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IN THE 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

AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE,

Defendant-Intervenor.

Case No. 17-cv-03404-VC

GOVERNMENT PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: January 18, 2018
Time: 10:00 a.m.
Dept: Courtroom 2
Judge: Hon. Vince Chhabria
Action Filed: June 13, 2017

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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INTRODUCTION

Defendants the Department of Energy and its Secretary James R. Perry ("DOE") mischaracterize this case as an action by Government Plaintiffs to compel DOE to publish "draft" rules still under development, where DOE's decision-making is "still ongoing." Defendants' Reply and Opposition (hereinafter "Def. Opp.") 1. To the contrary, the four energy efficiency standards[1] (the "Final Rules") at issue are final rules which resulted from the culmination of multiple years of substantive decision-making. *See* Government Plaintiffs' Motion "(Gov't. Pls. Mot.") 5-6. In December 2016, the substantive decision-making ended and DOE posted the Final Rules for a 45-day error review process as required by the error correction regulation ("ECR"), 10 C.F.R. § 430.5. The ECR was enacted as a short "pause" prior to publication of a final rule to enable DOE to detect typographic, calculation, or numbering errors in the regulatory text at the end of a highly technical rulemaking, so an error is not inadvertently codified. Ignoring the narrow purpose of the ECR, DOE now attempts to use this regulatory "pause" to reverse its previously adopted position and transform the ECR into a duplicative reconsideration process. Refusing to publish the Final Rules is not a legally permissible choice under the ECR or the Administrative Procedure Act ("APA"). Government Plaintiffs ask the Court to order DOE to do exactly what the text of the ECR explicitly requires: to publish the Final Rules.

ARGUMENT

I. THE TEXT OF THE ECR IS STRAIGHTFORWARD AND REQUIRES DOE TO PUBLISH THE FINAL RULES

A plain reading of the text of the ECR demonstrates that the process ultimately ends with publication of a final rule. While 10 C.F.R. § 430.5(f)(1)-(3) identifies three possible ways DOE may carry out its obligations under the ECR, there is only one possible outcome: "[DOE] will eventually publish a final rule in the Federal Register." 81 Fed. Reg. 26,998, 27,002 (May 5, 2016). The ECR states: (a) if DOE receives correction requests but decides not to make any

[1] The Final Rules contain energy efficiency standards for air compressors, commercial packaged boilers, portable air conditioners and uninterruptible power supplies ("UPS"). *See* Government Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Gov't Pls. Mot.") 6 n.4 for citation to text of regulatory rulemaking.

corrections, it "will submit the rule[s] for publication to the [Federal Register] as … posted" (10 C.F.R. § 430.5(f)(1)); or (b) if DOE does not receive any error corrections requests and does not identify any errors in its own review, it "will in due course submit the rule, as it was posted . . . to the [Federal Register] for publication" (*Id*., § 430.5(f)(2)); or (c) if DOE determines corrections are necessary, it "will, absent extenuating circumstances, submit a corrected rule for publication in the Federal Register within 30 days after the [error correction] period . . . has elapsed." *Id*., § 430.5(f)(3). Regardless of the path followed, the Secretary **will submit** the rule for publication in its original form or in its corrected form.[2] *Id*., § 430.5(e); *see* 81 Fed. Reg. at 26,999. Based on the plain language of the ECR, this Court should therefore compel DOE to submit the Final Rules for publication.

II. EPCA'S CITIZEN SUIT PROVISION ALLOWS FOR SUITS ENFORCING REGULATORY DUTIES

Contrary to DOE's arguments, EPCA's citizen suit provision, 42 U.S.C. § 6305(a)(2), allows suits for violations of regulatory duties under EPCA, including the ECR. This conclusion is compelled by a textual analysis of EPCA and supported by case law. EPCA repeatedly refers to acts or duties "under this part" to include duties arising under its regulations. Defendants' and AHRI's arguments to the contrary are unavailing and should be rejected.

The text of EPCA shows that, "under this part," as used in 42 U.S.C. § 6305(a)(2) refers to both regulatory and statutory duties and thus allows Government Plaintiffs' suit. *See* Gov't Pls. Mot. 9-11. DOE argues that the reference to "rules" in subsection (a)(1) (suits against manufacturers) means that Congress's omission of that term from subsection (a)(2) (suits against the agency), shows Congress's intent to allow suits against the agency only as to statutory duties. In fact, however, subsection (a)(1) specifically uses different terminology when referring to statutory provisions and rules: "provision of this part" and "rule under this part." Thus, the duty

[2] If the term "will submit" in 10 C.F.R. § 430.5(f)(1)-(3) is discretionary, "will" as it occurs throughout the ECR would have the same meaning which would allow DOE discretion to ignore the entire error review process. *See, e.g*, *id.*, § 430.5(c)(1) (Secretary will post the rules); *id.*, § 430.5(c)(2) (Secretary will not submit posted rules to the Federal Register before 45 days have elapsed). DOE cites no authority for the source of its discretion to violate its regulations.

referenced in subsection (a)(2) – "duty under this part" – includes rules.

The fact that "duties under this part" in subsection (a)(2) refers to both statutory and regulatory duties is further shown by 42 U.S.C. § 6309(a), which provided funding for DOE to "carry out [its] responsibilities *under this part*" (emphasis added) from 1976 to 1979. The terminology, "responsibilities under this part," necessarily would have included responsibilities that arose pursuant to regulation, as well as statute. Thus, while the ECR did not exist during those years, the appropriations undoubtedly would have been used to administer the ECR because it creates "responsibilities under this part" for DOE.[3]

Despite DOE's efforts to distinguish *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544 (D.D.C. 2005), it remains the only relevant case for interpretation of EPCA's citizen suit provision. Like EPCA, the Clean Air Act ("CAA") contains two citizen suit provisions, against entities subject to the CAA and against the implementing agency, respectively. Even considering the guidance to interpret sovereign immunity waivers narrowly (*id*. at 547-48 (citing *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992)), *Leavitt* holds that the CAA citizen suit provision allows suits against the implementing agency to enforce regulatory duties. *Id.* at 556.

DOE attempts to distinguish *Leavitt* by arguing that the CAA's citizen suit provision is not analogous to EPCA's because subsection (a)(1) of the CAA's citizen suit provision (providing for suits against entities subject to the CAA) does not include the words "or any rules under this part," as does the analogous subsection (a)(1) of EPCA's citizen suit provision. However, subsection (a)(1) of the CAA provision *does* refer to regulations, specifying those regulations as "emissions standard[s] or limitation[s]," and *Leavitt* nonetheless interprets subsection (a)(2) of the citizen suit provision to allow enforcement of regulatory duties, even though it does not refer explicitly to regulations. DOE also argues that the express definition of "emission standard or limitation under this chapter" in the CAA makes it reasonable to assume that "under this chapter," as used in subsection (a)(2) of the CAA provision, would include duties arising from regulations. Def. Opp. 4. But that definition effectively defines only "emission standard and limitations," not

[3] It would be peculiar, to say the least, if DOE took the position that it could only use an appropriation for responsibilities that arise pursuant to statute, not regulation.

"under this chapter," by identifying various limitations which the definition reiterates are "under this chapter." 42 U.S.C. § 7604(f). Therefore, the definition provides no basis to interpret subsection (a)(2) of the CAA citizen suit provision differently than EPCA's equivalent provision. The Court should interpret EPCA's provision to apply to regulatory duties, in line with *Leavitt*.[4]

Contrary to DOE's assertion, Congress's uses of "under this part" throughout EPCA affirm that subsection (a)(2) includes regulatory duties. DOE argues that "under this part" only refers to rules when additional language is included, e.g., referring to "rules" or referencing the Secretary. *See* Def. Opp. 2-3. However, DOE cites no clear examples where "under this part" refers to only statutory matters. Thus, if anything, the additional language in the sections cited by DOE only emphasizes that "under this part" applies to regulatory duties when used in subsection (a)(2).

DOE misconstrues Government Plaintiffs' argument to mean that "under" as used in EPCA never refers to statutory provisions only. Def. Opp. 3. However, that is not Government Plaintiffs' argument, which discusses "under this part," and not simply "under." Gov't Pls. Mot. 10. Instead, Government Plaintiffs have explained that the context of "under this part" as used throughout EPCA shows that it refers to both statutory *and* regulatory matters. Again, DOE identifies no place where EPCA clearly uses "under this part" to refer solely to statutory matters. DOE's examples of the uses of "under" in EPCA to refer to statutory provisions (Def. Opp. 3; *see*, *e.g.*, 42 U.S.C. § 6295(e)(6)(D)(i) (requiring Secretary to "publish an analysis of the data collected under subparagraph (C)") miss the mark, because they do not change the fact that "under this part" as used throughout EPCA refers to regulations. Section 6305(a)(2) – which references duties "under this part" – includes regulatory duties.

This Court should not "assume the authority to narrow the [sovereign immunity] waiver that Congress intended" (*United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)); instead, it should, as the *Leavitt* court did for a similar provision in the CAA, allow this suit against DOE under EPCA's citizen suit provision based on its failure to perform its regulatory duties.

[4] Contrary to DOE's argument (Def. Mot. 4-5), Congress's use of "in this chapter" in the CAA to refer exclusively to the statute is equivalent to the use of "of this part" in EPCA, and does not support DOE's attempts to distinguish *Leavitt*. Gov't Pls. Mot. 10.

III. THE ECR IMPOSES ON DOE A MANDATORY DUTY TO PUBLISH THE FINAL RULES

A. District Courts in the Ninth Circuit Do Not Use a Bright Line Rule to Determine Whether a Mandatory Duty Exists

Contrary to DOE's arguments (Def. Opp. 5-7), courts in the Ninth Circuit reject a "bright line" date-certain test to determine whether a statute (or regulation) creates a nondiscretionary duty which would permit citizen suit enforcement. *Sierra Club v. Johnson*, No. C 08-01409, 2009 WL 2413094, *3 (N.D. Cal. Aug. 5, 2009) (rejecting "bright line" date-certain test); *Natural Resources Defense Council v. U.S. E.P.A.*, 437 F. Supp.2d 1137, 1159-60 (C.D. Cal. 2006) (declining to rule on government's "date-certain" argument). Instead, courts evaluate whether the terms of the statute are "those of obligation rather than discretion," *Bennett v. Spear*, 520 U.S. 154, 172 (1997), and whether the authorizing text creates a "*discrete* agency action that [the agency] is *required to take*." *Norton v. SUWA*, 542 U.S. 55, 64 (2004) (emphasis in original).

DOE relies on *Center for Biological Diversity v. Norton*, 254 F.3d 833, 838-40 (9th Cir. 2001) to argue that the Ninth Circuit has implicitly adopted a date-certain requirement, by "endors[ing] the distinction on which the date-certain deadline is based." Def. Opp. 6. This analysis is incorrect. In *Norton,* the Ninth Circuit found the addition of a deadline in an Endangered Species Act ("ESA") provision indicated a Congressional intent to create a mandatory duty, but the case does not stand for the reverse of that proposition. Second, a close reading of *Norton* reveals that it undermines DOE's position. Under the ESA, if the Secretary determined, within the statutory time frame, that the petitioned action was warranted but was precluded by other proposals, the Secretary must "promptly publish" the finding in the Federal Register with a description and evaluation of the reasons underlying the decision. 16 U.S.C. § 1533(b)(3)(B); *Norton*, 254 F.3d at 835. The *Norton* Court invalidated a new policy, which would have permitted the Secretary to avoid this requirement, finding the Secretary's duty to "promptly publish" an explanation for her decision was a mandatory duty that was not fulfilled by "a one-line notice" in the Federal Register. *Id*. at 838-839. Thus, in *Norton*, in addition to finding that the Secretary's determination was required in a specific time frame, the Ninth Circuit also found the Secretary had a mandatory obligation to publish specific information based on the statutory

language of the ESA, and independent of any date-certain. *Id*. at 838-39.

B. Statutes with Terms of Obligation Create Enforceable Duties

Courts reviewing "shall" or "will" in statutory language generally find the terms denote a mandatory obligation. *Fernandez v. United States*, 496 F. App'x 704, 705-06 (9th Cir. 2012) (explaining "will" is a mandatory term). Even absent a date-certain deadline, "shall" or "will" denotes a mandatory duty. *See Idaho Conservation League, Inc. v. Russell,* 946 F.2d 717, 720 (9th Cir. 1991); *Forest Guardians v. Babbitt,* 174 F.3d 1178, 1187 (10th Cir. 1999); *United Cook Inlet Drift Ass'n v. NMFS*, 837 F.3d 1055 (9th Cir. 2016) ("*Cook Inlet*").[5]

In *Idaho Conservation League, Inc.*, the Ninth Circuit interpreted the term "shall" in Section 303(c) of the Clean Water Act ("CWA") as "mandatory language" creating an obligation. 946 F.2d at 720 (stating "[t]here is no case law suggesting Section 303(c) leaves the Administrator any discretion to deviate from this apparently mandatory course"). In *Forest Guardians,* 174 F.3d at 1187, the Tenth Circuit interpreted the listing requirements of the ESA as mandatory, stating "[s]hall means shall." In *Cook Inlet*, 837 F.3d at 1064, the Ninth Circuit held a requirement that fisheries "shall prepare a management plan" was mandatory over the agency's argument it could elect not to. Finally, EPA's duty to publish water quality standards, without a fixed deadline, has been held mandatory, with courts considering as secondary matter whether EPA's compliance was "prompt." *See Northwest Environmental Advocates v. E.P.A*., 268 F. Supp. 2d 1255, 1261 (D. Or. 2003); *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 549 (W.D. Wash. 1997) (delay of two years not prompt); *Raymond Proffitt Foundation v. E.P.A*., 930 F. Supp. 1088, 1096-1102 (E.D. Pa. 1996) (588-day delay not "promptly").

DOE's response to the cases where "shall means shall" is to redirect the Court to out-of-circuit cases, and to argue that the former cases are "not controlling" (Def. Opp. 7) because a statute was involved in those cases, and not a regulation, like the ECR. But courts do not adhere to the distinction drawn by DOE between statutes and regulations: "principles of statutory

[5] DOE cites to *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001) (Def. Opp. 13) as contrary authority that "shall" sometimes means "may" but *Cook Inlet,* 837 F.3d at 1064, distinguishes *Whitman* on the ground that an agency's enforcement decisions are traditionally within an agency's unfettered discretion, unlike other regulatory decisions.

interpretation apply equally to regulatory interpretation." *Bergmann v. C.I.R.*, 552 Fed. App'x 673, 674 (9th Cir. 2014). None of the cases make such a distinction.

DOE and AHRI also argue the CWA cases are distinguishable because the term "promptly" suggested Congress imposed a deadline on EPA, whereas DOE "declined to impose a deadline on itself." Def. Opp. 7-8; AHRI Opp. 6-7. However, the timeline for compliance that the ECR prescribes—the public has 45 to request a correction, 10 C.F.R. § 430.5(d)(1), and if correction is needed, DOE has 30 additional days to publish a final rule, absent extenuating circumstances, *id.*, § 430.5(f)(1)-(3)—is more specific than EPA's duty to "promptly" publish in the CWA cases.

Finally, DOE cites its rejection of a request to clarify how much time the agency would take to publish a final rule during the ECR rulemaking, as evidence of its intention to retain general "flexibility." Def. Opp. 8, citing 81 Fed. Reg. 57,745, 57,750 (Aug. 24, 2016).[6] A review of that section shows that DOE believed that such a clarification was not necessary because the ECR, as written, already "prescribe[d] a timeline under which DOE will submit the rule to the Federal Register." *Id.* at 57,750 (within 30 days after any correction is received). DOE's on-the-record comments made during the rulemaking reveal DOE viewed its obligations as mandatory and time-constrained.[7] Finally, there is nothing in the Preamble indicating that DOE retained "flexibility" to avoid publishing a final rule, altogether, as it now argues. 81 Fed. Reg. at 57,753 (emphasizing importance of publishing rules with no delay).

C. Cases Cited by DOE for its Deadline Argument Are Distinguishable

DOE continues to cite several out-of-circuit cases which are not binding on this Court in support of its "bright-line" date-certain requirement. Def. Opp. 6 (citing *Sierra Club v. Thomas*, 828 F.2d 783, 791 n.58 (D.C. Cir. 1987); *NRDC v. Thomas*, 885 F.2d 1067, 1073 (2d Cir. 1989)). As discussed in Gov't Pls. Mot. 13-14, even these cases acknowledge that a deadline need not be

[6] Even accepting DOE's contention for the sake of argument, it is a stretch for DOE to suggest it retains the "flexibility" to cabin the Final Rules in error review for over 365 days.

[7] "Barring extenuating circumstances, [DOE] will review proper error-correction submissions and submit the rule to the Office of the Federal Register for publication within 30 calendar days . . . ." 81 Fed. Reg. 27,002. DOE will "make every effort to adhere to this 30-day timeline." *Ibid.* DOE has never invoked the "extenuating circumstances" exception.

explicitly set forth, if it is readily ascertainable by reference to a fixed event.[8] Here, the ECR prescribes a particular timeline for publication. *See* 10 C.F.R. § 430.5(d)(1), (f)(1)-(3) (public has 45 days to request a correction; DOE has 30 days to publish a final rule).

DOE emphasizes the reasoning of *Sierra Club v. Thomas,* where the court stated that, without a date-certain deadline, it could not deprive the agency of discretion over "the timing of its work." 828 F.2d at 791; Def. Opp. 6. But *Thomas* is not analogous; the ECR is a regulation which intentionally limits DOE's discretion to particular steps it must take at the end of a final rulemaking, to allow a short pause after all the substantive work is concluded. Further, the ECR "prescribes" (81 Fed. Reg. at 57,750) a timeline for the ministerial duty of publication.

DOE states the circumstances here are most analogous to *Johnson,* 2009 WL 2413094, *3, where the court found EPA had discretion over the timing of its duty to publish regulations. Def. Opp. 8. The *Johnson* Court considered a CERCLA provision that required EPA to promulgate regulations "beginning not earlier than five years after [a particular date]." 2009 WL 2413094, *2. The Court ruled that the provision gave EPA discretion "*when* to perform this duty" because it contained only a beginning date and no end date whatsoever for compliance. *Id*. at *3. In contrast, the ECR does not merely specify a starting point ("shall publish no earlier than thirty days after"); rather, the ECR specifies an end time (shall publish "within 30 days" or "in due course"). Unlike EPA's open-ended duty in *Johnson*, DOE must publish the Final Rules within the narrow bounds defined in the rule (thirty days), absent "extenuating circumstances." Thus, neither *Thomas* nor *Johnson* supports EPA's arguments here.

D. DOE Does Not Have Inherent Discretion to Modify or Withdraw the Final Rules.

DOE now contends that it retains discretion to withdraw or modify the Final Rules. Def's Opp. 10-11; AHRI Opp. 4-5. DOE's interpretation of the ECR is inconsistent with the text of the ECR, with the purpose of the regulations and with DOE's own pre-litigation interpretations. 81 Fed. Reg. at 26,999; *Christensen v. Harris Cty*., 529 U.S. 576, 588 (2000). An agency's

[8] *See Sierra Club v. Thomas*, 828 F.2d at 791 n.58 ("deadline may exist [if] ascertainable by reference to a fixed date or event"); *NRDC*, 885 F.2d at 1075 (language that agency "from time to time ... revise" regulations did not create mandatory duty at a particular time).

interpretation of its regulations is not entitled to "controlling weight" if it is "plainly erroneous or inconsistent with the regulation." *Chase Bank USA, N.A. v. McCoy,* 562 US 195, 208 (2011).

DOE's newly expansive interpretation conflicts with the ECR's narrow purpose: finding and correcting technical errors in final rules before publication. The ECR is a "pause button," allowing the Secretary to "correct" final energy efficiency rules before publication in the Federal Register, "consistent with the Administrative Procedure Act." Gov. Pls' Mot. 15-16; 10 C.F.R. § 430.5(g).[9] It does not permit the Secretary to treat the Final Rules as drafts subject to reconsideration. During the rulemaking, DOE expressly rejected the argument that the error review process should function as another round of substantive comments (81 Fed. Reg. at 57,749) and made clear that the posting of a final energy efficiency standard rule constituted the end of DOE's substantive decision-making, not an invitation for further substantive deliberations.[10] *Ibid; see also* 81 Fed. Reg. 26,999 (finality of posting of rule for error review). DOE's assertions to the contrary now are simply *post hoc* justifications in conflict with its statements in the rulemaking record. Where an agency's current view is a change from prior practice or a *post hoc* justification in response to litigation, the agency is not entitled to deference. *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 614 (2013).

IV. THE APA AND FRA REQUIRE PUBLICATION OF THE FINAL RULES

The APA, as amended by the Freedom of Information Act, requires publication in the Federal Register of "substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). Contrary to DOE's arguments (Def. Opp. 16), Plaintiffs' distinction between "adoption" and "publication" is not erroneous, but is required by the "well-established canon of statutory interpretation that the use of different words . . . within a statute demonstrates

[9] Defendants contend (AHRI Opp. 4-5, Def Opp. 10-12) that where 10 C.F.R. § 430.5(g) permits DOE to "correct" the standards "consistent with the APA", it means the rules can be treated as draft rules under the APA. However, the intention of subsection (g) was to affirm DOE can correct a standard without implicating the anti-backsliding provision of EPCA. 81 Fed. Reg. 27,002-03. Second, throughout §430.5, references to "correct" refer to DOE addressing an "error," defined under subsection (b) (typically typographical, calculation, or numbering errors).

[10] DOE and AHRI take DOE's statement that it would "generally adhere" to its original policy determinations out of context to imply DOE has discretion *not* to adhere to those determinations. Def. Mot. 13, 15; AHRI Mot. 6-7. Because the statement refers a proposal that DOE rejected, it cannot support the Defendants' assertions. *See* 81 Fed. Reg. at 57,749-50.

that Congress intended to convey a different meaning for those words." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Adoption must occur at some point before publication. DOE and AHRI cite cases interpreting APA's publication mandate in the context of a rule submitted but withdrawn before publication (Def. Opp. 15; AHRI Opp. 10), which does not address the unique situation where DOE's own regulation and statements show the agency has adopted a regulation before "paus[ing]" publication and where publication is mandated by the statute. *See* Gov't Pls. Mot. 21; 81 Fed. Reg. at 27,000. Those cases are thus inapposite to this unique scenario.

V. THE COURT SHOULD ORDER DOE TO PUBLISH A UPS STANDARD PURSUANT TO THE REQUIREMENTS OF EPCA.

In addition to the regulatory duties set forth above, DOE is under a separate statutory duty to promulgate a standard for UPS. DOE argues that, if an agency delays its statutory obligations long enough, it becomes immune from an action seeking enforcement of those obligations. DOE was required to issue an energy conservation standard for all classes of battery chargers by July 1, 2011 or otherwise determine that a standard is neither feasible nor economically justified. 42 U.S.C. § 6295(u)(1)(E)(i)(II). It did neither. In May 2016, DOE issued a proposed rule for test procedures for UPS, which it had determined was a class of battery charger. DOE now claims it was only "considering" whether to classify UPS as a battery charger in June, 2016. This argument is belied by its own earlier stated conclusion: "DOE concludes that UPS[] meet the definition of a battery charger and, as such, should be considered within the scope of the battery charger test procedure." *See* 81 Fed. Reg. 31,542, 31,546 (May 19, 2016). Given that DOE now recognizes UPS as battery chargers, it is under a statutory obligation to promulgate energy conservation standards.

CONCLUSION

This Court should enforce the mandatory duty imposed on DOE by the ECR and order DOE to submit the Final Rules for publication. Alternatively, publication should be compelled under the APA and FRA.

Dated: December 22, 2017

Respectfully Submitted,

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