

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, CITY OF NEW YORK,
STATE OF CONNECTICUT, and
COMMONWEALTH OF MASSACHUSETTS,

Petitioners,

Docket No. 08-0311 AG

**MOTION OF THE STATE
OF CALIFORNIA TO
INTERVENE**
(FED. R. APP. P. 15(d))

v.

U.S. DEPARTMENT OF ENERGY and SAMUEL
W. BODMAN, Secretary, U.S. Department of
Energy,

Respondents.

The People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Energy Commission, move to intervene as Petitioners in this matter pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure. For purposes of this motion, movants are referred to collectively as “California.”

On January 17, 2008, the State of New York, City of New York, State of Connecticut, and Commonwealth of Massachusetts (collectively “Petitioners”) filed a petition for review of the final action taken by respondents U.S. Department of Energy and Samuel W. Bodman (collectively “DOE”), entitled “Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces and Boilers” (“Final Rule”). 72 Fed. Reg. 65136 *et seq.* (Nov. 19, 2007). The petition was filed pursuant to 42 U.S.C. Section 6306(b)(1) and Section 702 of the Administrative Procedure Act, 5 U.S.C. Section 702.

BACKGROUND

DOE promulgated the Final Rule pursuant to its authority under the Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. Section 6291 *et seq.*, to adopt efficiency standards for residential furnaces and boilers.¹ 42 U.S.C. § 6295(f)(3)(B).² As noted in the Final Rule, such standards “must be designed to ‘achieve the maximum improvement in energy efficiency * * * which the Secretary determines is technologically feasible and economically justified.’” 72 Fed Reg. 65136, quoting 42 U.S.C. § 6295(o)(2)(A).

DOE’s Final Rule calls for only nominal improvements in energy efficiency. The efficiency of furnaces and boilers is measured by determining the annual fuel utilization efficiency (“AFUE”) of those appliances, and the standards adopted by DOE are set in those terms. *See* 72 Fed. Reg. 65138-65139. In a previous rulemaking in 1992, DOE imposed a minimum AFUE at 78% for most furnaces. *See* 72 Fed. Reg. 65139. In the current Final Rule, DOE raised the AFUE to an average of 80.75% for furnaces – a trivial increase. 72 Fed. Reg. 65137, Table I.1. Moreover, manufacturers need not comply with the new AFUE standards until November 19, 2015. 72 Fed. Reg. 65136. Thus, over a span of 23 years, DOE demands a paltry efficiency increase of less than 3%. The required efficiency increase for boilers is no better – an average of only 2.5% over the same time period. 72 Fed. Reg. 65137, Tables I.1 and I.2.

¹More specifically, the standards in the Final Rule apply to non-weatherized and weatherized gas furnaces, mobile home gas furnaces, oil-fired furnaces and gas- and oil-fired boilers. 72 Fed. Reg. 65137. Non-weatherized gas furnaces account for the majority of appliances covered by the rule.

² This reference is to the statute as it existed at the time the Final Rule was adopted. 42 U.S.C. Section 6295(f), as well as other portions of federal appliance law, was amended and reorganized by the Energy Independence and Security Act of 2007, signed into law on December 18, 2007.

The weak standards proposed in the Final Rule, if allowed to stand, will result in wasted energy, excessive consumer costs, and unnecessary emissions of greenhouse gases. DOE estimates that the energy savings from the new standards will produce cumulative greenhouse gas emission reductions of 7.8 million metric tons of carbon dioxide (CO₂) by 2038.³ 72 Fed. Reg. 65137. While clearly a benefit, this amount is only a fraction of the emissions that could be reduced by adopting more stringent requirements. Specifically, DOE examined and rejected a 12% increase in energy efficiency for residential furnaces, to 90% AFUE, which would have resulted in a projected reduction of 137 million metric tons of CO₂ emissions by 2038. 72 Fed. Reg. 65165. If DOE had adopted 90% AFUE standards instead of the 80% AFUE standards actually adopted, it could have saved 3.21 quadrillion Btus (“quads”) of energy through 2038, which is enough energy to heat 80% of the U.S. housing stock for an entire year. *Id.* This would also have resulted in enormous savings for energy consumers.

DOE based its decision to adopt the 80% AFUE standard on a finding that stronger requirements would not be economically justified. 72 Fed. Reg. 65166. However, in reaching this conclusion, DOE failed to place a value on the reduction of CO₂ available under each of the standards evaluated in the rule. 72 Fed. Reg. 65148. Without placing a monetary value on the benefits of reduced CO₂ emissions, DOE’s analysis incorrectly weighed the costs and benefits of the furnace and boiler standards. *See Center for Biological Diversity v. NHTSA*, No. 508 F.3d 508 (9th Cir. 2007) (Agency’s failure to monetize benefits of greenhouse

³ In fact, the rule may have next to no practical impact, because approximately 99% of furnaces currently sold already meet this standard. *See American Council for an Energy-Efficient Economy*, Press Release: *New U.S. Standards for Home Furnaces Is a “Turkey”*, November 17, 2007, available at <http://www.aceee.org/press/0711furnaces.htm> (last visited January 31, 2008).

gas emissions reduction in setting corporate average fuel economy standards pursuant to EPCA was arbitrary and capricious.) DOE's decision therefore is arbitrary and capricious.

As set forth below, California has a vital interest in seeing that DOE adopts federal appliance efficiency standards that will increase energy savings and reduce greenhouse gas emissions, thereby reducing the energy costs of California consumers and protecting the State and its citizens from the impacts of global warming. California's interests are sufficient to warrant intervention in this case.

ARGUMENT

A. California Satisfies the Requirements for Intervention as a Matter of Right

Rule 15(d) of the Federal Rules of Appellate Procedure governs intervention in reviews of agency action. However, “[r]ule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under FED. R. CIV. P. 24.” *Sierra Club v. EPA*, 358 F.3d 516, 517-518 (7th Cir. 2004). Under Rule 24 of the Federal Rules of Civil Procedure, to intervene as a matter of right a person must “(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.” *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (internal quotations omitted).

1. California's Application Is Timely

Petitioners filed their petition for review on January 17, 2008. California files this motion to intervene within 30 days after the petition was filed; therefore

the intervention request is timely under Rule 15(d) of the Federal Rules of Appellate Procedure and under Rule 24 of the Federal Rules of Civil Procedure.

2. California Has Direct, Substantial and Legally Protectable Interests in Appropriate Energy Efficiency Standards for Residential Furnaces and Boilers

For an interest to be cognizable under Rule 24(a), it must be “direct, substantial, and legally protectable.” *Brennan v. N.Y.C. Bd. of Educ.*, *supra*, 260 F.3d at 129, quoting *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990).

California has significant environmental, public health, and consumer interests in DOE adopting and implementing sufficient energy efficiency requirements for appliances. Heightened efficiency will result in energy savings for California consumers. Additionally, efficiency standards for furnaces and boilers can reduce greenhouse gas emissions, including CO₂, that contribute to global warming. DOE acknowledges that the operation of most furnaces and boilers results in household emissions of CO₂, NO_x, and SO₂ at the sites where appliances are used, 72 Fed. Reg. 65147, as well as power plant emissions. 71 Fed. Reg. 59233 (Oct. 6, 2006). As discussed above, DOE found that 90% AFUE standards would result in a reduction of 137 million metric tons of CO₂ by 2038, while the adopted 80% AFUE standards will save only 7.8 million metric tons of CO₂.

California has an interest in slowing the pace of global warming by reducing domestic greenhouse gas emissions. *See Massachusetts v. EPA*, -- U.S. --, 127 S. Ct. 1438, 1458 (2007). The Supreme Court has recognized that a state has an “independent interest ... in all the earth and air within its domain[.]” *Id.* at 1455, quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). As the Court

noted, the harms of global warming “are serious and well recognized.” *Id.* at 1455. For example, California, as a coastal state and a state that relies heavily on snow pack for water supplies, is suffering the impacts of global warming, which will increase over time. Additionally, global warming increases the frequency, duration, and intensity of conditions conducive to the formation of smog. As temperatures rise, the number of days of extreme heat events also increases, causing the risk of injury or death from dehydration, heatstroke, heart attack, and respiratory problems to rise. In addition, California has by State statute committed itself to reducing greenhouse gas emissions to 1990 levels by 2020; weak federal energy standards will interfere with California’s ability to reach this target. *See* Cal. Health & Saf. Code § 38500, *et seq.*

California’s interests in DOE’s adoption of more stringent energy efficiency standards for residential furnaces and boilers are sufficient to permit intervention under Rule 24(a). *See Massachusetts v. EPA, supra*, -- U.S. at --, 127 S. Ct. at 1455 (State has standing based on its substantial interest in preventing global warming.)

3. California’s Interests In Appropriate Energy Efficiency Standards for Residential Furnaces and Boilers May Be Impaired by the Disposition of the Action

If DOE’s weak standards for residential furnaces and boilers are permitted to stand, California will lose the opportunity to benefit from a more stringent rule.

California has been adopting and implementing statewide efficiency standards for appliances since 1976, and DOE has been doing so on the national level since 1987. *See* Cal. Pub. Res. Code § 25402(c), Historical and Statutory Notes; 42 U.S.C. § 6295. California was a plaintiff in a lawsuit filed in the Second Circuit in 2005, which resulted in a consent decree that set a detailed schedule for

DOE to fulfill its obligation to adopt efficiency standards for many appliances, including the residential furnace and boiler standards at issue here.⁴ DOE's efficiency standards generally preempt state efficiency standards, including those for residential furnaces and boilers. 42 U.S.C. §§ 6295(f), 6297(b)-(c). The only way a state may seek relief from a DOE standard, other than challenging the rule itself, as is being done by Petitioners in this case, is to petition DOE for a waiver of preemption. 42 U.S.C. § 6297(d). DOE has never granted such a waiver.⁵ Considering the preemptive effect of DOE's standards and the difficulty in obtaining a waiver of that preemption, the instant petition is likely to be the last meaningful opportunity for California to make its case for a better standard.

4. California's Interests Are Not Protected Adequately by the Parties to the Action

Under this part of the Rule 24 criteria for intervention, a potential intervenor need show only "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

Here, there are at least three factors that make unique California's interests and its ability to protect them. First, California is the most populous state in the United States; according to 2000 Census data, California is home to over 12% of the Nation's population. Therefore, the potential loss of the environmental, public health, and consumer benefits of improved efficiency will disproportionately harm

⁴ *State of New York, et al. v. DOE*, U.S. District Court, Southern District of New York, Case Nos. 05 Civ. 7807(JES) and 05 Civ. 7808 (JES) (consolidated).

⁵ The California Energy Commission is currently in litigation with DOE over the latter's refusal to grant a waiver of preemption for California's legislatively-required water efficiency standards for residential clothes washers (Ninth Cir. No. 07-71576).

California. Second, as discussed, California is particularly susceptible to the adverse impacts of global warming. Third, California is unique in its statutory commitment to reducing greenhouse gas emissions to 1990 levels by 2020. While Petitioners undoubtedly will vigorously litigate this Petition, they cannot be expected to represent the separate and unique interests of the State of California and its citizens.

B. California Satisfies the Requirements for Permissive Intervention

Rule 24(b) of the Federal Rules of Civil Procedure governs permissive intervention. Because California meets the requirements for intervention of right under Rule 24(a) of the Federal Rules of Civil Procedure, it necessarily meets the lesser requirements for permissive intervention set forth in Rule 24(b).

CONCLUSION

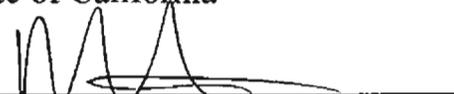
For the foregoing reasons, in light of the significant and unique interests of the State of California in ensuring that the benefits of increased efficiency are obtained for its citizens, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Energy Commission respectfully request that the Court grant their motion to intervene as petitioners in this matter pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure.

Respectfully submitted,

Dated: February 14, 2008

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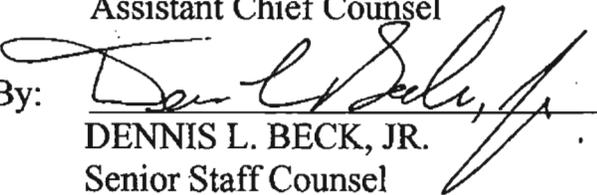
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Case No.: **U.S. Court of Appeals for the Second Circuit Docket No. 08-0311 AG**

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On **February 14, 2008**, I served the following document:

MOTION OF THE STATE OF CALIFORNIA TO INTERVENE

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered by a courier employed by Clark Courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Facsimile:** I caused such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (E) **By Personal Service:** I caused such envelope to be hand delivered.

TYPE OF SERVICE

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I declare under penalty of perjury the foregoing is my true and correct and that this declaration was executed on **February 14, 2008**, at Oakland, California.



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