

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.

Nos. 20-71068,
20-71071

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,
Petitioners,

v.

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

No. 20-73091

RESPONDENTS' MOTION TO CONSOLIDATE
AND END ABEYANCE

Respondents, the Department of Energy and the Secretary of Energy (DOE), respectfully move to consolidate the newly filed petition for review (No. 20-73091) with two petitions for review that were previously consolidated. This Court should end the abeyance, and should set the consolidated cases for briefing.

This Court previously consolidated two petitions for review (Nos. 20-71068 and 20-71071). Those cases both challenge the same agency action, a DOE 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 intervened in those cases.

In the February rule at issue in those consolidated cases, 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 has since promulgated the additional walk-down rule. See Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, 85 Fed. Reg. 50937 (Aug. 19, 2020).

We are aware of only one petition for review challenging the walk-down rule: *NRDC v. Brouillette*, 9th Cir. No. 20-73091 (docketed Oct. 16, 2020). That case was filed by several of the petitioners that also brought one of the cases challenging the February rule (No. 20-71071). In the government’s view, the new case should be consolidated with the earlier litigation, as all three cases challenge related rules amending the same regulation.

Respondents will file the certified index of the administrative record covering the rules challenged in all three cases by December 2, 2020 (30 days from today). We respectfully request that the Court set a briefing schedule that begins after that date. Any party may file a motion requesting appropriate relief at any time.

The government intends to file a single brief responding to all of the issues raised by petitioners in the consolidated cases. In order to streamline briefing and minimize the burden on the parties and the Court, all private petitioners should file a single opening and a single reply brief in the consolidated cases, and all state and local petitioners should similarly file a single opening and single reply brief (in addition to that filed by private petitioners). All intervenors likewise should file a single brief in the consolidated cases.

Counsel for all petitioners—including the state petitioners in No. 20-71068, and the organizational petitioners in Nos. 20-71071 and 20-73091—as well as counsel for intervenors American Gas Association and American Public Gas Association, have authorized us to state that they do not oppose the relief requested in this motion. Counsel for intervenors Association of Home Appliance Manufacturers and Consumer Technology Association have not provided their position on this motion.

CONCLUSION

For these reasons, respondents respectfully request that this Court consolidate No. 20-73091 with Nos. 20-71068 and 20-71071, end the abeyance in the previously consolidated cases, and set a briefing schedule in the three consolidated cases.

Respectfully submitted,

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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 588 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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