No. 18-15380 and No. 18-15475
Consolidated

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,

Plaintiffs-Appellees,

v.

JAMES R. PERRY, et al.,

Defendants-Appellants,

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor-Appellant

PEOPLE OF THE STATE OF CALIFORNIA et al.,

Plaintiffs-Appellees,

v.

JAMES R. PERRY, et al.

Defendants-Appellants,

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor-Appellant

Case No.18-15475

On Appeal from the United States District Court
for the Northern District of California

Nos. 17-cv-03404 and 17-cv-03406-VC
Vince Chhabria, Judge

OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Plaintiffs, the People of the State of California, by and through Xavier Becerra, Attorney General, et al. (Government Plaintiffs) [1] file this opposition to the Emergency Motion for Stay ("Motion") filed by Defendant-Intervenor Air-Conditioning, Heating, & Refrigeration Institute ("AHRI"). AHRI's Motion repeats many of the same arguments made by the Department of Energy ("DOE") in its emergency motion for stay. To the extent the arguments are identical, the Government Plaintiffs repeat their response to DOE's motion in this Opposition.

As noted in the Government Plaintiffs' opposition to the DOE's motion for emergency stay, this case arises from the Department of Energy's failure to publish its four final energy conservation standards (covering air compressors, commercial packaged boilers, portable air conditioners and uninterruptible power supplies (the "Final Rules")), as required by 10 C.F.R. § 430.5 (the Error Correction Regulation ("ECR")). The Final Rules resulted from years of substantive review and represented DOE's determination that the Final Rules are "technologically feasible and

[1] Government Plaintiffs are the People of the State of California, by and through Attorney General Xavier Becerra, the California State Energy Resources and Development Commission ("CEC"), the States of New York, Connecticut, Illinois, Maine, Maryland, Minnesota, by and through its Department of Commerce and Minnesota Pollution Control Agency, Oregon, Vermont, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the City of New York.

economically justified" pursuant to the Energy Policy and Conservation Act ("EPCA"). 42 U.S.C. §§ 6291-6309.

Rulemaking in this area is highly technical, and EPCA prevents DOE from reducing the efficiency required by an earlier standard. To avoid typographic, calculation, or numbering errors being codified in the regulatory text, the ECR provides a short "pause" after DOE's adoption of an energy conservation rule, prior to publication of the rule. Here, though the ECR review period passed, DOE failed to publish the Final Rules in the Federal Register for over a year. *See* Order Denying Defendants' Motions to Dismiss and Granting Plaintiffs' Motions for Summary Judgment ("Order"), District Court Docket ("Dkt.") #81, 3 (noting lack of explanation for lapse).

Government Plaintiffs filed suit on June 13, 2017 to compel what the text of the ECR explicitly requires: publication of the Final Rules in the Federal Register. AHRI intervened to assert its members' interest in the implementation of the ECR and against the publication of the commercial packaged boiler rule ("Boiler Rule"), which it asserts will negatively impact its members. Dkt. #23, 2-3. The district court ruled that the ECR limited DOE's discretion and compelled a single legally permissible action—to publish the Final Rules. Order 4. Accordingly, the district court ordered the DOE to publish the Final Rules within 28 days. Order 9. AHRI

then sought a stay pending appeal from the district court, which was denied. Dkt. #93, 98.

As with its request to the district court, AHRI's Motion to this Court should be denied. AHRI has not shown a probability of success on the merits and is not irreparably harmed by publication of the Final Rules. Further, the balance of harms and the public interest weigh against the stay.

PRIOR PROCEEDINGS

The Consolidated Complaint[2] (Dkt. #43) alleges that DOE failed to perform a non-discretionary duty under EPCA, 42 U.S.C. § 6305(a)(2), and the ECR, 10 C.F.R. § 430.5(f). The district court held that DOE violated a non-discretionary duty created by the ECR to publish the standards at the end of the error correction process. Order 4, 9. It rejected DOE and AHRI's contention that DOE retained discretion to reconsider, modify, or withdraw standards that were undergoing error review. Order 3-4. The district court denied DOE and AHRI's separate motions for a stay pending appeal and ordered DOE to publish the Final Rules by April 10, 2018. Order Denying Motion for Stay Pending Appeal, Dkt. #98. DOE then filed a motion for stay pending appeal which is currently pending before this Court along with AHRI's motion.

[2] At Judge Chhabria's request, Government Plaintiffs filed a consolidated complaint with Natural Resources Defense Council and its co-plaintiffs on September 8, 2017.

STATUTORY AND REGULATORY BACKGROUND

I. THE ENERGY POLICY AND CONSERVATION ACT

EPCA establishes mandatory efficiency standards for a broad range of consumer, commercial, and industrial products. *See* Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified at 42 U.S.C. §§ 6291-6309); *see* 42 U.S.C. §§ 6295, 6313. Energy efficiency standards are "designed to achieve the maximum improvement in energy efficiency" that "is technologically feasible and economically justified." *Id*. §§ 6295(o)(2)(A), 6316(a). The standards are highly technical, often involving engineering requirements and mathematical specifications. DOE's energy efficiency standards have a significant national impact.

For most products covered by EPCA, DOE must conduct a rulemaking every six years to determine whether the standards should be amended, and if so, to propose new standards. *Id*. §§ 6295(m)(1); 6313(a)(6)(C)(i). If DOE proposes new standards, it must publish a final rule within two years of issuing the notice of proposed rulemaking. *Id*. § 6295(m)(3)(A). EPCA also contains an "anti-backsliding" provision which prohibits DOE from promulgating "any amended standard" that "decreases the minimum required energy efficiency" of a "covered product." *Id*. §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I).

Under EPCA's "citizen suit" provision, "any person may commence a civil action" in a United States district court against DOE where DOE has failed "to

perform any act or duty under this part which is not discretionary." *Id*. §§ 6305(a)(2), 6316(a)-(b). Government Plaintiffs are "persons" within the meaning of EPCA and its citizen suit provision. *Id*. § 6202(2)(C).

II. THE ERROR CORRECTION REGULATION

DOE adopted the ECR to avoid a situation where EPCA's anti-backsliding provision may prevent DOE from correcting an unintended mistake. 10 C.F.R. § 430.5; 81 Fed. Reg. 26,998, 26,999 (May 5, 2016); 81 Fed. Reg. 57,745 (Aug. 24, 2016). The ECR provides a way to identify and correct errors in final rules prior to their publication in the Federal Register, allowing DOE to "avoid the harmful consequences" of such errors becoming binding. 81 Fed. Reg. at 27,000.

The ECR provides that, once DOE has completed substantive deliberations and made its final determination for an energy efficiency standard rule, the agency must post the standard on a publicly accessible website for 45 days to allow for identification of errors. 10 C.F.R. § 430.5(c); 81 Fed. Reg. at 57,746-48. "[DOE] posts a rule with the appropriate official's signature only after concluding its deliberations and reaching decisions on the relevant factual determinations and policy choices." 81 Fed. Reg. at 26,999. During the 45-day review period, interested parties may submit error correction requests to DOE. 10 C.F.R. § 430.5(d). "Error" is narrowly defined as "an aspect of the regulatory text of a rule that is inconsistent with what the Secretary intended regarding the rule at the time of posting," including

"typographical," "calculation," and "numbering mistake[s]." 10 C.F.R. § 430.5(b). Disagreement "with a policy choice that the Secretary has made will not, on its own, constitute a valid basis for a[n error correction] request." *Id*. § 430.5(d)(2)(ii).

There are three possible outcomes once a rule enters the error correction process. If DOE receives correction requests but determines not to make any corrections, it "will submit the rule for publication to the [Federal Register] as it was posted." *Id*. § 430.5(f)(1). If DOE does not receive any error correction requests and does not identify any errors in its own review, it "will in due course submit the rule, as it was posted . . ., to the [Federal Register] for publication." *Id*. § 430.5(f)(2). Finally, if DOE receives error correction requests and determines corrections are necessary, it "will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days after the [error correction] period . . . has elapsed." *Id*. § 430.5(f)(3). Thus, regardless of the outcome of the error correction process, the ECR states that either the original standard or a corrected standard will be submitted to the Federal Register for publication: "The error-correction process occurs . . . between DOE's posting of a rule and publication of the rule in the Federal Register." 81 Fed. Reg. at 26,999.

FACTUAL BACKGROUND

In December 2016, DOE completed its substantive analysis, determining that each of the Final Rules was technologically feasible and economically justified, and

would result in a significant conservation of energy; the Acting Assistant Secretary for Energy Efficiency and Renewable Energy signed the Final Rules; and the Secretary approved their publication, noting that they were "final rule[s]."[3] As required by the ECR (10 C.F.R. § 430.5(c)), the Final Rules were posted online for the 45-day error correction period. The error correction period ended on January 19, 2017 for the Air Compressor Final Rule and on February 11, 2017 for the other three Final Rules. DOE received no error correction requests for the Air Compressors, Portable AC, and UPS Final Rules, and received three purported error correction requests for the Boiler Final Rule. Order 2. DOE has not submitted any of the Final Rules to the Federal Register for publication; nor has DOE taken steps to correct any of the Final Rules.

STANDARD OF REVIEW

In determining whether to grant a stay pending appeal, courts consider: (1) whether the applicant has a strong chance of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the other parties; and (4) where the public interest lies. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (citing *Nken v. Holder*, 556 U.S. 418,

[3] Dkt. #66-2 at 346 ("Air Compressors Rule"); Dkt. #66-4 at 317 ("Boiler Rule"); Dkt. #66-1 at 255 ("Portable AC Rule"); Dkt. #66-3 at 193 ("UPS Rule"). References to the text of the Final Rules refer to their page numbers in the district court docket as labeled by the ECF system.

433-34 (2009)). On the merits, the applicant must show a "substantial case for relief." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). Further, the applicant must show irreparable harm is probable. *Ibid.* Even if the irreparable harm standard is met, all other factors must still be established. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. AHRI'S APPEAL HAS A MINIMAL LIKELIHOOD OF SUCCESS ON THE MERITS

After careful consideration, the district court found that the plain language of the ECR limited DOE's discretion to reconsider its policy-making choices, requiring publication of the Final Rules. Order 9. Nothing has changed; the district court's decision was correct and AHRI cannot show a "substantial case for relief." *Leiva-Perez*, 640 F.3d at 968.

In its Motion, AHRI argues that fundamental principles of administrative law give DOE unchecked discretion to revise its policy decisions after rules have entered the error correction process, despite the mandate of the ECR, and that the district court's opinion is illogical and exceeds its authority. Motion 9-13. AHRI's argument ignores the specific command of the text of the ECR and DOE's own statements in the ECR's regulatory history, which support Government Plaintiffs' interpretation.

A. The Text of the ECR is Unambiguous and Requires DOE to Publish the Final Rules

A plain reading of the ECR's text demonstrates that the process ultimately ends with publication of a final rule. While 10 C.F.R. § 430.5(f)(1)-(3) identifies three possible ways DOE may carry out its obligations under the ECR, there is only one possible outcome: publication of the Final Rules. The ECR states: (a) if DOE receives correction requests but decides not to make any corrections, it "will submit the rule[s] for publication to the [Federal Register] as … posted"; or (b) if DOE does not receive any error corrections requests and does not identify any errors in its own review, it "will in due course submit the rule, as it was posted . . . to the [Federal Register] for publication."; or (c) if DOE receives corrections requests it determines are necessary, it "will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days after the [error correction] period . . . has elapsed." 10 C.F.R. § 430.5(f)(1)-(3). Regardless of the path followed, the ECR requires that the Secretary submit the rule for publication in its original or corrected form. *Id*., § 430.5(e).

The term "will" in statutory language indicates a mandatory obligation. *Fernandez v. United States*, 496 Fed. App'x 704, 705-06 (9th Cir. 2012) (explaining "will" is a mandatory term). The district court found that the text of the ECR creates a "clear-cut duty for the Department to publish an energy standard in the Federal Register at the end of the error-correction process." Order 4.

Despite the mandatory language of subsection (f), AHRI argues that subsection (g)'s recognition of DOE's ability to "correct" final rules posted for error correction in compliance with the Administrative Procedure Act ("APA") overrides the specific command to publish the final rules and allows DOE to exercise "agency discretion" within the "background principles" of the APA. But if "will submit" does not create an obligation on the part of the Secretary, DOE would be permitted to ignore the error correction process completely. The term "will" appears repeatedly in the ECR with respect to the Secretary's required conduct. *See, e.g.*, *id.*, § 430.5(c)(1) ("The Secretary will cause a rule under the Act to be posted"); *id*., § 430.5(c)(2) ("The Secretary will not submit a rule for publication in the Federal Register during the 45 calendar days"); *id*., § 430.5(d)(3) ("The Secretary will not consider new evidence."); *id*., § 430.5(f)(6) ("[T]he Secretary will make publicly available a written statement indicating how any properly filed requests for correction were handled."). AHRI cites no authority for the discretion it claims DOE may exercise to violate its own regulations, and none exists. *See Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("An agency is bound by its regulations so long as they remain operative.").

Contrary to AHRI's interpretation, subsection (g) only affirms DOE's ability to "correct" final rules under the ECR—i.e., to rectify "typographical," "numbering," or "calculation" mistakes—while complying with the anti-

backsliding provision. Motion 11-12. This reading comports with the regulatory history, which states that subsection (g) "articulates [DOE]'s conclusion that it may change a standard that it has posted but has not yet published . . . even if the effect . . . is to increase the maximum energy use or decrease the energy efficiency the standards would reflect." 81 Fed. Reg. at 27,002. Thus, subsection (g) only provides DOE discretion to correct "errors" within the confines of the ECR, and does not allow the unbridled discretion AHRI suggests.

AHRI argues that the district court's order requires DOE to publish the exact "same standard" that was posted and thus exceeds the court's authority under *Norton v. Southern Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 65 (2004). Motion 12-13. There are two problems with this argument. First, the district court did not hold that DOE must publish the final rule that was posted. Rather, the district court held that DOE must publish either the posted version or a corrected version of the Final Rules. Order 5 (discussing DOE's "two options" after posting a standard for error review: "publish the standard as posted, or correct any errors in the standard and publish it as corrected"). This interpretation follows the provisions of the ECR. *See*, *e.g.*, 10 C.F.R. § 430.5(e) (Secretary may respond to errors identified by the public or by DOE "by submitting to the [Federal Register] either a corrected rule or the rule as previously posted."), *id*., § 430.5(f) (requiring publication of a final rule as posted or corrected).

Further, AHRI's incomplete quotation of *SUWA* misrepresents the Supreme Court's holding. Motion 13. The Supreme Court stated that if an agency is compelled to act within a "certain time period" but "*the manner of its action is left to the agency's discretion*, a court can compel an agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65 (emphasis added). This reasoning applies precisely to the present case: DOE is compelled by the ECR to act within a reasonable time, generally not more than 30 days, to publish final rules after the error correction process. DOE has discretion as to whether it publishes the original rule or a corrected rule. It does not, however, have discretion to forego publication altogether.

B. The Regulatory History of the ECR Confirms that DOE Has a Mandatory Duty to Publish the Final Rules

The regulatory history supports Government Plaintiffs' view that timely submission of the final rules for publication after the error correction period is mandatory.[4] DOE specifically noted that posting of final rules "signals the end of DOE's substantive analysis and decision-making regarding the applicable standards," 81 Fed. Reg. at 57,551, and it repeatedly rejected petitions seeking to expand the process to a full reconsideration procedure. *Id*. at 57,746, 57,752-57,755;

[4] When the language of a provision is clear, as it is here, a court need not go beyond the plain language of the enactment. *U.S. v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999).

26,998-26,999. Thus, at the time of promulgation of the ECR, DOE made clear that once the ECR process was initiated, rules were no longer subject to substantive consideration, as AHRI now argues. Motion 12-13; *see also* 81 Fed. Reg. at 26,999 (finality of posting of rule for error review).

Further, consistent with congressional "concern that [efficiency] standards rulemaking should not be unnecessarily delayed," 81 Fed. Reg. at 57,753, DOE made clear it was establishing "timelines," intended to sanction only a "relatively small delay" in publication of final rules. *Id*. at 57,448, 57,750. "DOE will follow a prescribed timeline for submitting a corrected rule to the Federal Register for publication." *Id*. at 57,751; s*ee also id*. at 57,746 (emphasizing "timelines" "prescribed" by the ECR). DOE sought to delay energy efficiency rules only as necessary to avoid possible errors. "[P]ostponing the publication of a standards rule in the Federal Register means delaying the benefits to consumers and to the economy that the new standard will achieve; and it prolongs the uncertainty for manufacturers about what the standard will eventually be." *Id*. at 57,753.

C. DOE Does Not Have Inherent Discretion to Modify or Withdraw the Final Rules Under the ECR

AHRI argues that the district court's ruling disregards fundamental principles of administrative law that allow an agency to review and revise the Final Rules up

until their actual publication date. Motion 10 (citing *Kennecott Utah Copper Corp. v. Dept. of Interior,* 88 F.3d 1191, 1202-1209 (D.C. Cir. 1996)).[5]

In fact, it is AHRI itself that ignores basic principles of administrative law; namely, that an agency must obey its own regulations, even where the agency has imposed stricter requirements on itself than required by statute. *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Chicano Educ. and Manpower Services v. U.S. Dept. of Labor*, 909 F.2d 1320, 1327 (9th Cir. 1990); *Romeiro de Silva*, 773 F.2d at 1025 (9th Cir. 1985). Here, the ECR compels publication of the Final Rules and DOE is bound to follow its regulation.

Although 1 C.F.R. § 18.13 does allow an agency to withdraw a regulation in the normal course of its actions (Motion 10-11), it does not grant an agency authority to do so in violation of its own regulations. The ECR limits the discretion that DOE would normally have under 1 C.F.R. § 18.13 and thus requires that DOE submit the rules for publication and refrain from withdrawing them. *See Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 375 (1990) (specific statute is not nullified by general one). No authority indicates that DOE retained the authority to

[5] AHRI's reliance on *Kennecott* is misplaced because *Kennecott* held only that district courts did not have authority to order publication of rules under section 552(a)(4)(B) of the Freedom of Information Act and that the Federal Register Act did not forbid an agency from withdrawing a rule from the Office of the Federal Register before publication. *Id*. at 1202-03, 1206. It did not hold an agency could refuse to publish a rule in violation of its own regulations.

avoid publishing a final rule altogether. 81 Fed. Reg. at 57,753 (emphasizing importance of publishing rules with no delay).

DOE's own understanding of its mandatory and time-limited obligation is emphasized by its response to requests for a more explicit deadline for publication during the ECR rulemaking. In rejecting a request to clarify how much time the agency would take to publish a final rule during the ECR rulemaking, DOE stated that a clarification was unnecessary because the ECR as written already "prescribe[d] a timeline under which DOE will submit the rule to the Federal Register." 81 Fed. Reg. at 57,750 (within 30 days after any correction is received). DOE's statements during the rulemaking reveal DOE viewed its obligations as mandatory and time-constrained.

AHRI further argues that the district court decision is illogical because the ECR could potentially force DOE to publish a rule with "serious flaws." Motion 12. But this unlikely hypothetical presupposes that such substantive flaws were not revealed by the years-long rulemaking process, only to be found in the 30-day error correction period. Rather than permitting endless review of energy efficiency rules, DOE determined that the ECR strikes the appropriate balance between the need for speedy publication of rules in order to obtain the benefit of energy savings and the desire to avoid making a clerical, typographical, or calculation error in rules that are highly technical. 81 Fed. Reg. at 57,750-55 (discussing publication timing and rejecting of

petitions to include full reconsideration procedure). The district court's order effectuates this determination.

Contrary to AHRI's argument, the district court also correctly rejected DOE's *post hoc* interpretation of its regulation as inconsistent with the text of the ECR and with DOE's own pre-litigation interpretations. Motion 11; Order 7; 81 Fed. Reg. at 26,999; *see Christensen v. Harris Cty*., 529 U.S. 576, 588 (2000). An agency's interpretation of its regulations is not entitled to controlling weight if it is "plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy,* 562 U.S. 195, 208 (2011). DOE's litigation assertions contradict its statements in the rulemaking record and thus are not entitled to deference. *See also Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 614 (2013).

II. AHRI CANNOT SHOW IRREPARABLE HARM IF THE FINAL RULES ARE PUBLISHED AS ORDERED

AHRI has failed to show that it will be "irreparably harmed" if the stay is not granted. As a preliminary matter, the denial of the Motion presents no risk of mootness, contrary to AHRI's arguments. Motion 13-14. If this Court ultimately reverses the district court, nothing in the anti-backsliding provision (42 U.S.C. § 6295(o)(1)), which applies only to DOE, not the courts, would prevent this Court from vacating the Final Rules under its discretionary remedial power. 28 U.S.C. § 2106 (providing "court of appellate jurisdiction may . . . reverse any judgment . . .

before it for review").[6] Indeed, despite the anti-backsliding provision, the judiciary has vacated EPCA rules in the past. *See*, *e.g.*, *Hearth, Patio & Barbecue Ass'n v. DOE*, 706 F.3d 499, 500 (D.C. Cir. 2013). Publication of the Final Rules during the pendency of the appeal, as directed by the district court, will therefore not moot this case since the Court can still fashion "some form of meaningful relief" (*U.S. v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1112 (9th Cir. 2012)) by vacating the Final Rules. Indeed, AHRI and DOE have previously moved for and received the vacatur of rules as relief in an EPCA case. *See* Dkt. 23-5, 2 (Declaration of Stephen R. Yurek, Exhibit C (Joint Motion Embodying Settlement Agreement of All Parties for Partial Vacatur and Remand and to Hold These Cases in Abeyance)); Declaration of Somerset Perry, Exhibit A (Order Granting Unopposed Motion, *Lennox v. DOE*, No. 14-60535, Doc. 513147772, (5th Cir. Aug. 10 2015)).

AHRI also argues its members will be irreparably harmed due to costs incurred to comply with the Boiler Rule or the loss of lead time for compliance. Motion 14-19. But, as AHRI concedes, "economic loss alone is generally insufficient" to demonstrate irreparable harm. Motion 18; *see L.A. Mem'l Coliseum Comm'n v. NFL,* 634 F.2d 1197, 1202 (9th Cir. 1980). Consequently, compliance costs are also

[6] AHRI asserts that Government Plaintiffs would argue that DOE cannot withdraw the Final Rules if they are published, and thus mootness is a real risk. Motion 14. AHRI is correct that DOE would not be able to withdraw the Final Rules of its own accord but fails to consider this Court's ability to reverse the effects of publication by vacating the Final Rules.

generally not considered irreparable harm. *See, e.g., Freedom Holdings v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("Ordinary compliance costs are typically insufficient to constitute irreparable harm"); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527–28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction.").

Citing *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), AHRI asserts that compliance costs may constitute irreparable harm. Motion 18. That case holds only that a stay is justified for economic losses when subsequent damages claims may be blocked by a distinct legal doctrine—in that case, by a state's sovereign immunity. 563 F.3d at 851-52; *see also A Woman's Friend Pregnancy Resource Clinic v. Harris*, 153 F.Supp.3d 1168, 1214-15 (E.D. Cal. 2015) (same). To qualify for this exception, a stay applicant must have a potential damages claim in the first place; because AHRI would not be entitled damages due to the publication of the Final Rules, this exception does not apply.

Even if compliance costs could constitute irreparable harm, AHRI would need to show that such harm is "directly traceable" to publication of the Boiler Rule, and that the harm would "certainly be redressed" by a stay of the challenged Rule. *Cal. Pharmacists Ass'n*, 563 F.3d at 851-52; *Leiva-Perez*, 640 F.3d at 968 (the Court

must "anticipate what would happen as a practical matter following the denial of a stay"); *Winter*, 555 U.S. at 20 (requiring a likelihood of harm). Under these standards, AHRI's alleged harms do not justify a stay because its compliance costs are improperly calculated, speculative, improbable, and not "directly traceable" to publication of the Boiler Rule.

According to DOE's calculations, costs to comply with the Boiler Rule total $21.2 million *for the entire industry*. Boiler Rule at 203-204, 256-57 (discussing conversion costs). The AHRI declarants represent only a small fraction of commercial boiler manufacturers, yet they collectively claim more than $54 million in unrecoverable investments. Dkt. #93-3 ¶ 6 ("Markel Decl."); Dkt. #93-2 ¶ 6 ("Morgan Decl."); Dkt. #93-4 ¶ 6 ("Butt Decl.") Dkt. #93-1 ¶ 11 ("Drew Decl."). This is more than double DOE's estimate of costs to the entire industry. AHRI's estimates are therefore not only speculative, they are highly improbable. Further, to the extent that AHRI claims that its members may be forced to discontinue certain boiler lines, that claim is equally speculative.

AHRI argues that DOE's "calculation was flawed in a number of respects." Motion 17 n.6. However, DOE already took into account AHRI's numerous comments in the rulemaking. *See*, *e.g.*, Boiler Rule at 91-92 (re factual bases), 167-68 (re discount rates), 221-229 (re social cost of carbon). Furthermore, unlike its erroneous regulatory interpretation, DOE's technical conclusions and expert

determinations are entitled to deference. *See National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 798 (9th Cir. 2005).

AHRI's alleged compliance costs are also not directly traceable to the Boiler Rule. As AHRI acknowledges, EPCA requires DOE to issue a final rule establishing an improved efficiency standard for commercial boilers by March 24, 2018. Motion 18 n.7. Thus, even in the absence of the Boiler Rule, industry would incur costs for compliance with an alternative standard. Indeed, an alternative efficiency standard could be even more stringent and costly to implement than the Boiler Rule, which was developed with older technology and different market conditions.

Finally, this matter can be resolved on the merits before AHRI has to incur extensive costs to comply with the Boiler Rule. AHRI identifies a median time for a final decision in the Ninth Circuit as almost two years, but ignores that this appeal is limited to a pure legal issue, does not involve any administrative record, and will be fully briefed by August 20, 2018. See *NRDC v. Perry*, Nos. 18-15380, 18-15475, Dkt. #23 (9th Cir. April 2, 2018). Given these factors favoring expeditious resolution, the probability that the Boiler Rule's standards will directly harm manufacturers is curtailed. In fact, AHRI's manufacturer declarants will not even begin the development process until "a few months after the new standards are published" (Butt Decl. ¶ 6; Morgan Decl. ¶ 6; Markel Decl. ¶ 6) and possibly as long as a year after publication. Drew Decl. ¶ 15. Even once the manufacturers begin

taking action (several months after the publication of the rules) to improve the efficiency of units (that they have known since at least March 2016 would be subject to more stringent regulation), they acknowledge that the first period of development involves retesting and initial development (e.g., Markel Decl. ¶ 7). As manufacturers would undertake these steps regardless of whether DOE ultimately publishes the Boiler Rule or an alternative boiler rule, such costs cannot constitute irreparable harm. It is therefore far from probable that manufacturer compliance costs during the period of this potentially expedited appeal will be specifically attributable to this Boiler Rule.

Considered together, the harms asserted by AHRI cannot support the issuance of a stay.

III. ISSUANCE OF A STAY WILL CAUSE SIGNIFICANT HARM TO GOVERNMENT PLAINTIFFS AND THE PUBLIC INTEREST

Although a stay would not irreparably injure AHRI or its members, further delaying publication of the Final Rules, beyond the current 13-month delay, significantly injures Government Plaintiffs by hindering efforts to reduce energy consumption and greenhouse gas emissions caused by energy demand; increase the reliability of the power grid; and avoid the costs of power plant construction. Consolidated Complaint, ¶¶ 39-54. Contrary to AHRI's assertions, these harms are not negligible. Motion 19.

Delaying publication of the energy conservation standards for any period of time will cause actual harm to Government Plaintiffs: instead of 30 years of the Boiler Rule's benefits followed by two years of equal or stricter standards, a stay would result in two years of the currently applicable boiler standards followed by 30 years of the Boiler Rule's benefits. This swap of two years of stricter standards for two years of the current standards represents a tangible loss for Government Plaintiffs. The loss of these benefits directly harms consumers' economic interests, diminishes public health, and contributes to global climate change, which threatens public safety by causing sea-level rise, drought, and increased wildfire risk. *See* Declaration of Kristin Driskell ("Driskell Decl.") in Opposition to AHRI's Motion, ¶¶ 7, 12, 16, 19. The harm caused by delay is immense. *Id*. ¶¶ 5-8, 10-12, 14-16, 19. Indeed, DOE identified the annualized net benefits of the Final Rules as ranging from $373 million to $798 million per year.[7]

To the extent that AHRI identifies "executive authority over administrative rulemaking," avoidance of mootness, and avoidance of lost investment as public interests supporting a stay[8] (Motion 21), its arguments are without merit. To the contrary, executive authority is furthered by agencies' compliance with their own

[7] Boiler Rule at 19; Air Compressor Rule at 18; Portable AC Rule at 18; UPS Rule at 17.

[8] *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) is inapt here where there are government parties on both sides of the litigation.

regulations; mootness is unlikely; and AHRI members' lost investments are not a matter of public interest.

The public interest requires denying the stay. DOE already determined that the Final Rules are in the public interest, that the nationwide benefits outweigh any burdens, and that the Final Rules satisfy EPCA's mandate for the maximum improvement in energy efficiency that is technologically feasible and economically justified.[9] *See* 42 U.S.C. § 6295(o)(2)(A). Denial of the stay furthers Congressional intent that energy efficiency standards be published promptly and regularly, as evidenced by EPCA's iterative rulemaking process and its product-specific statutory deadlines. *See* 42 U.S.C. §§ 6295(m) ("Amendment of standards") & (u)(1)(E)(i)(II) (deadlines for UPS standards), 6313(a) (deadlines for boiler standards).

CONCLUSION

For the reasons discussed above, Government Plaintiffs respectfully request that the Court deny AHRI's Motion for stay.

[9] Air Compressor Rule at 19; Boiler Rule at 20; Portable AC Rule at 19; UPS Rule at 18.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition 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) and 9th Cir. Rules 27-1(1)(d) and 32-3(2). This opposition includes 5,085 words, excluding the parts of the opposition excluded by Fed. R. App. P. 27(d)(2) and 32(f).

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