

1 Mark McKane, P.C. (SBN 230552)
Austin L. Klar (SBN 292271)
2 KIRKLAND & ELLIS LLP
555 California Street
3 San Francisco, CA 94104
Telephone: (415) 439-1400
4 Fax: (415) 439-1500
E-mail: mark.mckane@kirkland.com
5 austin.klar@kirkland.com

6 Stuart Drake (*pro hac vice*)
Edmund G. LaCour Jr. (*pro hac vice*)
7 C. Harker Rhodes IV (*pro hac vice*)
KIRKLAND & ELLIS LLP
8 655 Fifteenth Street, NW
Washington, DC 20005
9 Telephone: (202) 879-5000
Fax: (202) 879-5200
10 E-mail: stuart.drake@kirkland.com
edmund.lacour@kirkland.com
11 harker.rhodes@kirkland.com

12 Attorneys for Defendant-Intervenor
AIR-CONDITIONING, HEATING, &
13 REFRIGERATION INSTITUTE

14 **UNITED STATES DISTRICT COURT**

15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 NATURAL RESOURCES DEFENSE)
COUNCIL, INC., *et al.*,)
17)
Plaintiffs,)

18 v.)

19 RICK PERRY, *et al.*,)

20 Defendants,)

21 and)

22 AIR CONDITIONING, HEATING, AND)
23 REFRIGERATION INSTITUTE,)

24 Defendant-Intervenor.)
25)
26)
27)
28)

Lead Case

CASE NO. 3:17-cv-03404-VC

**DEFENDANT-INTERVENOR'S
NOTICE OF MOTION, MOTION TO
DISMISS, AND MEMORANDUM IN
SUPPORT**

Complaint Filed: June 13, 2017

Consolidated Complaint Filed:
Sept. 8, 2017

Judge: Hon. Vince Chhabria

Hearing Date: January 18, 2018

Time: 10:00am

Courtroom: 4, 17th Floor

1 THE PEOPLE OF THE STATE OF
2 CALIFORNIA, *et al.*,

3 Plaintiffs,

4 v.

5 JAMES R. PERRY, *et al.*,

6 Defendants,

7 and

8 AIR CONDITIONING, HEATING, AND
9 REFRIGERATION INSTITUTE,

10 Defendant-Intervenor.

) **Consolidated with**

) CASE NO. 3:17-cv-03406-VC

11
12 **NOTICE OF MOTION**

13 TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

14 PLEASE TAKE NOTICE, pursuant to Civil Local Rule 7-2, that on January 18, 2018, at
15 10:00 am, or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince
16 Chhabria, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, the
17 Air-Conditioning, Heating, and Refrigeration Institute (“AHRI”) will move to dismiss the First,
18 Second, and Third Claims for Relief of the Consolidated Complaint in the above-entitled
19 consolidated cases. In accordance with Judge Chhabria’s Civil Standing Order, counsel for AHRI
20 has conferred with counsel for the parties and determined that this hearing date is mutually
21 acceptable.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), AHRI respectfully moves to dismiss the First, Second, and Third Claims for Relief of the Consolidated Complaint in the above-captioned consolidated cases for lack of subject matter jurisdiction and failure to state a claim. This motion is supported by the accompanying Memorandum of Points and Authorities, and by such oral argument as the Court may allow.

DATED: September 29, 2017

Respectfully submitted,

KIRKLAND & ELLIS LLP

By: /s/ Mark McKane
Mark McKane
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Fax: (415) 439-1500
E-mail: mark.mckane@kirkland.com

Stuart Drake (*pro hac vice*)
Edmund G. LaCour Jr. (*pro hac vice*)
C. Harker Rhodes IV (*pro hac vice*)
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
Telephone: (202) 879-5000
Fax: (202) 879-5200
E-mail: stuart.drake@kirkland.com
 edmund.lacour@kirkland.com
 harker.rhodes@kirkland.com

Attorneys for Defendant-Intervenor
AIR-CONDITIONING, HEATING, &
REFRIGERATION INSTITUTE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES TO BE DECIDED 1

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

 A. Energy Conservation Standards and the Error Correction Rule 3

 B. The Current Actions..... 4

ARGUMENT 5

 I. THE ERROR CORRECTION RULE DOES NOT IMPOSE ANY
NONDISCRETIONARY DUTY ON DOE TO PUBLISH FINAL ENERGY
CONSERVATION STANDARDS 5

 II. NO STATUTE ENABLES PLAINTIFFS TO OBTAIN AN ORDER REQUIRING
DOE TO PUBLISH AND ENFORCE PROPOSED STANDARDS THAT DOE
HAS NOT FINALLY ADOPTED..... 8

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Alcaraz v. Block,
746 F.2d 593 (9th Cir. 1984)..... 10

Chen v. Slattery,
862 F. Supp. 814 (E.D.N.Y. 1994)..... 9

Ctr. for Biological Diversity v. Norton,
254 F.3d 833 (9th Cir. 2001)..... 6

Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior,
88 F.3d 1191 (D.C. Cir. 1996) 9

NRDC v. Abraham,
355 F.3d 179 (2d Cir. 2004)..... 3, 7

NRDC v. Thomas,
885 F.2d 1067 (2d Cir. 1989)..... 6

Rowell v. Andrus,
631 F.2d 699 (10th Cir. 1980)..... 7

Si v. Slattery,
864 F. Supp. 397 (S.D.N.Y. 1994)..... 9, 10

Wang v. Slattery,
877 F. Supp. 133 (S.D.N.Y. 1995)..... 9

Statutes

5 U.S.C. §552..... 2, 8

42 U.S.C. §6295..... 3, 7

42 U.S.C. §6305..... 5

42 U.S.C. §6316..... 3

44 U.S.C. §1503..... 2

44 U.S.C. §1505..... 2, 8

Regulations

10 C.F.R. §430.5..... 3, 4, 6, 9

81 Fed. Reg. 26,998 (May 5, 2016)..... 7

81 Fed. Reg. 57,745 (Aug. 24, 2016)..... 6, 7

Other Authority

Current Unified Agenda of Regulatory and Deregulatory Actions,
OIRA, <http://bit.ly/2vIJl2G> (last visited Sept. 29, 2017) 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11

STATEMENT OF ISSUES TO BE DECIDED

In 2016, the U.S. Department of Energy (“DOE”) promulgated a procedural regulation known as the Error Correction Rule. The Error Correction Rule requires DOE to post proposed energy conservation standards online for public comment on potential errors, for consideration by DOE, before those proposed standards can be published in the *Federal Register* and become effective. The Error Correction Rule contains no set date by which DOE must publish final energy conservation standards in the *Federal Register*. Nevertheless, in these actions, plaintiffs assert that the Error Correction Rule, the Administrative Procedure Act (“APA”), and the Federal Register Act (“FRA”) compel DOE to adopt and publish final versions of four proposed standards that DOE has posted for public comment on potential errors.

12
13
14
15
16
17
18
19
20
21

Defendant-Intervenor Air-Conditioning, Heating, and Refrigeration Institute (“AHRI”) now moves to dismiss three of the four claims in plaintiffs’ complaint. This motion raises the following issues:

1. Whether plaintiffs’ first claim for relief should be dismissed because the Error Correction Rule does not limit DOE’s discretion to reassess, modify, or withdraw proposed energy conservation standards rather than putting those standards into effect by publishing them in the *Federal Register*.

2. Whether plaintiffs’ second and third claims for relief should be dismissed because the proposed standards that DOE posts for error correction have not been “adopted” as “substantive rules of general applicability” that must be published in the *Federal Register* under the APA and the FRA.¹

PRELIMINARY STATEMENT

22
23
24
25
26

The Error Correction Rule is a sensible mechanism to allow public review of proposed energy conservation standards to help DOE catch potential errors in those standards before they are adopted and published in the *Federal Register*. In this action, plaintiffs seek to turn that sensible DOE regulation into something completely different. Plaintiffs would make the Error Correction

27
28

¹ AHRI takes no position on whether plaintiffs’ fourth claim for relief should also be dismissed.

1 Rule a straightjacket that would force DOE to adopt and publish any proposed standards that it has
2 posted for error correction. Plaintiffs seek a decision in this Court that would prevent the agency
3 charged with implementing EPCA from exercising its discretion to reconsider or withdraw its
4 proposed standards in light of revised factual or legal determinations, new policy priorities, or any
5 other changed circumstances.

6 AHRI opposes such an outcome for three reasons. *First*, the text of the Error Correction
7 Rule imposes no mandatory duty on the agency to publish its final energy conservation standards by
8 any specific deadline; to the contrary, the Error Correction Rule expressly preserves the agency's
9 discretion to review and correct its proposed standards at any time up until final publication.
10 *Second*, the outcome plaintiffs seek conflicts with the well-established rule that an agency normally
11 has inherent authority to review and reconsider its regulations until the moment those regulations are
12 published. *Third*, plaintiffs' interpretation of the Error Correction Rule also makes no sense as a
13 practical matter, because (as DOE recognizes) it could force the agency to adopt and publish its
14 proposed standards even when the agency later recognizes those proposed standards would create
15 problems if finally adopted. *See* Defs.' Mot. to Dismiss at 18, Doc. 46. Because the Error
16 Correction Rule does not impose the nondiscretionary duty that plaintiffs allege, their first claim
17 must be dismissed for lack of subject matter jurisdiction and failure to state a claim.

18 Plaintiffs also err in their second and third claims, which allege that the APA and the FRA
19 require DOE to adopt its proposed standards as final rules and publish them in the *Federal Register*.
20 The APA and the FRA require that when a government agency has "adopted" any "substantive rules
21 of general applicability," those rules must be published in the *Federal Register*. 5 U.S.C.
22 §552(a)(1)(D); *see* 44 U.S.C. §§1503, 1505. Those statutes serve an important function: they ensure
23 that agencies must give the public fair notice of the regulations they intend to enforce. But they do
24 not apply here, for the simple reason that DOE has not "adopted" its proposed standards as
25 substantive rules. On the contrary, both the Error Correction Rule and the language of the proposed
26 standards make clear that the proposed standards are just that: *proposed* standards, not final and
27 binding rules. Plaintiffs' second and third claims therefore fail as a matter of law.

STATEMENT OF FACTS

A. Energy Conservation Standards and the Error Correction Rule

In 1975, Congress enacted the Energy Policy and Conservation Act (“EPCA”) to create a framework for national energy conservation. *See generally NRDC v. Abraham*, 355 F.3d 179, 184-85 (2d Cir. 2004). EPCA authorizes DOE to set energy conservation standards for consumer products and industrial equipment sold in the United States in order to “achieve the maximum improvement in energy efficiency ... which the Secretary determines is technologically feasible and economically justified.” 42 U.S.C. §6295(o)(2)(A); *see id.* §6316(a). An amendment to EPCA in 1987 added an “anti-backsliding” provision that prohibits DOE from amending adopted and effective energy conservation standards to reduce the stringency of those standards. *See* 42 U.S.C. §6295(o)(1) (adopted by Pub. L. No. 100-12, 101 Stat. 103); *see also Abraham*, 355 F.3d at 187-88 (describing the anti-backsliding provision). As a result, once DOE prescribes an energy conservation standard for a given product, it cannot relax that standard to permit less efficient versions of the same product.

DOE promulgated the Error Correction Rule in 2016 to permit public review of proposed standards, to try to ensure that its energy conservation standards would be error-free before the adoption and publication of final standards in the *Federal Register*. Under the Error Correction Rule, DOE posts proposed energy conservation standards on a publicly-accessible website for at least 45 days. 10 C.F.R. §430.5(c)(2). Any proposed standard posted under the Error Correction Rule must include a “disclaimer” stating that the proposed standard is “subject to correction” and that DOE “may make any necessary corrections in the regulatory text.” *Id.* §430.5(c)(3).

Once a proposed energy conservation standard has been posted for public comment on potential errors, the procedures specified by the Error Correction Rule are straightforward. Any person who identifies an “error” in the proposed standard may submit a correction request asking DOE to correct that error. *Id.* §430.5(d). If DOE receives a properly filed correction request but decides that no corrections are necessary, “the Secretary will submit the rule for publication ... as it was posted.” *Id.* §430.5(f)(1). If DOE does not receive any properly filed correction request and

1 does not identify any errors on its own initiative, it “will in due course submit the rule, as it was
2 posted ... for publication.” *Id.* §430.5(f)(2). In either case, the Rule does not specify any time
3 period within which the Secretary must decide whether to make corrections or within which the
4 proposed rule must be submitted for publication.

5 If DOE receives a correction request and determines that a correction is necessary, DOE
6 “will, absent extenuating circumstances, submit a corrected rule for publication ... within 30 days
7 after the [correction request period] has expired. *Id.* §430.5(f)(3). Again, the Secretary retains
8 discretion to determine whether a correction is necessary and whether extenuating circumstances
9 require further delay before publishing the proposed rule.

10 Importantly, the Error Correction Rule also expressly confirms that “[u]ntil an energy
11 conservation standard has been published in the Federal Register, the Secretary may correct such
12 standard, consistent with the Administrative Procedure Act.” *Id.* §430.5(g). A final energy
13 conservation standard does not become effective until “the specified compliance date,” *id.*
14 §430.5(f)(4), which must ordinarily be at least 30 days after the rule is published in the *Federal*
15 *Register*, *id.* §430.5(f)(5). Along similar lines, an energy conservation standard is not considered
16 “prescribed” for determining the time within which to seek judicial review until the standard is
17 published in the *Federal Register*. *Id.* §430.5(h).

18 **B. The Current Actions**

19 AHRI is the trade association representing manufacturers of heating, cooling, water heating,
20 and commercial refrigeration equipment. Decl. of Stephen R. Yurek ¶3, Doc. 23-2. With more than
21 300 members, AHRI is an internationally recognized advocate for the industry that develops
22 standards and certifies performance for many of its members’ products, which are also often
23 regulated by DOE energy conservation standards. *Id.* For its upcoming rulemaking agenda, for
24 example, DOE has announced plans to issue energy conservation standards for more than ten new
25 classes of products, several of which are manufactured by AHRI members. *See Current Unified*
26 *Agenda of Regulatory and Deregulatory Actions*, OIRA, <http://bit.ly/2vIJI2G> (last visited Sept. 29,
27 2017).

1 In December 2016, DOE posted for error correction proposed energy conservation standards
 2 for four classes of products and equipment: commercial packaged boilers, portable air conditioners,
 3 air compressors, and uninterruptible power supplies. *See* Consolidated Complaint (“Compl.”) ¶¶83,
 4 91, 100, 111, Doc. 43. Because several AHRI members manufacture commercial packaged boilers,
 5 AHRI reviewed the proposed commercial packaged boiler standards and submitted an error
 6 correction request identifying multiple errors in the proposed standards. *See* Ex. B to AHRI Mot. to
 7 Intervene, Doc. 23-4. To date, DOE has not yet sent final versions of any of the proposed standards
 8 for publication in the *Federal Register*. Compl. ¶¶86, 95, 103, 114.

9 Plaintiffs are a group of states, government entities, and public advocacy organizations. On
 10 June 13, 2017, plaintiffs filed two complaints against DOE and the Secretary of Energy, asserting
 11 that DOE had failed to comply with its nondiscretionary duties by refraining from adopting final
 12 versions of the proposed energy conservation standards at issue and publishing them in the *Federal*
 13 *Register*. AHRI moved to intervene in both cases as a defendant. This Court granted AHRI’s
 14 motion to intervene, ordered the cases consolidated, and ordered plaintiffs to file a single
 15 consolidated complaint. Order, Doc. 40. The federal defendants filed a motion to dismiss that
 16 complaint, *see* Doc. 46, and AHRI now also moves to dismiss the first three claims of the
 17 consolidated complaint.

ARGUMENT²

I. THE ERROR CORRECTION RULE DOES NOT IMPOSE ANY NONDISCRETIONARY DUTY ON DOE TO PUBLISH FINAL ENERGY CONSERVATION STANDARDS.

21 Plaintiffs bring their first claim under the EPCA citizen suit provision, which provides (as
 22 relevant here) that “any person” may bring suit against DOE “where there is an alleged failure of
 23 such agency to perform any act or duty under this part which is not discretionary.” 42 U.S.C.
 24 §6305(a)(2). The text makes it clear that the duty to be enforced must be *nondiscretionary*—it must
 25 constitute a mandatory obligation that the agency is required by law to perform. Because the Error
 26 Correction Rule instead leaves DOE discretion to decide when and whether to finalize and publish
 27

28 ² AHRI adopts the federal defendants’ statement of the standard of review. *See* Doc. 46 at 8.

1 its energy conservation standards, the EPCA citizen suit provision neither waives sovereign
2 immunity as to plaintiffs' first claim nor provides a cognizable legal theory to sustain that claim.

3 Nothing in the text of the Error Correction Rule creates the nondiscretionary duty plaintiffs
4 assert. As described above, *see supra* pp.3-4, and as DOE explains in its motion to dismiss, *see* Doc.
5 46 at 11, the Error Correction Rule does not require DOE to publish final energy conservation
6 standards within any specified time after posting proposed standards for error correction. Although
7 the regulation indicates that DOE "will submit" its standards for publication, 10 C.F.R. §430.5(f)(1),
8 it leaves the agency full discretion to determine when it will do so. That makes it impossible for
9 plaintiffs to show that DOE has violated any nondiscretionary duty by not publishing those standards
10 yet. *See NRDC v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989); *cf. Ctr. for Biological Diversity v.*
11 *Norton*, 254 F.3d 833, 840 (9th Cir. 2001) (legislative amendment that imposed new statutory
12 deadlines "replaced [agency] discretion with mandatory, nondiscretionary duties" (brackets
13 omitted)).

14 Moreover, the text of the Error Correction Rule specifically preserves DOE's discretion to
15 revise its proposed standards "on [its] own initiative," 10 C.F.R. §430.5(f)(2), and further specifies
16 that "[u]ntil an energy conservation standard has been published in the Federal Register, [DOE] may
17 correct such standard, consistent with the [APA]." 10 C.F.R. §430.5(g). That text makes clear that
18 DOE retains discretion to reassess and revise its proposed standards as it sees fit—and
19 correspondingly, that no nondiscretionary duty requires it to publish those standards as soon as the
20 error correction period ends.

21 The regulatory history supports the same conclusion. In adopting the Error Correction Rule,
22 DOE specifically declined to set any firm deadline requiring it to publish standards within a certain
23 time after the error correction period ended, and explained that it needed "flexibility" to "ensure that
24 DOE has sufficient time to thoroughly review all timely error requests it receives and make any
25 necessary corrections." 81 Fed. Reg. 57,745, 57,750 (Aug. 24, 2016). And while DOE suggested
26 that it "would generally adhere to the policy decisions it has already made" in reviewing error
27
28

1 correction requests, *id.* at 57,479, the agency nowhere abandoned its inherent discretion to revise or
2 withdraw proposed standards rather than publishing them.

3 It is hardly surprising that DOE has retained its discretion to decide when and whether to
4 finalize and publish proposed energy conservation standards. As a general matter, agencies
5 normally have full discretion to reconsider proposed regulations before they are published in the
6 *Federal Register*. See, e.g., *Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980) (until
7 publication, an agency is “not bound to the issuance of the rule” and can “modify the rule” or
8 “scuttle the whole proposal”); see also *Abraham*, 355 F.3d at 195-96 (publication of energy
9 conservation standards in the *Federal Register* is the “terminal act” that “circumscrib[es] DOE’s
10 discretion”). It would be far more surprising if the Error Correction Rule did operate, despite its
11 plain terms and regulatory history, to strip DOE of that typical agency discretion.

12 Plaintiffs’ interpretation of the Error Correction Rule would also ignore the reasons why
13 DOE adopted the regulation. The Error Correction Rule was intended to ensure that the agency
14 would have a last chance to review and correct any errors in its proposed standards before those
15 standards were published and went into effect, to prevent issuance of a mistaken standard that could
16 trigger the EPCA anti-backsliding provision and require extensive judicial review. See 81 Fed. Reg.
17 26,998, 26,998 (May 5, 2016). But plaintiffs’ interpretation would impose a nondiscretionary duty
18 on DOE to publish its proposed standards in the *Federal Register* even when DOE realizes during
19 the error correction period that those standards have serious flaws—indeed, even when the agency
20 realizes those standards are not “technologically feasible and economically justified,” 42 U.S.C.
21 §6295(o)(2)(A)—in violation of the expert agency’s understanding of EPCA itself. Plaintiffs would
22 force DOE to publish standards that it knows are flawed and then just wait for their inevitable
23 invalidation in judicial review proceedings.

24 In sum: the text, history, and purpose of the Error Correction Rule all point in the same
25 direction. Nothing in that regulation denies DOE the discretion to reconsider its proposed standards
26
27
28

1 in light of changed circumstances, new priorities, or any other factors. That simple fact makes it
2 impossible as a matter of law for plaintiffs to succeed on their first claim.³

3 **II. NO STATUTE ENABLES PLAINTIFFS TO OBTAIN AN ORDER REQUIRING**
4 **DOE TO PUBLISH AND ENFORCE PROPOSED STANDARDS THAT DOE HAS**
5 **NOT FINALLY ADOPTED.**

6 Plaintiffs' second and third claims assert that DOE has violated the APA and the FRA by
7 failing to publish final versions of the energy conservation standards at issue in the *Federal Register*.
8 Because those statutes do not actually require the action that plaintiffs seek, these claims must also
9 be dismissed.

10 As amended by the Freedom of Information Act ("FOIA"), the APA obliges every agency to
11 publish in the *Federal Register* any "substantive rules of general applicability adopted as authorized
12 by law." 5 U.S.C. §552(a)(1)(D). The FRA incorporates that requirement, stating that agencies
13 must publish in the *Federal Register* any documents that are "required so to be published by Act of
14 Congress" (including the APA). 44 U.S.C. §1505(a)(3). To succeed on their second and third
15 claims, then, plaintiffs must show that DOE has "adopted" its proposed energy conservation
16 standards as "substantive rules of general applicability." 5 U.S.C. §552(a)(1)(D). Without that
17 showing, the APA and the FRA impose no relevant publication requirement.

18 Plaintiffs cannot make that showing. The Error Correction Rule and DOE practice both
19 make clear that DOE does not "adopt" its proposed standards by posting them for error correction
20 review; instead, the agency only adopts an energy conservation standard when the final version of
21 that standard is published in the Federal Register. *See* Doc. 46 at 14-18. That forecloses plaintiffs'
22 attempt to use the APA and the FRA to force DOE to publish energy conservation standards before
23 the agency completes its own review of those standards.

24 The Error Correction Rule itself provides that proposed energy conservation standards posted
25 for error correction have not yet been "adopted" and are subject to further revisions. The regulation
26 reserves to DOE express authority to revise those standards either in response to comments or on its

27 ³ AHRI takes no position on DOE's alternative argument that 42 U.S.C. §6305(a)(2) only
28 authorizes suit to enforce duties created by statute, not duties created by regulation.

1 own initiative. *See* 10 C.F.R. §430.5(e), (f)(1)-(3). The regulation underlines the tentative nature of
2 the proposed standards by emphasizing that “[u]ntil an energy conservation standard has been
3 published in the Federal Register, the Secretary may correct such standard, consistent with the
4 Administrative Procedure Act.” *Id.* §430.5(g). The Error Correction Rule also requires the proposed
5 standards themselves to include an express “disclaimer” stating that they remain “subject to
6 correction based on the identification of errors ... before publication in the Federal Register” and
7 that “DOE may make any necessary corrections in the regulatory text submitted to the Office of the
8 Federal Register for publication.” *Id.* §430.5(c)(3). Indeed, plaintiffs acknowledge that the
9 proposed standards here carried that exact disclaimer. Compl. ¶¶83, 91, 100, 111. Those provisions
10 make it clear that the proposed standards posted for error correction are still contingent on further
11 review and correction, and have not been adopted as final substantive rules.

12 Plaintiffs allege that just because the proposed standards are signed and dated, they must
13 have been formally “adopted” for APA and FRA purposes. *See, e.g.*, Compl. ¶3. But numerous
14 cases contradict that assumption, holding that agencies can withdraw even signed and dated rules at
15 will before they have been published in the *Federal Register*. *See, e.g., Wang v. Slattery*, 877 F.
16 Supp. 133, 138-40 (S.D.N.Y. 1995); *Si v. Slattery*, 864 F. Supp. 397, 402-05 (S.D.N.Y. 1994); *Chen*
17 *v. Slattery*, 862 F. Supp. 814, 822-23 (E.D.N.Y. 1994) (“[A]n agency cannot be bound by a
18 nonpublished rule in a situation in which the agency never actually adopted the rule.”); *cf. Kennecott*
19 *Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1200-01 (D.C. Cir. 1996) (courts cannot
20 order agencies to publish even signed agency rules). Moreover, if the proposed standards were
21 “adopted” when they were signed and dated, that would mean they were adopted before the error
22 correction period even began—making the error correction process itself pointless. That is not a
23 plausible interpretation.

24 Plaintiffs’ view, unsupported by text or precedent, that the APA and the FRA require
25 agencies to finalize and publish proposed regulations gets those statutes exactly backwards. The
26 APA and the FRA are intended to “prevent the reign of secret law,” by ensuring that agencies cannot
27 enforce regulations until they provide notice to regulated parties by publication. *Alcaraz v. Block*,

1 746 F.2d 593, 610 (9th Cir. 1984). They are not intended, and have never been interpreted, to
2 require agencies to treat proposed standards as final and publish them before completing their own
3 review process. *Id.* at 609-10; *see Si*, 864 F. Supp. at 405 (publication requirement “cannot be used
4 to force an agency to adopt a new regulation”). Unless and until DOE actually adopts final energy
5 conservation standards that it intends to make binding on regulated parties, the publication
6 requirement has no role to play here.

7 **CONCLUSION**

8 For the foregoing reasons, this Court should dismiss the First, Second, and Third Claims for
9 Relief in plaintiffs’ Consolidated Complaint.

10 DATED: September 29, 2017

Respectfully submitted,

11 KIRKLAND & ELLIS LLP

12 By.: /s/ Mark McKane, P.C.

13 Mark McKane, P.C.
14 Austin L. Klar
15 KIRKLAND & ELLIS LLP
16 555 California Street
17 San Francisco, CA 94104
18 Telephone: (415) 439-1400
19 Fax: (415) 439-1500
20 E-mail: mark.mckane@kirkland.com
21 austin.klar@kirkland.com

22 Stuart Drake (*pro hac vice*)
23 Edmund G. LaCour Jr. (*pro hac vice*)
24 C. Harker Rhodes IV (*pro hac vice*)
25 KIRKLAND & ELLIS LLP
26 655 Fifteenth Street, NW
27 Washington, DC 20005
28 Telephone: (202) 879-5000
E-mail: stuart.drake@kirkland.com
edmund.lacour@kirkland.com
harker.rhodes@kirkland.com

Attorneys for Defendant-Intervenor
AIR-CONDITIONING, HEATING, &
REFRIGERATION INSTITUTE

CERTIFICATE OF SERVICE

On September 29, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all persons registered for ECF. All copies of documents required to be served by Fed. R. Civ. P. 5(a) and L.R. 5-1 have been so served.

/s/ Mark McKane, P.C.
Mark McKane, P.C.
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Fax: (415) 439-1500
E-mail: mark.mckane@kirkland.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28