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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Plaintiffs,

v.

RICK PERRY, *et al.*,

Defendants,

and

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

Lead Case

Case No. 17-cv-03404-VC

DEFENDANTS' MOTION TO DISMISS

Date: January 18, 2018
Time: 10:00 a.m.
Judge: Judge Vince Chhabria

Courtroom 4, 17th Floor
450 Golden Gate Ave., San Francisco, CA

Consolidated with

Case No. 17-cv-03406-VC

v.

RICK PERRY, *et al.*,

Defendants,

and

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

PLEASE TAKE NOTICE THAT on January 18, 2018, at 10:00 a.m., before the Honorable Vince Chhabria, Courtroom 4, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, defendants United States Department of Energy and Rick Perry, in his official capacity as Secretary of Energy, will and hereby do move the Court for an order dismissing these consolidated cases in their entirety.

Defendants are entitled to dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), because the Court lacks subject matter jurisdiction and plaintiffs' Consolidated Complaint fails to state a claim upon which relief may be granted. The basis for this relief is set forth in defendants' accompanying Memorandum of Points and Authorities.

Dated: September 22, 2017

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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STATEMENT OF ISSUES TO BE DECIDED

(1) Do the error correction regulations impose on the U.S. Department of Energy ("DOE") a nondiscretionary duty enforceable under 42 U.S.C. § 6305(a)(2) to submit energy conservation standards rules for four products and equipment to the Federal Register for publication?

(2) Does DOE "adopt[]" "substantive rules of general applicability" within the meaning of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(1), when it posts pre-publication drafts of rules detailing energy conservation standards on its website in accordance with the error correction regulations?

(3) Does 42 U.S.C. § 6295(u)(1)(E)(i)(II) impose on DOE a nondiscretionary duty to promulgate a final rule setting energy conservation standards for uninterruptible power supplies ("UPSs") by July 1, 2011, even though DOE already issued a final rule for classes of battery chargers and at the time DOE did so (as well as on July 1, 2011) UPSs were not classified as battery chargers?

INTRODUCTION

The Energy Policy and Conservation Act of 1975, as amended ("EPCA"), establishes a program for DOE to set, and periodically consider amending, energy conservation standards for certain consumer products and industrial equipment. Before setting or amending a standard, DOE considers, among other things, whether any improvement in energy efficiency resulting from the standard is significant and whether the standard is technologically feasible and economically justified. Once DOE prescribes a standard for a particular product, EPCA's "anti-backsliding" provision prohibits the agency from diminishing the stringency of that standard.

To reduce the risk that DOE would prescribe standards containing errors that could not be corrected because of the anti-backsliding provision, DOE promulgated the error correction regulations. Under those regulations, DOE posts a pre-publication draft of any rule that would set energy conservation standards to its website for 45 days to allow interested parties to submit correction requests that identify typographical, calculation, or other errors in the posted rule before DOE submits any final rule for publication in the Federal Register. Both the error

correction regulations and any pre-publication rules posted to DOE's website make clear that DOE may make changes to a posted draft rule before the agency submits any final rule to the Federal Register. A standards rule, moreover, is not considered "prescribed" for purposes of obtaining judicial review until it is published in the Federal Register.

In December 2016, DOE posted to its website pre-publication drafts of rules setting energy conservation standards for portable air conditioners, air compressors, commercial packaged boilers, and UPSs. To date, DOE has not sent final rules for any of these products and equipment to the Federal Register for publication, because DOE's decision-making process is ongoing. In this lawsuit, plaintiffs seek to compel the agency to immediately publish in the Federal Register as final rules the pre-publication drafts of the four rules posted on DOE's website. All of plaintiffs' claims, however, should be dismissed for lack of jurisdiction and/or failure to state a claim.

Plaintiffs' first claim alleges that the error correction regulations require DOE to submit a final standards rule to the Federal Register for publication at the end of the error correction process. This claim fails at the outset, however, because the error correction regulations do not impose a nondiscretionary duty that is enforceable under EPCA's citizen suit provision. First, that provision does not authorize actions to enforce regulatory—as opposed to statutory—duties. Second, the error correction regulations do not set a date-certain deadline by which DOE must submit final rules for publication in the Federal Register, which is a necessary precondition for a nondiscretionary duty. Finally, the error correction regulations do not eliminate DOE's free-standing authority to continue to assess, modify, or withdraw posted draft rules before they are finalized and submitted to the Federal Register for publication.

Plaintiffs' second and third claims both hinge on their novel contention that any pre-publication rule that DOE posts to its website for error correction has been "adopted" by DOE as a "substantive rule[] of general applicability" within the meaning of FOIA. But that unprecedented interpretation of FOIA is untenable and warrants dismissal of these claims. The language of posted draft rules and the error correction regulations make clear that posted rules have not been adopted as final, binding rules. DOE adopts energy conservation standards only

once final rules are published in the Federal Register. The Government is not aware of any instance in which FOIA was used in the manner plaintiffs seek here: to force an agency to publish in the Federal Register a rule that the agency has not yet decided whether to adopt and that the agency does not intend to bind regulated entities. Indeed, if successful, plaintiffs' claim would turn FOIA's publication requirement—which protects the public from enforcement of unpublished rules—on its head.

Plaintiffs' final claim alleges that 42 U.S.C. § 6295(u)(1)(E)(i)(II) imposes on DOE a nondiscretionary duty to promulgate a final standards rule for UPSs by July 1, 2011. This claim also fails. DOE satisfied its obligation under the statute to issue a final rule addressing "battery chargers or classes of battery chargers" in June 2016 when it promulgated standards for seven classes of battery chargers. 42 U.S.C. § 6295(u)(1)(E)(i)(II). The statute does not require DOE to promulgate final rules for *all* classes of battery chargers, regardless of when they were classified as such. Plaintiffs' alternative interpretation would require the Court to reach the absurd conclusion that Congress intended DOE to set standards for UPSs more than five years before DOE even determined that UPSs are a class of battery charger.

BACKGROUND

I. ENERGY POLICY AND CONSERVATION ACT (EPCA)

EPCA establishes an energy conservation standards program for certain consumer products and industrial equipment. *See* 42 U.S.C. §§ 6291-6317. The statute itself sets standards for some products and directs DOE to consider periodically whether amendments are necessary. *See, e.g.*, *id*. § 6295(c), (m). For other products, EPCA instructs DOE to consider setting initial energy conservation standards by regulation and to consider periodically whether to amend those standards. *See, e.g.*, *id*. § 6295(m), (v). Finally, the statute authorizes DOE to designate additional "covered" products or equipment not currently regulated under EPCA for which standards may be established. *See id*. §§ 6292(a)(20), (b); 6311(2)(A)-(B); 6312(b).

EPCA provides that any new or amended standard "shall be designed to achieve the maximum improvement in energy efficiency . . . which the Secretary determines is technologically feasible and economically justified." *Id*. § 6295(o)(2)(A); *see id*. § 6316(a). In

determining whether a standard is economically justified, the statute directs DOE to determine "whether the benefits of the standard exceed its burdens" by considering a non-exhaustive list of factors, including the economic impact on manufacturers and consumers, the projected energy savings, any lessening of product performance or competition, and "other factors the Secretary considers relevant." *Id*. § 6295(o)(2)(B). The statute, moreover, explicitly prohibits DOE from prescribing a new or amended standard if DOE "determines, by rule, that the establishment of such standard will not result in significant conservation of energy" or "is not technologically feasible or economically justified." *Id*. § 6295(o)(3).

EPCA also contains an "anti-backsliding" provision that prohibits DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use . . . or decreases the minimum required energy efficiency[] of a covered product." *Id*. § 6295(o)(1); *see id*. § 6316(a). Thus, when determining whether to amend a standard, DOE may decide that no amendment is necessary, but it cannot amend a prescribed standard so as to diminish efficiency requirements. A standard is "prescribed" such that the anti-backsliding provision is triggered no earlier than when the standard is published in the Federal Register. *See* 81 Fed. Reg. 57,745, 57,754 (Aug. 24, 2016). *Cf. Nat. Res. Def. Council (NRDC) v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004).

II. ERROR CORRECTION REGULATIONS

In 2016, DOE promulgated a procedural rule—known as the "error correction rule"—to ensure that energy conservation standards are free of typographical, calculation, or other errors before they are published as final rules in the Federal Register. *See* 10 C.F.R. § 430.5. The rule is intended to address the "risk that [DOE] would be unable to undo [such errors] because of the [anti-backsliding provision's] limitations on reducing the stringency of [] standards." 81 Fed. Reg. 26,998, 26,999 (May 5, 2016).

Under the regulations, before submitting any energy conservation standard to the Federal Register for publication as a final rule, "[t]he Secretary will cause a rule . . . to be posted on a publicly-accessible Web site" for 45 days. 10 C.F.R. § 430.5(c). During that time, interested parties may submit correction requests that identify typographical, calculation, or other errors in

the posted draft rule. *Id.* § 430.5(d). Because the posted rule is not final, it must bear a "disclaimer," stating that "[t]he text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5" and "DOE may make any necessary corrections in the regulatory text submitted to the Office of the Federal Register for publication." *Id.* § 430.5(c)(3).

If DOE receives a properly filed correction request but decides not to undertake any corrections, the regulations provide that DOE "will submit the rule for publication to the Office of the Federal Register as it was posted." *Id.* § 430.5(f)(1). If DOE receives no properly filed requests and identifies no errors on its own initiative, the regulations state that DOE "will in due course submit the rule, as it was posted . . . , to the Office of the Federal Register for publication." *Id.* § 430.5(f)(2). If DOE receives a properly filed request and determines that a correction is necessary, DOE "will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days after the [correction request period] has elapsed." *Id.* § 430.5(f)(3).

The error correction regulations make clear that, "[u]ntil an energy conservation standard has been published in the Federal Register, [DOE] may correct such standard, consistent with the Administrative Procedure Act [("APA")]." *Id.* § 430.5(g). In addition, compliance with an energy conservation standard is not required until "the specified compliance date as published in the relevant rule in the Federal Register," *id.* § 430.5(f)(4), and a rule is not considered "prescribed" for purposes of determining timeliness of a petition for judicial review under 42 U.S.C. § 6306 until "the date when the rule is published in the Federal Register," *id.* § 430.5(h).

III. EPCA'S CITIZEN SUIT PROVISION

EPCA authorizes "any person" to "commence a civil action against—"

> (1) any manufacturer or private labeler who is alleged to be in violation of any provision of this part or any rule under this part;
>
> (2) any Federal agency which has a responsibility under this part where there is an alleged failure of such agency to perform any act or duty under this part which is not discretionary; or

> (3) the Secretary in any case in which there is an alleged failure of the Secretary to comply with a nondiscretionary duty to issue a proposed or final rule according to the schedules set forth in section[s] 6295 [and 6313] of this title.

42 U.S.C. § 6305(a); *see id*. § 6316(a). Jurisdiction over such citizen suits is vested in the district courts. *Id*. §§ 6305(a), 6316(a). Challenges to rules "prescribed" under EPCA, however, must be filed in the courts of appeals. *See id*. §§ 6306(b)(1), 6316(a).

IV. THE FOUR PRODUCTS AND EQUIPMENT AT ISSUE HERE

Portable Air Conditioners and Air Compressors. EPCA does not designate portable air conditioners or air compressors as consumer products or industrial equipment for which energy conservation standards must be established. Instead, in 2016, DOE classified these products and equipment as, respectively, "covered products" and "covered equipment"—meaning DOE could, in a subsequent rulemaking, decide whether to establish standards for them. *See* 81 Fed. Reg. 22,514 (Apr. 18, 2016); 81 Fed. Reg. 79,991 (Nov. 15, 2016).

On June 13, 2016, DOE proposed establishing standards for portable air conditioners. *See* 81 Fed. Reg. 38,398. Pursuant to the error correction regulations, DOE posted a pre-publication portable air conditioner rule on its website on December 28, 2016. *See* Consolidated Compl. ¶ 83, ECF No. 43 ("Compl."). Like all draft standards rules posted for error correction, the posted portable air conditioner rule states that "[t]he effective date of this rule is **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**." *See* Appliance and Equipment Standards Rulemakings and Notices: Portable Air Conditioners, https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=65&action=viewcurrent.[1] No requests for correction were submitted during the 45-day error correction period, and DOE has not sent a final standards rule for portable air conditioners to the Federal Register for publication. *See* Compl. ¶¶ 85-86.

[1] The other posted draft rules at issue in this case are available at: https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=63&action=viewcurrent (air compressors); https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=8 (commercial packaged boilers); and https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=26&action=viewlive (UPSs).

Similarly, DOE proposed setting standards for certain classes of air compressors on May 19, 2016. *See* 81 Fed. Reg. 31,680. DOE posted a pre-publication air compressor rule on its website on December 5, 2016. *See* Compl. ¶ 100. Although no requests for correction were submitted during the error correction period, *see id*. ¶ 102, interested parties subsequently submitted correspondence raising concerns about the potential impact of the draft rule, *see, e.g.*, Regulations.gov, Executive Correspondence to Secretary Perry, https://www.regulations.gov/document?D=EERE-2013-BT-STD-0040-0089. DOE has not sent a final air compressor standards rule to the Federal Register for publication. *See* Compl. ¶ 103.

Commercial Packaged Boilers. DOE last amended energy conservation standards for commercial packaged boilers on July 22, 2009. *See* 74 Fed. Reg. 36,312. On March 24, 2016, DOE proposed to amend the standards. *See* 81 Fed. Reg. 15,836. DOE posted a pre-publication standards rule for commercial packaged boilers on its website on December 28, 2016. *See* Compl. ¶ 111. DOE received three requests for correction during the error correction period. *See id*. ¶ 113. DOE has not sent a final rule amending standards for commercial packaged boilers to the Federal Register for publication. *See id*. ¶114.

Uninterruptible Power Supplies (UPSs). EPCA provides that, "[n]ot later than July 1, 2011, the Secretary shall issue a final rule that prescribes energy conservation standards for battery chargers or classes of battery chargers or determine that no energy conservation standard is technically feasible and economically justified." 42 U.S.C. § 6295(u)(1)(E)(i)(II). Pursuant to this provision, DOE promulgated a final rule establishing standards for seven classes of battery chargers on June 13, 2016. *See* 81 Fed. Reg. 38,266.

At the time DOE promulgated that rule, DOE had not yet concluded that UPSs are a class of battery charger. *Compare* 81 Fed. Reg. at 38,275 (explaining that DOE planned to regulate UPSs as part of its separate computer and battery backup systems rulemaking effort), *with* 81 Fed. Reg. 89,806, 89,807 (Dec. 12, 2016) (noting that, after considering comments, DOE changed course and determined UPSs meet the definition of a battery charger). On August 5, 2016, DOE proposed establishing standards for UPSs. *See* 81 Fed. Reg. 52,196. DOE posted a pre-publication standards rule for UPSs on its website on December 28, 2016. *See* Compl. ¶ 91.

Although no requests for correction were submitted during the error correction period, *see id*. ¶ 94, DOE and interested parties subsequently conferred about alleged problems with the posted draft rule, *see* Regulations.gov, 2017-07-05 Ex Parte Record of Meeting, https://www.regulations.gov/document?D=EERE-2016-BT-STD-0022-0031. DOE has not sent a final standards rule for UPSs to the Federal Register for publication. *See* Compl. ¶ 95.

STANDARD OF REVIEW

Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim. *See* Fed. R. Civ. P. 12(b)(1), (b)(6). Plaintiffs bear the burden to show jurisdiction, and the Court must determine whether it has jurisdiction before addressing the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 103 (1998). Under Rule 12(b)(6), "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' FIRST CLAIM

In their first claim, plaintiffs allege that the error correction regulations impose a nondiscretionary duty on DOE to submit a final standards rule to the Federal Register for publication at the end of the correction request period. *See* Compl. ¶¶ 116-17. Plaintiffs seek to enforce this purported nondiscretionary duty under § 6305(a)(2) of EPCA's citizen suit provision with respect to all four products and equipment at issue in this lawsuit. *See id*. This claim fails at the threshold because EPCA's citizen suit provision does not permit suit to compel discretionary agency action.

As a limited waiver of sovereign immunity, EPCA's citizen suit provision must be construed narrowly and may not be enlarged "beyond what the language requires." *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). In addressing another citizen suit provision, the Ninth Circuit observed that "the non-discretionary duty requirement . . . must be read in light of the Congressional intent to use this phrase to limit the number of citizen suits which could be brought against the [agency] and to lessen the disruption of the Act's complex administrative process." *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1353 (9th Cir. 1978). Accordingly,

where there is a "plausible" reading of a citizen suit provision that does not result in a waiver of immunity, a court cannot conclude that the "unequivocal expression" of congressional intent necessary to waive immunity exists. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992).

The error correction regulations do not impose a nondiscretionary duty enforceable under § 6305(a)(2) for at least three reasons. First, § 6305(a)(2) only authorizes enforcement of statutory duties, not duties imposed by regulation. Second, the error correction regulations do not set a date-certain deadline by which DOE must submit final standards rules for publication in the Federal Register and thus cannot be interpreted to impose a nondiscretionary duty. Third, although the error correction regulations contemplate that DOE typically will submit final standards rules for publication sometime after the correction request period ends, the regulations do not impose on DOE a nondiscretionary duty to do so. Nothing in the regulations forecloses DOE's ability to continue assessing, or to reconsider, policy choices, legal issues, or factual determinations made with respect to a posted draft rule in light of changed circumstances, new priorities, or other factors before a final rule is published in the Federal Register. For these reasons, plaintiffs' first claim should be dismissed for lack of jurisdiction.[2]

A. Section 6305(a)(2) Does Not Authorize Suit To Enforce Regulatory Duties

Plaintiffs' effort to enforce purported duties imposed by the error correction regulations fails because § 6305(a)(2) only authorizes enforcement of statutory duties, not duties imposed solely by regulation. The plain text of § 6305(a)(2) provides a cause of action for an agency's alleged failure to "perform any act or duty *under this part*" and grants courts jurisdiction to "order [the] agency to perform such act or duty." 42 U.S.C. § 6305(a)(2) (emphasis added). "[U]nder this part" refers to duties imposed by EPCA, not an agency's self-imposed regulations.

Indeed, where Congress meant to authorize enforcement of regulatory duties in EPCA, it said so expressly. Section 6305(a)(1) of the same citizen suit provision creates a cause of action against "any manufacturer . . . who is alleged to be in violation of any provision of this part *or any rule under this part*" and grants courts jurisdiction to "enforce such provision *or rule*." *Id.*

[2] In the event the Court determines one or more of these arguments is not jurisdictional, defendants move, in the alternative, to dismiss under Rule 12(b)(6) for the same reasons.

§ 6305(a)(1) (emphasis added). Congress's omission of similar language in § 6305(a)(2) shows that it did not intend that provision to authorize enforcement of regulatory duties. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Furthermore, even if there were some ambiguity, the citizen suit provision "must be construed strictly in favor of [DOE]" because it waives the Government's sovereign immunity. *Dep't of Energy*, 503 U.S. at 615. It is, at the very least, "plausible" that § 6305(a)(2) does not authorize enforcement of regulatory duties, and thus, the Court may not give the provision a more expansive reading. *Nordic Vill.*, 503 U.S. at 37. Because § 6305(a)(2) does not authorize the enforcement of any duties purportedly imposed by the error correction regulations, plaintiffs' first claim should be dismissed. *See Maine v. Thomas*, 874 F.2d 883, 888 n.7 (1st Cir. 1989) ("[R]egulatory duties . . . are not *statutory* nondiscretionary duties; hence, they are not proper grist for the [Clean Air Act's citizen suit provision] mill."); *Ohio Valley Envtl. Coal. v. McCarthy*, 2015 WL 3824255, *2 n.1 (S.D.W.V. June 19, 2015) (same).

B. The Error Correction Regulations Do Not Impose A Nondiscretionary Duty On DOE Because They Do Not Set A Date-Certain Deadline For Publication

Even if a regulation could form the basis for a citizen suit under § 6305(a)(2), the error correction regulations do not do so because they do not require DOE to submit a final standards rule to the Federal Register for publication by any "date-certain deadline." *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). To impose a nondiscretionary duty, a statute "must 'categorically mandat[e]' that all specified action be taken by a date-certain deadline." *Id.* (emphasis omitted). Absent such a deadline, "it will be almost impossible to conclude that Congress accords a particular agency action such high priority as to impose upon the agency a 'categorical[] mandat[e]' that deprives it of all discretion over the timing of its work." *Id.*; *see Maine*, 874 F.2d at 888; *Envtl. Def. v. EPA*, 2007 WL 127998, at *4 (N.D. Cal. Jan. 12, 2007) ("Without bright-line deadlines, the statute in question cannot be reached by a citizen's suit."); *Defs. of Wildlife v. Browner*, 888 F. Supp. 1005, 1008 (D. Ariz. 1995). *See also Ctr. for*

Biological Diversity v. Norton, 254 F.3d 833, 840 (9th Cir. 2001) (explaining that, by adding deadlines to a statute, Congress replaced an agency's discretion with nondiscretionary duties).

The error correction regulations do not mandate that DOE submit final standards rules to the Federal Register for publication by any specific deadline. Depending on what transpires during the 45-day correction request period and DOE's own internal decision-making processes, the regulations provide, alternatively, that DOE "will submit the rule for publication," 10 C.F.R. § 430.5(f)(1); "will in due course submit" the rule for publication, *id*. § 430.5(f)(2); or "will, absent extenuating circumstances, submit a corrected rule for publication . . . within 30 days," *id*. § 430.5(f)(3). This language does not impose a "date-certain deadline" that "deprives [DOE] of all discretion over the timing of its work." *Sierra Club*, 828 F.2d at 791; *see, e.g.*, *NRDC v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989) (holding provision that required agency to revise air pollutants list "from time to time" did not impose nondiscretionary duty); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 662 (D.C. Cir. 1975) (same); *Defs. of Wildlife*, 888 F. Supp. at 1008-09 (dismissing citizen suit because "promptly" is "not a categorical mandate from Congress that deprives [the agency] of all discretion over the timing for preparing and publishing" rules). The sole provision that even identifies a time period is § 430.5(f)(3), but that period only applies "absent extenuating circumstances." 10 C.F.R. § 430.5(f)(1). Such language means there is no date-certain deadline and DOE instead retains discretion over timing.

Indeed, in formulating the error correction regulations, DOE explicitly rejected a request by commenters (including plaintiff NRDC) to provide "a more definitive statement regarding when [a] corrected rule will be submitted for publication in the Federal Register." 81 Fed. Reg. at 57,750. The commenters asserted that the phrase "absent extenuating circumstances" "creates an ambiguity" with respect to timing and requested that DOE "drop this phrase or specify exactly how much time" DOE would take to submit final rules for publication. 81 Fed. Reg. at 57,750. DOE rejected this proposal, explaining that the lack of a specific deadline is necessary to provide the agency "flexibility" and to "ensure that [it] has sufficient time to thoroughly review" correction requests and "make any necessary corrections." 81 Fed. Reg. 57,750. The "flexibility" provided by the regulations is the epitome of discretion. Because the regulations do

not mandate that DOE act by a date-certain deadline, they do not impose a nondiscretionary duty that is enforceable under § 6305(a)(2).

C. The Error Correction Regulations Do Not Eliminate DOE's Broad Discretion To Continue To Evaluate Posted Draft Rules Before Publication

Even if the error correction regulations imposed a date-certain deadline (and they do not), nothing in the regulations eliminates DOE's free-standing authority and discretion to continue to assess, modify, or withdraw draft rules that the agency has contemplated before those rules are published as final rules in the Federal Register. The error correction regulations are intended to reduce the likelihood that DOE will publish as final rules energy conservation standards that contain typographical, calculation, or other errors, which the agency then may be unable to correct because of EPCA's anti-backsliding provision. *See* 81 Fed. Reg. at 26,999. By establishing a procedure to address this particular problem, DOE did not relinquish or limit its separate—and broad—authority and discretion to continue to evaluate rules before they are published in the Federal Register. *Cf. Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980) ("At the point of publication of the proposed rule the agency is, of course, not bound to the issuance of the rule in any exact form. It could (1) scuttle the whole proposal; (2) before adoption, modify the rule in light of comments and agency reconsideration . . . ; or (3) adopt the rule in the exact terms of the proposal."); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994) (observing that an agency cannot be "force[d] . . . to adopt a new regulation that it withdrew from publication for the specific purpose of determining whether or not it should be adopted").

During the rulemaking process for the error correction regulations, DOE rejected commenters' requests to transform the error correction process into a general reconsideration period whereby interested parties could express disagreement with DOE's policy choices or ask DOE to revisit substantive issues. *See* 81 Fed. Reg. at 57,749 (declining to "establish a general procedure, applicable to every standards rulemaking, *requiring* [DOE] to reconsider every aspect of the rulemaking documents") (emphasis added). DOE thus absolved itself of any obligation to consider correction requests that did not identify typographical, calculation, or other errors. *See* 10 C.F.R. § 430.5(d); 81 Fed. Reg. at 57,751. In doing so, however, DOE did not surrender its

own authority and discretion to continue to evaluate draft rules that it posts to its website in accordance with the error correction procedure before those rules are finalized by publication in the Federal Register. DOE explained that the error correction process exists "apart from the procedures already afforded by EPCA and the APA" for setting energy conservation standards. 81 Fed. Reg. at 57,753. And the error correction regulations themselves make clear that, "[u]ntil an energy conservation standard has been published in the Federal Register, [DOE] may correct such standard, consistent with the [APA]." 10 C.F.R. § 430.5(g). Although DOE noted during the rulemaking that it "would *generally* adhere to the policy decisions it [had] already made" when a draft rule was posted to its website, DOE did not foreclose the possibility that it would change its mind—whether in response to requests for correction or on the agency's own initiative because of changed circumstances, new priorities, or otherwise. 81 Fed. Reg. at 57,749 (emphasis added). Indeed, DOE stressed that the administrative record would not be closed upon the posting of a draft rule. *See* 81 Fed. Reg. at 57,751.

In *NRDC v. Abraham*, the Second Circuit observed that "[t]hroughout [EPCA], *publication* of final rules amending efficiency standards is used as the relevant act for purposes of circumscribing DOE's discretion to conduct rulemakings." 355 F.3d at 195. Nothing in the error correction regulations is intended to restrict DOE's discretion before publication in the Federal Register. *But see* 81 Fed. Reg. at 57,754 (reserving question of whether EPCA's anti-backsliding provision prevents DOE from reconsidering standards rules after publication). It is undisputed that the posted draft rules have not been published in the Federal Register, and thus, DOE retains discretion to continue to evaluate them.

Further, even if there were some ambiguity about whether the error correction regulations impose a nondiscretionary duty on DOE to submit the posted draft rules for publication in the Federal Register, that ambiguity must be resolved in favor of DOE for two independent reasons. First, DOE's interpretation of its own regulations is entitled to deference. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (Courts "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is plainly erroneous or inconsistent with the regulation."); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). Second,

because EPCA's citizen suit provision waives the Government's sovereign immunity, its reference to "nondiscretionary" duties must be construed narrowly to encompass only "clear-cut," *Sierra Club*, 828 F.2d at 791, and "mandatory" duties, *Kennecott Copper*, 572 F.2d at 1355. The error correction regulations do not impose a clear-cut and mandatory duty that requires DOE to relinquish its separate, broad authority and discretion to continue to assess, modify, or withdraw draft rules before they are published as final rules in the Federal Register. Therefore, the Court lacks jurisdiction over plaintiffs' first claim.

II. THE COURT SHOULD DISMISS PLAINTIFFS' SECOND AND THIRD CLAIMS

In their second and third claims, plaintiffs allege that DOE "adopted" energy conservation standards rules for the four products and equipment at issue when it posted draft rules on the agency's website pursuant to the error correction regulations. *See* Compl. ¶¶ 119-26. Plaintiffs' second claim asserts that a provision of FOIA, 5 U.S.C. § 552(a)(1)(D)[3], requires DOE to publish these purportedly "adopted" rules in the Federal Register. *See id*. ¶¶ 119-121. And plaintiffs' third claim asserts that the Federal Records Act ("FRA") similarly requires publication in the Federal Register because, in plaintiffs' view, the rules are required "to be published by Act of Congress," *i.e.*, FOIA, 44 U.S.C. § 1505(a)(3). *See id*. ¶¶ 123-26.

Plaintiffs' second and third claims, thus, both hinge on plaintiffs' incorrect contention that any draft standards rule that DOE posts to its website pursuant to the error correction process has been "adopted" by DOE as a "substantive rule[] of general applicability" within the meaning of FOIA. 5 U.S.C. § 552(a)(1)(D). That interpretation is untenable. The language of the posted draft rules themselves, as well as the error correction regulations, make clear that posted draft rules have not been adopted as final, binding rules by DOE. Instead, DOE only adopts an energy conservation standard when a final rule is published in the Federal Register. Plaintiffs' attempt to use FOIA, and correspondingly the FRA, to force DOE to promulgate rules that it has not yet decided whether to adopt should be rejected.

[3] Section 552(a)(1)(D) states, in part, that "[e]ach agency shall . . . currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law."

DOE did not "adopt[]" "substantive rules of general applicability" within the meaning of FOIA when it posted pre-publication drafts of the standards rules to its website for error correction. 5 U.S.C. § 552(a)(1)(D). The plain language of the posted draft rules demonstrates that they have not been adopted by DOE as binding rules. The posted draft rules contain an explicit disclaimer, stating that "[t]he text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5" and "DOE may make any necessary corrections in the regulatory text submitted to the Office of the Federal Register for publication." 10 C.F.R. § 430.5(c)(3). Moreover, the posted draft rules contain no effective date. Instead, they state that "[t]he effective date of this rule is **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**." *See supra* p. 6 & note 1.

The error correction regulations also make clear that pre-publication rules that DOE posts to its website have not been adopted as substantive rules of general applicability by the agency. The regulations explicitly authorize DOE to modify a posted draft rule in response to correction requests or on the agency's own initiative. *See* 10 C.F.R. § 430.5(e), (g). And the regulations make clear that, "[u]ntil an energy conservation standard has been published in the Federal Register, [DOE] may correct such standard, consistent with the [APA]." *Id*. § 430.5(g). In addition, the regulations specify that a standards rule is not considered "prescribed" for purposes of obtaining judicial review under 42 U.S.C. § 6306 until "the date when the rule is published in the Federal Register." *Id*. § 430.5(h). Indeed, plaintiffs' decision to bring this action in district court is a tacit acknowledgement that DOE has not adopted the posted draft rules; if DOE had in fact adopted those rules, jurisdiction to review them would exist only in the court of appeals. *See* 42 U.S.C. §§ 6306(b)(1), 6316(a).

DOE noted during the error correction rulemaking process that it "would generally adhere to the policy decisions it [had] already made" when a draft rule was posted, 81 Fed. Reg. at 57,749, but DOE did not state that the posting of a draft rule for error correction means that the rule has been "adopted" by the agency as a "substantive rule[] of general applicability," 5 U.S.C. § 552(a)(1)(D). To the contrary, to "generally adhere" implies exceptions—where the agency will change course after posting a draft rule. 81 Fed. Reg. at 57,749. In fact, DOE made

clear that the administrative record is not closed upon the posting of a draft rule. *See* 81 Fed. Reg. at 57,751. For these reasons, a draft rule that is posted to DOE's website pursuant to the error correction regulations has not been adopted as a substantive rule of general applicability.

Plaintiffs' effort to use FOIA to force DOE to publish in the Federal Register a draft rule that the agency does not understand to be binding law turns FOIA's publication requirement on its head. The requirement is intended to protect the public against enforcement of unpublished rules of which it has no knowledge, not to compel agencies to promulgate (and enforce) rules before the agency has completed its decision-making process. Section 552(a)(1) states that it is "for the guidance of the public." And, after setting forth the publication requirement, § 552(a)(1) provides that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published," "[e]xcept to the extent that a person has actual and timely notice of the terms thereof." Numerous courts have applied this provision to protect regulated entities from the demands of unpublished rules. *See, e.g.*, *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981). But the Government is not aware of any instance in which it was used to force an agency to publish a rule that the agency has not yet decided whether to adopt and that the agency does not intend to bind regulated entities. To the contrary, § 552(a)(1)'s provision of a remedy for persons "adversely affected by" a rule only has meaning if an agency is actually seeking to enforce the rule.

Cases addressing § 552(a)(1) confirm this limited purpose and further demonstrate that the posted draft rules have not been "adopted" by DOE within the meaning of FOIA. In *Alcaraz v. Block*, 746 F.2d 593, 609 (9th Cir. 1984), the Ninth Circuit held that § 552(a)(1)(D) "protects only against the enforcement of unpublished regulations, not against administrative tardiness." Because the plaintiffs did "not allege the existence of any unpublished regulations with which they [were] being forced to comply," the court affirmed the dismissal of their FOIA claim. *Id*. at 610; *see also City of Santa Clara v. Andrus*, 572 F.2d 660, 675 (9th Cir. 1978) (rejecting proposition that § 552 "requires an agency to formulate and adopt rules").

In addition, in a series of cases from the 1990s, multiple courts held that a rule that was signed, dated, and sent to the Federal Register, but was withdrawn prior to publication, was not

effective and that courts could not compel its publication under FOIA. On January 22, 1993, the Attorney General signed, dated, and submitted to the Federal Register for publication a "Final Rule" regarding certain asylum claims. *See Si*, 864 F. Supp. at 402. That same day, following his inauguration, President Clinton directed the heads of government agencies to "withdraw from the Federal Register . . . all regulations that have not yet been published" so that his newly appointed agency heads would "have an opportunity to review and approve new regulations." *Id*. at 403. Pursuant to this directive, the Acting Assistant Attorney General withdrew the "Final Rule" and it was never published. *Id*. Numerous individuals brought suit seeking to compel the Government to comply with the "Final Rule." Courts, however, repeatedly rejected the claims.

In *Si*, for example, the district court determined there was no authority to support the plaintiffs' theory that "an agency is bound to follow a rule that it has never before followed and that it in fact withdrew from publication, and thereby affirmatively decided not to adopt." *Id*. at 404. "The purpose of the FOIA," the court noted, "is to ensure that all persons who may be affected by a particular regulation have notice of its provisions." *Id*. at 404-05. "FOIA cannot be used to force an agency to adopt a new regulation that it withdrew from publication for the specific purpose of determining whether or not it should be adopted." *Id*. at 405; *see, e.g.*, *Wang v. Slattery*, 877 F. Supp. 133, 139 (S.D.N.Y. 1995); *Chen v. Slattery*, 862 F. Supp. 814, 822 (E.D.N.Y. 1994) ("The publication requirement of [FOIA] is intended to prevent an agency from enforcement of a rule without notice, not to bind an agency to rules never enforced."). *Cf. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1202-03 (D.C. Cir. 1996) (holding FOIA "does not authorize district courts to order publication of [] documents" in the Federal Register—in that case, a document signed by an official of the Bush Administration but withdrawn before publication by a Clinton Administration official).

DOE has not adopted final standards rules for the four products at issue here because it has not sent final rules to the Federal Register for publication. Plaintiffs make much of the fact that the posted draft rules were signed by a DOE official and dated. *See, e.g.*, Compl. ¶¶ 3, 83. But that was also true in the cases discussed above. Indeed, in those cases, the agency actually sent final rules to the Federal Register before withdrawing them prior to publication. If the

signed, dated, and sent-for-publication rules in those cases were not "adopted" by the agency as "substantive rules of general applicability" then, *a fortiori*, neither could rules that have not even been sent to the Federal Register. Furthermore, if signing and dating are the key events, as plaintiffs suggest, then the posted draft rules were "adopted" by DOE, and thus required to be published in the Federal Register, even before the error correction process began. Such an understanding cannot withstand scrutiny—it would completely undermine the rationale for the error correction process and would force DOE to publish posted draft rules even where it discovered significant legal or technical errors in them during the error correction process.

Finally, even if there were some ambiguity about whether the posted draft rules have been adopted by DOE within the meaning of FOIA, plaintiffs' claims still would fail. Both claims are brought under § 706(1) of the APA, which authorizes a court to compel agency action unlawfully withheld or unreasonably delayed.[4] *See* Compl. ¶¶ 121, 126. As with EPCA's citizen suit provision, § 706(1) can only be used to compel nondiscretionary duties that are "demanded by law," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-65 (2004), and "clear and indisputable," *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899). For all the reasons explained above, it is not clear and indisputable that FOIA requires DOE to publish the posted draft rules in the Federal Register. Thus, plaintiffs' second claim should be dismissed. And, because plaintiffs' third claim (the FRA claim) hinges on plaintiffs' allegation that FOIA requires publication, it too fails. *See White v. Bowen*, 636 F. Supp. 1235, 1241 (S.D.N.Y. 1986).

III. THE COURT SHOULD DISMISS PLAINTIFFS' FOURTH CLAIM

Plaintiffs' fourth claim seeks to compel DOE to promulgate a final rule setting energy conservation standards for UPSs under § 6305(a)(3) of EPCA's citizen suit provision. *See* Compl. ¶¶ 128-30. According to plaintiffs, 42 U.S.C. § 6295(u)(1)(E)(i)(II) imposes on DOE a nondiscretionary duty to promulgate such a rule by July 1, 2011. *See id*. This claim fails as well, because DOE has already complied with its obligation under § 6295(u)(1)(E)(i)(II).

[4] To the extent plaintiffs seek to bring their claims directly under FOIA or the FRA, the claims would fail for the additional reason that neither statute provides a cause of action or a waiver of sovereign immunity to compel publication. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-50 (1980); *Kennecott Utah Copper*, 88 F.3d at 1202-03.

Section 6295(u)(1)(E)(i)(II) provides that, "[n]ot later than July 1, 2011, the Secretary shall issue a final rule that prescribes energy conservation standards for battery chargers or classes of battery chargers or determine that no energy conservation standard is technically feasible and economically justified." DOE satisfied its obligation to issue such a rule on June 13, 2016 when it promulgated a final rule setting standards for seven classes of battery chargers. *See* 81 Fed. Reg. 38,266. Plaintiffs nevertheless contend that the June 2016 rule did not satisfy § 6295(u)(1)(E)(i)(II), because it did not include standards for UPSs, which DOE subsequently designated as a class of battery charger. In essence, plaintiffs read the statute to require DOE to issue a final rule that addresses *all* classes of battery chargers by the statutory deadline, even where the agency did not classify a product as a battery charger until after that date. That, however, is not what the statute says.

The statute permits DOE to issue a final rule that addresses "battery chargers or classes of battery chargers," 42 U.S.C. § 6295(u)(1)(E)(i)(II), and DOE exercised its discretion to do the latter. Plaintiffs ask the Court to add "all" before "classes of battery chargers," such that the statute requires DOE's final rule to address all conceivable classes of battery chargers. But it is well-established that courts cannot "read an absent word into [a] statute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (refusing to read "attorney" to refer to "debtors' attorney," as doing so would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted . . . may be included within its scope").

Plaintiffs' proposed interpretation also would lead to an absurd result. The definition of "battery charger" in EPCA does not explicitly encompass UPSs. *See* 42 U.S.C. § 6291(32). At the time DOE promulgated the June 2016 rule, DOE had not yet concluded that UPSs were a class of battery charger, and instead was considering whether to regulate UPSs as computer and battery backup systems. *See* 81 Fed. Reg. at 38,275. Although DOE subsequently concluded that UPSs were a class of battery charger in December 2016, plaintiffs' proposed interpretation would require the Court to conclude that Congress, in enacting § 6295(u)(1)(E)(i)(II), intended to require DOE to set standards for UPSs as battery chargers by a date that was more than five years before DOE even determined that UPSs were a class of battery charger. The Court should

not adopt such an illogical interpretation, particularly where, as here, it is not supported by the statute's plain language. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

Finally, even if there were some doubt as to whether the statute obligates DOE to address UPSs by July 1, 2011, DOE's interpretation that it does not is entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). EPCA's "regulatory scheme is highly detailed" and DOE has extensive and "specialized experience" interpreting and implementing it. *Mead Corp.*, 533 U.S. at 234-35. Under such circumstances, the Court should accord DOE's reasonable view considerable weight. *See id.* Because the statute does not impose on DOE a nondiscretionary duty to address UPSs by July 1, 2011, plaintiffs' fourth claim should be dismissed.[5]

CONCLUSION

For all of the foregoing reasons, the Court should dismiss these consolidated cases.

Dated: September 22, 2017

Respectfully submitted,

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[5] Even if the Court were to determine that § 6295(u)(1)(E)(i)(II) requires DOE to address UPSs by the statutory deadline, the Court still could not order the relief plaintiffs seek, *i.e.*, publication of the posted draft USPs rule. *See, e.g.*, *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000); *Envtl Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) (observing that, even where a court has authority to compel an agency to act, "the content of [the agency's subsequent] decision [is] within [the agency's] discretion"); 42 U.S.C. § 6295(u)(1)(E)(i)(II).

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Michelle R. Bennett
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