16, 2010).	42 U.S.C. § 6295(m)(1)	April 16, 2016
Clothes dryers	76 Fed. Reg. 22,454 (Final Rule, Apr. 21, 2011).	42 U.S.C. § 6295(m)(1)	April 21, 2017
Room air conditioners	76 Fed. Reg. 22,454 (Final Rule, Apr. 21, 2011)	42 U.S.C. § 6295(m)(1)	April 21, 2017
Oil and weatherized gas furnaces	76 Fed. Reg. 37408 (Final Rule, Jun. 27, 2011).	42 U.S.C. § 6295(m)(1)	June 27, 2017
Refrigerators and freezers	76 Fed. Reg. 57,516 (Final Rule, Sept. 15, 2011).	42 U.S.C. § 6295(m)(1)	September 15, 2017
Fluorescent lamp ballasts	76 Fed. Reg. 70,548 (Final Rule, Nov. 14, 2011).	42 U.S.C. § 6295(m)(1)	November 14, 2017
Residential clothes washers	77 Fed. Reg. 32,308 (Final Rule, May 31, 2012).	42 U.S.C. § 6295(m)(1)	May 31, 2018

⁹ 42 U.S.C. § 6313(a)(6)(A).

¹⁰ 42 U.S.C. § 6313(a)(6)(B)(i).

Water- and evaporatively-cooled commercial air conditioners	77 Fed. Reg. 28,928 (Final Rule, May 16, 2012).	42 U.S.C. § 6313(a)(6)(C)	May 16, 2018
Distribution transformers	78 Fed. Reg. 23,335 (Final Rule, Apr. 18, 2013).	42 U.S.C. § 6295(m)(1)	April 18, 2019
Microwave ovens	78 Fed. Reg. 36,316 (Final Rule, Jun. 17, 2013).	42 U.S.C. § 6295(m)(1)	June 17, 2019
Electric motors	79 Fed. Reg. 30,934 (Final Rule, May 29, 2014).	42 U.S.C. § 6295(m)(1)	May 29, 2020
Furnace fans	79 Fed. Reg. 38,130 (Final Rule, July 3, 2014).	42 U.S.C. § 6295(m)(1)	July 3, 2020
Three Year Review Overdue			
Direct heating equipment	81 Fed. Reg. 71,325 (Determination not to amend standards for vented home heating equipment, Oct. 17, 2016).	42 U.S.C. § 6295(m)(3)(B) (requiring DOE to make new determination whether to amend within three years)	October 17, 2019
Dishwashers	81 Fed. Reg. 90,072 (Determination not to amend, Dec. 13, 2016).	42 U.S.C. § 6295(m)(3)(B)	December 16, 2019
Final Rule Overdue			
Non-weatherized and mobile home gas furnaces	80 Fed. Reg. 13,120 (Proposed amended standard, Mar. 12, 2015).	42 U.S.C. § 6295(m)(3)(A) (requiring DOE to publish final rule amending standard within two years of proposed standard)	March 12, 2017
conventional cooking products	80 Fed. Reg. 33,030 (Proposed amended standard, June 10, 2015).	42 U.S.C. § 6295(m)(3)(A)	June 10, 2017
Commercial water heating equipment	81 Fed. Reg. 34,440 (Proposed amended standard, May 31, 2016).	42 U.S.C. § 6313(a)(6)(C)(iii) (requiring DOE to publish final rule amending standard within two years of proposed standard)	May 31, 2018
Specified Review Overdue			
Metal halide lamp fixtures	79 Fed. Reg. 7746 (Final Rule, Feb. 10, 2014).	42 U.S.C. § 6295(hh)(3) (requiring DOE to publish, by Jan. 1, 2019, final determination whether to amend standard, along with amended standard)	January 1, 2019
Walk-in coolers and freezers	82 Fed. Reg. 31,808 (Final Rule, July 10, 2017).	42 U.S.C. § 6313(f)(5) (requiring DOE to publish, by January 1, 2020, determination whether standard should be amended)	January 1, 2020

Commercial refrigeration equipment	79 Fed. Reg. 17,725 (Final Rule, Mar. 28, 2014).	42 U.S.C. § 6313(c)(6)(B) (requiring DOE to publish, within three years of current standard's effective date, determination whether standard should be amended)	March 28, 2020
ASHRAE Update Overdue			
Dedicated outdoor air systems	ASHRAE 90.1 – 2016 (Amendment, Oct. 26, 2016)	42 U.S.C. § 6313(a)(6)(A)(ii)(II) (requiring DOE to adopt updated standard within 18 months of ASHRAE 90.1 amendment) 42 U.S.C. § 6313(a)(6)(B) (requiring DOE to adopt updated standard with more stringent standard within 30 months of ASHRAE 90.1 amendment)	April 26, 2018 (or April 26, 2019 for more stringent standard)
Computer room air conditioners (CRAC) ¹¹	ASHRAE 90.1 - 2016 (Amendment, Oct. 26, 2016)	42 USC 6313(a)(6)(A)(ii)(II) 42 USC 6313(a)(6)(B)	April 26, 2018 (or April 26, 2019 for more stringent standard)
Variable refrigerant flow (VRF) air conditioners and heat pumps ¹²	ASHRAE 90.1 – 2016 (Amendment, Oct. 26, 2016)	42 USC 6313(a)(6)(A)(ii)(II) 42 USC 6313(a)(6)(B)	April 26, 2018 (or April 26, 2019 for more stringent standard)

III. DOE's Unlawful Delay Forfeits Consumer and Environmental Benefits

DOE's delay in strengthening national standards results in missed opportunities to conserve energy and avoid the economic and environmental costs of energy production and use. According to the Appliance Standards Awareness Project (ASAP), the potential energy, emissions and economic benefits associated with amended standards for just four common appliances -- refrigerators and freezers, clothes washers, clothes dryers, and room air conditioners -- include annual reductions of more than \$7.5 billion in consumer utility costs and

¹¹ A six-year lookback analysis is required for CRAC product categories that DOE determines were not subjected to more stringent standards by ASHRAE 90.1-2016. 42 U.S.C. § 6313(a)(6)(C). Because CRAC standards were last updated on May 16, 2012, the deadline for completing a review of the standards for these categories was May 16, 2018. *See* 77 Fed. Reg. 28,928 (May 16, 2012); 84 Fed. Reg. 48,011-12 (Sept. 11, 2019).

¹² A six-year lookback analysis is required for VRF air conditioners and heat pumps product categories that DOE determines were not subjected to more stringent standards by ASHRAE 90.1-2016. 42 U.S.C. § 6313(a)(6)(C). Because standards for VRF air conditioners and heat pumps were last updated on May 16, 2012, the deadline for completing a review for these products classes was May 16, 2018. *See* 77 Fed. Reg. 28,928 (May 16, 2012); 84 Fed. Reg. 32,333 (July 8, 2019).

22 million metric tons of carbon dioxide emissions by the year 2035.¹³ Without question, updated standards for the 25 product categories would generate substantial consumer savings and environmental benefits, with DOE's unlawful delay prolonging the time that less efficient appliances stay on the market and remain in use.

IV. DOE's Delay Harms Public, State, and Local Governmental Interests

DOE's failure to timely review and update efficiency standards violates EPCA, frustrates Congress' energy conservation goals and harms public, state, and local governmental interests. Without the benefit of updated standards, electricity and natural gas consumption will increase, as will energy bills for states, municipalities, and their residents and businesses. Additionally, increases in fossil fuel consumption resulting from reduced efficiency lead to increased emissions of air pollutants that negatively impact public health and the environment, including emissions of carbon dioxide and other gases that contribute to climate change. DOE's inaction hampers the abilities of the undersigned state and municipal governments to meet their energy efficiency, clean energy, and climate goals and commitments. Significant improvements in energy efficiency, including reductions in household, residential, and commercial building energy consumption within state and local jurisdictions, are critical to meeting efficiency targets under state and local government renewable energy and climate policies. Unfortunately, states have few options to fill the void created by DOE's delay.

V. Citizen Suit Claim for DOE's Failure to Perform Non-Discretionary Duty

DOE's failure to timely review and amend, as appropriate, efficiency standards for the 25 categories of products identified above violates DOE's mandatory, non-discretionary duty to periodically update its standards in accordance with 42 U.S.C. §§ 6295 and 6313. DOE's delay in meeting its obligations under §§ 6295 and 6313 is actionable under 42 U.S.C. § 6305(a)(2), which allows for the commencement of a civil action in federal district court against DOE for "an alleged failure . . . to perform any act or duty under this part which is not discretionary." DOE's failure to meet statutory deadlines is also actionable in a civil action under 42 U.S.C. § 6305(a)(3), which authorizes a claim against the Secretary for failing to "comply with a non-discretionary duty to issue a proposed or final rule according to the schedules set forth in [42 U.S.C. § 6295]." The statute provides that such action shall be entitled to expedited review and disposition. *Id.*

We therefore urge DOE, and you, as DOE Secretary, to perform your mandatory duties under EPCA, 42 U.S.C. §§ 6295 and 6313, to immediately review and update the standards applicable to the product categories for which DOE action is overdue. If your failure to comply

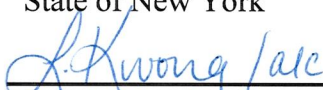
¹³ See ASAP Report, "Next Generation Standards: How the National Energy Efficiency Standards Program Can Continue to Drive Energy, Economic, and Environmental Benefits" at 11-15 (August 2016). ASAP's methodology for estimating savings is based on product sales, estimates of annual shipments, per-unit energy and/or water savings, and average product lifetime. ASAP generally relies on information from recent DOE rulemakings. Its analysis takes into consideration that some percentage of products shipped will meet the level of efficiency contemplated under an assumed DOE standard absent formal adoption of such standard. The ASAP Report analyzed product standard levels equivalent to the "max-tech" levels in the most recent DOE rulemaking for each product. The "max-tech" levels represent DOE's analysis of a product's maximum technologically achievable efficiency.

with EPCA persists, we intend to commence litigation pursuant to 42 U.S.C. §§ 6305(a)(2) and (3) to compel you to perform those duties and to seek costs and attorneys' fees. Please be advised that this letter provides notice of intent to sue under 42 U.S.C. § 6305(b)(2) to the extent such notice is required and that parties other than the undersigned may join any such litigation with respect to the claims covered by this notice.

Sincerely,

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