

October 2019
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Ninth Circuit affirms district court order requiring Department of Energy to publish energy-conservation standards approved by Obama Administration

The Energy Policy and Conservation Act authorizes the Department of Energy to promulgate energy conservation standards for certain consumer products and industrial equipment. It also prohibits DOE from promulgate standards less stringent than existing ones. To build in a measure of flexibility for the “anti-backsliding” mandate, DOE adopted an “error-correction” rule, 10 C.F.R. § 430, in 2016 that establishes a 45-day period between promulgation of an amended or new standard and its publication in the Federal Register at which point the standard becomes final. The rule defines the term “error” 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” and gives as examples “(i) [a] typographical mistake that causes the regulatory text to differ from how the preamble to the rule describes the rule; (ii) [a] calculation mistake that causes the numerical value of an energy conservation standard to differ from what technical support documents would justify; or (iii) [a] numbering mistake that causes a cross-reference to lead to the wrong text.” Litigation arose over the error-correction rule when DOE adopted final rules covering various products with the 45-day period expiring for certain products on January 19, 2017 and others on February 11, 2017. The DOE received minor proposed corrections to one rule but refused to publish any of standards on the ground that it is continuing to review them. Various States, municipalities and environment and consumer organizations then sued to compel their publication.

The district court agreed with the plaintiffs and ordered the rules’ publication in the Federal Register. *Natural Resources Defense Council, Inc. v. Perry*, 302 F. Supp. 3d 1094 (N.D. Cal. 2018). On October 10, 2019, the Ninth Circuit affirmed that order. *Natural Resources Defense Council, Inc. v. Perry*, 2019 WL 5076950 (9th Cir. Oct. 10, 2019). It rejected DOE’s arguments “that the error-correction rule does not impose a mandatory duty to publish final rules in the Federal Register upon completion of the error-correction process” and, alternatively, that “the plaintiffs cannot invoke [42 U.S.C.] § 6305(a)(2) because that provision only authorizes suits for the enforcement of non-discretionary duties imposed by statute.”

As to the first argument, the court pointed to language of the error-correction rule stating that “the Secretary ‘will’ submit the final rule for publication in the Federal Register” and reasoned that “[t]he word ‘will,’ like the word ‘shall,’ is a mandatory term, ... unless something about the context in which the word is used indicates otherwise.” Applying this rule of construction, it disagreed with DOE’s interpretation of “will” as “merely descriptive rather than prescriptive[;]” *i.e.*, the rule simply describes “what the agency anticipates will ordinarily occur at the end of the error-correction process, leaving the Secretary free to do something different if he so chooses.” Concurring with the plaintiffs, the court responded that “when the word ‘will’ is used elsewhere in the error-correction rule, it is used in its mandatory sense, to prescribe what the agency is required (or forbidden) to do.” “Will” thus had its ordinary mandatory meaning, leaving the DOE Secretary with “a non-discretionary duty to submit all four rules for publication in the Federal Register within 30 days after the error-correction process ended.”

As to the second argument, the court of appeals found “unconvincing” DOE’s construction of § 6305(a)(2) as authorizing suit only for duties directly imposed under EPCA, as opposed to agency rules adopted pursuant to the statute, through the subsection’s use of the phrase “under this part.” It instead interpreted the phrase as “encompass[ing] duties imposed by statute and regulation alike, so long as the regulation in question was issued under Part A of Subchapter III.” It relied in part on the fact “throughout EPCA, Congress consistently used the phrase ‘under this part’ or ‘under this section’ when referring to requirements established by regulation.”