

NATURAL RESOURCES DEFENSE COUNCIL
PUBLIC CITIZEN
CONSUMER FEDERATION OF AMERICA
NATIONAL CONSUMER LAW CENTER
APPLIANCE STANDARDS AWARENESS PROJECT
NORTHWEST ENERGY EFFICIENCY ALLIANCE
NORTHWEST POWER AND CONSERVATION COUNCIL
EARTHJUSTICE

Re: Notice of Proposed Rulemaking: Inadmissibility of Consumer Products and Industrial Equipment Noncompliant With Applicable Energy Conservation or Labeling Standards

U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

Docket No. USCBP-2012-0004; RIN 1515-AD82

May 25, 2012

I. Introduction

Natural Resources Defense Council, Public Citizen, Consumer Federation of America, National Consumer Law Center (on behalf of its low-income clients), the Appliance Standards Awareness Project, the Northwest Energy Efficiency Alliance, the Northwest Power and Conservation Council, and Earthjustice submit the following comments on CBP and Treasury's proposed rule regarding the importation of products that violate applicable energy efficiency rules.

Our organizations are environmental, consumer, energy efficiency, government, and utility groups that regularly advocate for improvements in efficiency standards and labeling requirements. We believe that fair and effective enforcement of these rules is an important component of our national energy strategy. Such enforcement can help protect the environment, reduce utility bills for businesses and consumers, and ensure a level playing field for companies that do comply with the law. To that end, we support enforcement efforts that will bar imports of noncompliant products without placing significant burdens on imports of compliant products.

In general, we are pleased to see that CBP and the Department of Treasury are finally making an effort to address their statutory duty to promulgate rules under Section 331 of the Energy Policy and Conservation Act (EPCA). Pub. L. 94-163, 42 U.S.C. § 6301. However, for reasons described in more detail below, the proposed rule fails to satisfy that duty and will not be effective in reducing noncompliance among imported products. Accordingly, CBP must take additional steps to rectify these problems.¹

II. The proposed rule fails to comply with the statutory requirement to ensure noncompliant products are refused admission.

Section 331 requires CBP to promulgate regulations ensuring that "[a]ny covered product offered for importation in violation of [section 332] shall be refused admission into the customs territory of the United States." 42 U.S.C. § 6301 (emphasis added). The statute codifies a single exception to this otherwise absolute requirement. CBP is permitted to authorize the entry of noncompliant products only upon terms and conditions appropriate to ensure that "such

¹ Our comments below are directed to CBP because the proposed rule indicates that CBP, and not the Treasury Department, will implement the proposed regulations.

covered product will not violate [section 332], or will be exported or abandoned to the United States.” *Id.* Therefore, to comply with EPCA, the proposed regulations must refuse admission to products unless they either comply with Section 332 of EPCA, 42 U.S.C. § 6302, or meet conditions (including posting of a bond) “appropriate to ensure” that they will come into compliance with Section 332 before being sold. *Id.*

Section 332 in turn prohibits, among other things, violations of the following:

- FTC labeling rules. *Id.* § 6302(a)(1) (*citing Id.* § 6294).
- Compliance certification rules promulgated by DOE. *Id.* § 6302(a)(3).
- Energy efficiency standards set by EPCA itself or DOE acting pursuant to EPCA. *See id.* § 6302(a)(5).

Compliance with these requirements is crucial to achieving the energy saving benefits that Congress sought in enacting EPCA. *See* 42 U.S.C. § 6201 (purposes of EPCA include conserving energy supplies and improving the efficiency of major appliances).

What section 331 requires is implementation of an affirmative program to ensure at the time that a covered product is proposed for importation that the product meets the applicable efficiency standards and labeling requirements.

Unfortunately, despite the clear language of section 331, the proposed rule will not do this. The proposal will not ensure the refusal of admission of “any covered product offered for importation in violation of section [332].” Nor does the proposed rule impose measures appropriate to ensure that such product will come into compliance or be exported or abandoned to the United States. Instead, the proposal would refuse admission only to those noncompliant products that have been identified in a written notice from DOE or FTC that also names the regulated party that is in violation and “describe[s] the subject product or equipment in a manner sufficient to enable CBP to identify the articles.” 77 Fed. Reg. at 17365.

We agree that DOE and FTC can play an important role in the process, but the proposed rule provides no assurance that noncompliant products will be barred entry. Accordingly, it violates the plain language of the statute.

Under the proposed regime, DOE and FTC will have no reason to know that a noncompliant product has been offered for import. It appears that DOE and FTC would only have reason to submit a letter to Customs directing it to bar importation if DOE or FTC had already discovered similar noncompliant products in the United States. This means that the original non-compliant product would have already been admitted into the country. And the proposed rule does not even require importers to provide information that would allow CBP to order the return of the unlawfully admitted product.

The proposed rule’s failure to even attempt to meet EPCA’s enforcement mandate is particularly egregious in light of the existing compliance resources that CBP could have leveraged to establish a workable regime to police the importation of covered products. For example, DOE has established a publicly available and searchable online database of covered products as to which the Department has received certifications of compliance with Federal minimum energy efficiency standards. *See* DOE, Compliance and Certification Management System, at <http://www.regulations.doe.gov/certification-data/>. FTC has proposed to accept certifications submitted to this database as satisfying its own reporting obligation. 77 Fed. Reg. 15298, 15299 (Mar. 15, 2012). Verifying that the basic model number of a product offered for importation shows up in DOE’s database would assure compliance with EPCA’s certification requirements and offer a meaningful degree of assurance that the product complies with federal efficiency standards and labeling requirements.

The proposed rule’s abdication of responsibility to DOE and FTC is also arbitrary and capricious, given that those agencies have—for one reason or another—been unable to effectively address the problem of noncompliant products.

For example, as Natural Resources Defense Council and Public Citizen noted in their April 6, 2011, 60-day notice letter to the agencies, *see* Attachment A, domestic manufacturers have raised concerns about the importation of electric motors and fluorescent lamp ballasts that

violate energy efficient standards under EPCA.² Similarly, a lighting company appears to have been importing and selling lamps that violate applicable efficiency standards since 2008. See Attachment B, Comments of Earthjustice et al. re Application for Exception filed by Tailored Lighting Inc. for SoLux PAR lamps, p. 1-2. But DOE does not appear to have ever taken enforcement action against any of these companies or otherwise publicly identified these products as noncompliant.

Likewise, separate inspections since 2007 by the Government Accountability Office,³ FTC,⁴ and Earthjustice⁵ have revealed that between 38 and 55 percent of covered appliances—many of which are imported—violate FTC’s Appliance Labeling Rule. Yet the only enforcement action FTC has ever brought under that rule was back in 2000 and targeted a domestic manufacturer of oil boilers. See <http://www.ftc.gov/opa/2001/03/enerjet.shtm>.

The agencies’ spotty records of enforcement in this field are hardly surprising. It can be difficult to track down products for testing after they have been dispersed to retail outlets throughout the country. And demonstrating noncompliance with labeling rules can be complicated by the possibility that products were compliant when manufactured or imported, only to have post-admission handling or display damage or dislodge the label. These problems would be eliminated or greatly mitigated through proactive compliance certification or review prior to admission. By contrast, the proposed rule takes the reactive approach of relying entirely on post-admission enforcement efforts. This inevitably will lead to the admission of noncompliant products, contrary to the statutory command.

Further, the proposed rule is arbitrary and capricious because it evades CBP’s *nondiscretionary statutory duty* to refuse admission to noncompliant products by relying on DOE and FTC’s *discretionary authority* to identify a product as noncompliant. Even if those agencies had the resources to identify noncompliant products, the statute does not require them to do so. Future administrations may be less eager to exercise that discretionary authority, which would further undermine the proposed rule’s ability to satisfy the statutory duty.

Even if it were permissible to refuse admission only when products have been identified after the fact by third parties, CBP cannot reasonably rely exclusively on DOE and FTC for such identification. While the agencies may not be willing or able to identify certain noncompliant imported products to Customs, private citizens can still establish those products are noncompliant by bringing citizen suits under 42 U.S.C. § 6305, or under any number of state unfair competition laws. Yet, under the proposed rule, Customs would not refuse admission to these products until notified by DOE or FTC, even if a court had already ruled that these products are noncompliant.

² See Transcript of DOE Public Meeting (Oct. 18, 2010), EERE-2010-BT-STD-0027, at 211-12 (comments of motor manufacturer claiming every motor in informal survey of new products was noncompliant); Transcript of DOE Public Meeting (Sept. 30, 2010), EERE-2010-BT-CE-0014, at 305-06 (comments of second motor manufacturer claiming ability to name at least 20 companies exporting noncompliant motors to U.S.); Transcript of DOE Public Meeting (Jan. 30, 2009), EERE-2007-BT-TP-0007, at 60-61 (comments of motor manufacturer discussing imported motors that are not labeled in accordance with EPCA requirements and that do not meet EPCA efficiency levels); Transcript of DOE Public Meeting (Apr. 26, 2010), EERE-2009-BT-TP-0016, at 33-34 (comments of a representative from a fluorescent lamp ballast manufacturer discussing imported ballasts that do not meet EPCA efficiency levels).

³ GAO-07-1162, “Energy Efficiency: Opportunities Exist for Federal Agencies to Better Inform Household Consumers,” p. 6, available at <http://www.gao.gov/new.items/d071162.pdf> (finding that 26 percent of covered appliances lacked an EnergyGuide label and 24 percent had labels that were “no longer affixed in a prominent and easily accessible location”).

⁴ 77 Fed. Reg. 15300 (38 percent of products were either missing labels or had detached labels)

⁵ RIN 3084-AB15, FTC File No. R611004, Comments of Earthjustice et al., p. 18, available at <http://ftc.gov/os/comments/energylabelamend/00015-83010.pdf> (finding that 22 percent of products were missing labels and 33 percent were otherwise noncompliant).

Finally, the proposed rule's requirement that DOE and FTC not only name the regulated party that is in violation, but also describe the product or equipment in sufficient detail to enable CBP to identify the noncompliant articles, *see* 77 Fed. Reg. at 17365, has not been adequately explained. Commenting on this aspect of the proposal is made difficult because the preamble fails to provide the necessary detail to clarify the intended meaning of this requirement. However, if CBP has in mind a scenario in which DOE enforcement testing of covered products identifies a particular model as violating an applicable efficiency standard, the proposed requirement represents an irrational bar to enforcement. In such a case, DOE may have no information about who imports the noncompliant product, particularly if the product has not been certified as compliant, as covered products may be manufactured by one entity, imported by another, and sold under the brand name of a third company. Moreover, as DOE would be unlikely to ever have information identifying the particular shipping container that carries the noncompliant product, it is unclear whether DOE could ever identify noncompliant covered products in sufficient detail to meet CBP's arbitrary and unlawful enforcement trigger.

III. CBP must, at minimum, require importers to provide proof of compliance or other information sufficient to enable the use of existing DOE and FTC resources to identify noncompliant products and facilitate their return to CBP

Even if CBP remains unwilling to accept the proactive enforcement role that EPCA requires, adopting regulations that require importers to provide evidence of compliance that can be instantly verified would provide at least a minimum degree of assurance that imported covered products comply with EPCA requirements. Such a requirement would rectify at least some of the shortcomings described above and streamline enforcement without adding significant burdens to importers of compliant products.

To this end, CBP should create a system that is linked with the DOE Compliance and Certification Management System database and require that importers identify their proposed import as in compliance with applicable standards and labeling requirements and certified as such in the database. Requiring that importers certify to CBP their compliance with EPCA and using DOE's existing database of certifications to verify the importer's claim would satisfy the statutory mandate by providing substantial assurance in advance of importation that the products comply with efficiency standards. It would also ensure that the products at least comply with DOE's certification requirements, increase the potential penalties for importers of noncompliant products, and alert unsophisticated importers of energy efficiency requirements of which they may otherwise be unaware. While the best approach would be an automated system that instantly checks the product information provided by the importer against the DOE Compliance and Certification Management System database, CBP must, at a minimum, require some form of certification or affirmation that provides sufficient detail to enable verification using the DOE database.

Such regulations would not be significantly different from the requirements CBP places on importers of other products. For example, importers of chemical substances must "certify either that the chemical shipment is subject to [the Toxic Substances Control Act (TSCA)] and complies with all applicable rules and orders thereunder, or that the chemical shipment is not subject to TSCA." 19 C.F.R. § 12.121. To comply, importers must merely sign one of two sample statements. *Id.* Likewise, importers of cheese from Europe to Puerto Rico must supply an affidavit affirming, and to be proven within three years, "that the cheese will be consumed in Puerto Rico or areas outside the Customs territory of the United States." *Id.* § 12.6.

Moreover, a similar approach to the importation of products subject to efficiency requirements is used in Canada. Canada's Energy Efficiency Act provides that where there are reasonable grounds to believe "that an energy-using product is being or has been imported into Canada in contravention of this Act or the regulations" the product may be seized or required to be removed from Canada. Energy Efficiency Act, S.C. 1992, c. 36, s. 17.⁶ To carry out this

⁶ Available online at <http://laws-lois.justice.gc.ca/eng/acts/E-6.4/page-5.html#docCont>.

discretionary enforcement authority, a formalized Memorandum of Understanding provides for the sharing of obligations between Canada Border Service Agency (CBSA) and Natural Resources Canada (NRCan), which administers Canada's energy efficiency standards and labeling requirements. A party importing a product with a tariff code that indicates it may be subject to Canada's energy efficiency requirements must provide five simple pieces of information on an electronically submitted customs release form:

- (a) the name of the product (using one of the names provided on a list);
- (b) the model number;
- (c) the brand name, if any;
- (d) the address of the importer; and
- (e) for which of the following purposes the product is being imported:
 - (i) sale or lease in Canada without modification,
 - (ii) sale or lease in Canada after being modified to comply with applicable energy efficiency requirements, or
 - (iii) use as a component for incorporation into any other product that is to be exported from Canada.

Energy Efficiency Regulations, SOR/2003-136, s. 5.⁷

CBSA verifies that the required data elements have been submitted and transmits the supplied information to NRCan electronically. NRCan receives data from CBSA on a continuous, real-time basis, and cross-checks the customs release data against its own database of products for which required compliance certifications have been submitted.⁸ In cases where no match is found and reporting inconsistencies do not appear to be the cause, NRCan may initiate product-specific alerts through CBSA to block additional imports and require the return of products that have cleared customs.

Though it has some limitations (*e.g.*, it does not appear to provide assurance that required labels are in place on covered products), Canada's approach to imported products at least generates enough information to allow NRCan to verify that there is a matching energy efficiency report for each imported product, which confirms that the product has been certified as meeting Canada's minimum energy performance standards. Moreover, requiring the importer to provide contact information enables NRCan and CBSA to gather additional information from the importer or demand return of the products if compliance problems are detected.

Nor is Canada's program unduly burdensome on importers or customs officials. According to a 2010 report from the Collaborative Labeling and Appliance Standards Program, the majority of Canada's import reports "are filed electronically prior to importation, while few are submitted to the customs officer at the time of importation." Mark Ellis et al., "Compliance Counts: A Practitioner's Guidebook on Best Practice Monitoring, Verification, and Enforcement for Appliance Standards & Labeling" (Sept. 2010) at 45.⁹

Implementation of a similar program in the U.S. could leverage DOE's Compliance and Certification Management System. Like NRCan's database of products for which energy efficiency reports have been submitted, DOE's database contains records for covered products as to which the Department has received a certification report indicating that the product complies with DOE's efficiency standards.

IV. Conclusion

The proposed rule, issued more than 35 years after the statutory deadline and nearly a full year after Natural Resources Defense Council and Public Citizen's letter notifying CBP and the Treasury Department of their intent to enforce the unmet obligation, does not reflect the

⁷ Available online at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-94-651/page-9.html#h-10>.

⁸ Email communication dated May 22, 2012, from John Cockburn, Director, Equipment Division, Office of Energy Efficiency, NRCan, to Timothy Ballo, Earthjustice.

⁹ Available online at http://www.clasponline.org/~media/Files/SLDocuments/2006-2011/2010-09_MVEGuidebookSingle.pdf.

requirements of EPCA or reasoned decision-making. EPCA imposes a clear obligation: any noncompliant covered product offered for importation shall be refused admission. As we note above, there are multiple ways to construct a regulatory regime that would satisfy this command. But the regulations that CBP and Treasury have proposed come nowhere close to meeting EPCA's requirements.

Respectfully submitted,

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