IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Plaintiffs-Appellees, v. JAMES R. PERRY, in his official capacity as Secretary of Energy, et al., Defendants-Appellants.	No. 18-15380

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3(a)

DEFENDANTS' MOTION FOR STAY PENDING APPEAL, AND FOR A TEMPORARY ADMINISTRATIVE STAY

Circuit Rule 27-3 Certificate

The district court ordered the government defendants to submit four draft rules for publication in the Federal Register. See DE# 81 at 9 (Feb. 15, 2018) (Op.); DE# 90, at 1 (Mar. 13, 2018) (Stay Order). In denying the government's motion for a stay pending appeal, the district court extended the deadline for submitting the draft rules for publication until April 10, 2018, "so that the Department and the Intervenor have sufficient time to seek a stay from the Court of Appeals." Stay Order at 1.

Pursuant to this Court's Rule 27-3(a), action on this motion—either a stay pending appeal or an administrative stay to permit the Court additional time to consider granting a stay pending appeal—is required before April 10, 2018, to avoid significant and likely irreparable harm to the government and the regulated industries resulting from publication of the draft rules at issue, as required by the district court's injunction. The government requests a temporary administrative stay to permit this Court adequate time to consider the motion.

Undersigned government counsel notified the parties by email of the government's intention to seek a stay pending appeal on Friday, March 16, 2018, and of the current filing date on Monday, March 19, 2018. All parties have been served with this motion, either by this Court's CM/ECF system, or by mail and email. A list of counsel for the parties appears on the following page.

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INTRODUCTION

Defendants-appellants, the Secretary of Energy, et al., respectfully ask that this Court issue a stay of the district court's order of February 15, 2018 which ordered the federal government to publish four draft rules in the Federal Register within 28 days. See DE# 81 at 4, 9 (Feb. 15, 2018) (Op.) (attached). The federal government also asks for a temporary administrative stay to permit plenary consideration of our motion.[1]

The district court denied the government's motion for a stay pending appeal, but modified its earlier order, requiring the government to submit the draft rules for publication in the Federal Register by April 10, 2018, "so that the Department [of Energy] and the Intervenor have sufficient time to seek a stay from the Court of Appeals." DE# 90, at 1 (Mar. 13, 2018) (Stay Order) (attached). In light of this deadline, we ask for relief as soon as possible.

The four draft rules would establish energy conservation standards for portable air conditioners, uninterruptible power supplies, air compressors, and commercial packaged boilers. The draft rules have been subject to notice and comment, and also have been posted on a public website to permit an "error-correction" process established by Department of Energy (DOE) regulations. Plaintiffs argue that by engaging in this

[1] Jennifer Sorenson, on behalf of the NGO plaintiffs, informs us that they oppose the request for a temporary administrative stay. Jamie Jefferson, on behalf of the state and local government plaintiffs, informs us that they have not taken a position.

additional preliminary process, DOE forfeited the ability to determine whether the draft rules should be published.

DOE did not cabin its own discretion in this extraordinary fashion. A federal agency has discretion to decide whether to submit a draft rule for publication in the Federal Register, and even whether to withdraw such a draft rule on the eve of publication, after it has been submitted. The district court mistakenly construed DOE's error-correction regulation to eliminate the agency's own authority, notwithstanding DOE's contrary understanding of its own regulation. The regulation is designed to facilitate public input on possible technical corrections in draft regulations before publication. It does not tie the agency's hands and permit a court to compel publication of draft regulations that the agency has not decided to adopt. That extraordinary decision runs afoul of fundamental principles of administrative law and misreads the statutory and regulatory provisions on which plaintiffs seek to rely. That error alone warrants issuance of a stay.

The balance of harms and the public interest likewise strongly support issuance of a stay. Plaintiffs apparently take the view that once the four draft regulations are issued pursuant to a court order, DOE would lack authority to rescind them. If that position were accepted, DOE's injury would plainly be irreparable. The government does not share plaintiffs' view. But it should be equally clear that issuing regulations that may then be rescinded is in no one's interest and will only result in unnecessary

burdens on the government and third parties. In contrast, staying the court's order for the time necessary to consider this appeal will result in no irreparable injury.

BACKGROUND

1. The "Error-Correction" Rule and the "Anti-Backsliding" Statute

DOE adopted the "error-correction" rule in 2016 as a procedural rule pursuant to the agency's statutory authority to establish energy conservation standards for certain consumer products and industrial equipment under the Energy Policy and Conservation Act (EPCA). The rule specifies a procedure for public review of draft rules in order to avoid the risk that a rule would be published with typographical, mathematical, or similar errors that might have escaped the agency's notice. See 10 C.F.R. § 430.5. It was intended to serve the limited purpose of "providing interested parties with an opportunity to timely point out errors to DOE and request that DOE correct them." 81 Fed. Reg. 26998, 26999 (May 5, 2016).

The error-correction rule is designed to avoid a unique problem that could arise from a provision of EPCA known as the "anti-backsliding provision." This provision prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use * * * or decreases the minimum required energy efficiency[] of a covered product." 42 U.S.C. § 6295(o)(1) (consumer products); see *id.* § 6316(a) (industrial equipment). The scope and implications of that limitation have not been fully fleshed out in litigation, but one court has held that publication

in the Federal Register of a rule establishing such standards triggers the anti-backsliding provision. See *NRDC* v. *Abraham*, 355 F.3d 179, 196-197 (2d Cir. 2004); but see 81 Fed. Reg. 57745, 57754 (Aug. 24, 2016) (noting open question whether publication of rule would preclude agency reconsideration).

DOE adopted the error-correction rule to minimize the possibility that the agency would be unable to correct errors in its rules due to the anti-backsliding provision. See 81 Fed. Reg. 26999 ("should such an error go uncorrected for too long, there is a risk that the Department would be unable to undo it because of the limitations on reducing the stringency of its standards"). The error-correction rule established an additional step following the ordinary notice-and-comment process to allow for further, but limited, public review, before publication in the Federal Register, of a draft rule that would establish a new or amended energy conservation standard. The agency posts the draft rule on a publicly accessible website, and the rule bears a "disclaimer" stating that "[t]he text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5" and that the agency "may make any necessary corrections in the regulatory text submitted to the Office of the Federal Register for publication." *Id*. § 430.5(c)(3). During the 45-day posting period, the public may submit requests to correct any "typographical," "calculation," or "numbering mistake[s]" that they identify in the posted draft rule. *Id*. § 430.5(d).

The agency took care to ensure that the error-correction process would not merely repeat or extend the rulemaking process of soliciting public comment on policy options. Thus, DOE denied petitions to amend the error-correction rule to permit comments during the error-correction period raising broader disagreements with the policy choices underlying a draft rule. See 81 Fed. Reg. 57749 (observing that "such a general reconsideration procedure would create substantially more delay," and "DOE would generally adhere to the policy decisions it has already made"); see also *id.* at 57752-57755 (explaining rejection of general reconsideration procedure).

2. Prior Proceedings

Plaintiffs brought two cases, consolidated in district court, pursuant to a citizen-suit provision in EPCA, which provides that "any person" may bring a civil action in district court against "any Federal agency which has a responsibility under this part where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary." 42 U.S.C. § 6305(a)(2). Plaintiffs principally contend that DOE was required to publish the draft rules in the Federal Register upon completion of the error-correction process and that the agency lacked discretion to do otherwise.

Plaintiffs also contended that publication of the draft rules was required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(1)(d), which requires

agencies to publish "substantive rules of general applicability adopted as authorized by law," and by the Federal Register Act, 44 U.S.C. § 1505(a), which provides that all documents "required * * * to be published by Act of Congress" must be "published in the Federal Register." Finally, plaintiffs contended that publication of one of the draft rules, which would have established an energy conservation standard for uninterruptible power supplies, was required to comply with a statutory requirement to issue energy conservation standards applicable to battery chargers, see 42 U.S.C. § 6295(u)(1)(E)(i)(II).

The government urged the district court to dismiss the suits, pointing out that the citizen-suit provision is limited to claims that an agency "has a responsibility under this part," 42 U.S.C. § 6305(a)(2). The government explained that "this part" refers to the portion of the statute governing energy conservation standards, and does not by its terms include any purported obligation resulting from the agency's own regulations. The government also contended that, even if the citizen-suit provision could be extended to claims seeking to enforce regulatory obligations, the error-correction rule retains the agency's discretion prior to publication of a draft rule, and thus is not within the scope of the statute, which only permits claims "where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary." *Ibid.* The government also addressed the remaining claims, explaining that neither FOIA nor the Federal Register Act required publication of

draft rules that had not been adopted by the agency, and that DOE had complied with the statutory requirement for a battery-charger standard by issuing a rule in 2016, see 81 Fed. Reg. 38266 (June 13, 2016). An association of manufacturers, the Air-Conditioning, Heating, & Refrigeration Institute, intervened as a defendant, and also moved to dismiss.

The district court denied the government's motion to dismiss, and granted summary judgment to plaintiffs, addressing only their principal claim that the error-correction rule required publication of the draft rules. The court determined that the agency had violated a non-discretionary duty, created by its own error-correction rule, to publish the draft standards at the end of the error-correction process. See Op. 4, 9. In reaching that conclusion, the court rejected the government's contention that EPCA's citizen-suit provision did not authorize plaintiffs to bring an action to compel enforcement of regulatory provisions such as the error-correction rule. Op. 3-9. The court also rejected the government's argument that the agency had inherent authority to reconsider, modify, or withdraw any draft energy conservation standard prior to its publication as a final rule. Op. 5-7. Based on those conclusions, the court ordered the agency to "publish the standards within 28 days of [the court's] ruling." Op. 9. The court noted that it would "entertain a [timely] motion for a stay pending appeal." *Ibid.*

The government appealed and also moved for a stay pending appeal in the district court. The district court denied the requested stay, but extended the deadline for submitting the draft rules for publication until April 10, 2018, "so that the Department and the Intervenor have sufficient time to seek a stay from the Court of Appeals." Stay Order 1.

ARGUMENT

Under the familiar standards for a stay pending appeal, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken* v. *Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)). Where the federal government is a party to the litigation, the public interest merges with the asserted harm to the government. *Id.* at 435. This Court has referred to a continuum or sliding scale when considering those factors: The stronger the showing on the merits, the less harm is required, and vice versa. See, *e.g.*, *Leiva-Perez* v. *Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam); *Golden Gate Rest. Ass'n* v. *City & County of San Francisco*, 512 F.3d 1112, 1115-1116 (9th Cir. 2008).

I. The Government Is Likely To Prevail On The Merits.

The district court here read the error-correction rule—a narrowly focused procedural rule that established a framework for limited public comment on specific draft rules—as imposing a mandatory obligation on the agency to forgo its fundamental policymaking responsibility to determine whether to submit a draft rule for publication in the Federal Register. An agency should not lightly be deemed to have curtailed its fundamental policy authority in this way: any ambiguity in a regulation should be construed to preserve rather than diminish an agency's inherent authority and discretion to determine whether to promulgate regulations, up until the time they are actually published in the Federal Register. The district court disregarded those fundamental principles of administrative law and failed to defer to the agency's interpretation of its own regulations.

The district court's decision also misinterpreted the proper scope of the governing statute (the citizen-suit provision). That limited cause of action, and accompanying waiver of sovereign immunity, permits suits in district court to address a narrow set of claims where an agency has failed to perform a statutory duty; it does not apply to regulatory obligations. It does not displace or alter the standard for claims seeking to compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Any such claim must be brought exclusively in the court of appeals in the first instance. See *Public Util. Comm'r of*

Oregon v. *Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) ("where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review"); 42 U.S.C. § 6306(b) (direct review in courts of appeals of rules establishing energy conservation standards). Thus, the district court's expansion of EPCA's citizen-suit provision—to encompass plaintiffs' claims that DOE violated a duty found in an extraordinary and unsupported reading of the error-correction rule—improperly arrogated judicial review authority that is properly limited to this Court and its sister circuits.

Those errors demonstrate the requisite "strong showing that" the government "is likely to succeed on the merits." *Hilton*, 481 U.S. at 776, quoted in *Nken*, 556 U.S. at 434. "[A]t a minimum," they present a "substantial case for relief on the merits." *Leiva-Perez*, 640 F.3d at 968; see *id.* at 966 (stay applicants "need not demonstrate that it is more likely than not that they will win on the merits").

A. Agencies ordinarily retain the discretion to reconsider, modify, or withdraw their draft rules before the rules are published in the Federal Register. Indeed, agencies generally cannot enforce their rules—and private parties cannot challenge them—until after the rules have been published in the Federal Register.

Thus, even after a draft rule has been finalized, signed, and submitted to the Office of the Federal Register, an agency has untrammeled discretion to withdraw

the draft rule, and nothing in the Administrative Procedure Act (APA), FOIA, or the Federal Register Act is to the contrary. The D.C. Circuit so held in 1996, rejecting arguments that an agency improperly withdrew a draft rule from the Office of the Federal Register prior to publication. *Kennecott Utah Copper Corp.* v. *Dept. of the Interior*, 88 F.3d 1191, 1202-1209 (D.C. Cir. 1996). The Office of the Federal Register expressly permits agencies to withdraw rules submitted for publication up until noon on the day before the actual publication date. *See* Office of the Federal Register, Document Drafting Handbook 5-3 (2017 ed.), https://go.usa.gov/xne3w. Thus, even after an agency submits a rule for publication, it retains the discretion to withdraw it. A fortiori, an agency has inherent discretion not to submit a rule for publication in the first place. See *Rowell* v. *Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980) (noting in dicta that "the agency is, of course, not bound to the issuance of the rule in any exact form").

Those fundamental principles flow from the agency's policymaking responsibility. A variety of factors may influence an agency's determination whether to permit a draft rule to be published: The agency may learn of relevant factual developments, economic factors could lead to a reevaluation of the agency's earlier analysis, the prospect of imminent legislation or regulation in a related area could warrant a pause and reevaluation, or a different policymaker might take a contrary view of the appropriateness of the draft rule. Any of those developments would

provide an appropriate basis for an agency to determine that publication in the Federal Register should be delayed or reconsidered. As *Kennecott Copper* demonstrates, a new Presidential Administration, among other factors, may prompt such considerations. See 88 F.3d at 1200-1201 (discussing Clinton Administration policy changes); see also, *e.g.*, Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U.L. Rev. 471, 507-512, 519-525 (2011) (analyzing wide range of uncompleted rulemakings, and the influence of presidential and congressional transitions, judicial decisions, and other possible factors).

The error-correction rule must be interpreted in light of these background principles of agency discretion. Because of the importance of the agency's policymaking responsibilities, a court should be hesitant to interpret an ambiguous provision in a regulation to encroach on the policymaker's discretion. See *Action on Smoking & Health* v. *Dep't of Labor*, 100 F.3d 991, 993 (D.C. Cir. 1996) ("It would be odd to suppose that the [agency's] regulations * * * were meant to eliminate the sort of discretion" that prior case law had "found implicit" in the statute authorizing the rulemaking). Yet, the district court here failed to heed that warning. The court fundamentally misunderstood the scope and effect of the error-correction rule.

Plaintiffs and the district court rely on the error-correction rule's description of the process the agency would generally use in order to permit the public to identify possible errors in a draft standards rule. See Op. 4 (noting that the rule indicates that

the agency "will" submit a posted standard for publication after the error-correction period, 10 C.F.R. § 430.5(f)). But interpreting the word "will" to create a mandatory duty ignores the nature and limited purpose of the error-correction rule, and is contrary to the background principle of agency discretion.

The error-correction process is designed to address a narrow concern—that typographical, mathematical, or similar errors might go unnoticed before a rule is published, and that EPCA's anti-backsliding provision might limit the agency's ability to correct those errors after publication. The error-correction rule was expressly denominated a procedural rule, recognizing that it was not intended to effect major substantive changes. See 81 Fed. Reg. 27003 ("rule of agency procedure and practice"; "not a substantive rule"). Thus, while the error-correction rule indicates that DOE "will" submit a draft rule for publication following the conclusion of the period for public comment, that language appears in the context of the narrow procedural question of limited public input on draft rules; it is not intended, and should not be read, to address DOE's inherent authority to decide whether to submit a draft rule for publication—a discretion based on the agency's policy judgments that can extend beyond the limited types of errors that the public is invited to address. The error-correction rule is silent on this broader policy discretion, and that silence should not be read—contrary to the agency's own interpretation of its regulation—to constrain the agency's authority. See *Chase Bank*

USA, N.A. v. *McCoy*, 562 U.S. 195, 208 (2011) (deferring to agency interpretation of its own regulation).

That understanding is reinforced by the rule's express reference to the agency's authority under the APA to make changes to a draft rule prior to publication. See 10 C.F.R. § 430.5(g) ("Until an energy conservation standard has been published in the Federal Register, [DOE] may correct such standard, consistent with the Administrative Procedure Act."). Such a reference to the background principles of agency pre-publication discretion confirms that the error-correction rule was not intended to constrain that discretion.

B. Even apart from the misunderstanding of the scope and effect of the error-correction rule, the district court's decision must be reversed because the court also misinterpreted the statute that plaintiffs invoked as a basis for their cause of action and for jurisdiction in that court. EPCA's citizen-suit provision permits private parties to bring suit against an agency for its "failure * * * to perform any act or duty *under this part* which is not discretionary." 42 U.S.C. § 6305(a)(2) (emphasis added). The phrase "act or duty under this part" refers only to obligations created by EPCA itself—not duties created by an agency rule.

The most natural reading of "under this part" is as a reference to the statutory provisions contained in the same "part" of EPCA as the citizen-suit provision.[2] See, *e.g.*, *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) (holding that statutory reference to "authority * * * specified under this subchapter" encompasses only statutory, not regulatory, provisions). That reading is confirmed by contrasting that language with another subsection of the citizen-suit provision, which permits a broader range of suits against a manufacturer (rather than an agency), explicitly including regulatory duties as well as statutory obligations. Thus, Congress authorized suits against private manufacturers for "violation[s] of any provision of this part *or any rule* under this part." 42 U.S.C. § 6305(a)(1) (emphasis added). The inclusion of the phrase "or any rule" in that subsection—but not in the subsection authorizing suits against federal agencies—confirms that Congress drew a distinction between statutory duties and regulatory duties, permitting suits against a federal agency only to enforce the former, not the latter.[3]

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[2] The citizen-suit provision is currently codified in Part A of subchapter III of EPCA, 42 U.S.C. §§ 6291-6309. Because those provisions were originally enacted as Part B of Title V of EPCA, *see* Pub. L. No. 94-163, 89 Stat. at 917, the district court referred to this part of the statute as "Part B." See Op. 3.

[3] As originally enacted, the citizen-suit provision repeated the distinction between citizen suits against manufacturers (which could be based on either statutory or regulatory obligations) and those against the government (which could be based only

Despite this statutory language clearly distinguishing between statutory and regulatory duties in EPCA, the district court held that "the only plausible interpretation of the citizen-suit provision is that it covers both regulatory and statutory obligations." Op. 3. The court reasoned that "[a] 'duty' can be imposed by a regulation as well as a statute." *Ibid.*

But that reasoning misses the point: the question here is not whether any conceivable duty can arise from a regulation but whether Congress intended the modifying phrase "under this part" in EPCA's citizen-suit provision to refer to statutory duties alone. Although Congress may *sometimes* use the phrase "under this part" to refer to both statutory and regulatory obligations, the court's conclusion that Congress *always* uses the phrase in that way—and that it must have done so here—is untenable. That conclusion is also irreconcilable with the Supreme Court's contrary holding in *Kucana*, recognizing that Congress had limited a similar reference to statutory, not regulatory provisions. See 558 U.S. at 245-251.

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on statutory obligations). See Pub. L. No. 94-163, § 335, 89 Stat. 871, 930 (1975). In the clause governing suit against manufacturers, Congress precluded suits for violations of "sections 325 and 332(a)(5), *and rules thereunder*." *Ibid.* (emphasis added) The analogous clause governing suits against federal agencies, however, precluded suits only for violations of "section 325 or 332(a)(5)," without reference to any related rules. *Ibid.*

The district court's reading of the phrase "under this part" is also inconsistent with the doctrine requiring narrow construction of a statute authorizing suit against the government. That doctrine is grounded in the principle that a "waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192 (1996); see also, *e.g.*, *In re DBSI, Inc.*, 869 F.3d 1004, 1013 (9th Cir. 2017). Here, the government's reading of "under this part" is not only plausible—it is the most natural understanding of the statute's language, both as a matter of ordinary grammar and in light of the purposeful distinctions Congress drew between statutory and regulatory obligations throughout the citizen-suit provision.

In any event, as explained above, the error-correction rule does not eliminate DOE's inherent discretion to determine whether to submit a draft rule for Federal Register publication. For that reason, the error-correction rule does not impose a non-discretionary duty on DOE, and plaintiffs' claims are not properly within the scope of the citizen-suit provision, which only extends to an "act or duty * * * which is not discretionary." 42 U.S.C. § 6305(a)(2).

Because plaintiffs' claims are not within the scope of the citizen-suit provision, they could only have been brought in this Court, as a claim that agency action was unlawfully withheld or unreasonably delayed. See 5 U.S.C. § 706(1); *Public Util. Comm'r*, 767 F.2d at 626. But such claims are only available in narrow

circumstances. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*"); *Hells Canyon Pres. Council* v. *U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (legal obligation must be "so clearly set forth that it could traditionally have been enforced through a writ of mandamus"). Here, no statute requires the agency to publish the draft rules at issue, and (as explained above) the error-correction rule cannot properly be read to diminish the agency's inherent authority to determine whether the draft rules should be published.

II. The Balance Of Harms Weighs Strongly In Favor Of A Stay.

A. Plaintiffs seek to compel publication in the Federal Register of four draft rules that DOE has not adopted. Overriding the agency's policy discretion and requiring publication of the draft rules prior to this Court's resolution of the appeal poses significant harm to the government. As explained below, even if this Court reverses the district court's decision, plaintiffs or other litigants likely would contend that DOE and this Court are precluded from vacating or withdrawing the published rules. Although DOE disagrees with those arguments, the risk that they might prevail—and the related risk that this Court could conclude that this appeal is accordingly moot—imposes harm on the government militating in favor of a stay pending appeal.

Plaintiffs suggested below that this Court might be able to vacate the rules if it were to reverse the district court's order. But the jurisdictional basis for such a remedy is not certain, as the rules themselves would not be before the Court for review, and interested parties might in the meantime bring challenges to the published rules in other circuits. See 42 U.S.C. § 6306(b). In any event, issuance of the rules followed by their subsequent vacatur or withdrawal serves no purpose and would only lead to confusion and legal uncertainty.

If this Court reverses the district court's order but does not itself vacate the published rules, any attempt by the government to withdraw the rules on that basis, and any subsequent rule that does not impose equally or more stringent energy conservation standards, would likely be challenged on the ground that it is an "amended standard which increases the maximum allowable energy use * * * or decreases the minimum required energy efficiency, of a covered product." 42 U.S.C. § 6295(o)(1).[4] Although no court has addressed whether the anti-backsliding provision could be invoked based on compelled publication resulting from a court order that is later reversed, the Second Circuit has attributed anti-backsliding significance to Federal Register publication. See *NRDC*, 355 F.3d at 196-197. Such

[4] Plaintiffs have not disavowed this theory or disputed the likelihood of future litigation. See DE# 88, at 2; DE# 89, at 3-4.

a theory, if adopted by a reviewing court, would significantly constrain the agency's future policy discretion, imposing constraints on that discretion that could be avoided by a stay pending appeal. Moreover, the risk of such an outcome creates additional legal uncertainty that would harm the government, and denying a stay pending appeal would likely generate further costly and time-consuming litigation that could otherwise be avoided. Publication (over the government's objection) is the ultimate relief sought by plaintiffs, and it should not be granted prematurely, especially where the statutory scheme creates a risk of mootness.[5]

B. Publication of the draft rules prior to this Court's resolution of the government's appeal would also impose harms on both regulated entities and the government due to the legal uncertainty concerning the validity of the published energy conservation standards, and the burdens related to compliance with those standards and likely litigation. Rules establishing energy conservation standards are

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[5] The risk of mootness constitutes irreparable harm. See, *e.g.*, *Nken*, 556 U.S. at 435 (recognizing "the irreparable nature of harm from removal before decision on a petition for review, given that the petition abated upon removal" under earlier statutory scheme). Even where mootness is not certain to result, a stay pending appeal is warranted to prevent such a possibility. See, *e.g.*, *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) ("When * * * 'the normal course of appellate review *might* otherwise cause the case to become moot,' issuance of a stay is warranted.") (emphasis added; citation omitted); see also, *e.g.*, *Mikutaitis* v. *United States*, 478 U.S. 1306, 1309 (1986) ("it is possible that continued enforcement of the contempt order may have the practical consequence of rendering the proceeding moot").

required by statute to provide lead time for manufacturers to make any necessary changes in the design and manufacture of covered products. See, *e.g.*, 81 Fed. Reg. 27002 ("compliance with a new or amended standard is generally linked to a specified lead-time from the date of publication in the Federal Register to provide the affected industries with sufficient time to adjust their products and manufacturing to satisfy the new or amended standard"). Thus, while compliance is not required immediately, the statutory scheme contemplates that the time between publication of a standard in the Federal Register and the compliance deadline is necessary for manufacturers to implement the changes required to comply with the standards.

If the draft rules were published in the Federal Register prior to this Court's resolution of the appeal, starting the lead-time clock, manufacturers would face a dilemma: They could begin compliance efforts, incurring costs that otherwise would not be required by law, without knowing whether the rules would later be withdrawn or vacated, if this Court were to reverse. Or they could await a decision by this Court and run the risk that, if the decision below were affirmed, or the anti-backsliding provision were construed to prevent withdrawal, their compliance lead time could be drastically shortened.[6]

[6] The harms described here result from the consequences of legal uncertainty and do not turn on disputed facts. The district court was thus mistaken to conclude that

Publication of the rules would also open the door to litigation over their validity. See 42 U.S.C. § 6306(b) (authorizing a petition for review by "[a]ny person who will be adversely affected by a rule" establishing energy conservation standards; such a petition must be filed in the appropriate court of appeals "within 60 days after the date on which such rule is prescribed"). If manufacturers or others were to challenge the validity of any of the published rules while this appeal is pending, the government would be obliged to defend the validity of the rules in such a case at the same time it is urging this Court that the rules should not have been published at all. The prospect of such a litigation burden imposes irreparable harm on the government and the public.

C. By contrast, plaintiffs will suffer negligible harm, if any, from the short delay required to permit this Court to exercise its appellate function and determine the merits of the government's appeal. And plaintiffs have not pointed to any imminent event requiring immediate action. Instead, their complaint identified only potential long-term benefits of energy conservation standards. See DE# 43 (consolidated complaint) at 8, 19.

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additional factual support was necessary to address the burdens on manufacturers. See Stay Order at 1.

But the long-term benefits plaintiffs seek would only accrue many years in the future. Any energy conservation standard would apply only to new products, and compliance would not be required for two to five years after the publication date of any rule establishing such standards. See 42 U.S.C §§ 6295(l)(2), 6313(a)(6)(C)(iv)(I); DE# 66-3 (Sorenson Decl., Ex. C) at 4. Even after compliance is required, any benefits from reduced energy usage would take time to accumulate. On balance, the brief delay necessary for this Court to exercise its judicial function does not constitute irreparable harm and does not outweigh the harm to the government that would result from publication of the draft rules.

CONCLUSION

For these reasons, defendants respectfully request that this Court stay the district court's injunctive order pending appeal. The Court should enter an administrative stay to permit additional time to consider a stay pending appeal.

Respectfully submitted,

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MARCH 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 5,430 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f), and excluding the Circuit Rule 27-3 Certificate.

/s/ H. Thomas Byron III

H. Thomas Byron III

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Most participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except that the following counsel will be served by first class mail, postage prepaid, and by email:

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