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## COURT OF APPEALS REJECTS DOE DELAY IN PUBLISHING EFFICIENCY RULES

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The U.S. Court of Appeals for the Ninth Circuit has restricted the authority of the Department of Energy (DOE) to delay publishing energy efficiency standards in the Federal Register.<sup>1</sup> Upholding a lower court, the court of appeals determined that DOE did not have the right to delay publishing four standards rules once a 45-day error-correction period had expired. This restriction places a premium on interested parties making their views known early in the rulemaking process.

### DOE delays publication of standards

The case concerns efficiency standards rules adopted by DOE under the Energy Policy and Conservation Act (EPCA)<sup>2</sup> for portable air conditioners, uninterruptible power supplies, air compressors, and commercial packaged boilers. In December 2016, late in the Obama administration, DOE posted on its website pre-Federal-Register versions of these standards rules. Under DOE's "error-correction rule,"<sup>3</sup> the public then had 45 days to review the posted versions of the standards before the agency would submit them to the Federal Register for publication.<sup>4</sup> For three of the four standards DOE received no request for error correction; one minor error (a symbol in a table) in the other standard was flagged for correction.

The 45-day period ended in the Trump administration. DOE, now under new management, refused to submit the rules to the Office of the Federal Register for publication. This led to judicial challenge pursuant to EPCA's citizen-suit provision<sup>5</sup> by states, municipalities, and environmental and consumer organizations.

### Courts reject DOE's delay

The district court determined that the error-correction rule imposed on DOE a "clear-cut" non-discretionary duty.<sup>6</sup> It ruled that the agency has only two options once it has posted a standard for error correction and the time for correction has passed: "publish the standard as posted, or correct any errors in the standard and publish it as corrected."<sup>7</sup> Therefore, the court believed that DOE's delay in publishing in the Federal Register violated the error-correction rule. The court ordered DOE promptly to publish the standards in the Federal Register.

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<sup>1</sup> *Natural Res. Def. Council v. Perry*, No. 18-15380 (9<sup>th</sup> Cir. Oct. 10, 2019).

<sup>2</sup> 42 U.S.C. §§ 6291-6347e.

<sup>3</sup> 10 C.F.R. § 430.5.

<sup>4</sup> *Id.* § 430.5(c).

<sup>5</sup> 42 U.S.C. § 6305(a)(2).

<sup>6</sup> *Natural Res. Def. Council v. Perry*, 302 F. Supp. 3d 1094, 1097 (N.D. Cal. 2018).

<sup>7</sup> *Id.* at 1098.

DOE appealed. The court of appeals stayed the order pending resolution of the matter. It then affirmed the district court's decision.

The court of appeals said that DOE had a non-discretionary duty to publish the four standards rules upon completion of the error-correction process.<sup>8</sup> It determined that whatever discretion DOE may have had to withhold publication was relinquished when the agency adopted the error-correction rule.<sup>9</sup> The rule provides that DOE "will" submit a final rule for publication at the end of the error-correction process, which phrasing the court said was mandatory in this context.<sup>10</sup>

The court of appeals also held<sup>11</sup> that the plaintiffs were entitled to bring their action pursuant to EPCA's citizen-suit provision.<sup>12</sup> It rejected DOE's argument that this provision was restricted to violations of duties imposed by EPCA and did not also cover violations of duties imposed by regulations under EPCA.

### **Conclusion**

The court of appeals' decision is only the latest chapter in a complex saga covering more than 40 years regarding energy efficiency rules under EPCA. DOE, Congress, the courts, and stakeholders are key players. DOE's approach to its role sometimes shifts with changes in administrations. A common thread is that stakeholders are at an advantage if they participate in rulemaking at an early stage. This helps assure that their views are taken into account by DOE on a timely basis. And it can reduce the risk of being impeded later in the process by deadlines and other constraints.

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<sup>8</sup> *Perry*, No. 18-15380, slip op. at 12-13.

<sup>9</sup> *Id.* at 13.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> *Id.* at 21.

<sup>12</sup> 42 U.S.C. § 6305(a)(2).