



April 6, 2011

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

George W. Madison
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Allen Gina
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U.S. Customs and Border Protection
Department of Homeland Security
1300 Pennsylvania Avenue, N.W.
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RE: 60-Day Notice of Intent to Sue for Violation of the Energy Policy and Conservation Act

Dear Mr. Madison and Assistant Commissioner Gina:

We are writing on behalf of the Natural Resources Defense Council and Public Citizen and their members to respectfully call upon the U.S. Department of the Treasury and the U.S. Department of Homeland Security to fulfill legal requirements relating to the energy efficiency of consumer products and commercial and industrial equipment. Section 331 of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 42 U.S.C. § 6301, requires the Secretary of the Treasury to prescribe regulations ensuring the compliance of imported products with federal energy efficiency standards and labeling requirements, but these regulations have not been issued. The failure to complete these regulations has undermined energy-saving efforts that are sorely needed to protect our environment, inhibited the efforts of American households and businesses to reduce their utility bills, and placed compliant domestic manufacturers at a competitive disadvantage relative to non-compliant foreign firms.

Our clients are organizations whose members and own interests are adversely affected by the failure to promulgate rules under 42 U.S.C. § 6301. These organizations regularly advocate for improvements in energy efficiency standards and labeling requirements, and their members regularly purchase products that are subject to efficiency and labeling requirements that must be assured by the above-referenced rules.

This letter serves two purposes. First, our clients wish to bring this issue to the Department's attention and determine whether the Department intends to expeditiously remedy the problem identified by promulgating the regulations required by law. We look forward to working with the Department if this is its intent. Second, this letter provides notice of our intent to sue to enforce the requirements of 42 U.S.C. § 6301 if the Department does not commit to an expeditious remedy. The failure by the Departments of Treasury and Homeland Security to promulgate the above-referenced regulations as required by 42 U.S.C. §6301 constitutes failure by these agencies to perform acts or duties under 42 U.S.C. Ch. 77, Subch. II, Part A that are not discretionary with these agencies within the meaning of 42 U.S.C. § 6305(a)(2). Because the Homeland Security Act of 2002 (Homeland Security Act), Pub. L. 107-296, 116 Stat. 2135 (2002) and Treasury Order No. 100-16 have transferred most of the Treasury Department's customs responsibilities to the Department of Homeland Security, this letter is directed to both the Treasury Department and the Department of Homeland Security. We are providing this letter pursuant to the 60-day notice requirement of the citizen suit provision of EPCA, to the extent such notice is deemed necessary by a court. *See* 42 U.S.C. § 6305(b)(2). To the extent that this provision indicates that the Secretary of Energy and the Federal Trade Commission must also be notified, we are providing this letter to those parties in fulfillment of any such requirement. *See id.*

In this letter, we first outline the legal framework of EPCA's energy efficiency standards and labeling requirements. Then, we describe the violations of law requiring immediate correction by the Department of the Treasury and the Department of Homeland Security. Finally, we discuss the significant benefits that expeditious compliance with these mandates will produce for public health and welfare, the environment, and the economy.

I. Legal Background

EPCA establishes a comprehensive framework to improve the energy efficiency of new products. EPCA mandates minimum energy efficiency standards for nearly all major household appliances and many kinds of commercial and industrial equipment. These standards must be set at the maximum efficiency level that is technologically feasible and economically justified. 42 U.S.C. § 6295(o)(2)(A). EPCA also requires products to be labeled with information on their annual operating costs and to include comparative information on energy efficiency to assist consumers in making purchasing decisions. *See id.* § 6294(c)(1). Pursuant to 42 U.S.C. § 6302, it is unlawful "for any manufacturer or private labeler to distribute in commerce any new covered product to which [an EPCA labeling requirement] applies, unless such covered product is labeled in accordance with such rule" and "for any manufacturer or private labeler to distribute in commerce any new covered product which is not in conformity with an applicable energy conservation standard established in or prescribed under this part." *Id.* § 6302(a)(1) & (5).¹

¹ The statute also establishes water efficiency standards for a range of products. *See* 42 U.S.C. § 6295(g) (dishwashers and clothes washers), (j)(showerheads and faucets), (k)(water closets and urinals), (dd)(commercial

EPCA's efficiency standards and labeling requirements apply to all new covered products sold in the U.S., regardless of where those products are built. The statute defines a "manufacturer" as "any person who manufactures" a product, *Id.* § 6291(12), while to "manufacture" means "to manufacture, produce, assemble, or import." *Id.* § 6291(10). Therefore, products built abroad must comply with EPCA's requirements by the time they are imported into the U.S. and distributed in commerce.

However, some U.S. manufacturers have raised concerns about the importation of certain covered products that do not comply with EPCA requirements. For example, at a recent Department of Energy public meeting on EPCA efficiency standards for electric motors, a representative from a motor manufacturer related that he was unable to locate a compliant electric motor in an informal survey of new products. *See* Transcript of DOE Public Meeting (Oct. 18, 2010), EERE-2010-BT-STD-0027, at 211-12.² A representative of another motor manufacturer told DOE that he could name at least 20 companies who export noncompliant motors to the U.S. *See* Transcript of DOE Public Meeting (Sept. 30, 2010), EERE-2010-BT-CE-0014, at 305-06;³ *see also* Transcript of DOE Public Meeting (Jan. 30, 2009), EERE-2007-BT-TP-0007, at 60-61 (comments of a representative from an electric motor manufacturer discussing imported motors that are not labeled in accordance with EPCA requirements and that do not meet EPCA efficiency levels);⁴ 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).⁵ As discussed more fully below, the failure of imported products to meet EPCA requirements has serious consequences for the environment, domestic manufacturers, and the American consumers of these products.

Congress recognized the importance of ensuring the compliance of imported products when it enacted EPCA in 1975. Therefore, EPCA requires the Treasury Department to prescribe rules to ensure imported products comply with the Act's efficiency measures. EPCA provides that, subject to limited exceptions, "[a]ny covered product offered for importation in violation of [EPCA] shall be refused admission into the customs territory of the United States under rules issued by the Secretary of the Treasury." 42 U.S.C. § 6301. EPCA required the Secretary of the

perinse spray valves. Although not discussed in detail here, the missing regulations also must ensure compliance with those standards.

² The transcript from the October 18, 2010 public meeting is available on the Department of Energy's website at http://www1.eere.energy.gov/buildings/appliance_standards/commercial/electric_motors_framework_public_meeting.html.

³ The transcript from the Sept. 30, 2010 public meeting is available on the Department of Energy's website at http://www1.eere.energy.gov/buildings/appliance_standards/certification_nopr_public_meeting.html.

⁴ The transcript from the January 30, 2009 public meeting is available on the Department of Energy's website at http://www1.eere.energy.gov/buildings/appliance_standards/commercial/small_electric_motors_nopr_public_meeting.html.

⁵ The transcript from the April 26, 2010 public meeting is available on the Department of Energy's website at http://www1.eere.energy.gov/buildings/appliance_standards/residential/fluorescent_lamp_ballasts_ecs_prelim_public_meeting.html.

Treasury to prescribe rules to implement these requirements “not later than 180 days after December 22, 1975.” *Id.*⁶

Despite EPCA’s clear command to complete customs regulations by June 1976, these regulations have never been promulgated. In July of 1976, the U.S. Customs Service proposed regulations to address, in part, the requirements of 42 U.S.C. § 6301. *See* 41 Fed. Reg. 31,223 (July 27, 1976) (to be codified at 19 C.F.R. § 12.92). However, the Customs Service never finalized this proposal, nor did it promulgate other regulations implementing 42 U.S.C. § 6301. For several years after the Customs Service issued the 1976 proposed rule, the agency’s regulatory agenda carried references to it as a regulation under development. *See, e.g.*, 46 Fed. Reg. 22,116 (Apr. 15, 1981). But references to the proposal then ceased without regulations implementing 42 U.S.C. § 6301 having been completed.

As noted above, the Homeland Security Act of 2002 (Homeland Security Act), Pub. L. 107-296, 116 Stat. 2135 (2002), subsequently transferred many of the Treasury Department’s customs responsibilities to the Department of Homeland Security. The Homeland Security Act reassigned the U.S. Customs Service, “including the functions of the Secretary of the Treasury relating thereto,” to the Department of Homeland Security. Pub. L. 107-296, § 402, codified at 6 U.S.C. § 203(1). While the Secretary of the Treasury retained general authority over customs revenue functions, Treasury Department Order No. 100-16 delegated this authority to the Secretary of Homeland Security. 68 Fed. Reg. 28322 (May 23, 2003). The Department of Homeland Security ultimately renamed the Customs Service as U.S. Customs and Border Protection. 72 Fed. Reg. 20131 (April 23, 2007). And in the “Security and Accountability for Every Port Act of 2006,” Congress created the Office of International Trade within U.S. Customs and Border Protection. Pub. L. 109-347 § 402, codified at 19 U.S.C. § 2072.

But these transfers of responsibility have had no impact on the status of the customs regulations required by EPCA. Neither the Treasury Department nor the Department of Homeland Security has fulfilled the statutory mandate to prescribe rules implementing 42 U.S.C. § 6301.

⁶ The full text of this provision is reproduced below:

Any covered product offered for importation in violation of section 6302 of this title shall be refused admission into the customs territory of the United States under rules issued by the Secretary of the Treasury, except that the Secretary of the Treasury may, by such rules, authorize the importation of such covered product upon such terms and conditions (including the furnishing of a bond) as may appear to him appropriate to ensure that such covered product will not violate section 6302 of this title, or will be exported or abandoned to the United States. The Secretary of the Treasury shall prescribe rules under this section not later than 180 days after December 22, 1975.

II. Statutory Violations

In failing to promulgate regulations to ensure the compliance of imported products with EPCA, the Department of the Treasury and Department of Homeland Security are in violation of 42 U.S.C. § 6301. The statutory deadline for these regulations has long since passed, and the violation is a continuing and ongoing one. The failure to perform that non-discretionary duty is proper grounds for a citizen suit under EPCA. *See* 42 U.S.C. § 6305(a)(2). Therefore, to the extent such notice is required, this letter provides notice, pursuant to 42 U.S.C. § 6305(b)(2), of our clients' intent to commence a civil action against the Secretary of the Treasury and the Secretary of Homeland Security for failure to timely promulgate the regulations required by 42 U.S.C. § 6301.

III. The Need for Customs Regulations

Effective enforcement of EPCA's energy efficiency standards and labeling requirements against imported products is essential to realizing the benefits that those measures were intended to achieve. As the Department of Energy's General Counsel has stated, "[f]or the sake of our environment and our economy, it's critical that we enforce our energy efficiency regulations. Strong enforcement of the rules will require compliance and keep manufacturers who break the law from having a competitive advantage over manufacturers who play by the rules." Office of the General Counsel, U.S. Dep't of Energy, "Conservation Standards Enforcement," at <http://www.gc.energy.gov/1217.htm> (last visited Nov. 24, 2010). The customs regulations required by 42 U.S.C. § 6301 represent a vital addition to the Department of Energy's own enforcement efforts.

When effectively enforced, EPCA's energy efficiency standards and labeling requirements can achieve important goals of public health and environmental protection. Reducing the electricity used by new household appliances and commercial and industrial equipment leads to the decreased burning of fossil fuels at power plants, which translates to reductions in emissions of greenhouse gases and other air pollutants.

The Department of Energy recently estimated that, by 2005, its efficiency standards had saved customers \$64 billion dollars and that the cumulative customer savings would increase to \$241 billion by 2030.⁷ The standards also achieve substantial pollution reductions. Annual carbon savings are projected to reach 38 million tons by 2020 and 1,200 million tons by 2045. Completing the regulations at issue is necessary to assure the energy savings provided for by EPCA's efficiency standards and labeling requirements and thereby reduce the severity of local and national air pollution problems and the impacts of global warming and its resultant harm.

Beyond the environmental and health benefits, ensuring the compliance of imported products with energy efficiency standards and labeling requirements will financially benefit

⁷ http://apps1.eere.energy.gov/buildings/publications/pdfs/corporate/regulatory_programs_mypp.pdf

individuals and businesses that purchase new products, because the operating cost savings realized through efficiency standards are typically much greater than any increase the initial cost of compliant products. For example, the Department of Energy found that the efficiency standards it adopted pursuant to EPCA for general service fluorescent lamps and incandescent reflector lamps will save the purchasers of these lighting products up to a cumulative \$71 billion over 30 years. 74 Fed. Reg. 34,080, 34,083 (July 14, 2009). In addition, ensuring that imported products comply with EPCA's labeling requirements preserves consumers' access to valuable information, allowing them to cut their electricity use and save money in the process. *See, e.g.*, 75 Fed. Reg. 11,483, 11,484-85 (Mar. 11, 2010) (discussing the need for and benefits of EPCA energy efficiency labels for televisions).

Further, the required regulations are important to U.S. manufacturers and the jobs they provide. As one trade association of manufacturers whose products are subject to EPCA efficiency standards has explained, the lack of an effective program to ensure that foreign manufacturers abide by U.S. regulations creates an "'unlevel playing field' between manufacturers who abide by the rules versus manufacturers who see no penalty for noncompliance." Comments of National Electrical Manufacturers Association (Jan. 25, 2010), Dep't of Energy Rulemaking on Energy Conservation Standards for Small Electric Motors, EERE-2007-BT-STD-0007, comment 24, at 31. When some manufacturers are able to sell equipment in the U.S. at a lower price than law-abiding manufacturers who use more expensive compliant designs, "the potential loss in sales and jobs for these law-abiding manufacturers could be huge." *Id.* One representative of an electric motors manufacturer has estimated that imported products with noncompliant motors embedded within them can undercut the price of compliant domestic products by 30 percent or more. *See* Transcript of DOE Public Meeting (Sept. 30, 2010), EERE-2010-BT-CE-0014, at 306.

Finally, the need for the customs regulations required by 42 U.S.C. § 6301 is especially great at this time. The role of greenhouse gas emissions in driving global warming has highlighted the importance of seizing opportunities to eliminate wasteful uses of energy. *See, e.g.*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (U.S. Environmental Protection Agency finding that greenhouse gas emissions endanger both the public health and the public welfare of current and future generations). Further, imported products now account for a significant share of the products that must comply. Indeed, for some products, such as room air conditioners, all or substantially all units are now manufactured outside the U.S. *See* Dep't of Energy, Preliminary Technical Support Document: Residential Clothes Dryers and Room Air Conditioners (Feb. 2010) at § 3.6.1 ("The manufacture of room air conditioners has, in recent years, entirely moved offshore.").

IV. Conclusion

We hope that the Department will agree to move swiftly to develop and promulgate regulations and stand ready to work with the Department to that end. However, if the Department cannot commit, within 60 days of the date of this letter, to a schedule for

expeditious action to cure the above-referenced violations, our clients intend to pursue litigation in Federal District Court seeking injunctive and declaratory relief against the Department of the Treasury and the Department of Homeland Security to compel performance of their nondiscretionary duties under 42 U.S.C. § 6301.

We welcome the opportunity to discuss the matters raised in the letter. Please contact us promptly at the address below if you would like to pursue such discussions.

Sincerely,

/s/ Benjamin Longstreth (as authorized)

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