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Devon Hudson MacWilliam
Boston College Law School, devon.macwilliam@bc.edu

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MORE GUIDANCE PLEASE: PROVING PREJUDICIAL ERROR UNDER THE APA

DEVON HUDSON MACWILLIAM*

Abstract: In response to widespread brown- and black-outs, Congress passed the Energy Policy Act in 2005. Under this Act, the Department of Energy must conduct a nationwide study of congestion in transmission lines every three years. Because the results of these studies may affect rights traditionally reserved to the states, DOE must prepare each study in consultation with affected states. In California Wilderness Coalition v. U.S. Department of Energy, the Court of Appeals for the Ninth Circuit held that DOE failed to consult with affected states and applied a broad test to find an error that violated the harmless error doctrine. The dissent would have applied a more technical test thus concluded that a harmless error occurred. This Comment explores various harmless error tests and suggests that litigation on this issue would be more predictable if the Supreme Court were to provide additional guidance for substantive and procedural errors.

INTRODUCTION

On August 14, 2003, over 50 million people in the northeast and midwest United States and Canada lost power in a massive blackout.1 Energy experts attributed this widespread blackout to transmission bottlenecks and inadequate capacity relative to demand.2 Responding to this and other electrical brown- and black-outs, Congress passed the Energy Policy Act (EPAct) in 2005, authorizing the Department of Energy (DOE) to designate national interest electric transmission corridors (NIETC).3 Designation as an NIETC triggers the availability of a fast-track process through which utility companies can obtain transmission permits, circumventing state processes and authorizing the use of

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eminent domain, a power usually reserved to the states.\(^4\) Recognizing that the EPAct would increase the role of the federal government in transmission line development, Congress instructed DOE to develop transmission studies “in consultation with affected [s]tates.”\(^5\)

Consultation requires “conferring with an entity before taking action.”\(^6\) In *California Wilderness Coalition v. U.S. Department of Energy*, the Court of Appeals for the Ninth Circuit determined that DOE failed to consult with affected states when it developed its first congestion study in 2006 (Congestion Study).\(^7\) Further, the court held that DOE’s administrative error was not harmless under the Administrative Procedure Act (APA).\(^8\) Accordingly, the court vacated DOE’s Congestion Study.\(^9\)

The *California Wilderness Coalition* majority determined that complainants adequately demonstrated that DOE’s failure to consult violated the harmless error doctrine.\(^10\) The dissent asserted, however, that the court made a mistake in vacating DOE’s Congestion Study because the complainants failed to “offer even a scintilla of evidence to establish prejudice.”\(^11\) These different conclusions arose from disagreement within the court regarding the standard with which to judge complainants’ evidence.\(^12\) While the U.S. Supreme Court recently confirmed that the complainant carries the burden to persuade the court that error was not harmless, it refrained from enumerating additional criteria by which lower courts should make these judgments.\(^13\) As a result, harmless error jurisprudence lacks predictability and complainants do not have sufficient guidance to draft arguments on appeal.\(^14\)

\(^4\) See id at 1080, 1101.
\(^6\) Cal. Wilderness Coal., 631 F.3d at 1087.
\(^7\) Id. at 1107.
\(^8\) Id. at 1090.
\(^9\) Id. at 1095.
\(^10\) Id. at 1093.
\(^11\) Id. at 1107 (Ikuta, J., dissenting).
\(^12\) Compare Cal. Wilderness Coal., 631 F.3d at 1091–92 (majority opinion) (requiring complainant to show that agency error impacted the procedure used or substance of the decision reached), with id. at 1111 (Ikuta, J., dissenting) (requiring complainant to present facts that mount a credible challenge or identify omissions in procedure that demonstrate unreliability of agency decision).
\(^13\) See Shinseki v. Sanders, 129 S. Ct. 1696, 1707 (2009). The Supreme Court lists various factors that “inform a reviewing court’s ‘harmless-error’ determination,” however it “hesit[ates] to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.” Id.
This Comment argues that not all agency errors are alike and that different types of error deserve different treatment within the harmless error doctrine.\textsuperscript{15} As the \textit{California Wilderness Coalition} case exemplifies, errors like DOE’s failure to consult with affected states may be so obviously harmful that the court can make that determination without application of a defined test.\textsuperscript{16} This Comment further suggests that substantive errors should be judged according to an outcome-based standard, while procedural errors should be judged according to a record-based standard.\textsuperscript{17}

\section*{I. Facts and Procedural History}

In 2005, Congress passed the EPAct, adding \S\ 216 to the Federal Power Act (FPA).\textsuperscript{18} Responding to electrical brown- and black-outs across the nation, the first provision of \S\ 216 establishes a procedure through which DOE may designate NIETCs.\textsuperscript{19} Designation is significant because utility companies are granted a “fast-track approval process” for transmission line permits within the geographic boundaries of any NIETC.\textsuperscript{20} Although designation is federal, the fast-track process affects the rights of state and local governments.\textsuperscript{21} For instance, if a state agency does not approve a transmission line permit within one year of application, the Federal Energy Regulatory Commission (FERC) is authorized to disrupt the state process and issue permits within NIETC boundaries directly.\textsuperscript{22} When such FERC-issued permits are located on private property, \S\ 216 further authorizes the applicant utility company to exercise eminent domain to acquire necessary rights-of-way, a power traditionally reserved to the states.\textsuperscript{23}

The NIETC designation procedure established under \S\ 216 involves two steps.\textsuperscript{24} First, every three years the Secretary of Energy must conduct and issue an energy transmission study “in consultation with affected [s]tates.”\textsuperscript{25} Second, after a notice and comment period, the

\begin{thebibliography}{99}
\bibitem{15} See infra notes 111–115 and accompanying text.
\bibitem{16} See Sanders, 129 S. Ct. at 1706; \textit{Cal. Wilderness Coal.}, 631 F.3d at 1093.
\bibitem{17} See infra notes 101–124 and accompanying text.
\bibitem{18} Cal. Wilderness Coal. v. U.S. Dep’t of Energy, 631 F.3d 1072, 1080 (9th Cir. 2011).
\bibitem{19} \textit{Id}.
\bibitem{20} \textit{Id}.
\bibitem{21} See \textit{id.} at 1087.
\bibitem{22} 16 U.S.C. \S\ 824p(b) (1)(C) (2006).
\bibitem{23} \textit{Id.} \S\ 824p(e); \textit{Cal. Wilderness Coal.}, 631 F.3d at 1101.
\bibitem{24} 16 U.S.C. \S\ 824p(a).
\bibitem{25} \textit{Id.} \S\ 824p(a) (1).
\end{thebibliography}
Secretary must issue a report—based on the energy transmission study—where NIETCs may be designated.26

Pursuant to the deadline established in § 216, DOE issued its first energy transmission study in August 2006.27 While preparing the Congestion Study, DOE accepted input from interested parties and held a series of outreach meetings.28 On February 2, 2006, DOE issued a notice in the Federal Register with its first request for comments.29 While indicating that the Congestion Study was already “well underway,” the notice invited responses to four specific questions as well as feedback regarding DOE’s eight draft criteria and corresponding metrics.30 DOE also announced a technical conference “to allow participants to discuss key issues.”31 A number of states sent representatives to the technical conference and some of these representatives served as panelists.32 Additionally, DOE hosted a series of invitation-only meetings from which state entities were excluded,33 and it had sixty-two outreach meetings with industry organizations, two of which were with various state officials.34

When DOE published the Congestion Study, it solicited public comment and contacted the executive offices of each potential NIETC state.35 In May 2007, DOE responded to the over four hundred com-

26 Id. § 824p(a) (2).
28 Cal. Wilderness Coal., 631 F.3d at 1080–81; see, e.g., CONGESTION STUDY, supra note 27, app. G at 91–93.
30 See id. at 5661–62. DOE invited responses to the following questions:

(1) Should the Department distinguish between persistent congestion and dynamic congestion . . . ? (2) Should the Department distinguish between physical congestion and contractual congestion . . . ? (3) . . . [W]hat existing, specific transmission studies . . . should the Department review? . . . (4) What categories of information would be most useful to include in the congestion study to develop geographic areas of interest?

Id. at 5662.
31 Id. at 5660, 5663.
32 Id., Wilderness Coal., 631 F.3d at 1081.
33 Id.
34 See id. at 1094 n.20; CONGESTION STUDY, supra note 27, app. G at 91–95.
ments it received regarding the Congestion Study and solicited comments on draft NIETCs.\textsuperscript{36} Finally, on October 5, 2007, DOE issued a final ruling in which it designated two NIETCs: the Mid-Atlantic corridor and the Southwest corridor.\textsuperscript{37} In its formal order, DOE rejected” all comments recommending different approaches.”\textsuperscript{38}

In response to DOE’s formal order, the California Wilderness Coalition and eight other citizen groups and states filed requests to stay the NIETC designations with the DOE.\textsuperscript{39} DOE rejected these requests.\textsuperscript{40} Pursuant to the statutory grant of federal appellate jurisdiction,\textsuperscript{41} the California Wilderness Coalition and other parties filed petitions for review within the sixty day statutory window.\textsuperscript{42} The Ninth Circuit consolidated these petitions for review,\textsuperscript{43} ruled in favor of petitioners, and held that “DOE failed to consult with the affected States in undertaking the Congestion Study as required by § 824p(a)(1)” and that such error was not harmless.\textsuperscript{44}

II. Legal Background

The APA authorizes judicial review of agency actions.\textsuperscript{45} In addition to declaring agency action unlawful,\textsuperscript{46} a court may vacate agency actions when an agency violates required procedures.\textsuperscript{47}

The standard of review for agency actions was established in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{48} 

\textit{Chevron} outlined a two-phase test to determine whether an agency acted lawfully in interpreting relevant statutes and following necessary procedures.\textsuperscript{49} First, the court must determine whether “Congress has directly spoken

\textsuperscript{38} \textit{Cal. Wilderness Coal.}, 631 F.3d at 1083.
\textsuperscript{39} National Electric Transmission Congestion Report; Order Denying Rehearing, 73 Fed. Reg. 12,959, 12,962, 12,966 (Mar. 11, 2008).
\textsuperscript{40} Id.
\textsuperscript{42} Id.; \textit{Cal. Wilderness Coal.}, 631 F.3d at 1083.
\textsuperscript{43} \textit{Cal. Wilderness Coal.}, 631 F.3d at 1083.
\textsuperscript{44} Id. at 1079.
\textsuperscript{46} Id.
\textsuperscript{47} Id. § 706(2)(d).
\textsuperscript{48} \textit{Cal. Wilderness Coal. v. U.S. Dep’t of Energy}, 631 F.3d 1072, 1083 (9th Cir. 2011).

\textsuperscript{44} See 467 U.S. at 842.
to the precise question at issue.” When Congress has “unambiguously expressed” its intent, both the reviewing court and agency in question must follow the language of the statute. When a statute is “silent or ambiguous” on the precise question at issue, however, the court must uphold agency action provided it is based “on a permissible construction of the statute.” This standard is so “highly deferential” that the Ninth Circuit Court of Appeals presumes “agency action to be valid.”

Even when a court finds an agency did not follow a required procedure, it only vacates an action when it violates the harmless error doctrine. This interpretation of the APA, which instructs courts to take “due account” of prejudicial error, requires that courts determine whether an error had a “bearing on the procedure used or the substance of [a] decision reached” before issuing a remedy.

Decades of Ninth Circuit precedent reinforces the harmless error doctrine for agency review pursuant to the APA. For instance, in Sagebrush Rebellion, Inc. v. Hodel, the Ninth Circuit upheld an erroneous agency action because the purpose of the statute’s provision was fully satisfied. The Sagebrush plaintiffs alleged that the Department of the Interior (Interior) violated the notice and hearing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA). The Ninth Circuit agreed that Interior did not “comply in every respect with the terms” of FLPMA. The court explained, however, that “[a]n agency may rely on harmless error only when its ‘mistake . . . is one that clearly had no bearing on the procedure used or the substance of deci-

50 Id. at 842.
51 Id. at 842–43.
52 Id. at 843.
53 Nw. Ecosystems Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007).
54 See Shinseki v. Sanders, 129 S. Ct. 1696, 1704 (2009); Cal. Wilderness Coal., 631 F.3d at 1090; Paulsen v. Daniels, 413 F.3d 999, 1006 (9th Cir. 2005).
56 See Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 466 (D.C. Cir. 1967). In 1949, Congress codified the common law harmless error doctrine, requiring that courts of appeals examine the records of lower tribunals “without regard to errors or defects which do not affect the substantial rights of the parties.” See 28 U.S.C. § 2111 (2006).
57 See, e.g., Paulsen, 413 F.3d at 1006; Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992); Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764–65 (9th Cir. 1986).
58 See Sagebrush, 790 F.2d at 764–65.
59 Id. at 761.
60 Id. at 764.
Applying this reasoning, the court found the violation was a harmless error because the plaintiffs received “a full and fair opportunity to be heard” through a parallel notice and comment procedure administered under another statute.62

Relying on the reasoning of Sagebrush, the Ninth Circuit in Riverbend Farms, Inc. v. Madigan emphasized the importance of applying the harmless error rule to both the result of an agency action as well as the process:

An agency is not required to adopt a rule that conforms in any way to the comments presented to it. . . . Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with APA procedures. To avoid gutting the APA’s procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.63

Applying the harmless error rule in Riverbend—a case in which navel orange growers alleged that the Secretary of Agriculture failed to comply with the notice and comment provisions of the APA—the Ninth Circuit held that the administrative error was harmless.64 Because the Secretary of Agriculture followed a “system of regulation . . . for decades without challenge,” where all parties “knew the ground rules,”65 the court concluded that the procedural deviation from the statute was a harmless error.66

In contrast, in Paulsen v. Daniels, the Ninth Circuit held that a Bureau of Prisons omission of the notice and comment procedure under the APA was not harmless error.67 Unlike Sagebrush and Riverbend, where alternative procedures satisfied the purpose of notice and comment, the court found that the Bureau of Prisons failed to give the plaintiffs sufficient opportunity “to participate in the rulemaking process before the . . . agency adopted the rule.”68

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61 Id. at 765 (emphasis added) (quoting Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) (internal quotations omitted)).
62 Id. at 769.
63 958 F.2d at 1487.
64 Id. at 1487–88.
65 Id.
66 Id. at 1488.
67 Paulsen, 413 F.3d at 1002, 1007.
68 Id.
The above examples of Ninth Circuit precedent illustrate that courts must evaluate the facts of a case to determine whether a deviation constitutes harmless error.\textsuperscript{69} In 2009, the U.S. Supreme Court held in \textit{Shinseki v. Sanders} that the burden of proof in such cases is on the complainant.\textsuperscript{70} The plaintiff, a World War II veteran, was denied disability benefits from the Department of Veterans Affairs (VA).\textsuperscript{71} In response to plaintiff’s arguments that the VA made a procedural error,\textsuperscript{72} the United States Court of Appeals for the Federal Circuit held that VA “notice errors should be presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication.”\textsuperscript{73}

Reviewing the decision of the Federal Circuit, the Supreme Court reversed.\textsuperscript{74} The Court held that the Federal Circuit’s framework was inconsistent with the APA statutory requirement that courts “take due account of the rule of prejudicial error” when ruling on agency actions.\textsuperscript{75} The Federal Circuit’s “complex, rigid, and mandatory” framework imposed an “unreasonably high evidentiary” burden on the VA.\textsuperscript{76} The Supreme Court held that precedent requires case-by-case adjudication, noting that the Federal Circuit’s framework “differ[ed] significantly from the approach courts normally take in ordinary civil cases.”\textsuperscript{77} Whereas the Federal Circuit framework presumed agency error was not harmless and put the burden of proving otherwise on the agency, the Supreme Court explained that the burden of showing error should be on “the party attacking the agency’s determination.”\textsuperscript{78}

Courts have taken a variety of approaches regarding what a claimant must show to persuade the court that agency error was not harmless.\textsuperscript{79} Although not explicit in every opinion, courts sometimes begin

\begin{itemize}
  \item \textsuperscript{69} See \textit{id.} at 1006–07 (summarizing fact specific harmless error analyses of \textit{Riverbend Farms} and \textit{Sagebrush}).
  \item \textsuperscript{70} See \textit{Sanders}, 129 S. Ct. at 1706.
  \item \textsuperscript{71} \textit{Id.} at 1701.
  \item \textsuperscript{72} \textit{Id.} at 1702.
  \item \textsuperscript{73} \textit{Sanders v. Nicholson}, 487 F.3d 881, 889 (Fed. Cir. 2007).
  \item \textsuperscript{74} \textit{Sanders}, 129 S. Ct. at 1708.
  \item \textsuperscript{75} \textit{Id.} at 1700 (quoting 38 U.S.C. § 7261(b)(2) (2006)). Although \textit{Sanders} interprets the statutory language of a code provision specific for appeals to the Veterans Court, the majority mandates that the Veterans Court treat its appeals as courts treat civil cases under the APA, applying the harmless error doctrine. \textit{Id.} at 1704.
  \item \textsuperscript{76} See \textit{id.} at 1704–05.
  \item \textsuperscript{77} \textit{Id.}
  \item \textsuperscript{78} See \textit{id.} at 1705–06.
  \item \textsuperscript{79} See \textit{Smith, supra note 14, at 1739.}
their inquiry by determining whether the agency error was substantive or procedural in nature.\textsuperscript{80}

In substantive error cases, courts often apply an outcome-based standard.\textsuperscript{81} For instance, \textit{Braniff Airways, Inc. v. Civil Aeronautics Board} involved a contested award by the Civil Aeronautics Board (CAB) to Eastern Air Lines of air routes from Florida to Texas.\textsuperscript{82} In 1967, the Court of Appeals for the District of Columbia agreed that CAB violated the APA when this award was “unsupported by substantial evidence.”\textsuperscript{83} In applying the harmless error doctrine to this substantive error, the D.C. Circuit asked whether the agency would have drawn the same conclusion without the error.\textsuperscript{84} Finding substantial doubt that this was the case, the D.C. Circuit concluded the error was not harmless.\textsuperscript{85}

In \textit{Kurzon v. U.S. Postal Service}—a 1976 substantive error case—the plaintiff alleged that the Postal Service erred when it put a mail-stop on the plaintiff’s advertisements.\textsuperscript{86} The Court of Appeals for the First Circuit held that the record contained substantial evidence to support the several Postal Service decisions.\textsuperscript{87} In the one case of agency error, the court applied an outcome-based standard: substantive agency decisions should be vacated only when there is substantial doubt that “the administrative agency would have made the same ultimate finding with the erroneous finding removed from the picture.”\textsuperscript{88} Not persuaded that this was the case, the court determined that the agency error was harmless.\textsuperscript{89}


\textsuperscript{81} See, e.g., Kurzon, 539 F.2d at 796; \textit{Braniff Airways, Inc.}, 379 F.2d at 466.

\textsuperscript{82} 379 F.2d at 458.

\textsuperscript{83} See id. at 462–63. \textit{Braniff Airways} is often cited for the proposition that only administrative error “that clearly had no bearing on the procedure used or the substance of decision reached” is not harmless. \textit{Cal. Wilderness Coal.}, 631 F.3d at 1091 n.14; Kurzon, 539 F.2d at 796. However, the D.C. Circuit applied an outcome-based standard to the facts of the case in \textit{Braniff Airways}. 379 F.2d at 466.

\textsuperscript{84} \textit{Braniff Airways, Inc.}, 379 F.2d at 465–66.

\textsuperscript{85} Id. at 466–67.

\textsuperscript{86} See 539 F.2d at 792.

\textsuperscript{87} See id. at 794.

\textsuperscript{88} Id. at 796 (internal quotation marks omitted).

\textsuperscript{89} Id. at 796–97.
In contrast, when agency error is procedural in nature, courts tend to use analyses that focus more on process and less on the outcome of agency decisions. In *Gerber v. Norton*—a 2002 procedural error case—the D.C. Circuit utilized a record-based test. The plaintiffs challenged a permit issued by the Fish and Wildlife Service (FWS) to a residential community development for “the incidental taking of Delmarva fox squirrels.” In their challenge, the plaintiffs asserted that FWS violated the APA and Endangered Species Act (ESA) when the agency failed to publish a map of a mitigation site during the notice and comment period. After finding this withholding was agency error, the D.C. Circuit asserted that it would find the error harmful only if the complainant could indicate “with reasonable specificity what portions of the documents it object[ed] to and how it might have responded if given the opportunity.” By pointing out specific issues they would have identified had they been shown the mitigation site map, the plaintiffs met this burden.

Unlike the *Gerber* record-based standard, in *City of Sausalito v. O’Neill*, another procedural error case, the court utilized a more general harm-based standard. Here, plaintiffs alleged that the National Park Service (NPS) violated the ESA by preparing a biological assessment of listed species outside the ESA mandated 180-day window. Recognizing this violation, the Ninth Circuit categorized the error as one of tardiness. As a case where “the agency’s error consisted of a failure to comply with regulations in a timely fashion,” the Ninth Circuit queried whether the plaintiffs could identify “the prejudice they have suffered.” Finding that plaintiffs failed to point to harm resulting from NPS’s delay, the Ninth Circuit concluded the agency error was harmless.

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90 See, e.g., Riverbend Farms, 958 F.2d at 1487.
91 See 294 F.3d at 182–83.
92 Id. at 176.
93 Id. at 178.
94 Id. at 182 (internal quotation marks omitted).
95 Id. at 182, 184.
96 Compare *Gerber*, 294 F.3d at 182 (record-based test), with *City of Sausalito*, 386 F.3d at 1220 (harm-based test).
97 *City of Sausalito*, 386 F.3d at 1220.
98 Id.
99 Id.
100 See id.
III. Analysis

Neither the majority nor dissent in *California Wilderness Coalition v. U.S. Department of Energy* challenged the holding of *Shinseki v. Sanders*—in cases of unlawful agency action, the party challenging the agency action has the burden of showing that administrative error was not harmless.101 Rather, the two opinions disagree about what a complainant must show to persuade an appellate court that agency error is not harmless, an issue about which *Sanders* is silent.102 In this case, the majority appropriately categorized failure to consult as both substantive and procedural error,103 but the standard it applied should be reformulated in light of *Sanders*, to remove the semblance of a presumption of prejudicial error.104 Although the dissent presented a test that is generally more appropriate for harmless error cases, it erroneously categorized the failure to consult as procedural, a characterization that colors the remainder of the dissent’s analysis.105 *California Wilderness Coalition* thus demonstrates how, until the Supreme Court articulates additional guidance for the lower courts, there is a gap in administrative law jurisprudence that results in a lack of predictability for such cases.106

The *California Wilderness Coalition* dissent would have interpreted *Sanders* as “reject[ing] the presumption of prejudice articulated in *Riverbend Farms, Inc. v. Madigan*” and its progeny, and concluded the complainants in this case failed to prove prejudice from DOE’s unlawful actions.107 The dissent analogized DOE’s failure to consult to notice and comment error cases.108 In particular, the dissent implicitly relied on the *Gerber v. Norton* test in which the D.C. Circuit held that a complainant can show harmful procedural error only when it “indicate[s] with ‘reasonable specificity’ what portions of the documents it objects to and how it might have responded if given the opportunity.”109 Apply-

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103 See *Cal. Wilderness Coal.*, 631 F.3d at 1093.
104 See id. at 1091–92; id. at 1111–12 (Ikuta, J., dissenting).
105 See id. at 1093 (majority opinion); id. at 1111–17 (Ikuta, J., dissenting); Smith, *supra* note 14, at 1744.
108 See id. at 1110–11.
ing this standard to *California Wilderness Coalition*, the dissent would have queried whether complainants were denied the opportunity to present "specific information or arguments [to DOE] . . . because of the lack of consultation.”\(^{110}\)

Although it referenced an outcome-based test—often used for substantive errors—in passing, the dissent primarily analogized failure to consult to notice and comment errors, thus emphasizing the procedural aspect of the error.\(^{111}\) Though procedural on its face—the EPAct requires that DOE consult with affected states—the purpose of consultation is "the desirability of the interactive process itself.”\(^{112}\) In contrast, notice and comment provisions are a means by which agencies gather information in promulgating rulings.\(^{113}\) Contrary to the dissent’s analysis, these errors are not alike, and should not be treated the same under the harmless error doctrine.\(^{114}\) Thus while the dissent’s proposed test may be clear and administrable for procedural errors, application of this notice-based standard to the facts of this case is inappropriate.\(^{115}\)

In contrast, the Ninth Circuit majority acknowledged that failure to consult is more than procedural error, but it struggled to assert an appropriate test.\(^{116}\) Instead of analyzing DOE’s error systematically, using the most appropriate standard, the majority briefly discussed record-, harm-, and outcome-based tests before implicitly resorting to policy dicta from *Braniff Airways, Inc. v. Civil Aeronautics Board*.\(^{117}\) Here, the court attempted to reconcile the Sanders holding with the standard of *Sagebrush Rebellion, Inc. v. Hodel* and *Riverbend Farms*—that an error is not harmless unless it clearly had no bearing on the procedure used or the substance of decision reached.\(^{118}\) This broad standard is appealing because failure to consult has substantive as well as procedural components.\(^{119}\) The “clearly had no bearing” language, however, maintains an

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\(^{110}\) *Cal. Wilderness Coal.*, 631 F.3d at 1108 (Ikuta, J., dissenting).

\(^{111}\) *See id.* at 1108, 1110–11; Smith, supra note 14, at 1739.


\(^{113}\) *See Cal. Wilderness Coal.*, 631 F.3d at 1092.

\(^{114}\) *See id.*

\(^{115}\) *See id.* at 1092–93.

\(^{116}\) *See id.* at 1093.

\(^{117}\) *See id.* at 1093–94. The majority would conclude the failure to consult was not harmless under the *Gerber* results-based test, a harm-based test like that of *City of Sausalito v. O’Neill*, or the outcome-based test of *Kurzon v. U.S. Postal Office*. *Id.* at 1093.

\(^{118}\) *See id.* at 1091–92; *see also Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986).

\(^{119}\) *See Cal. Wilderness Coal.*, 631 F.3d at 1093.
appearance of the presumption of prejudice, and therefore is no longer appropriate after Sanders.\(^{120}\)

Despite its analyses under record-, harm-, and outcome-based tests and the “clearly had no bearing” threshold, the majority’s strongest assertion of harmful error is that “the prejudice to the party excluded [from consultation] is obvious.”\(^{121}\) Here, the majority could have used dicta from Sanders to carve out an exception from the tests proposed by the dissent.\(^{122}\) The Supreme Court, in reasoning towards the Sanders holding, remarked that “[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said.”\(^{123}\) Once the Ninth Circuit established that “the impact of the lack of consultation before a decision is made . . . is particularly severe” and the prejudice to the affected states is obvious, it could have determined that the erroneous action was harmful under this Sanders carve-out.\(^{124}\)

**Conclusion**

As California Wilderness Coalition v. U.S. Department of Energy demonstrates, harmless error jurisprudence contains significant gaps and ambiguities.\(^{125}\) Through Shinseki v. Sanders, the Supreme Court reiterated to lower courts that the party attacking procedural error bears the burden of proving such error was harmful.\(^{126}\) Courts apply numerous iterations of a variety of tests for the harmless error doctrine, however, including notice-, harm-, and outcome-based standards.\(^{127}\) Application of these various tests is inconsistent, producing unpredictability in this area of law.\(^{128}\) Because of this unpredictability, complainants do not know what they must assert to successfully challenge agency actions.\(^{129}\) Complainants deserve greater predictability, and the disagreement be-

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\(^{120}\) See id. at 1111–12 (Ikuta, J., dissenting).

\(^{121}\) See id. at 1095 (majority opinion).

\(^{122}\) See Sanders, 129 S. Ct. at 1706.

\(^{123}\) See id. (emphasis added).

\(^{124}\) See Sanders, 129 S. Ct. at 1706; Cal. Wilderness Coal., 631 F.3d at 1093.

\(^{125}\) See supra notes 114–120 and accompanying text.


\(^{127}\) See, e.g., City of Sausalito v. O’Neill, 386 F.3d 1186, 1220 (9th Cir. 2004); Gerber v. Norton, 294 F.3d 173, 182 (D.C. Cir. 2002); Kurzon v. U.S. Postal Serv., 539 F.2d 788, 796 (1st Cir. 1976).

\(^{128}\) Smith, supra note 14, at 1753.

\(^{129}\) See id.
tween the majority and dissent in California Wilderness Coalition illustrates how lower courts need additional guidance.\(^{130}\)

Not all error is alike;\(^{131}\) however, agency errors generally are substantive, procedural, or some combination of the two.\(^{132}\) Although courts are inconsistent in their characterizations of error, these categories are significant and deserving of different harmless error standards.\(^{133}\) By developing bright line rules with an outcome-based standard for substantive errors, a record-based standard for procedural errors, and a carve-out for cases where the circumstances clearly indicate that the erroneous ruling was harmful, the Supreme Court could stabilize an important area of administrative law.\(^{134}\)