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 AIR-CONDITIONING, HEATING, AND
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14 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

16	NATURAL RESOURCES DEFENSE)	Lead Case
	COUNCIL, INC., <i>et al.</i> ,)	
17)	CASE NO. 3:17-cv-03404-VC
	Plaintiffs,)	
18)	DEFENDANT-INTERVENOR’S
	v.)	ADMINISTRATIVE MOTION FOR A
19)	STAY PENDING APPEAL
	RICK PERRY, <i>et al.</i> ,)	
20)	Complaint Filed: June 13, 2017
	Defendants,)	Consolidated Complaint Filed:
21)	Sept. 8, 2017
	and)	
22)	Judge: Hon. Vince Chhabria
	AIR CONDITIONING, HEATING, AND)	Courtroom: 4, 17th Floor
23	REFRIGERATION INSTITUTE,)	
)	No Hearing Requested
24	Defendant-Intervenor.)	
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THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Plaintiffs,
v.
JAMES R. PERRY, *et al.*,
Defendants,
and
AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,
Defendant-Intervenor.

Consolidated with
CASE NO. 3:17-cv-03406-VC

1 Pursuant to Federal Rule of Civil Procedure 62 and Local Rule 7-11, Defendant-Intervenor
2 Air-Conditioning, Heating, and Refrigeration Institute (AHRI) hereby respectfully moves for a stay
3 pending appeal of this Court’s Order and Judgment entered on February 15, 2018. *See* Order, ECF
4 No. 81; Judgment, ECF No. 82. As the declarations submitted with this motion show, AHRI
5 members and other manufacturers will suffer irreparable harm absent a stay, because they will be
6 forced to incur tens of millions of dollars in unrecoverable costs in order to prepare for compliance
7 with the new energy conservation standards at issue. Those substantial costs far outweigh whatever
8 minimal harm plaintiffs may suffer from temporarily postponing publication of these standards. For
9 these reasons, and for the reasons given in defendants’ previous motion, *see* Mot. for Stay, ECF No.
10 86, this Court should enter a stay pending appeal. If this Court does not grant a stay pending appeal,
11 AHRI respectfully requests a brief additional administrative stay to permit AHRI to seek a stay
12 pending appeal from the Ninth Circuit.

13 ARGUMENT

14 In deciding whether to grant a stay pending appeal, courts consider: (1) whether the stay
15 applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably injured
16 absent a stay; (3) whether a stay will substantially injure other parties; and (4) where the public
17 interest lies. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citing *Nken v. Holder*, 556 U.S.
18 418, 434 (2009)). The second factor asks courts to “anticipate what would happen as a practical
19 matter following the denial of a stay,” and determine whether irreparable harm is “probable.” *Leiva-*
20 *Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011); *see Lair*, 697 F.3d at 1214.

21 I. AHRI Members Will Suffer Irreparable Harm Absent A Stay.

22 As the declarations accompanying this motion show, AHRI members and other
23 manufacturers will suffer irreparable harm unless a stay is entered. Without a stay, the Department
24 of Energy (DOE) will be required to submit the energy conservation standards at issue for
25 publication by April 10, 2018. *See* Order Denying Stay, ECF No. 90. Once published, the new
26 standards will become effective two to five years after publication for each of the four product types
27 at issue—periods specifically established by Congress to ensure that manufacturers would have
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1 adequate time to adapt to any new standards. *See* 42 U.S.C. §§ 6295(I)(2), 6313(a)(6)(C)(iv)(I); 81
2 Fed. Reg. 52,197 (Aug. 5, 2016). For the commercial packaged boilers that AHRI members
3 manufacture, Congress chose a compliance period of three years. 42 U.S.C. §6313(a)(6)(C)(iv)(I).

4 That three-year compliance period is not a luxury—it is a necessity. Once the proposed
5 energy conservation standards are published, AHRI members and other manufacturers who produce
6 commercial packaged boilers will have to commit to an extended research and development process
7 to begin manufacturing products that meet those standards. Almost immediately after the standards
8 are published, manufacturers will have to begin the initial product development process, including
9 evaluating existing products, creating digital models of new design options, soliciting input from
10 engineers and burner manufacturers, and eventually constructing one or more full-size prototypes.
11 Ex. A (Drew Decl.) ¶12; Ex. B (Morgan Decl.) ¶7-8; Ex. C (Markel Decl.) ¶7-8; Ex. D (Butt Decl.)
12 ¶7, 10-11. Once that initial phase is complete, manufacturers will then have to begin a lengthy
13 testing and redesign process, to ensure that the remodeled products are safe for their intended use
14 and actually meet the required efficiency standards. Ex. A ¶14; Ex. B ¶10; Ex. C ¶10; Ex. D. ¶¶13-
15 14. AHRI members and other manufacturers will also have to make substantial capital investments
16 for full production of their new products. Ex. A ¶14; Ex. B ¶11; Ex. C ¶11; Ex. D ¶15.

17 Publication of these standards will thus impose immediate costs on AHRI members (and
18 similar manufacturers), who will be forced to start investing in compliance with those standards
19 within a few short months after they are issued. The costs involved, moreover, are far from trivial.
20 For the initial product development process alone, the manufacturers providing declarations have
21 estimated their individual costs at \$500,000 to \$9 million, which will start being spent soon after the
22 standards are published. Ex. A ¶12; Ex. B ¶7; Ex. C ¶7. After that, the necessary testing,
23 development, and capital investment costs are expected to be between \$2.75 million and \$29 million
24 for each manufacturer providing a declaration, starting within a year after the standards are
25 published. Ex. A ¶15; Ex. B ¶10-11; Ex. C ¶10-11.¹ Imposing those costs on each of those

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28 ¹ For some commercial packaged boilers, moreover, it may be physically impossible to redesign
them to meet the proposed standards. *See* Ex. A ¶10; Ex. B. ¶6-7, 13; Ex. C ¶6-7, 13; Ex. D, ¶6-

1 manufacturers—to say nothing of other manufacturers and the industries affected by the other three
2 standards at issue—would likely amount to tens of millions of dollars of harm.

3 Once the new standards are published, manufacturers cannot just wait until the appeal in this
4 case is resolved to decide whether to start incurring those costs. For a civil appeal like this case (*i.e.*,
5 a non-prisoner case), the *median* time from notice of appeal to final decision in the Ninth Circuit is
6 just under *two years*—meaning that half of all such appeals take even longer. *See* Admin. Office of
7 the U.S. Courts, *Judicial Business 2017*, tbl.B-4A (Sept. 30, 2017) (median time of 22.8 months). In
8 other words, waiting for the Ninth Circuit to rule on this appeal is likely to take up two-thirds or
9 more of the compliance period that Congress provided to allow AHRI members and other
10 manufacturers to adjust to new energy conservation standards for commercial packaged boilers. As
11 the attached declarations show, that kind of delay is not a plausible option. *See* Ex. A ¶11-12; Ex. B
12 ¶6; Ex. C ¶6; Ex. D ¶ 6. Unless a stay is granted, manufacturers will have to invest tens of millions
13 of dollars in redesigning their products and facilities before the Ninth Circuit renders its decision in
14 this case—investments that cannot be recovered if the order to issue the standards is vacated.²

15 These unrecoverable costs constitute irreparable harm. Although economic harm alone
16 usually is not irreparable, *see, e.g., L.A. Mem’l Coliseum Comm’n v. NFL*, 634 F.2d 1197, 1202 (9th
17 Cir. 1980), that limitation “does not apply where, as here, [a party] can obtain no remedy in
18 damages” for the economic injury involved. *Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847,
19 852 (9th Cir. 2009), *vacated on other grounds by Douglas v. Indep. Living Ctr. of S. Cal.*, 565 U.S.
20 606 (2012). In this case, no remedy exists to allow AHRI members to recover the interim cost of
21 complying with these energy conservation standards if their compelled publication is later

22 7, 17. If so, manufacturers who produce those boilers will be forced to terminate those product
23 lines once the new standards go into effect. *See* Ex. A ¶10; Ex. B ¶13; Ex. C ¶13; Ex. D ¶17.

24 ² A separate statutory subsection requires DOE to publish a final rule regarding commercial
25 packaged boilers by March 24, 2018. *See* 81 Fed. Reg. 15,836 (Mar. 24, 2016) (proposed rule);
26 42 U.S.C. §6313(a)(6)(C)(iii)(I) (requiring final rule within two years of proposed rule). That
27 subsection, however, does not require DOE to publish the same proposed standards that were
28 posted for error correction review in December 2016. Indeed, the fact that DOE has not yet
published those proposed standards indicates that DOE is not convinced they are appropriate. As
such, the “more probable or likely outcome” of denying a stay is that manufacturers will suffer
irreparable harm in being forced to prepare for compliance with standards that DOE would not
otherwise have adopted. *Leiva-Perez*, 640 F.3d at 968.

1 invalidated on appeal. Because the AHRI members and other manufacturers regulated by these
 2 standards “will be unable to recover damages [for their wasted investments] even if they are
 3 successful on the merits of their case, they will suffer irreparable harm if the requested [stay] is not
 4 granted.” *Cal. Pharmacists Ass’n*, 563 F.3d at 852; *see also, e.g., A Woman’s Friend Pregnancy*
 5 *Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1214-15 (E.D. Cal. 2015) (“unrecoverable” financial
 6 losses “do constitute irreparable injury”), *aff’d*, 669 F. App’x 495 (9th Cir. 2016).³

7 **II. The Harm To AHRI Members Easily Outweighs Any Possible Harm To Plaintiffs.**

8 These substantial, immediate, and unrecoverable economic costs outweigh any minimal harm
 9 to plaintiffs from a stay. *Cf. Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010)
 10 (affirming district court finding that “the economic stakes ... outweighed any harm to environmental
 11 interests”). The only injury plaintiffs claim they will suffer if a stay is granted is that any long-term
 12 environmental and other benefits of the proposed standards will be temporarily delayed. *See* NGO
 13 Pls. Opp. to Stay, ECF No. 88, at 5; State Pls. Opp. to Stay, ECF No. 89, at 5; *see also* Consolidated
 14 Compl., ECF No. 43, ¶¶39-55 (alleging benefits to the environment, the electrical grid, and
 15 consumers). Even if those benefits are as significant as plaintiffs allege, plaintiffs will face no
 16 substantial hardship from a stay that “would only briefly postpone” the relief they seek. *Hiken v.*
 17 *Dep’t of Defense*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012).

18 Plaintiffs note DOE has estimated that “over a 30-year period,” the proposed standards will
 19 lead to significant reductions in carbon dioxide emissions and will generate savings for consumers
 20 and businesses. NGO Pls. Opp. to Stay at 5 (quoting Order at 2). Of course, plaintiffs make no
 21 attempt to quantify the extent to which those projected emissions reductions and consumer savings
 22 will benefit them and their constituents rather than third parties. Regardless, a stay will not eliminate
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24 ³ AHRI will also suffer irreparable injury if its appeal is mooted by publication of the standards at
 25 issue. *See, e.g., City of Oakland v. Holder*, 961 F. Supp. 2d 1005, 1013 (N.D. Cal. 2013)
 26 (“potential mooting ... constitutes irreparable injury”). Plaintiffs cite 28 U.S.C. §2106, *see* NGO
 27 Pls. Opp. to Stay at 2; State Pls. Opp. to Stay at 3, but that statute by its terms only authorizes an
 28 appellate court to vacate “any judgment, decree, or order of a court” below—not agency
 regulations. Plaintiffs have not cited any case establishing that if these energy conservation
 standards are published, a court would have power under 28 U.S.C. §2106 to vacate those
 standards just because DOE should not have been required to issue them.

1 any projected benefits plaintiffs expect to receive over that 30-year period; it just postpones those
2 benefits by about two years (or less, if the Ninth Circuit decides the appeal more promptly). That is,
3 instead of obtaining their expected environmental benefits and consumer savings between 2022 and
4 2052, plaintiffs will obtain them between 2024 and 2054. That brief delay does not “substantially
5 injure” plaintiffs, *Lair*, 697 F.3d at 1203, and is clearly outweighed by the tens of millions of dollars
6 in immediate and irreparable harm to AHRI members and other manufacturers if a stay is denied.

7 **III. The Remaining Factors Likewise Favor A Stay.**

8 The other two factors of the stay calculus likewise favor a stay. As for likelihood of success
9 on the merits, the Ninth Circuit has made clear that stay applicants “need not demonstrate that it is
10 more likely than not that they will win on the merits,” *Leiva-Perez*, 640 F.3d at 966; instead, this
11 factor requires only a “reasonable probability” or “fair prospect” of success, “serious legal
12 questions,” or a “substantial case on the merits.” *Id.* at 967-68. As defendants have explained, *see*
13 *Mot. for Stay* at 4-5, this case raises an issue of first impression regarding the proper interpretation
14 of the Error Correction Rule, and this Court has resolved that issue contrary to the operative
15 background principle of broad administrative discretion and the agency’s own controlling
16 interpretation of its regulation. *Id.* There is at least a “reasonable probability” that the Ninth Circuit
17 would decide that issue of first impression differently. *Leiva-Perez*, 640 F.3d at 967; *see Mohamed*
18 *v. Uber Techs.*, 115 F. Supp. 3d 1024, 1029 (N.D. Cal. 2015) (“serious legal issue” is “one that
19 raises genuine matters of first impression”).

20 A stay pending appeal is also in the public interest, insofar as it would prevent millions of
21 dollars in wasted investment and would preserve Executive authority over administrative
22 rulemaking. *Cf. Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (public
23 interest and balance of hardships “merge” when the federal government is a party). Those public
24 purposes plainly outweigh any countervailing interest in avoiding a temporary delay to the new
25 energy conservation standards.

26 **CONCLUSION**

27 For the foregoing reasons, the motion for a stay pending appeal should be granted.

1 DATED: March 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 20, 2018, 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.

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