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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SIERRA CLUB; CONSUMER FEDERATION OF AMERICA; and TEXAS RATEPAYERS' ORGANIZATION TO SAVE ENERGY,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Secretary of the United States Department of Energy; and the UNITED STATES DEPARTMENT OF ENERGY,

Defendants,

and

Lead Case

Case No. 17-cv-03404-VC

Citizen Plaintiffs' Reply in Support of Motion for Summary Judgment

Date: January 18, 2018
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria
Courtroom: 2, 17th Floor

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AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

THE PEOPLE OF THE STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA, THE CALIFORNIA ENERGY COMMISSION, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, BY AND THROUGH ITS MINNESOTA DEPARTMENT OF COMMERCE AND MINNESOTA POLLUTION CONTROL AGENCY, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF VERMONT, STATE OF WASHINGTON, THE DISTRICT OF COLUMBIA, and CITY OF NEW YORK,

Plaintiffs,

v.

JAMES R. PERRY, AS SECRETARY OF UNITED STATES DEPARTMENT OF ENERGY, and THE UNITED STATES DEPARTMENT OF ENERGY,

Defendants,

and

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

Consolidated with

Case No. 17-cv-03406-VC

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Citizen Plaintiffs seek ordinary relief: to compel DOE to comply with its own binding regulations. The plain language of DOE's Error Correction Regulation mandates publication of the four Final Rules at issue, and the Government has failed either to explain away that language or to identify the source of DOE's supposed "free-standing" authority to disregard the regulation. This Court should enforce DOE's regulations and order the agency to publish the Final Rules.

ARGUMENT

I. The Error Correction Regulation requires DOE to publish the Final Rules

A. The Error Correction Regulation imposes nondiscretionary duties on DOE

1. The Error Correction Regulation is mandatory

By using mandatory language, the Error Correction Regulation makes clear that DOE must publish a final rule at the end of the error-correction process: "[DOE] *will* submit the rule for publication to the Office of the Federal Register as it was posted," "[DOE] *will* in due course submit the rule, as it was posted . . . , to the Office of the Federal Register for publication," or "[DOE] *will*, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days after the [45-day posting period] has elapsed." 10 C.F.R. § 430.5(f)(1)-(3) (emphases added). "Will" is a mandatory term. *See Fernandez v. United States*, 496 F. App'x 704, 705-06 (9th Cir. 2012) ("The language 'will dispose,'" in agencies' memorandum of understanding, "is unconditional and clearly mandatory."); *Navarette v. United States*, 500 F.3d 914, 918 (9th Cir. 2007) (directive in agency's safety plan that "[d]angerous terrain conditions, such as drop-offs, etc, will be properly marked or fenced" is "specific and mandatory").

The Government relies on a case holding that another mandatory term, "shall," can mean "may" when it appears in a provision authorizing an agency to enforce the law. Defs.' Reply Supp. Mot. to Dismiss & Opp. to Pls.' Mots. Summ. J. (DOE Opp.) 13 (citing *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001)). But the Ninth Circuit has clarified that that holding "was driven by 'the traditional presumption that an agency's refusal to investigate or enforce is within the agency's discretion.'" *United Cook Inlet Drift Ass'n v.*

Nat'l Marine Fisheries Serv., 837 F.3d 1055, 1064 (9th Cir. 2016). That presumption has no relevance here because this action does not implicate DOE's enforcement discretion. Instead, the "general rule" applies, *id.*, and "will" means "will."

That the Error Correction Regulation also uses the word "may" does not change this analysis. *See* DOE Opp. 14. The regulation states that DOE "may respond to [an error-correction request] or address an Error discovered [by DOE] by submitting to the Office of the Federal Register either a corrected rule or the rule as previously posted." 10 C.F.R. § 430.5(e). This provision shows that DOE has discretion to choose between two options: publish a corrected rule, or publish the rule as posted. *See also* 81 Fed. Reg. 26,998, 26,999 (May 5, 2016) (explaining DOE's "range of options": "submit the rule for publication in the Federal Register in the same form it was previously posted" or, if "DOE identifies an error in a rule," "correct the error"). Both options end in publication.

The very next provision describes DOE's limited options in more detail, using mandatory language to spell out precisely what DOE "will" do, depending on whether the agency receives error-correction requests or decides to make a correction. 10 C.F.R. § 430.5(f)(1)-(3). Again, in each case, DOE "will" publish a final rule. *Id.* Although the regulation does not clearly address a situation in which DOE receives no correction requests but discovers an error on its own, it strains credulity for the Government to imply that that omission gives DOE the authority to delay publication of any final rule indefinitely, or to decide never to publish it. *See* DOE Opp. 14. (And DOE has not asserted that any of the Final Rules contain errors.)

The Government's argument that DOE is free to take actions not mentioned by the regulation must fail, because the regulation specifies what actions DOE must take. The Ninth Circuit addressed a similar argument in *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764 (9th Cir. 2006). There, an agency's regulation provided that if a person failed to pay a penalty assessed by the agency, the "matter shall be referred" to the Department of Justice for collection in a civil suit. *Id.* at 778. The agency argued it could also refer the matter to an outside collection agency, because the regulation did not forbid that. The

court restated the agency's argument as follows: "a regulation or statute mandating that an agency 'shall' do *x* in fact means that it 'shall' do *x or y*, unless the statute or regulation explicitly states that it 'shall not' do *y*"—and rejected it as "patently absurd." *Id.* at 780. The Government's interpretation of the Error Correction Regulation fails for the same reason.

An agency's interpretation of its regulation "cannot be upheld if it is plainly erroneous or inconsistent with the regulation." *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (per curiam). The Error Correction Regulation is clearly mandatory, and the Court owes no deference to the Government's assertions to the contrary. *Sacks*, 466 F.3d at 781 (declining to defer to agency's interpretation of regulation as discretionary, where regulation used mandatory language); *Webber*, 158 F.3d at 461 (same).

2. DOE retains no "free-standing" authority to violate its regulations

The Government insists that DOE retains "free-standing" authority not to publish a final rule following the error-correction process, but it still has not identified the source of that authority. DOE Opp. 1, 10. The Government cites the provision of the Energy Policy and Conservation Act (EPCA) that authorizes DOE to issue rules to carry out the statute. *Id.* at 11 (citing 42 U.S.C. § 6298). That is the provision under which DOE issued the Error Correction Regulation, a duly promulgated regulation that binds the agency. The Government can point to no source of authority that allows DOE to violate its own rules.

The Government argues that the Error Correction Regulation addresses only a "narrow" aspect of rulemaking, and therefore does not "curtail the broad discretion that the agency enjoys" to do as it likes with a not-yet-published rule. *Id.* The problem with this argument is that the Error Correction Regulation addresses exactly the aspect of DOE's rulemaking that matters here: what actions DOE must take at the conclusion of the error-correction process. Even if the Government had pointed to sources of law generally giving it broad discretion over rulemaking, it is a "basic principle" of statutory and regulatory construction that "the specific prevails over the general." *Sacks*, 466 F.3d at 779.

Citizen Plaintiffs do not argue that DOE's posting of a final rule to start the error-correction process triggers the operation of EPCA's anti-backsliding provision. *See* DOE

1 Opp. 12. Obviously, the point of the error-correction process is to allow DOE to fix typos
2 or other mistakes in a final rule *before* the anti-backsliding provision kicks in. Instead, the
3 posting triggers DOE's duty under the Error Correction Regulation to publish the final
4 rule at the conclusion of that process, either as posted or as corrected. (Once the rule is
5 published, of course, the protections of the anti-backsliding provision apply—a result DOE
6 is avoiding by refusing to publish the Final Rules. *See Nat. Res. Def. Council v. Abraham*, 355
7 F.3d 179, 196 (2d Cir. 2004).)
8 The possibility that DOE might publish a rule that is later struck down in litigation
9 is not a special hazard of Citizen Plaintiffs' reading of the Error Correction Regulation, as
10 Intervenor AHRI suggests. Def.-Intervenor's Reply Supp. Mot. to Dismiss & Opp. to Pls.'
11 Mots. Summ. J. (AHRI Opp.) 1, 3 n.1. Instead, that possibility is a consequence of the
12 rulemaking process. The time for commenters to identify "serious flaws" in a rule is
13 during the comment period on the proposed rule, not during the error-correction process,
14 which happens later. The Error Correction Regulation makes clear that the sole purpose of
15 that process is to correct errors—defined as an "inconsisten[cy]" between what DOE
16 "intended" and what it wrote. 10 C.F.R. § 430.5(b). If AHRI thinks the final rule is flawed
17 or unlawful, it can challenge it in litigation, as is true for every other rulemaking.
18 Both the Government and AHRI continue to rely on an out-of-context quotation
19 from the Error Correction Regulation's preamble as evidence that DOE retained discretion
20 to revisit policy decisions during the error-correction process. DOE Opp. 12 (quoting
21 DOE's statement, made in the context of denying AHRI's request to turn the error-
22 correction process into a general reconsideration procedure, that DOE "would generally
23 adhere to the policy decisions it ha[d] already made," 81 Fed. Reg. 57,745, 57,749 (Aug. 24,
24 2016)); AHRI Opp. 4 n.2 (same). The Government even suggests that the context does not
25 matter because DOE still said the words. DOE Opp. 12-13 n.8. Yet the context makes plain
26 that the quoted statement does not refer to the error-correction process. *See* Citizen Pls.'
27 Mem. Supp. Mot. Summ. J. (Citizen MSJ) 11.
28 The Error Correction Regulation is mandatory, and DOE retains no "free-standing"

authority to violate it. DOE must publish the Final Rules.

B. Plaintiffs may bring this claim under EPCA's citizen suit provision

1. Section 6305(a)(2) authorizes suit to enforce regulatory duties

The Government seeks to insulate regulatory actions from the reach of EPCA's citizen suit provision, arguing that EPCA does not authorize this suit to enforce DOE's regulatory duties. DOE Opp. 2-5. Congress's inclusion of a citizen suit provision in EPCA is an indication of the priority the Legislature placed on enforcement of the law, including against DOE. *See* 42 U.S.C. § 6305(a)(2), (3). The Government wants to limit the efficacy of that provision by preventing it from applying to any actions mandated by the regulations DOE has issued to carry out EPCA, of which the Error Correction Regulation is only one. *See, e.g.*, 10 C.F.R. § 430.27(h) (requiring DOE to take certain actions after issuing interim waiver to manufacturer); *id.* § 430.53(b) (prescribing time for DOE to process petition for small business exemption). The Government does not explain why Congress would undercut the purpose of the citizen suit provision by blunting its force in this way, let alone why Congress would do so indirectly and not explicitly.

The text of the statute demonstrates that Congress did not choose to exclude regulatory actions. The citizen suit provision authorizes anyone to bring a civil action against "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." *Id.* § 6305(a)(2) (emphasis added). The Government has moved the goalposts: in its opening brief, it said the phrase "under this part" referred to duties imposed by the statute, not by DOE's regulations. Defs.' Mot. to Dismiss 9. Now it says that when "under this part" or "under this section" appears in EPCA, it refers only to the statute *unless* "additional language," such as "rule" or "the Secretary," is nearby. DOE Opp. 2-3. The Government is inventing interpretive rules to produce its desired result.

The logical and consistent reading of "under this part" or "under this section" is that the phrase refers both to the relevant statutory provisions encompassed by the part or section, and to any pertinent rules issued under the part or section. "Under this part"

includes rules because provisions of the part authorize DOE to issue rules, *e.g.*, 42 U.S.C. § 6298, and DOE has issued rules under the part, including the Error Correction Regulation. "Under this section" includes rules if DOE is authorized to issue rules under the section in question, *e.g.*, *id.* § 6295; otherwise, it does not. And, of course, "under this part" or "under this section" refers only to statutory or regulatory provisions that are relevant to the context in which "under this part" or "under this section" is used. Thus, in the citizen suit provision at issue here, "under this part" refers only to provisions that prescribe nondiscretionary duties. This reading explains the Government's examples of instances of "under this section" that refer only to the statute. *See* DOE Opp. 3 (citing, *e.g.*, 42 U.S.C. § 6305(c), authorizing DOE to intervene in an action "under this section").

Contrary to the Government's argument, the EPCA citizen suit provision is analogous to the Clean Air Act provision interpreted in *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005) (interpreting 42 U.S.C. § 7604(a)(2), authorizing suit against agency for failure "to perform any act or duty *under this chapter* which is not discretionary" (emphasis added)). In holding that the Clean Air Act provision could be used to enforce regulatory duties, the court relied in part on Congress's reference to "an emission standard or limitation [defined to include rules] *under this chapter*" in the previous paragraph of the citizen suit provision. *Id.* at 556 (quoting 42 U.S.C. § 7604(a)(1)) (emphasis added). The court inferred that the use of the same phrase, "under this chapter," in the next paragraph must also include rules. Similarly, the previous paragraph in EPCA refers to "any rule under this part," 42 U.S.C. § 6305(a)(1), illustrating that "under this part" includes regulations. The Government's argument that the Clean Air Act defines "emission standard or limitation under this chapter," making clear that it includes rules, DOE Opp. 4, is a useless distinction because the corresponding phrase in EPCA, "any rule under this part," needs no definition; it expressly covers rules.[1]

[1] The Government suggests Congress used "under" differently in the Clean Air Act and EPCA. DOE Opp. 4-5. But just as in EPCA, there are places in the Clean Air Act where "under" does not include rules because it appears in a section that does not authorize the

The Government invokes the sovereign immunity canon, DOE Opp. 3-4, but here there is no need to decide between two "plausible" interpretations of the statute. *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004). The Government has advanced neither a reason that Congress would limit the reach of the citizen suit provision, nor a compelling textual basis for its argument. Plaintiffs' reading is the only plausible one: (a) EPCA authorizes enforcement of any nondiscretionary duty under the part, (b) the part authorizes DOE to issue rules to carry out the part, and (c) those rules therefore necessarily prescribe duties "under" the part (because their purpose is to carry out the part).

2. Section 6305(a)(2) is available to enforce nondiscretionary duties without date-certain deadlines

Arguing that Citizen Plaintiffs cannot use EPCA's citizen suit provision to enforce a nondiscretionary duty without a date-certain deadline, the Government emphasizes the reasoning of *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987): without 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.* at 791 (quoted at DOE Opp. 6). But this case does not pose that question. Instead, the question is whether DOE limited its *own* discretion when it issued the Error Correction Regulation. As shown above and in Citizen Plaintiffs' opening brief, the clear answer is yes. *See supra* pp. 1-3; Citizen MSJ 7-9.

It is also clear that the Error Correction Regulation prescribes a timeline for publication in the Federal Register. The preamble to the regulation uses just that word: "prescribes." 81 Fed. Reg. at 57,750. Members of the public have 45 days to request a

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issuance of relevant rules. For example, the Government points to this sentence in EPCA: "In such action under this section, the Secretary . . . , if not a party, may intervene as a matter of right." 42 U.S.C. § 6305(c) (cited at DOE Opp. 3). The Clean Air Act contains a nearly identical sentence: "In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding." 42 U.S.C. § 7604(c)(2). This does not change the analysis because, in both statutes, the "chapter" (Clean Air Act) or "part" (EPCA) authorizes rulemaking, and "under this chapter" or "under this part" refers both to the statute and the rules issued under it.

correction, 10 C.F.R. § 430.5(d)(1), and if a correction is needed, DOE has 30 additional days to publish a final rule, absent extenuating circumstances, *id.* § 430.5(f)(1)-(3). Reading the 30-day deadline to apply only in the event that DOE must make a correction, and *no* deadline to apply otherwise, is absurd. *See* DOE Opp. 10 n.6. It takes longer to correct a rule than to publish the rule as is. If DOE receives no correction requests, or receives a request and decides not to make a correction, there is almost nothing to do other than to submit the rule to the Office of the Federal Register.[2]

Likewise, reading the exception for "extenuating circumstances" as a license never to publish anything defeats both the timeline set forth in the regulation and the intent expressed in the regulation's preamble. *See* DOE Opp. 7-8. The preamble gives an example of a specific instance in which DOE might avail itself of the exception: "it is not *inconceivable* that there may be *occasions* in which an unexpected delay may occur that would necessitate the need for additional time, such as where an error relates to particularly complex engineering analysis." 81 Fed. Reg. at 57,750 (emphases added). The preamble does not suggest that DOE retained "flexibility" to avoid publishing a final rule altogether, whenever it wants. To the contrary, the preamble states that DOE will "make every effort to adhere to this 30-day timeline," *id.*, and reiterates the importance of publishing final rules without delay, *id.* at 57,753. In any event, DOE has not invoked the exception for extenuating circumstances here.

The Error Correction Regulation imposes mandatory duties on DOE, and the Court may enforce them. The Court should order DOE to publish the Final Rules.

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[2] The regulation says that if DOE receives no correction requests and discovers no errors on its own, it will publish the rule "in due course . . . . after the [45-day posting period] has elapsed." 10 C.F.R. § 430.5(f)(2). The Government, consulting the dictionary, argues that "in due course" means "at the appropriate time," DOE Opp. 9, but it does not say what the appropriate time is. The text of the regulation makes plain that the appropriate time is "after the [45-day posting period] has elapsed," not a year later, or never, which DOE's interpretation would allow. (DOE recently reclassified the Final Rules as "Long-Term Actions," http://bit.ly/2oNZ4V3, meaning it does not expect to publish them in the next 12 months, http://bit.ly/2BJbP8R.)

II. In the alternative, the APA and Federal Register Act require publication

The Administrative Procedure Act (APA), as amended by the Freedom of Information Act (FOIA), requires agencies to publish rules they have adopted. Agencies "shall separately state and currently publish in the Federal Register . . . substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). The grammar of the sentence shows that adoption precedes publication: "shall . . . publish" is a forward-looking imperative, while "adopted" is a past participle, describing what has already taken place. Although the Government and AHRI insist that publication signals adoption, and that these two events occur at the "same instant," AHRI Opp. 9-10; *see* DOE Opp. 16, that cannot be true, or the statutory mandate would be a dead letter. An unpublished rule would not have been adopted, and so publication would never be required. That is not how courts have interpreted § 552(a)(1)(D), as the cases cited by the Government show. *See PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (finding violation of 5 U.S.C. § 552(a)(1)(D), where agency failed to publish part of rule it had adopted); *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977) (same).

While it is true that a later sentence of the APA provision functions as a "shield," DOE Opp. 15, that is not the sentence Citizen Plaintiffs invoke here. The "shield" sentence protects a person from being "adversely affected by[] a matter required to be published in the Federal Register and not so published," unless the person has notice of the matter. 5 U.S.C. § 552(a)(1). The statute also contains a clear mandate: it tells agencies what they "shall" publish. *Id.* § 552(a)(1)(D). Courts have enforced that mandate by ordering agencies to publish rules and policies they had adopted but failed to publish. *See Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 487 F. Supp. 192, 202, 207 (D.D.C. 1979); *Neighborhood Legal Servs., Inc. v. Legal Servs. Corp.*, 466 F. Supp. 1148, 1155 (D. Conn. 1979).

If Citizen Plaintiffs' APA claim is unusual, it is because DOE's error-correction process is unusual. Generally, agencies do not publicize rules they have finalized, signed, and dated but have not yet submitted for publication in the Federal Register. DOE recognized in the preamble to the Error Correction Regulation that the process created an

unusual situation, and that the APA publication requirement would apply to rules posted for error correction:

> DOE will post a rule bearing the signature of an appropriate official of DOE on a publicly-accessible Web site. . . . However, [DOE] will not publish the rule in the Federal Register for 30 calendar days [later changed to 45]. . . . DOE recognizes that it has an obligation under the Administrative Procedure Act to publish a "rule," as defined in this part, in the Federal Register. *The time for error-correction contemplated by this rule will not be a departure from that obligation.* The [APA] does not specify that publication in the Federal Register must occur at a particular point following a specified period of time after posting.

81 Fed. Reg. at 27,001 (emphasis added). Now the Government says DOE meant that "publication . . . is required once the agency decides to adopt a final rule," DOE Opp. 18, which could be years later, or could be never. That completely changes the meaning of the preamble and the explicit purpose of the Error Correction Regulation. Regardless of whether the preamble is binding, it explains why § 552(a)(1)(D) applies here and requires DOE to publish the Final Rules.

DOE adopted the Final Rules when, after labeling them "Final Rule," it signed and dated them and posted them on a public website, under a regulation providing that the rules could be "[a]lter[ed]," if at all, only to correct errors representing deviations from what DOE "intended regarding the rule at the time of posting." 10 C.F.R. § 430.5(b), (g). This followed a full notice-and-comment rulemaking process, during which DOE published proposed rules and solicited public comment. Both the APA and the Federal Register Act require DOE now to publish the Final Rules in the Federal Register.

III. DOE has violated a statutory deadline and must issue a rule for UPSs

For the reasons given in Citizen Plaintiffs' opening brief, DOE has violated a statutory deadline, 42 U.S.C. § 6295(u)(1)(E)(i)(II), and must issue a rule prescribing energy conservation standards for uninterruptible power supplies. Citizen MSJ 25.

CONCLUSION

The Court should compel DOE to publish the Final Rules.

1 Dated: December 21, 2017 Respectfully submitted,

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