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, and Air Conditioning, Heating, and Refrigeration Institute, Intervenor-Defendant-Appellant.	Case Nos. 18-15380, 18-15475

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

RULE 26.1 DISCLOSURE STATEMENT

Plaintiffs-Appellees Natural Resources Defense Council, Inc., Sierra Club, Consumer Federation of America, and Texas Ratepayers' Organization to Save Energy represent that each is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in any of the Plaintiffs-Appellees.

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INTRODUCTION

Intervenor AHRI's emergency motion for a stay pending appeal comes 43 days after the district court ordered the Department of Energy (DOE) to publish four final energy-conservation rules, 10 days after DOE filed its own motion for a stay, and only 11 days before the deadline set by the district court for DOE to act. AHRI waited 33 days after the district court entered judgment to file a notice of appeal. AHRI has shown no urgency in pursuing its appeal, and is not entitled to emergency relief.

Moreover, AHRI cannot satisfy the demanding standard for a stay. AHRI asserts that, absent a stay, manufacturers of commercial packaged boilers will be harmed because they will have to take steps to comply with the Boiler Rule, one of the four final rules at issue in this appeal. But the harm to Plaintiffs and the public from delaying publication of the Boiler Rule far outweighs AHRI's stated harm to manufacturers, as DOE's cost-benefit analysis reveals. And AHRI does not show any harm from the other three rules, while other manufacturers and trade groups are harmed by the delay of those rules and have urged DOE to publish them. AHRI also fails to make a strong showing that it is likely to succeed on the merits.

The Court should deny AHRI's motion for a stay.

BACKGROUND

Plaintiffs incorporate by reference the statutory and regulatory background section set forth in their opposition to DOE's stay motion. Dkt. 21 at 2-3 (No. 18-15380). Plaintiffs also incorporate by reference the procedural history section of that brief, *id.* at 4-6, with this addition:

On March 20, 2018, AHRI filed a notice of appeal and moved for a stay pending appeal in the district court. Dist. Ct. Dkts. 92, 93. On March 30, AHRI filed its emergency motion for a stay in this Court. Dkt. 13 ("Mot.") (No. 18-15475). The district court denied AHRI's stay motion later that day. Dist. Ct. Dkt. 98. On April 2, this Court consolidated AHRI's appeal with DOE's appeal. Dkt. 23 (No. 18-15380).

ARGUMENT

Courts consider four factors in deciding whether to grant a stay: "(1) whether the stay applicant has made a strong showing that [it] 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." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)

(quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The movant bears the burden of justifying a stay. *Id*.

I. The harm from more delay outweighs any harm to manufacturers

Delaying publication of the Final Rules would cause significant economic and environmental harm to consumers and the public, including Plaintiffs and their members. Efficiency standards require appliances to use less energy, which saves consumers money on their utility bills and avoids emissions of harmful air pollutants, among other benefits. DOE conducted a cost-benefit analysis for each of the Final Rules, analyzing the impact on manufacturers, the benefits and costs to consumers, and the value of avoided pollution emissions. Dist. Ct. Dkt. 94-1 (Urbanek Dec.) ¶¶ 4, 18, 25, 32. According to DOE, the Boiler Rule alone will yield between $558 million and $1.977 billion in consumer economic benefits over 30 years. *Id*. ¶ 11. Adding in the value of emission reductions, the net benefits from the Boiler Rule amount to $85 million to $143 million *per year*. *Id*. ¶ 15.

AHRI's stay motion does not sum the asserted harm to manufacturers, and it is hard to discern a precise number from AHRI's declarations. A conservative count of the claimed costs in the declarations is around $56 million. Dist. Ct. Dkt. 93-1 ¶ 11; Dist. Ct. Dkt. 93-2 ¶¶ 6, 7, 10,

11; Dist. Ct. Dkt. 93-3 ¶ 6; Dist. Ct. Dkt. 93-4 ¶ 6. Thus, a single year of unrecoverable lost benefits from delaying the Boiler Rule—at $85 million to $143 million—exceeds the total asserted harm to manufacturers. Urbanek Dec. ¶ 15. If all four of the rules were delayed for just a couple of years, the lost benefits would dwarf AHRI's asserted harm. *Id*. ¶¶ 15, 23, 30, 37.

AHRI contends in a footnote that DOE "massively overestimate[d]" the benefits from the Boiler Rule; AHRI cites comments it filed with DOE during the rulemaking process. Mot. 20 n.8. But DOE had those comments before it when it finalized its cost-benefit analysis, and it opted not to change its analysis. If AHRI were to file a petition for review challenging the Boiler Rule, the deferential standard of review under the Administrative Procedure Act would apply, *see Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1369 & n.14 (D.C. Cir. 1985), and DOE's conclusions would be entitled to a "presumption of regularity," *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). AHRI has offered no reason why DOE's economic analysis would not pass arbitrary-and-capricious review.

In fact, there is good reason to think that, if anything, DOE *underestimated* the consumer benefits from the Boiler Rule. An independent

economic analysis of nine efficiency standards that took effect between 2000 and 2010 found that, for every single rule, "the actual cost of standards was always lower than DOE estimated," and "the net present value benefits to consumers of products subject to standards has been substantially higher than DOE predicted." Steven Nadel & Andrew deLaski, Am. Council for an Energy-Efficient Econ., Appliance Standards: Comparing Predicted and Observed Prices, at vi, 17 (2013), *available at* https://bit.ly/2pWblFi.

AHRI commits a basic error in arguing that the only harm to consumers would be delayed benefits, not lost benefits. Mot. 19-21. When talking about consumer savings from reduced energy costs, a delayed benefit is a lost benefit, because economic value is cumulative. As an illustration, assume a consumer's energy bill is $100 per year, and with these rules in place it will be $90 per year. If the rules are delayed for three years, the consumer loses $10 each year, which is $30 that she will never get back. That is not a delayed benefit, as it would be if someone planned to give the consumer $30 but then waited three years to do it. It is a lost benefit.

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

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

Finally, a stay pending appeal would harm other manufacturers who will benefit from the new efficiency rules and are prepared to comply with them. The company Ingersoll Rand, for example, wrote DOE last month asking the agency to publish the final Air Compressor Rule, to provide regulatory certainty, allow the company to invest confidently in more efficient products, and ensure a level playing field across the industry. Dist. Ct. Dkt. 94-2. The trade group for the air compressor industry, the Compressed Air and Gas Institute, also filed comments with DOE last month, supporting publication of the final Air Compressor Rule to clarify requirements throughout the industry. Dist. Ct. Dkt. 94-3. And last summer, the trade group representing manufacturers of portable air conditioners, the Association of Home Appliance Manufacturers, urged DOE to provide regulatory certainty by quickly publishing the final Portable Air Conditioner Rule. Dist. Ct. Dkt. 94-4. Further delay would harm those manufacturers who want these final rules to go into effect.

II. AHRI's asserted harm is inconsistent with the record

The discussion above assumes that AHRI's asserted economic harm is accurate. But there are reasons not to accept the stated harm at face value. First, the costs itemized in AHRI's declarations are inconsistent with

DOE's conclusions in the administrative record. The agency analyzed the Boiler Rule's impact on manufacturers and estimated that the industry as a whole will incur $21.2 million in one-time conversion costs to comply with the new standards, which is much less than what AHRI suggests. Urbanek Dec. ¶ 7. DOE also projected that the industry would be able to recover up to half of those costs by passing them on to consumers, reducing the rule's net cost to the industry to as little as $10.3 million. *Id*. ¶ 8. And whereas DOE's economic analysis comprises dozens of pages in the rulemaking record and is based on published cost-benefit methodologies, *see id*. ¶¶ 4-8, AHRI's estimated costs are presented in four largely boilerplate declarations, repeating entire paragraphs nearly verbatim, with no explanation for the numbers provided in each. DOE's published analysis carries far more weight.[1]

Second, some of the costs listed in AHRI's declarations depend on the assumption that an appeal will take years to resolve. *See* Mot. 17. There is

[1] AHRI, citing the comments it submitted to DOE during the rulemaking process for the Boiler Rule, argues that DOE's calculation of costs is flawed. Mot. 17 n.6. But, once again, DOE had the benefit of AHRI's comments when it finalized the rule and its economic analysis, and the agency's conclusions are entitled to a "presumption of regularity." *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 601.

no reason an appeal needs to take that long. AHRI could seek expedited review to minimize any harm to manufacturers in the meantime. *See* Fed. R. App. P. 2 (on motion, a court of appeals may expedite a decision); 9th Cir. R. 27-12 (motions to expedite briefing and hearing will be granted for good cause). AHRI has done nothing to try to speed the process along: it did not file a notice of appeal until more than a month after the district court entered judgment, Dkt. 92, and it has not taken any steps to expedite proceedings in this Court. If the appeal were resolved in a year, instead of two or more, it would significantly cut AHRI's estimated harm to boiler manufacturers.

AHRI's remaining assertion of harm—its brief argument that publication of the rules could "potentially moot[]" its appeal, Mot. 13-14—fails for the reasons given in Plaintiffs' opposition to DOE's stay motion, Dkt. 21 at 7-11 (No. 18-15380). AHRI asserts that 28 U.S.C. § 2106 would not authorize this Court to vacate the published rules, were DOE and AHRI to prevail on appeal, Mot. 14 n.4, but AHRI ignores the part of § 2106 that empowers the Court to remand the case to district court and "direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances." Like DOE, AHRI has not explained why the

district court would lack sufficient equitable authority on remand to vacate the rules. District courts possess broad equitable authority to award meaningful relief, *see* Dkt. 21 at 8-9 (No. 18-15380) (citing cases), and that authority logically includes the power to undo the legal effect of a court's own injunction, if that injunction were struck down on appeal. Neither DOE nor AHRI has come close to establishing that it would be "impossible" for this Court or the district court to order effective relief. *See United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1112 (9th Cir. 2012). There is no risk of mootness that would justify a stay.

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

DOE is now in violation of a March 24, 2018 statutory deadline to publish a final Boiler Rule. *See* 42 U.S.C. § 6313(a)(6)(C)(iii)(I) (requiring final rule within two years of proposed rule); 81 Fed. Reg. 15,836 (Mar. 24, 2016) (proposed rule). AHRI concedes this deadline but argues that Congress did not direct the agency to publish this *particular* Boiler Rule—the one posted for error correction. Mot. 18 n.7. That misses the point: granting a stay would extend DOE's violation of the statutory deadline to publish a Boiler Rule by months or years. It is not in the public interest to perpetuate DOE's violation of the law.

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

AHRI has not made a "strong showing" that it is likely to succeed on the merits. *Lair*, 697 F.3d at 1203. AHRI's merits arguments fail for the reasons given in Plaintiffs' opposition to DOE's stay motion. Dkt. 21 at 15-21 (No. 18-15380).

The Error Correction Rule mandates that DOE "will" submit a final energy-conservation rule for publication at the end of the error-correction process, either with corrections (if necessary) or without. 10 C.F.R. § 430.5(f)(1)-(3). As the district court correctly held, "the text of the Rule makes clear that the Department must publish any standard that has gone through the process." Dist. Ct. Dkt. 81 ("Order") at 4.

AHRI complains that the district court "relied on . . . the regulatory text," instead of on a "background principle" posited by AHRI. Mot. 11. But it is well established that agencies may issue regulations that limit their discretion, *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004), and the district court held that both the "language of the [Error Correction] Rule" and the "history of its adoption" make clear that DOE has done so. Order 5-7.

AHRI mischaracterizes the text of the Error Correction Rule, suggesting it says DOE may "revise" an energy-conservation rule on its "own initiative" after posting the rule for error correction. Mot. 6 (citing 10 C.F.R. § 430.5(f)(2)); *see also id.* at 11-12. The Error Correction Rule says no such thing. It says only that if DOE "identifies no *Errors* on [its] own initiative," it "will" submit the rule for publication "as it was posted." 10 C.F.R. § 430.5(f)(2) (emphasis added); *see also id.* § 430.5(b) (defining "Error" 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"). Likewise, subsection (g) of the Error Correction Rule says only that, until a final rule has been published, DOE "may *correct*" the rule, *id.* § 430.5(g) (emphasis added), not, as the district court pointed out, "assess" or "modify" or "withdraw" it, Order 6. DOE's discretion to find and correct errors does not add up to "the discretion to review and revise its proposed standards at any point before publication," as AHRI contends. Mot. 11.

Like DOE, AHRI attempts to characterize the Final Rules as not yet final, consistently referring to them in its motion as "proposed rules." The "proposed rule" moniker is especially misleading because it implies that the rules have not yet gone through the notice-and-comment process. In a

similar vein, AHRI suggests that the error-correction process is an "intermediate step" in the rulemaking process. Mot. 10. As the district court pointed out, however, in "each posted document, the Department stated that the energy standard was a 'final rule,'" Order 2, and on "its website, the Department called the energy standards 'pre-publication *Federal Register* final rule[s],'" *id.* For each of the rules, DOE already issued "proposed" rules and solicited public comment at an earlier stage of the rulemaking process. 81 Fed. Reg. 52,196 (Aug. 5, 2016); 81 Fed. Reg. 38,398 (June 13, 2016); 81 Fed. Reg. 31,680 (May 19, 2016); 81 Fed. Reg. 15,836 (Mar. 24, 2016). And, according to DOE, the "posting of an energy conservation standards rule [for error correction] signals the *end* of DOE's substantive analysis and decision-making regarding the applicable standards," 81 Fed. Reg. 57,745, 57,751 (Aug. 24, 2016) (emphasis added), not an "intermediate step" in the process.

Finally, the district court's interpretation would not force DOE to publish rules with errors in them, as AHRI contends. Mot. 12-13. The whole purpose of the Error Correction Rule is to give the agency a chance to find and correct errors in energy-conservation rules before they are published. In this case, only one error was identified, in just one of the

Final Rules: the substitution of ">" for "≥" in a table. Order 2. The district court plainly interpreted the Error Correction Rule to allow DOE to correct such errors before publishing a final rule. The Order states that "once the Department has posted an energy standard for error correction and the time to submit requests for correction has passed, subsection (f) of the Rule gives the Department only two options: publish the standard as posted, or correct any errors in the standard and publish it as corrected." *Id.* at 5 (citing 10 C.F.R. § 430.5(f)(1)-(3)).

The district court correctly held that DOE breached its duty to publish the Final Rules.

CONCLUSION

The Court should deny AHRI's emergency motion for a stay pending appeal. The harm to Plaintiffs and the public from delaying publication of the Final Rules outweighs any harm to manufacturers, and AHRI has not shown that it is likely to succeed on the merits.

Dated: April 5, 2018

Respectfully submitted,

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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 2,982 words, excluding the parts of the opposition excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ Jennifer A. Sorenson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this opposition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 5, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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