

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ALLIANCE FOR WATER EFFICIENCY, U.S.
PUBLIC INTEREST RESEARCH GROUP, and
ENVIRONMENT AMERICA,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY
and DAVID G. HUIZENGA, Acting Secretary,
United States Department of Energy,
Respondents.

Nos. 21-1166 and 21-1167

**CONSENT MOTION TO UNCONSOLIDATE CASES, TO TRANSFER
CASE NO. 21-1166 TO THE SECOND CIRCUIT, AND FOR EXTENSION
OF TIME TO FILE RESPONSES TO STAY MOTIONS**

Respondents the United States Department of Energy and David G. Huizenga, Acting Secretary, United States Department of Energy, hereby move (1) to unconsolidate the above captioned cases, (2) to transfer case No. 21-1166 to the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 2112(a), and (3) for a one-week extension of time to file responses to the stay motions. Counsel for Alliance for Water Efficiency and counsel for U.S. Public Interest Research Group, and Environment America (collectively, petitioners) have authorized us to represent that they consent to this motion.

1. In Case No. 21-1166, the petitioners filed a petition for review of a final rule, *Energy Conservation Program: Establishment of New Product Classes for Residential Clothes*

Washers and Consumer Clothes Dryers, 85 Fed. Reg. 81359 (Dec. 16, 2020), issued by the Department of Energy (DOE) pursuant to the authority of the Energy Policy and Conservation Act, 42 U.S.C. §§ 6291-6309. The rule “establishes separate product classes for top-loading consumer clothes washers and consumer clothes dryers that offer cycle times for a normal cycle of less than 30 minutes, and for front-loading residential clothes washers that offer cycle times for a normal cycle of less than 45 minutes.” 85 Fed. Reg. 81359-81360. Petitioners filed the petition for review of the rule in this Court on January 27, 2021.

Another case, *California v. United States Department of Energy*, No. 21-108 (2nd Cir.), also challenges the same DOE rule. The petition for review in the *California* case was filed in the Second Circuit on January 20, 2021, *before* the petition for review in Case No. 21-1166 was filed in this Court.¹

Multiple petitions for review challenging the same order are subject to 28 U.S.C. § 2112(a), which provides rules governing the filing of the administrative record, and the transfer of cases, when “proceedings [including petitions for review] are instituted in two or more courts of appeals with respect to the same order.” That statute provides particular rules for determining the venue of all such cases

¹ A petition for review of the same DOE rule was also filed in the Ninth Circuit on February 12, 2021. *See Sierra Club v. U.S. Department of Energy*, No. 21-70319 (9th Cir.). The government plans to move to transfer that case to the Second Circuit as well.

challenging the same agency order. Unless specific conditions are satisfied,² the statute directs the agency to file the administrative record “in the court in which proceedings with respect to the order were first instituted.” *Id.* § 2112(a)(1). And the statute directs “[a]ll [other] courts in which proceedings are instituted with respect to the same order” to “transfer those proceedings to the court in which the record is so filed.” *Id.* § 2112(a)(5).

The United States Court of Appeals for the Second Circuit was the court in which “proceedings . . . were first instituted,” 28 U.S.C. § 2112(a)(1), with respect to the DOE order challenged in Case No. 21-1166 in this Court.

DOE is prepared to file the certified index to the administrative record in the Second Circuit, pursuant to 28 U.S.C. § 2112(a) and FRAP 17(b). We anticipate that the certified index will be complete and ready for filing in that court by Monday, March 1, in accordance with FRAP 17(b). Thus, pursuant to 28 U.S.C. § 2112(a)(5), this Court should transfer Case No. 21-1166 to the Second Circuit. Transfer of the case should include any pending motions, including the motion for stay pending review that petitioners filed on February 17, 2021.

Counsel for petitioners have indicated that petitioners consent to the transfer of Case No. 21-1166 to the Second Circuit.

² None of the other statutory mechanisms for determining venue apply because DOE did not receive, “within ten days after the issuance of the order, . . . a copy of [any] petition . . . which is stamped by the court with the date of filing,” 28 U.S.C. § 2112(a)(1)-(3).

2. In Case No. 21-1167, the Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America filed a petition for review of a final rule, *Energy Conservation Program: Definition of Showerhead*, 85 Fed. Reg. 81341 (Dec. 16, 2020), issued by DOE pursuant to the authority of the Energy Policy and Conservation Act, 42 U.S.C. §§ 6291-6309. The rule “adopts a revised definition for ‘showerhead’ and definitions for ‘body spray’ and ‘safety shower showerhead’.” 85 Fed. Reg. 81341. Petitioners filed the petition for review of the rule in this Court on January 27, 2021.

The Court sua sponte consolidated Case Nos. 21-1166 and 21-1167 on January 29, 2021.

We respectfully request that the Court unconsolidate Case Nos. 21-1166 and 21-1167 because they involve challenges to two separate DOE rules, involving different subjects and different records, and because Case No. 21-1166 should be transferred to the Second Circuit.

Counsel for petitioners have indicated that petitioners consent to the unconsolidation of the cases.

3. Petitioners filed motions for stay pending review in Case Nos. 21-1166 and 21-1167 on February 17, 2021. Pursuant to this Court’s February 19, 2021 order, the responses to the motions would be due on March 1, 2021.

An extension is necessary to allow adequate time for the government to prepare its responses in light of the press of other litigation matters and medical leave. Counsel for the government in Case No. 21-1166 currently has another brief due on

March 1, 2021, *United States v. Newsom*, No. 20-56304 (9th Cir.), and is responsible for working on other matters during the briefing time. Counsel for the government in Case No. 21-1167 was on medical leave for surgery on February 18, 2021, and is responsible for working on other matters during the briefing time.

The government respectfully requests a one-week extension of time, to and including March 8, 2021, in which to file its responses to the motions.

Counsel for petitioners have indicated that petitioners consent to the requested extension.

Conclusion

For the foregoing reasons, Case Nos. 21-1166 and 21-1167 should be unconsolidated, Case No. 21-1166 should be transferred to the United States Court of Appeals for the Second Circuit, and the government should be granted an extension of time until March 8, 2021 to respond to petitioners' motions for stay pending review.

Respectfully submitted,

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FEBRUARY 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,042 words, according to the count of Microsoft Word.

/s/ Katherine Twomey Allen
Katherine Twomey Allen

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/Katherine Twomey Allen
Katherine Twomey Allen