

B. Energy Policy and Conservation Act

1. Natural Resources Defense Council v. Perry, 940 F.3d 1072 (9th Cir. 2019)

The Natural Resources Defense Council, in conjunction with states, municipalities, and other nonprofit organizations (collectively, plaintiffs),^{1} brought suit against the Department of Energy (DOE),^{2} alleging that the DOE's refusal to publish new energy-conservation standards in the Federal Register violated the Energy Policy and Conservation Act (EPCA).^{3} Plaintiffs claimed that the Secretary of Energy had a non-discretionary duty under EPCA's error-correction rule^{4} to submit the new standards for publication. The United States District Court for the Northern District of California granted summary judgment in favor of the Plaintiffs.^{5} The DOE appealed. The Ninth Circuit reviewed the judgment *de novo* and affirmed.

Under the EPCA, the DOE establishes energy conservation standards for certain consumer products and industrial equipment through notice-and-comment rulemaking. In 2016, the DOE adopted the error-correction rule, creating a forty-five day window between the DOE's issuance of a final rule establishing an energy conservation standard and the rule's publication in the Federal Register.^{6} During this period, the DOE posts the rule on its website and invites the public to identify any errors that should be corrected before final publication.^{7} Requests for correction cannot be premised on a disagreement with a policy choice that the Secretary made, nor will the DOE consider any new evidence.

The rule provides that if, after receiving properly filed requests, the Secretary decides not to undertake any correction, the Secretary "will submit the rule for publication as it was posted."^{8} If there are no properly filed requests and the Secretary identifies no errors, the Secretary "will in due course submit the rule."^{9} If the Secretary receives a properly filed request and determines that a correction is needed, the Secretary "will, absent extenuating circumstances, submit a corrected rule for publication" within thirty days after the error-correction period has elapsed.^{10}

In December 2016, the DOE finalized four new energy conservation standards, posting the final rules prescribing the standards on its website. The forty-five day error-correction period ended on January 19, 2017, for one rule and February 11, 2017, for the other three. The DOE received one minor correction request for one rule and no correction requests for the remaining three. However, after the error-correction period ended, the DOE refused to submit any rules to the Office of the Federal Register for publication.

Plaintiffs brought suit under the EPCA's citizen-suit provision,^{11} arguing that the error-correction rule imposes a non-discretionary duty on the DOE to publish the four new standards in the Federal Register. The district court found jurisdiction was proper under the EPCA's citizen-suit provision as the rule imposes a non-discretionary duty and held that the DOE violated this duty. The

[1] Plaintiffs included Natural Resource Defense Council, Inc.; Sierra Club; Consumer Federation of America; Texas Ratepayers' Organization to Save Energy; People of the State of California, by and through Attorney General Xavier Becerra; California State Energy Resources Conservation and Development Commission; State of Maryland; State of Washington; State of Maine; Commonwealth of Massachusetts; State of Vermont; State of Connecticut; Commonwealth of Pennsylvania; District of Columbia; State of Illinois; State of New York; State of Oregon; City of New York; and State of Minnesota.[1]

[2] Defendants also included James R. Perry, in his official capacity as Secretary of Energy. The Air-Conditioning, Heating, & Refrigeration Institute intervened as defendants.[2]

[3] Energy Policy Conservation Act, 42 U.S.C. §§ 6291–6317 (2019).[3]

[4] 10 C.F.R. § 430.5 (2020).[4]

[5] Nat. Res. Def. Council, Inc v. Perry, 302 F. Supp. 3d 1094, 1101 (N.D. Ca. 2018).[5]

[6] 10 C.F.R. § 430.5.[6]

[7] Error is defined narrowly as "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." *Id.* at § 430.5(b).[7]

[8] *Id.* at § 430.5(f)(1).[8]

[9] *Id.* at § 430.5(f)(2).[9]

[10] *Id.* at § 430.5(f)(3).[10]

[11] EPCA's citizen-suit provision authorizes any person to bring a civil action against an agency administering the statute only where there is an alleged failure to perform a non-discretionary act or duty. 42 U.S.C. § 6305(a)(2) (2019).[11]

district court ordered the DOE to publish the four rules in the Federal Register. The Ninth Circuit stayed the district court order pending resolution of the DOE's appeal.

On appeal, the Ninth Circuit held that jurisdiction was proper under the EPCA's citizen-suit provision because the error-correction rule creates a mandatory duty to publish the final rules in the Federal Register. The DOE first argued that the Agency retains discretion because the word "will" was intended to describe what will ordinarily occur at the end of the error-correction period. The Ninth Circuit noted that agencies are ordinarily free to withdraw a proposed rule before it has been published, even if the rule received final agency approval and was submitted to the Office of the Federal Register. However, because of the plain language of the error-correction rule, the Ninth Circuit found that the DOE relinquished this discretion. The rule's use of the word "will" unambiguously imposed a mandatory duty.

Next, the Ninth Circuit found that the DOE violated the non-discretionary duty imposed by the error-correction rule. The rule specifies a general 30-day deadline for submitting the original rule for publication. The Agency must submit a corrected rule within the timeframe unless unusual circumstances are present. As the Agency did not claim extenuating circumstances, the DOE had a non-discretionary duty to submit all four rules for publication within 30 days after the error-correction period ended.

The Ninth Circuit rejected the DOE's argument that, even if the error-correction rule imposes a mandatory duty, Plaintiffs cannot invoke the EPCA's citizen-suit provision because the provision does not authorize suits for the enforcement of non-discretionary duties imposed by regulation. The provision requires plaintiffs to identify an alleged failure by the DOE to perform an "act or duty under this part."^{[[12]]} The Ninth Circuit held that "under this part" encompasses duties imposed both by statute and regulation. Congress consistently used this phrase throughout the statute to refer to requirements established by regulation and the DOE did not identify a provision that used this phrase to refer solely to statutory requirements. Thus, plaintiffs properly invoked the EPCA's citizen-suit provision.

In sum, the Ninth Circuit held that the plain language of the error-correction rule imposed a non-discretionary duty on the Secretary of Energy to submit the new energy conservation standards for publication within 30 days after the error-correction period ended. Because the DOE failed to publish the four new standards, the DOE violated the EPCA. Additionally, because the error-correction rule imposed a non-discretionary duty and the phrase "under this part" encompasses duties imposed by statute and regulation, the court had jurisdiction under the EPCA's citizen-suit provision.

[[12]] *Id.*[[12]]