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20 **UNITED STATES DISTRICT COURT**  
21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

22 NATURAL RESOURCES DEFENSE COUNCIL,  
23 INC.; SIERRA CLUB; CONSUMER FEDERATION  
24 OF AMERICA; and TEXAS RATEPAYERS'  
25 ORGANIZATION TO SAVE ENERGY,

26 Plaintiffs,

27 v.

28 RICK PERRY, in his official capacity as Secretary of  
the United States Department of Energy; and the  
UNITED STATES DEPARTMENT OF ENERGY,

Defendants,

and

**Lead Case**

Case No. 17-cv-03404-VC

**Citizen Plaintiffs' Opposition to  
Defendant-Intervenor's Motion for  
a Stay Pending Appeal**

1 AIR-CONDITIONING, HEATING, AND  
2 REFRIGERATION INSTITUTE,

3 Defendant-Intervenor.

4  
5 THE PEOPLE OF THE STATE OF CALIFORNIA,  
6 BY AND THROUGH ATTORNEY GENERAL  
7 XAVIER BECERRA, THE CALIFORNIA ENERGY  
8 COMMISSION, STATE OF NEW YORK, STATE OF  
9 CONNECTICUT, STATE OF ILLINOIS, STATE OF  
10 MAINE, STATE OF MARYLAND,  
11 COMMONWEALTH OF MASSACHUSETTS,  
12 STATE OF MINNESOTA, BY AND THROUGH ITS  
13 MINNESOTA DEPARTMENT OF COMMERCE  
14 AND MINNESOTA POLLUTION CONTROL  
15 AGENCY, STATE OF OREGON,  
16 COMMONWEALTH OF PENNSYLVANIA, STATE  
17 OF VERMONT, STATE OF WASHINGTON, THE  
18 DISTRICT OF COLUMBIA, and CITY OF NEW  
19 YORK,

20 Plaintiffs,

21 v.

22 JAMES R. PERRY, AS SECRETARY OF UNITED  
23 STATES DEPARTMENT OF ENERGY, and THE  
24 UNITED STATES DEPARTMENT OF ENERGY,

25 Defendants,

26 and

27 AIR-CONDITIONING, HEATING, AND  
28 REFRIGERATION INSTITUTE,

Defendant-Intervenor.

*Consolidated with*

Case No. 17-cv-03406-VC

1 The Court ordered the Department of Energy to publish four final energy-efficiency  
2 rules by March 15, later extended to April 10. Dkts. 81, 90. Intervenor AHRI seeks a stay  
3 pending appeal, asserting harm to manufacturers of products covered by one of the four  
4 rules: commercial packaged boilers. The harm to Plaintiffs and the public from delaying  
5 publication of the Boiler Rule far outweighs AHRI's stated harm to manufacturers. AHRI  
6 does not claim any harm from the other three rules, while other manufacturers and trade  
7 groups are harmed by the delay of those rules and have urged DOE to publish them.

8 The Court should deny the stay motion.

### 9 ARGUMENT

#### 10 I. Any harm to manufacturers is outweighed by the harms caused by more delay

11 Delaying publication of these efficiency standards would cause significant  
12 economic and environmental harm to consumers. DOE conducted a cost-benefit analysis  
13 for each of the four rules, analyzing the impact on manufacturers, the benefits and costs to  
14 consumers, and the value of emission reductions. Decl. of Lauren Urbanek (Urbanek Dec.)  
15 ¶¶ 4, 18, 25, 32. According to DOE, the Boiler Rule alone will yield between \$558 million  
16 and \$1.977 billion in consumer economic benefits over 30 years. *Id.* ¶ 11. Adding in the  
17 value of avoided pollution emissions, the net benefits from the Boiler Rule amount to \$85  
18 million to \$143 million *per year*. *Id.* ¶ 15. AHRI does not contest these numbers.

19 AHRI's stay motion does not sum the asserted harm to manufacturers, and it is  
20 hard to discern a precise number from the declarations. A conservative count of the  
21 claimed costs in the declarations is around \$56 million. Dkt. 93-1 ¶ 11; Dkt. 93-2 ¶¶ 6, 7, 10,  
22 11; Dkt. 93-3 ¶ 6; Dkt. 93-4 ¶ 6. Thus, a single year of unrecoverable lost benefits from  
23 delaying the Boiler Rule – at \$85 million to \$143 million – exceeds the total asserted harm  
24 to manufacturers. Urbanek Dec. ¶ 15. If all four of the rules were delayed for just a couple  
25 of years, the lost benefits would dwarf AHRI's asserted harm. *Id.* ¶¶ 15, 23, 30, 37.

26 AHRI commits a basic error in arguing that the only harm to consumers would be  
27 delayed benefits, not lost benefits. Dkt. 93 (Mot.) 4. When talking about consumer savings  
28 from reduced energy costs, a delayed benefit is a lost benefit. As an illustration, assume a

1 consumer's energy bill is \$100 per year, and with these rules in place it will be \$90 per  
2 year. If the rules are delayed for three years, the consumer loses \$10 each year, which is  
3 \$30 that she will never get back. That is not a delayed benefit, as it would be if someone  
4 planned to give the consumer \$30 but then waited three years to do it. It is a lost benefit.

5 Another way of viewing the harm from delay is to consider the subset of consumers  
6 who will purchase new equipment during the first year or two after manufacturers are  
7 required to comply with a new standard. If the standard is delayed, many, if not most, of  
8 these consumers will not be able to delay their purchase to wait until the standard  
9 mandates more efficient products. For each year the Boiler Rule is delayed, tens of  
10 thousands of customers will buy a new boiler, according to DOE's estimates of annual  
11 product shipments. Urbanek Dec. ¶ 16. Many of these products will meet the old standard  
12 rather than the new one, and these customers will be locked in to their less-efficient  
13 product for the twenty-plus-year life of the boiler.

14 Just as with consumer savings, when it comes to ongoing pollution emissions, a  
15 delayed benefit is a lost benefit. Delayed publication of the rules means more pollution  
16 from extra energy consumption in the meantime, including emissions of carbon dioxide,  
17 nitrogen oxides, sulfur dioxide, and mercury. Urbanek Dec. ¶¶ 12, 21, 28, 35. Those  
18 emissions will never be recaptured; the climate and health impacts from that pollution  
19 cannot be undone. That results in environmental harm to Plaintiffs and the public, not just  
20 a delayed benefit.

21 AHRI argues that harm to boiler manufacturers should trump environmental  
22 benefits to Plaintiffs and the public. Mot. 4. Even assuming that is sometimes true – that  
23 economic harm to manufacturers matters more than environmental harm to the public – it  
24 is demonstrably not true here. DOE monetized some of the environmental benefits that  
25 will be provided by these four efficiency standards. In the Boiler Rule, DOE calculated the  
26 value of avoided carbon dioxide emissions alone as worth an estimated \$482 million over  
27 30 years. Urbanek Dec. ¶ 13. The other three rules confer a benefit from avoided  
28 greenhouse gas emissions of \$300 million (air compressors), \$1 billion (portable air

1 conditioners), and \$1.7 billion (uninterruptible power supplies). *Id.* ¶¶ 22, 29, 36. AHRI  
2 again does not contest these numbers, which are in addition to the consumer economic  
3 benefits. And this does not include the value of other avoided pollution emissions that  
4 DOE did not attempt to monetize. *Id.* ¶ 13. AHRI correctly notes that these benefits will  
5 inure to the broader public, not just the Plaintiffs, but the public interest is an important  
6 part of the stay calculus too. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

7 Finally, a stay pending appeal would harm other manufacturers who will benefit  
8 from the new efficiency rules and are prepared to comply with them. The company  
9 Ingersoll Rand, for example, wrote DOE last week asking the agency to publish the final  
10 Air Compressor Rule, to provide regulatory certainty, allow the company to invest  
11 confidently in more efficient products, and ensure a level playing field across the industry.  
12 Urbanek Dec. Ex. A. The trade group for the air compressor industry, the Compressed Air  
13 and Gas Institute, also filed comments with DOE last week, supporting publication of the  
14 final Air Compressor Rule to clarify requirements throughout the industry. *Id.* Ex. B. And  
15 last summer, the trade group representing manufacturers of portable air conditioners, the  
16 Association of Home Appliance Manufacturers, urged DOE to provide regulatory  
17 certainty by quickly publishing the final Portable Air Conditioner Rule. *Id.* Ex. C. Further  
18 delay would harm those manufacturers who want these final rules to go into effect.

## 19 **II. AHRI's asserted harm is thinly supported and inconsistent with the record**

20 The discussion above assumes that AHRI's asserted economic harm is accurate. But  
21 there are reasons not to accept the stated harm at face value. First, the costs itemized in  
22 AHRI's declarations are inconsistent with DOE's conclusions in the administrative record.  
23 The Boiler Rule analyzed the impact on manufacturers and estimated that the industry as  
24 a whole will incur \$21.2 million in one-time conversion costs to comply with the new  
25 standards, which is much less than what AHRI suggests. Urbanek Dec. ¶ 7. DOE also  
26 projected that the industry would be able to recover up to half of those costs by passing  
27 them on to consumers, reducing the rule's net cost to the industry to as little as \$10.3  
28 million. *Id.* ¶ 8. AHRI does not acknowledge DOE's conclusions, let alone explain the

1 discrepancy. And whereas DOE's economic analysis comprises dozens of pages in the  
2 rulemaking record and is based on published cost-benefit methodologies, *see id.* ¶¶ 4-8,  
3 AHRI's estimated costs are presented in four largely boilerplate declarations, repeating  
4 entire paragraphs nearly verbatim, with no explanation for the numbers provided in each.  
5 DOE's published analysis carries far more weight.

6 Second, some of the costs listed in AHRI's declarations depend on the assumption  
7 that an appeal will take years to resolve. There is no reason an appeal needs to take that  
8 long. AHRI could seek expedited review to minimize any harm to manufacturers in the  
9 meantime. *See Fed. R. App. P. 2* (on motion, a court of appeals may expedite a decision);  
10 9th Cir. R. 27-12 (motions to expedite briefing and hearing will be granted for good cause).  
11 AHRI has done nothing to try to speed the process along: it did not file a notice of appeal  
12 until more than a month after the Court's order on summary judgment, Dkt. 92, and it has  
13 not taken any steps to expedite proceedings in the Ninth Circuit. If the appeal were  
14 resolved in a year, instead of two or more, it would significantly cut AHRI's estimated  
15 harm to boiler manufacturers.

16 Importantly, AHRI does not claim any harm from publication of the other three  
17 efficiency rules in this case, which govern portable air conditioners, uninterruptible power  
18 supplies, and air compressors. At a minimum, if the Court grants a stay based on harm to  
19 manufacturers, the stay should be limited to the Boiler Rule alone.

### 20 **III. A stay would sanction DOE's violation of a statutory deadline**

21 DOE is now in violation of a March 24, 2018 statutory deadline to publish a final  
22 Boiler Rule. *See* 42 U.S.C. § 6313(a)(6)(C)(iii)(I) (requiring final rule within two years of  
23 proposed rule); 81 Fed. Reg. 15,836 (Mar. 24, 2016) (proposed rule). AHRI concedes this  
24 deadline but argues that Congress did not direct the agency to publish this *particular* Boiler  
25 Rule – the one posted for error correction. Mot. 3 n.2. That misses the point: granting a stay  
26 would guarantee that DOE violates the statutory deadline to publish a Boiler Rule by  
27 months or years. It is not in the public interest to enable and perpetuate DOE's violation of  
28 the law.

1 **IV. AHRI is not likely to succeed on the merits of its appeal**

2 AHRI briefly argues that it is likely to succeed on appeal. Mot. 5. This argument  
3 disregards the Court’s recent order. The Court denied a stay without prejudice to a  
4 renewed motion that makes a better showing of asserted harm to manufacturers. Dkt. 90.  
5 The Court did not invite more argument on likelihood of success.

6 AHRI’s only claim here is that the case raises an issue of first impression, and that is  
7 enough to show a serious legal question sufficient for a stay. Mot. 5. AHRI applies the  
8 wrong test. The “serious legal questions” standard only applies if the balance of hardships  
9 tips “sharply” in favor of the movant. *Mohamed v. Uber Techs.*, 115 F. Supp. 3d 1024, 1029  
10 (N.D. Cal. 2015). Because that is not true here, AHRI must make a “strong showing that [it]  
11 is likely to succeed on the merits.” *Lair*, 697 F.3d at 1203 (quoting *Nken v. Holder*, 556 U.S.  
12 418, 434 (2009)). It failed to do so.

13 AHRI is also wrong that the case raises a genuine issue of first impression. The case  
14 instead presents standard questions of textual interpretation and administrative law.  
15 AHRI itself previously argued that this case is governed by “general principle[s] of  
16 administrative law” and “clear regulatory text.” Dkt. 68 at 1, 3.

17 **V. An additional administrative stay is unwarranted**

18 AHRI asks for another administrative stay to give it more time to seek a stay  
19 pending appeal from the Ninth Circuit. Mot. 1. AHRI did not initially move for a stay in  
20 this Court; instead it filed a two-sentence response in support of DOE’s motion. Dkt. 87.  
21 The Court granted an administrative stay once already, to allow time for DOE and AHRI  
22 to seek a stay from the Ninth Circuit, or from this Court in a renewed motion. Dkt. 90.  
23 DOE then filed an emergency motion for a stay in the Ninth Circuit, but AHRI did not. If  
24 AHRI wanted to ask the Ninth Circuit for a stay pending appeal, it could and should have  
25 done so earlier. There is no basis to delay publication of the Final Rules any further.

26 **CONCLUSION**

27 The Court should deny AHRI’s motion for a stay pending appeal.

1 Dated: March 26, 2018

Respectfully submitted,

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