

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

U.S. DEPARTMENT OF ENERGY and
DAN BROUILLETTE, Secretary, U.S.
Department of Energy,
Respondents.

No. 20-71068

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,
Petitioners,

v.

U.S. DEPARTMENT OF ENERGY and
DAN BROUILLETTE, Secretary, U.S.
Department of Energy,
Respondents.

No. 20-71071

**RESPONDENTS' UNOPPOSED MOTION TO CONSOLIDATE
AND HOLD PROCEEDINGS IN ABEYANCE**

Respondents, the Department of Energy and the Secretary of Energy (DOE), respectfully move to consolidate the two captioned petitions for review, and to hold the proceedings in abeyance pending DOE's issuance of a related final rule amending the rule under review. Petitioners do not oppose the requested relief.

Both pending petitions for review challenge the same agency action, a final rule amending a regulation referred to as the Process Rule. See Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8626 (Feb. 14, 2020). Several industry groups have moved to intervene in both cases; those motions remain pending. These cases challenging the same rule should be consolidated to avoid duplicative effort by the court and the parties.

In addition, in the rulemaking under review, DOE indicated that it would undertake additional rulemaking to consider a further amendment of the Process Rule. See 85 Fed. Reg. 8627 (describing a proposal not incorporated in the rule under review, concerning what is known as the “walk-down” approach). DOE is preparing to issue a final rule on the subject, and expects to promulgate the additional walk-down rule very soon. If a challenge to that rule were brought in the court of appeals, as these cases were, invoking 42 U.S.C. § 6306(b)(1), that statute imposes a 60-day limit for filing any petition for review.

The parties and this Court should have an opportunity to consider the effect of any such additional litigation concerning the walk-down rule on the issues raised in these pending cases, to avoid potential duplication of effort and to coordinate proceedings challenging provisions in the same underlying rules. Moreover, procedural

matters in the pending litigation also could be affected by additional petitions for review. Thus, any further procedural steps—including filing any additional motions, submitting a certified index to the administrative record, and establishing a coordinated briefing schedule addressing all parties and issues—should await a determination of the scope of related litigation. The parties take no position at this time on what procedural steps would be appropriate in light of any additional litigation; the parties intend to consult further after reviewing any additional challenges.

DOE accordingly requests that this Court consolidate the pending petitions for review (Nos. 20-71068 and 20-71071), and hold the consolidated proceedings in abeyance pending further developments. The government will file a status report within 90 days after the date of abeyance, providing additional information on any related litigation and proposing appropriate steps to address the range of related litigation; if needed, the parties will file motions to govern further proceedings after evaluating any additional litigation.

Somerset Perry, counsel for petitioners in No. 20-71068, and Pete DeMarco, counsel for petitioners in No. 20-71071, have authorized us to state that they do not oppose consolidation of these cases and abeyance pending DOE's issuance of the walk-down rule and the period for seeking judicial review of that rule.

CONCLUSION

For these reasons, respondents respectfully request that this Court consolidate these cases and hold proceedings in abeyance.

Respectfully submitted,

/s/ H. Thomas Byron III

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

/s/ H. Thomas Byron III

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