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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

NATURAL RESOURCES DEFENSE COUNCIL,
INC.; SIERRA CLUB; and CONSUMER
FEDERATION OF AMERICA,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Secretary
of the United States Department of Energy; and
the UNITED STATES DEPARTMENT OF
ENERGY,

Defendants.

Case No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 INTRODUCTION

2 1. This lawsuit challenges the U.S. Department of Energy’s (DOE’s) unlawful
3 withholding of publication of five final rules developed under the Energy Policy and
4 Conservation Act (EPCA). The five rules establish cost-effective, technologically justified,
5 consumer-friendly, and environmentally beneficial energy-conservation standards for
6 several categories of home appliances and commercial and industrial equipment: portable
7 air conditioners, uninterruptible power supplies, air compressors, walk-in coolers and
8 freezers, and commercial packaged boilers.

9 2. DOE adopted the five final rules in December 2016. Each rule is the result of
10 a robust rulemaking process in which the agency collected input from manufacturers,
11 trade associations, consumer advocates, and others in public meetings and through public
12 comments. An authorized DOE official signed and dated each rule, and the agency posted
13 the final rules on its website for a 45-day error-correction period, pursuant to the agency’s
14 error-correction regulation.

15 3. DOE’s error-correction regulation allows the public to alert the agency to a
16 minor error in a final energy-conservation rule – such as a “typographical,” “calculation,”
17 or “numbering” error – before the rule is published. The regulation mandates that,
18 following the 45-day period for public review, DOE must submit the final rule to the
19 Office of the Federal Register for publication. If DOE deems any corrections necessary, the
20 agency has 30 days, absent extenuating circumstances, to submit a corrected rule for
21 publication.

22 4. The last of the public-review periods for the five final rules ended on
23 February 11, 2017. As far as plaintiffs are aware, DOE received no correction requests for
24 the portable air conditioners rule, the uninterruptible power supplies rule, the air
25 compressors rule, or the walk-in coolers and freezers rule. DOE received three correction
26 requests purporting to identify errors in the commercial packaged boilers rule.

27 5. DOE has not submitted any of the final rules to the Office of the Federal
28 Register for publication.

1 6. DOE's failure to submit the five final rules for publication violates the
2 agency's error-correction regulation under EPCA. In the alternative, DOE's failure to
3 publish the rules violates the Administrative Procedure Act and the Federal Register Act.

4 7. In addition, two of the five final rules – the uninterruptible power supplies
5 rule and the walk-in coolers and freezers rule – are subject to statutory deadlines that DOE
6 has missed. DOE's failure to publish these rules by the deadlines prescribed by Congress
7 violates EPCA.

8 8. DOE's unlawful failure to publish the five final energy-conservation rules
9 deprives plaintiffs, their members, and the American public of the substantial benefits the
10 rules would bring, including lower energy bills, a more reliable electricity grid, and
11 reduced emissions of harmful air pollutants that threaten public health.

12 9. Plaintiffs seek an order enjoining DOE to ensure immediate publication of
13 the five final rules in the Federal Register.

14 JURISDICTION

15 10. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331,
16 42 U.S.C. §§ 6305(a)(2)-(3) and 6316, and 5 U.S.C. § 702.

17 11. DOE's failure to submit the portable air conditioners rule, the
18 uninterruptible power supplies rule, the air compressors rule, the walk-in coolers and
19 freezers rule, and the commercial packaged boilers rule for publication in the Federal
20 Register is a failure to perform a nondiscretionary duty under DOE's regulations
21 implementing EPCA, 10 C.F.R. § 430.5, and is subject to judicial review, 42 U.S.C.
22 §§ 6305(a)(2), 6316.

23 12. Plaintiffs have provided DOE and the Federal Trade Commission with at
24 least sixty days' written notice of the violations of DOE's regulations under EPCA, in the
25 manner required by law. *Id.* § 6305(b)(2). A copy of plaintiffs' notice letter is attached as
26 Exhibit A to this Complaint.

27 13. In the alternative, DOE's failure to publish the five final energy-conservation
28 rules in the Federal Register is an agency action unlawfully withheld, in violation of the

1 Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), and the Federal Register Act, 44
2 U.S.C. §§ 1503, 1505, and is subject to judicial review, 5 U.S.C. §§ 702, 706(1).

3 14. In addition, DOE's failure to publish the final energy-conservation rules for
4 uninterruptible power supplies and walk-in coolers and freezers is a failure of Secretary of
5 Energy Rick Perry to comply with a nondiscretionary duty to issue final rules according to
6 the schedules set forth in 42 U.S.C. §§ 6295 and 6313, and is subject to judicial review, *id.*
7 §§ 6305(a)(3), 6316.

8 15. This Court has the authority to grant the requested declaratory and
9 injunctive relief pursuant to 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 6305(a)(2)-(3), and 5 U.S.C.
10 §§ 702 and 706.

11 **VENUE AND INTRADISTRICT ASSIGNMENT**

12 16. Venue is proper in the Northern District of California under 28 U.S.C.
13 § 1391(e)(1)(C) because this civil action is brought against an agency of the United States
14 and an officer and employee of the United States acting in his official capacity and under
15 the color of legal authority, Plaintiff Sierra Club resides in the Northern District of
16 California, and no real property is involved in the action.

17 17. Pursuant to Local Rule 3-2(c) and (d), assignment to the San Francisco
18 Division or the Oakland Division is appropriate because Plaintiff Sierra Club resides in
19 Alameda County.

20 **THE PARTIES**

21 The Plaintiffs

22 18. Plaintiff Natural Resources Defense Council, Inc. (NRDC), is a national,
23 nonprofit environmental and public health organization with several hundred thousand
24 members. NRDC engages in research, advocacy, media, and litigation related to protecting
25 public health and the environment. One of NRDC's top priorities is to fight climate change
26 by cutting carbon emissions and building the clean energy economy. As part of this work,
27 NRDC promotes the use of sustainable energy sources and energy efficiency to reduce
28 greenhouse gas pollution, lower consumer energy bills, and minimize the adverse

1 environmental impacts of electricity generation and natural gas production. NRDC has
2 participated in the majority of DOE's rulemakings to develop efficiency standards for
3 appliances and commercial equipment, including the rulemakings for the portable air
4 conditioners rule, the uninterruptible power supplies rule, the air compressors rule, the
5 walk-in coolers and freezers rule, and the commercial packaged boilers rule.

6 19. Plaintiff Sierra Club is a national, nonprofit environmental organization with
7 hundreds of thousands of members nationwide. Sierra Club's purposes include practicing
8 and promoting the responsible use of the Earth's ecosystems and resources. Energy
9 efficiency is crucial to achieving Sierra Club's mission, and Sierra Club has a variety of
10 initiatives designed to encourage businesses, individuals, and utilities to undertake
11 energy-conservation measures.

12 20. Plaintiff Consumer Federation of America (CFA) is an association of more
13 than 250 nonprofit consumer organizations established to advance the consumer interest
14 through research, advocacy, and education. CFA has long supported cost-effective energy-
15 efficiency standards and DOE's efficiency standards program for consumer products.

16 21. Plaintiffs and their members and constituents have strong environmental,
17 health, and consumer interests in the prompt publication of the final energy-conservation
18 rules for portable air conditioners, uninterruptible power supplies, air compressors, walk-
19 in coolers and freezers, and commercial packaged boilers. Plaintiffs and their members
20 include consumers and business owners who use, or whose businesses use, portable air
21 conditioners, uninterruptible power supplies, walk-in coolers and freezers, and
22 commercial packaged boilers. The rules will help plaintiffs and their members save energy
23 and lower their energy bills; will reduce air pollution emissions from power plants and
24 other electricity generators and the adverse health impacts from those emissions; will
25 reduce the possibility of electric shortages and blackouts; will keep wholesale electricity
26 prices down during periods of peak electricity demand; and will help avoid the need to
27 build new power plants. In the absence of a court order requiring DOE to publish the five
28 final rules, there is no indication that the rules will be published and become effective.

1 DOE's unlawful failure to publish the five final rules harms the environmental, health, and
2 consumer interests of plaintiffs and their members and constituents because it denies them
3 the benefits that the energy-conservation rules would bring. Plaintiffs' injuries will be
4 redressed by the requested relief.

5 The Defendants

6 22. Defendant Rick Perry, Secretary of Energy, is the head of DOE and is
7 responsible for ensuring compliance with EPCA. Defendant Perry is sued in his official
8 capacity.

9 23. Defendant DOE is an agency of the United States Government. DOE is
10 responsible for administering EPCA, and is the agency whose failure to act as required by
11 law is challenged here.

12 **STATUTORY AND REGULATORY BACKGROUND**

13 24. DOE must comply with the following federal statutes, among others: EPCA,
14 the Administrative Procedure Act, and the Federal Register Act.

15 Energy Policy and Conservation Act (EPCA)

16 25. Congress enacted EPCA in 1975 to reduce wasteful use of the nation's energy
17 resources following the 1973 oil embargo. *See* Pub. L. No. 94-163, 89 Stat. 871 (1975)
18 (codified at 42 U.S.C. §§ 6291-6309). EPCA's purposes include "conserv[ing] energy
19 supplies through energy conservation programs" and improving the energy efficiency of
20 major appliances. 42 U.S.C. § 6201(4), (5).

21 26. Initially, EPCA authorized, but did not require, DOE to establish energy-
22 conservation standards for household appliances, including appliances listed in the Act
23 and other appliances designated by DOE. Congress amended EPCA in 1978, however, and
24 mandated that DOE prescribe energy-conservation standards for thirteen classes of major
25 appliances. *See* National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206.
26 The 1978 amendments also created a program for improving the efficiency of industrial
27 equipment, now codified at 42 U.S.C. §§ 6311-6317.

1 27. In 1987, after NRDC and others successfully sued DOE for its continued
2 failure to set meaningful energy-conservation standards for appliances, *see NRDC v.*
3 *Herrington*, 768 F.2d 1355 (D.C. Cir. 1985), Congress enacted, and President Reagan signed
4 into law, further amendments to EPCA. *See* National Appliance Energy Conservation Act
5 of 1987, Pub. L. No. 100-12, 101 Stat. 103. The 1987 amendments established energy-
6 conservation standards for household appliances such as room air conditioners, water
7 heaters, and furnaces, and required DOE to review and amend these standards
8 periodically, by specific deadlines. 42 U.S.C. §§ 6291-6309.

9 28. Since 1987, Congress has continued to make EPCA stronger. In 1992,
10 President George H.W. Bush signed into law amendments prescribing energy-
11 conservation standards for commercial and industrial equipment such as packaged
12 boilers. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

13 29. President George W. Bush signed into law additional strengthening
14 amendments in 2005 and 2007. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat.
15 594; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.
16 The 2007 amendments required DOE to set energy-conservation standards for battery
17 chargers (which include uninterruptible power supplies), or determine that no standard
18 was technically feasible and economically justified, by July 1, 2011, 42 U.S.C.
19 § 6295(u)(1)(E)(i)(II), and required DOE to set energy-conservation standards for walk-in
20 coolers and freezers by January 1, 2012, *id.* § 6313(f)(4)(A).

21 30. When DOE establishes or amends an energy-conservation standard under
22 EPCA, the standard must be designed to achieve the maximum improvement in energy
23 efficiency that is technologically feasible and economically justified. *Id.* §§ 6295(o)(2)(A),
24 6316(a). The standard must also result in significant conservation of energy. *Id.*
25 §§ 6295(o)(3)(B), 6316(a).

26 31. DOE must review its existing standards at least every six years and either
27 determine that the standards do not need to be amended or propose new standards. *Id.*
28 §§ 6295(m)(1), 6313(a)(6)(C)(i). If DOE proposes new standards, then it must publish a final

1 rule within two years of issuing a notice of proposed rulemaking. *Id.* §§ 6295(m)(3),
2 6313(a)(6)(C)(iii).

3 32. EPCA contains an “anti-backsliding” provision, which prevents DOE from
4 prescribing any amended standard that either increases the maximum allowable energy
5 use or decreases the minimum required energy efficiency of a covered product. *Id.*
6 §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I).

7 33. EPCA’s energy-conservation standards program for appliances and
8 equipment has been highly effective in improving our nation’s energy efficiency, saving
9 consumers money, and avoiding emissions of greenhouse gases and other air pollutants.
10 DOE estimates that, by 2030, the standards completed through 2016 will save more energy
11 than the entire nation consumes in one year, and will save consumers more than \$2 trillion
12 on their utility bills. Reduced energy use also avoids emissions of harmful air pollutants:
13 through 2030, standards completed through 2016 will cut emissions of more than 7.9
14 billion metric tons of carbon dioxide, more greenhouse gas emissions than the entire
15 United States generates in a year.

16 DOE’s Error-Correction Regulation

17 34. At the conclusion of a rulemaking establishing or amending an energy-
18 conservation standard under EPCA, DOE is required by regulation to post the signed final
19 rule on its website for a 45-day error-correction period. 10 C.F.R. § 430.5(c).

20 35. The “posting of an energy conservation standards rule signals the end of
21 DOE’s substantive analysis and decision-making regarding the applicable standards.” 81
22 Fed. Reg. 57,745, 57,751 (Aug. 24, 2016).

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

28

1 37. DOE must take one of three actions after the 45-day public-review period
2 ends:

- 3 a. If DOE receives a request for correction but decides not to make any
4 corrections, it “will submit the rule for publication to the Office of the
5 Federal Register as it was posted.” *Id.* § 430.5(f)(1).
- 6 b. If DOE receives no requests, it “will in due course submit the rule, as
7 it was posted . . . , to the Office of the Federal Register for publication.
8 This will occur after” the 45-day public-review period “has elapsed.”
9 *Id.* § 430.5(f)(2).
- 10 c. If DOE receives a request and determines that a correction is
11 necessary, it “will, absent extenuating circumstances, submit a
12 corrected rule for publication in the Federal Register within 30 days”
13 after the 45-day public-review period “has elapsed.” *Id.* § 430.5(f)(3).

14 Administrative Procedure Act

15 38. The Administrative Procedure Act, as amended by the Freedom of
16 Information Act, mandates that “[e]ach agency shall separately state and currently publish
17 in the Federal Register . . . substantive rules of general applicability adopted as authorized
18 by law.” 5 U.S.C. § 552(a)(1)(D).

19 39. The Administrative Procedure Act also provides for judicial review of
20 agency action, *id.* § 702, and authorizes the reviewing court to “compel agency action
21 unlawfully withheld,” *id.* § 706(1).

22 Federal Register Act

23 40. The Federal Register Act instructs that documents “required or authorized to
24 be published by section 1505 of this title shall be filed with the Office of the Federal
25 Register.” 44 U.S.C. § 1503.

26 41. Section 1505(a)(3) of the Federal Register Act provides, in turn, that “[t]here
27 shall be published in the Federal Register . . . documents or classes of documents that may
28

1 be required so to be published by Act of Congress.” *Id.* § 1505(a)(3). Under the
2 Administrative Procedure Act, this includes agency rules.

3 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

4 42. In December 2016, DOE posted five signed final rules on its website. These
5 rules establish energy-conservation standards for portable air conditioners,
6 uninterruptible power supplies, air compressors, walk-in coolers and freezers, and
7 commercial packaged boilers.

8 The Portable Air Conditioners Rule

9 43. Portable air conditioners are similar to window air conditioners, but instead
10 of being mounted in a window, they stand on the floor and use an exhaust hose to expel
11 hot air through a window. Portable air conditioners have never been subject to an energy-
12 conservation standard and are less efficient than other cooling equipment. On average,
13 portable air conditioners use about twice as much energy per year as new window air
14 conditioners, which have had to meet federal energy-conservation standards for more than
15 25 years.¹



27
28

¹ All photos in this Complaint are intended to be illustrative and do not necessarily represent the specific products that would be regulated under the standards at issue.

1 44. In 2013, DOE proposed determining that portable air conditioners were
2 covered products under EPCA and invited public comment on the issue. 78 Fed. Reg.
3 40,403 (July 5, 2013); *see* 42 U.S.C. § 6292(a)(20), (b) (authorizing DOE to designate
4 appliances as covered products). DOE made a final determination of coverage in 2016. 81
5 Fed. Reg. 22,514 (Apr. 18, 2016).

6 45. In 2015, while still evaluating possible coverage, DOE released a preliminary
7 technical analysis of potential energy-conservation standards for portable air conditioners
8 and announced a public meeting and comment period for discussion of the analysis. 80
9 Fed. Reg. 10,628 (Feb. 27, 2015). In June 2016, DOE issued a proposed rule setting forth
10 energy-conservation standards for portable air conditioners, announced a public meeting,
11 and invited public comment. 81 Fed. Reg. 38,398 (June 13, 2016).

12 46. On December 28, 2016, DOE's Acting Assistant Secretary for Energy
13 Efficiency and Renewable Energy signed a final rule establishing energy-conservation
14 standards for portable air conditioners. On the same day, DOE posted the signed and
15 dated final rule on its website with the following notice:

16 The text of this rule is subject to correction based on the identification of
17 errors as defined in 10 CFR 430.5 before publication in the Federal
18 Register. Readers are requested to notify DOE by email at
19 ErrorCorrectionInfo@EE.DOE.Gov of any typographical or other errors, as
20 described in such regulations, by no later than midnight on February 11,
21 2017, in order that DOE may make any necessary corrections in the
22 regulatory text submitted to the Office of the Federal Register for
23 publication.

24 47. DOE concluded that the energy-conservation standards in the portable air
25 conditioners final rule "represent the maximum improvement in energy efficiency that is
26 technologically feasible and economically justified, and would result in significant
27 conservation of energy." The agency projected that the standards would save
28 approximately 0.49 quadrillion BTUs (or "quads") of energy over a 30-year period, and

1 would save consumers up to \$3 billion.² According to DOE, these savings will also avoid
2 emissions of approximately 25.6 million metric tons of carbon dioxide – equivalent to the
3 annual emissions of 5.4 million cars – as well as 16,400 tons of sulfur dioxide, 32,200 tons
4 of nitrogen oxides, and emissions of methane, nitrous oxide, and mercury.

5 48. On information and belief, DOE did not receive any communications
6 claiming to identify errors in the portable air conditioners final rule.

7 49. On information and belief, as of the date of this Complaint, DOE has not
8 submitted the portable air conditioners final rule to the Office of the Federal Register for
9 publication.

10 The Uninterruptible Power Supplies Rule

11 50. Uninterruptible power supplies are backup battery and charging systems
12 that operate automatically to keep electronics running when the power fluctuates or goes
13 out. They are used with desktop computers and other sensitive electronic devices in
14 homes and businesses, and they consume energy to keep the backup battery charged.



27 ² This estimate of consumer savings, and the estimates given for the rules discussed
28 in the following paragraphs, represents the estimated total value of future utility bill
savings minus the estimated costs of purchasing new products.

1 51. In a 2007 amendment to EPCA, Congress charged DOE with prescribing
2 energy-conservation standards for battery chargers, or determining that no standard was
3 technically feasible and economically justified, by July 1, 2011. 42 U.S.C.
4 § 6295(u)(1)(E)(i)(II). DOE has concluded that uninterruptible power supplies are a class of
5 battery chargers.

6 52. In 2012, DOE proposed energy-conservation standards for battery chargers,
7 including uninterruptible power supplies, invited public comment, and held a public
8 meeting. 77 Fed. Reg. 18,478 (Mar. 27, 2012). Subsequently, DOE considered whether to
9 regulate uninterruptible power supplies as part of a separate rulemaking on computers
10 and battery backup systems. *See* 79 Fed. Reg. 11,345 (Feb. 28, 2014); 79 Fed. Reg. 41,656
11 (July 17, 2014). In June 2016, DOE issued a final rule establishing energy-conservation
12 standards for battery chargers other than uninterruptible power supplies. 81 Fed. Reg.
13 38,266, 38,275 (June 13, 2016). In that rule, DOE stated that it would “continue to conduct
14 rulemaking activities” to evaluate energy-conservation standards for uninterruptible
15 power supplies “as part of ongoing and future battery charger rulemaking proceedings.”
16 *Id.*

17 53. In August 2016, DOE issued a proposed rule containing energy-conservation
18 standards for uninterruptible power supplies, announced a public meeting, and invited
19 public comment. 81 Fed. Reg. 52,196 (Aug. 5, 2016).

20 54. On December 28, 2016, DOE’s Acting Assistant Secretary for Energy
21 Efficiency and Renewable Energy signed a final rule establishing energy-conservation
22 standards for uninterruptible power supplies. On the same day, DOE posted the signed
23 and dated final rule on its website with the following notice:

24 The text of this rule is subject to correction based on the identification of
25 errors as defined in 10 CFR 430.5 before publication in the Federal
26 Register. Readers are requested to notify DOE by email at
27 ErrorCorrectionInfo@EE.DOE.Gov of any typographical or other errors, as
28 described in such regulations, by no later than midnight on February 11,

1 2017, in order that DOE may make any necessary corrections in the
2 regulatory text submitted to the Office of the Federal Register for
3 publication.

4 55. The uninterruptible power supplies final rule refers to the EPCA provision
5 requiring standards for battery chargers, 42 U.S.C. § 6295(u)(1)(E), as the source of
6 authority for the rule.

7 56. DOE concluded that the energy-conservation standards in the
8 uninterruptible power supplies final rule “represent the maximum improvement in energy
9 efficiency that is technologically feasible and economically justified, and would result in
10 significant conservation of energy.” The agency projected that the standards would cut
11 energy use by approximately 0.94 quads of energy over a 30-year period, and would save
12 consumers and businesses up to \$3 billion. By some estimates, those energy savings are
13 enough to power 7 million U.S. homes for a year. According to DOE, these savings will
14 also avoid emissions of approximately 49 million metric tons of carbon dioxide, 39,000
15 tons of sulfur dioxide, and 63,000 tons of nitrogen oxides, as well as emissions of methane,
16 nitrous oxide, and mercury.

17 57. On information and belief, DOE did not receive any communications
18 claiming to identify errors in the uninterruptible power supplies final rule.

19 58. On information and belief, as of the date of this Complaint, DOE has not
20 submitted the uninterruptible power supplies final rule to the Office of the Federal
21 Register for publication.

1 The Air Compressors Rule

2 59. A compressor is a machine that reduces the volume and increases the
3 pressure of gases. DOE's air compressors rule covers lubricated rotary air compressors
4 rated between 10 and 200 nominal horsepower. These compressors are used to power
5 commercial and industrial equipment including manufacturing robots, pneumatic tools,
6 and paint sprayers.



18 60. In 2012, DOE proposed determining that compressors were covered
19 products under EPCA. 77 Fed. Reg. 76,972 (Dec. 31, 2012); 78 Fed. Reg. 8998 (Feb. 7, 2013)
20 (reopening the public comment period); *see* 42 U.S.C. §§ 6311(1)(L), 6312(b) (authorizing
21 DOE to designate industrial equipment as covered products). DOE issued a final
22 determination of coverage in 2016. 81 Fed. Reg. 79,991 (Nov. 15, 2016).

23 61. In 2014, DOE published a framework document that discussed potential
24 energy-conservation standards for compressors, announced a public meeting, and invited
25 public comment. 79 Fed. Reg. 6839 (Feb. 5, 2014); *see* 79 Fed. Reg. 15,061 (Mar. 18, 2014)
26 (extending the comment period).

27 62. In May 2016, DOE proposed a definition for the term "compressor," 81 Fed.
28 Reg. 27,220, 27,226 (May 5, 2016), and proposed energy-conservation standards for certain

1 types of air compressors, 81 Fed. Reg. 31,680 (May 19, 2016). DOE held a public meeting to
2 discuss the proposed standards and invited public comment.

3 63. On December 5, 2016, DOE's Acting Assistant Secretary for Energy Efficiency
4 and Renewable Energy signed a final rule establishing energy-conservation standards for
5 air compressors. On the same day, DOE posted the signed and dated final rule on its
6 website with the following notice:

7 The text of this rule is subject to correction based on the identification of
8 errors as defined in 10 CFR 430.5 before publication in the Federal Register.
9 Readers are requested to notify DOE by email at
10 ApplianceStandardsQuestions@ee.doe.gov of any typographical or other
11 errors, as described in such regulations, by no later than midnight on
12 January 19, 2017, in order that DOE may make any necessary corrections in
13 the regulatory text submitted to the Office of the Federal Register for
14 publication.

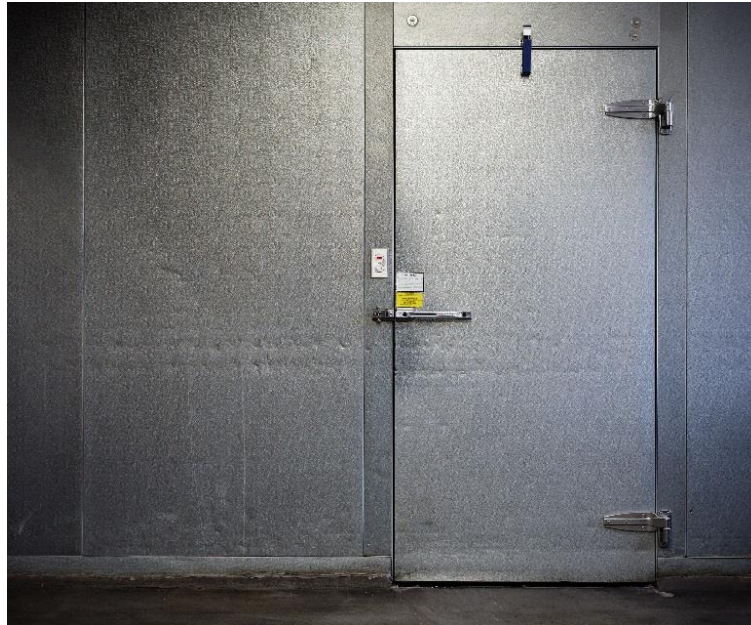
15 64. DOE concluded that the energy-conservation standards in the air
16 compressors final rule "represent the maximum improvement in energy efficiency that is
17 technologically feasible and economically justified, and will result in significant
18 conservation of energy." The agency projected that the standards would cut energy use by
19 approximately 0.16 quads of energy over a 30-year period, and would save businesses up
20 to \$400 million. According to DOE, these savings will also avoid emissions of
21 approximately 8.2 million metric tons of carbon dioxide, 6,500 tons of sulfur dioxide, and
22 11,000 tons of nitrogen oxides, as well as emissions of methane, nitrous oxide, and
23 mercury.

24 65. On information and belief, DOE did not receive any communications
25 claiming to identify errors in the air compressors final rule.

26 66. On information and belief, as of the date of this Complaint, DOE has not
27 submitted the air compressors final rule to the Office of the Federal Register for
28 publication.

1 The Walk-In Coolers and Freezers Rule

2 67. Walk-in coolers and freezers (“walk-ins”) can be found in supermarkets,
3 restaurants, and convenience stores across the country. They are often constructed on site
4 and are used to temporarily store food or other perishable items. For example,
5 supermarkets keep food in walk-ins before moving it to refrigerated display cases on the
6 store floor.



18 68. In a 2007 amendment to EPCA, Congress charged DOE with prescribing
19 energy-conservation standards for walk-ins by January 1, 2012. 42 U.S.C. § 6313(f)(4)(A).

20 69. DOE published a final rule establishing energy-conservation standards for
21 walk-ins in 2014. 79 Fed. Reg. 32,050 (June 3, 2014). A trade association and manufacturer
22 filed petitions for review of the final rule, and the case was litigated in the Fifth Circuit
23 Court of Appeals. *Lennox Int’l, Inc. v. DOE*, No. 14-60535 (5th Cir.). As part of a settlement
24 agreement resolving the lawsuit, on August 10, 2015, the Fifth Circuit vacated the
25 standards for six of the nineteen categories of walk-ins and components covered in the
26 final rule. The settlement provided that “DOE will use its best efforts to issue a final rule
27 establishing the remanded standards by December 1, 2016, by negotiated rulemaking or
28 otherwise.”

1 70. In 2015, DOE established a working group under the Appliance Standards
2 and Rulemaking Federal Advisory Committee, in accordance with the Federal Advisory
3 Committee Act, 5 U.S.C. App. 2, and the Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570.
4 The working group included representatives from manufacturers; trade associations;
5 environmental and energy-conservation advocacy organizations, including Plaintiff
6 NRDC; utilities; and DOE. The working group held thirteen in-person meetings, all open
7 to the public, in the fall of 2015. In December 2015, the working group reached consensus
8 on energy-conservation standards for walk-ins to replace the six standards that had been
9 vacated. The working group collected the standards in a term sheet, which the Advisory
10 Committee then approved.

11 71. In September 2016, DOE proposed energy-conservation standards for walk-
12 ins, reflecting the standards negotiated by the working group. 81 Fed. Reg. 62,980 (Sept.
13 13, 2016). DOE announced a public meeting to discuss the proposed standards and invited
14 public comment.

15 72. On December 28, 2016, DOE's Acting Assistant Secretary for Energy
16 Efficiency and Renewable Energy signed a final rule establishing energy-conservation
17 standards for walk-in coolers and freezers. On the same day, DOE posted the signed and
18 dated final rule on its website with the following notice:

19 The text of this rule is subject to correction based on the identification of
20 errors as defined in 10 CFR 430.5 before publication in the Federal
21 Register. Readers are requested to notify DOE by email at
22 ErrorCorrectionInfo@EE.DOE.Gov of any typographical or other errors, as
23 described in such regulations, by no later than midnight on February 11,
24 2017, in order that DOE may make any necessary corrections in the
25 regulatory text submitted to the Office of the Federal Register for
26 publication.

27 73. DOE concluded that the energy-conservation standards in the walk-ins final
28 rule, which reflect the consensus negotiated by the working group, "represent the

1 maximum improvement in energy efficiency that is technologically feasible and
2 economically justified, and would result in significant conservation of energy.” The agency
3 projected that the standards would cut energy use by approximately 0.9 quads of energy
4 over a 30-year period, and would save businesses up to \$3.2 billion. By some estimates,
5 those energy savings are enough to power 7 million U.S. homes for a year. According to
6 DOE, these savings will also avoid emissions of approximately 46 million metric tons of
7 carbon dioxide, 36,000 tons of sulfur dioxide, and 58,000 tons of nitrogen oxides, as well as
8 emissions of methane, nitrous oxide, and mercury.

9 74. On information and belief, DOE did not receive any communications
10 claiming to identify errors in the walk-ins final rule.

11 75. On information and belief, as of the date of this Complaint, DOE has not
12 submitted the walk-ins final rule to the Office of the Federal Register for publication.

13 The Commercial Packaged Boilers Rule

14 76. Commercial packaged boilers are used to heat commercial and multifamily
15 residential buildings. They are powered by oil or natural gas and are generally used in
16 buildings with a central distribution system that circulates steam or hot water from the
17 boiler to other parts of the building. Nearly a quarter of the commercial floor space in the
18 United States is heated by packaged boilers, and space heating uses far more energy than
19 any other activity in these and other commercial buildings.



1 77. The American Society of Heating, Refrigerating, and Air-Conditioning
2 Engineers (ASHRAE) publishes Standard 90.1, a model energy-efficiency code for
3 commercial buildings. ASHRAE Standard 90.1 sets energy-efficiency levels for several
4 types of heating and cooling equipment used in these buildings, including commercial
5 packaged boilers. EPCA mandates that if ASHRAE amends Standard 90.1 with respect to
6 commercial packaged boilers, DOE must adopt amended energy-conservation standards
7 at the ASHRAE level, unless DOE determines that adoption of a more stringent standard
8 would be justified. 42 U.S.C. § 6313(a)(6)(A)(ii).

9 78. Additionally, EPCA requires DOE to review its energy-conservation
10 standards for commercial packaged boilers every six years and either determine that the
11 standards do not need to be amended or propose amended standards. *Id.*
12 § 6313(a)(6)(C)(i). If DOE proposes new standards, then it must publish a final rule within
13 two years. *Id.* § 6313(a)(6)(C)(iii).

14 79. DOE last amended its energy-conservation standards for commercial
15 packaged boilers in July 2009, when it adopted the levels set by a revision of ASHRAE
16 Standard 90.1. 74 Fed. Reg. 36,312 (July 22, 2009). DOE was required to review the
17 standards and either determine that they did not need to be amended, or propose new
18 standards, by July 22, 2015. 42 U.S.C. § 6313(a)(6)(C)(i).

19 80. In 2013, DOE published a framework document that discussed DOE's
20 anticipated approach to reviewing the energy-conservation standards for commercial
21 packaged boilers, announced a public meeting, and invited public comment. 78 Fed. Reg.
22 54,197 (Sept. 3, 2013).

23 81. In 2014, DOE published a preliminary technical analysis of potential energy-
24 conservation standards for commercial packaged boilers, announced another public
25 meeting, and invited public comment. 79 Fed. Reg. 69,066 (Nov. 20, 2014).

26 82. In March 2016, DOE proposed amended energy-conservation standards for
27 commercial packaged boilers, announced a public meeting to discuss the proposed
28 standards, and invited public comment. 81 Fed. Reg. 15,836 (Mar. 24, 2016).

1 83. On December 28, 2016, DOE’s Acting Assistant Secretary for Energy
2 Efficiency and Renewable Energy signed a final rule establishing amended energy-
3 conservation standards for commercial packaged boilers. On the same day, DOE posted
4 the signed and dated final rule on its website with the following notice:

5 The text of this rule is subject to correction based on the identification of
6 errors as defined in 10 CFR 430.5 before publication in the Federal
7 Register. Readers are requested to notify DOE by email at
8 ErrorCorrectionInfo@EE.DOE.Gov of any typographical or other errors, as
9 described in such regulations, by no later than midnight on February 11,
10 2017, in order that DOE may make any necessary corrections in the
11 regulatory text submitted to the Office of the Federal Register for
12 publication.

13 84. DOE concluded that the amended energy-conservation standards in the
14 commercial packaged boilers final rule “represent significant additional energy
15 conservation and are technologically feasible and economically justified.” The agency
16 projected that the standards would cut energy use by approximately 0.27 quads of energy
17 over a 30-year period, and would save customers up to nearly \$2 billion. By some
18 estimates, those energy savings are enough to heat all the natural gas-heated homes in
19 New England for a year and a half. According to DOE, these savings will also avoid
20 emissions of approximately 16 million metric tons of carbon dioxide, 3,100 tons of sulfur
21 dioxide, and 41,000 tons of nitrogen oxides, as well as emissions of methane, nitrous oxide,
22 and mercury.

23 85. During the 45-day error-correction period, DOE received three letters from
24 industry trade associations and a natural gas distribution company claiming to identify
25 errors in the commercial packaged boilers final rule.

26 86. On information and belief, as of the date of this Complaint, DOE has not
27 submitted the commercial packaged boilers final rule to the Office of the Federal Register
28 for publication.

FIRST CLAIM FOR RELIEF

87. Plaintiffs incorporate by reference all preceding paragraphs.

88. Once DOE has posted a signed, final energy-conservation-standards rule on its website pursuant to the agency's error-correction regulation, the required 45-day period for public review has passed, and, if necessary, DOE has corrected any errors identified in the rule, DOE is required to submit the rule for publication in the Federal Register. 10 C.F.R. § 430.5.

89. DOE's failure to submit the portable air conditioners rule, the uninterruptible power supplies rule, the air compressors rule, the walk-in coolers and freezers rule, and the commercial packaged boilers rule for publication in the Federal Register following the conclusion of the error-correction period for each rule violates 10 C.F.R. § 430.5, and constitutes a failure to perform a nondiscretionary duty under EPCA, 42 U.S.C. § 6305(a)(2).

SECOND CLAIM FOR RELIEF

90. Plaintiffs incorporate by reference all preceding paragraphs.

91. In the alternative, once DOE has adopted a substantive rule of general applicability, the Administrative Procedure Act requires the agency to publish the rule in the Federal Register. 5 U.S.C. § 552(a)(1)(D).

92. DOE adopted the portable air conditioners rule, the uninterruptible power supplies rule, the air compressors rule, the walk-in coolers and freezers rule, and the commercial packaged boilers rule, each of which was signed and dated by the Acting Assistant Secretary and posted on the agency's website.

93. DOE's failure to publish the portable air conditioners rule, the uninterruptible power supplies rule, the air compressors rule, the walk-in coolers and freezers rule, and the commercial packaged boilers rule in the Federal Register violates the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), and constitutes an agency action unlawfully withheld, 5 U.S.C. § 706(1).

1 **THIRD CLAIM FOR RELIEF**

2 94. Plaintiffs incorporate by reference all preceding paragraphs.

3 95. The Federal Register Act provides that documents “shall be filed with the
4 Office of the Federal Register,” 44 U.S.C. § 1503, if an Act of Congress requires that they be
5 published in the Federal Register, *id.* § 1505(a).

6 96. The Administrative Procedure Act is an Act of Congress requiring that
7 “substantive rules of general applicability” be published in the Federal Register. 5 U.S.C.
8 § 552(a)(1)(D).

9 97. The portable air conditioners rule, the uninterruptible power supplies rule,
10 the air compressors rule, the walk-in coolers and freezers rule, and the commercial
11 packaged boilers rule are substantive rules of general applicability that DOE adopted as
12 authorized by law. *Id.*

13 98. DOE’s failure to file the portable air conditioners rule, the uninterruptible
14 power supplies rule, the air compressors rule, the walk-in coolers and freezers rule, and
15 the commercial packaged boilers rule with the Office of the Federal Register for
16 publication violates the Federal Register Act, 44 U.S.C. §§ 1503 and 1505, and constitutes
17 an agency action unlawfully withheld, 5 U.S.C. § 706(1).

18 **FOURTH CLAIM FOR RELIEF**

19 99. Plaintiffs incorporate by reference all preceding paragraphs.

20 100. Congress required DOE, not later than July 1, 2011, to prescribe energy-
21 conservation standards for battery chargers, or to determine that no standard was
22 technically feasible and economically justified. 42 U.S.C. § 6295(u)(1)(E)(i)(II).

23 101. Although DOE published a final rule in June 2016 that established energy-
24 conservation standards for some classes of battery chargers, DOE did not in that rule
25 prescribe energy-conservation standards for uninterruptible power supplies or determine
26 that no standard for uninterruptible power supplies was technically feasible and
27 economically justified. 81 Fed. Reg. 38,266 (June 13, 2016).

28

1 102. By failing to publish a final rule prescribing energy-conservation standards
2 for uninterruptible power supplies, DOE has violated the statutory deadline for
3 publication of the final rule required in 42 U.S.C. § 6295(u)(1)(E)(i)(II). DOE has thereby
4 failed “to comply with a nondiscretionary duty to issue a . . . final rule according to the
5 schedules set forth in section 6295.” *Id.* § 6305(a)(3).

6 **FIFTH CLAIM FOR RELIEF**

7 103. Plaintiffs incorporate by reference all preceding paragraphs.

8 104. Congress required DOE, not later than January 1, 2012, to prescribe energy-
9 conservation standards for walk-in coolers and freezers. 42 U.S.C. § 6313(f)(4)(A).

10 105. Although DOE published a final rule in June 2014 that established energy-
11 conservation standards for walk-ins, 79 Fed. Reg. 32,050 (June 3, 2014), the standards for
12 six of the nineteen classes of walk-ins were vacated by a court order with DOE’s consent.
13 Order of Aug. 10, 2015, *Lennox Int’l, Inc. v. DOE*, No. 14-60535 (5th Cir.).

14 106. Because DOE has failed to replace the vacated standards for the six classes of
15 walk-ins, DOE has not fulfilled its obligation to prescribe energy-conservation standards
16 for those six classes of walk-ins. Accordingly, DOE has violated the statutory deadline for
17 publication of the final rule required in 42 U.S.C. § 6313(f)(4)(A). DOE has thereby failed
18 “to comply with a nondiscretionary duty to issue a . . . final rule according to the schedules
19 set forth in section [6313].” *Id.* §§ 6305(a)(3), 6316(a) (making § 6305(a)(3) applicable to the
20 schedule set forth in § 6313(f)(4)(A)).

21 **REQUEST FOR RELIEF**

22 Plaintiffs respectfully request that this Court:

23 1. Advance on the docket and expedite the decision of this case pursuant to 42
24 U.S.C. § 6305(a);

25 2. Declare that defendants are each in violation of the Energy Policy and
26 Conservation Act, or, in the alternative, the Administrative Procedure Act and the Federal
27 Register Act, as described above;

28

1 3. Enjoin defendants to ensure publication of the portable air conditioners rule,
2 the uninterruptible power supplies rule, the air compressors rule, the walk-in coolers and
3 freezers rule, and the commercial packaged boilers rule in the Federal Register
4 immediately;

5 4. Grant plaintiffs their costs of suit, including reasonable attorney fees;

6 5. Grant plaintiffs such further relief as is necessary and appropriate.
7

8 Dated: June 13, 2017

Respectfully submitted,

9 /s/ Jennifer A. Sorenson

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*Counsel for Plaintiffs Sierra Club and
Consumer Federation of America*

Exhibit A

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,



Aaron Colangelo
Jennifer A. Sorenson
*Counsel for Natural Resources
Defense Council*

Timothy Ballo
Earthjustice
*Counsel for Sierra Club and Consumer
Federation of America*

cc: Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580