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Washing Machines, Water Efficiency, and Federal Preemption: California's Quest to Regulate Water Consumption Under the EPCA

*California Energy Commission v. Department of Energy*¹

I. INTRODUCTION

California's distinct geo-climactic condition puts it in a hydrologically disadvantaged position when compared with much of the United States. Covering more than 155,000 square miles,² the State's vast size encompasses several varied climate classifications; ranging from mild-Mediterranean in certain coastal areas to the dry Mojave Desert.³ This climactic diversity results in much of southern California being dependent on an intricate aqueduct system that transports substantial quantities of much needed water down from the aquifers in the north.⁴ Rainfall is limited,⁵ and that lack of precipitation is only exacerbated by a water withdrawal rate that is over six times the national average—51 billion gallons per year versus 8 billion gallons per year.⁶ It was under those strained circumstances that California's Legislature began the process to establish new standards for improving the water efficiency on both commercial and residential clothes washers.⁷ However, in order to

¹ 585 F.3d 1143 (9th Cir. 2009).

² U.S. Census Bureau, State Quick Facts- California, *available at* <http://quickfacts.census.gov/qfd/states/06000.html>.

³ John E. Kesseli, *The Climates of California According to the Koppen Classification*, GEOGRAPHICAL REVIEW, vol. 32, no. 3, 476, 478 (Jul. 1942).

⁴ CAL. DEP'T OF WATER RESOURCES, CAL. GEOGRAPHY AND ITS WATER NEEDS (2008), <http://www.water.ca.gov/swp/geography.cfm> (stating that northern California receives the most rainfall and mountain snowpack runoff and, in order to support a heavily populated and arid southern California, a system is needed to convey water supplies down the state) (last visited April 4, 2010).

⁵ Over the past two years, large portions of California have been categorized by the National Oceanic and Atmospheric Association ("NOAA") as at least "abnormally dry," and well over half of the state is considered "moderately" to "severely" dry. NOAA, STANDARDIZED PRECIPITATION INDEX STUDY: FEB. 2008-JAN. 2010, *available at* <http://www.ncdc.noaa.gov/oa/climate/research/prelim/drought/spi.html>.

⁶ CAL. DEP'T OF WATER RESOURCES, CAL. GEOGRAPHY AND ITS WATER NEEDS (2008), *available at* <http://www.water.ca.gov/swp/geography.cfm>.

⁷ *Cal. Energy Comm'n*, 585 F.3d at 1146.

give legal effect to those standards, the legislature required the California Energy Commission (“CEC”) to petition the Department of Energy (“DOE”) for a waiver of the federal standards that, due to the Energy Policy and Conservation Act (“EPCA”), preempted any applicable state law.⁸ Finding the petition critically deficient in three separate aspects, the DOE rejected the petition.⁹ On direct appeal to the U.S. Court of Appeals for the Ninth Circuit, the Court found that the EPCA vested jurisdiction over denials of waiver petitions in the circuit courts and, on review, the DOE’s rejection was arbitrary and capricious.¹⁰

II. FACTS AND HOLDING

California is in the midst of a water crisis that is further aggravated by a rapidly growing population and a dwindling supply of water.¹¹ Existing water sources have been steadily depleted by a combination of over-appropriating and over-drafting the aquifers, salt-water contamination, and environmental degradation.¹² With no significant alternative water supplies available, California has evaluated a variety of potential solutions to better utilize the existing water supply.¹³ Some of the methods pressed into service have included water recycling,

⁸ *Id.* It is expected that California’s total population will increase by approximately 36 percent through 2025 thereby increasing the current population of 36 million to 49 million by 2025. See US CENSUS BUREAU, PROJECTIONS OF THE TOTAL POPULATIONS OF THE STATES: 1995-2025, available at

<http://www.census.gov/population/projections/state/stpjpop.txt>.

⁹ Denial of California’s Petition for Waiver of Preemption, 71 Fed. Reg. 78,157 (Dec. 28, 2006).

¹⁰ *Cal. Energy Comm’n*, 585 F.3d at 1150 (citing 42 U.S.C. § 6306(b)(2) (2006)).

¹¹ *Id.* at 1146. See CAL. DEP’T OF WATER RESOURCES, MANAGING AN UNCERTAIN FUTURE, CLIMATE CHANGE ADAPTATION STRATEGIES FOR CALIFORNIA’S WATER, at 3-4 (Oct. 2008), available at

<http://www.water.ca.gov/climatechange/docs/ClimateChangeWhitePaper.pdf> (stating that the water supply is further reduced by the “[t]he average early spring snowpack in the Sierra Nevada decreased by about 10 percent during the last century” and this loss is expected to grow by 25 to 40 percent by 2050 and will significantly reduce the source of the largest freshwater reservoir in California).

¹² See *Cal. Energy Comm’n*, 585 F.3d at 1146.

¹³ *Id.*

desalination, and increasing water efficiency.¹⁴ Of those options, California has concluded that improved water efficiency is the most promising means of alleviating its water crisis.¹⁵

In order to effectuate this movement toward higher water efficiency, California enacted legislation requiring the CEC to establish standards for residential clothes washers.¹⁶ Under this mandate, the CEC adopted a two-tiered standard that centered on a particular clothes washer's "water factor" ("WF").¹⁷ The WF standard is simply an expression of the ratio of gallons of water used per load to the capacity, in cubic feet, of the washtub.¹⁸ The standards were to apply to both top-loading and front-loading washers, and were to be implemented using a tiered system with two implementation dates.¹⁹ Tier 1, scheduled to take effect on January 1, 2007, required that all washers were to perform with a WF of no greater than 8.5.²⁰ Tier 2, scheduled to take effect on January 1, 2010, required all washers to perform with a WF of no greater than 6.0.²¹

Under the EPCA, federal standards expressly preempt any state regulations pertaining to the energy efficiency, energy use, or water use of any product.²² As a result, when federal energy efficiency standards for residential clothes washers were adopted in 2001, the CEC's water

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* The legislature's reason for focusing on residential clothes washers stemmed from research that showed 22% of the water use in a typical household was from the operation of the clothes washer. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* For example, a washer that has a 5.0 cubic feet tub and uses 50.0 gallons of water per load would have a WF of 10.0. Should that same 5.0 cubic feet tub instead use only 25.0 gallons of water per load, the WF would be 5.0.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1146-47. With the implementation of these new standards, the CEC asserts that the water savings would be equal to the City of San Diego's current water usage. *Id.*

²² 42 U.S.C. § 6297 (2002). The type of preemption seen in this instance is "express preemption" because Congress included explicit preemptive language in the statute. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 394 (Aspen Publishers 2006). Federal preemption powers are derived from the supremacy clause in Article VI of the Constitution. U.S. CONST. art. VI.

efficiency standards were effectively preempted.²³ Cognizant of this obstacle, the California Legislature directed the CEC to petition the DOE for a rule waiving preemption of the federal standards.²⁴

In order to successfully obtain such a waiver, the CEC needed to, among other things, demonstrate that the state regulation was necessary “to meet unusual and compelling State or local water interests.”²⁵ Completed on December 23, 2005, the DOE outlined three separate reasons for denial; each it considered independently sufficient for rejection of the petition.²⁶ First, the initial tier of the CEC’s proposed regulation, set to take effect on January 1, 2007, failed to meet the statutory three-year minimum waiting period prior to implementation.²⁷ Second, the CEC “did not meet the statutory standard, which requires a state to show unusual and compelling water interests.”²⁸ The CEC did not do this, the DOE maintained, because the CEC did not support its cost-benefit analysis with the underlying data that would have allowed the DOE to determine whether the standard was satisfied.²⁹ Third, the CEC’s proposed regulation would make an entire class of clothes washers unavailable in California.³⁰

The CEC requested reconsideration of the DOE’s decision and, following thirty days of inaction by the DOE, the request was denied on February 28, 2007.³¹ Having exhausted its remedies within the DOE, the CEC filed a petition for review with the United States Court of Appeals for the Ninth Circuit.³² In its appeal, the CEC asserted that the DOE’s

²³ *Cal. Energy Comm’n*, 585 F.3d at 1147. This exemplifies Chief Justice John Marshall’s view of preemption when he stated: “[A]cts of the State Legislatures... which interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of congress...is supreme; and the law of State though enacted in the exercise of powers not controverted, must yield to it.” *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824).

²⁴ *Cal. Energy Comm’n*, 585 F.3d at 1147.

²⁵ 42 U.S.C. § 6297(d)(1)(B)-(C) (2002).

²⁶ *Id.*

²⁷ *Id.*; 71 Fed. Reg. 78,157, 78,157.

²⁸ *Cal. Energy Comm’n*, 585 F.3d at 1147; *see also* 71 Fed. Reg. 78,157, 78,157.

²⁹ *Cal. Energy Comm’n*, 585 F.3d at 1147; *see also* 71 Fed. Reg. 78,157, 78,157.

³⁰ *Cal. Energy Comm’n*, 585 F.3d at 1147; *see also* 71 Fed. Reg. 78,157, 78,157-58.

³¹ *Cal. Energy Comm’n*, 585 F.3d at 1147.

³² *Id.*

rejection of its petition was arbitrary and capricious.³³ In support of that argument, the CEC argued that: (1) the DOE’s requirement that there be “strict parity” between the analysis submitted and the implementation timeline was unworkable in practice;³⁴ (2) the DOE’s conclusion that the CEC did not provide underlying analyses of its assumptions and data was unsupported by the record;³⁵ and, (3) there was no “rational connection between the facts found and the conclusions made” regarding the DOE’s finding that there would be an unavailability of top-loading washers.³⁶ In response, the DOE first asserted that the Ninth Circuit lacked jurisdiction.³⁷ According to the DOE, the EPCA required the CEC to initially seek review in federal district court.³⁸ Second, should jurisdiction lie properly with the Ninth Circuit, the DOE argued that any of the three reasons it articulated for denial of the petition could independently support their action under the applicable standard of review.³⁹

In its decision the Ninth Circuit found that, contrary to the DOE’s assertion, jurisdiction was properly evoked under the EPCA and the CEC was not required to first seek review in federal district court.⁴⁰ Next, the court systematically evaluated each of three reasons for denial given by the DOE and found the rejection of the CEC’s petition to be “arbitrary and capricious.”⁴¹ Thus, the decision made by the DOE was reversed and the issue remanded for further, more proper consideration of the waiver petition filed by the CEC.⁴²

III. LEGAL BACKGROUND

³³ *Id.* at 1152.

³⁴ *Id.*

³⁵ *Id.* at 1153.

³⁶ *Id.* at 1154 (quoting *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003)).

³⁷ *Id.* at 1147-48.

³⁸ *Id.*

³⁹ *Id.* at 1151.

⁴⁰ *Id.* at 1150.

⁴¹ *Id.* at 1151-54.

⁴² *Id.* at 1155.

A. *The Energy Policy and Conservation Act*⁴³

The Energy Policy and Conservation Act of 1975 was the legislative result of the devastating energy crisis that gripped the United States in the early 1970's.⁴⁴ Among the primary objectives of the EPCA was to "establish a comprehensive national energy policy" that would maximize domestic energy production, establish a strategic reserve, and reduce domestic energy consumption.⁴⁵ Put into practice, the EPCA provided for everything from the "creation of a Strategic Petroleum Reserve capable of reducing the impact of severe supply interruptions," to "provid[ing] for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products."⁴⁶ Included in the extensive list of "major appliances" governed by the EPCA are furnaces, water heaters, clothes washers, and clothes dryers.⁴⁷

Upon the adoption of a federal energy conservation standard, the EPCA explicitly stipulated that no state regulation "concerning the energy efficiency, energy use, or water use of such covered product shall be effective" unless the regulation has been granted a waiver by the DOE.⁴⁸ Obtaining a waiver to regulate any EPCA covered product for which there is already federal energy conservation standards requires the state to file a petition with the Secretary of the DOE to give the regulation effect.⁴⁹ Following consideration of the petition and an appropriate notice and

⁴³ 42 U.S.C. §§ 6201-6422 (2006).

⁴⁴ In response to American support for Israel in the Yom-Kippur War of 1973, the Organization of Arab Petroleum Exporting Countries ("OAPEC") and its parent organization, the Organization for Petroleum Exporting Countries ("OPEC"), dealt a crippling financial blow to the United States through the implementation of a sweeping oil embargo and the institution of punishing price fixing measures. See H.R. REP. NO. 94-340, at 2-3 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762, 1763-65.

⁴⁵ S. REP. NO. 94-516, at 2 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 1956, 1957.

⁴⁶ 42 U.S.C. § 6201.

⁴⁷ *Id.* § 6292(a)(4)-(8).

⁴⁸ *Id.* § 6297(c)(2). Regardless of whether the federal government decides to regulate only water use, energy efficiency or energy use on a specific covered product, once those standards are in place, individual states are completely preempted from establishing any energy or water standards on that product.

⁴⁹ *Id.* § 6297(d)(1)(A).

comment period, the DOE will only grant the waiver petition if the state has established by a preponderance of the evidence “that the state regulation is needed to meet unusual or compelling State or local energy or water interests.”⁵⁰ Nonetheless, even if the state establishes such “unusual or compelling” interests, the DOE will still reject the petition if interested persons establish that the state’s regulation will “significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis.”⁵¹

In the case that a party is aggrieved or adversely affected by a rule, the EPCA gives two avenues of review.⁵² The first avenue gives the adversely affected party the right to petition the United States court of appeals for the circuit in which the person resides, or has her principal place of business, for judicial review of a rule prescribed under §§ 6293-6295.⁵³ Alternatively, if a party would like to determine if a state or local government is in compliance under the EPCA, such review may be sought in the United States district courts.⁵⁴

In 2001, pursuant to 42 U.S.C. § 6295, the DOE adopted energy efficiency standards for residential clothes washers.⁵⁵ Despite not prescribing water efficiency standards for residential clothes washers, the DOE’s promulgation of energy efficiency standards expressly preempted state agencies from regulating the energy or water efficiency of that appliance.⁵⁶

⁵⁰ A state’s interests will be considered “unusual and compelling” if they are: (1) substantially different in nature or magnitude than those prevailing in the United States generally; and (2) are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the regulation outweigh the costs, benefits, burdens, and reliability of alternative approaches. *Id.* § 6297(d)(1)(B)-(d)(1)(C)(ii).

⁵¹ *Id.* § 6297(d)(3). An interested person is anyone that takes the time to comment following the notice of proposed rulemaking. The interested persons meet their burden if they do so by a preponderance of the evidence. *Id.*

⁵² 42 U.S.C. § 6306(b).

⁵³ *Id.* § 6306(b)(1). Section 6293 concerns testing procedures, section 6294 concerns labeling, and section 6295 concerns energy conservation standards.

⁵⁴ *Id.* § 6306(c)(1). Section 6306(c)(2) also allows review in the district courts when a petition is filed to have the DOE change national energy efficiency standards for a covered product and the petition is denied. *Id.* § 6306(c)(2).

⁵⁵ 10 C.F.R. § 430.32(g) (2009).

⁵⁶ 42 U.S.C. § 6297(c)(2).

B. *California Statutes and Regulations*

In 2002, the California Legislature required the CEC to promulgate water efficiency standards for both commercial and residential clothes washers.⁵⁷ The CEC was able to adopt energy and water efficiency standards for commercial clothes washers without preemption difficulties because they were not covered by a federal regulation.⁵⁸ However, in regards to residential washers, the CEC promulgated the aforementioned two-tier standards with implementation dates of January 1, 2007 and January 1, 2010.⁵⁹ Yet, for those regulations to become enforceable, the CEC was instructed to petition the DOE for a rule waiving preemption.⁶⁰ That petition was the subject of the instant case.

C. *Jurisdictional Issues and the EPCA*

Natural Resources Defense Council v. Abraham (“*Abraham*”) is the most important case to evaluate the propriety of jurisdiction in cases involving the EPCA.⁶¹ In *Abraham*, the DOE was required to either approve or modify congressionally established energy efficiency standards for central air conditioning units.⁶² Yet, to modify the congressionally established standards, Congress required that the standard adopted by the DOE “achieve the maximum improvement in energy efficiency” that is determined to be technologically and economically feasible.⁶³ Also, Congress installed an “anti-backsliding” mechanism, codified in 42 U.S.C. § 6295(o)(1), that forbid the DOE from promulgating standards which were less stringent than those established by prior federal legislation.⁶⁴

⁵⁷ *Cal. Energy Comm'n*, 585 F.3d at 1146.

⁵⁸ See CAL. CODE REGS. tit. 20 § 1605.3(p)(1) (2010).

⁵⁹ *Id.* § 1605.2(p)(1).

⁶⁰ 2002 Cal. Stat. ch. 421.

⁶¹ 355 F.3d 179 (2d Cir. 2004).

⁶² *Id.* at 186-87.

⁶³ *Id.* at 187 (quoting National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, sec. 5, § 325(1)(2)(A), 101 Stat. 103, 114 (codified as amended at 42 U.S.C. § 6295(o)(2)(A)).

⁶⁴ *Id.* at 187-88 (citing S. REP. NO. 100-6, at 2 (1987)).

Initially, on January 22, 2001, the DOE proposed a conforming rule that was to become effective on February 21, 2001.⁶⁵ However, prior to enactment, the proposed rule's effective date was delayed and the DOE issued a new rule stating that it intended to withdraw and revisit the standards set forth in the January 22nd proposed rule.⁶⁶ Following a public comment period and public hearing, the DOE promulgated a new rule that instituted more lenient efficiency standards than had been put forward in the January 22nd proposed rule.⁶⁷ In response, multiple parties filed petitions for review in the U.S. Court of Appeals for the Second Circuit and also in the District Court for the Southern District of New York.⁶⁸ Those parties sought appellate review of both the DOE's decision to postpone the effective date of the already published rule and also its decision to implement less restrictive standards.⁶⁹ The district court summarily dismissed the petitions due to a lack of subject matter jurisdiction and held that the EPCA granted jurisdiction to the appellate courts.⁷⁰ The Second Circuit, in order to determine whether jurisdiction was proper, consolidated the petitions already before it with the appeal and petitions for relief dismissed by the district court.⁷¹

The court first looked to the EPCA and found that, although § 6306 vested jurisdiction in the appellate courts for actions relating to §§ 6293-6295, a persuasive argument could be made that the district courts had jurisdiction on the basis of general federal question jurisdiction.⁷²

⁶⁵ *Id.* at 189.

⁶⁶ *Id.* at 190. The effective date of the rule was delayed by an order issued by President George W. Bush's Chief of Staff, Andrew Card. It required that all federal regulations already published in the Federal Register, but not yet effective, be postponed for a period of sixty days. Memorandum for the Heads and Acting Heads of Executive Dep'ts and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 191 (citing *New York v. Abraham*, 199 F. Supp. 2d 145, 152 (S.D.N.Y. 2002)).

⁷¹ *Id.*

⁷² *Id.* at 192 (quoting *Clark v. Commodity Futures Trading Comm'n*, 170 F.3d 110, 113, n.1 (2d Cir. 1999)) (noting that the petitioners relied on the well-established precedent that "District Courts, unlike courts of appeals, require no further statutory authority to hear appeals from agency decisions than the federal question jurisdiction set forth at 28 U.S.C. § 1331.").

Nevertheless, the court held that whenever there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeal.⁷³ Moreover, the court found the statutory structure of § 6306 favored finding jurisdiction in the court of appeals because the EPCA provided that most acts undertaken by the DOE regarding home appliances are subject to review by the courts of appeals.⁷⁴ Lastly, the court held that “rulemaking proceedings do not ordinarily necessitate additional fact-finding by a district court to effectuate the review process.”⁷⁵ This is in stark contrast to the fact-finding that, in the court’s opinion, would need to take place when evaluating state compliance with the EPCA—situations that are explicitly vested in the district courts by § 6303.⁷⁶ As a result, the Second Circuit held that jurisdiction was proper in the court of appeals.⁷⁷

Another case that weighed jurisdictional considerations in close statutory interpretation cases was *Public Citizen, Inc. v. National Highway Traffic Safety Administration* (“*Public Citizen*”).⁷⁸ In that case, the D.C. Circuit Court of Appeals considered whether jurisdiction belonged to the district court or court of appeals following denial of a petition for a “an order prescribing a motor vehicle safety standard” under the Safety Act.⁷⁹ At issue was a petition filed by a group of tire-makers requesting that the National Highway Traffic Safety Administration (“NHTSA”) raise the manufacturer’s recommended tire pressure that was printed on individual tires.⁸⁰ The NHTSA denied the rulemaking petition and the tire-makers appealed to the D.C. Circuit.⁸¹

⁷³ *Id.* at 193 (citing *Clark*, 170 F.3d at 114); *see also* Nat’l Parks & Conservation Ass’n v. FAA, 998 F.2d 1523, 1529 (10th Cir. 1993) (stating that if any ambiguity exists as to whether jurisdiction lies with a district court or a court of appeals, it should be resolved in favor of review by the court of appeals).

⁷⁴ *Abraham*, 355 F.3d at 193.

⁷⁵ *Id.* at 193; *see also* Fla. Power & Light v. Lorion, 470 U.S. 729, 744 (1985).

⁷⁶ *Abraham*, 355 F.3d at 193-94.

⁷⁷ *Id.*

⁷⁸ 489 F.3d 1279 (D.C. Cir. 2007).

⁷⁹ *Id.* at 1287.

⁸⁰ *Id.* at 1286.

⁸¹ *Id.*

Much like the EPCA, the Safety Act vested jurisdiction in the courts of appeals when such an order is issued.⁸² However, as the court reasoned, there is a stark difference between the NHTSA prescribing an order, which is directly reviewable by the courts of appeal, and the NHTSA simply denying a petition to initiate a proceeding to consider orders or rules.⁸³ The D.C. Circuit held that the statute clearly dictated that review of “NHTSA’s denial of a petition for rulemaking must begin in district courts—not in courts of appeals.”⁸⁴

IV. INSTANT DECISION

The Ninth Circuit’s evaluation in *California Energy Commission v. Department of Energy* primarily turned on two issues. First, the court determined that it properly had jurisdiction under the EPCA.⁸⁵ Second, the court found that none of the reasons cited by the DOE were sufficient for denial of the CEC’s petition and were therefore arbitrary and capricious.⁸⁶

A. Jurisdiction

The crux of the DOE’s jurisdictional argument was that the EPCA did not specifically place jurisdiction in the Appellate Courts for issues concerning the denial of a waiver sought pursuant to § 6297(d).⁸⁷ As a result, the DOE argued, judicial review should have originated in federal district court as prescribed by the Administrative Procedure Act (“APA”).⁸⁸ The court was not persuaded. First, the Ninth Circuit noted that although § 6306 did not specifically list § 6297(d) in its enumeration of issues that may be raised initially before an appellate court, that was not

⁸² *Id.* (citing 49 U.S.C. § 30161(a) (2006)).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Cal. Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1147 (9th Cir. 2009).

⁸⁶ *Id.*

⁸⁷ *Id.* at 1148.

⁸⁸ Under the APA, absent a specific statutory provision to the contrary, review of agency action is typically located in the District Courts. *Id.* (citing *Owner-Operators Indep. Drivers Ass’n v. Skinner*, 931 F.2d 582, 585 (9th Cir. 1991)); 5 U.S.C. § 500 (2006).

enough to simply infer Congress intended default jurisdiction to lie in the district courts for all other challenges.⁸⁹ Under the EPCA, the court observed, jurisdiction was specifically vested in the district courts for two categories of action: suits to determine state compliance with requirements of the EPCA, and suits challenging the denial of rulemaking to amend a product standard.⁹⁰ Thus, the court argued that if Congress had intended jurisdiction to vest in the district courts for all challenges other than direct challenges to rules adopted, then those specific jurisdictional grants to the district courts would appear unnecessary.⁹¹ Instead, the court reasoned that the EPCA simply allocated certain groups of cases to be decided first by the district courts and another group of cases to be decided first by the appellate courts.⁹² When a matter is unlisted, “considerations of efficiency, consistency with the congressional scheme, and judicial economy may be employed to determine whether initial review in the circuit courts best accomplishes the intent of Congress.”⁹³ In the instant case, the court believed those considerations militated in favor of jurisdiction in the appellate court.⁹⁴

In support of its belief that courts must make considerations of practicality and ensure consistency with Congress’ intent, the Ninth Circuit looked to the Second Circuit’s decision in *Abraham*.⁹⁵ In that case, the Second Circuit held that a sharp distinction should be drawn between “[r]ulemaking proceedings [which] do not ordinarily necessitate additional fact-finding by a district court to effectuate the review process” and “the exceptions to review by a court of appeals found in § 6303 [which] ordinarily would entail additional fact-finding, as they do not reflect the culmination of a structured rulemaking process with its attendant

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* See generally *Estate of Bell v. Comm’r*, 928 F.2d 901, 904 (9th Cir. 1991) (“Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.”).

⁹² *Cal. Energy Comm’n*, 585 F.3d at 1148.

⁹³ *Id.* (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 741-45 (1985)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1149.

record.”⁹⁶ Applying that standard to the present case, the Ninth Circuit found that the DOE’s denial of a waiver of preemption resulted in a full record upon which the agency deliberated and no further fact-finding was necessary.⁹⁷ Holding otherwise, the court believed, would create a system of duplicity whereby the district courts and appellate courts would review the same record under the same legal standards.⁹⁸

Next, the court rejected the DOE’s reliance on *Public Citizen*.⁹⁹ In *Public Citizen*, the D.C. Circuit held that, although orders prescribing a motor vehicle standard are reviewable in the first instance by the courts of appeal, denials of requests to initiate proceedings to consider orders are not available for direct appellate review.¹⁰⁰ The circumstances in *Public Citizen*, the Ninth Circuit believed, were substantially different and actually provided support for jurisdiction.¹⁰¹ The court held that the policy considerations relied on in *Public Citizen* were analogous to the reasoning of *Abraham* because original jurisdiction in the appellate court was denied when the agency had refused to act and no record whatsoever had been compiled.¹⁰² Without such a record, the court reasoned, any appellate court would find it impossible to determine whether the agency had acted legally.¹⁰³ A district court, with its fact-finding capability, was a more appropriate venue.¹⁰⁴ In the instant case, the court found a fully developed record and, as a result, the type of review the court would engage in was no different than the sort it would engage when reviewing a rule promulgated under § 6295—a section the court was expressly assigned jurisdiction over by the EPCA.¹⁰⁵

Thus, the Ninth Circuit concluded that it properly had jurisdiction to consider the CEC’s petition for review.

⁹⁶ *Id.* at 1149 (quoting *NRDC v. Abraham*, 355 F.3d 179, 193-94 (2d Cir. 2004) (alteration in original)).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1150; *Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007)).

¹⁰⁰ *Cal. Energy Comm’n*, 585 F.3d at 1150.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

*B. The DOE's Rejection of the CEC's Petition was
Arbitrary and Capricious*

In evaluating the DOE's rejection of the CEC's petition, the Ninth Circuit first looked at the DOE's reliance on the three-year waiting period as a reason for denial.¹⁰⁶ The EPCA establishes a mandatory three-year delay between the date of the DOE's grant of a waiver and the date on which the state standard takes effect.¹⁰⁷ Since the CEC's petition contained a tiered implementation strategy, with the first standard taking effect on January 1, 2007, the DOE held that the CEC's petition failed for lack of adherence to the waiting period.¹⁰⁸ The Ninth Circuit found that reasoning unacceptable.¹⁰⁹ The court pointed out that the DOE did not even accept the petition as complete until December 23, 2005, and did not rule upon it until December 28, 2006.¹¹⁰ Because the DOE does not generally provide a specific date by which a waiver petition will be ruled upon, the court believed the DOE needed to infuse a level of flexibility so that those petitioning entities might be able to better estimate a starting date.¹¹¹ Furthermore, the court noted that the DOE made no attempt to apply the data provided by the CEC and evaluate a permissible implementation date.¹¹² Consequently, the Ninth Circuit rejected the DOE's contention that it could simply reject the waiver petition because the first implementation date was not outside the three-year waiting period.¹¹³ Such a system, the court held, created an unworkable schematic

¹⁰⁶ *Id.* at 1151.

¹⁰⁷ *Id.* No final rule prescribed by the DOE under the waiver provisions may permit any state regulation to become effective with respect to any covered product within three years after such rule is published in the Federal Register. 42 U.S.C. 6297(d)(5)(A) (2006).

¹⁰⁸ *Cal. Energy Comm'n*, 585 F.3d at 1151. Specifically, the DOE found that the January 2007 implementation date would fail the three-year lead-time requirement and California did not show what impact a revised effective date would have on the data and analyses provided to the DOE. Denial of California's Petition for Waiver of Preemption, 71 Fed. Reg. 78,157, 78,160 (Dec. 28, 2006).

¹⁰⁹ *Cal. Energy Comm'n*, 585 F.3d at 1151.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1152.

¹¹² *Id.*

¹¹³ *Id.*

framework that was contrary to common sense, and thus arbitrary and capricious.¹¹⁴

The Ninth Circuit next looked at the DOE's second ground for denial of the CEC's petition.¹¹⁵ The DOE's second reason for denial was that "the CEC had not established by a preponderance of the evidence that the State of California has unusual and compelling water interests" as required by the EPCA.¹¹⁶ To satisfy that standard, the CEC was required to demonstrate that California had: (1) interests in saving water that are substantially different than those prevailing in the United States generally; and (2) the costs, benefits, burdens, and reliability of energy or water savings resulting from the state regulation made such state regulation preferable or necessary when balanced against alternative approaches.¹¹⁷ The DOE found the CEC met the first requirement in showing that California's water interests were "substantially different in magnitude than those prevailing in the U.S. generally."¹¹⁸ However, the DOE thought the CEC did not show how its standards were preferable or necessary when compared to alternative approaches.¹¹⁹ The DOE's support for this conclusion was rooted in its belief that the CEC failed to provide the underlying analysis of its assumptions and data inputs, and because of that, the DOE was unable to determine if the petition met EPCA requirements.¹²⁰

In rejecting this analysis, the Ninth Circuit found that the CEC had done its part and provided a full explanation of its data and assumption in the form of its own rulemaking record.¹²¹ The DOE itself, in its notice

¹¹⁴ *Id.* The Ninth Circuit's reasoning on this issue tracks closely with the First Circuit's decision in *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73 (1st Cir. 1993). In that case, the First Circuit found an EPA rejection of a discharge permit to have been arbitrary and capricious because the EPA's stringent reliance on its own procedural rules were insufficient to support the denial without an adequate rationale for its actions. *Id.* at 78-79. A bit tongue-in-cheek, the court declared "It may come as a surprise that agency decisions must make sense to reviewing courts." *Id.* at 77.

¹¹⁵ *Cal. Energy Comm'n*, 585 F.3d at 1152.

¹¹⁶ *Id.* at 1153.

¹¹⁷ *Id.* at 1152-53 (citing 42 U.S.C. § 6297(d)(1)(C)(i)-(ii)).

¹¹⁸ *Id.* at 1153.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

soliciting comment, referred readers to the website at which the CEC's rulemaking record could be found.¹²² Moreover, the court noted that the DOE's own regulations require that it accept as complete "only such petitions which conform to the requirements of [DOE's regulations] and which contain sufficient information for the purposes of a substantive decision."¹²³ Thus, the court concluded that the CEC had provided sufficient data and analysis for the DOE to make a decision and the DOE simply did not evaluate them.¹²⁴ As a result, the court held the DOE's reliance on its second ground for denying the petition for waiver was arbitrary and capricious.¹²⁵

Lastly, the Ninth Circuit looked to the DOE's third reason for rejecting the CEC's petition. That final reason centered on the DOE's assertion that if the CEC's waiver petition was granted, the 6.0 WF standard for top-loading washers would likely result in the unavailability of top-loading residential washers in California.¹²⁶ This, the DOE asserted, precluded the approval of the waiver because the EPCA requires denial of a waiver if "interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics, features, sizes...."¹²⁷

The court found the DOE's reasoning flawed.¹²⁸ In holding that top-loading washers would be made unavailable, the DOE relied on comments that no top-loading residential clothes washers existed in the current market that could comply with the 6.0 WF level of the proposed California regulation.¹²⁹ This, the court held, was wholly insufficient. In order to adequately show by a preponderance of the evidence that the state regulation is likely to result in the unavailability of top-loading washers, the DOE could not simply point to the current unavailability.¹³⁰ It was

¹²² *Id.*

¹²³ *Id.* (citing 10 C.F.R. § 430.42(f)(1)).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1153-54 (citing 42 USC § 6297(d)(4)).

¹²⁸ *Id.* at 1154.

¹²⁹ *Id.*

¹³⁰ *Id.*

necessary, according to the court, for the DOE to weigh evidence of future availability of top-loaders that would meet such a standard.¹³¹ The CEC presented evidence pertaining to that point, but, as the court noted, the DOE did not conduct an analysis of that evidence.¹³² The DOE's failure to address the CEC's evidence of the probable capability of top-loading washers in the future was a "clear error of judgment," and thus the court found it to be arbitrary and capricious.¹³³

V. COMMENT

A. *Legal Analysis*

The Ninth Circuit correctly found that Congress intended decisions, such as the denial of waiver petition, to be directly reviewed by the courts of appeal. With a fully developed record already in place, it would be redundant and a waste of limited judicial resources to initially vest review in the district courts. Furthermore, in light of the ill-supported and dismissive reasoning relied on by the DOE, the court was correct in finding that the rejection of the waiver petition was arbitrary and capricious. In so finding, the court has helped ensure that the DOE will follow the legislative intent of Congress and give individual states the full and fair hearing to which they are entitled when petitioning for a waiver of preemption.

B. *Cooperative Federalism and the Future of California's Water Preservation*

Increasingly popular over the last forty years, cooperative federalism is essentially a form of governance that divides authority between various jurisdictions.¹³⁴ One of the underlying principles of cooperative federalism is that the federal government typically establishes

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 MISS. C. L. REV. 127, 130 (2006).

minimum standards, but will leave the states discretion to alter them.¹³⁵ Traditionally, environmental law has favored an arrangement where the federal government will establish a minimum standard by statute or regulation and, after meeting certain conditions, states are allowed to enact more stringent standards.¹³⁶ Persons in favor of cooperative federalism in this context believe that it excels in providing much needed deference to state officials who are better positioned to tailor federal regulatory schemes to local conditions.¹³⁷ An excellent model for the beneficial operation of cooperative federalism has been the Clean Air Act.

Similar to the EPCA, the Clean Air Act of 1970¹³⁸ (“CAA”) was passed to increase environmental stewardship and improve the nation’s air quality.¹³⁹ However, unique to the CAA is the duality of standards inserted into it by Congress in regards to motor vehicle emissions. While federal standards would still preempt any conflicting state standards, California alone is given the option to request a preemption waiver in order to set its own standards.¹⁴⁰ If California requests a waiver under that provision, the Administrator of the EPA is to grant the waiver so long as: (1) the state standards are at least as protective as the federal standards; (2) the determination of the state is not arbitrary or capricious; (3) the state standards exist to meet compelling and extraordinary circumstances; and (4) the state standards and enforcement are consistent with the federal standards.¹⁴¹ Following approval of the preemption waiver, other states may choose to either adopt the more stringent California standard or simply remain under the federal standard.¹⁴²

¹³⁵ *Id.*

¹³⁶ *Id.* The other model for cooperative federalism is seen in programs such as Medicaid where a federal agency “develop[s] certain standards for state agencies to follow when implementing the federal statutory scheme that provides federal funding for the states.” *Id.* (quoting Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001)).

¹³⁷ Wells, *supra* note 132, at 130-31.

¹³⁸ 42 U.S.C. §§ 7401-7671 (2006).

¹³⁹ *Id.* § 7401.

¹⁴⁰ 42 U.S.C. § 7543(a)-(b). California is the only state which meets § 7543(b)(1)’s requirement for obtaining a waiver because it was the only state which had standards in place prior to March 30, 1966. See S. Rep. No. 90-403 at 632 (1967).

¹⁴¹ 42 U.S.C. § 7543(b)(1)-(2).

¹⁴² *Id.* § 7543(b)(3).

What this feature has done under the CAA is allow California, historically progressive on environmental issues, to serve as a laboratory for tighter emissions controls while allowing sister states to decide whether such standards would be beneficial to their respective populaces. Should a state find that the more stringent California standards would be prohibitively expensive to implement, or would yield only modest positive results, that state is free to simply adhere to the federal standards. Thus far, fifteen states and the District of Columbia have chosen to adopt the California standards.¹⁴³ Overall, the CAA, with its cooperative federalism framework and structural flexibility towards California, has been effective in steadily reducing the levels of the six major air pollutants and increasing national air quality.¹⁴⁴

It would seem self-evident that a similar urgency should be exhibited in the preservation of our water supply as has been demonstrated in improving the quality of the air we breathe. In light of the success realized under the CAA, California should advocate for and Congress should legislate a provision into the EPCA comparable to the one in the CAA. Not only would it allow California to serve at the forefront of another major environmental issue, but it would also give other states and the federal government the opportunity to evaluate the efficacy of more stringent efficiency standards.¹⁴⁵ As the nation's most populous state,¹⁴⁶ and one of the largest markets for consumer goods,¹⁴⁷ California is a large

¹⁴³ See PEW CENTER ON GLOBAL CLIMATE CHANGE, VEHICLE GREENHOUSE EMISSIONS STANDARDS, http://www.pewclimate.org/what_s_being_done/in_the_states/vehicle_ghg_standard.cfm (last visited Apr. 5, 2010). States that adopt the California standards are known as "CARB" States because the California Air Resources Board is the institution responsible for promulgating California's standards. *Id.*

¹⁴⁴ EPA, OUR NATION'S AIR: STATUS AND TRENDS THROUGH 2008, *available at* <http://www.epa.gov/airtrends/2010/index.html>.

¹⁴⁵ See Ann E. Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. 63, 68 (2008) (stating that replicating the regulatory scheme used under the CAA would be a workable option under the EPCA because of the past successes realized under the CAA).

¹⁴⁶ U.S. CENSUS BUREAU, NAT'L AND STATE POPULATION ESTIMATES: 2000-2009, *available at* <http://www.census.gov/popest/states/NST-ann-est.html>.

¹⁴⁷ CAL. CHAMBER OF COMMERCE, CAL. TRADE FACTS, *available at* <http://www.calchamber.com/international/trade/pages/tradestatistics.aspx>; U.S. CENSUS

enough segment of both the market and society that it would serve as an ideal test subject for new standards while avoiding the production of the fragmented standards feared by opponents of cooperative federalism in environmental legislation.¹⁴⁸ Moreover, the waiver petition process itself would encourage further dialog in the field of environmental regulation by states that might not otherwise be interested. Each time California would present an argument in its waiver petition for new standards, those arguments would have to be analyzed and either supported or rejected by other states. As multiple states begin to adopt the California efficiency standards under this revised version of the EPCA, it would also assuage any fear that the federalization of environmental law is leading to a “ceiling mentality” where federal standards are not the minimum, but instead the maximum the states may require.¹⁴⁹

With the way in which the EPCA is presently codified, Congress does not need to take drastic action to afford California the same privilege it has under the CAA. The standard for any state to be granted a preemption waiver under the EPCA is strikingly similar to the standard, as outlined above, for the CAA. Congress would simply have to enact a provision similar to § 7543(b)(3) in the CAA that allows for other states to either adopt the California standard or remain under the federal standards.¹⁵⁰ Also, to give added strength to that provision, the DOE should give substantial deference to California’s petition waivers. Such deference is not unusual and would be reflective of the deference California is given under the CAA. An example of that deference was recently seen when the EPA was asked by the Obama Administration to reevaluate a prior decision rejecting a petition for waiver of preemption under the CAA.¹⁵¹ Following receipt of that request, the EPA changed

BUREAU, NAT’L AND STATE POPULATION ESTIMATES: 2000-2009, *available at* <http://www.census.gov/popest/states/NST-ann-est.html>.

¹⁴⁸ See Michael Burger, *Empowering Local Autonomy and Encouraging Experimentation in Climate Change Governance: The Case for a Layered Regime*, 39 ENVTL. L. REP. NEWS & ANALYSIS 11161, 11167 (Dec. 2009).

¹⁴⁹ *Id.* (stating that many in the environmental law community believe that federal preemption places a ceiling on environmental standards and thus limits the potential for future reductions.)

¹⁵⁰ 42 U.S.C. § 7543(b)(3) (2006).

¹⁵¹ Presidential Memorandum to Admin’r of the EPA, 74 Fed. Reg. 4905 (Jan. 26, 2009).

course and granted California's waiver petition, stating that "Congress intended EPA's review of California's decision-making be narrow."¹⁵² Were California's requests for waiver preemption under the EPCA given such deference, it would be a significant step toward streamlining the waiver process and allowing California to serve as a vehicle to improve efficiency standards.

C. Application to and Recommendations for Missouri

Traditionally, Missouri is a state that is associated with Mark Twain inspired visions of riverboats traversing the mighty Missouri and Mississippi Rivers throughout the late 18th and early 19th centuries. For many years the strength of Missouri's economy has been intertwined with its intimate connection to those rivers, and in the 21st century those rivers are still integral to the future success of the State. With so much of Missouri's viability connected to those rivers, it is important to note that neither river originates in Missouri and the bulk of their respective river systems are well beyond Missouri's borders.¹⁵³ In fact, Missouri is the last state to share the flow of both the upper Mississippi and Missouri rivers.¹⁵⁴ Without increased water efficiency standards implemented, it is probable that upstream states with earlier access to those river systems will desire to draw more water from those limited bodies as their populations and agricultural production increase.¹⁵⁵

¹⁵² Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744, 32,747 (July 8, 2009).

¹⁵³ The headwaters to the Missouri River are located in Montana and the river flows through Montana, North Dakota, South Dakota, and Nebraska prior to crossing into Missouri. Similarly, the Mississippi River cuts down the eastern border of Missouri as it makes its way from Minnesota to the Gulf of Mexico. See UNITED STATES GEOLOGICAL SURVEY, LARGEST RIVERS IN THE UNITED STATES, *available at* <http://pubs.usgs.gov/of/1987/ofr87-242/pdf/ofr87242.pdf>.

¹⁵⁴ JERRY D. VINEYARD, MO. DEP'T OF NATURAL RESOURCES, STATE WATER PLAN SERIES, VOLUME VI, WATER RESOURCE SHARING: THE REALITIES OF INTERSTATE RIVERS 1 (1997), *available at* <http://www.dnr.mo.gov/pubs/WR50.pdf>.

¹⁵⁵ *Id.* When the White River is added to the mix, Missouri shares the flows of it, the Missouri River, and the Mississippi River with 19 other states.

Historically, Missouri has been blessed with adequate rainfall and plentiful supplies of groundwater.¹⁵⁶ That is not to say, however, that Missouri has been immune from water shortages and drought. Most recently, from July 1999 through the summer of 2000 many parts of Missouri experienced drought conditions.¹⁵⁷ Several community water reservoirs reached dangerously low levels and agricultural areas throughout the northern portions of the State were hit especially hard.¹⁵⁸ Although the drought began only as a “supply drought,” commonly characterized by a lack of precipitation to replenish and maintain the levels of surface and ground water, it nearly became a “water use drought” as a result of human activity using more water than was available.¹⁵⁹

With Missouri’s own susceptibility to future water shortages, it should take a more proactive approach on issues concerning water use and efficiency. Although California is well positioned to carry the mantle on the water efficiency issue, support from a state that is outside the traditionally arid Southwest would be invaluable to serve notice that water conservation principles are also a key focus in the Midwest. Missouri could be a leader in that regard. On issues such as water efficiency in clothes washers, Missouri could provide assistance in the form of supportive comments during the petition for a waiver of preemption process. If, as happened in *California Energy Commission v. Department of Energy*,¹⁶⁰ the case ends up in the court of appeals, Missouri could file an amicus curiae brief supporting California’s changes.¹⁶¹ Lastly, the Missouri delegation in the U.S. Congress could introduce legislation to modify the EPCA to give states the same level of cooperative federalism seen in the CAA, thus allowing willing states to adopt California’s more

¹⁵⁶ MO. DEPT. OF NATURAL RESOURCES, MISSOURI DROUGHT PLAN 9 (2002), available at <http://www.dnr.mo.gov/pubs/WR69.pdf>.

¹⁵⁷ *Id.* at preface.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2. Supply droughts and water use droughts can often occur simultaneously due to dwindling supply and an uptick in water use due to any number of societal or environmental factors. *Id.*

¹⁶⁰ 585 F.3d 1143 (9th Cir. 2009).

¹⁶¹ As a state, Missouri may file an amicus curiae brief without consent of the parties or leave of the Court. FED. R. CIV. P. 29.

stringent standards. Taking these actions would allow Missouri to not only recite, but also live its *Water Conservation Ethic*:

Water conservation begins at home. We have a serious responsibility to use water conservatively, so that those downstream from us may share to the same extent that we share the rivers that flow into Missouri from upstream states. It is not OUR water; it belongs to the entire Earth, endlessly renewed through the hydrologic cycle.¹⁶²

VI. CONCLUSION

As concerns over what effects a growing worldwide population will have on the limited natural resources available, it is critical that a good amount of flexibility be built into the environmental regulatory framework so that local answers might eventually solve global problems. Allowing California to innovate and legislate tighter standards that are narrowly tailored to the unique needs of their climactic situation can only serve to raise the bar for the remainder of the country as more states look to those improvements and decide to follow them. The present system of standards promulgated by the federal government is not obsolete; it just needs to be adjusted to confront today's challenges. The standards put in place in Washington, D.C. should remain to serve as the floor which no state or industry may venture below. Nevertheless, by allowing California to remain in its leadership position on environmental issues under a scheme akin to the CAA, efficiency in a variety of industries will improve and will further national environmental objectives.

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¹⁶² JERRY D. VINEYARD, MISSOURI STATE WATER PLAN SERIES, VOLUME VI, WATER RESOURCE SHARING: THE REALITIES OF INTERSTATE RIVERS 20, *available at* <http://www.dnr.mo.gov/pubs/WR50.pdf>.