

NATURAL RESOURCES DEFENSE COUNCIL
CONSUMER FEDERATION OF AMERICA
SIERRA CLUB
MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS
PUBLIC CITIZEN
CENTER FOR BIOLOGICAL DIVERSITY

August 10, 2020

By Certified Mail

Hon. Dan Brouillette, Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Re: Sixty-day notice of intent to sue for violations of the Energy Policy and Conservation Act

Dear Secretary Brouillette:

On behalf of the Natural Resources Defense Council, Consumer Federation of America, Sierra Club, Massachusetts Union of Public Housing Tenants, Public Citizen, and Center for Biological Diversity, we urge the Department of Energy (DOE) to comply with its statutory duty to update energy conservation standards under the Energy Policy and Conservation Act (EPCA). To ensure DOE's standards continue to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified, EPCA requires DOE to review and update the energy conservation standards for each product according to deadlines prescribed in the Act. DOE under the Trump Administration has repeatedly and systemically failed to comply with these basic and important duties. As detailed below, DOE is behind on its obligations for twenty-six products. If DOE does not comply with its duty to complete the actions required under EPCA to review and update the standards for these products within sixty days, we intend to bring suit to compel it to do so.

DOE's Legal Obligations

For consumer products, EPCA requires DOE to review the energy conservation standards for each covered product every six years and either make a determination that no

amendments are needed or else propose amended standards. 42 U.S.C. § 6295(m)(1). DOE may refuse to amend standards for a covered product only if amended standards will not result in significant conservation of energy, are not technologically feasible, or are not cost effective as defined under EPCA. *Id.* § 6295(m)(1)(A), (n)(2), (o)(2)(B)(i)(II). If DOE cannot reach one of those conclusions, DOE must propose amended standards “designed to achieve the maximum improvement in energy efficiency” that is “technologically feasible and economically justified.” *Id.* § 6295(m)(1)(B), (o)(2)(A).

EPCA imposes a similar review requirement for each type of covered commercial equipment. DOE must review the energy conservation standards for each class of covered equipment every six years and either make a determination that no amendments are needed or else propose amended standards. *Id.* § 6313(a)(6)(C)(i). DOE may refuse to amend standards for covered equipment only if amended standards will not result in significant conservation of energy, are not technologically feasible, or are not economically justified. *See id.* § 6313(a)(6)(A)(ii)(II), (C)(i)(I). If DOE cannot reach one of those conclusions, DOE must propose amended standards. *Id.* § 6313(a)(6)(C)(i)(II).

Once DOE proposes to amend the energy conservation standards for a covered product or covered equipment, it must publish final amended standards within two years. *Id.* §§ 6295(m)(3)(A), 6313(a)(6)(C)(iii)(I). Conversely, if DOE issues a determination not to amend, the Department must review the product or equipment again within three years. *Id.* §§ 6295(m)(3)(B), 6313(a)(6)(C)(iii)(II).

For certain product categories, EPCA also imposes specific date-certain deadlines for DOE to issue final rules updating current standards. *Id.* § 6295(hh)(3) (metal halide lamp fixtures); § 6313(f)(5) (walk-in coolers).

EPCA also requires that when the ASHRAE/IES Standard 90.1 for certain products is amended, DOE must establish a uniform national standard for any such product either at a level equivalent to the ASHRAE standard within 18 months, *see id.* § 6313(a)(6)(A), or at a level that is more stringent than the ASHRAE standard within 30 months, *see* § 6313(a)(6)(B)(i).

The products with overdue conservation standard reviews are listed in Table 1, products with overdue final rules are listed in Table 2, and products with unmet deadlines triggered by 42 U.S.C. § 6313(a)(6) (so-called “ASHRAE products”) are listed in Table 3.

Table 1: Products with Overdue Reviews under 42 U.S.C. § 6295(m)(1)

Product	Prior Final Rule	Deadline for Review
Small electric motors	75 Fed. Reg. 10874 (March 9, 2010)	March 9, 2016

Product	Prior Final Rule	Deadline for Review
Pool heaters	75 Fed. Reg. 20112 (April 16, 2010)	April 16, 2016
Water heaters	75 Fed. Reg. 20112 (April 16, 2010)	April 16, 2016
Clothes dryers	76 Fed. Reg. 22454 (April 21, 2011)	April 21, 2017
Room air conditioners	76 Fed. Reg. 22454 (April 21, 2011)	April 21, 2017
Oil furnaces and weatherized gas furnaces	76 Fed. Reg. 37408 (June 27, 2011)	June 27, 2017
Refrigerators and freezers	76 Fed. Reg. 57516 (September 15, 2011)	September 15, 2017
Fluorescent lamp ballasts	76 Fed. Reg. 70548 (November 14, 2011)	November 14 2017
Residential clothes washers	77 Fed. Reg. 32308 (May 31, 2012).	May 31 2018
Evaporatively-cooled commercial air conditioners	77 Fed. Reg. 28928 (May 16, 2012).	May 16, 2018
Water-cooled commercial air conditioners	77 Fed. Reg. 28928 (May 16, 2012).	May 16, 2018
Distribution transformers	78 Fed. Reg. 23335 (April 18, 2013).	April 18, 2019
Microwave ovens	78 Fed. Reg. 36316 (June 17, 2013).	June 17, 2019
Direct heating equipment	81 Fed. Reg. 71325 (October 17, 2016) (determining not to amend standards for direct heating equipment at that time).	October 17, 2019
Dishwashers	81 Fed. Reg. 90072 (December 13, 2016) (determining not to amend standards for dishwashers at that time).	December 13, 2019
Electric motors	79 Fed. Reg. 30934 (May 29, 2014).	May 29, 2020
Furnace fans	79 Fed. Reg. 38130 (July 3, 2014).	July 3, 2020

Table 2: Products with Overdue Final Rules

Product	Trigger of Legal Duty	Legal Deadline
Non-weatherized and mobile home gas furnaces	80 Fed. Reg. 13120 (Mar. 12, 2015) (proposed amended standard).	March 12, 2017
Cooking products	80 Fed. Reg. 33,030 (June 10, 2015) (proposed amended standard).	June 10, 2017
Commercial water heaters	81 Fed. Reg. 34,440 (May 31, 2016) (proposed amended standard).	May 31, 2018
Metal halide lamp fixtures	42 U.S.C. § 6295(hh)(3) (requiring DOE to publish a final rule by January 1, 2019 to determine whether the standards should be amended and, if so, to amend such standards).	January 1, 2019
Walk-in coolers and freezers	42 U.S.C. § 6313(f)(5) (stating that “Not later than January 1, 2020, the Secretary shall publish a final rule to determine if the standards established under paragraph (4) should be amended”).	January 1, 2020

Product	Trigger of Legal Duty	Legal Deadline
Commercial refrigeration equipment	42 U.S.C. § 6313(c)(6)(B) (requiring DOE to publish a final rule “Not later than 3 years after the effective date” of the current standards to determine whether such standards “should be amended”).	March 27, 2020

Table 3: ASHRAE Products with Overdue Standards

Product	ASHRAE 90.1 Update	Update Deadline, 90.1 Levels	More Stringent Standard Deadline
Dedicated outdoor air systems	October 26, 2016	April 26, 2018	April 26, 2019
Computer room air conditioners ¹	October 26, 2016	April 26, 2018	April 26, 2019
VRF air conditioners and heat pumps ²	October 26, 2016	April 26, 2018	April 26, 2019

The Need for DOE Action

Updated standards for the products listed above will provide important benefits to our organizations, our members, and the American public. Energy efficiency is the most affordable and effective solution to America’s energy problems, and DOE’s energy conservation standards program has been transformative in making U.S. buildings and products more efficient. Appliance and equipment efficiency standards save energy, increase the reliability of the electricity grid, reduce consumer energy bills, and decrease pollution.

There is ample evidence that additional significant, technologically feasible, economically justified savings are available for the overdue products. For example, the current standards for clothes dryers, clothes washers, refrigerators and freezers, and room

¹ For computer room air conditioner (CRAC) product categories that DOE determines were not subjected to more stringent standards by ASHRAE 90.1-2016, DOE must conduct a 6-year lookback analysis under 42 U.S.C. § 6313(a)(6)(C). CRAC standards were last updated on May 16, 2012, which established a deadline for completing a review of the standards for these categories by May 16, 2018. *See* 77 Fed. Reg. 28928 (May 16, 2012). The full table of CRAC product classes, including whether or not they have been triggered by ASHRAE 90.1 updates, is located at 84 Fed. Reg. 48011-12 (Sept. 11, 2019). All classes not triggered by updates are subject to the 6-year lookback.

² For variable refrigerant flow (VRF) air conditioners and heat pumps product categories which DOE determines were not subjected to increased standards in ASHRAE 90.1-2016, DOE is bound to conduct a 6-year review under 42 U.S.C. § 6313(a)(6)(C). Standards for VRFs were last updated on May 16, 2012, which established a deadline for completing a review for these products classes by May 16, 2018. *See* 77 Fed. Reg. 28928 (May 16, 2012). The full table of VRF product classes, including whether or not they have been triggered by ASHRAE 90.1 updates, is located at 84 Fed. Reg. 32333 (July 8, 2019). All classes not triggered by updates are subject to the 6-year lookback.

air-conditioners were set based on negotiated levels recommended jointly a decade ago by manufacturers, efficiency and consumer advocates, and other interested stakeholders. Even when these standards were set, it was clear that adopting stronger standards would achieve significant additional cost-effective energy savings for consumers. For example, DOE found that more stringent clothes washer standards than those adopted in 2012 would maximize the net present value of consumer benefits. *See* 77 Fed. Reg. 32,308, 32,372-74 (Oct. 1, 2012) (comparing net present value of consumer benefits for trial standard levels 4 and 5 with adopted level 3). Similarly, DOE found that stronger room air-conditioner standards would maintain a favorable net present value of consumer benefits and that stronger standards for some types of refrigerators and freezers could maintain or increase the net present value of consumer benefits for those products. *See* 76 Fed. Reg. 22,454, 22,555-57 (Apr. 21, 2011) (comparing net present value of consumer benefits for room air-conditioner trial standard level 5 with adopted level 4); 76 Fed. Reg. 57,516, 57,597-601 (Sept. 15, 2011) (comparing net present value benefits for standard size freezer and compact refrigeration product trial standard levels).

The Energy Star program confirms that significant, additional cost-effective energy savings are available from products as to which DOE action is overdue. The Energy Star specifications for many of the overdue products and equipment require substantially greater efficiency than DOE's current standards—in some cases more than 30% greater.³ Moreover, these Energy Star levels have achieved significant market penetration. For example, as of 2018, Energy Star certified products accounted for 51% of residential clothes washer shipments, 46% of residential refrigerators, 42% of room air conditioners, 37% of residential freezers, 35% of all clothes dryers, and 56% of commercial gas water heaters.⁴ The robust sales of these efficient models suggest that efficiency levels that meet or exceed Energy Star specifications would be cost effective for a significant percentage of American households.

In addition to providing consumer benefits, adopting stronger standards would achieve significant additional reductions in air pollution emissions and other environmental harms caused by energy production. A 2016 analysis from the Appliance Standards Awareness Project and the American Council for an Energy Efficient Economy projected that updated standards for clothes dryers, refrigerators and freezers, water heaters, distribution transformers, and electric motors alone would achieve an annual reduction in carbon dioxide (CO₂) emissions of about 70 million metric tons in 2035, a figure greater than the current annual CO₂ emissions of many U.S. states.⁵

³ *See* EPA, “Energy Star Sales Associate Training” materials for each product, at https://www.energystar.gov/index.cfm?c=pt_univ.pt_univ_appliances.

⁴ *See* EPA, *Energy Star Unit Shipment and Market Penetration Report: Calendar Year 2018 Summary* at 4-6, at <https://www.energystar.gov/sites/default/files/asset/document/2018%20Unit%20Shipment%20Data%20Summary%20Report%20.pdf>.

⁵ *See* deLaski, et al., *Next Generation Standards: How the National Energy Efficiency Standards Program Can Continue to Drive Energy, Economic, and Environmental Benefits* at 11 (Aug. 4, 2016), at

None of the benefits of stronger standards will accrue, however, if DOE continues its unlawful failure to comply with its duties under EPCA.

Conclusion

DOE's unlawful failure to review and update the energy conservation standards for the twenty-six products listed above is unacceptable. For each product with an overdue review, *supra* tbl. 1, DOE must immediately complete its required review and publish in the Federal Register either a notice proposing updated standards or a notice explaining the Department's determination that the standards should not be amended. In addition, DOE must expeditiously finalize updated standards that are now overdue, *supra* tbl. 2-3.

DOE's failures to perform its nondiscretionary duties to review, update, and issue standards under EPCA are subject to suit under 42 U.S.C. § 6305(a). If DOE does not cure its non-compliance with its EPCA obligations, as described above, within 60 days, we intend to file suit and obtain a court order compelling the Department to do so. To the extent our notice of intent to sue is required by 42 U.S.C. § 6305(b)(2), this letter provides that notice. Other parties not signatories to this letter may also join this litigation with respect to the same claims covered by this letter.

Respectfully,



Timothy Ballo
Earthjustice
1001 G Street, NW
Suite 1000
Washington, DC 20001
(202) 745-5209
tballo@earthjustice.org

*On behalf of Sierra Club and Center for
Biological Diversity*

/s/ Melissa J. Lynch (by permission)
Melissa J. Lynch
Jared Knicley
Natural Resources Defense Council
1152 15th St., NW Suite 300
Washington, DC 20005
ML: (202) 717-8296
JK: (202) 513-6242
llynch@nrdc.org
jknicley@nrdc.org

*On behalf of Natural Resources Defense
Council*

<https://aceee.org/research-report/a1604>. The most recent data from the U.S. Energy Information Administration show that 24 states have annual energy-related CO₂ emissions less than 70 million metric tons. EIA, State Carbon Dioxide Emissions Data (Oct. 23, 2019), at <https://www.eia.gov/environment/emissions/state/>.

/s/ Mel Hall-Crawford (by permission)

Mel Hall-Crawford
Consumer Federation of America
1620 Eye Street, NW – Suite 200
Washington, D.C. 20006
(202) 387-6121
melhc@consumerfed.org

On behalf of Consumer Federation of America

/s/ Charles Harak (by permission)

Charles Harak
National Consumer Law Center
7 Winthrop Sq.
Boston, MA 02110
(617) 542-8010
charak@nclc.org

On behalf of Massachusetts Union of Public Housing Tenants

/s/ Allison M. Zieve (by permission)

Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

On behalf of Public Citizen

cc: Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580