

NATURAL RESOURCES DEFENSE COUNCIL

SIERRA CLUB

CONSUMER FEDERATION OF AMERICA

April 3, 2017

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. James Richard Perry, Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Re: 60-day notice of intent to sue for violations of the Energy Policy and
Conservation Act

Dear Secretary Perry:

On behalf of the Natural Resources Defense Council, Sierra Club, and Consumer Federation of America, we write to urge the Department of Energy to comply with its duty to publish in the Federal Register five final rules prescribing energy conservation standards under the Energy Policy and Conservation Act (EPCA). Each of the five rules – which cover compressors, uninterruptible power supplies, walk-in coolers and freezers, portable air conditioners, and commercial packaged boilers – is the product of a robust rulemaking process and was signed by an authorized DOE official in December 2016.¹ DOE regulations mandate that the Department now take the final step required to ensure the rules' effectiveness: send them to the Office of the Federal Register for publication.

¹ [Energy Conservation Standards for Portable Air Conditioners](#), Docket No. EERE-2013-BT-STD-0033 (posted Dec. 28, 2016); [Energy Conservation Standards for Uninterruptible Power Supplies](#), Docket No. EERE-2016-BT-STD-0022 (posted Dec. 28, 2016); [Energy Conservation Standards for Air Compressors](#), Docket No. EERE-2013-BT-STD-0040 (posted Dec. 5, 2016); [Energy Conservation Standards for Walk-in Cooler and Freezer Refrigeration Systems](#), Docket No. EERE-2015-BT-STD-0016 (posted Dec. 28, 2016); [Energy Conservation Standards for Commercial Packaged Boilers](#), Docket No. EERE-2013-BT-STD-0030 (posted Dec. 28, 2016).

Energy efficiency is the most affordable and effective solution to America's energy problems. Appliance and equipment efficiency standards save energy, increase the reliability of the electricity grid, reduce consumer energy bills, and decrease pollution. DOE's energy efficiency standards program has been transformative in making U.S. buildings and products more efficient. The program has a long history of bipartisan support. President Reagan signed into law the provisions of EPCA that establish appliance efficiency standards, while Presidents George H.W. Bush and George W. Bush signed strengthening legislation.²

The five rules awaiting publication will provide important benefits to our organizations, our members, and the American public. According to DOE projections, the standards prescribed by the rules will save approximately 2.76 quads of energy – about 3 percent of all the energy used in the United States for all purposes in a year – over a 30-year period. These energy savings will save consumers money on their utility bills: combined, the standards will yield more than \$11 billion in consumer net-present-value savings over 30 years of shipments. The standards will also reduce emissions of carbon dioxide by more than 25 million metric tons by 2030 – equivalent to the emissions generated by the annual electricity use of more than 3 million U.S. homes. Additionally, the standards will enhance public health by reducing emissions of other harmful air pollutants, such as sulfur dioxide and nitrogen oxides, by hundreds of thousands of tons.

None of these benefits will accrue, however, unless DOE complies with its regulations and publishes the final rules in the Federal Register. We respectfully request that DOE immediately send the final rules to the Office of the Federal Register and ensure that they are published. If DOE fails to do so, we intend to commence litigation to enforce DOE's regulatory duty to publish the final rules.

DOE's Legal Obligations

At the conclusion of a rulemaking establishing or amending an energy conservation standard under EPCA, DOE is required by regulation to post the signed final rule on its website for a 45-day public inspection period. 10 C.F.R. § 430.5(c). The "posting of an energy conservation standards rule signals the end of DOE's substantive analysis and decision-making regarding the applicable standards." 81 Fed. Reg. 57,745, 57,751 (Aug.

² See Pub. L. 100-12; Pub. L. 100-357; Pub. L. 102-486; Pub. L. 109-58; Pub. L. 110-140.

24, 2016). During the 45-day period, any person may identify a potential error in the rule and request that DOE correct it. 10 C.F.R. § 430.5(d). DOE's regulations define an error as "an aspect of the regulatory text of a rule that is inconsistent with what [DOE] intended regarding the rule at the time of posting," for example, a "typographical," "calculation," or "numbering" mistake. *Id.* § 430.5(b).

The regulations mandate that DOE take one of three courses of action after the 45-day inspection period ends:

- (1) If DOE receives a request for correction but decides not to make any corrections, DOE "will submit the rule for publication to the Office of the Federal Register as it was posted." *Id.* § 430.5(f)(1).
- (2) If DOE receives no requests, the Department "will in due course submit the rule, as it was posted . . . , to the Office of the Federal Register for publication. This will occur after" the 45-day inspection period "has elapsed." *Id.* § 430.5(f)(2).
- (3) If DOE receives a request and determines that a correction is necessary, the Department "will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days" after the 45-day inspection period "has elapsed." *Id.* § 430.5(f)(3).

As required by these regulations, DOE posted the five signed, final rules on its website in December 2016. For the compressors rule, the 45-day inspection period ended on January 19, 2017. For the remaining four rules, the period ended on February 11, 2017. Based on information available in the rulemaking dockets, DOE received requests to correct alleged errors in the commercial packaged boiler rule, but received no correction requests for the other four rules.

It has been more than 30 days since the 45-day inspection period ended for all five rules, *see id.* § 430.5(f)(3), and DOE is now required to submit the five rules, as posted or as corrected, to the Office of the Federal Register for publication.

Conclusion

DOE's unlawful failure to send the five final rules to the Office of the Federal Register is unacceptable. The delay in the rules' publication could delay manufacturers' ultimate compliance with the standards, harming our organizations, our members, and American consumers. By failing to ensure the rules' publication in the Federal Register, DOE has failed to perform a nondiscretionary duty under its regulations implementing EPCA, and is therefore subject to suit under 42 U.S.C. § 6305(a) and § 6316, and/or the Administrative Procedure Act.

We respectfully request that DOE immediately send the five final rules to the Office of the Federal Register and ensure that they are published in the Federal Register. Although we hope that litigation will not be necessary, if DOE maintains its unlawful inaction, then we intend to commence litigation as early as 60 days from the date of this letter, to compel DOE comply with its nondiscretionary duty to publish the five rules. Accordingly, to the extent required by 42 U.S.C. § 6305(b)(2), we hereby provide notice of our intent to pursue such litigation. Other parties not signatories to this letter may also join this litigation with respect to the same claims covered by this letter.

Respectfully,



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cc: Federal Trade Commission
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