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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' Notice of Motion, Motion for Summary Judgment, and Memorandum in Support and in Opposition to Defendants' and Defendant-Intervenor's Motions to Dismiss

Date: January 18, 2018
Time: 10:00 a.m.
Judge: Hon. Vince Chhabria
Courtroom: 4, 17th Floor

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

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on January 18, 2018, at 10:00 a.m., before the Honorable Vince Chhabria, Courtroom 4, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, Plaintiffs Natural Resources Defense Council, Sierra Club, Consumer Federation of America, and Texas Ratepayers' Organization to Save Energy will and hereby do move the Court for an order granting summary judgment in their favor.

Plaintiffs are entitled to summary judgment under Federal Rule of Civil Procedure 56 because there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law. Plaintiffs seek a declaration that Defendants are each in violation of (1) the Error Correction Regulation, 10 C.F.R. § 430.5, issued under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§ 6291-6309, or, in the alternative, (2) the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), (3) the Federal Register Act, 44 U.S.C. § 1505(a)(3), and (4) a deadline prescribed in EPCA, 42 U.S.C. § 6295(u)(1)(E)(i)(II). Plaintiffs seek an order compelling Defendants to publish in the Federal Register four final rules that set energy-conservation standards for portable air conditioners, air compressors, uninterruptible power supplies, and commercial packaged boilers. This motion is based on the pleadings and other papers filed in this case; the attached memorandum, declarations, and exhibits filed with this motion; and such other matters as may be presented to the Court.

Dated: October 27, 2017

Respectfully submitted,

/s/ Jennifer A. Sorenson

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STATEMENT OF ISSUES TO BE DECIDED

1. Does the Department of Energy (DOE) have a nondiscretionary duty under its Error Correction Regulation, 10 C.F.R. § 430.5, to publish four final rules in the Federal Register, where the regulation uses mandatory language to compel publication and prescribes a timeline for publication?

2. In the alternative, did DOE "adopt" four final rules within the meaning of the Administrative Procedure Act, 5 U.S.C. § 552(a)(1)(D), when an authorized official signed the rules and DOE posted them on its website to begin the error-correction process, "after concluding its deliberations," 81 Fed. Reg. 26,998, 26,999 (May 5, 2016)?

3. Did DOE violate a statutory deadline to prescribe energy-conservation standards for battery chargers by July 1, 2011, 42 U.S.C. § 6295(u)(1)(E)(i)(II), where DOE has determined that uninterruptible power supplies (UPSs) are battery chargers?

INTRODUCTION

This case is about a federal agency's attempt to change course and prevent the publication of four final rules, following the advent of the new administration. "Changes in course, however, cannot be solely a matter of political winds and currents." *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). The "pivot from one administration's priorities to those of the next" must "be accomplished with at least some fidelity to law and legal process." *Id.* Here, that fidelity to law and process is lacking, because DOE is violating its own regulations.

DOE is unlawfully withholding publication of four final rules (the Final Rules) developed under the Energy Policy and Conservation Act (EPCA). The Final Rules establish energy-conservation standards for four categories of home appliances and commercial and industrial equipment: portable air conditioners, air compressors, UPSs, and commercial packaged boilers. An authorized DOE official signed and dated each rule in December 2016, and the agency posted the Final Rules on its website for 45 days, pursuant to the agency's Error Correction Regulation, 10 C.F.R. § 430.5.

The Error Correction Regulation inserts a brief pause between DOE's adoption of a

final rule setting energy-conservation standards and the agency's submission of the rule to the Office of the Federal Register for publication. During the 45-day posting period, anyone may alert DOE to an error in the regulatory text—such as a "typographical," "calculation," or "numbering" error—before the rule is published. *Id.* § 430.5(b), (c). Following the 45-day period, DOE must submit the final rule for publication. *Id.* § 430.5(f). If DOE deems any corrections necessary, the agency has 30 days, absent extenuating circumstances, to submit a corrected rule. *Id.* § 430.5(f)(3). Although DOE received no correction requests for three of the Final Rules, and the latest of the 30-day periods ended on March 15, 2017, DOE has not submitted any of the Final Rules for publication.

DOE requires the error-correction process to be "rapid and streamlined," because, "[b]y pausing to receive suggestions of error, DOE will be delaying the eventual benefits to be produced by an amended standard." 81 Fed. Reg. at 27,000. In the Error Correction Regulation, DOE limited its own discretion by, among other things, including mandatory language and a timeline for publication. Now, however, as the agency attempts to change course, the Government argues that DOE silently reserved "separate" authority to violate its regulations. Defs.' Mot. to Dismiss (DOE Br.) 12. The Government's argument misses the mark. The new administration may well have an opportunity to influence future energy-conservation-standards rulemakings, but the Final Rules have passed the point of no return. Fidelity to law requires that DOE comply with its nondiscretionary duty, under its own Error Correction Regulation, to publish the Final Rules.

In the alternative, DOE's failure to publish the Final Rules is an agency action unlawfully withheld under the Administrative Procedure Act and the Federal Register Act. Additionally, DOE's failure to publish a rule setting energy-conservation standards for UPSs violates a statutory deadline.

As DOE itself has warned, "postponing the publication of a standards rule in the Federal Register means delaying the benefits to consumers and to the economy that the new standard will achieve." 81 Fed. Reg. 57,745, 57,753 (Aug. 24, 2016). DOE's unlawful failure to publish the Final Rules deprives Plaintiffs, their members, and the American

public of benefits including lower energy bills, a more reliable electricity grid, and reduced emissions of harmful air pollutants that threaten public health. Plaintiffs Natural Resources Defense Council (NRDC), Sierra Club, Consumer Federation of America, and Texas Ratepayers' Organization to Save Energy (collectively, Citizen Plaintiffs) seek an order enjoining DOE to ensure immediate publication of the Final Rules.

BACKGROUND

I. The Energy Policy and Conservation Act

Congress enacted EPCA in 1975 to "conserve energy supplies through energy conservation programs" and improve the energy efficiency of major appliances, among other purposes. Pub. L. No. 94-163, 89 Stat. 871 (codified at 42 U.S.C. §§ 6291-6309); 42 U.S.C. § 6201(4), (5). Initially, EPCA authorized, but did not require, DOE to establish energy-conservation standards for home appliances. Congress amended EPCA in 1978, however, and mandated that DOE prescribe energy-conservation standards for thirteen classes of major appliances. *See* National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206. The 1978 amendments also created a program to improve the efficiency of industrial equipment, now codified at 42 U.S.C. §§ 6311-6317.

In 1987, after NRDC and others sued DOE for failing to set meaningful energy-conservation standards for appliances, *see NRDC v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985), Congress enacted, and President Reagan signed into law, further amendments to EPCA, *see* National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103. These amendments prescribed energy-conservation standards for several categories of appliances and required DOE to review and amend these standards periodically, by specific deadlines. 42 U.S.C. §§ 6291-6309; *see NRDC v. Abraham*, 355 F.3d 179, 184-87 (2d Cir. 2004) (recounting history of EPCA and its amendments). Since 1987, Congress has continued to amend EPCA to make it stronger.

When DOE establishes or amends an energy-conservation standard under EPCA, the standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified, 42 U.S.C. §§ 6295(o)(2)(A),

6313(a)(6)(A), 6316(a), and must result in significant conservation of energy, *id.* §§ 6295(o)(3)(B), 6313(a)(6)(A), 6316(a). DOE must review its existing standards at least every six years and either propose amending them or determine that no amendment is necessary. *Id.* §§ 6295(m)(1), 6313(a)(6)(C)(i). If DOE proposes amended standards, it must publish a final rule within two years of issuing a proposed rule. *Id.* §§ 6295(m)(3)(A), 6313(a)(6)(C)(iii). EPCA contains an "anti-backsliding" provision, which prevents DOE from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. *Id.* §§ 6295(o)(1), 6313(a)(6)(B)(iii)(I).

EPCA's energy-conservation standards program for appliances and equipment has been highly effective in improving energy efficiency, saving consumers money, and avoiding emissions of greenhouse gases and other air pollutants. *See* Decl. of Lauren Urbanek ¶¶ 7-8.

II. DOE's Error Correction Regulation

At the end of a rulemaking establishing or amending an energy-conservation standard, DOE is required by regulation to post the final rule on its website for a 45-day error-correction period. 10 C.F.R. § 430.5(c). The "posting of an energy conservation standards rule signals the end of DOE's substantive analysis and decision-making regarding the applicable standards." 81 Fed. Reg. at 57,751. During the 45-day period, anyone may identify a potential error in the rule and ask DOE to correct it. 10 C.F.R. § 430.5(d). An error is defined as "an aspect of the regulatory text of a rule that is inconsistent with what [DOE] intended regarding the rule at the time of posting," such as a "typographical," "calculation," or "numbering" mistake. *Id.* § 430.5(b). The point is to allow the public to spot and correct mistakes in a final rule before it is published.

DOE must take one of three actions after the 45-day posting period ends:

1. If DOE receives a correction request but decides not to make corrections, it "will submit the rule for publication to the Office of the Federal Register as it was posted." *Id.* § 430.5(f)(1).

2. If DOE receives no requests, it "will in due course submit the rule, as it was posted . . . , to the Office of the Federal Register for publication. This will occur after the [45-day posting period] has elapsed." *Id.* § 430.5(f)(2).
3. If DOE receives a request and decides a correction is necessary, it "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." *Id.* § 430.5(f)(3).[1]

III. The Administrative Procedure Act and Federal Register Act

The Administrative Procedure Act (APA), as amended by the Freedom of Information Act (FOIA), mandates that "[e]ach agency 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 Federal Register Act instructs that "[t]here shall be published in the Federal Register . . . documents or classes of documents that may be required so to be published by Act of Congress." 44 U.S.C. § 1505(a)(3). Under the APA, this includes agency rules. 5 U.S.C. § 552(a)(1)(D).

IV. The Final Rules

In December 2016, DOE posted four signed final rules on its website. The Final Rules establish energy-conservation standards for portable air conditioners, air compressors, UPSs, and commercial packaged boilers. Sorenson Decl. Ex. A (the Portable AC Final Rule); *id*. Ex. B (the Air Compressor Final Rule); *id*. Ex. C (the UPS Final Rule); *id*. Ex. D (the Boiler Final Rule). The UPS Final Rule is subject to a statutory deadline: EPCA required DOE to prescribe standards for battery chargers, or determine that no standard is technically feasible and economically justified, by July 1, 2011. 42 U.S.C. § 6295(u)(1)(E)(i)(II). DOE has determined that UPSs are battery chargers. DOE Br. 19.

Each of the Final Rules is the result of a robust rulemaking process in which DOE collected input from manufacturers, trade associations, consumer advocates, and others in

[1] The preambles to the Error Correction Regulation, as issued and as amended, are attached as Exhibits I and J to the Declaration of Jennifer A. Sorenson.

public meetings and through public comments. DOE estimates that the Final Rules, as applied to products purchased over a 30-year period, will save 1.86 quadrillion BTUs (or "quads") of energy, reduce carbon dioxide emissions by 98.8 million metric tons, and result in net savings of up to nearly $8.5 billion. Urbanek Decl. ¶¶ 13-16.

Each rule was signed by DOE's Acting Assistant Secretary for Energy Efficiency and Renewable Energy and posted on DOE's website with the following notice:

> The text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5 before publication in the Federal Register. Readers are requested to notify DOE by email at [address] of any typographical or other errors, as described in such regulations, by no later than midnight on February 11, 2017 [or January 19, 2017, for the Air Compressor Final Rule], in order that DOE may make any necessary corrections in the regulatory text submitted to the Office of the Federal Register for publication.

Sorenson Decl. Exs. A-D. DOE received no correction requests for the Portable AC Final Rule, the Air Compressor Final Rule, or the UPS Final Rule. DOE Br. 6-8. DOE received three requests purporting to identify errors in the Boiler Final Rule. DOE Br. 7.

DOE has not submitted any of the Final Rules for publication.

ARGUMENT

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

DOE has a nondiscretionary duty, enforceable through EPCA's citizen suit provision, 42 U.S.C. § 6305(a)(2), to publish the Final Rules. The rules are final: DOE "posts a rule with the appropriate official's signature only after concluding its deliberations and reaching decisions on the relevant factual determinations and policy choices." 81 Fed. Reg. at 26,999. And DOE posted each rule on its website with an explicit statement that the rule was final. *E.g.*, Sorenson Decl. Ex. E ("DOE has issued a pre-publication *Federal Register* final rule pertaining to energy conservation standards for portable air conditioners."); *id.* Exs. F-H. At this point, DOE has two options: it may publish the rules as posted, or it may publish them with corrections to fix an error, as defined in the Error Correction Regulation. 10 C.F.R. § 430.5(b), (f). By failing to publish the Final Rules, DOE is failing to

perform a nondiscretionary duty mandated by the agency's regulations under EPCA.

A. The Error Correction Regulation imposes nondiscretionary duties on DOE

1. The Error Correction Regulation binds DOE

It is well established that agencies may bind themselves to act in a particular way by issuing a regulation with the force of law. *See Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 65 (2004); *e.g.*, *Viet. Veterans of Am. v. Cent. Intelligence Agency*, 811 F.3d 1068, 1078, 1082-83 (9th Cir. 2016) (requiring Army to comply with its regulations). The Error Correction Regulation limits DOE's discretion, and DOE must adhere to it.

The text of the Error Correction Regulation plainly limits DOE's discretion. Throughout the regulation, DOE uses mandatory language to describe its duties. For example: "[DOE] *will* cause a rule under the Act to be posted on a publicly-accessible Web site." 10 C.F.R. § 430.5(c)(1) (emphasis added). "[DOE] *will not* submit a rule for publication in the Federal Register during 45 calendar days after posting the rule . . . ." *Id.* § 430.5(c)(2) (emphasis added). And, depending on whether DOE receives correction requests or determines that a correction is necessary, "[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." *Id.* § 430.5(f)(1)-(3) (emphases added). "'Will' is a mandatory term, not a discretionary one." *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009); *Arroyo Vista Tenants Ass'n v. City of Dublin*, No. C 07-05794 MHP, 2008 WL 2338231, at *13 (N.D. Cal. May 23, 2008). DOE could not publish a final energy-conservation-standards rule without posting it for error correction first, or before 45 days had passed. The requirement to publish a final rule following the error-correction process is equally mandatory.

As the text of the regulation demonstrates, the sole purpose of the error-correction process is to allow DOE to fix a mistake in a final rule before it is published. "Error" is

defined narrowly: it means "an aspect of the regulatory text of a rule that is inconsistent with what [DOE] intended regarding the rule at the time of posting." 10 C.F.R. § 430.5(b). DOE "*will not* consider new evidence" at the error-correction stage, *id.* § 430.5(d)(3) (emphasis added), and a "person's disagreement with a policy choice that [DOE] has made *will not*, on its own, constitute a valid basis" for a correction request, *id.* § 430.5(d)(2)(ii) (emphasis added). Nowhere in the regulation does DOE purport to retain discretion to rescind or revise a final rule, other than to correct an error, as defined. To the contrary, the paragraph entitled "Alteration of standards" says only that, until a rule has been published, DOE "may *correct*" the rule. *Id.* § 430.5(g) (emphasis added). That is consistent with the limited purpose of the error-correction process.

The Error Correction Regulation also "prescribes a timeline under which DOE will submit a rule to the Office of the Federal Register for publication." 81 Fed. Reg. at 57,750. If DOE decides it must correct a final rule—the scenario requiring the most time between the end of the 45-day posting period and publication—"[DOE] will, absent extenuating circumstances, submit a corrected rule for publication . . . within 30 days after the [45-day] period . . . has elapsed." 10 C.F.R. § 430.5(f)(3). If DOE were under no duty to publish a final rule following the error-correction process, the regulation's inclusion of this timeline "would be rendered meaningless." *Otter Project; Envtl. Def. Ctr. v. Salazar*, 712 F. Supp. 2d 999, 1005 (N.D. Cal. 2010).

The history of the Error Correction Regulation confirms that it limits DOE's discretion. DOE established the process because, "given the complexity" of rules setting energy-conservation standards, it was "conceivable" that a rule "may occasionally contain an error," such as "an accidental transposition of digits [that] could result in a standard that is inconsistent with [DOE's] analysis." 81 Fed. Reg. at 26,999. To address this concern, DOE created a "brief" "window between DOE's posting of a rule and publication of the rule in the Federal Register." *Id.*; 81 Fed. Reg. at 57,749. DOE "posts a rule with the appropriate official's signature only after concluding its deliberations and reaching decisions on the relevant factual determinations and policy choices." 81 Fed. Reg. at

26,999. DOE intended the error-correction process to be "rapid and streamlined" because, "[b]y pausing to receive suggestions of error, DOE will be delaying the eventual benefits to be produced by an amended standard." *Id.* Accordingly, the "narrow error correction rule" creates a "limited administrative process" that constrains the options of the public and the agency. 81 Fed. Reg. at 57,753. "DOE commits to considering properly submitted error correction requests before publishing the rule in the Federal Register." *Id.* at 57,747. After reviewing requests, DOE has a finite "range of options": "If it concludes that the claims of error are not valid, and if it has identified no errors on its own, DOE will proceed to submit the rule for publication in the Federal Register in the same form it was previously posted. . . . If, on the other hand, DOE identifies an error in a rule, DOE can correct the error." 81 Fed. Reg. at 26,999. The regulatory history confirms that the error-correction process provides only an opportunity to catch and fix mistakes in a final rule before it is published.

2. DOE retains no "separate" authority to violate its regulations

Although the Government and Intervenor AHRI contend that DOE retains "separate" authority to reconsider rules before they are published in the Federal Register, DOE Br. 12; *see* Def.-Int.'s Notice of Mot., Mot. to Dismiss, and Mem. in Support (AHRI Br.) 7, no case they cite supports their argument. That is because none addresses a situation in which an agency (1) has issued a regulation that limits its discretion in a particular way but (2) argues that it nonetheless retains "separate" authority to act in a way that is contrary to the regulation. That argument cannot succeed, because it would undercut the maxim that agencies must comply with their regulations.

The three cases cited by the Government and AHRI are readily distinguished. It is obviously true, as the court observed in *Rowell v. Andrus*, 631 F.2d 699 (10th Cir. 1980), that "[a]t the point of publication of the *proposed* rule the agency is . . . not bound to the issuance of the rule in any exact form." *Id.* at 702 n.2 (emphasis added). But that is beside the point, for two reasons. First, when DOE posts a rule on its website to begin the error-correction process, that is well past the "point of publication of the proposed rule." DOE

already issued proposed rules and solicited public comment at an earlier stage of the rulemaking process. 81 Fed. Reg. 52,196 (Aug. 5, 2016); 81 Fed. Reg. 38,398 (June 13, 2016); 81 Fed. Reg. 31,680 (May 19, 2016); 81 Fed. Reg. 15,836 (Mar. 24, 2016). The rules DOE posted for error correction are labeled "Final rule." Sorenson Decl. Exs. A-D (p. 1 of each rule); *see id.* Exs. E-H. Second, there was no Error Correction Regulation at issue in *Rowell*. Here, DOE has "bound" itself to publish a final rule, as posted or as corrected, following the error-correction process.

Si v. Slattery, 864 F. Supp. 397 (S.D.N.Y. 1994), is also not on point. There, the court rejected plaintiff's argument that an agency was required to comply with an unpublished regulation that the agency had withdrawn from publication. *Id.* at 403. Here, DOE has not withdrawn the Final Rules and could not do so consistent with the Error Correction Regulation. Finally, the Second Circuit's conclusion in *Abraham* that EPCA itself uses publication "as the relevant act for purposes of circumscribing DOE's discretion," 355 F.3d at 195, does not bear on the question whether the Error Correction Regulation (which was issued after *Abraham* was decided) circumscribes DOE's discretion at an earlier point and compels publication of final rules after the error-correction process is over.

Nor can the Government or Intervenor AHRI point to any indication in the regulatory history that DOE reserved for itself the option to depart from the Error Correction Regulation and revise or even rescind a final rule whenever it chose to do so. Indeed, DOE considered and rejected AHRI's request that it make the error-correction process a "general reconsideration procedure." 81 Fed. Reg. at 57,749; *see id.* at 57,752-55. AHRI insisted that DOE had the authority "to allow for a process for full reconsideration (to any degree, of any aspect) of an energy conservation standard," but DOE responded that it was within the agency's "discretion to determine the scope of the error correction procedure, and DOE has reasonably concluded that the procedure should be limited to 'errors' as defined in the rule." *Id.* at 57,754 n.6. Having declined to create a reconsideration procedure in favor of a more limited process, DOE cannot now claim that it silently reserved authority to reconsider final rules anyway. *Cf. Abraham*, 355 F.3d at 203

(rejecting argument that DOE had "inherent power" to reconsider published rules, where Congress did not provide for a reconsideration procedure).[2]

Straining to find support for their position, the Government and AHRI repeatedly misrepresent the regulatory history. First, they misleadingly quote DOE's statement in the preamble to the Error Correction Regulation that the agency "would generally adhere to the policy decisions it has already made." DOE Br. 13; AHRI Br. 6-7. They suggest this means DOE left the door open to changing its mind about the substance of a rule following the error-correction process. But DOE made this statement in the context of denying AHRI's request to turn the error-correction process into a "general reconsideration procedure." 81 Fed. Reg. at 57,749; *see id.* at 57,752-55. DOE said a full reconsideration procedure would not be worth the delay it would cause, because even if DOE *were* to entertain petitions to reconsider its policy decisions, it would generally adhere to the decisions it had already made. *Id.* at 57,749. DOE never stated or implied it would reconsider policy decisions during the error-correction process. Instead, it emphasized that the error-correction process would occur *after* DOE had "conclud[ed] its deliberations and reach[ed] decisions on the relevant factual determinations and policy choices." 81 Fed. Reg. at 26,999; *see id.* at 27,001; 81 Fed. Reg. at 57,751.

Second, the Government says that, in the preamble to the Error Correction Regulation, "DOE stressed that the administrative record would not be closed upon the posting of a draft rule." DOE Br. 13 (citing 81 Fed. Reg. at 57,751). In fact, when DOE first issued the Error Correction Regulation, it said twice that DOE "considers the record with

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[2] AHRI contends that DOE must have authority to reconsider a final rule before publishing it, because otherwise DOE might be forced to publish a rule with "serious flaws." AHRI Br. 7. But as DOE noted in denying requests from AHRI and others to broaden the scope of the error-correction process, "individuals are free to exercise their options under 42 U.S.C. § 6306 to seek a remedy to address any applicable issues that would fall outside of the ambit of the error correction rule." 81 Fed. Reg. at 57,749. If a party with standing believes a rule is seriously flawed, it may file a judicial challenge after the rule is published; "that is precisely what the EPCA contemplates." *Abraham*, 355 F.3d at 203. DOE may also amend a rule after publishing it, provided it complies with APA notice-and-comment requirements and EPCA's anti-backsliding provision. *See id.*

respect to a rule subject to the error correction process closed upon posting of the rule." 81 Fed. Reg. at 26,999; *see id.* at 27,001 (once DOE posts rule, the "record of the rulemaking is closed, and [DOE] has concluded its deliberations"). AHRI and others petitioned DOE to amend the Error Correction Regulation, and AHRI raised a concern that DOE's statements about closing the record meant that, in a "court challenge to a standards rule, no documents postdating the posting of a rule would be included in the administrative record filed in a court of appeals." 81 Fed. Reg. at 57,751. DOE clarified that "it did not intend . . . to make any statements about the contents of such an administrative record," and that such a record "would include all documents that are required by law to be part of such a record," including properly filed correction requests, DOE's responses, and the published rule. *Id.* But DOE confirmed that, in "DOE's view, the posting of an energy conservation standards rule signals the end of DOE's substantive analysis and decision-making regarding the applicable standards." *Id.*

3. DOE's regulatory interpretation deserves no deference

The Government asks the Court to defer to its interpretation of the Error Correction Regulation but does not interpret the regulation. DOE Br. 13. Instead, it argues that DOE retains "separate" authority to act in a way that is contrary to the regulation. *Id.* at 12. Implicitly, the Government interprets the regulation to be precatory, not mandatory. But the text of the regulation uses mandatory language ("will"), making clear that it imposes mandatory duties on DOE. *See supra* p. 7; *UPS Customhouse Brokerage, Inc.*, 575 F.3d at 1382. The Government's interpretation is inconsistent with the plain language of the regulation and deserves no deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

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

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

The plain text of 42 U.S.C. § 6305(a)(2) authorizes suit to enforce regulations issued under EPCA. The statute provides that "any person may commence 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 phrase "under this part" plainly refers to legal obligations arising from EPCA and its implementing regulations.

The Government contends that "under this part" refers only to statutory obligations set forth in EPCA itself. DOE Br. 9. As evidence, the Government points to the preceding paragraph of the statute, which authorizes suit against "any manufacturer or private labeler who is alleged to be in violation of any provision *of this part* or any rule *under this part*." 42 U.S.C. § 6305(a)(1) (emphasis added). Contrary to the Government's interpretation, this paragraph confirms Citizen Plaintiffs' reading of § 6305(a)(2), because it demonstrates that Congress used the phrase "under this part" to include rules issued under EPCA. In the same paragraph, where Congress intended to refer only to obligations set forth in EPCA itself, it used the phrase "of this part." *Id.* § 6305(a)(1). It is illogical to argue, as the Government does, that Congress used the same words ("under this part") to include regulations in paragraph (a)(1) and to exclude them in paragraph (a)(2). *See Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 249-50 (1996) ("[W]e have been given no reason to believe that Congress meant the term 'claim' to mean one thing in § 6511 but to mean something else altogether in the very next section of the statute.").

Indeed, Congress used the words "under this part" or "under this section" throughout EPCA to refer to regulations issued under the statute. *See, e.g.*, 42 U.S.C. § 6294(a)(1) (referring to labeling rules prescribed "under this section"); *id.* § 6295(b)(3)(A)(ii)(I) (referring to "energy conservation standard[s] *established in* this section or *prescribed . . . under* this section") (emphasis added); *id.* § 6295(n)(5) (referring to "final rule[s] published under this part"); *id.* § 6302(a) (referring to "energy conservation standard[s] *established in* or *prescribed under* this part") (emphasis added); *id.* § 6314(b) (referring to test procedures prescribed "under this section"); *id.* § 6317(c) (referring to standards established "under this section"). It is a longstanding rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Comm'r of Internal Revenue*, 516 U.S. at 250.

The Government relies on dicta in *Maine v. Thomas*, 874 F.2d 883, 888 n.7 (1st Cir.

1989), suggesting that the citizen suit provision of the Clean Air Act does not authorize suit to enforce regulatory duties. DOE Br. 10. But federal courts that have analyzed the question have held the opposite. *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 557 (D.D.C. 2005); *accord Diné CARE v. EPA*, No. C 12-03987 JSW, 2013 WL 6327530, at *2 n.1 (N.D. Cal. Dec. 3, 2013). The Clean Air Act authorizes suit against EPA for failure "to perform any act or duty *under this chapter* which is not discretionary." 42 U.S.C. § 7604(a)(2) (emphasis added). After reviewing the Clean Air Act, the *Leavitt* court concluded, "it is clear that the phrase 'under this chapter' encompasses both the statutory obligations imposed in the Act itself, and the regulatory obligations promulgated under the auspices of the Act." 355 F. Supp. 2d at 556. The court noted, for example, that another paragraph of the citizen suit provision authorized suit against any person violating "an emission standard or limitation *under this chapter*," where "emission standard or limitation" was defined to include regulations. *Id.* (quoting 42 U.S.C. § 7604(a)(1)) (emphasis added). As explained above, the same reasoning applies here. Citizen Plaintiffs may bring suit under 42 U.S.C. § 6305(a)(2) to compel DOE to comply with its regulations issued under EPCA.[3]

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

Citizen Plaintiffs may bring suit under 42 U.S.C. § 6305(a)(2) to compel DOE to publish the Final Rules even though the Error Correction Regulation excuses compliance

[3] Because the citizen suit provision defines the scope of judicial review and is "jurisdictional in nature," *see Stone v. INS*, 514 U.S. 386, 405 (1995), the Court owes no deference to the Government's interpretation of its meaning, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). Additionally, the Court should reject the Government's argument that the sovereign immunity canon dictates interpreting 42 U.S.C. § 6305(a)(2) to exclude suits to enforce regulatory duties. "[O]nce Congress has waived sovereign immunity over certain subject matter," as it did in the EPCA citizen suit provision, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'" *Aageson Grain & Cattle v. U.S. Dep't of Agric.*, 500 F.3d 1038, 1045 (9th Cir. 2007). Moreover, the "sovereign immunity canon" does not "displac[e] the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). Here, as discussed, applying the traditional tools of statutory construction makes plain that "under this part" includes legal obligations arising from EPCA's implementing regulations.

with its timeline in "extenuating circumstances." 10 C.F.R. § 430.5(f)(3). To begin with, the plain text of 42 U.S.C. § 6305(a)(2) does not specify that a date-certain deadline is necessary for enforcement of a nondiscretionary duty, and the Court should reject the Government's and AHRI's attempt to read this requirement into the statute. *See* DOE Br. 10; AHRI Br. 5-6. A different paragraph of the citizen suit provision, § 6305(a)(3), *does* specify that it applies only to duties with deadlines: it authorizes suit to enforce the "schedules set forth in section 6295." The comparative absence of any reference to schedules or deadlines in § 6305(a)(2) indicates that deadlines are not required for enforcement of a nondiscretionary duty under that paragraph. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Ninth Circuit has never held, in the context of EPCA or any other statute, that the only enforceable nondiscretionary duties are those with date-certain deadlines. *See Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 WL 2413094, at *3 (N.D. Cal. Aug. 5, 2009) (declining to adopt "bright line rule that only duties with date-certain deadlines are nondiscretionary for the purpose of citizen suits under [the Comprehensive Environmental Response, Compensation, and Liability Act]," and noting that "Ninth Circuit has not yet addressed this issue" and "courts are split on the classification of duties as nondiscretionary for citizen suits under other environmental laws"); *cf. Idaho Conservation League v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991) (concluding plaintiffs' nondiscretionary duty claim under Clean Water Act was not frivolous for purposes of plaintiffs' entitlement to attorneys' fees where statute said EPA "shall promptly prepare and publish proposed regulations," 33 U.S.C. § 1313(c)(4), and no case law suggested statute left EPA "any discretion to deviate from this apparently mandatory course"); *Viet. Veterans*, 811 F.3d at 1078, 1082-83 (holding, in suit under 5 U.S.C. § 706(1), that Army must comply with regulations requiring it to provide notice and medical care to human test subjects, where regulations did not contain deadlines).

Several courts, including courts in this circuit, have enforced nondiscretionary duties in the absence of a date-certain deadline. In *Northwest Environmental Advocates v. EPA*, 268 F. Supp. 2d 1255, 1261 (D. Or. 2003), *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 548 (W.D. Wash. 1997), and *Raymond Proffitt Foundation v. EPA*, 930 F. Supp. 1088, 1098 (E.D. Pa. 1996), the courts held that EPA had an enforceable, nondiscretionary duty to comply with a provision of the Clean Water Act, 33 U.S.C. § 1313(c)(4), requiring EPA "promptly" to publish proposed water quality standards if a state takes no action within 90 days of EPA's rejection of the state's standards. And in *Sierra Club v. Johnson*, 500 F. Supp. 2d 936 (N.D. Ill. 2007), the court held that EPA had a nondiscretionary duty to issue or deny a permit under the Clean Air Act, where the statute provided that EPA "shall issue or deny the permit" if a state fails to submit a permit within 90 days after an EPA objection. *Id.* at 941 (citing 42 U.S.C. § 7661d(c)). In each case, the agency's duty arose after a state was required to act by a deadline. Several of the courts concluded that EPA's subsequent duty to act must be an enforceable, nondiscretionary duty, or the statute's timeframe would be meaningless. *Id.* at 937-38, 940-41; *Raymond Proffitt Found.*, 930 F. Supp. at 1099; *see also Nw. Envtl. Advocates*, 268 F. Supp. 2d at 1261 (concluding that enforcing mandatory duty without date-certain deadline upheld purpose of statute).

In contrast, the statutory provisions at issue in most of the cases cited by the Government and AHRI contain no similar timeframe, and in one case the statute lacks mandatory language.[4] *See NRDC v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989) (Clean Air Act imposed no deadline on EPA to revise list of hazardous air pollutants, where EPA was

[4] The only case with a similar timeframe is *Defenders of Wildlife v. Browner*, 888 F. Supp. 1005 (D. Ariz. 1995), which dealt with the same Clean Water Act provision discussed above. *Defenders* was expressly rejected by *Raymond Proffitt Foundation*, 930 F. Supp. at 1098, and was not followed by *Northwest Environmental Advocates*, 268 F. Supp. 2d at 1261, or *Idaho Conservation League*, 968 F. Supp. at 548. An additional case cited by the Government and AHRI, *Center for Biological Diversity v. Norton*, 254 F.3d 833 (9th Cir. 2001), does not apply here. That case held that the addition of deadlines to the Endangered Species Act indicated that EPA's duties were nondiscretionary, but it did not address whether duties could also be nondiscretionary in the absence of deadlines. *Id.* at 840.

required to do so "from time to time"); *Maine*, 874 F.2d at 888 (Clean Air Act imposed no interim deadline on EPA to control regional haze, between initial deadline for regulations and deadline for "strategy" to be issued "ten to fifteen years" later); *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) (Clean Air Act imposed no deadline on EPA to conclude rulemaking concerning whether to place strip mines on list of pollutant sources subject to fugitive emissions regulation); *Envtl. Def. v. EPA*, No. C 06-4273 SC, 2007 WL 127998, at *4 (N.D. Cal. Jan. 12, 2007) (Congress eliminated deadlines for regulation of spark-ignition engines when it required EPA to conduct safety study before regulating). In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 662 (D.C. Cir. 1975), the court did not address the deadline issue; it held that a statute that said EPA "may, from time to time," revise regulations used discretionary, not mandatory, language.

Whether a statute or regulation imposes an enforceable nondiscretionary duty depends on the text and purpose of the statute. A date-certain deadline may indicate a nondiscretionary duty, but it is illogical to require it in every instance. As demonstrated by the cases cited above, courts have found other indications of a nondiscretionary duty—for example, mandatory language combined with a timeframe and a statutory purpose that would be undercut if the agency were not required to act.

Here, as in the cases finding an enforceable nondiscretionary duty, the Error Correction Regulation uses mandatory language and prescribes a timeline to govern the error-correction process. Members of the public have 45 days to submit a correction request. 10 C.F.R. § 430.5(d)(1). DOE has 30 days to publish a rule, absent "extenuating circumstances," in the event the agency determines it must correct the rule before publishing it. *Id.* § 430.5(f)(3). Naturally, it will take DOE longer to correct a rule than to publish a rule when no corrections are necessary. Logically, then, the deadline for publication after correction represents the outer bound on when DOE will publish a rule following the error-correction process. If DOE's duty to publish a final rule within 30 days were not enforceable, then the regulation's timeline would be meaningless, *see Sierra Club v. Johnson*, 500 F. Supp. 2d at 940-41, and the regulation's purpose of providing a "rapid

and streamlined" process for correcting errors would be defeated, 81 Fed. Reg. at 27,000; *see Nw. Envtl. Advocates*, 268 F. Supp. 2d at 1261.

The Government stresses that the regulation allows DOE to deviate from the timeline in "extenuating circumstances," DOE Br. 11, but the existence of that limited exception is not enough to excuse DOE from complying with the regulation at all. *Cf. Norton Const. Co. v. U.S. Army Corps of Eng'rs*, No. 1:03-CV-02257, 2006 WL 3526789, at *8 (N.D. Ohio Dec. 6, 2006) (in case under 5 U.S.C. § 706(1), finding nondiscretionary duty despite availability of exception to regulatory deadline). To begin with, DOE may not invoke the exception when the agency has received no correction requests, which is true for three of the four final rules here. For those, DOE must submit the rule for publication "in due course," that is, "after the [45-day posting period] has elapsed." 10 C.F.R. § 430.5(f)(2). And the preamble makes clear that DOE intended the exception to apply in limited circumstances, for example, "where an error relates to particularly complex engineering analysis." 81 Fed. Reg. at 57,750. By retaining the flexibility to take more time to correct an error in circumstances like those, DOE did not negate the mandatory aspects of the Error Correction Regulation. The text of the regulation plainly imposes mandatory duties on DOE, and the Court may enforce them.

C. DOE must publish the Final Rules

DOE received no correction requests for three of the four rules at issue: the Portable AC Final Rule, the Air Compressor Final Rule, and the UPS Final Rule. The 45-day posting period for the last of these rules expired on February 11, 2017. The Error Correction Regulation required DOE to publish these rules "in due course," that is, "after the [45-day posting period] has elapsed." 10 C.F.R. § 430.5(f)(2). It is inconsequential that, after the expiration of the respective 45-day posting periods, DOE received "correspondence raising concerns" about the Air Compressor Final Rule, DOE Br. 7, and "DOE and interested parties . . . conferred about alleged problems" with the UPS Final Rule, *id.* at 8. The Error Correction Regulation mandates that requests for correction "must be submitted within 45 calendar days of the posting of the rule," and "[a] request that does not comply with the

requirements of this section will not be considered." 10 C.F.R. § 430.5(d)(1), (5). DOE does not assert that it has identified any errors in these three rules. The Court should compel DOE to comply with its regulations and publish the three rules.

DOE received three requests purporting to identify errors in the Boiler Final Rule, but only one request identified an error within the meaning of the Error Correction Regulation. *See* 10 C.F.R. § 430.5(b) (defining "error"). That error was the substitution of a "greater-than" sign for a "greater-than-or-equal-to" sign in a table categorizing boilers based on their rated input. *See* Sorenson Decl. Ex. D, at 318 tbl.2 (Boiler Final Rule); *id.* Ex. K (AHRI email identifying error); *id.* Ex. L, at 2 (Feb. 13, 2017 email from John Cymbalsky, manager of DOE's Appliance and Equipment Standards Program, stating that the "last of the 2016 rules . . . have passed through error correction as of Friday. Only [the Boiler Final Rule] received comment and of those received, only the AHRI email appears to conform to the error correction final rule – and only the bit about a table not having a '>=' instead of '>'"). The Government does not assert that there are any other errors in the rule.

Even if DOE were required to correct additional errors in the Boiler Final Rule, that would not excuse DOE from complying with the requirement to publish the rule. The Error Correction Regulation mandates that DOE submit a corrected rule for publication within 30 days after the end of the 45-day posting period, absent extenuating circumstances. The 30-day deadline ran on March 15, 2017, and DOE has not invoked the exception for extenuating circumstances. The Court should compel DOE to comply with its regulations and publish the Boiler Final Rule.

II. In the alternative, the APA and Federal Register Act require DOE to publish the Final Rules

The APA empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see SUWA*, 542 U.S. at 62. A failure to act is remediable under the APA if the action not taken is both "discrete" and "legally required." *SUWA*, 542 U.S. at 63 (emphasis omitted).

Under both the APA and the Federal Register Act, DOE must publish the Final

Rules in the Federal Register. The APA, as amended by FOIA, mandates that 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). Likewise, the Federal Register Act provides that "[t]here shall be published in the Federal Register . . . documents or classes of documents that may be required so to be published by Act of Congress," 44 U.S.C. § 1505(a)(3), including agency rules, 5 U.S.C. § 552(a)(1)(D). Congress's use of mandatory language ("shall") in both statutes indicates that agencies must publish rules they have adopted, and publication is a discrete action that this Court can compel, *see SUWA*, 542 U.S. at 62, 66-67. DOE has adopted the Final Rules, and its failure to publish them is an agency action unlawfully withheld.

A. DOE has adopted the Final Rules

DOE adopts a rule when it posts the rule for error correction. At that point, DOE has finalized and signed the rule and intends to publish and enforce it; all that remains is to correct any mistakes. The plain text of the Error Correction Regulation makes clear that it "applies to *rules*" that DOE has adopted, 10 C.F.R. § 430.5(a) (emphasis added); *id.* § 430.5(b), not to "draft" or "proposed" rules, as the Government and AHRI misleadingly suggest, *see, e.g.*, DOE Br. 5, 15; AHRI Br. 3-4, 6, 9. For example, the regulation states that its purpose is to "describe procedures through which [DOE] accepts and considers submissions regarding possible Errors in its *rules* under [EPCA]," 10 C.F.R. § 430.5(a) (emphasis added), and mandates that DOE "will cause a *rule* under the Act to be posted on a publicly-accessible Web site," *id.* § 430.5(c)(1) (emphasis added).

There are other indications in the text of the Error Correction Regulation that DOE adopts a rule when it posts it for error correction. The narrow definition of "error"—"an aspect of the regulatory text of a rule that is inconsistent with what the Secretary intended regarding the rule at the time of posting"—demonstrates that the "rule at the time of posting" is the operative rule, and the purpose of the error-correction process is merely to eliminate any mistakes in the rule prior to publication. 10 C.F.R. § 430.5(b); *see id.* § 430.5(d)(2)(ii) (disallowing correction requests based on a "person's disagreement with a

policy choice that [DOE] has made"). And by making publication the inevitable end point of the error-correction process, *id.* § 430.5(f)(1)-(3), the regulation further demonstrates that DOE has adopted, and intends to publish, the rules it posts for error correction.

The preamble to the Error Correction Regulation confirms that DOE adopts a rule when it posts it for error correction. It could not be more clear: the "posting of an energy conservation standards rule signals the end of DOE's substantive analysis and decision-making regarding the applicable standards." 81 Fed. Reg. at 57,751.[5] DOE even "recognizes it has an obligation under the Administrative Procedure Act to publish a 'rule,' as defined in this part, in the Federal Register." 81 Fed. Reg. at 27,001. DOE goes on to say that the "time for error-correction contemplated by this rule will not be a departure from that obligation," because 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." *Id.* Thus, DOE itself concluded, when it issued the Error Correction Regulation, that the APA requires the agency to publish the rules it posts for error correction.

The above-quoted passage answers the Government's and AHRI's argument that DOE could not have adopted the Final Rules when it posted them, because then plaintiffs could have compelled their publication before the error-correction process ended. DOE Br. 18; AHRI Br. 9. DOE determined, and Citizen Plaintiffs agree, that a brief "paus[e]" before publication to allow DOE to fix errors does not violate the APA. 81 Fed. Reg. at 27,000-01. It is DOE's continued refusal to publish the Final Rules, months after the expiration of the "time for error-correction contemplated by [the Error Correction Regulation]," *id.* at 27,001, that violates the APA and the Federal Register Act.

Lastly, the Final Rules themselves indicate that DOE has adopted them. At the beginning of each rule, following the title, are the words, "ACTION: Final Rule." Sorenson

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[5] Although the Government again claims that DOE said only that it would "'generally adhere to the policy decisions it [had] already made,'" DOE Br. 15, DOE made that statement in the different context of explaining why it was not adopting a general reconsideration procedure, *see supra* p. 11.

Decl. Exs. A-D. At the end of each rule is the statement, "The Secretary of Energy has approved publication of this final rule." That is followed by a date and the ink signature of an authorized official. *Id.* Ex. A, at 253; Ex. B, at 344; Ex. C, at 191; Ex. D, at 315.

Additionally, the notice attached to each rule states, "The text of this rule is subject to correction based on the identification of errors as defined in 10 CFR 430.5 before publication in the Federal Register." *Id.* Exs. A-D. This notice communicates two important points: (1) DOE may change the text of the rule, but if it does, it will be to correct errors as defined in the Error Correction Regulation, and (2) the rule will be published in the Federal Register. Both points support the conclusion that DOE has adopted the rule.

B. The Government's and AHRI's counterarguments fail

The Government and AHRI protest that DOE could not have adopted the Final Rules because they were still "subject to correction," DOE Br. 15; AHRI Br. 9, but neither party explains why adopting a rule would preclude correcting errors in that rule prior to publication. It does not. There is nothing extraordinary about an agency correcting a "typographical," "calculation," or "numbering" error after adopting a rule and before publishing it. 10 C.F.R. § 430.5(b). Indeed, the regulations of the Office of the Federal Register permit an agency to make "corrections" to a document it has submitted for publication but which has not yet been published, and unless the corrections are "[e]xtensive," the agency may do so without withdrawing the document. 1 C.F.R. § 18.13(a). DOE's error-correction process is similar. It takes place after the rule's substance is set; DOE has made its "decisions on the relevant factual determinations and policy choices." 81 Fed. Reg. at 26,999. And the only changes that may result from the process are any corrections needed to ensure that the regulatory text reflects DOE's intentions "at the time of posting." 10 C.F.R. § 430.5(b). Allowance for this type of error correction is consistent with adoption.

The Government's and AHRI's contention that DOE does not adopt a rule until the rule appears in its published form in the Federal Register is illogical, for two reasons. *See* DOE Br. 15; AHRI Br. 8. First, the plain text of the APA indicates that adoption is distinct

from and precedes publication: "Each agency 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). If adoption did not occur until publication, then the requirement that agencies publish rules they adopt would be meaningless. Second, treating publication as adoption would take the adoption of a rule out of DOE's hands and assign that task to the Office of the Federal Register. The Government suggests this is indeed what happens: it argues that the Final Rules will not be adopted until they contain an effective date, DOE Br. 15, and it is up to the Office of the Federal Register to "**[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**," *id.* (quoting Final Rules). It cannot be, however, that the Office of the Federal Register is responsible for "adopt[ing] as authorized by law," 5 U.S.C. § 552(a)(1)(D), energy-conservation standards under EPCA. Only DOE is authorized to do that. For both of these reasons, adoption must occur at some point prior to publication. For rules subject to DOE's error-correction process, that point is the posting of the signed, final rule for error correction.[6]

The cases cited by the Government and AHRI do not apply here. Although it is true, as the court explained in *Alcaraz v. Block*, that one purpose of § 552(a)(1)(D) is to protect against the enforcement of unpublished regulations, 746 F.2d 593, 609 (9th Cir. 1984), that case does not foreclose the use of § 552(a)(1)(D) to compel an agency to publish a regulation it has adopted but is not yet enforcing. *Alcaraz* addressed a different situation: plaintiffs sought to compel an agency to *formulate*, adopt, and publish regulations. *Id.* at 598-601, 609-10; *see City of Santa Clara v. Andrus*, 572 F.2d 660, 674 (9th Cir. 1978) (same). They did not argue, as Citizen Plaintiffs do here, that the agency was unlawfully refusing to publish a regulation it had already adopted.

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[6] The Government incorrectly asserts that Citizen Plaintiffs' choice to bring suit in district court instead of filing petitions for review in the court of appeals is a tacit acknowledgment that the Final Rules have not been adopted. DOE Br. 15. Citizen Plaintiffs do not allege that they are "adversely affected" by the Final Rules, 42 U.S.C. § 6306(b)(1); instead, they seek to compel the rules' publication because they will benefit from them.

The *Slattery* cases also do not apply. *See* DOE Br. 16-17 (citing *Wang v. Slattery*, 877 F. Supp. 133 (S.D.N.Y. 1995); *Chen v. Slattery*, 862 F. Supp. 814 (E.D.N.Y. 1994); *Si v. Slattery*, 864 F. Supp. 397 (S.D.N.Y. 1994)); AHRI Br. 9 (same). In those cases, plaintiffs sought to require federal immigration authorities to comply with "an unpublished rule [that] not only deviated from agency policy . . . but was actually withdrawn by the agency from publication." *Wang*, 877 F. Supp. at 139-40. Here, DOE has adopted and has not withdrawn the Final Rules. Nor could it withdraw them; the Error Correction Regulation requires DOE to publish the Final Rules at the end of the error-correction process. *See supra* pp. 7-9. Additionally, neither the *Slattery* cases nor *Alcaraz* addressed a claim under the Federal Register Act.

Finally, *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), does not answer the questions presented here. The court did "not decide whether [a regulation] was 'adopted' by virtue of [an agency official's] signature, and thus whether [5 U.S.C.] § 552(a)(1) imposed a duty to publish the document." 88 F.3d at 1202. That is because the court held that FOIA's judicial review provision, 5 U.S.C. § 552(a)(4)(B), under which plaintiff brought suit, did not authorize the relief sought. 88 F.3d at 1203. Here, Citizen Plaintiffs are proceeding under the APA's general provisions for judicial review, 5 U.S.C. §§ 704 and 706(1), not the FOIA judicial review provision. If this Court were to deny Citizen Plaintiffs' First Claim, then §§ 704 and 706(1) would be available to enforce DOE's violations of the publication requirements of the APA, *id.* § 552(a)(1)(D), and the Federal Register Act, 44 U.S.C. § 1505(a)(3), because there would be "no other adequate remedy in a court," 5 U.S.C. § 704.[7]

DOE adopted the Final Rules when it posted them for error correction. Both the APA and the Federal Register Act require DOE now to publish the Final Rules in the Federal Register. DOE has unlawfully withheld agency action within the meaning of 5 U.S.C. § 706(1), and this Court should compel publication.

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[7] The *Kennecott* court did not decide whether § 706(1) is available to enforce a violation of § 552(a)(1)(D), because plaintiff had waived that argument. 88 F.3d at 1203.

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

DOE was required to "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" by July 1, 2011. 42 U.S.C. § 6295(u)(1)(E)(i)(II). DOE has determined that UPSs are battery chargers, DOE Br. 19, and is in continuing violation of the deadline Congress prescribed.

The Government's interpretation of the statute is implausible; DOE could not have fulfilled its duty by setting standards for a single class of battery chargers and ignoring every other class. Instead, DOE was required to set standards for all classes of battery chargers for which a standard was "technically feasible and economically justified." 42 U.S.C. § 6295(u)(1)(E)(i)(II); *compare id.* § 6295(o)(3)(B) (DOE may not prescribe standards "for a type (or class) of covered product" if DOE "determines . . . that the establishment of such standard is not technologically feasible or economically justified").

The Court should not excuse DOE from complying with its statutory deadline because the agency delayed determining that UPSs are battery chargers. DOE has now made that determination; is subject to a long-past statutory deadline to issue standards; and has posted to its website, but refuses to publish, a final rule prescribing standards for UPSs. The Court should not countenance DOE's continuing delay.

CONCLUSION

For the foregoing reasons, Citizen Plaintiffs respectfully request that the Court deny the Government's and AHRI's motions to dismiss and grant Citizen Plaintiffs' motion for summary judgment.[8]

[8] Citizen Plaintiffs have standing to pursue their claims. DOE's failure to publish the Final Rules deprives plaintiffs and their members of benefits including lower energy bills, a more reliable electricity grid, and reduced emissions of harmful air pollutants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); Decls. of Gina Trujillo, Lauren Urbanek, Anthony Guerrero, Marc Vigliotti, Huda Fashho, Mel Hall-Crawford, and Carol Biedrzycki.

Dated: October 27, 2017

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