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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,

v.

Lead Case

Case No. 17-cv-03404-VC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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

RICK PERRY, *et al.*,

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and

AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

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INTRODUCTION

Plaintiffs seek to force the U.S. Department of Energy ("DOE") to submit to the Federal Register for publication draft rules setting energy conservation standards for four products and equipment, despite the fact that DOE's decision-making process is still ongoing and the pre-publication draft rules do not create any binding legal obligations and are not intended to bind anyone. There is no basis in law for the extraordinary relief plaintiffs seek. The error correction regulations are not enforceable under 42 U.S.C. § 6305(a)(2) and, even if they were, do not impose on DOE a nondiscretionary duty to submit a final standards rule to the Federal Register for publication at the end of the error correction process. Moreover, neither the Freedom of Information Act ("FOIA") nor the Federal Records Act ("FRA") requires DOE to submit to the Federal Register posted draft rules that the agency has not yet decided to adopt and that are not intended to, and do not, bind regulated entities. Finally, 42 U.S.C. § 6295(u)(1)(E)(i)(II) does not require DOE to set energy conservation standards for uninterruptible power supplies ("UPSs") by July 1, 2011, which is more than five years before DOE even determined that UPSs are a class of battery charger. Plaintiffs' claims, therefore, should be dismissed and their summary judgment motions denied.

ARGUMENT

I. THE ERROR CORRECTION REGULATIONS DO NOT IMPOSE ON DOE A NONDISCRETIONARY DUTY TO PUBLISH THE POSTED DRAFT RULES IN THE FEDERAL REGISTER

As DOE showed in its opening brief, there are at least three independent reasons that plaintiffs' first claim fails. *See* Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mem.") at 8-14 (ECF No. 46). First, 42 U.S.C. § 6305(a)(2) does not authorize suit 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. Third, the error correction regulations do not eliminate DOE's free-standing discretion to continue to assess, modify, or withdraw posted draft rules before they are finalized by publication in the Federal Register. Plaintiffs' opposition briefs do not demonstrate otherwise.

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

Plaintiffs' first claim fails at the threshold because 42 U.S.C. § 6305(a)(2) does not authorize suit to enforce duties imposed solely by regulation. *See* Defs.' Mem. at 9-10. Where Congress meant to authorize suit by citizens to enforce regulatory duties in EPCA, it said so. Section 6305(a)(1) of EPCA's 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*" (emphasis added). In contrast, in § 6305(a)(2), the provision plaintiffs invoke here, Congress omitted any reference to "rule[s]" and instead authorized a cause of action against any agency that "has a responsibility under this part" where the agency allegedly failed to "perform any act or duty *under this part* which is not discretionary" (emphasis added). The statute's reference to "this part" encompasses only statutory obligations, a limitation confirmed by the absence of any reference to regulatory or other authorities. The omission of "rule[s]" in § 6305(a)(2)—particularly when contrasted with its explicit inclusion in the immediately preceding paragraph—demonstrates that Congress did not intend § 6305(a)(2) to authorize suits seeking to enforce regulatory duties. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Plaintiffs argue that Congress used "under this part" throughout EPCA to encompass both statutes and regulations and that, when Congress intended to include only statutes, it used "of this part" or "in this part." *See* Citizen Pls.' Mem. in Supp. & in Opp'n to Defs.' and Def.-Intervenor's Mots. to Dismiss ("NRDC Mem.") at 13 (ECF No. 65); Government Pls.' Mem. of P. & A. in Supp. of Mot. for Summ. J. & in Opp'n to Defs.' and Def.-Intervenor's Mots. to Dismiss ("CA Mem.") at 10 (ECF No. 67). But, in all of the examples plaintiffs cite to support their theory, Congress included additional language to make clear that the provision is referring to rules. *See* NRDC Mem. at 13; CA Mem. at 10 n.5. For example, many of the provisions to which plaintiffs point (like § 6305(a)(1)) specifically include the term "rule," "rules," or "final rule." *See* 42 U.S.C § 6294(a)(1) ("rules under this section"); *id.* § 6295(n)(5)(B) ("final rule published under this part"); *id.* § 6302(a)(1) ("a rule under section 6294 of this title"); *id.* § 6302(a)(2) (same). Other examples are structured like § 6305(a)(1) in that they use additional language to make clear that both statutes and rules are included. *See* 42 U.S.C.

§ 6295(b)(3)(A)(ii)(I) ("any energy conservation standard *established in this section or prescribed, on or after January 1, 1990, under this section*" (emphasis added)); *id*. § 6302(a)(5) ("applicable energy conservation standard *established in or prescribed under this part*" (emphasis added)). If plaintiffs' argument were correct, Congress would have simply referred in these provisions (and in § 6305(a)(2)) to energy conservation standards "under this part" and that would have conveyed both statutory and regulatory standards. But Congress included additional language throughout the Act when it intended to encompass rules. Plaintiffs' remaining examples explicitly reference "the Secretary," leaving no doubt that they refer to regulatory action. *See* 42 U.S.C. § 6314(b) ("Before prescribing any final test procedures under this section, the Secretary shall . . ."); *id*. § 6317(c) ("In establishing any standard under this section, the Secretary shall . . ."). In contrast to all of plaintiffs' examples, § 6305(a)(2) of EPCA's citizen suit provision does not contain any additional language to indicate that "under this part" encompasses regulations.

Furthermore, plaintiffs' argument is premised on the theory that Congress never used "under" to denote statutory provisions only. *See* NRDC Mem. at 13; CA Mem. at 10 n.5. Putting aside the question whether this proposition can hold the weight that plaintiffs place upon it, Congress did use "under" in EPCA—including in its citizen suit provision—when it intended to refer only to the statute. Specifically, § 6305(c) permits the Secretary, if not already a party, to intervene in any "action *under this section*." 42 U.S.C. § 6305(c) (emphasis added). "[U]nder this section" clearly refers to a statutory provision, *i.e.*, § 6305. *Id*. Similarly, 42 U.S.C. § 6295(e)(6)(D)(1) requires the Secretary to "publish an analysis of the data collected *under* subparagraph (C)," and "under subparagraph (C)" plainly refers to a preceding statutory provision, *i.e.*, § 6295(e)(6)(C). 42 U.S.C. § 6295(e)(6)(D)(1) (emphasis added); *see also, e.g.*, 42 U.S.C. § 6295(c)(2)(A) (using "standards established *under* paragraph (1)" to refer to standards set forth in the statute (emphasis added)); *id*. § 6306(b)(5) (referring interchangeably to "procedures . . . under this part" and "procedures of this part").

Given the language of § 6305(a)(2) and the statutory context, it is at the very least a plausible reading of the Act that Congress did not intend § 6305(a)(2) to authorize suit against

the Government to enforce duties imposed solely by regulation. That should be the end of the matter; if a purported waiver of sovereign immunity is "susceptible" to two interpretations—one that would waive immunity in a given circumstance and one that would not—the Court must adopt the construction that does not result in a waiver of immunity. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34, 37 (1992); *see also Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004) ("courts should not read [an] ambiguous portion of [a] statute to find a waiver [of sovereign immunity]"). This principle does not derive, as plaintiffs suggest (NRDC Mem. at 14 n.3; CA Mem. at 10), from any obligation of the Court to defer to DOE's interpretation of the statute. Rather, it stems from the maxim that waivers of sovereign immunity must be "unequivocal[ly] express[ed]." *Nordic Vill.*, 503 U.S. at 37. Any "ambiguity as to whether" § 6305(a)(2) authorizes suit to enforce regulatory duties thus "must be resolved in favor" of the "plausible" interpretation that it does not. *Siddiqui*, 359 F.3d at 1204.

Plaintiffs' reliance on *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005) (NRDC Mem. at 14; CA Mem. at 10-11) is not persuasive because the Clean Air Act ("CAA") provision at issue in that case is not analogous to EPCA's citizen suit provision. First, the CAA does not contain a provision like § 6305(a)(1) that refers to a "violation of any provision of this part *or any rule* under this part" and suggests that, if Congress had intended to authorize enforcement of rules, it would have said so using similar language. 42 U.S.C. § 6305(a)(1) (emphasis added). The preceding paragraph of the CAA's citizen suit provision instead refers to violations of "an emission standard or limitation under this chapter," and the citizen suit provision explicitly defines that full phrase (including "under this chapter") to cover certain regulatory enactments. *See Leavitt*, 355 F. Supp. 2d at 556 (citing 42 U.S.C. § 7604(f)). Thus, it is arguably not unreasonable to understand "under this chapter" in the next paragraph of the CAA's citizen suit provision to also include regulatory duties. EPCA, in contrast, does not define what "under this part" means in the context of its citizen suit provision or otherwise. And, as explained above, § 6305(a)(1) (along with other provisions of EPCA) shows that, when Congress clearly intended to include regulations, it said so by explicitly referring to "rules under this part" (or by the use of similar language). The district court in *Leavitt* also relied on the fact that, in the CAA, when

Congress intended to limit the definition of a term to only the statute itself, it used the phrase "*in* this chapter," rather than "under this chapter." 355 F. Supp. 2d at 556-57. In EPCA, however, as explained above, Congress also used "under" to refer only to the statute. Even if *Leavitt* were binding on this Court (which it is not), it is therefore inapposite.[1]

Because § 6305(a)(2) does not authorize suit to enforce any duties purportedly imposed by the error correction regulations, plaintiffs' first claim should be dismissed.

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), plaintiffs' claim still fails because the error correction regulations do not impose a date-certain deadline on DOE. A provision "must 'categorically mandat[e]' that all specified action be taken by a date-certain deadline" in order to impose a nondiscretionary duty. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (emphasis omitted). The error correction regulations do not impose a date-certain deadline that deprives DOE of all discretion over the timing of its work. *See* 10 C.F.R. § 430.5(f)(1) (DOE "will submit the rule for publication"); *id*. § 430.5(f)(2) (DOE "will in due course submit" the rule for publication); *id*. § 430.5(f)(3) (DOE "will, *absent extenuating circumstances*, submit a corrected rule for publication . . . within 30 days" (emphasis added)). DOE thus cannot be compelled to publish final standards rules in any particular time period.

Plaintiffs contend that a date-certain deadline is not a necessary precondition for a nondiscretionary duty and, even if it is, the error correction regulations impose such a deadline. Neither argument has merit.

1. A Date-Certain Deadline Is A Necessary Precondition For A Nondiscretionary Duty

Plaintiffs note that the Ninth Circuit has not yet addressed whether a date-certain deadline

[1] Plaintiffs also cite *Dine Care v. EPA*, 2013 WL 6327530 (N.D. Cal. Dec. 3, 2013). *See* NRDC Mem. at 14; CA Mem. at 11. But that case addressed (in a footnote and without analysis) whether regulatory duties can ever be nondiscretionary, not whether they can be enforced under the CAA's citizen suit provision. *See Dine Care*, 2013 WL 6327530, at *2 n.1. In any event, the purported meaning of the CAA's citizen suit provision does not control EPCA for the reasons explained above.

is necessary to impose a nondiscretionary duty. *See* NRDC Mem. at 15; CA Mem. at 11. But other courts of appeals that have addressed the issue have held that a statute does not create a nondiscretionary duty enforceable in a citizen suit unless the statute requires an agency to take an action by a date-certain deadline. *See Nat. Res. Def. Council, Inc. v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989); *State of Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *Sierra Club*, 828 F.2d at 791. The reasoning of these cases is compelling. Without a date-certain deadline in the statute, "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[] mandate[e]' that deprives [the agency] of all discretion over the timing of its work." *Sierra Club*, 828 F.2d at 791. The absence of specific deadlines in a statute instead suggests that Congress intended the agency to decide how best to juggle "competing demands upon [its] time and resources." *Id*.

Although the Ninth Circuit has not explicitly addressed this issue, it has endorsed the distinction on which the date-certain deadline requirement is based. In *Center for Biological Diversity v. Norton*, 254 F.3d 833 (9th Cir. 2001), the court discussed a 1982 amendment to the Endangered Species Act ("ESA") in which Congress had replaced a provision requiring the Secretary of Interior to "conduct a review" of any species "upon the petition of an interested person," with a provision that required the Secretary to make certain findings "[w]ithin 12 months after receipt of [such a] petition." *Id*. at 838-40 & n.5. The court explained that, "[b]y imposing [] deadlines" in the amended version of the statute, Congress had "replace[d] the Secretary's discretion with mandatory, nondiscretionary duties." *Id*. at 840 (quoting from the ESA's legislative history). The Ninth Circuit thus recognized Congress's view that a statute without deadlines leaves an agency with discretion over the pace of its work, whereas the inclusion of deadlines can create nondiscretionary duties for the agency. *See id*.[2]

[2] Plaintiffs assert that § 6305(a)(2) of EPCA's citizen suit provision does not require a date-certain deadline because, unlike § 6305(a)(3), it does not refer to compliance with "schedules." NRDC Mem. at 15. As explained above, however, it is the requirement in § 6305(a)(2) that the "duty" not be "discretionary" that necessitates a date-certain deadline. *See, e.g.*, *Sierra Club*, 828 F.2d at 791.

Plaintiffs cite a few district court cases that have rejected the date-certain deadline requirement (NRDC Mem. at 16; CA Mem. at 12), but those cases are not controlling and, as noted above, other courts—including multiple appellate courts—have come out the other way. In any event, the statutory provision at issue in the cases plaintiffs cite is distinguishable from the error correction regulations. Plaintiffs' cases addressed a provision of the Clean Water Act ("CWA") that requires states to assess water quality standards every three years and, if a state fails to act timely, requires the Environmental Protection Agency ("EPA") to act in the state's stead. *See, e.g.*, *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1090-91 (E.D. Pa. 1996). The statute imposed date-certain deadlines for each step in the process of developing water quality standards and for each contingency, except the last contingency. *See id*. at 1091. In particular, EPA had 60 days to approve a state's proposed standard or 90 days to reject it. *See id*. If EPA did the latter, the state then had 90 days to adopt the changes proposed by EPA. *See id*. And if the state failed to meet this deadline, the statute provided that EPA should act in the state's place by "promptly prepar[ing] and publish[ing] proposed regulations setting forth a revised or new water quality standard." *Id*. Because Congress had imposed date-certain deadlines throughout the process and, in particular, for the adoption of standards by the state, the courts determined that the statute should be read to impose a similar deadline on EPA acting in the state's stead.[3] *See id*. at 1099; *Nw. Envtl. Advocates v. EPA*, 268 F. Supp. 2d 1255, 1260-61 (D. Or. 2003); *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 548-49 (W.D. Wash. 1997). *But see Defs. of Wildlife v. Browner*, 888 F. Supp. 1005, 1008-09 (D. Ariz. 1995) (holding same statute was not enforceable since Congress did not impose date-certain deadline).

Unlike the statute at issue in those cases, the error correction regulations are not a directive from Congress. Nor do they involve DOE acting in the place of anyone else who is subject to a nondiscretionary obligation. Also, in contrast to the structure of the CWA's water quality provisions, which suggested (to some courts at least) that Congress intended to impose a deadline on EPA, DOE explicitly declined to impose a date-certain deadline on itself when it

[3] The other case on which plaintiffs rely (NRDC Mem. at 16) involved a similar statutory scheme. *See Sierra Club v. Johnson*, 500 F. Supp. 2d 936, 940-41 (N.D. Ill. 2007).

issued the error correction regulations. During the rulemaking process for the error correction regulations, DOE rejected a proposal by commenters (including plaintiff NRDC) to provide "a more definitive statement" regarding timing by "specify[ing]" in the regulations "exactly how much time" DOE would take to submit final rules to the Federal Register for publication. 81 Fed. Reg. 57,745, 57,750 (Aug. 24, 2016). Given that DOE intentionally declined to impose a date-certain deadline on itself in favor of retaining its "flexibility," *id.*, the Court should not now hold that DOE is subject to any particular deadline for publishing final rules.

Indeed, the circumstances here are more like those in *Sierra Club v. Johnson*, 2009 WL 2413094 (N.D. Cal. 2009). *See* NRDC Mem. at 15; CA Mem. at 11. Although the court in *Johnson* declined to say that the absence of a date-certain deadline alone is dispositive, it nevertheless held that "the combination of" no date-certain deadline and the "legislative history" of the statute at issue demonstrated that the statute did not impose a nondiscretionary duty. 2009 WL 2413094, at *3. The legislative history showed that Congress had "rejected a proposed amendment to add a date-certain deadline" to the statute. *Id*. Because "Congress purposely gave the government discretion," the court refused to read the statute as imposing a mandatory duty. *Id*. The same reasoning applies here.[4]

2. The Error Correction Regulations Do Not Impose A Date-Certain Deadline On DOE

Plaintiffs assert, in the alternative, that the error correction regulations satisfy the date-certain deadline requirement because they impose on DOE a "readily-ascertainable deadline" (CA Mem. at 14) or a general "timeframe" (NRDC Mem. at 17) for action. Plaintiffs reason that

[4] The remaining cases on which plaintiffs rely (NRDC Mem. at 15; CA Mem. at 11-13) are inapposite. *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991) considered whether an argument was "not frivolous" for purposes of awarding attorney's fees. The court did not address the date-certain deadline requirement and specifically noted that, if the case had not settled, "[i]t is . . . possible . . . that the [agency] would have been vindicated in its position that it had not violated any mandatory duty." *Id*. at 721. *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2015) did not involve a citizen suit provision and also did not address whether a date-certain deadline is a necessary precondition for a nondiscretionary duty. And, in *NRDC v. EPA*, 437 F. Supp. 2d 1137, 1160-61 (C.D. Cal. 2006), the court "did not rule" on the necessity of a date-certain deadline because the statute at issue imposed such a deadline.

§ 430.5(f)(3) requires DOE to submit final rules for publication within 30 days and a shorter deadline can be inferred for §§ 430.5(f)(1) and (f)(2) because, "[n]aturally, it will take DOE longer to correct a rule than to publish a rule when no corrections are necessary." NRDC Mem. at 17; *see* CA Mem. at 14. Plaintiffs' argument is wrong for several reasons.

First, plaintiffs' premise—that § 430.5(f)(3) imposes a date-certain deadline—is incorrect. The 30-day time period in § 430.5(f)(3) is expressly limited by the phrase "absent extenuating circumstances," which DOE purposefully included to provide the agency leeway regarding timing. 10 C.F.R. § 430.5(f)(3); *see* 81 Fed. Reg. at 57,750; *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulations is controlling "unless it is plainly erroneous or inconsistent with the regulation").[5]

Second, plaintiffs' leap from their premise is not justified. Section 430.5(f)(3) does not create any sort of "outer bound" on timing that governs §§ 430.5(f)(1) and (f)(2). NRDC Mem. at 17. DOE knows how to create a date-certain deadline when it intends to, as it did in providing that error correction requests "must be submitted within 45 calendar days of the posting" of a draft standards rule to DOE's website. 10 C.F.R. § 430.5(d)(1); *see Russello*, 464 U.S. at 23. But DOE did not include any such language in § 430.5(f)(1) or (f)(2). Section 430.5(f)(1) does not reference timing at all and § 430.5(f)(2) uses the phrase "in due course." Far from imposing a date-certain deadline, "in due course" means "at the appropriate time." NEW OXFORD AMERICAN DICTIONARY 536 (3rd ed. 2010); s*ee* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 419 (4th ed. 2000) ("At the proper or right time.").

Finally, plaintiffs misunderstand the meaning of a "readily-ascertainable" deadline. A deadline is readily ascertainable if it is set "by reference to some other fixed date or event." *Sierra Club*, 828 F.2d at 790. For example, a statute that requires action "within one year from

[5] Plaintiffs' reliance on *Norton Construction Co. v. U.S. Army Corps of Engineers*, 2006 WL 3526789 (N.D. Ohio Dec. 6, 2006) (NRDC Mem. at 18; CA Mem. at 14 n.9), is not persuasive. The "exception" to the deadline in that case involved a question of law that the court was asked to resolve, *i.e.*, whether agency action on the permit application was "precluded as a matter of law or procedures required by law." *Id*. at *8. In contrast, the "absent extenuating circumstances" qualifier in § 430.5(f)(3) is intended to provide DOE with discretion and flexibility to make its own determination whether such circumstances exist.

October 18, 1972" contains a readily-ascertainable deadline. *Id*. at 790 n.55. The actual deadline (October 18, 1973) is not explicit, but it can be readily ascertained from a fixed date in the statute (October 19, 1972). Plaintiffs, on the other hand, ask the Court to infer a deadline from the overall structure of the error correction regulations. Such inferences do not amount to date-certain deadlines. *See id*. at 791; *Defs. of Wildlife*, 888 F. Supp. at 1008.

Because the error correction 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).[6]

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), plaintiffs' first claim still fails for yet another reason: the error correction regulations do not require DOE to publish in the Federal Register as final rules all pre-publication drafts that the agency posts to its website pursuant to the error correction process. Instead, DOE retains its 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 validity of plaintiffs' first claim turns on the meaning of the error correction regulations, and DOE's interpretation of its own regulations is entitled to "*controlling* weight" "unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson*, 512 U.S. at 512 (emphasis added); *see Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (noting deference is accorded even where an agency's interpretation is "advanced in a legal brief"); *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997). Plaintiffs would read the error correction regulations to give DOE only two options at the end of the correction request period: submit the posted draft rule to the Federal Register for publication or submit a corrected version of the draft rule to the

[6] Even assuming *arguendo* that § 430.5(f)(3) imposes a date-certain deadline, that provision only applies where DOE has received a properly filed correction request and determines that a correction is necessary. *See* 10 C.F.R. § 430.5(f)(3). Thus, § 430.5(f)(3) does not even apply to the three products at issue for which DOE received no correction requests. *See* Compl. ¶ 5. And the provision would apply to the fourth product—commercial packaged boilers—only if DOE determines that a correction is warranted.

Federal Register for publication. *See* NRDC Mem. at 6; CA Mem. at 7-8. But that is not the best or only reading of the regulations. Plaintiffs' argument ignores the broader rulemaking context in which the error correction process operates as part of DOE's inherent discretion to continue to assess, modify, or withdraw draft rules before taking final agency action.

EPCA authorizes DOE to "issue such rules as [it] deems necessary to carry out the provisions of [the statute]," including rules that prescribe energy conservation standards. 42 U.S.C. § 6298; *see also id*. § 6295(a). The error correction regulations address only one component of DOE's general rulemaking process. They are not intended to supplant that process or to curtail the broad discretion the agency enjoys throughout that process. Indeed, as explained in the preamble to the error correction rule, "DOE developed the error correction rule to invite public input on a *narrow* but challenging category of problems." 81 Fed. Reg. at 57,753 (emphasis added). DOE intended the error correction process to be "an *additional* limited administrative process *apart from the procedures already afforded by EPCA and the APA*." *Id*. (emphasis added).

The narrow problem DOE addressed through the error correction regulations involves the risk of technical errors in rulemaking, and the concern that correction of those errors after publication would be complicated by EPCA's "anti-backsliding" provision, 42 U.S.C. § 6295(o)(1), which prohibits DOE from diminishing the stringency of an energy conservation standard. In *NRDC v. Abraham*, 355 F.3d 179, 196 (2d Cir. 2004), the Second Circuit held that publication of a standards rule in the Federal Register is the "triggering event for the operation of [the anti-backsliding provision]." The Second Circuit reasoned 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."[7] 355 F.3d at 195.

DOE thus created the error correction process to "offer an additional administrative process to stakeholders" to reduce the risk that DOE would publish in the Federal Register final rules containing errors that potentially could not be corrected because of the anti-backsliding provision. 81 Fed. Reg. at 57,755. By providing this additional opportunity for public input,

[7] DOE takes no position on whether *Abraham* was correctly decided.

DOE did not eliminate or restrict its own authority and discretion (under EPCA and the APA) 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. *Cf. Rowell v. Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994).

Plaintiffs' claim is premised on their unfounded assumption that the error correction regulations reflect an intent by DOE to further "circumscribe[] [its own] discretion" by making the posting of a draft rule on DOE's website for error correction, instead of publication of a final rule in the Federal Register, the triggering event for operation of EPCA's anti-backsliding provision. *Abraham*, 355 F.3d at 195. But the regulations say no such thing, and DOE did not intend to forfeit its own discretion. Indeed, the very purpose of the regulations—the need to allow for error correction before the anti-backsliding provision takes effect—is contrary to plaintiffs' assumption. Moreover, the preamble to the error correction rule clearly explains that DOE interprets the anti-backsliding provision to be *inapplicable* prior to publication of a final rule in the Federal Register. *See, e.g.*, 81 Fed. Reg. at 57,748, 57,754 & n.5 (declining to opine on whether the anti-backsliding provision is triggered by publication in the Federal Register or some later event). And nothing in EPCA itself would support the idea that the anti-backsliding requirement could be triggered before a regulation is published in the Federal Register.

DOE has acknowledged that, in many circumstances, a draft rule posted to the agency's website for error correction may be finalized by publication in the Federal Register within a short period of time. *See* NRDC Mem. at 8-9; CA Mem. at 8-9. But DOE's recognition of that anticipated outcome does not mean that DOE has forfeited its own discretion to reach a different result, or to continue to assess posted draft rules, when the agency determines it is appropriate to do so. *See, e.g.*, 81 Fed. Reg. at 57,749 (explaining that DOE "would *generally* adhere to the policy decisions it [had] already made" when a draft rule was posted (emphasis added)); *id*. at 57,751 (stating that the administrative record is not closed upon the posting of a draft rule).[8]

[8] Plaintiffs erroneously assert that some of DOE's statements construing the error correction regulations are not persuasive because they were made in response to commenters' questions or

Likewise, the fact that DOE placed constraints on the timing and content of error correction requests submitted by stakeholders (NRDC Mem. at 10-11; CA Mem. at 15) does not mean that DOE placed similar constraints on itself. DOE rejected commenters' requests to transform the error correction process into a general reconsideration period in order to absolve itself of any commitment to consider correction requests that did not comply with the regulations' requirements; but, by doing so, DOE did not in any way eliminate its own authority to continue considering or to reconsider posted draft rules. *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)); *id*. at 57,751 ("DOE is only obligated to consider [correction requests]" if they comply with the regulations); *id*. at 57,753 (rejecting mandatory reconsideration period because DOE did not want to "commit[]" to it in every circumstance). Nothing about DOE's regulation of external involvement in the error correction process limits DOE's own internal processes or decision-making.

Plaintiffs erroneously contend that the error correction regulations leave DOE with only a "finite 'range of options'" and that the use of "will" in §§ 430.5(f)(1)-(3) means one of those options is mandatory. NRDC Mem. at 7-9; *see* CA Mem. at 7-8. Unlike a provision of law requiring action by another person, the agency's description of its own likely conduct in the future should not be read to constrain the agency's exercise of its discretionary authority. Moreover, terms such as "shall" or "will" do not necessarily create mandatory duties. "Particularly when used in a [provision] that prospectively affects government action," the use of the word "will" does not necessarily overcome the presumption that the agency retains discretion. *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001). The question whether "will" commands or merely authorizes is "determined by the objectives of the [regulation]." *Id*. Here, given the narrow purpose of the error correction regulations, §§ 430.5(f)(1)-(3) cannot be read to strip away DOE's discretion to continue to assess, modify, or withdraw draft rules before

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concerns about different issues. *See* NRDC Mem. at 11-12; CA Mem at 15 n.11. Regardless of what prompted DOE's statements, they represent DOE's interpretation of its own regulations, which is entitled to deference.

they are published as final rules in the Federal Register. Such a reading is particularly unwarranted because § 430.5(e), which also discusses DOE's options, uses the term "may." *Jama v. ICE*, 543 U.S. 335, 346 (2005) (explaining that "may" "customarily connotes discretion"); *see* 10 C.F.R. § 430.5(e) ("The Secretary *may* respond to a request for correction . . . or address an Error discovered on the Secretary's own initiative by submitting to the Office of the Federal Register either a corrected rule or the rule as previously posted." (emphasis added)).

Furthermore, the actions in §§ 430.5(f)(1)-(3) that DOE may take at the conclusion of the correction request period are not exclusive and the regulations do not say otherwise. Sections 430.5(f)(1)-(3) do not address a situation where DOE does not receive any properly filed correction requests but identifies a problem on its own that requires correction. Given that the regulations do not address that situation, there can be no question that they do not constrain DOE's actions when such a situation arises. Similarly, §§ 430.5(f)(1)-(3) do not address a situation in which DOE decides to withdraw a posted draft rule because of a significant problem with the rule or because of changed circumstances, new priorities, or other factors. Accordingly, the regulations do not constrain DOE's options under those circumstances.

Because DOE retains broad authority and discretion to continue to assess, modify, or withdraw posted draft rules, the Court cannot compel DOE to submit the posted draft rules to the Federal Register for publication. Plaintiffs' first claim thus should be dismissed.

II. NEITHER FOIA NOR THE FRA REQUIRE DOE TO PUBLISH THE POSTED DRAFT RULES IN THE FEDERAL REGISTER

Plaintiffs' second and third claims are meritless because draft standards rules that DOE posts to its website pursuant to the error correction process have not been "adopted" by the agency as "substantive rules of general applicability" within the meaning of FOIA, 5 U.S.C. § 552(a)(1)(D). *See* Defs.' Mem. at 14-18. The posted draft rules do not impose any legally binding obligations, they do not create any rights or responsibilities, and they have no legal significance. Nor does DOE intend posted draft rules to bind anyone. That intent is manifested by the explicit disclaimer included with posted draft rules, which states 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); *see also id.* § 430.5(g) ("Until an energy conservation standard has been published in the Federal Register, [DOE] may correct such standard, consistent with the [APA]."). DOE's intent that posted draft rules not bind regulated entities is further demonstrated by the absence of an effective date. Posted draft rules instead state that "[t]he effective date of this rule is **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**." *See* Defs.' Mem. at 6 & n.1. Because DOE has not "adopted" the four posted draft rules at issue in this case as "substantive rules of general applicability," 5 U.S.C. § 552(a)(1)(D), the Court cannot compel DOE to submit them to the Federal Register for publication pursuant to FOIA or the FRA.

The provision of FOIA on which plaintiffs rely is a shield. It protects the public from an agency's enforcement of unpublished rules of which the public has no knowledge. *See* Defs.' Mem. at 16. Yet plaintiffs seek to turn § 552(a)(1)(D) into a sword. They ask the Court to wield the provision to force DOE to impose binding obligations on regulated entities and the agency by publishing draft rules that the agency has not yet decided whether to adopt and that the agency does not intend to bind regulated entities. Plaintiffs' opposition briefs, however, do not identify a single case in which FOIA has been used in this manner. And plaintiffs fail to meaningfully distinguish the many cases DOE cited in its opening brief that have rejected this wrong-headed approach. *See* Defs.' Mem. at 16-17; *Alcaraz v. Block*, 746 F.2d 593, 609 (9th Cir. 1984) (noting that § 552(a)(1)(D) "protects only against the enforcement of unpublished regulations"); *Si*, 864 F. Supp. at 404-05 ("The purpose of [] FOIA is to ensure that all persons who may be affected by a particular regulation have notice of its provisions. [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."); *Chen v. Slattery*, 862 F. Supp. 814, 822 (E.D.N.Y. 1994) (FOIA's publication requirement "is intended to prevent an agency from enforcement of a rule without notice, not to bind an agency to rules never enforced.").[9]

[9] The only case plaintiffs cite to support their claims (CA Mem. at 18) is inapposite. *American Mining Congress v. Thomas*, 772 F.2d 640 (10th Cir. 1985) did not involve § 552(a)(1)(D) or

Plaintiffs erroneously assert that requiring publication in the Federal Register before a rule setting energy conservation standards will be deemed adopted is "tautological" and would render FOIA's publication requirement "meaningless." CA Mem. at 19; *see* NRDC Mem. at 23. This situation has arisen only because plaintiffs are attempting to turn FOIA's publication requirement on its head. In the usual case, an agency's "adoption" of an unpublished rule will be evidenced by the agency's expectation that regulated entities comply with the rule or by enforcement action the agency takes against those who do not comply. *See, e.g.*, *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981); *Appalachian Power Co. v. Train*, 566 F.2d 451, 457 (4th Cir. 1977). Here, there is no dispute that these indicia of "adoption" do not exist. No one is required to comply with draft rules that DOE posts to its website for error correction, and DOE does not (and cannot) enforce posted draft rules. Indeed, the error correction regulations make clear that compliance with an energy conservation standard is not required until "the specified compliance date as published in the relevant rule in the Federal Register." 10 C.F.R. § 430.5(f)(4); *see also id.* § 430.5(h) (a standards rule is not considered "prescribed" for purposes of obtaining judicial review until "the date when the rule is published in the Federal Register"). DOE therefore does not adopt standards rules as substantive rules of general applicability within the meaning of FOIA until final rules are published in the Federal Register.

Plaintiffs point to several reasons they believe that posted draft rules have been adopted by DOE as substantive rules of general applicability, but none are persuasive. First, the fact that the error correction regulations refer to pre-publication rules that DOE posts to its website pursuant to the error correction process as "rules," instead of "proposed rules" or "draft rules" (*see* NRDC Mem. at 20; CA Mem. at 20) is a non sequitur. DOE used the term "rule" in the regulations to distinguish rules, which are subject to the error correction process, from "documents such as general statements of policy, guidance documents, and interpretative guidelines," which are not. 81 Fed. Reg. 26,998, 27,001 (May 5, 2016). In other words, DOE

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even address the meaning of "adopted" as a "substantive rule[] of general applicability," 5 U.S.C. § 552(a)(1)(D). Instead, the court considered whether an agency had timely "promulgated" regulations where the agency intended the rules to be final and to bind regulated entities. *See Am. Mining*, 772 F.2d at 644-45. Those circumstances are not present here.

did not use the term "rule" in the error correction regulations to refer to a finalized statement of the agency with binding effect, but rather to the type of agency statements that are subject to notice-and-comment rulemaking. DOE's position is that posted draft rules are not "adopted rules" or "final rules," and the error correction regulations do not say otherwise. To the contrary, by requiring posted draft rules to contain an explicit disclaimer and by specifying that DOE may correct such rules at any time before they are published in the Federal Register, the error correction regulations make clear that posted draft rules are not adopted, final, or binding. *See* 10 C.F.R. §§ 430.5(c)(3), (g).

Second, the fact that the posted draft rules are signed by a DOE official, dated, and marked "final rule" after a disclaimer page (NRDC Mem. at 21-22; CA Mem. at 17, 20) is not dispositive. As DOE explained in its opening brief, courts have held that a rule that was signed, dated, and sent to the Federal Register, but withdrawn before publication, was not adopted by the agency as a substantive rule of general applicability within the meaning of FOIA. *See* Defs.' Mem. at 16-17 (citing cases). *A fortiori*, neither are DOE's posted draft rules, which have not been sent to the Federal Register for publication and, among other things, include a disclaimer making clear that they may change before publication.

Finally, DOE's statement that it expects to typically adhere to the "substantive analysis and decision-making" set forth in a posted draft rule if and when it sends a corresponding final rule to the Federal Register for publication (CA Mem. at 17-18) does not mean that the agency has adopted the posted draft rule as a substantive rule of general applicability within the meaning of FOIA. Concluding otherwise would negate entirely the purpose of the error correction process, which specifically contemplates that posted draft rules may change. *See* 10 C.F.R. § 430.5(g). Indeed, plaintiffs concede (as they must) that DOE need not submit for publication in the Federal Register a draft rule as posted and instead may submit a corrected version of the rule. *See* NRDC Mem. at 6; CA Mem. at 18. This concession is fatal to plaintiffs' FOIA and FRA claims. If posted draft rules were in fact "adopted" by DOE as "substantive rules of general applicability," then § 552(a)(1)(D) would require their publication in the form in which they were posted, not any corrected form. *See* 5 U.S.C. § 552(a)(1)(D). For the same reason,

plaintiffs' observation (NRDC Mem. at 22; CA Mem. at 20) that regulations issued by the Office of the Federal Register ("OFR") authorize an agency to "correct[]," or even "withdraw[] from publication," a rule after it has been submitted to the Federal Register but before publication only further confirms that DOE does not adopt energy conservation standards rules until they are published as final rules in the Federal Register. 1 C.F.R. § 18.13(a).[10]

Plaintiffs also erroneously assert that DOE stated in the preamble to the error correction rule that the agency has an obligation to publish in the Federal Register any draft rule that is posted to DOE's website for error correction. *See* NRDC Mem. at 21. DOE instead merely acknowledged that publication in the Federal Register is required once the agency decides to adopt a final rule, following the error correction process. *See* 81 Fed. Reg. at 27,001. Although DOE anticipates that, in many circumstances, adoption (and publication) of a final rule will occur shortly after the error correction process concludes, nothing in the preamble or in the error correction regulations themselves requires that result. Regardless, the preamble is not binding on DOE in any event. *See, e.g.*, *Eisai, Inc. v. FDA*, 134 F. Supp. 3d 384, 396 (D.D.C. 2015).

In sum, plaintiffs' second claim is inconsistent with the purpose of FOIA's publication requirement, the error correction regulations, and the text of the posted draft rules. The Court therefore should reject plaintiffs' novel theory that any pre-publication rule that DOE posts to its website for error correction has been "adopted" by the agency as a "substantive rule[] of general applicability" within the meaning of FOIA. 5 U.S.C. § 552(a)(1)(D). Moreover, 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. DOE WAS NOT REQUIRED TO ESTABLISH ENERGY CONSERVATION STANDARDS FOR UNINTERRUPTIBLE POWER SUPPLIES BY JULY 1, 2011

Plaintiffs' fourth claim fails because 42 U.S.C. § 6295(u)(1)(E)(i)(II) does not require DOE to establish energy conservation standards by July 1, 2011 for products (like UPSs) that, on that date, were not even classified as battery chargers. *See* Defs.' Mem. at 18-20.

[10] This OFR regulation also demonstrates that, contrary to plaintiffs' suggestion (NRDC Mem. at 23; CA Mem. at 20), the ultimate decision to adopt a final energy conservation standards rule is in DOE's control, not OFR's.

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." 42 U.S.C. § 6295(u)(1)(E)(i)(II). In their opposition briefs, plaintiffs do not dispute that the EPCA's definition of "battery charger" does not explicitly encompass UPSs. *See* Defs.' Mem. at 19 (citing 42 U.S.C. § 6291(32)). Nor do plaintiffs dispute that on July 1, 2011—the statutory deadline—DOE had not yet classified UPSs as battery chargers. *See* Defs.' Mem. at 20; CA Mem. at 22. Although plaintiffs claim that DOE "confirmed UPS[s] as a class of battery charger[]" in June 2016 when it issued final rules setting energy conservation standards for seven classes of battery chargers (CA Mem. at 22), the June 2016 rule actually makes clear that, at that time, DOE was still considering whether UPSs were a class of battery charger. *See* 81 Fed. Reg. 38,266, 38,275 (June 13, 2016) (explaining that "DOE . . . is *now considering* including UPSs within the scope of its battery charger regulations" (emphasis added)). DOE did not conclude that UPSs were a class of battery charger (as opposed to computer and battery backup systems, *see* 81 Fed. Reg. at 38,275) until December 2016. *See* 81 Fed. Reg. 89,806, 89,807, 89,811 (Dec. 12, 2016).

Given that UPSs were not classified as battery chargers on the statutory deadline (July 1, 2011) or nearly five years later (in June 2016) when DOE first set standards for certain classes of battery chargers, it would be absurd to conclude that § 6295(u)(1)(E)(i)(II) required DOE to issue final rules addressing UPSs by July 1, 2011. Congress does not set up agencies for certain failure by imposing deadlines with which it is impossible to comply. *See, e.g.*, *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996) ("Congress is presumed not to have intended absurd (impossible) results."). That, however, is exactly what plaintiffs' reading of § 6295(u)(1)(E)(i)(II) would require this Court to conclude that Congress intended.[11]

[11] Plaintiffs suggest that DOE intentionally or improperly "delayed" determining that UPSs are battery chargers. *See* NRDC Mem. at 25. But plaintiffs provide no support for this assertion and the rulemaking record demonstrates otherwise. *See, e.g.*, 81 Fed. Reg. 52,196, 52,203 (Aug. 5, 2016) (discussing history of rulemaking proceedings with respect to UPSs). Indeed, plaintiffs have never challenged DOE's prior classification decisions (or lack thereof) regarding UPSs.

Plaintiffs note that DOE has proposed energy conservation standards for UPSs and also has indicated that it would "continue to conduct rulemaking activities" with regard to UPSs. CA Mem. at 22-23. But DOE's acknowledgement that it has the *authority* under EPCA to propose (and establish) standards for UPSs does not mean that DOE is *required* to do so by the statutory deadline in § 6295(u)(1)(E)(i)(II). Indeed, none of the rulemaking documents to which plaintiffs point state that DOE believed it was required to address UPSs by July 1, 2011.

In addition, the rulemaking documents that plaintiffs cite do not contain any statement by DOE that it believed it was violating § 6295(u)(1)(E)(i)(II) by failing to more quickly address UPSs. The absence of such a statement shows that DOE's interpretation of § 6295(u)(1)(E)(i)(II) not to cover UPSs is not merely a litigating position. *See* CA Mem. at 23. DOE instead has been operating with this understanding for many years. Because of DOE's extensive and "specialized experience" interpreting and implementing EPCA's "highly detailed" regulatory scheme, DOE's interpretation of § 6295(u)(1)(E)(i)(II) is entitled to *Skidmore* deference. *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In any event, even without this deference, plaintiffs' § 6295(u)(1)(E)(i)(II) claim fails. That provision, by its plain terms, could not extend to all products that may conceivably be categorized as battery chargers. *See* Defs.' Mem. at 19. At the very least, it does not impose on DOE a nondiscretionary duty to promulgate a final rule setting energy conservation standards for UPSs by July 1, 2011, where DOE had already satisfied its statutory obligation by issuing a final rule for classes of battery chargers in June 2016. And at the time DOE did so, as well as on the statutory deadline of July 1, 2011, UPSs were not classified as battery chargers.[12]

CONCLUSION

For the foregoing reasons and those set forth in DOE's opening brief, the Court should dismiss these consolidated cases and deny plaintiffs' motions for summary judgment.

[12] Plaintiffs' opposition briefs do not dispute that, even if their fourth claim were meritorious (and it is not), the Court still could not order the relief plaintiffs seek, *i.e.*, publication of the posted draft UPSs rule. *See* Defs.' Mem. at 20 n.5.

Dated: December 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 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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