

## Court Orders DOE to Publish Efficiency Rules

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The Department of Energy (DOE) has again been challenged over the timeliness of energy conservation standards adopted pursuant to the Energy Policy and Conservation Act (EPCA).<sup>1</sup> A court has now ordered DOE promptly to publish in the Federal Register standards it had previously adopted – but not published there – for four products.<sup>2</sup> The litigation is significant for industry members seeking to assure timely presentation of their views in the DOE rulemaking process.

### DOE posts pre-publication standards for error correction

In December 2016 – the waning days of the Obama administration – DOE posted on its website pre-Federal-Register versions of standards for four products (portable air conditioners, air compressors, commercial packaged boilers, and uninterruptible power supplies). Under DOE’s “Error Correction Rule,” DOE provided the public 45 days to review the posted versions of the rules before the agency would submit them to the Federal Register for publication.<sup>3</sup>

The Error Correction Rule stemmed from a concern that once a standards rule was published in the Federal Register, it might be locked in pursuant to EPCA’s so-called anti-backsliding provision, even if errors had snuck into the process.<sup>4</sup>

For three of the four standards DOE received no request for error correction; one error was flagged in the other standard.

### Litigation to force Federal Register publication

Reflecting a change in the regulatory landscape with the coming of the Trump administration, more than a year has passed without DOE submitting any of the four standards to the Federal Register. Environmental advocates and states sued to force publication.

In a strongly-worded opinion, a District Court in California has ordered DOE to submit the standards to the Federal Register.

The court said that the Error Correction Rule “creates a clear-cut duty” for DOE to publish a standard in the Federal Register “at the end of the error-correction process.”<sup>5</sup> The court rejected DOE’s argument that the agency has “free-standing authority and discretion to continue to assess, modify, or withdraw draft rules that the agency has contemplated before those rules are published

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<sup>1</sup> 42 U.S.C. §§ 6291-6347e.

<sup>2</sup> *Natural Res. Def. Council v. Perry*, Case Nos. 17-cv-03404-VC et al. (N.D. Cal. Feb. 15, 2018).

<sup>3</sup> 10 C.F.R. § 430.5(c).

<sup>4</sup> 42 U.S.C. § 6295(o)(1) (DOE may not prescribe amended standard that, *inter alia*, increases maximum allowable energy use or decreases minimum required energy efficiency of a covered product); *see Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004) (construing § 6295(o)(1) to apply as of date of publication in Federal Register).

<sup>5</sup> *Natural Res. Def. Council v. Perry*, slip op. at 4.

as final rules in the Federal Register.”<sup>6</sup> The court said that DOE has only two options once it has posted a standard for error correction and the time for correction has passed: “publish the standard as posted, or correct any errors in the standard and publish it as corrected.”<sup>7</sup>

The court ordered DOE to publish the standards in the Federal Register within 28 days of the court’s February 15, 2018 ruling. The court said that it would entertain a motion for stay pending appeal, should DOE wish to appeal.

### **Court decision places a premium on early industry involvement in rulemaking**

The court’s decision, if it stands, will make it more difficult to obtain redress from a rule if the rule has been posted in a pre-Federal-Register form on DOE’s website and the error correction period has passed. Options may shrink. An aggrieved party can file a petition for judicial review of a final rule.<sup>8</sup> And it can file a petition for rulemaking to amend a standard,<sup>9</sup> keeping in mind the potential strictures of EPCA’s anti-backsliding provision. Thus, there is a premium on industry participation in rulemaking at an early stage in order to assure that its views are presented to DOE on a timely basis.

### **Other intricacies on adoption of standards**

There is another pending case challenging timing of publication of these standards.<sup>10</sup> And there are earlier court decisions on the adoption of energy efficiency standards that emphasize the importance of timing.

Thus, in the George W. Bush administration, DOE made an effort to replace a standard for central air conditioners, that had been sent to the Federal Register at the end of the Clinton administration, with a less stringent standard. A court rejected the less stringent standard, deeming the more stringent one locked in as of the date it was published in the Federal Register.<sup>11</sup>

In another case, states and energy conservation advocates claimed that DOE was violating statutory schedules for standards rulemaking. This litigation led to a settlement in which DOE agreed to conduct further rulemaking based on an agreed-upon schedule.<sup>12</sup>

DOE is now weighing potential revision of its standards-adoption procedures<sup>13</sup> and broader restructuring of the standards program.<sup>14</sup>

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<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 6306(b).

<sup>9</sup> *Id.* § 6295(n).

<sup>10</sup> See *Natural Res. Def. Council v. U.S. Dep’t of Energy*, Case No. 1:17-cv-06989-RWS (S.D.N.Y. filed Sept. 14, 2017).

<sup>11</sup> *Natural Res. Def. Council v. Abraham*, *supra* note 4.

<sup>12</sup> *New York v. Bodman*, Nos. 05 Civ. 7807 (JES), 05 Civ. 7808 (JES), 2007 U.S. Dist. LEXIS 80980 (S.D.N.Y. Nov. 1, 2007).

<sup>13</sup> Procedures, Interpretations, and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products, 82 Fed. Reg. 59992 (Dec. 18, 2017).

<sup>14</sup> Energy Conservation Program: Energy Conservation Standards Program Design, 82 Fed. Reg. 56181 (Nov. 28, 2017).

**Conclusion**

Opportunities for industry participation in efficiency standards rulemaking are subject to a web of statutory, DOE, and judicial criteria, with respect to which there are significant developments. Industry needs to be vigilant to assure that it presents its views on a timely basis and is not inadvertently thwarted by regulatory strictures.

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