IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, *Plaintiff*, vs. U.S. DEPARTMENT OF ENERGY, *Defendant*.	Case No. 17-cv-6989

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the Department of Energy's ("DOE") violation of the Administrative Procedure Act ("APA") in improperly staying a final rule.

2. On January 5, 2017, DOE published a final rule entitled "Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps," 82 Fed. Reg. 1426 ("Test Procedures Rule"). The Test Procedures Rule was part of a series of rulemaking proceedings DOE has undertaken to update and strengthen the energy conservation standards and test procedures for central air conditioners and heat pumps. Among other things, the Test Procedures Rule sought to clarify the test procedure for central air conditioners and heat pumps that may be used as replacements for units using last-generation, ozone-depleting refrigerant R-22.

3. On March 3, 2017, Johnson Controls, Inc. ("JCI"), a manufacturer of central air conditioners, filed a petition for review in the United States Court of Appeals for the Seventh Circuit, challenging two provisions of the Test Procedures Rule. On April 28, 2017, the Seventh

Circuit suspended all briefing in the case indefinitely while the parties seek to resolve the case out of court.

4. Nevertheless, on July 13, 2017—eight days after the Test Procedures Rule's effective date—DOE indefinitely stayed two provisions of the Test Procedures Rule.[1] DOE's Delay Rule purported to act pursuant to 5 U.S.C. § 705, which allows an agency to "postpone the effective date of action taken by it, pending judicial review."

5. The Delay Rule is unlawful for at least two reasons.

6. First, the effective date of the Test Procedures Rule had already passed when DOE published the Delay Rule, and § 705 does not authorize an agency to postpone the effectiveness of a rule after it has gone into effect.

7. Second, the Delay Rule was arbitrary and capricious, because (a) DOE's one-sentence justification did not set forth a sufficient basis for a § 705 stay, (b) DOE's justification relies on a contention that is not in the submissions that it cites, (c) DOE entirely failed to consider reasoned arguments against the stay, and (d) the judicial proceedings that DOE claimed warranted an indefinite stay were suspended at the time of the stay.

8. For these reasons, Plaintiff Natural Resources Defense Council ("NRDC") seeks a declaration that DOE's action was unlawful and that the delayed provisions of the Test Procedures Rule have taken effect, and an injunction requiring Defendants to vacate the Delay Rule.

PARTIES

9. Plaintiff Natural Resources Defense Council is a national, not-for-profit environmental and public health organization with more than 300,000 members nationwide. On

[1] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 32,227 (July 13, 2017) ("Delay Rule").

behalf of its members, NRDC engages in research, advocacy, public education, and litigation to protect public health and the environment. Since its founding in 1970, NRDC has worked to reduce air pollution and improve air quality throughout the United States. NRDC's core priorities include fighting climate change, in part by advocating for laws and policies that increase the energy efficiency of appliances like air conditioners.

10. Many of NRDC's members live in homes with central air conditioning systems that need or will need repair or replacement. DOE's efficiency standards and test procedures ensure that air conditioning equipment meets minimum efficiency levels. NRDC's members benefit from the application of the strongest and most effective standards and test procedures because such standards and test procedures ensure that the air conditioning equipment on sale will reduce the cost of operating such equipment, saving them money by reducing their energy needs.

11. Up-to-date standards and test procedures are particularly important for NRDC members who rent their homes, since renters generally cannot select replacement air conditioning equipment but pay the cost of operating such equipment.

12. NRDC members who own their homes and need to replace their central air conditioning systems also benefit from compliance with DOE's efficiency standards. Many of NRDC's members are not themselves engineers or scientists and cannot independently evaluate the environmental impacts of competing central air conditioning units, and so benefit from test procedures that ensure manufacturers' products comply with governing standards.

13. NRDC's membership also includes individuals with respiratory conditions that make them highly sensitive to airborne pollution, such as that emitted by electricity-generating power plants. Those members are injured when inefficient products that do not meet energy

efficiency standards are sold and the subsequent use of those products leads to greater use of polluting electricity generation sources.

14. NRDC is headquartered at 40 West 20th Street, 11th Floor, New York, NY 20011.

15. Defendant Department of Energy is a federal agency of the United States within the meaning of the APA, 5 U.S.C. § 551(1). It is headquartered at 1000 Independence Avenue SW, Washington, DC 20585.

JURISDICTION AND VENUE

16. This Court has authority to review final agency action pursuant to the APA, 5 U.S.C. §§ 701-706, and it has jurisdiction over this action seeking such review pursuant to 28 U.S.C. § 1331.

17. Venue is proper in this District under 28 U.S.C. § 1391(e), as NRDC resides in this District and no real property is involved in this action.

FACTS

The Test Procedures Rule

18. The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201 *et seq.*, grants DOE authority to adopt energy conservation standards for consumer products and set test procedures by which manufacturers certify their products' compliance with applicable standards. EPCA requires DOE to periodically review and strengthen the energy conservation standards, *id.* § 6295, and to review and amend the test procedures when necessary to "more accurately" measure a covered product's energy efficiency, *id.* § 6293(b)(1)(A). These test procedures, and DOE's periodic updates to them, are critical for maintaining a level playing field for

manufacturers, providing a reliable basis for consumers to compare the energy efficiency of household appliances, and reducing both energy consumption and emission of greenhouse gases.

19. The Test Procedures Rule is one in a series of rulemaking proceedings DOE has undertaken to update and strengthen the energy efficiency standards and test procedures for central air conditioners and heat pumps. The current energy efficiency standards, which went into effect in 2015, grew out of a 2011 negotiated rulemaking that resulted in a "consensus agreement . . . by a broad cross-section of the manufacturers who produce the subject products, their trade associations, and environmental, energy, efficiency, and consumer advocacy organizations," including both NRDC and industry trade associations.[2]

20. In 2014, DOE convened the Central Air Conditioner and Heat Pumps Working Group ("Working Group") to negotiate further amendments to the efficiency standards and test procedures, in which NRDC and many other industry, energy, environmental, and consumer representatives participated.[3] The Working Group produced consensus recommendations in 2016, many of which DOE adopted in a final rule.[4]

21. The most popular type of central air conditioning system, a split system, consists of both an outdoor unit and an indoor component. When an outdoor unit breaks down, it may be possible to replace that unit without replacing the existing indoor components and the associated piping. Among the Working Group recommendations adopted by DOE was an amendment to

[2] Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 Fed. Reg. 67,037, 67,037-38 (Oct. 31, 2011) ("2011 Rule").
[3] *See* Appliance Standards and Rulemaking Federal Advisory Committee: Notice of Membership of the Regional Enforcement Working Group, 79 Fed. Reg. 41,456 (July 16, 2014).
[4] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps; Final Rule, 81 Fed. Reg. 36,991 (June 8, 2016) ("2016 Rule").

the air conditioner test procedures for "outdoor units with no match," or "unmatched outdoor units," which are sold as replacements for only the outdoor half of a split system.

22. Many older outdoor units are designed to use an ozone-depleting refrigerant known as R-22, a hydrochlorofluorocarbon also known as HCFC-22. *See* 81 Fed. Reg. at 37,009-11. According to EPA, R-22 has one of the "highest ozone depletion potentials of all HCFCs."[5]

23. As part of the phaseout of ozone-depleting substances, the Environmental Protection Agency ("EPA") had previously banned the sale and distribution of new central air conditioning systems designed to use R-22. EPA's rules did not, however, forbid sale of replacement components—such as unmatched outdoor units—that were shipped separately from the refrigerant (a practice known as "dry ship"). For those dry-ship units sold to replace broken outdoor air conditioning units, there was widespread non-compliance with the Department of Energy test procedure requirements for sale of unmatched outdoor units that would be used with existing indoor equipment. In part, this non-compliance was due to the lack of a well-defined procedure for certifying unmatched outdoor units; DOE required certification via a waiver process that few or no manufacturers followed.[6]

24. In the 2016 Rule, DOE addressed the absence of a clear test procedure for replacement R-22 units by devising an explicit test procedure for unmatched outdoor units. The 2016 Rule focused on R-22 units because EPA's ban allowed the sale of R-22 units only as separate replacement components; however, the new test procedure applied generally to any

[5] Envtl. Prot. Agency, "Phaseout of Class II Ozone-Depleting Substances," *available at* https://www.epa.gov/ods-phaseout/phaseout-class-ii-ozone-depleting-substances (last updated Dec. 5, 2016).
[6] *See* Dep't of Energy, "Enforcement Policy Statement: Split-System Central Air Conditioners Without HSVC" (Dec. 16, 2015), *available at* https://energy.gov/sites/prod/files/2015/12/f27/Enforcement%20Policy-CAC%202015_0.pdf.

unmatched outdoor unit. Among other things, the 2016 Rule required unmatched outdoor units to be paired for certification purposes with an indoor unit representative of the units they tended to be paired with in practice—that is, the older, less-efficient indoor units found in most homes with split systems. These changes were supported by many industry participants and efficiency advocates, including NRDC.

25. After the 2016 Rule, a new type of unmatched outdoor unit—one not based directly on last-generation R-22 refrigerant, and thus not contemplated by the 2016 Rule—emerged. These air conditioners, sold by JCI, were designed to use refrigerant R-407C, a non-ozone-depleting refrigerant that performs similarly to R-22 but is not subject to the regulatory limitations of R-22. Using R-407C allowed JCI to develop a product that is compatible with systems designed to use R-22, and thus is able to serve as an unmatched outdoor unit to replace broken R-22 units. Such units could be operated with either R-407C or R-22. The 2016 test procedure did not explicitly require that these products use the test procedure for unmatched outdoor units. However, as DOE explained in the Test Procedure Rule, "R-407C units [are] predominantly sold in scenarios in which the outdoor unit is replaced, and the indoor unit is not replaced."[7] As such, the appropriate test procedure for these units is the unmatched outdoor unit test.

26. To bring these newly emergent unmatched outdoor units within the testing regime, DOE published a Supplementary Notice of Proposed Rulemaking proposing additional changes to the relevant test procedures.[8] The rule proposed requirements that outdoor units designated by a manufacturer for use with any refrigerant that is compatible with R-22

[7] Test Procedures Rule, 82 Fed. Reg. at 1434.
[8] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 81 Fed. Reg. 58,164 (Aug. 24, 2016) ("2016 SNOPR").

equipment, or shipped dry without a significant amount of refrigerant, be certified through the same test procedure as for unmatched outdoor units using R-22. *See* 81 Fed. Reg. at 58,171.

27. After considering comments from JCI, NRDC, and other industry participants and efficiency, environmental, and consumer groups, DOE published the Test Procedures Rule. As it proposed in the 2016 SNOPR, DOE required that units compatible with R-22, including R-407C units, be tested the same way as unmatched outdoor R-22 units themselves. *See* 82 Fed. Reg. at 1434.

DOE Temporarily Delays the Test Procedure Rule, Drawing Objections

28. The original effective date for the Test Procedures Rule was February 6, 2017, and its original compliance deadline was July 5, 2017. 82 Fed. Reg. at 1426.

29. On February 2, 2017, without any advance notice or opportunity to comment, DOE published a final rule purporting to postpone the effective date by 60 days.[9] The sole basis for this delay was "to give DOE officials the opportunity for further review and consideration of new regulations" in light of a memo from then–White House Chief of Staff Reince Priebus. 82 Fed. Reg. at 8985.

30. This first delay, and the prospect that DOE would delay the Test Procedure Rule further, came to the attention of industry participants who opposed delaying the Rule's effective date.

31. Lennox International ("Lennox"), a manufacturer of central air conditioners, sent a letter to DOE on March 17, 2017, explaining that the recently enacted Test Procedures Rule "was crafted during a negotiated rulemaking . . . with broad stakeholder involvement" and "has

[9] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 8985 (Feb. 2, 2017) ("February Rule").

broad industry support, because it makes many improvements to the test procedure." It then outlined those improvements and urged that the Rule not be "delayed or overturned."[10]

32. On March 21, 2017, again without any advance notice or opportunity to comment, DOE published a final rule purporting to further postpone the effective date to July 5, 2017, the original compliance date.[11] The sole basis for this delay was to provide the Secretary of DOE more time "for further review and consideration of new regulations."

33. Two days later, the Air-Conditioning, Heating, and Refrigeration Institute ("AHRI"), an industry trade association, sent a letter explaining that AHRI "is not seeking to delay or rescind the [Test Procedures] Rule."[12]

34. On April 12, 2017, Lennox expanded on the reasoning behind the Test Procedures Rule and the reasons it should be "implemented without further delay" in a detailed 12-page letter.[13]

35. JCI responded to Lennox's letter on May 22, 2017, defending its products and practices.[14] JCI claimed that the Test Procedures Rule would harm consumers but never contended that harm to JCI was a reason to delay the Rule.

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[10] Letter from Doug Young, President and COO, Lennox Residential, to The Hon. Rick Perry, Sec'y, U.S. Dep't of Energy (Mar. 17, 2017).

[11] Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 14,425 (Mar. 21, 2017) ("March Rule") *as corrected by* Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps; Correction, 82 Fed. Reg. 15,457 (Mar. 29, 2017). The March Rule originally listed an incorrect date for the second postponement, but was subsequently corrected; for purposes of this Complaint, Plaintiff will refer to the effective date set by the March Rule as July 5, 2017.

[12] Letter from Stephen R. Yurek, President and CEO, AHRI, to The Hon. Rick Perry, Sec'y, U.S. Dep't of Energy (Mar. 23, 2017).

[13] Letter from Dave Winningham, Senior Eng'g Manager, Regulatory Affairs, Lennox International, to Daniel Simmons, Acting Assistant Sec'y of Energy Efficiency and Renewable Energy, Dep't of Energy (Apr. 12, 2017).

[14] Letter from Steven A. Tice, UPG Vice-President, Eng'g, Johnson Controls, Inc. to Daniel Simmons, Acting Assistant Sec'y of Energy Efficiency and Renewable Energy, Dep't of Energy (May 22, 2017).

36. Lennox responded to JCI's letter on June 28, 2017, providing additional reasons not to delay the effective date of the Test Procedures Rule further.[15]

DOE Indefinitely Stays the Test Procedures Rule

37. JCI filed its petition to review the Test Procedures Rule on March 3, 2017.[16] JCI specifically petitioned for review of two provisions that compel dry-shipped and under-charged outdoor units or those designed to employ R-22–like refrigerants to certify as unmatched outdoor units.

38. On April 28, 2017, the Seventh Circuit suspended all briefing on JCI's petition for review indefinitely while JCI and DOE seek to resolve the case out of court.

39. On May 31, 2017, while the case was suspended indefinitely, JCI requested that DOE grant an administrative stay pending judicial review under 5 U.S.C. § 705. One week later, however, JCI requested that DOE hold its stay request in abeyance, in light of a 180-day compliance extension that DOE granted to JCI on June 2, 2017. *See* 82 Fed. Reg. at 32,228.

40. Even though the Seventh Circuit proceedings were indefinitely stayed while DOE and JCI negotiated a resolution, and even though JCI had asked DOE to hold its stay request in abeyance, DOE granted JCI the relief it no longer requested. On July 13, 2017—eight days after the Test Procedures Rule's effective date—DOE published the Delay Rule, indefinitely staying the two provisions of the Test Procedures Rule that JCI challenged.

41. DOE did not seek notice and comment before publishing the Delay Rule.

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[15] Letter from Dave Winningham, Senior Eng'g Manager, Regulatory Affairs, Lennox International, to Daniel Simmons, Acting Assistant Sec'y of Energy Efficiency and Renewable Energy, Dep't of Energy (June 28, 2017).

[16] *See* Petition for Review, *Johnson Controls, Inc. v. U.S. Dep't of Energy*, No. 17-1740, Doc. No. 1 (7th Cir. Mar. 3, 2017).

42. The sole authority under which DOE purported to act was 5 U.S.C. § 705, which allows an agency to "postpone the effective date of action taken by it, pending judicial review."

43. DOE stated that it had "determined that, during the pendency of the lawsuit brought by JCI, it is in the interests of justice to postpone the effectiveness of the provisions of the [Test Procedure Rule]" described above. 82 Fed. Reg. at 32,227-28.

44. The entirety of DOE's stated reasoning for its determination is as follows:

> DOE has determined to postpone the effectiveness of these provisions based on JCI's submissions to DOE that raise concerns about significant potential impacts on JCI, and further to ensure all manufacturers of central air conditioners and heat pumps have the same relief granted to JCI.

Id.

45. The Delay Rule did not identify the submissions to which it referred, did not acknowledge that the Seventh Circuit proceedings were indefinitely suspended, and did not respond to or even acknowledge the submissions of Lennox and AHRI opposing delay of the effective date.

46. As far as the public docket reveals, no submission to DOE suggested that "potential impacts on JCI" were a reason to delay the effective date of the Test Procedures Rule.

CLAIMS FOR RELIEF

Count One (Violation of the APA, 5 U.S.C. §§ 705, 706)

47. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

48. DOE relied on § 705 to "postpone the effectiveness" of the Test Procedures Rule after its effective date.

49. In doing so, DOE acted in a manner that was arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of its statutory authority, all in violation of 5 U.S.C. § 706.

Count Two (Violation of the APA, 5 U.S.C. §§ 705, 706)

50. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

51. DOE failed to set forth a sufficient justification for a § 705 stay, relied on a contention that is not in the submissions that it cites, failed to consider reasoned arguments against the stay, and attempted to justify its stay on judicial proceedings that were indefinitely suspended at the time of the stay.

52. In so doing, DOE acted in a manner that was arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

WHEREFORE, plaintiffs pray that this Court:

1. declare that defendants violated the APA and exceeded their statutory authority in issuing the Delay Rule and that it is therefore unlawful;

2. declare that the purported delay of the effective date was a nullity and that the Test Procedures Rule has gone into effect;

3. vacate the Delay Rule and reinstate the original Test Procedures Rule;

4. award plaintiffs their costs, attorneys' fees, and other disbursements for this action; and

5. grant any other relief this Court deems appropriate.

Dated: September 14, 2017

Respectfully submitted,

/s/ Jeffrey B. Dubner
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