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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants, and AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE, Defendant-Intervenor.	**Lead Case** Case No. 17-cv-03404-VC **DEFENDANTS' ADMINISTRATIVE MOTION FOR A STAY PENDING APPEAL**
THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*, Plaintiffs, v.	***Consolidated with*** Case No. 17-cv-03406-VC

RICK PERRY, *et al.*,

Defendants,

and

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

Pursuant to Federal Rule of Civil Procedure 62 and Local Rule 7-11, the U.S. Department of Energy and James R. Perry, in his official capacity as Secretary of Energy, (collectively, "DOE") hereby move for a stay pending appeal of the Order and Judgment entered on February 15, 2018 (ECF Nos. 81, 82). *See also* Order at 9 (indicating that the Court "will entertain a motion for a stay pending appeal" if DOE wishes to appeal the Court's decision). The Order directs DOE to publish in the Federal Register final rules addressing energy conservation standards for four products and equipment by March 15, 2018. If the Order and Judgment are not stayed and DOE instead is required to publish final rules, this case could become moot, depriving DOE of its right to obtain meaningful appellate review of questions of exceptional importance to the agency. Furthermore, absent a stay, DOE may be unable to take future action to rescind or otherwise diminish any final standards published pursuant to the Court's Order because of the anti-backsliding provision of the Energy Policy and Conservation Act ("EPCA").

In contrast, plaintiffs will not be harmed by a stay. The potential benefits they seek to the environment, the electrical grid, and their energy bills are all long term. Moreover, compliance with a new energy conservation standard is not required until several years after the standard is published in the Federal Register and, even then, the standard only applies to new products.

Because the balance of harms tips sharply in favor of a stay and this case raises important questions of first impression about the proper interpretation of DOE's error correction rule, the amount of discretion agencies have to modify rules prior to publication, and the scope of EPCA's citizen suit provision, this Court should grant DOE's motion for a stay pending appeal. If the Court denies a stay pending appeal, DOE requests, in the alternative, that the Court grant a more limited stay to allow the agency to seek a stay pending appeal from the Ninth Circuit.

In addition, DOE requests that the Court clarify its Order, which appears to require the agency to "publish" final rules by March 15, 2018. Order at 9. The Office of the Federal Register ("OFR") is "charged with the custody and . . . with the prompt and uniform printing" of documents in the Federal Register. 44 U.S.C. § 1502. Although DOE can submit rules to OFR by a certain date, OFR ultimately controls when final rules are published in the Federal Register. *See id*. § 1503; 1 C.F.R. pt. 17 (describing publication schedule and circumstances in which OFR

may modify schedule). The error correction regulations thus discuss DOE "submit[ting]" rules "to [OFR]" for publication. 10 C.F.R. § 430(f). Accordingly, DOE asks that the Court clarify that, in the absence of a stay pending appeal, the Order requires DOE to submit rules to OFR for publication by March 15, 2018.[1]

ARGUMENT

In determining whether to grant a stay pending appeal, courts employ "two interrelated legal tests that represent the outer reaches of a single continuum." *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008). "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury." *Id.* "At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id*. at 1116. Both factors weigh in DOE's favor, but, at the very least, DOE's appeal presents serious legal questions and the balance of harms tilt decidedly in favor of a stay.

I. THE BALANCE OF HARMS FAVORS A STAY PENDING APPEAL

"[T]he quintessential form of prejudice justifying a stay" exists where a party's appeal may be "rendered moot" if a stay is not granted. *In re Pac. Gas & Elec. Co.*, 2002 WL 32071634, at *2 (N.D. Cal. Nov. 14, 2002); *see, e.g.*, *City of Oakland v. Holder*, 961 F. Supp. 2d 1005, 1013 (N.D. Cal. 2013) (granting stay of forfeiture proceedings because "the potential mooting of Oakland's claims . . . constitutes irreparable injury"); *People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (explaining that "courts have routinely issued stays" of disclosure orders in Freedom of Information Act cases "where the release of documents would moot a defendant's right to appeal"); *In re St. Johnsbury Trucking Co., Inc.*, 185 B.R. 687, 690 (S.D.N.Y. 1995) (holding government was "threatened with irreparable injury," as "there [was] a risk that its appeal [would] be mooted absent a stay").

[1] Plaintiffs oppose defendants' stay requests, but take no position on defendants' request for clarification of the Order. *See* Bennett Decl. ¶ 2, attached hereto.

That possibility exists here. If the Court's Order is not stayed, DOE will be required to publish final rules addressing energy conservation standards for the four products and equipment by March 15, 2018. But publishing final rules, which is the relief plaintiffs seek in their complaint, *see* Consolidated Compl., at 34, ECF No. 43, would threaten the viability of DOE's appeal by potentially rendering the parties' controversy moot. Indeed, in a case presenting similar circumstances—*i.e.*, the district court ordered the agency to designate critical habitat for a particular endangered species within 120 days—the Ninth Circuit held that the government had mooted its appeal by issuing a final rule in accordance with the district court's order instead of seeking a stay pending appeal. *See Nat. Res. Def. Council (NRDC) v. U.S. Dep't of Interior*, 13 Fed. App'x 612, 613-14 (9th Cir. 2001). The mere possibility that DOE would lose its ability to challenge the publication of final rules that are contrary to agency policy is sufficient harm to justify a stay of the Court's Order. Indeed, the harm to DOE here goes one step further. Because EPCA's anti-backsliding provision prohibits DOE from diminishing the stringency of an energy conservation standard once it is prescribed, denying a stay could limit DOE's ability to take future action to rescind or modify any final rules published in accordance with the Court's Order. *See* 42 U.S.C. §§ 6295(o)(1), 6316(a); *NRDC v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004).[2]

Denial of a stay also could harm manufacturers, as they will need to begin taking steps and incurring costs in order to comply with any new standards by the compliance date. In addition, if manufacturers or other interested parties challenge any final rules published pursuant to this Court's Order, DOE could be put in the difficult position of seeking to rescind the rules in this case and potentially defending them in separate litigation.

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[2] DOE does not concede that publication of final rules pursuant to this Court's Order would deprive the Ninth Circuit of jurisdiction to review the Order. Nor does DOE concede that the anti-backsliding provision would prohibit the Ninth Circuit from allowing DOE to rescind any final rules published pursuant to the Order if the Ninth Circuit determines that the Order was entered in error. But no court has addressed these questions, and DOE should not be put to the choice of conceding mootness or the applicability of the anti-backsliding provision in order to obtain a stay, or being denied a stay because it is unwilling to make such concessions only to discover later that the Ninth Circuit believes publication of final rules renders the appeal moot and triggers EPCA's anti-backsliding provision. The mere risk created by the Court's Order is sufficient to justify a stay.

In contrast to the severe and immediate harms to DOE discussed above, plaintiffs will not be harmed by a stay. Plaintiffs' alleged injuries all relate to denial of the potential long-term benefits of energy conservation standards, not any immediate impacts. *See* Consolidated Compl. ¶¶ 35-55 (alleging benefits relating to the environment, the electrical grid, and energy costs). Moreover, EPCA mandates a multiple-year delay between publication of final energy conservation standards and the date on which manufactures are required to comply with those standards. Thus, even if DOE were required to publish final rules pursuant to the Court's Order, compliance with any new standards would not be required for 2 years for uninterruptible power supplies, 3 years for commercial packaged boilers, and 5 years for air compressors and portable air conditioners, *see* 42 U.S.C §§ 6295(l)(2), 6313(a)(6)(C)(iv)(I); Sorenson Decl., Ex. C, at 4, ECF No. 66-3, and, even then, the standards would only apply to new products.

For these reasons, the balance of hardships tips sharply in favor of a stay pending appeal.

II. THE APPEAL RAISES SERIOUS LEGAL QUESTIONS

A party seeking a stay pending appeal "is not required to convince the court that its own order was incorrect, otherwise no district court would ever grant a stay." *U.S. Surgical Corp. v. Origin Medsystems, Inc.*, 1996 U.S. Dist. LEXIS 2793, at *9 (N.D. Cal. Feb. 3, 1996). Rather, where, as here, the balance of harms favors a stay, the movant need only show that the appeal raises "serious legal questions." *Id.*; *see Golden Gate Rest.*, 512 F.3d at 1116. That standard is easily satisfied here, as this case presents an issue of first impression regarding the proper interpretation of DOE's recently-promulgated error correction rule. *See Hunt v. Check Recovery Sys., Inc.*, 2008 WL 2468473, at *3 (N.D. Cal. June 17, 2008) (concluding presence of "questions of first impression on which no binding precedent exists" alone satisfies this prong).

DOE's appeal raises a number of serious legal questions. First, contrary to the weight of authority recognizing that agencies have broad discretion to modify or withdraw policies that are under consideration at any time before publication of a final rule in the Federal Register, *see, e.g.*, *Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980); *Si v. Slattery*, 864 F. Supp. 397, 404-05 (S.D.N.Y. 1994), this Court determined that DOE lacked such discretion with respect to draft rules posted for error correction. In doing so, the Court relied on DOE's purported failure

to explicitly reserve its discretion in the error correction regulations. But the broad discretion recognized in these cases is a background norm of administrative law against which agencies regulate. Thus, the proper inquiry is not whether DOE explicitly reserved its discretion, but rather, whether the agency explicitly abandoned it (and it did not). An agency does not abandon this broad discretion (either explicitly or implicitly) when it merely creates "an additional limited administrative process apart from the procedures already afforded by EPCA and the [Administrative Procedure Act]." 81 Fed. Reg. 57,745, 57,753 (Aug. 24, 2016).

Second, the Court adopted an interpretation of the recently-promulgated error correction rule that is contrary to DOE's intent. An agency's interpretation of its own regulations is typically entitled to controlling weight, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997), and courts therefore rarely depart from an agency's regulatory interpretation. Given the deference usually accorded to agencies and the strong support DOE provided regarding its intent in promulgating the rule, the Court's departure from DOE's view raises serious legal questions.

Finally, based on the use of different prepositional words ("in" and "of" versus "under"), the Court concluded that the *only* plausible interpretation of 42 U.S.C. § 6305(a)(2) is that it authorizes suit to enforce regulatory duties. But, as DOE explained, Congress's use of those terms in EPCA was inconsistent at best. *See, e.g.*, 42 U.S.C. § 6306(b)(5) (using "under this part" and "of this part" to refer to the same thing). Moreover, when Congress wanted to include regulations in another section of EPCA's citizen suit provision, it specifically referenced "rule[s]." 42 U.S.C. § 6305(a)(1). In light of this inconsistency and the strict standard for finding a waiver of sovereign immunity, the Court's broad interpretation of the citizen suit provision—an issue of first impression—raises serious questions.

CONCLUSION

For the foregoing reasons, the Court should stay its Order and Judgment pending final resolution of DOE's appeal. In the alternative, the Court should grant a limited stay to allow DOE to seek a stay pending appeal from the Ninth Circuit. In addition, the Court should clarify that, in the absence of a stay pending appeal, its Order requires DOE to submit rules to OFR for publication by March 15, 2018.

Dated: March 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2018, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

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