ORAL ARGUMENT NOT SET

No. 11-1485

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PUBLIC GAS ASSOCIATION,
Petitioner,
v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent.

On Petition for Review of a Direct Final Rule Issued by the
United States Department of Energy

JOINT BRIEF OF *AMICI CURIAE* THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF NEW YORK, AND THE CALIFORNIA ENERGY COMMISSION IN SUPPORT OF RESPONDENT

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GLOSSARY OF ABBREVIATIONS

ACCA	Air Conditioning Contractors of America
ACEEE	American Council for an Energy Efficient Economy
AFUE	Annual Fuel Utilization Efficiency
AHRI	Air-Conditioning, Heating and Refrigeration Institute
APGA	American Public Gas Association
ASAP	Appliance Standards Awareness Project
ASE	Alliance to Save Energy
CEC	State Energy Resources Conservation and Development Commission of the State of California, aka California Energy Commission
C.M.R.	Code of Massachusetts Regulations
DOE	Respondent, the United States Department of Energy
DOER	Massachusetts Department of Energy Resources
EPCA	Energy Policy and Conservation Act of 1975, as amended, 42 U.S.C. §§ 6291-6309
GWSA	Massachusetts Global Warming Solutions Act
GCA	Massachusetts Green Communities Act
HARDI	Heating, Air Conditioning & Refrigeration Distributors International
JSC	Joint Stakeholder Comment (submitted by American Council for an Energy Efficient Economy; Alliance to Save Energy, Appliance Standards Awareness Project, Natural Resources Defense Council, Northeast Energy Efficiency Project)
M.G.L.	Massachusetts General Laws

NEEP	Northeast Energy Efficiency Project
NOPR	Notice of Proposed Rulemaking
NPV	Net present value
NRDC	Natural Resources Defense Council
NWGFs	Non-weatherized gas furnaces

IDENTITY AND INTERESTS OF THE *AMICI*

The Commonwealth of Massachusetts and the State of New York (the "Amici States") are national leaders on energy efficiency and environmental protection. As sovereign states, they are entitled to "special solicitude" because of their roles "as *parens patriae* to protect . . . public or governmental interests that concern the state as a whole." *See Massachusetts v. EPA*, 549 U.S. 497, 520, and n. 17 (other citations omitted) (2007). The Amici States may file an *amicus curiae* brief with this Court pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29(a).

The State Energy Resources Conservation and Development Commission of the State of California, more commonly known as the California Energy Commission ("CEC"), is California's primary energy policy and planning agency. The CEC was created by the California Legislature in 1974 by the Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act") (Stats. 1974, ch. 276), codified at Cal. Pub. Res. Code § 25000, *et seq*. The CEC has obtained the consent of all parties to join the *amicus curiae* brief of the Amici States pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29(b).

The Amici States and the CEC share common interests in supporting the furnace, central air conditioner, and heat pump efficiency standards set by the

Department of Energy's ("DOE") "direct final rule" being challenged by petitioner American Public Gas Association ("APGA"), and each also has its own special interests in seeing the standards upheld. Massachusetts and New York support the standards because, by reducing demand for natural gas, the 90 percent efficiency gas-furnace standard for northern tier states (including Massachusetts and New York) should result in significant cost savings for residents on their heating bills and improvements in the reliability of our energy systems, which depend on natural gas. The CEC supports the standards because the more stringent central air conditioner and heat pump efficiency standards for southwestern states (including California) should similarly result in significant cost savings for residents on their electric bills and improvements in system reliability. Thus, the standards will assist the Amici States and the CEC in advancing their energy and environmental laws and policies. *See*, *e.g.*, Massachusetts State Energy Plan[1] (reflecting Massachusetts' view that increased energy efficiency is "the best cost-containment tool we have to reduce energy use and greenhouse gas emissions that are causing global warming"); Massachusetts Green Communities Act ("GCA"), 2008 Mass. Acts, Ch. 169[2] (requiring utilities to meet electric or natural gas resource needs

[1] Available as Attachment B, at: http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/ma_state_petition.pdf.

[2] Available at: http://www.malegislature.gov/Laws/SessionLaws/Acts/2008/Chapter169/

first through "all available energy efficiency and demand reduction resources that are cost-effective or less expensive than supply"); N.Y. Energy Law § 3-101 (stating the policy of the State "to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the state," and to "encourage conservation of energy . . . in heating"); N.Y. State Energy Plan[3] (setting forth goal to reduce demand for natural gas through energy efficiency improvements); Cal. Pub. Res. Code § 25402(c) (mandating that the CEC reduce energy consumption in California); *Id.* at § 25006, 25007 (expressing state policy to employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy and promotion of all feasible means of energy conservation); 2011 Integrated Energy Policy Report[4] (stating California's commitment to meet new electricity demand first with energy efficiency).

In addition, both the Amici States and the CEC view the new furnace standard as an important tool in addressing the harms from climate change and other air pollution resulting from the combustion of fossil fuels during electricity generation. The Amici States and the State of California have participated in several cases in this Circuit, including *Massachusetts v. EPA*, *supra*, and, most recently, the *Coalition for Responsible Regulation v. EPA* cases, 684 F.3d 102

[3] Available at: http://www.nysenergyplan.com/2009stateenergyplan.html.
[4] Available at: http://www.energy.ca.gov/2011publications/CEC-100-2011-001/CEC-100-2011-001-CMF.pdf.

(D.C. Cir. 2012), in an effort to either compel or support efforts of the federal government to address greenhouse gas pollution that is causing, and will continue to cause, harm to our residents and natural resources due to climate change. In the absence of federal standards, the Amici States and the State of California enacted statutes and promulgated regulations to reduce emissions of greenhouse gas pollution. *See, e.g.*, Massachusetts Global Warming Solutions Act ("GWSA"), 2008 Mass. Acts. Ch. 298[5] (setting strict greenhouse gas reduction goals, including reducing those emissions 80 percent below 1990 levels by 2050); N.Y. CO_2 Budget Trading Program, N.Y. Comp. Codes R. & Regs., tit. 6, ch. 242[6] (establishing a cap-and-trade air pollution reduction program to reduce emissions of carbon dioxide from power plants in New York); California Global Warming Solutions Act of 2006 (AB 32), Cal. Health & Saf. Code § 38550, *et seq.*[7] (requiring the state to reduce greenhouse gas emissions to 1990 levels by 2020); Cal. Code Regs. tit. 17, § 95801, *et seq*.[8] (establishing a cap-and-trade program to implement AB 32). Because DOE projects that the furnace efficiency standards will reduce greenhouse gas pollution by approximately 82 million metric tons per year, and because the standards would eliminate the need for many power plants, the Amici States and

[5] Available at: http://www.malegislature.gov/Laws/SessionLaws/Acts/2008/Chapter298.
[6] Available at: http://www.dec.ny.gov/regs/2492.html.
[7] Available at: http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.html.
[8] Available at: http://www.arb.ca.gov/regact/2010/capandtrade10/finalrevfro.pdf.

the CEC support the standards as an important measure to address climate change and other forms of air pollution.

The CEC also has a unique interest as a signatory to the consensus agreement that underlies the direct final rule at issue in this case. The preamble of the consensus agreement requires the Joint Stakeholders to pursue a multipronged approach to achieve implementation of the standards contained in that agreement.[9] It is therefore in the CEC's interest, in furtherance of that obligation and in light of the energy and environmental benefits of the direct final rule, to see that the standards contained in the consensus agreement, and the regulatory process used to adopt those standards, are upheld by this Court.

[9] Available at: http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/hvac_consensus_agreement.pdf.

STATEMENT OF FACTS[10]

A. The Federal Efficiency Standards.

1. The States' Lawsuit to Compel DOE to Issue Revised Furnace Efficiency Standards.

As of 2005, the federal annual fuel utilization efficiency standard set by DOE for gas-furnaces was only 78 percent. It had remained at this low level for many years because DOE had failed to engage in rulemaking required under the Energy Policy and Conservation Act ("EPCA")[11] to promulgate a more stringent, technologically feasible and cost effective standard. Because DOE had also missed deadlines to upgrade efficiency standards for 21 other consumer and commercial products (*e.g.*, air conditioners, clothes dryers and some lamps) covered by EPCA, a coalition of stakeholders and fifteen states, including the

[10] While some materials submitted with and in this brief are not part of the record on appeal, this Court may still take notice of them because they are offered to show the Amici States' and the CEC's interest in the direct final rule and that DOE had full knowledge of those interests when it adopted the rule, thus informing the agency's discretion to conclude that the sample of signatories to the JSC and the consensus agreement was "representative" under EPCA § 325(p)(4)(A). *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226, n.6 (D.C. Cir. 1993) (as matters of public record, statements in the Federal Register can be examined); *Interstate Nat. Gas Co. v. S. California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) ("We may take judicial notice of records and reports of administrative bodies."); *Native Village of Point Hope v. Salazar*, 680 F.3d 1123, 1129, n.6 (9th Cir. 2012) (notice taken of agency plan approval); *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008) (DOE study noticed).

[11] EPCA Subchapter III, Parts A & A-1, 42 U.S.C. §§ 6291-6317.

Amici States and the CEC,[12] brought suit against DOE in 2005 to force the issuance of new standards. *New York v. Bodman*; *NRDC v. Bodman*, Consolidated C.A. Nos. 05 Civ. 7807 (JES) and 05 Civ. 7808 (JES) (U.S.D.C., S.D.N.Y).

In November 2006, the parties to the consolidated cases against DOE, including the Amici States and the CEC, entered into a consent decree approved by the District Court that established deadlines for issuance of new DOE rules for all products at issue. The Consent Decree set September 30, 2007, as the deadline for issuance of an amended furnace and boiler standard (including for mobile home and small furnaces).

2. The Lawsuit Challenging DOE's Failure to Adopt a Ninety-Percent Efficiency Standard.

After a short stay, DOE published a new final rule on November 19, 2007,[13] raising the gas-furnace standard to only 80 percent efficiency, still a very lenient standard. Government agencies in several states, including Michigan, New Hampshire, New York and Ohio, had submitted comments during the rulemaking

[12] Joined by: Connecticut, Illinois, Iowa, Maine, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont and Wisconsin, the Pennsylvania Department of Environmental Protection, the City of New York, Natural Resources Defense Council ("NRDC"), the Massachusetts Union of Public Housing Tenants, and the Texas Ratepayers' Organization to Save Energy.

[13] 72 Fed. Reg. 65,136 (Nov. 19, 2007).

proceeding urging DOE to adopt a 90 percent or higher efficiency standard for furnaces.[14]

On January 17, 2008, New York, Massachusetts, New York City, Connecticut and NRDC, filed petitions for review of this rule in the Court of Appeals for the Second Circuit, *New York v. DOE*, Nos. 08-311-ag(L), 08-312-ag(con). California, the California Energy Commission, and New Jersey subsequently intervened as petitioners. In briefs submitted in that case, the State petitioners expressly argued that DOE improperly rejected a more stringent 90 percent furnace efficiency standard.[15] By Court Order dated April 21, 2009, the 80 percent efficiency rule was voluntarily remanded to DOE for further notice and comment rulemaking.

DOE was further made aware of Massachusetts' interest in implementing a more stringent 90 percent gas-furnace efficiency standard when, on October 6, 2009, DOE received the "Waiver Petition of the Commonwealth of Massachusetts to Exempt from Federal Preemption Massachusetts' 90% Annual Fuel Utilization

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[14] See Comments 114, 117, 124 & 134 submitted in rulemaking docket # EE-RM/STD-01-350, available at: http://www.regulations.gov/#!searchResults;dct=PS;rpp=25;po=0;s=EE-RM%252FSTD-01-350

[15] *See, e.g.*, Final Opening Brief for Government Petitioners States of New York, Connecticut, New Jersey, and California, Commonwealth of Massachusetts, City of New York, and California Energy Comm'n, *New York v. DOE*, No. 08-0311ag(L) (2d Cir., May 7, 2008).

Efficiency Standard for Non-Weatherized Gas Furnaces" ("Waiver Petition").[16] (This is described more fully in Statement of Facts subsection B, below.)

3. The "Joint Stakeholder Comment" Process.

The CEC, as California's energy policy and planning agency, regularly participates in coalition efforts and federal efficiency rulemakings to seek more stringent energy conservation regulations from DOE under Part B of Title III of EPCA that will apply to California's regulated appliances, especially where, as here, DOE's authority to adopt new efficiency standards preempts states from issuing their own without prior DOE approval or waiver.

During 2009, the CEC participated extensively in the negotiations that led to a consensus agreement and the submission of a Joint Stakeholder Comment ("JSC") to DOE, including face-to-face discussions with AHRI and other stakeholders on July 9, 2009.

On October 13, 2009, fifteen interested stakeholders (including seven furnace manufacturers, energy efficiency advocates, and the CEC) reached a consensus agreement that, among other things, supported a regional 90 percent

[16] The Waiver Petition and all Attachments thereto are available at: http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/ma_state_petition.pdf.

efficiency gas-furnace rule for thirty "northern tier" states.[17] 76 Fed. Reg., at 37,422. On January 26, 2010, various stakeholders (AHRI, ACEEE, ASE, ASAP, NRDC and NEEP) submitted the JSC to DOE that referenced the consensus agreement and advocated for such a rule. *Id.*

4. DOE's Adoption of the Direct Final Rule Establishing a Ninety-Percent Standard.

On June 27, 2011, DOE issued a direct final rule establishing energy conservation standards for residential furnaces, central air conditioners, and heat pumps, including the regional standards for non-weatherized gas furnaces advocated in the consensus agreement. Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, Direct Final Rule, 76 Fed. Reg. 37,408. In adopting the direct final rule, DOE concluded that similarly-situated states in the northern tier would all benefit from a 90 percent furnace efficiency standard. *Id.* at 37,410 (citing EPCA § 325(o)(3)(B)'s requirement that a new or amended standard must

[17] Available at: https://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/furnaces_framework_jointstakeholdercomments.pdf

"result in significant conservation of energy.")[18]

Comments for and against retaining the direct final rule were submitted to DOE, and the agency, pursuant to the discretion afforded by EPCA § 325(p)(4)(C), declined to withdraw it. Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps, 76 Fed. Reg. 67,037 (Oct. 31, 2011).

B. The Massachusetts Efficiency Standards.

In 2005, because of its concerns about high energy costs, the availability of natural gas for home heating, and market barriers that exist for conservation programs, and to advance other overarching state energy and environmental policy goals, including addressing climate change, the Massachusetts Legislature amended its energy efficiency standards statute, M.G.L. c. 25B, §5,[19] to require that non-weatherized gas- and propane-fired residential furnaces" ("NWGF")[20]

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[18] Although California is not in the northern tier of states, the direct final rule also sets regional efficiency standards for central air conditioners and heat pumps in the southwest, of which California is a part. *See* 76 Fed. Reg. 37,408, 37,430-31 (June 27, 2011). The CEC supports the rule for this reason (as it appears APGA seeks to vacate the entire rule and not just the furnace standards) and because the gas-furnace standards will help address climate change concerns in the Nation and globally.

[19] *See* §11 of Chapter 139 of the Acts of 2005.

[20] A weatherized furnace is designed for installation outdoors and resistance to weather, and has its own venting system." 10 C.F.R. §430.2. NWGFs are far more typical, are located indoors, and need no weatherization.

sold in-state meet a 90 percent annual fuel utilization efficiency standard.[21] The Massachusetts standard, much stricter than the then-existing 78 percent federal efficiency standard, was tightened to reduce the significant contribution furnaces make to overall Massachusetts energy consumption, to reduce high consumer energy costs, and to prevent unnecessary air pollution that results from excess fossil-fuel energy generation. Projections at that time were that the new standard would allow Massachusetts to avoid consuming one billion cubic feet of natural gas annually by the year 2020, and that the net present value ("NPV") of the economic savings to consumers could be as high as $100 million.[22]

Because furnaces are "covered products" for which DOE is authorized to set efficiency standards under 42 U.S.C. §§ 6291(2) and 6292(a)(5), Massachusetts could not implement its 90 percent standard without obtaining from DOE a waiver of federal preemption under EPCA § 327(d). In early October 2009,

[21] Following M.G.L. c. 25B, §5, the Massachusetts DOER revised its regulations to add the 90 percent AFUE standard. *See* 225 C.M.R. 9.03(10).

[22] An analysis prepared by the Appliance Standards Awareness Project ("ASAP"), a commenter on the JSC and signatory to the consensus agreement, estimated $144 million in net present value savings from the adoption of 90 percent AFUE in Massachusetts. Formerly found at: http://www.standardsasap.org/state/2009%20federal%20analysis/states/fedappl_ma.pdf Now replaced by http://www.appliance-standards.org/sites/default/files/2009_Mass_fed_svngs.pdf

Massachusetts filed the Waiver Petition" and supporting reports and exhibits.[23]

While Massachusetts knew about and supported the consensus agreement and JSC, it did not sign on because of its assessment that doing so might have undercut its request to DOE for a waiver of preemption.

Massachusetts identified in the Waiver Petition certain "unusual and compelling state . . . interests" that it believed justified a waiver under EPCA § 327(d)(1)(B). First, Massachusetts' residential heating consumers have long been burdened by some of the nation's highest energy costs,[24] which are well above the national average.[25]

Second, those customers need to consume far more natural gas to operate their furnaces than customers in many other states because heating degree days in Massachusetts generally exceed 6,000 and are higher than the national average.[26]

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[23] Available at: http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/ma_state_petition.pdf.

[24] For example, in 2008, Massachusetts residential natural gas prices averaged $17.18 per thousand cubic feet ("mcf") - 8th highest in the country - according to the Energy Information Administration's listing of "Natural Gas Prices" by area (available at: http://tonto.eia.doe.gov/dnav/ng/ng_pri_sum_a_EPG0_PRS_DMcf_a.htm). In 2011, Massachusetts rose to the 6th highest-cost state in the country. *Id.*

[25] The Optimal Report, Fig. 2, submitted as Attachment D to the Waiver Petition (*see* URL in footnotes 1, 16 & 23, above, showed Massachusetts residential gas prices to be 20% to 30% above national average since 2000.

[26] Optimal Report, at Fig. 1. Regardless of the year chosen, the U.S. average is generally between 4,000 and 4,500 heating degree days, compared to Massachusetts' more than 6,000.

Third, residences and gas-fired power plants compete for regional gas supplies in Massachusetts,[27] which could cause winter gas interruptions and reliability problems.

Fourth, Massachusetts' high rate of rental housing (8th highest nationally)[28] creates unusual barriers to increasing the percentage of households that install high-efficiency furnaces because owners and renters have divergent interests. Owners have an "interest in reducing first cost, that is, putting in the least expensive equipment," while tenants who pay for fuel are "focused on reducing operation cost." These "split incentives" make it "significantly more challenging . . . to influence purchasing decisions through means other than standards."[29] *Id.*

Fifth, Massachusetts continues to seek lower gas consumption to help meet state policies and laws whose purposes are to save energy costs and address climate change, including the Massachusetts State Energy Plan ("Energy Plan")

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[27] Optimal Report, Sec. II.D., at 7. *See also* ISO-New England, "CIGRE 2008 Case Study: Electric and Natural Gas Market Interdependencies Within New England" (Sept. 1, 2008), available at http://www.iso-ne.com/pubs/spcl_rpts/2008/final_isone_cigre_case_study_090108.pdf. This study noted, *id.* at 8: "There is no natural gas production or underground storage in New England," unlike much of the rest of the country, thus creating a relative scarcity of supply. Moreover, "gas-fired peaking generation" in New England "can also experience fuel related problems, exacerbated during winter conditions" because gas-fired generation is sometimes "treated as secondary on the priority list with respect to fuel delivery needs." *Id.* at 21.

[28] Optimal Report, at 8 & Fig. 8.

[29] Optimal Report, at 8.

and Gas Forecast ("Forecast"),[30] the GWSA[31] and the GCA.[32]

As required by EPCA § 327(d)(1)(C), Massachusetts evaluated its 90 percent rule "within the context of the State's energy plan and forecast," which reflects Massachusetts' view that increased energy efficiency is "the best cost-containment tool we have to reduce energy use and greenhouse gas emissions that are causing global warming."[33] During 2008, Massachusetts adopted the GWSA, which sets strict greenhouse gas reduction goals, including reducing those emissions 80 percent below 1990 levels by 2050.[34] Massachusetts also adopted the GCA to require in-state utilities to meet their electric and natural gas resource needs first by achieving all cost-effective energy efficiency.[35] The Waiver Petition explained that Massachusetts had already adopted a very broad range of programs to reduce energy consumption in light of the aggregated Forecast for regulated gas companies projecting yearly increases in gas consumption through 2015.

In its Waiver Petition, Massachusetts demonstrated that cost and energy savings from its 90 percent rule would be substantial. Estimates of the NPV savings (in 2009 dollars) to Massachusetts' consumers ranged as high as $144

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[30] Waiver Petition, Attachments B & C.
[31] 2008 Mass. Acts, Ch. 298.
[32] 2008 Mass. Acts, Ch. 169.
[33] Energy Plan, at 2.
[34] *Id.*
[35] *Id.*, at 3.

million,[36] with avoided consumption of approximately 19 million therms of natural gas by 2030.[37]

Under EPCA § 327(d)(1)(C), Massachusetts needed to demonstrate to DOE that the "costs, benefits, burdens and reliability of energy . . . savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens and reliability of alternative approaches to energy . . . savings . . ." Massachusetts prepared an Alternatives Analysis [38] that evaluated five alternative programs - consumer rebates, low-income grants, tax incentives, consumer financing, and a public information/education campaign. It concluded that high-efficiency furnaces had already reached high market penetration in Massachusetts through aggressive non-regulatory efficiency programs; that those approaches had largely reached maximum benefit; and that improving penetration would be difficult and costly without new regulations.[39] Implementing the 90 percent efficiency standard would have cost only $24,000, compared to a range of $3 million for tax incentives to

[36] Massachusetts offered an ASAP Project analysis found at http://www.standardsasap.org/state/2009%20federal%20analysis/states/fedappl_ma.pdf , that has now been replaced at: http://www.appliance-standards.org/sites/default/files/2009_Mass_fed_svngs.pdf

[37] *Id.* (revising estimate to 18 million therms).

[38] Waiver Petition, Attachment E.

[39] Alternatives Analysis, at 2.

almost $58 million for grant programs.[40] Thus, it would cost 125 to about 2,400 times more for Massachusetts to try to achieve 95 percent penetration of the high-efficiency furnaces using the studied alternatives, compared to adopting a 90 percent efficiency standard.[41]

Despite agreeing with much of Massachusetts' data and analysis, on October 7, 2010, DOE denied the Waiver Petition, but described in the decision that it was simultaneously conducting a rulemaking on whether to adopt a regional 90 percent gas-furnace efficiency standard based on the consensus agreement. *See* Notice of Denial of a Petition for Waiver from Federal Preemption, 75 Fed. Reg. 62,115, 62,119 (Oct. 7, 2010).[42]

The interests set forth by Massachusetts in its Waiver Petition remain today, and are shared by all northern-tier states, which is precisely why affirmation of the direct final rule is so important to the Amici States.

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[40] *Id.*, at 3, 21-23.
[41] *Id.*
[42] Available at: http://www.gpo.gov/fdsys/pkg/FR-2010-10-07/pdf/2010-25324.pdf

ARGUMENT

Although the Amici States and the CEC support the DOE's issuance of the direct final rule in all respects, we focus specifically here on APGA's erroneous contention[43] that DOE acted contrary to the statute by issuing, and then deciding not to withdraw, the direct final rule promulgating the 90 percent furnace efficiency standard. Contrary to APGA's arguments, DOE did not abuse its discretion by concluding that the JSC (and underlying consensus agreement) supporting issuance of the direct final rule was "fairly representative of relevant points of view . . . of interested parties," and by deciding that there was no reasonable basis offered by the Petitioner for withdrawing the direct final rule. EPCA § 325(p)(4).

Although APGA correctly notes[44] that the familiar test of *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984), governs, APGA fundamentally misapplies it here. APGA reads out of EPCA § 325(p)(4) the scope of the discretion Congress explicitly granted the Secretary to decide whether the JSC, supported by the consensus agreement, was made by parties who were "fairly representative of relevant points of view," and whether the adverse comments received about the direct final rule provided a "reasonable basis" for withdrawing it. Of course, that discretion is not unlimited; it is black-letter law that the Secretary must not act

[43] APGA Br. 53-60.
[44] APGA Br. 38, n. 48.

unreasonably, arbitrarily, capriciously, or in violation law, and he must make his decisions based on substantial record evidence. 5 U.S.C. § 706. These requirements were met in this case.

I. DOE Properly Exercised Its Discretion Under 42 U.S.C. § 6295(p)(4)(A) (EPCA § 325(p)(4)(A)) When Issuing the Direct Final Rule.

A. The Secretary Properly Applied EPCA § 325(p)(4)(A) in Determining That the Consensus Agreement's Signatories Were "Representative of Relevant Points of View," and in Issuing the Direct Final Rule.

EPCA § 325(p)(4)(A) provides in relevant part that, upon "receipt of a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), *as determined by the Secretary*, and contains recommendations with respect to an energy or water conservation standard," the Secretary "may issue*"* a direct final rule establishing the standard at the same time that the Secretary issues a proposed rule regarding the standard (emphasis added). Because the highlighted clause in the statute, "*as determined by the Secretary*," is clear and not subject to any other reasonable interpretation, this Court should simply give effect to it as written, as required under the first step of the *Chevron* test. Under the facts and circumstances of this case, the Court should uphold DOE's determinations because each had a rational basis and each was amply supported by the administrative record.

Coalition for Responsible Regulation v. EPA, 2012 WL 2381955, *3, *22 (2012); *Virginia Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Services*, 678 F.3d 918, 921-22, 926 (D.C. Cir. 2012); *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012).

Subject to the general requirements of administrative law, EPCA § 325(p)(4)(A) unambiguously delegates discretionary authority to the Secretary to do two things: first, to decide whether a statement of joint interest is "fairly representative" of "relevant points of view" on a proposed new energy standard, and then, if so, to decide whether to issue a direct final rule on the proposal. Congress required the Secretary to give due consideration to whether the group expressing views deemed "relevant" by DOE is representative of the entities listed in the parenthetical of the statute. The Amici States and the CEC agree with DOE that it did so, and that it properly found that the consensus agreement in this case, joined by seven product manufacturers, multiple efficiency advocates, and the CEC on behalf of California, and informed by the views of Massachusetts, New York and other interested states, and receiving no opposition from any State, was "fairly representative" of "relevant points of view." 76 Fed. Reg., at 67,038.

B. The Secretary Properly Determined That the Consensus Agreement Was Fairly Representative of Relevant States' Views.

The claim of Intervenors ACCA and HARDI[45] that the consensus agreement submitted with the JSC was not representative because only a single "State entity" and no "State" signed on is plainly wrong. The CEC[46] signed on and has been authorized by California's Legislative and Executive Branches to speak for California on matters involving appliance efficiency standards. The California Legislature established and consolidated the state's responsibility for energy resources in the CEC when it passed the Warren-Alquist Act. Cal. Pub. Res. Code § 25006. The Warren-Alquist Act establishes as state policy the employment of a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, and the promotion of all feasible means of energy conservation. *Id*., at §§ 25007 and 25008. The CEC is required to carry out, directly or indirectly, various energy conservation measures, including prescribing efficiency standards for appliances. *Id*., at §§ 25216(a) & 25402(c)(1). The CEC is also authorized to request and utilize the services of all federal, state, local, and regional agencies and to take any action it deems reasonable and necessary to carry out its duties to

[45] ACCA/HARDI Br. 29 & 28, n. 58.

[46] The CEC is comprised of five Commissioners appointed by the Governor and confirmed by the California Senate, who may be removed from office only by a majority vote of each house of the state Legislature. *Id*., at §§ 25200, 25204, & 25216. Each Commissioner serves the state at large on a full-time basis for a five-year term. *Id*., at §§ 25203 & 25206.

represent California's efficiency interests. *Id.*, at §§ 25218(d) & (e); § 25219. Taken together, the provisions of the Warren-Alquist Act designate the CEC as a California agency that must be considered the "State" for the purposes of the involvement that led to the consensus agreement and the JSC. DOE acted appropriately in according the CEC this status here, as it has done in prior proceedings.

This treatment of the CEC by DOE is historically supported. Over the years, the CEC has submitted numerous letters and written comments to DOE in various rulemaking proceedings involving appliance efficiency. Particularly noteworthy is the CEC's 2005 petition to DOE for a waiver of federal preemption under EPCA § 327(d) to permit California to implement new water conservation standards for residential clothes washers.[47] DOE accepted and considered the CEC's petition and in doing so properly recognized the CEC's ability to act as the "State" of California in the context of an EPCA proceeding.[48]

Moreover, when considering the direct final rule, the Secretary was well aware of the strong, publicly expressed interest of numerous other states in a 90 percent efficiency gas-furnace standard from comments they submitted to DOE in

[47] The facts and issues involved in the petition are discussed in *California Energy Commission v. Department of Energy*, 585 F.3d 1143 (9th Cir. 2009).

[48] More recently, CEC staff recently attended DOE's May 2, 2012, public meeting regarding energy conservation standards for battery chargers and external power supplies and subsequently submitted written comments to the proceeding on May 29, 2012.

its prior rulemaking adopting an 80 percent efficiency standard,[49] the Second Circuit litigation filed by several states, including the Amici States and the CEC, challenging this standard as inadequate,[50] and Massachusetts' Waiver Petition.[51] Although these states did not join the JSC because they were already advocating for the higher furnace standard through the related Second Circuit litigation and the waiver process, their position undoubtedly informed the agency's determination that the sample of signatories to the JSC and the consensus agreement was indeed "representative" of relevant points of view and not underinclusive under EPCA § 325(p)(4)(A), as APGA erroneously claims.

C. There is No *Per Se* Rule That Multiple State Signatures Are Required to Make a Joint Statement Fairly Representative of Relevant Points of View.

Intervenors ACCA's and HARDI's claim[52] that "multiple States . . . must sign a joint statement before DOE may issue a DFR" is similarly unfounded. The touchstone under EPCA § 325(p)(4)(A) is a determination by the Secretary that the joint statement is fairly representative of relevant points of view. As the statutory text makes clear, in this analysis, the Secretary must consider whether the views of the States are represented in the joint statement.

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[49] *See* 72 Fed. Reg. at 65,136.
[50] *See New York v. DOE*, No. 08-0311ag(L).
[51] *See* Notice of Denial, 75 Fed. Reg. at 62,115-20.
[52] ACCA/HARDI Br. 28, n. 58.

But contrary to intervenors' claims, the statute sets forth no *per se* rule that multiple States must sign a joint statement before it ever may be considered fairly representative of state views. As discussed above, the particular facts here provided ample basis for the Secretary to conclude that the States' views were fairly represented in the JSC. The CEC signed the consensus agreement, and through a variety of public proceedings - including DOE's own prior rulemaking proceedings, related litigation brought by the States, and DOE's handling of Massachusetts' waiver petition - DOE had been fully apprised of many States' interest in the passage of a 90 percent gas-furnace efficiency rule. Moreover, no State opposed the direct final rule, nor has any state challenged it or DOE's process as non-representative of the States' interests. Consequently, DOE had a sound basis here to conclude that the JSC was fairly representative of many States' views, and the direct final rule should not be annulled merely because the numerous States that publicly supported a 90 percent rule did not themselves sign the JSC. DOE thus satisfied the procedural threshold set forth in the statute to permit the Secretary to utilize the more streamlined mechanism available under EPCA to issue a direct final rule based on what he considered to be a representative group of entities with relevant opinions.

ACCA's and HARDI's restrictive viewpoint makes little logical sense under the facts of this case. The signatory to the consensus agreement was the CEC,

representing the country's largest state with a population (according to 2009 U.S. census data)[53] of approximately 37 million people. If, for example, Wyoming and Vermont, with populations totaling just under 1.2 million, had signed the consensus agreement and the CEC had not, this would presumably comply with ACCA's and HARDI's proposed *per se* rule, even though those two States together have only about 3% of California's population and only about 0.4% of the country's population. Congress could not have meant for DOE to rigidly apply EPCA § 325(p)(4)(A) to produce such anomalous results when its goal was to ensure "representativeness" for the greater good, and the Secretary had a sound basis to conclude that the States' views were well represented here.

D. The Secretary Properly Determined That Entities Not Mentioned in the Statute Are Not Necessary to Make a Joint Statement Fairly Representative of Relevant Points of View.

Curiously, and without adequate legal support, APGA argues[54] that DOE cannot "predicate" a direct final rule on the views of the kinds of entities specifically mentioned in the statute (*i.e.*, manufacturers, States, and efficiency advocates), without considering the views of certain other entities that the statute does not mention - namely "energy suppliers, contractors, distributors, and

[53] Available at: http://www.census.gov/compendia/statab/2012/ranks/rank01.html
[54] APGA Br. 54-55.

consumers."[55] But, the "other" categories APGA lists were neither enumerated by Congress in the statute as entities whose opinions DOE had to consider in determining whether the consensus agreement was "representative," nor as entities with "relevant points of view" in this area.

Moreover, DOE's issuance of the direct final rule without any signatories from the specific entities that APGA represents is logical. Those entities are peripheral to the focus of the direct final rule's 90 percent efficiency gas-furnace standard, which is directed only at furnace manufacturers, not energy suppliers, distributors or installers. As discussed above, the consensus agreement provided a representative sample of those parties specifically enumerated in the statute, and no such parties voiced any objection to it or the JSC. Furthermore, several groups advocating on behalf of energy consumers besides the consensus agreement signatories also supported the standards.[56] Thus, DOE acted well within the discretion and authority Congress delegated to it when determining that the viewpoints represented in support of the standards were sufficient under the statute

[55] In point of fact, many of the signatories to the consensus agreement and the JSC represent consumer groups.

[56] In addition to the energy efficiency advocates who signed the JSC (ACEEE, ASE, ASAP, NRDC and NEEP), Northwest Energy Efficiency, Environment America, and the Northwest Power and Conservation Council submitted comments in support of the direct final rule. (R.60 [EERE-2011-BT-STD-0011], submitted Nov. 17, 2011.)

to issue a direct final rule.[57]

Adopting Petitioner's view of the statute would frustrate EPCA's grant of expedited rulemaking authority to DOE to issue long-overdue energy efficiency standards. That authority gives DOE the discretion to utilize a streamlined rulemaking process where, as here, a representative set of stakeholders has negotiated a proposal for energy conservation standards that are technologically feasible and economically justified, and several other interested parties made their support for such standards clear in prior rulemaking proceedings, litigation, and legislation. APGA's reading of the statute is rigid, overly technical and without textual support. Adopting such an interpretation would undermine DOE's ability to use the Congress's valuable direct final rule procedure to expeditiously adopt efficiency standards that benefit consumers and the environment in the Amici States and in California and to avoid further unnecessary delay.

II. EPCA § 325(p)(4)(C) Provides DOE with Authority to Refuse to Withdraw a Direct Final Rule Even When It Receives Substantive Opposition to the Rule.

APGA's arguments[58] that DOE was required to withdraw the direct final rule once it received any substantive opposition to the rule ignores the plain

[57] It is also noteworthy that APGA and its supporting intervenors submitted comments on the consensus agreement that was the basis of the JSC, and therefore the direct final rule. 76 Fed. Reg. at 37,423-25. Thus, APGA and its supporting intervenors cannot plausibly say that they had no meaningful input in the rulemaking process.

language in the second part of subsection (C) of the statute, which expressly delegates authority to the Secretary to determine whether any adverse comments it has received provide a "reasonable basis" for withdrawing the rule. Section 325(p)(4)(C) of EPCA provides in relevant part that "the Secretary shall withdraw" the direct final rule "*if* . . . the Secretary receives 1 or more adverse public comments relating to" the rule *and* "based on the . . . record . . . the Secretary determines that such adverse public comments . . . *may* provide a reasonable basis for withdrawing" it. (Emphasis added.)

If, as the statute says, the Secretary is empowered to decide that adverse comments *may* provide a reasonable basis for withdrawing a direct final rule, he also possesses the corollary authority to decide that adverse comments *may not* or *do not* provide a reasonable basis for withdrawal. Of course, the Secretary's power is not unlimited under the statute, and he still must act reasonably based on sufficient record evidence. That is precisely what the Secretary did here when, based on a thorough review of the record before him, including the submitted comments of APGA, HARDI and ACCA, he determined that the comments failed to raise concerns that would compel DOE to adopt a different standard upon further review. 76 Fed. Reg., at 67,037, 67,040, 67,051. Under the facts of this case, and given the long history of DOE's consideration of new furnace standards,

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[58] APGA Br. 56-58.

the Secretary permissibly exercised the discretion Congress granted him when he refused to withdraw the direct final rule.[59]

APGA fails to cite any authority in support of its argument that only "noncontroversial" consensus standards may be implemented through direct final rules.[60] There is no such limitation in the language of EPCA § 325(p)(4)(C), which is unambiguous with respect to the Secretary's discretion. As such, under the first step of the *Chevron* test, it would not be appropriate for the Court to construe the statute in the manner the Petitioner argues.

Even if the Court were to conclude that the statute was not clear on its face, DOE's interpretation of the statute as allowing it discretion not to withdraw the direct final rule in light of adverse comments received is reasonable and entitled to deference under the second step of the *Chevron* test. Given DOE's long-term study and review of furnace standards, the agency properly concluded that it was well within its discretion to retain the rule.

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[59] Here, DOE pointed out in its decision to retain the direct final rule that it "weighed the significance of each comment individually and all comments cumulatively" to evaluate whether they provided a reasonable basis for withdrawing the direct final rule," and it considered "each adverse comment based on its merits and the background data and information that supported that comment." 76 Fed. Reg., at 67,050.

[60] APGA Br. 57 (citing only to a quote from a comment on the direct final rule submitted by AHRI (R. 52 [EERE-2011-BT-STD-0011], at 2), in which the commenter ultimately supported the consensus agreement).

CONCLUSION

For the foregoing reasons, and for the reasons cited by DOE in its brief, the petition for review should be denied and the direct final rule should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing Joint Brief of *Amici Curiae* the Commonwealth of Massachusetts, the State of New York, and the California Energy Commission in Support of Respondent, complies with the type-volume limitation of FRAP 32(a)(7)(B). The brief is proportionately spaced, printed in Times New Roman font in 14 point typeface, and the body of the brief contains 5,353 words, as counted by Word.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I electronically filed the foregoing Joint Brief of *Amici Curiae* the Commonwealth of Massachusetts, the State of New York, and the California Energy Commission in Support of Respondent, with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Counsel for the parties listed below are registered CM/ECF users, and have been served by the CM/ECF system:

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ADDENDUM:

STATUTES AND REGULATIONS

FEDERAL STATUTES AND REGULATIONS

42 U.S.C. § 6291(2)

For purposes of this part:

(2) The term "covered product" means a consumer product of a type specified in section 6292 of this title.

42 U.S.C. § 6292(a)(5)

(a) In general.
The following consumer products, excluding those consumer products designed solely for use in recreational vehicles and other mobile equipment, are covered products:
(5) Furnaces.

42 U.S.C. § 6295(p)(4)

(p) Procedure for prescribing new or amended standards
Any new or amended energy conservation standard shall be prescribed in accordance with the following procedure:
(4) Direct final rules.
(A) In general. On receipt of a statement that is submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, and contains recommendations with respect to an energy or water conservation standard—

> (i) if the Secretary determines that the recommended standard contained in the statement is in accordance with subsection (*o*) or section 6313(a)(6)(B) of this title, as applicable, the Secretary may issue a final rule that establishes an energy or water conservation standard and is published simultaneously with a notice of proposed rulemaking that proposes a new or amended energy or water conservation standard that is identical to the standard established in the final rule to establish the recommended standard (referred to in this paragraph as a "direct final rule"); or
> (ii) if the Secretary determines that a direct final rule cannot be issued based on the statement, the Secretary shall publish a notice of the determination, together with an explanation of the reasons for the determination.

(B) Public comment. The Secretary shall solicit public comment for a period of at least 110 days with respect to each direct final rule issued by the Secretary under subparagraph (A)(i).
(C) Withdrawal of direct final rules.

> (i) In general. Not later than 120 days after the date on which a direct final rule issued under subparagraph (A)(i) is published in the Federal Register, the Secretary shall withdraw the direct final rule if
> (I) the Secretary receives 1 or more adverse public comments relating to the direct final rule under subparagraph (B)(i) or any alternative joint recommendation; and
> (II) based on the rulemaking record relating to the direct final rule, the Secretary determines that such adverse public comments or alternative joint recommendation may

provide a reasonable basis for withdrawing the direct final rule under subsection (*o*), section 6313(a)(6)(B) of this title, or any other applicable law.
(ii) Action on withdrawal. On withdrawal of a direct final rule under clause (i), the Secretary shall
(I) proceed with the notice of proposed rulemaking published simultaneously with the direct final rule as described in subparagraph (A)(i); and
(II) publish in the Federal Register the reasons why the direct final rule was withdrawn.
(iii) Treatment of withdrawn direct final rules.—A direct final rule that is withdrawn under clause (i) shall not be considered to be a final rule for purposes of subsection (*o*).

42 U.S.C. § 6297(d)

(d) Waiver of Federal preemption
(1)(A) Any State or river basin commission with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use for any type (or class) of covered product for which there is a Federal energy conservation standard under section 6295 of this title may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.
(B) Subject to paragraphs (2) through (5), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State or river basin commission has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.
(C) For purposes of this subsection, the term "unusual and compelling State or local energy or water interests" means interests which
(i) are substantially different in nature or magnitude than those prevailing in the United States generally; and
(ii) are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation. The factors described in clause (ii) shall be evaluated within the context of the State's energy plan and forecast, and, with respect to a State regulation for which a petition has been submitted to the Secretary which provides for any energy conservation standard or requirement with respect to water use of a covered product, within the context of the water supply and groundwater management plan, water quality program, and comprehensive plan (if any) of the State or river basin commission for improving, developing, or conserving a waterway affected by water supply development.
(2) The Secretary shall give notice of any petition filed under paragraph (1)(A) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the 6-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after the date on which the petition was filed. Such notice shall

include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of, and the reasons for, such denial.
(3) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including -
(A) the extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;
(B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;
(C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction -

(i) in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or
(ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States; and

(D) the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.
(4) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding, except that the failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).
(5) No final rule prescribed by the Secretary under this subsection may -
(A) permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation; or
(B) become effective with respect to a covered product manufactured before the earliest possible effective date specified in section 6295 of this title for the initial amendment of the energy conservation standard established in such section for the covered product; except that such rule may become effective before such date if the Secretary finds (and publishes such finding) that, in addition to the other requirements of this subsection the State has established, by a preponderance of the evidence, that -

(i) there exists within the State an energy emergency condition or, if the State regulation provides for an energy conservation standard or other requirement with respect to the water use of a covered product for which there is a Federal energy conservation standard under subsection (j) or (k) of section 6295 of this title, a water emergency condition, which -

(I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy or, in the case of a water emergency condition, water or wastewater treatment, to its residents at less than prohibitive costs; and
(II) cannot be substantially alleviated by the importation of energy or, in the case of a water emergency condition, by the importation of water, or by the use of interconnection agreements; and
(ii) the State regulation is necessary to alleviate substantially such condition.

(6) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended pursuant to section 6295 of this title, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraph (1) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), and (4), except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraph (1) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it.

10 C.F.R. § 430.2

Weatherized warm air furnace or boiler means a furnace or boiler designed for installation outdoors, approved for resistance to wind, rain, and snow, and supplied with its own venting system.

MASSACHUSETTS STATUTES AND REGULATIONS

M.G.L. 25B § 5.

Establishment of energy efficiency standards; revision

The commissioner shall by regulation establish the level of energy efficiency standards for lamps, so that each lamp covered by said standard shall consume less power in watts per unit of light output in lumens than a maximum reference level to be established by the commissioner; provided, however, that said standards shall not become effective until January first, nineteen hundred and ninety. The commissioner may by regulation increase the level of the energy efficiency standards for lamps, fluorescent ballasts, luminaires and showerheads. Said commissioner may also by regulation increase the level of the energy efficiency standards for refrigerators, refrigerator-freezers, freezers and water heaters, provided that said standards shall not become effective until January first, nineteen hundred and ninety. Any revision of such standards shall be based upon the determination by the commissioner that such efficiency levels are cost-effective to the users, as a group, of the covered appliance or lamp. Any standard revised pursuant to this section which conflicts with a corresponding standard in the state plumbing code shall take precedence over the standard in said code. Any standard revised pursuant to this section shall not take effect for at least one year after its adoption.

The commissioner, in consultation with the heads of other appropriate agencies, shall adopt regulations, in accordance with this chapter, establishing minimum energy efficiency standards for the types of new products set forth in clauses (f) to (s), inclusive, of section 3.

The regulations shall provide for the following minimum efficiency standards:

(1) New medium voltage dry-type distribution transformers, single voltage external AC to DC power supplies, and state-regulated incandescent reflector lamps manufactured on or after January 1, 2008, shall not be sold or offered for sale in the commonwealth unless the efficiency of the new product meets or exceeds the efficiency standards set forth in 225 CMR 9.03.

(2) Metal halide lamp fixtures designed to be operated with lamps rated greater than or equal to 150 watts but less than or equal to 500 watts shall not contain a probe-start metal halide ballast.

(3) Residential furnaces or boilers shall meet or exceed the following Annual Fuel Utilization Efficiency (AFUE):

Product Type	Minimum Efficiency Level
Gas and propane furnaces	90% AFUE
Oil furnaces	83% AFUE
Gas and propane hot water boilers	84% AFUE
Oil-fired hot water boilers	84% AFUE
Gas and propane steam boilers	82% AFUE
Oil-fired steam boilers	82% AFUE

The commissioner may adopt rules to exempt compliance with these furnace or boiler standards at any building, site or location where complying with said standards would be in conflict with any local zoning ordinance, building or plumbing code or other rule regarding installation and venting of boilers or furnaces.

Residential furnace air handlers shall have an ER of 2 per cent or less, except residential oil furnaces with a capacity of less than 94,000 Btu per hour shall have an ER of 2.3 per cent or less.

(4) Single-voltage external AC to DC power supplies shall meet the tier 1 energy efficiency requirements of California Code of Regulations, Title 20, Section 1605.3, as published in April 2005. This standard applies to single-voltage AC to DC power supplies that are sold individually and to those that are sold as a component of or in conjunction with another product.

(5) State-regulated incandescent reflector lamps shall meet the minimum average lamp efficiency requirements for federally-regulated incandescent reflector lamps contained in 42 U.S.C. section 6295 (i)(1)(A). The following lamps are exempt from these requirements: ER30, BR30, BR40 and ER40 of 50 watts or less; BR30, BR40 and ER40 of 65 watts; and R20 of 45 watts or less.

On or after January 1, 2008, no new medium voltage dry-type distribution transformer, single-voltage external AC to DC power supply or state-regulated incandescent reflector lamp may be

sold or offered for sale in the state unless the efficiency of the new product meets or exceeds the efficiency standards set forth in the regulations adopted pursuant to this section. On or after January 1, 2009, no new metal halide lamp fixture may be sold or offered for sale in the commonwealth unless the efficiency of the product meets or exceeds the efficiency standards set forth in the regulations adopted pursuant to this section. In accordance with section 9, the commissioner, in consultation with the attorney general, shall determine if implementation of state standards for residential furnaces or boilers requires a waiver from federal preemption, and shall apply for such waivers if necessary. If the commissioner determines that a waiver from federal preemption is necessary for residential furnaces or boiler standards established by this section, the state standard shall go into effect at the earliest date permitted by federal law. If the commissioner determines that a waiver from federal preemption is not needed for residential furnaces or boilers, then such state standards shall go into effect on June 1, 2008.

One year after the date upon which sale or offering for sale of certain products is limited pursuant to the preceding paragraph of this section, no new products may be installed for compensation in the state unless the efficiency of the new product meets or exceeds the efficiency standards set forth in the regulations adopted pursuant to this section.

225 C.M.R. 9.03(10)

Product Standards and Test Methods

(10) Residential Furnaces or Boilers.
(a) Residential furnaces or boilers shall meet or exceed the following Annual Fuel Utilization Efficiency (AFUE):

Product Type	Minimum Efficiency Level
Gas and propane furnaces	*90% AFUE
Oil furnaces	*83% AFUE
Gas and propane hot water boilers	*84% AFUE
Oil-fired hot water boilers	*84% AFUE
Gas and propane steam boilers	*82% AFUE
Oil-fired steam boilers	Oil-fired steam boilers

(b) The commissioner may adopt rules to exempt compliance with these furnace or boiler standards at any building, site or location where complying with said standards would be in conflict with any local zoning ordinance, building or plumbing code or other rule regarding installation and venting of boilers or furnaces.
(c) Residential furnace air handlers shall have an ER of 2% or less, except residential oil furnaces with a capacity of less than 94,000 Btu per hour shall have an ER of 2.3% or less.
(d) The manufacturer shall cause the testing of samples of each model of residential furnaces and boilers to be sold for final retail sale in Massachusetts in accordance with the federal test method contained in 10 CFR § 430, Subpart B, Appendix N. The test method includes the testing methods required for both elements of Massachusetts standards (*i.e.* minimum AFUE standards and maximum electricity ratio standard.)

CALIFORNIA STATUTES

CAL. PRC. CODE § 25006

It is the policy of the state and the intent of the Legislature to establish and consolidate the state's responsibility for energy resources, for encouraging, developing, and coordinating research and development into energy supply and demand problems, and for regulating electrical generating and related transmission facilities.

CAL. PRC. CODE § 25007

It is further the policy of the state and the intent of the Legislature to employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, thereby reducing the rate of growth of energy consumption, prudently conserve energy resources, and assure statewide environmental, public safety, and land use goals.

CAL. PRC. CODE § 25008

It is further the policy of the state and the intent of the Legislature to promote all feasible means of energy and water conservation and all feasible uses of alternative energy and water supply sources.

The Legislature finds and declares that the State of California has extensive physical and natural resources available to it at state-owned sites and facilities which can be substituted for traditional energy supplies or which lend themselves readily to the production of electricity or water. Due to increases in energy and water costs, the state's expenditures for energy and water have also increased, adding to the burden on California taxpayers and reducing the amount of funds available for other public purposes.

It is in the best interest of the state to use these resources when it can be demonstrated that long-term cost, water, and energy use reduction will result, and where increased independence from other fuel and water sources and development of additional revenues for the state may be obtained.

Therefore, in recognition of recent and projected increases in the cost of energy and water from traditional sources, it is the policy of the state to use available resources at state facilities which can substitute for traditional energy and water supplies or produce electricity or water at its facilities when use or production will reduce long-term energy or water expenditures. Criteria used in analysis of proposed actions shall include lifecycle cost evaluation, benefit to taxpayers, reduced fossil fuel or reduced water consumption depending on the application, and improved efficiency. Energy or water facilities at state-owned sites shall be scaled to produce optimal system efficiency and best economic advantage to the state. Energy or water produced may be reserved by the state to meet state facility needs or may be sold to state or nonstate purchasers. Resources and processes which may be used to substitute for traditional energy and water supplies and for the purpose of electrical generation at state facilities include, but are not limited

to, cogeneration, biomass, wind, geothermal, vapor compression, water reclamation, and solar technologies.

It is the intent of the Legislature that no policy in this section, expressed or implied, be in conflict with existing state or federal regulations regarding the production or sale of electricity or water, and that this policy be just and reasonable to utility ratepayers.

CAL. PRC. CODE § 25200

There is in the Resources Agency the State Energy Resources Conservation and Development Commission, consisting of five members appointed by the Governor subject to Section 25204.

CAL. PRC. CODE § 25203

Each member of the commission shall represent the state at large and not any particular area thereof, and shall serve on a full-time basis.

CAL. PRC. CODE § 25204

The Governor shall appoint the members of the commission within 30 days after the effective date of this division. Every appointment made by the Governor to the commission shall be subject to the advice and consent of a majority of the members elected to the Senate.

CAL. PRC. CODE § 25218

In addition to other powers specified in this division, the commission may do any of the following:

(a)Apply for and accept grants, contributions, and appropriations.
(b)Contract for professional services if such work or services cannot be satisfactorily performed by its employees or by any other state agency.
(c)Be sued and sue.
(d)Request and utilize the advice and services of all federal, state, local, and regional agencies.
(e)Adopt any rule or regulation, or take any action, it deems reasonable and necessary to carry out the provisions of this division.
(f)Adopt rules and regulations, or take any action, it deems reasonable and necessary to ensure the free and open participation of any member of the staff in proceedings before the commission.

CAL. PRC. CODE § 25219

As to any matter involving the federal government, its departments or agencies, which is within the scope of the power and duties of the commission, the commission may represent its interest or the interest of any county, city, state agency, or public district upon its request, and to that end may correspond, confer, and cooperate with the federal government, its departments or agencies.

CAL. PRC. CODE § 25402

The commission shall, after one or more public hearings, do all of the following, in order to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy, including the energy associated with the use of water:

(a)(1)Prescribe, by regulation, lighting, insulation climate control system, and other building design and construction standards that increase the efficiency in the use of energy and water for new residential and new nonresidential buildings. The commission shall periodically update the standards and adopt any revision that, in its judgment, it deems necessary. Six months after the commission certifies an energy conservation manual pursuant to subdivision (c) of Section 25402.1, no city, county, city and county, or state agency shall issue a permit for any building unless the building satisfies the standards prescribed by the commission pursuant to this subdivision or subdivision (b) that are in effect on the date an application for a building permit is filed. Water efficiency standards adopted pursuant to this subdivision shall be demonstrated by the commission to be necessary to save energy.

(2)Prior to adopting a water efficiency standard for residential buildings, the Department of Housing and Community Development and the commission shall issue a joint finding whether the standard (A) is equivalent or superior in performance, safety, and for the protection of life, health, and general welfare to standards in Title 24 of the California Code of Regulations and (B) does not unreasonably or unnecessarily impact the ability of Californians to purchase or rent affordable housing, as determined by taking account of the overall benefit derived from water efficiency standards. Nothing in this subdivision in any way reduces the authority of the Department of Housing and Community Development to adopt standards and regulations pursuant to Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code.

(3)Water efficiency standards and water conservation design standards adopted pursuant to this subdivision and subdivision (b) shall be consistent with the legislative findings of this division to ensure and maintain a reliable supply of electrical energy and be equivalent to or superior to the performance, safety, and protection of life, health, and general welfare standards contained in Title 24 of the California Code of Regulations. The commission shall consult with the members of the coordinating council as established in Section 18926 of the Health and Safety Code in the development of these standards.

(b)(1)Prescribe, by regulation, energy and water conservation design standards for new residential and new nonresidential buildings. The standards shall be performance standards and shall be promulgated in terms of energy consumption per gross square foot of floorspace, but may also include devices, systems, and techniques required to conserve energy and water. The commission shall periodically review the standards and adopt any revision that, in its judgment, it deems necessary. A building that satisfies the standards prescribed pursuant to this subdivision need not comply with the standards prescribed pursuant to subdivision (a). Water conservation design standards adopted pursuant to this subdivision shall be demonstrated by the commission to be necessary to save energy. Prior to adopting a water conservation design standard for residential buildings, the Department of Housing and Community Development and the

commission shall issue a joint finding whether the standard (A) is equivalent or superior in performance, safety, and for the protection of life, health, and general welfare to standards in the California Building Standards Code and (B) does not unreasonably or unnecessarily impact the ability of Californians to purchase or rent affordable housing, as determined by taking account of the overall benefit derived from the water conservation design standards. Nothing in this subdivision in any way reduces the authority of the Department of Housing and Community Development to adopt standards and regulations pursuant to Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code.

(2)In order to increase public participation and improve the efficacy of the standards adopted pursuant to subdivisions (a) and (b), the commission shall, prior to publication of the notice of proposed action required by Section 18935 of the Health and Safety Code, involve parties who would be subject to the proposed regulations in public meetings regarding the proposed regulations. All potential affected parties shall be provided advance notice of these meetings and given an opportunity to provide written or oral comments. During these public meetings, the commission shall receive and take into consideration input from all parties concerning the parties' design recommendations, cost considerations, and other factors that would affect consumers and California businesses of the proposed standard. The commission shall take into consideration prior to the start of the notice of proposed action any input provided during these public meetings.

(3)The standards adopted or revised pursuant to subdivisions (a) and (b) shall be cost-effective when taken in their entirety and when amortized over the economic life of the structure compared with historic practice. When determining cost-effectiveness, the commission shall consider the value of the water or energy saved, impact on product efficacy for the consumer, and the life cycle cost of complying with the standard. The commission shall consider other relevant factors, as required by Sections 18930 and 18935 of the Health and Safety Code, including, but not limited to, the impact on housing costs, the total statewide costs and benefits of the standard over its lifetime, economic impact on California businesses, and alternative approaches and their associated costs.

(c)(1)Prescribe, by regulation, standards for minimum levels of operating efficiency, based on a reasonable use pattern, and may prescribe other cost-effective measures, including incentive programs, fleet averaging, energy and water consumption labeling not preempted by federal labeling law, and consumer education programs, to promote the use of energy and water efficient appliances whose use, as determined by the commission, requires a significant amount of energy or water on a statewide basis. The minimum levels of operating efficiency shall be based on feasible and attainable efficiencies or feasible improved efficiencies that will reduce the energy or water consumption growth rates. The standards shall become effective no sooner than one year after the date of adoption or revision. No new appliance manufactured on or after the effective date of the standards may be sold or offered for sale in the state, unless it is certified by the manufacturer thereof to be in compliance with the standards. The standards shall be drawn so that they do not result in any added total costs for consumers over the designed life of the appliances concerned.

In order to increase public participation and improve the efficacy of the standards adopted pursuant to this subdivision, the commission shall, prior to publication of the notice of proposed action required by Section 18935 of the Health and Safety Code, involve parties who would be subject to the proposed regulations in public meetings regarding the proposed regulations. All potential affected parties shall be provided advance notice of these meetings and given an opportunity to provide written or oral comments. During these public meetings, the commission shall receive and take into consideration input from all parties concerning the parties' design recommendations, cost considerations, and other factors that would affect consumers and California businesses of the proposed standard. The commission shall take into consideration prior to the start of the notice of proposed action any input provided during these public meetings.

The standards adopted or revised pursuant to this subdivision shall not result in any added total costs for consumers over the designed life of the appliances concerned. When determining cost-effectiveness, the commission shall consider the value of the water or energy saved, impact on product efficacy for the consumer, and the life cycle cost to the consumer of complying with the standard. The commission shall consider other relevant factors, as required by Sections 11346.5 and 11357 of the Government Code, including, but not limited to, the impact on housing costs, the total statewide costs and benefits of the standard over its lifetime, economic impact on California businesses, and alternative approaches and their associated costs.

(2)No new appliance, except for any plumbing fitting, regulated under paragraph (1), that is manufactured on or after July 1,1984, may be sold, or offered for sale, in the state, unless the date of the manufacture is permanently displayed in an accessible place on that appliance.

(3)During the period of five years after the commission has adopted a standard for a particular appliance under paragraph (1), no increase or decrease in the minimum level of operating efficiency required by the standard for that appliance shall become effective, unless the commission adopts other cost-effective measures for that appliance.

(4)Neither the commission nor any other state agency shall take any action to decrease any standard adopted under this subdivision on or before June 30, 1985, prescribing minimum levels of operating efficiency or other energy conservation measures for any appliance, unless the commission finds by a four-fifths vote that a decrease is of benefit to ratepayers, and that there is significant evidence of changed circumstances. Before January 1, 1986, the commission shall not take any action to increase a standard prescribing minimum levels of operating efficiency for any appliance or adopt a new standard under paragraph (1). Before January 1, 1986, any appliance manufacturer doing business in this state shall provide directly, or through an appropriate trade or industry association, information, as specified by the commission after consultation with manufacturers doing business in the state and appropriate trade or industry associations on sales of appliances so that the commission may study the effects of regulations on those sales. These informational requirements shall remain in effect until the information is received. The trade or industry association may submit sales information in an aggregated form in a manner that allows the commission to carry out the purposes of the study. The commission shall treat any sales information of an individual manufacturer as confidential and that information shall not be a public record. The commission shall not request any information that cannot be reasonably

produced in the exercise of due diligence by the manufacturer. At least one year prior to the adoption or amendment of a standard for an appliance, the commission shall notify the Legislature of its intent, and the justification to adopt or amend a standard for the appliance. Notwithstanding paragraph (3) and this paragraph, the commission may do any of the following:

(A)Increase the minimum level of operating efficiency in an existing standard up to the level of the National Voluntary Consensus Standards 90, adopted by the American Society of Heating, Refrigeration, and Air Conditioning Engineers or, for appliances not covered by that standard, up to the level established in a similar nationwide consensus standard.

(B)Change the measure or rating of efficiency of any standard, if the minimum level of operating efficiency remains substantially the same.

(C)Adjust the minimum level of operating efficiency in an existing standard in order to reflect changes in test procedures that the standards require manufacturers to use in certifying compliance, if the minimum level of operating efficiency remains substantially the same.

(D)Readopt a standard preempted, enjoined, or otherwise found legally defective by an administrative agency or a lower court, if final legal action determines that the standard is valid and if the standard that is readopted is not more stringent than the standard that was found to be defective or preempted.

(E)Adopt or amend any existing or new standard at any level of operating efficiency, if the Governor has declared an energy emergency as described in Section 8558 of the Government Code.

(5)Notwithstanding paragraph (4), the commission may adopt standards pursuant to Commission Order No. 84-0111-1, on or before June 30, 1985.

(d)Recommend minimum standards of efficiency for the operation of any new facility at a particular site that are technically and economically feasible. No site and related facility shall be certified pursuant to Chapter 6 (commencing with Section 25500), unless the applicant certifies that standards recommended by the commission have been considered, which certification shall include a statement specifying the extent to which conformance with the recommended standards will be achieved.

Whenever this section and Chapter 11.5 (commencing with Section 19878) of Part 3 of Division 13 of the Health and Safety Code are in conflict, the commission shall be governed by that chapter of the Health and Safety Code to the extent of the conflict.

(e)The commission shall do all of the following:

(1)Not later than January 1, 2004, amend any regulations in effect on January 1, 2003, pertaining to the energy efficiency standards for residential clothes washers to require that residential clothes washers manufactured on or after January 1, 2007, be at least as water efficient as commercial clothes washers.

(2)Not later than April 1, 2004, petition the federal Department of Energy for an exemption from any relevant federal regulations governing energy efficiency standards that are applicable to residential clothes washers.

(3)Not later than January 1, 2005, report to the Legislature on its progress with respect to the requirements of paragraphs (1) and (2).

NEW YORK STATUTES

N.Y. Energy Law § 3-101

It shall be the energy policy of the state:

1. to obtain and maintain an adequate and continuous supply of safe, dependable and economical energy for the people of the state and to accelerate development and use within the state of renewable energy sources, all in order to promote the state's economic growth, to create employment within the state, to protect its environmental values, to husband its resources for future generations, and to promote the health and welfare of its people;

2. to encourage conservation of energy in the construction and operation of new commercial, industrial, and residential buildings, and in the rehabilitation of existing structures, through heating, cooling, ventilation, lighting, insulation and design techniques and the use of energy audits and life-cycle costing analysis;

3. to encourage the use of performance standards in all energy-using appliances, and in industrial and commercial applications of energy-using apparatus and processes;

4. to encourage transportation modes and equipment which conserve the use of energy;

5. to foster, encourage and promote the prudent development and wise use of all indigenous state energy resources including, but not limited to, on-shore oil and natural gas, off-shore oil and natural gas, natural gas from Devonian shale formations, small head hydro, wood, solar, wind, solid waste, energy from biomass, fuel cells and cogeneration; and

6. to encourage a new ethic among its citizens to conserve rather than waste precious fuels; and to foster public and private initiative to achieve these ends at the state and local levels.

* 7. to conduct energy planning in an integrated and comprehensive manner through development of a long-range energy master plan which shall provide the framework for energy related decisions made throughout the state.

* NB Expired January 1, 1984