November 4, 2019

ATTORNEY GENERAL RAOUL SUES DEPARTMENT OF ENERGY OVER ROLLBACK OF ENERGY EFFICIENCY STANDARDS

Chicago — Attorney General Kwame Raoul, as part of a coalition of 16 attorneys general and New York City, today filed a lawsuit against the Department of Energy (DOE) challenging its final rule rolling back energy efficiency standards for certain lightbulbs.

The lawsuit alleges that the rollback of the energy efficiency requirements for certain lightbulbs would unlawfully delay the adoption of energy efficiency goals, undermine state and local energy policy, and increase consumer and environmental costs.

"The Department of Energy's rule to roll back lightbulb regulations is unlawful and is yet another step back in progress toward energy efficiency," Raoul said. "As with other federal energy policies implemented over the last two years, this arbitrary rule leaves consumers with the cost of higher power bills and increased climate change-causing carbon emissions."

In comments submitted on May 3, Raoul and a coalition of attorneys general asserted that the DOE should maintain the stricter, environmentally sound definitions enacted by the Obama administration in 2017, which expanded the definition of general service lamps (GSLs) to include seven previously unregulated types of lightbulbs. By including those types of bulbs as GSLs, the 2017 definitions mean they are subject to the congressionally-imposed GSL minimum standard of 45 lumens per watt applicable on Jan. 1, 2020. The rollback would remove those lightbulbs from the GSL efficiency, costing consumers $12 billion each year in lost electricity savings by 2025, or $100 per household per year.

By reversing the 2017 rules, the DOE is enacting a less stringent standard in violation of the Energy Policy and Conservation Act. Raoul and the coalition argue that this action is arbitrary, capricious, and unlawful under the Administrative Procedure Act.

In addition to filing the lawsuit, Raoul and the coalition submitted comments opposing the DOE's related proposal to not amend (and strengthen) energy efficiency standards for common pear-shaped incandescent lightbulbs. According to the DOE's own analysis, if department were to adopt stronger energy efficiency standards for these bulbs, the net present value of the benefits to the nation would equal up to $4.171 billion.

Joining Raoul in filing the lawsuit are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Nevada, Oregon, Vermont, and Washington, as well as New York City.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATES OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, MARYLAND, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEVADA, OREGON, VERMONT, and WASHINGTON, the COMMONWEALTH OF MASSACHUSETTS, the DISTRICT OF COLUMBIA, and the CITY OF NEW YORK,

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY and JAMES R. PERRY, Secretary, U.S. Department of Energy,

Respondents.

Docket No.

PETITION FOR REVIEW

Pursuant to Section 336(b)(1) of the Energy Policy and Conservation Act, 42 U.S.C. § 6306(b)(1), Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, and Rule 15 of the Federal Rules of Appellate Procedure, the States of New York, California, Colorado, Connecticut, Illinois, Maryland, Maine, Michigan, Minnesota, New Jersey, Nevada, Oregon, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York hereby petition this Court for review of a final action taken by respondents, published at 84 Fed. Reg. 46,661 *et seq*. (September 5, 2019), entitled "Energy Conservation Program: Definition for General Service Lamps." A copy of the final rule is attached hereto.

Dated: November 4, 2019

Respectfully submitted,

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Dated: August 29, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF ENERGY

10 CFR Part 430

RIN 1904–AE26

Energy Conservation Program: Definition for General Service Lamps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rules; withdrawal.

SUMMARY: On February 11, 2019, the U.S. Department of Energy (DOE) published a notice of proposed rulemaking (NOPR) proposing to withdraw the revised definitions of general service lamp (GSL), general service incandescent lamp (GSIL) and other supplemental definitions, that were to go into effect on January 1, 2020. DOE responds to comments received on the NOPR in this final rule and maintains the existing regulatory definitions of GSL and GSIL, which are the same as the statutory definitions of those terms.

DATES: The final rules published on January 19, 2017 (82 FR 7276 and 82 FR 7322), are withdrawn effective October 7, 2019.

ADDRESSES: The docket is available for review at *http://www.regulations.gov*. All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index may not be publicly available, such as those containing information that is exempt from public disclosure.

The docket web page can be found at: *http://www.regulations.gov/docket?D=EERE-2018-BT-STD-0010*. The docket web page contains instructions on how to access all documents in the docket.

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I. Authority and Background

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as ''covered products''), which includes general service lamps (GSLs), the subject of this final rule. Amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA) directed DOE to conduct two rulemaking cycles to evaluate energy conservation standards for GSLs. (42 U.S.C. 6295(i)(6)(A)–(B)) GSLs are currently defined in EPCA to include general service incandescent lamps (GSILs), compact fluorescent lamps (CFLs), general service light-emitting diode (LED) lamps and organic light-emitting diode (OLED) lamps, and any other lamps that the Secretary of Energy (Secretary) determines are used to satisfy lighting applications traditionally served by general service incandescent lamps. (42 U.S.C. 6291(30)(BB))

For the first rulemaking cycle, Congress instructed DOE to initiate a rulemaking process prior to January 1, 2014, to consider two questions: (1) Whether to amend energy conservation standards for general service lamps and (2) whether ''the exemptions for certain incandescent lamps should be maintained or discontinued.'' (42 U.S.C. 6295(i)(6)(A)(i)) Further, if the Secretary determines that the standards in effect for GSILs should be amended, EPCA provides that a final rule must be published by January 1, 2017, with a compliance date at least 3 years after the date on which the final rule is published. (42 U.S.C. 6295(i)(6)(A)(iii)) In developing such a rule, DOE must consider a minimum efficacy standard of 45 lumens per watt (lm/W). (42 U.S.C. 6295(i)(6)(A)(ii)) If DOE fails to complete a rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv) or a final rule from the first rulemaking cycle does not produce savings greater than or equal to the savings from a minimum efficacy standard of 45 lm/W, the statute provides a ''backstop'' under which DOE must prohibit sales of GSLs that do not meet a minimum 45 lm/W standard beginning on January 1, 2020. (42 U.S.C. 6295(i)(6)(A)(v))

The EISA-prescribed amendments further directed DOE to initiate a second rulemaking cycle by January 1, 2020, to determine whether standards in effect for GSILs should be amended with more-stringent requirements and if the exemptions for certain incandescent lamps should be maintained or discontinued. (42 U.S.C. 6295(i)(6)(B)(i)) For this second review of energy conservation standards, the scope is not limited to incandescent lamp technologies. (42 U.S.C. 6295(i)(6)(B)(ii))

DOE initiated the first GSL standards rulemaking process by publishing in the **Federal Register** a notice of public meeting and availability of the framework document. 78 FR 73737 (Dec. 9, 2013); *see also* 79 FR 73503 (Dec. 11, 2014) (notice of public meeting and availability of preliminary technical support document). DOE later issued a NOPR to propose amended energy conservation standards for GSLs. 81 FR 14528, 14629–14630 (Mar. 17, 2016) (the March 2016 NOPR). The March 2016 NOPR focused on the first question

that Congress directed DOE to consider—whether to amend energy conservation standards for general service lamps. (42 U.S.C. 6295(i)(6)(A)(i)(I)) In the March 2016 NOPR proposing energy conservation standards for GSLs, DOE stated that it would be unable to undertake any analysis regarding GSILs and other incandescent lamps because of a then applicable congressional restriction (the Appropriations Rider) [1] on the use of appropriated funds to implement or enforce 10 CFR 430.32(x). 81 FR 14528, 14540–14541 (Mar. 17, 2016). Notably, the Appropriations Rider was readopted and extended continuously in multiple subsequent legislative actions, and only expired on May 5, 2017, when the Consolidated Appropriations Act of 2017 was enacted.[2]

In response to comments to the March 2016 NOPR, DOE conducted additional research and published a notice of proposed definition and data availability (NOPDDA), which proposed to amend the definitions of GSIL and GSL. 81 FR 71794, 71815 (Oct. 18, 2016). DOE explained that the October 2016 NOPDDA related to the second question that Congress directed DOE to consider—whether ''the exemptions for certain incandescent lamps should be maintained or discontinued,'' and stated explicitly that the NOPDDA was not a rulemaking to establish an energy conservation standard for GSLs. (42 U.S.C. 6295(i)(6)(A)(i)(II)); *see also* 81 FR 71798. The relevant ''exemptions,'' DOE explained, referred to the 22 categories of incandescent lamps that are statutorily excluded from the definitions of GSIL and GSL. 81 FR 71798. In the NOPDDA, DOE clarified that it was defining what lamps constitute GSLs so that manufacturers could understand how any potential energy conservation standards might apply to the market. *Id.*

On January 19, 2017, DOE published two final rules concerning the definition of GSL. 82 FR 7276; 82 FR 7322. The January 2017 definition final rules amended the definitions of GSIL and GSL by bringing certain categories of lamps that had been excluded by statute from the definition of GSIL within the definitions of GSIL and GSL. Like the October 2016 NOPDDA, DOE stated that the January 2017 definition final rules related only to the second question that Congress directed DOE to consider, regarding whether to maintain or discontinue certain ''exemptions.'' (42 U.S.C. 6295(i)(6)(A)(i)(II)). That is, neither of the two final rules issued on January 19, 2017, established, or even purported to establish, energy conservation standards applicable to GSLs. Although the two final rules were published on January 19, 2017, neither rule has yet gone into effect because the effective date was set as January 1, 2020.

With the removal of the Appropriations Rider in the Consolidated Appropriations Act, 2017, DOE was no longer restricted from undertaking the analysis and decision making required to address the first question presented by Congress, *i.e.,* whether to amend energy conservation standards for general service lamps, including GSILs. Thus, on August 15, 2017, DOE published a notice of data availability and request for information (NODA) seeking data for GSILs and other incandescent lamps. 82 FR 38613. The purpose of this NODA was to assist DOE in making a decision on the first question posed to DOE by Congress; *i.e.,* a determination regarding whether standards for GSILs should be amended. Comments submitted in response to the NODA also led DOE to re-consider the decisions it had already made with respect to the second question presented to DOE; *i.e.,* whether the exemptions for certain incandescent lamps should be maintained or discontinued. As a result of the comments received in response to the NODA, DOE also re-assessed the legal interpretations underlying certain decisions made in the January 2017 definition final rules. Accordingly, DOE issued a NOPR on February 11, 2019 to withdraw the revised definitions of GSL, GSIL, and the supporting definitions established in the January 2017 definition rules (the February 2019 NOPR). 84 FR 3120. DOE held a public meeting on February 28, 2019 to hear oral comments and solicit information and data relevant to the February 2019 NOPR.

The following sections of this preamble respond to comments received on the February 2019 NOPR and during the NOPR public meeting.

II. Synopsis of Final Rule

In this rule, DOE withdraws the revised definitions of GSL and GSIL established in the January 2017 definition final rules which would otherwise take effect on January 1, 2020. These definitions included certain GSILs as GSLs in a manner that is not consistent with the best reading of the statute. Additionally, DOE withdraws the supplemental definitions established in the January 2017 definition final rules that are no longer necessary in light of the withdrawal of the revised definitions of GSL and GSIL. This rule maintains the existing definitions of GSL and GSIL currently found in DOE's regulations, which are the same as the statutory definition of those terms. Specifically, the rule maintains the statutory exclusions of specified lamps from the definition of GSIL, and thus, such lamps would not be GSLs. DOE does not make a determination in this rule whether standards for GSLs, including GSILs, should be amended. Rather, this rule establishes the scope of lamps to be considered in that determination. DOE will make that determination in a separate rulemaking.

III. Discussion of Comments

A. Scope of Products Included in the Definitions of GSIL and GSL

In the February 2019 NOPR, DOE proposed to retain the existing statutory exclusions from the GSIL definition by withdrawing the revised definition of GSL, which, among other lamps, included as GSILs the five specialty incandescent lamps regulated under 42 U.S.C. 6295(l)(4), namely rough service lamps, vibration service lamps, 3-way incandescent lamps, high lumen lamps and shatter-resistant lamps. Additionally, DOE proposed to maintain the existing exclusion of incandescent reflector lamps (IRLs) from the statutory definitions of GSIL and GSL, as well as T-shape lamps that use no more than 40 W or have a length of more than 10 inches, B, BA, CA, F, G16–1/2, G25, G30, S, and M–14 lamps of 40 W or less. Further, DOE proposed that candelabra base incandescent lamps not be considered GSL because the existing definition of GSIL applies only to medium screw base lamps. 84 FR 3122–3123. DOE noted in the February 2019 NOPR that, because it had not yet made a final determination on whether standards applicable to GSILs should be amended per 42 U.S.C. 6295(i)(6)(A)(iii), no backstop energy conservation standard has been imposed. 81 FR 3123. In response, DOE received numerous comments relating to whether the backstop requirement for GSLs in 42 U.S.C. 6295(i)(6)(A)(v) had been triggered and the applicability of EPCA's anti-backsliding provision in 42 U.S.C. 6295(o), which precludes DOE from amending an existing energy

[1] Section 312 of the Consolidated and Further Continuing Appropriations Act, 2016 (Pub. L. 114–113, 129 Stat. 2419) prohibits expenditure of funds appropriated by that law to implement or enforce: (1) 10 CFR 430.32(x), which includes maximum wattage and minimum rated lifetime requirements for GSILs; and (2) standards set forth in section 325(i)(1)(B) of EPCA (42 U.S.C. 6295(i)(1)(B)), which sets minimum lamp efficiency ratings for incandescent reflector lamps.

[2] See, the Consolidated Appropriations Act of 2017 (Pub. L. 115–31, div. D, tit. III); see also, Consolidated Appropriations Act, 2018 (Pub. L. 115–141).

conservation standard to permit greater energy use or a lesser amount of energy efficiency.

1. Imposition of the Backstop

DOE received comments from the National Electrical Manufacturers Association (NEMA), Westinghouse Lighting, Signify North America Corporation (Signify), GE Lighting, and the American Lighting Association (ALA) agreeing with DOE's statement in the February 2019 NOPR that the backstop standard in 42 U.S.C. 6295(i)(6)(A)(v) has not been triggered since the Secretary has not determined whether to amend GSIL standards under 42 U.S.C. 6295(i)(6)(A)(iii), and so there is no obligation yet to publish a rule in accordance with the 42 U.S.C. 6295(i)(6)(A)(i)–(iv). (NEMA, No. 329 at p. 40; Westinghouse Lighting, No. 360 at p. 1; Signify, No. 354 at p. 1; GE Lighting, No. 325 at p. 1; ALA, No. 308 at p. 2) Further, these commenters supported NEMA's assertion that the backstop is not self-executing, and, per EPCA, requires the Secretary to first make a prohibitory order under 42 U.S.C. 6295(i)(6)(A)(v), which the Secretary has not yet done because the conditions precedent to that prohibitory order in 42 U.S.C. 6295(i)(6)(A)(v) have not occurred. That is, NEMA asserted that the Secretary has not failed to complete a rulemaking in accordance with clauses (i) through (iv) or that such final rule does not produce savings that are greater than or equal to the savings from a minimum efficacy standard of 45 lm/W because the obligation to issue such a rule does not yet exist. (NEMA, No. 329 at p. 40)

There were also commenters who disagreed with DOE's preliminary determination in the February 2019 NOPR regarding the application of the backstop. Such commenters include Earthjustice, the Natural Resources Defense Council (NRDC), Sierra Club, U.S. Public Interest Research Group and Environment America (collectively, the Joint Commenters), the Appliance Standards Awareness Project and 13 co-signing organizations [3] (ASAP), the California Energy Commission (CEC), Pacific Gas and Electric Company (PG&E) and San Diego Gas and Electric (SDG&E), and the Attorney Generals of California, New York, New Jersey, Oregon, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, North Carolina, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York (collectively, the State Attorneys General). These commenters assert the backstop standard was triggered by DOE's failure to complete a rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). Thus, beginning on January 1, 2020, the commenters believe that the sale of any GSLs having a luminous efficacy less than 45 lm/W is unlawful under EPCA. (*See* Joint Commenters, No. 335 at p. 4) Additionally, the Joint Commenters noted that DOE cannot use its inaction to complete a rulemaking as a result of the Appropriations Rider to allow it to indefinitely block the application of the backstop standard for GSLs. (Joint Commenters, No. 335 at p. 7) PG&E and SDG&E further noted that the pre-emption exemption in 42 U.S.C. 6295(i)(6)(A)(vi) would serve no purpose if DOE had no limitation on its timeline to complete the rulemaking. (PG&E and SDG&E, No. 348 at pp. 4–5) PG&E and SDG&E also discounted the argument that DOE needs to take an additional action to make the backstop enforceable. Instead, they stated the backstop was triggered by DOE's failure to comply with clauses (i)–(iv) in section 6295(i)(6)(A) of EPCA and that these provisions have binding effect without the need for prior notice and opportunity for comment, similar to the manner in which DOE finalized the backstop requirements for rough service and vibration service lamps, which were treated as a mere administrative formality. (PG&E and SDG&E, No. 348 at p. 5)

By law, the Secretary must initiate a rulemaking by January 1, 2014 to determine whether standards in effect for GSLs should be amended and whether exemptions for certain incandescent lamps should be maintained or discontinued based, in part, on exempted lamp sales. (42 U.S.C. 6295(i)(6)(A)(i)) If the Secretary determines that standards in effect for GSILs should be amended, the Secretary is obligated to publish a final rule establishing such standards no later than January 1, 2017. (42 U.S.C. 6295(i)(6)(A)(iii)) If the Secretary makes a determination that standards in effect for GSILs should be amended, failure by the Secretary to publish a final rule by January 1, 2017, in accordance with the criteria in the law, would result in the imposition of the backstop provision in 42 U.S.C. 6295(i)(6)(A)(v). That backstop requirement would require that the Secretary prohibit the sale of any GSL that does not meet a minimum efficacy standard of 45 lm/W.

DOE initiated the first GSL standards rulemaking process by publishing a notice of availability of a framework document in December 2013, which satisfied the requirements in 42 U.S.C. 6295(i)(6)(A)(i) to initiate a rulemaking by January 1, 2014. DOE subsequently issued the March 2016 NOPR proposing energy conservation standards for GSLs, but was unable to undertake any analysis regarding GSILs and other incandescent lamps in the NOPR because of a then-applicable Appropriations Rider. Now that the Appropriations Rider has been removed, DOE is able to undertake the analysis to determine whether standards for GSLs, including GSILs, should be amended per the requirements in 42 U.S.C. 6295(i)(6)(A)(i). DOE has issued a proposed determination published elsewhere in this issue of the **Federal Register** in order to complete its obligations under the statute that were precluded from being completed by DOE previously by application of the Appropriations Rider.

DOE received many comments pointing to DOE's failure, per 42 U.S.C. 6295(i)(6)(A)(iii), to publish a standards rulemaking for GSILs by January 1, 2017 as evidence that DOE has triggered the backstop provision, because DOE had not completed a rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). However, the statutory deadline on the Secretary to complete a rulemaking by January 1, 2017, is premised on the Secretary first making a determination that standards for GSILs should be amended. The Secretary only fails to meet the requirement in 42 U.S.C. 6295(i)(6)(A)(iii) if he determines that standards for GSILs should be amended and fails to publish a rule prescribing standards by January 1, 2017. That is, 42 U.S.C. 6295(i)(6)(A)(iii) does not establish an absolute obligation on the Secretary to publish a rule by a date certain, as is the case in numerous other provisions in EPCA. *See* 42 U.S.C. 6295(e)(4); 42 U.S.C. 6295(u)(1)(A); and 42 U.S.C. 6295(v)(1). Rather, the obligation to issue a final rule prescribing standards by a date certain applies if, and only if, the Secretary makes a determination that standards in effect for GSILs need to be amended. Interpreting the statute otherwise would suggest that, if the Secretary were to make a determination that standards in effect for GSILs do not need to be amended, the Secretary nonetheless has

[3] These co-signing organizations are the: American Council for an Energy Efficient Economy, Conservation Law Foundation, Consumer Federation of America, E4TheFuture, Florida Consumer Action Network, National Consumer Law Center, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Southeast Energy Efficiency Alliance, Southwest Energy Efficiency Alliance, Texas Ratepayers Organization to Save Energy, Vermont Energy Investment Corporation, and Vermont Public Interest Research Group.

an obligation to issue a final rule setting standards for those lamps he determined did not necessitate amended standards. And, further, DOE disagrees with the assertion that the Secretary's failure to issue a rule the obligation for which does not yet exist would lead to imposition of a sales prohibition applicable to the very lamps about which the Secretary must still decide whether amended standards are needed. Although different readings of the statutory language have been suggested, DOE believes that the best reading of the statute is that Congress intended for the Secretary to make a predicate determination about GSILs, otherwise it could result in a situation where a prohibition is automatically imposed for a category of lamps that the Secretary may conclude is unnecessary. Since DOE has not yet made the predicate determination on whether to amend standards for GSILs, the obligation to issue a final rule by a date certain does not yet exist and, as a result, the condition precedent to the potential imposition of the backstop requirement does not yet exist and no backstop requirement has yet been imposed.

DOE disagrees that it does not need to take an additional action to make the backstop enforceable, similar to the manner in which it handled the final rule for rough and vibration service lamps.[4] DOE's final rule for rough and vibration service lamps was not an exercise of agency discretion, but merely codified the statutory requirements that already applied to those lamps. Congress codified a separate regulatory process for rough and vibration service lamps in 42 U.S.C. 6295(l)(4) that includes a distinct backstop provision for each of the five lamp types that is triggered if specific objective criteria are met, namely when annual sales grow to be more than 100 percent above an extrapolated level of historical sales. Once these sales benchmarks have been exceeded, DOE is required, without discretion, to develop its own energy conservation standard and if it fails to do so by a time certain the backstop is mandated by the statute. This is in direct contrast to the discretion accorded the Secretary before any backstop for GSLs is triggered, *i.e.,* the determination whether standards in effect for GSILs need to be amended. Presently, some further action is required on the part of DOE before any backstop is enforceable to GSLs. DOE acknowledges that it will need to address the backstop in a future rulemaking, should the Secretary make a determination that standards in effect for GSILs need to be amended. To that end, DOE has issued a proposed determination published elsewhere in this issue of the **Federal Register**.

2. EPCA's Anti-Backsliding Provision

NEMA, with the support of Westinghouse Lighting, Signify, GE Lighting, and ALA, agreed with DOE's position in the February 2019 NOPR that rescinding the January 19, 2017 definition of GSL is not backsliding within the meaning of 42 U.S.C. 6295(o)(1), because, in the case of DOE's 2017 definition of GSL, the government cannot illegally backslide from a position it could not legally stand upon in the first place. (NEMA, No. 329 at p. 41)

On the contrary, commenters including the Joint Commenters, ASAP, the National Association of State Utility Consumer Advocate (NASUCA), CEC, PG&E/SDG&E, the State Attorneys General, the United States Senators, Consumer Groups, Colorado Office of Consumer Counsel, Connecticut Dept. of Energy and Environmental Protection, and the Emmett Institute on Climate Change and the Environment at UCLA School of Law (Emmett Institute) all asserted that DOE's proposal in the February 2019 NOPR would violate the anti-backsliding provision in 42 U.S.C. 6295(o) of EPCA. By narrowing the scope of the term ''general service lamp,'' the Joint Commenters stated that DOE's proposed action will exempt from the backstop standard all lamp types excluded from the GSL definition in this rulemaking. Instead of meeting the 45 lm/W backstop standard level, each lamp of a type excluded from the definition of GSL will have to meet a weaker energy conservation standard, or no standard at all. Accordingly, in repealing the January 2017 final definitions, the Joint Commenters argued DOE is reducing the minimum energy efficiency required of those lamps that it is excluding from the term ''general service lamp,'' which is an action the anti-backsliding provision forbids. (Joint Commenters, No. 335 at p. 10) The Joint Commenters stated that the anti-backsliding provision applies not only to DOE actions that amend the numerical level of a standard, but also to actions that alter the scope of a standard by exempting products. (Joint Commenters, No. 335 at p. 4) Similarly, the State Attorneys General asserted that, according to the court in *Hearth, Patio and Barbecue Ass'n* v. *U.S. DOE,*[5] definitional changes can result in the imposition of otherwise inapplicable numerical standards. (State Attorneys General, No. 350 at p.7) The Emmett Institute cited *NRDC* v. *Abraham*[6] to support its anti-backsliding argument, noting that it is irrelevant that the GSL standards for the seven categories of lamps have not yet reached their effective date, as these lamps became subject to GSL standards at the time the January 2017 definition final rules were published. (Emmett Institute, No. 341 at pp. 4–5) The Joint Commenters rejected DOE's argument in the February 2019 NOPR that its proposal to withdraw the GSL and GSIL definitions could not be considered backsliding because the proposal does not constitute an amendment of an existing energy conservation standard. The Joint Commenters pointed out that in the February 2019 NOPR, DOE claimed that the proposed rule fit within a categorical exclusion from National Environmental Policy Act (NEPA) review that applies to certain rulemakings that establish energy conservation standards for consumer products and industrial equipment. These commenters asserted that DOE cannot simultaneously avail itself of this exemption while at the same time asserting that its instant action is not an energy conservation standard rulemaking, but rather a precursor to any standards development for GSLs. (Joint Commenters, No. 335 at p. 21; *see also* State Attorneys General, No. 350 at p. 28)

The anti-backsliding provision at 42 U.S.C. 6295(o)(1) precludes DOE from amending an existing energy conservation standard to permit greater energy use or a lesser amount of energy efficiency. This provision is inapplicable to the current rulemaking because DOE has not established an energy conservation standard for GSLs from which to backslide. Commenters' assertions that the anti-backsliding provision has been violated hinge on the assumption that the backstop requirement for GSLs in 42 U.S.C 6295(i)(6)(A)(v) has been triggered and is currently in effect. However, DOE makes clear in this rule that it has not yet made the predicate determination of whether to amend standards for GSILs, and therefore the backstop is not yet in effect—meaning that any discussion of backsliding is misplaced. For similar reasons, DOE disagrees with commenters' reliance on *NRDC* v. *Abraham* to support their anti-backsliding argument. In that case, the Second Circuit held that the publication date in the **Federal Register** of a final rule establishing an energy conservation standard operates as the point at which

[4] *See* Docket ID: EERE–2017–BT–STD–0057.

[5] 706 F.3d 499 (D.C. Cir. 2013).

[6] 355 F.3d 179 (2nd Cir. 2004).

EPCA's anti-backsliding provision applies to a new or amended standard. 355 F.3d at 196. This case is inapplicable to the present rulemaking since DOE has not yet published a final rule amending standards for GSLs, nor has DOE issued a final determination on whether GSIL standards should be amended or issued a rule codifying the statutory backstop in DOE's regulations. DOE has only published the January 2017 definition final rules, which constituted a decision only on whether to maintain or discontinue various lamp exclusions. The January 2017 definition final rules were explicit that they were not setting any standards. Moreover, the 2017 rules did not follow the statutory procedures for promulgating efficiency standards as would be required, because the rules were only defining terms, not setting standards. While these definition rules have an effective date of 2020, this date is irrelevant for purposes of whether anti-backsliding applies, since the rule did not establish a standard. Further, even if the backstop was triggered, it does not apply, by the terms of the statute, until January 1, 2020. DOE does not agree that the 2017 definition final rules amending the GSIL and GSL definitions, or this final rule withdrawing the 2017 final rules, constitutes a change in scope of a standard. But even under a theory that considers the GSIL and GSL definitions as changing the scope of a standard, the present circumstances still are in contrast with those in *Abraham.* As DOE has never published a final rule establishing a standard to serve as the starting point to consider anti-backsliding, DOE could change that scope prior to the date Congress chose for start of the supposed standard, *i.e.,* January 1, 2020, without violating the anti-backsliding provision.

Furthermore, even if the backstop requirement in EPCA were to apply, it would operate as a sales prohibition for any GSL that does not meet a minimum efficacy standard of 45 lm/W. The anti-backsliding provision states that the Secretary cannot prescribe any amended *standard* that would allow greater energy use or less efficiency. EPCA defines an energy conservation standard for consumer products as a performance standard that prescribes a minimum efficiency level or maximum quantity of energy usage for a covered product or, in certain circumstances, a design requirement. (42 U.S.C. 6291(6)) In contrast, a sales prohibition in EPCA is tied to whether a transaction in commerce can occur with respect to a covered product, but the prohibition is not itself a standard.[7] Because the scope of a sales prohibition is not the same as a standard, the minimum efficacy standard of 45 lm/W mandated by the backstop's sales prohibition is unchanged by this final rule. The anti-backsliding provision in 42 U.S.C. 6295(o) limits the Secretary's discretion only in prescribing standards, not sales prohibitions, and thus is inapplicable to the backstop requirement for GSLs in 42 U.S.C 6295(i)(6)(A)(v). Therefore, DOE has the authority to change the scope of what lamps would apply to any sales prohibition for GSLs, assuming the backstop applied.

DOE agrees with commenters that it did not use the appropriate NEPA categorical exclusion for the February 2019 NOPR (even though DOE did use the same categorical exclusion used in the 2017 definition final rules) and has corrected this oversight. In this final rule, DOE has referenced the applicable categorical exclusion, 10 CFR part 1021, subpart D, appendix A5, to more accurately reflect the effect of this rulemaking, which amends the previously proposed definition for GSLs to that of the original statutory language and does not change the environmental effect of the rule being amended See section III.C.3 for further explanation as to how correcting this oversight by utilizing the appropriate categorical exclusion does not result in environmental harm.

B. Withdrawal of Revised GSL and GSIL Definitions

1. General Authority

Several commenters objected generally to the DOE's lack of authority in the February 2019 NOPR to withdraw the GSL, GSIL and supplemental definitions. For example, the Joint Commenters asserted DOE's failure to explain the legal basis for its proposal, or even to provide supporting citations, violates the Administrative Procedure Act (APA) and is defective as a matter of law. The Joint Commenters further asserted that DOE must provide stakeholders notice and a meaningful opportunity to comment on the legal authority DOE believes authorizes this action. (Joint Commenters, No. 335 at p. 2) Additionally, PG&E and SDG&E commented that DOE is overstepping its authority from Congress by creating or reinstating lamp exemptions; pursuant to 42 U.S.C. 6295(i)(6)(A)(i)(II), DOE may only maintain or discontinue them. To the extent DOE re-exempts lamps from the GSIL and/or GSL definition, PG&E and SDG&E, and similarly, the State Attorneys General, stated that DOE will have acted beyond the express scope of its statutory authority. (PG&E and SDG&E, No. 348 at p. 4; *see also* State Attorneys General, No. 350 at p. 10)

The February 2019 NOPR invoked DOE's authority under the 2007 EISA-prescribed amendments to EPCA which directed DOE to consider whether ''the exemptions for certain incandescent lamps should be maintained or discontinued.'' 42 U.S.C. 6295(i)(6)(A)(i)(II). In the 2017 definition final rules, DOE interpreted the ''exemptions'' to refer to the 22 excluded lamp categories from the definition of GSL and concluded that it has authority to bring the excluded lamps within the definition of GSIL and GSL. 81 FR 71798; 82 FR 7277. As noted, DOE did not make any determinations with regard to amending standards for GSILs in the 2017 definition final rules because it was prohibited from doing so by the Appropriations Rider. When the Appropriations Rider was lifted in the Consolidated Appropriations Act, 2017, DOE regained its statutory authority to determine whether to amend standards for GSILs, and so issued the 2017 NODA seeking data for GSILs and other incandescent lamps. With the additional benefit of the comments and data arising from the 2017 NODA, DOE reviewed its earlier interpretation of the statute and subsequently identified fundamental inaccuracies underlying its determination to revise the definitions of GSL and GSIL in the 2017 definition final rules. As discussed in more detail in Section B. of this final rule, DOE has determined that its prior action of defining IRLs as GSLs is not consistent with the best reading of statute, because Congress explicitly stated in the statute, in two distinct provisions, that these reflector lamps are not within the scope of the definition of GSLs. Additionally, DOE has determined that its prior action of defining candelabra base incandescent lamps within the definition of GSIL is not consistent with the best reading of the statute, because the existing definition of GSIL applies only to medium screw base lamps that candelabra base lamps do not have. Further, DOE discovered that it had overestimated shipment numbers for candelabra base incandescent lamps by a factor of more than two. As a result of this new information gathering and the restoration of DOE's decision-making authority under the statute upon the removal of the Appropriations Rider, DOE reassessed its original legal

[7] *See* 42 U.S.C. 6302(a)(5) for another example of a sales prohibition.

interpretations which were based on an incomplete picture of GSILs. DOE believes maintaining the existing statutory exemptions for the 22 categories of lamps excluded from the definition of GSL is the best interpretation of the statute.

For purposes of the APA, this rulemaking is amending a rule previously published based on the receipt of additional and more accurate information, as well as based on a re-interpretation of the statute. To the extent that the APA issues raised in the comments are based on DOE's use of the word ''withdraw'' in both the proposed rule and this final rule, DOE points out that this word is a reflection of the status of the 2017 definition final rules and amendatory instruction requirements of the Office of the Federal Register. That is, because the 2017 definition final rules do not take effect until January 1, 2020, those rules cannot be ''amended'' for purposes of the **Federal Register** prior to January 1, 2020; rather a change to those rules prior to their January 1, 2020, effective date constitutes a ''withdrawal''.

2. Five Specialty Incandescent Lamps

In the February 2019 NOPR, DOE proposed to maintain the existing exclusions for rough service lamps, shatter-resistant lamps, 3-way incandescent lamps, high lumen incandescent lamps (2,601–3,300 lm) and vibration service lamps in the definition of GSIL and GSL. 84 FR 3124. DOE tentatively determined that since these lamps are subject to standards in accordance with a specific regulatory process under 42 U.S.C. 6295(l)(4), there is no need to undertake an additional process for determining whether to establish energy conservation standards for these lamp types as GSLs under 42 U.S.C. 6295(i)(6)(A)(i). Doing so would potentially subject these lamps types to two separate standards and create confusion among regulated entities as to which one applies. *Id.*

NEMA, with the support of other commenters such as Westinghouse Lighting, Signify, GE Lighting, and ALA, agreed with DOE's preliminary determination, and noted that DOE has already decided to discontinue the exemption of rough service lamps and vibration service incandescent lamps in accordance with the specific statutory regulatory regime for those lamps stated in the statute. NEMA stated the specific conditions precedent for the regulation of three other types of exempt incandescent lamps specifically called out by Congress in 42 U.S.C. 6295(l)(4) have not occurred, and therefore discontinuance of the exemptions for those three lamps is unwarranted under the statute. (NEMA, No. 329 at p. 41) DOE also received comments objecting to its proposed exemptions for the five specialty incandescent lamps on the grounds of ''double regulation.'' PG&E and SDG&E pointed out that GSLs are already defined by statute to include both GSILs and CFLs, both of which are also regulated by separate statute, and clearly intended by Congress to be subject to the backstop requirement. (PG&E and SDG&E, No. 348 at p. 6) PG&E and SDG&E stated that with DOE's interpretation of the statute, there is no scenario where these five lamp types could ever be considered GSLs, which is in direct conflict with Congress's instructions in 42 U.S.C. 6295(i)(6)(A)(i)(II) to DOE to consider discontinuing their exemptions statuses. Additionally, the Joint Commenters commented that the NOPR points to no evidence indicating that regulating the five tracked lamps as GSLs would create confusion, nor does it even begin to explore how the standards for GSLs would interact with the standards currently imposed for rough service and vibration service lamps. The Joint Commenters noted that EPCA requires that DOE provide justification for its conclusion to discontinue these five exempted lamps with substantial evidence per 42 U.S.C. 6306(b)(2). (Joint Commenters, No. 335 at p. 16)

Congress excluded these five categories of lamps from the definition of GSIL and GSL, and it codified a distinct regulatory process for these lamps in 42 U.S.C. 6295(l)(4). This final rule confirms what the statue already requires, that these lamps are subject to separate statutory requirements set forth in 42 U.S.C. 6295(l)(4). Thus, DOE is not additionally regulating these five lamp types as GSLs under 42 U.S.C. 6295(i)(6)(A)(i).

The regime for potential regulation of the five lamp types was added to the statute in the same enactment that required DOE to consider standards for GSLs, *i.e.,* the Energy Independence and Security Act of 2007, Public Law 110–140, *see* section 321(a)(4). Moreover, in both instances the criteria stated in the statute for consideration for standards was based on sales of the subject lamps. If Congress had intended for these five lamp types to be considered for potential inclusion under the GSL authority there would have been little reason to have also established a separate process for potential imposition of energy conservation standards using similar criteria. As such, DOE agrees that, using this logic, these five lamp types could not be GSLs. However, DOE disagrees that this interpretation conflicts with Congressional instruction in 42 U.S.C. 6295(i)(6)(A)(i)(II). Notably, the language in this section refers to ''exemptions for certain incandescent lamps.'' Thus, this provision still has meaning even if the five (l)(4) lamps are excluded from applicability.

3. Incandescent Reflector Lamps

In the first January 2017 definition final rule (the 2017 GSL Rule), DOE adopted a regulatory definition of GSL that maintained the existing exemption for IRLs. In the second definition final rule (the 2017 IRL Rule), issued simultaneously, DOE determined to discontinue the IRL exemption, and amended its definition of GSL and GSIL accordingly. In the February 2019 NOPR, DOE revisited its determination relating to the IRL exemption, and proposed to remove IRLs from the definition of GSIL established in the 2017 IRL Rule. In the February 2019 NOPR, DOE pointed out that since IRLs are twice excluded from the definition of GSL in 42 U.S.C. 6291(30)(BB)(ii)(II), it is clear that Congress did not want the Secretary to include IRLs within the definition of GSL. 84 FR 3124.

In response to DOE's proposal relating to IRLs, NEMA with the support of Westinghouse Lighting, Signify, GE Lighting, and ALA, reiterated its prior comments in the prior rulemaking proceeding and additionally noted that the general service incandescent lamp is the ''standard incandescent or halogen lamp type,'' 42 U.S.C. 6291(30)(D)(i), which is a reference to the standard pear-shape bulb that provides omnidirectional light output. (NEMA, No. 329 at p. 4) Thus, NEMA stated that the traditional general service incandescent lighting applications do not include light bulbs that provide focused or ''directional'' lighting such as reflector lamps.'' NEMA provided additional details about the different characteristics and applications of reflector lamps that deviate in a material way from the characteristics and lighting applications of a general service incandescent lamp as defined by Congress. (NEMA, No. 329 at pp. 18–21) Specifically, that reflector lamps are traditionally used in different applications compared to GSLs, normally recessed sockets that takes advantage of the bulb's unique direction downlight capacity to a task or area on a counter or workspace; in small recessed sockets where general service A-line lamp will not fit; in track lighting where directional light is narrowly focused to accent a spot on a wall; and in outdoor fixtures where illumination for security or accenting a garden area

is desired by a consumer. NEMA concluded that GSILs are not traditionally used in these directional lighting applications. (NEMA, No. 329 at p. 21)

The Joint Commenters responded that IRLs provide general lighting and should be included in the definition of GSLs and subject to the same standards. They commented that Congress's act of (allegedly) repeating itself in the definition of GSL by twice exempting IRLs should not undermine an otherwise broad grant of authority provided in 42 U.S.C. 6295(i)(6)(A)(i)(II) to remove these exemptions. (Joint Commenters, No. 335 at p. 17) PG&E and SDG&E also disagreed with DOE's interpretation of IRLs in the February 2019 NOPR, stating that it creates ambiguity by permanently preserving a GSL exemption that was otherwise left to DOE's discretion. (PG&E and SDG&E, No. 348 at p. 7) PG&E and SDG&E noted that DOE recognized in the prior rulemaking that the definitions of ''reflector lamps'' and ''IRL'' were meant to encompass a different range of lamps. (PG&E and SDG&E, No. 348 at p. 7) PG&E and SDG&E further commented that DOE's assertion that IRLs are regulated elsewhere in the statute and therefore should not be considered GSLs is inconsistent with the regulation of other lamp types such as GSILs and CFLs, which are explicitly GSLs and are also regulated elsewhere in EPCA. (PG&E and SDG&E, No. 348 at p. 7) Additionally, PG&E and SDG&E commented that DOE's definition of general service LEDs (GSLEDs), which are also explicitly GSLs, includes LED reflector lamps as well as LED omni-direction lamps. (PG&E and SDG&E, No. 348 at p.7) They noted that GSLEDs are not defined by directionality and that it would create further inconsistencies for LED reflector lamps to be defined as GSLs but not their incandescent counterparts. (PG&E and SDG&E, No. 348 at pp. 7–8)

DOE does not have the authority to regulate IRLs as GSLs, because the statute plainly states, in 42 U.S.C. 6291(30)(BB)(ii)(I), that the term ''general service lamp'' does not include the list of lamps that were excluded from the term general service incandescent lamp (which includes reflector lamps). The statute then continues by specifically excluding any general service fluorescent lamp or incandescent reflector lamp. 42 U.S.C. 6291(30)(BB)(ii)(II). The notion that DOE was given a ''broad grant of authority provided in 42 U.S.C. 6295(i)(6)(A)(i)(II) to remove these exemptions'' attempts to suggest that DOE has the authority by rule to amend a statute. Simply put, DOE does not have that authority. DOE has to implement the law as written. And, where Congress has spoken directly to an issue it is not within the agency's power to act in contravention of that statement. To the extent that one might argue the statute is unclear on this point, DOE believes that it is the best reading (and, consequently, a reasonable reading) of the statute that Congress's express statements in two distinct provisions that IRLs are not GSLs should be interpreted as meaning that Congress intended that DOE not consider IRLs to be GSLs. Apart from consideration as a GSL, DOE continues to have the authority to establish energy conservation standards applicable to IRLs under separate requirements set by Congress in 42 U.S.C. 6295(i)(3).

With regard to comments on the definition of GSLEDs, for consistency in this rule, DOE removes all supplemental definitions adopted in the January 2017 definition final rules, including the definition of GSLED. This rulemaking relates only to whether the 22 categories of lamps exempted from the definition of GSL should be maintained or discontinued per the requirements in 42 U.S.C. 6295(i)(6)(A)(i)(II).

4. T-Shape, B, BA, CA, F, G16–1/2, G25, G30, S, M–14 and Candelabra Base Lamps

EPCA defines the term GSL to include any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by GSILs. (42 U.S.C. 6291(30)(BB)(i)(IV)). In the 2017 GSL Rule, DOE determined that lamps that would satisfy the same applications as traditionally served by GSILs are ones that would provide overall illumination and can functionally be a ready substitute, or ''convenient unregulated alternative'' for lamps already covered as GSLs. 82 FR 7277. To inform its assessment as to which GSL exclusions should be maintained, DOE also used sales data, as the statute directs in 42 U.S.C. 6295(i)(6)(A)(i)(II). *Id.* Consequently, the definitions of GSL and GSIL adopted in the January 2017 definition final rules included a broad array of specialty incandescent lamps and candelabra base lamps, such as T-Shape, B, BA, CA, F, G16–1/2, G25, G30, S, and M–14 lamps. In the February 2019 NOPR, and in direct response to stakeholder comments, DOE proposed to withdraw the revised definitions of GSIL and GSL which added T-shape lamps and B, BA, CA, F, G16–1/2, G25, G30, S, and M–14 lamps to the definition of GSIL, agreeing with commenters that it may have overstepped its limited authority by relying on factors which Congress did not intend it to consider. 84 FR 3125. In the February 2019 NOPR, DOE further acknowledged it is unlikely Congress intended that DOE have broad discretion to regulate an incandescent lamp out of existence based on an assumption that manufacturers could make and sell an LED version of the lamp or that Congress authorized DOE to eliminate ''convenient unregulated alternatives'' that DOE concluded could undercut this unstated intent of Congress. *Id.* Along these lines, DOE also proposed to withdraw its revision to the GSL definition that included all lamps having an ANSI base, such as candelabra base lamps. DOE preliminarily determined that overbreadth in its January 2017 definition final rules had the consequence of including lamps such as candelabra base lamps as GSLs, even though such lamps could not meet the statutory definition of GSIL since such lamps do not have a medium screw base. New data submitted by NEMA also indicated that DOE's estimated shipment numbers for candelabra base incandescent lamps were potentially too high by a factor of more than two. *Id.*

NEMA, Westinghouse Lighting, Signify, GE Lighting, ALA and Lucidity Lights, dba/Finally Bulbs submitted comments in support of DOE's proposal to withdraw these lamp shapes from the definitions of GSL and GSIL, with NEMA stating that it avoided sweeping into a regulatory scheme special purpose bulbs that would be inappropriate, for both technical and economic reasons, to regulate in the same manner as the GSIL, the CFL or the general service LED lamp. (NEMA, No. 329 at p.31) These commenters agreed that DOE overstepped its authority by redefining GSLs as outlined in the 2007 EISA legislation. (*See* Finally Bulbs, No. 253 at p. 1; GE Lighting, No. 325 at p. 2, NEMA, No. 329 at p. 3) For example, GE Lighting commented that the intent of the 2007 EISA law, governing lightbulb regulation, was to regulate 40w, 60w, 75w, and 100w general service incandescent A-line lamps as well as lamps that can be used in applications traditionally served by general service incandescent A-line lamps. (GE Lighting, No. 325 at p. 2) NEMA pointed out that the statutory test of whether the Secretary can include other lamps in the definition of ''general service lamp'' beyond the three types of light bulbs specified in the statute is that the ''other lamps'' must be used to satisfy lighting applications traditionally served by general service incandescent lamps.'' 42

U.S.C. 6291(30)(BB)(i)(IV). (NEMA, No. 329 at p. 4) Thus, when Congress authorized DOE to determine whether the exemptions for certain incandescent lamps should be maintained or discontinued in 42 U.S.C. 6295(i)(6)(A)(i)(II), this authorization did not include applying energy conservation standards applicable to general service lamps to a broad array of light bulbs with odd bulb shapes and designs, limited light output, uncommon applications, and unusual lamp bases. (NEMA, No. 329 at p. 31) NEMA stated that these are not traditional applications of the general service incandescent lamp; DOE overstepped its limited authority by relying on factors which Congress did not intend it to consider such as whether a lamp is a ''convenient unregulated alternative.'' (NEMA, No. 329 at p. 4). Additionally, it was brought to the attention of DOE by representatives of the Federal Aviation Administration (FAA), that some of the lamps listed in the February 2019 NOPR are used in critical aviation applications, such as navigational aids, airfield lighting, and airfield signage and as yet the lamps used in those safety-critical applications do not have acceptable LED alternatives. Furthermore, according to the FAA, the nation's busiest passenger airports have been aggressively transitioning their lighting systems to LED technology over the past decade and by its estimation this conversion should reach its optimum penetration over the next 5 years.

In contrast, DOE received numerous comments from stakeholders asserting that DOE failed to provide an adequate reason for its departure from its previous interpretation of congressional intent. (*See* State Attorneys General, No. 350 at p. 12) For example, the Joint Commenters stated that, in basing its decision to discontinue exemptions for non-pear lamps on unit sales in combination with other factors, DOE was acting entirely within its discretion under EPCA. (Joint Commenters, No. 335 at p. 18) Similarly, the Joint Commenters noted that DOE lawfully invoked its authority under 42 U.S.C. 6291(30)(BB)(i)(IV) to include candelabra lamps within the definition of general service lamp. (Joint Commenters, No. 335 at p. 20) The Joint Commenters, as well as PG&E and SDG&E commented that this provision does not require that a bulb be able to fit within the definition of general service lamp; the provision simply requires that the bulb be able to serve the same lighting application. *Id.* (PG&E and SDG&E, No. 348 at 7) Similarly, the California Investor Owned Utilities (CA IOUs) commented at the public meeting for the February 2019 NOPR that, while GSILs typically have a medium screw base, GSLs are supposed to also capture CFLs, GSLEDs, and OLEDs, and those have more than just [medium screw] [8] base types. (CA IOUs, Public Meeting Transcript, No. 44 at p. 92) PG&E and SDG&E and the Joint Commenters also asserted that NEMA's updated shipment information for candelabra lamps does not support a repeal. The Joint Commenters stated that the February 2019 NOPR ignores the limited role of shipment information in deciding whether a lamp is ''used to satisfy lighting applications traditionally served by general service incandescent lamps.'' (Joint Commenters, No. 335 at p. 20) Similarly, PG&E and SDG&E commented that DOE's previous usage of the concept of ''lamp-switching potential'' to address non-sales-based considerations was supported by various stakeholders as a means for proactively addressing product loopholes that would otherwise proliferate. (PG&E and SDG&E, No. 348 at p. 6) DOE's assertion that it must depend only on sales for evidence of lamp switching to warrant the discontinuation of exemptions would remove DOE's discretion to maintain or discontinue exemptions, which is contrary to Congress's express intent in EISA. (PG&E and SDG&E, No. 348 at p. 6)

The definition of ''general service lamp'' includes specific categories of lamps, along with ''any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps.'' 42 U.S.C. 6291(30)(BB)(i). DOE determines that its January 2017 definition final rules that treated specialty lamps such as T-Shape, B, BA, CA, F, G16–1/2, G25, G30, S, M–14 and candelabra base lamps as GSLs is not consistent with the best reading of the statute, because such lamps are not used in the same applications as the standard general service incandescent lamp. The exemptions from the GSIL definition for the specific shapes listed in the previous sentence generally apply to lamps of 40 watts or less. DOE agrees with NEMA that traditional general service incandescent lighting applications do not include light bulbs that provide only a limited range of light output, such as light bulbs with very dim light output because of their low wattage. (NEMA, No. 329 at pp. 4–5) Furthermore, as described by NEMA, decorative light bulbs such as those with a ''candle'' shape bulb (''B'' blunt tip; ''BA'' bent tip; ''C'' flame tip; ''CA'' bent tip; ''F'' flame shape) and small globe shape lamps (G16.5) have a form factor that is not as large as the general service incandescent lamp's pear shape bulb. These decorative light bulbs present a decorative aesthetic to the consumer that is not replicated in the general service incandescent lamp, which is not used in decorative applications. The decorative bulb serves a different application for the consumer than the GSIL. When these decorative bulbs are mounted on a medium screw base, they are by definition low wattage (≤ 40W) and therefore low lumen lamps and will not serve the broader range of light outputs sought by consumers for applications traditionally served by general service incandescent lamps. (NEMA, No. 329 at p. 24) Lamps with an S shape have a small form factor, low wattage, and low lumen output; they are used in marquee signs and sometimes in appliance applications, night lights, and lava lamps. Lamps with a T shape have a tubular form factor and are also low wattage and low lumen lamps; they are typically used in music stands and showcase displays. Neither S nor T shape lamps are used in applications traditionally served by GSILs. (NEMA, No. 329 at p. 25) With respect to candelabra base lamps, these lamps additionally could not meet the statutory definition of GSIL since such lamps do not have a medium screw base. This distinction is important, as the purpose of this rule is to determine whether the statutory exclusions from GSILs should be retained per 42 U.S.C. 6295(i)(6)(A)(i)(II). As a pure matter of law, a candelabra base lamp cannot be a GSIL because EPCA defines a GSIL, in part, as having a medium-screw base. Congress made plain in the statute the scope of lamps it authorized DOE to consider. To the extent there is any uncertainty on this point, DOE believes the best interpretation of the statute is to remain within bounds of the existing statutory definition. DOE is no longer using ''convenient unregulated alternatives'' as a basis upon which to discontinue exemptions for specialty lamp types. This type of consideration is never mentioned in the statute and DOE agrees with those commenters that assert it goes beyond the authority granted to it by Congress to use the potential that a lamp may be considered a loophole to GSL standards as the basis

[8] DOE's public meeting transcript was incomplete regarding this statement from the CA IOUs. DOE has added what it believes to be the missing language.

for discontinuing its exemption under the statute.

In response to commenters asserting otherwise, DOE believes it gave proper weight to its consideration of the sales information for candelabra base lamps provided by manufacturers. The data provided by NEMA indicated that shipments of candelabra base incandescent lamp have been in a continuous decline since 2011 and there is no evidence of increasing shipments. (NEMA, No. 329 at p. 41) As sales data is the only factor Congress specifically pointed to in determining whether exemptions for certain incandescent lamps should be maintained or discontinued in 42 U.S.C. 6295 (i)(6)(A)(i)(II), DOE finds it appropriate to give this manufacturer data considerable weight in determining whether to maintain the exemption for the regulation of candelabra base lamps as GSLs. In light of the declining shipments for candelabra base lamps and the fact that consumers use candelabra as well as T-shape, B, BA, CA, F, G16–1/2, G25, G30, S, M–14 lamps for different applications than a general service incandescent lamp, in this final rule, DOE withdraws the revised definitions of GSL and GSIL, and maintains the current exclusion of these lamp shapes from the definitions of GSL/GSIL.

5. Supplemental Definitions

In the February 2019 NOPR, DOE proposed to withdraw the revised definitions of GSL and GSIL established in the January 2017 definition final rules as well as the supplemental definitions established in those rules that would no longer be necessary in light of the proposed withdrawal of the revised definitions of GSL and GSIL. 84 FR 3122. NEMA, with the support of Westinghouse Lighting, Signify, GE Lighting, and ALA provided comments supporting the retention of certain supplemental definitions, stating that it would be beneficial to define statutory terms that are undefined in the statute or are found in the current DOE regulations where DOE has adopted the statutory term or are appropriate in connection with these definitions. (NEMA, No. 329 at p. 33) GE Lighting additionally commented that if DOE is reverting to the original definitions in the EISA 2007 law, this should include keeping definitions for excluded lamps. (GE Lighting, No. 325 at p. 3) NEMA also requested that DOE modify the definition of GSLEDs to be consistent with the February 2019 NOPR and the intent of Congress. (NEMA, No. 329 at p. 34) NEMA derived its proposed definition of GSLED from the congressional definition of the medium base compact fluorescent lamp. (NEMA, No. 329 at p. 34)

For consistency in this rule, DOE removes all supplemental definitions adopted in the January 2017 definition final rules, including the definition of GSLED. DOE anticipates addressing undefined statutory terms in a future GSL standards rulemaking in which it can consider these issues with the benefit of analysis and public comment.

C. Additional Issues

Commenters expressed concern over a number of additional issues arising out of the February 2019 NOPR, which are discussed below.

1. Preemption

Northwest Energy Efficiency Alliance (NEEA), the Emmett Institute, the New York Assembly Commission on Science and Technology, and the National Association of Statue Utility Consumer Advocates (NASUCA) provided comments generally that if DOE rescinds the revised definitions of GSL and GSIL established in the January 2017 definition final rules, states will resume regulation of these lamps, leaving a patchwork of state regulations for retailers to navigate. (NEEA, No. 358 at p. 2; Emmett Institute, No. 341 at pp. 6–7; New York Assembly Commission on Science and Technology, No. 321 at p. 2; NASUCA, No. 347 at p. 7; Green Energy Consumers Alliance, No. 322 at p. 1) Signify requested that DOE address directly the issue of preemption for states that have adopted, or are adopting a 45 lm/W GSL standard and the expanded definitions promulgated on January 19, 2017. (Signify, No. 354 at p. 2) Signify prefers a strong regulatory framework, noting that a patchwork of different State regulations is counter-productive, hurts manufacturers and ultimately increases costs for consumers and stymies market adoption and energy savings. (Signify, No. 354 at p. 2)

Federal energy conservation requirements generally supersede state laws or regulations concerning energy conservation standards. (42 U.S.C. 6297(a)–(c)) Absent limited exceptions, states generally are precluded from adopting energy conservation standards for covered products both before an energy conservation standard becomes effective, and after an energy conservation standard becomes effective. (42 U.S.C. 6297(b) and (c)) However, the statute contains three narrow exceptions to this general preemption provision specific to GSLs in 42 U.S.C. 6295(i)(6)(A)(vi). Under the limited exceptions from preemption specific to GSLs that Congress included in EPCA, only California and Nevada have authority to adopt, with an effective date beginning January 1, 2018 or after, either:

(1) A final rule adopted by the Secretary in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv);

(2) If a final rule has not been adopted in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv), the backstop requirement under 42 U.S.C. 6295(i)(6)(A)(v); or

(3) In the case of California, if a final rule has not been adopted in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv), any California regulations related to ''these covered products'' adopted pursuant to state statute in effect as of the date of enactment of EISA 2007.

DOE clarifies in this rule that none of these narrow exceptions from preemption are available to California or Nevada. The first exception applies if DOE determines that standards in effect for GSILs need to be amended and issues a final rule setting standards for these lamps in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). In that event, California and Nevada would be allowed to adopt a rule identical to the Federal standards rule. This exception does not apply since DOE had not yet determined whether standards in effect for GSILs need to be amended and thus has not issued a final rule setting standards for these lamps in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). The second exception allows California and Nevada to adopt the statutorily prescribed backstop of 45 lm/W if DOE determines standards in effect for GSILs need to be amended and fails to adopt a final rule for these lamps in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). This exception does not apply because DOE has not yet made the determination on whether to amend standards for GSILs, and thus no obligation currently exists for DOE to issue a final rule setting standards for these lamps in accordance with the 42 U.S.C. 6295(i)(6)(A)(i)–(iv). The third exception does not apply since there are no California efficiency standards for GSLs in effect as of the date of enactment of EISA 2007. Therefore, all states, including California and Nevada, are prohibited from adopting energy conservation standards for GSLs.

2. Manufacture Date in Lieu of Sales Prohibition

Signify and Finally Bulbs requested that DOE's final GSL standard rulemaking should impose an effective date tied to a manufacturing date as opposed to a sales date. (Signify, No. 354 at p. 2) Finally Bulbs commented that a sales ban generates multiple

issues that would result in financial losses throughout distribution channels. (Finally Bulbs, No. 253 at p. 2)

DOE notes that the sales prohibition on GSLs that do not meet a minimum 45 lm/W standard beginning on January 1, 2020 would go into effect only if the backstop has been triggered. If the backstop requirement had been triggered the sales prohibition would be required by statute under 42 U.S.C. 6295(i)(6)(A)(v) and DOE has no discretion to change this requirement.

3. Consumer/Environmental Harm

DOE received many comments, including 64,145 bulk comments contained in batched form letters, two spreadsheets, and executive correspondence surrounding the alleged uncertainty introduced by the February 2019 NOPR and its potential to increase costs for retailers and consumers while damaging the environment. (See ASAP, No. 331 at p. 8; NEEA, No. 358 at p. 2; Ceres BICEP Network, No. 313 at p. 3; Green Mountain Power, No. 259 at p. 1; United States Climate Alliance, No. 270 at pp. 1–2) The Sierra Club and NRDC filed several comments from individuals through a form letter process. The Sierra Club submitted comments from 3,788 individuals strongly urging DOE to abandon its proposal stating that it would cost Americans billions in electricity bills and put millions of tons of greenhouse gases and pollutants in the atmosphere. These commenters also stated that application of more stringent requirements for recessed lighting, chandeliers, and other decorative fixtures beginning in 2020 will save consumers nearly $12 billion annually. Additionally, they noted that the adoption of lighting standards have already greatly increased the market for high-efficiency LED bulbs and the proposal was taking them in the wrong direction. (Sierra Club, No. 236, 238, 240, 244, 246, 390, 392, 395, 397, 399, 401, 403, 405, 407, 408, 410, 412, 414, 415, 417,421, 423, 424 at all pages) The NRDC submitted comments from 46,945 individuals stating strong opposition to DOE's proposal to narrow the scope of light bulbs covered by what commenters understood as the upcoming 2020 backstop. Further, these commenters stated that DOE's proposal would cost consumers billions of dollars in additional annual energy costs and increase carbon emissions by millions of tons. (NRDC, No. 343, 359 at spreadsheet attachment) NASUCA commented that consumers of essential utility service stand to lose environmental benefits and millions of dollars in energy efficiency savings if the DOE rolls back lighting standards. (NASUCA, No. 347 at p. 4) NEEA noted that the proposal, if finalized, will cause utilities in the Northwest region to replace the lost energy savings either by building more power plants or by creating more utility programs around other products to achieve the savings through much less cost-effective means. (NEEA, No. 358 at p. 1) The Energy Strategy Coalition [9] asserted that the February 2019 NOPR would hinder technological progress and make it harder for them to reduce their systems' emissions and provide cost-saving programs to customers (Energy Strategy Coalition, No. 324 at p. 3) The California Municipal Utilities Association, SMUD, CEC, PG&E and SDG&E, the Consumer Federation of America and the National Consumer Law Center (Consumer Groups), the United States Senate, and the Colorado Energy Office also generally noted that substantial consumer benefits are threatened by DOE's withdrawal of the definition final rules as, among other things, it will result in increased energy consumption and higher electricity bills. (SMUD, No. 312 at p. 2; CEC, No. 332 at p. 4; PG&E and SDG&E, No. 348 at pp. 1–2; Consumer Groups, No. 310 at p. 2; United States Senate, No. 377 at p.1 and Colorado Energy Office, No. 330 at p. 1) Joint commenters from utilities/energy associations (collectively, NorthWestern Energy),[10] as well as comments from the Sunrise Bay Area Hub, estimated that DOE's proposal to rescind the 2017 definition of GSL would reduce household energy savings by an average of $100 every year (as of 2025). (NorthWestern Energy, No. 327 at p. 1; Sunrise Bay Area Hub, No. 317 at p. 1) Many of these commenters, as well as the Green Energy Consumers Alliance, the American Chemical Society, the New York State Assembly Commission on Science and Technology, the Nevada Governor's Office of Energy, and the Connecticut Department of Energy and Environmental Protection also asserted that the February 2019 NOPR will release even more carbon emissions from the power sector. (Green Energy Consumers Alliance, No. 322 at p. 1; American Chemical Society, No. 298 at p. 1; the New York State Assembly Commission on Science and Technology, No. 321 at p. 1; the Nevada Governor's Office of Energy, No. 171 at p. 1; and the Connecticut Department of Energy and Environmental Protection, No. 261 at p.2) Further, the State Attorneys General, CEC and the Emmett Institute commented that DOE's proposed action has significant environmental effects which must be evaluated under NEPA. (State Attorneys General, No. 350 at p. 27; CEC, No. 332 at p. 5; and Emmett Institute, No. 341 at p. 7) Emmett Institute stated that the February 2019 NOPR would almost certainly result in a significant increase in energy consumption once numerous categories of lamps are no longer subject to EPCA standards. The State Attorneys General added that the proposed rule violates other environmental laws, including the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act. (State Attorneys General, No. 350 at p. 31)

As DOE has consistently stated throughout this rulemaking, this rule to withdraw the revised definitions of GSL and GSIL is not a standard. The January 2017 definition final rules likewise were emphatic in stating that they were not setting a standard. DOE has not applied the backstop requirement to the lamps that remain as GSL or to those that are being withdrawn from the definition. The obligation for DOE to consider energy conservation standards for lamps considered to be GSLs remains and DOE is working toward completing that task. More importantly for purposes of responding to these comments, this rule does not prevent consumers from buying the lamps they desire, including efficient options. NEMA's market and lamp shipment data analysis demonstrates that the average GSL product in the market already has an average efficacy greater than 45 lm/w. (NEMA, No. 329 at p. 49) Further, NEMA's confidential data provided to DOE, and the lamps consumers find currently offered for sale at retail establishments, shows that the market is successfully transitioning to LEDs regardless of government regulation. Consumers are clearly taking advantage of the energy savings provided by LEDs, and the data provided by NEMA gives

[9] These commenters include: Austin Energy, Con Edison, Exelon Corporation, Los Angeles Department of Water and Power, National Grid, New York Power Authority, Pacific Gas & Electric Corporation, Sacramento Municipal Utility District, and Seattle City Light.

[10] These commenters include: Ameren Missouri, American Electric Power, Arizona Public Service, Austin Energy, Avista, Berkshire Hathaway Energy, Chelan County PUD, California Municipal Utilities Association, Cedarburg Light & Water Utility, Consumers Energy, CPS Energy, Dominion Energy, DTE Energy Company, Entergy Corporation, Evergy, Eversource, Exelon Utilities, Hawaiian Electric, Idaho Power, Kerrville Public Utility Board (Texas), Lincoln Electric System (Nebraska), Long Island Power Authority, Los Angeles Department of Water and Power, New York Power Authority, NorthWestern Energy, PNM Resources, PSEG, Portland General Electric, Puget Sound Energy, Sacramento Municipal Utility District, San Diego Gas & Electric, Seattle City Light, Southern California Edison, Tacoma Public Utilities, Tucson Electric Power, Vistra Energy, and Xcel Energy.

no indication that the current market direction toward an increasing use of LED lamps will change as a result of this rule or any other factor. This final rule does not affect the availability of efficient LED lamp types, and DOE anticipates that consumers will continue to purchase and install highly efficient lighting options. As such, there is nothing about this rule that will lead to the need for more power generation, increased emissions, or lost consumer benefits. Consumers who already benefit from the wide availability of LEDs will continue to do so.

Lastly, in response to the concerns raised regarding the increase in energy consumption and environmental effects of this rule, DOE reiterates that this rulemaking addresses the scope of the definitions for GSL and GSIL and does not adopt an energy conservation standard for these products. DOE acknowledges that the February 2019 NOPR referenced an inapplicable categorical exclusion to meet its NEPA obligations to evaluate the environmental impact of the rulemaking. DOE recognizes that it can still comply with NEPA through the use of a different categorical exclusion. As this rulemaking changes the scope of an existing rule that does not alter the environmental effect of the rule being amended, DOE determined the categorical exclusion under 10 CFR part 1021, subpart D, appendix 5A, applies. (10 CFR 1021.410) [11] DOE now seeks to correct this oversight.

Further, although the February 2019 NOPR relied on the same categorical exclusion used in the January 2017 definition final rules that were met with no objections,[12] this rulemaking, as DOE has earlier explained, is not the adoption of an energy conservation standard, and is distinct from the types of rules that would accurately fall under Categorical Exclusion B5.1(b). Like the January 2017 definition final rules, this action does not establish an energy conservation standard, but rather only defines certain statutory terms (here, by adhering to the existing definitions in the statute). Moreover, as previously noted, the 2017 definition final rules are not yet in effect. Consequently, DOE's action in this rule does not result in a change to the environmental effect of the existing rule being amended. (10 CFR 1021.410) A change that would result in a measurable environmental impact would be the product of a separate regulatory action, such as setting energy conservation standards which this rule does not adopt. DOE's action here maintains the scope of the definitions of GSL and GSIL as that of the statute and withdraws a broader scope and supplemental definitions prior to their having taken effect. These actions are limited to identifying which lamps are defined as GSLs and GSILs and do not cause a change to the environmental effect of the existing rule. In fact, this action maintains the status quo. As such, this action, therefore, fits within this A5 categorical exclusion and its use meets DOE's obligations to evaluate the environmental impact of its proposed action under NEPA.

4. Data

The February 2019 NOPR, and this final rule, address two issues: (1) The scope of lamp types included in the definitions of GSL and GSIL; and (2) the applicability of the 2020 backstop requirement. Issue 1, because it relates to definitions and does not establish or materially change any standard, is not a subject of analysis under DOE's statutory requirements at 42 U.S.C. 6295(o)(2)(B). As a result, DOE did not draft an analysis of these definitional changes and did not seek comments on any analysis of these changes.

In contrast, Issue 2 reduces market uncertainty to a significant extent by clarifying the applicability of a 2020 backstop sales prohibition. DOE sought comment in its February 2019 NOPR on data that would enable it to better analyze this issue. Specifically, DOE sought comment on seven topics related to the distribution of relevant lamps throughout the retail cycle and the potential opportunity cost to retailers of transitioning lamp types into and out of stock. 84 FR 3127. DOE sought comment on these topics to enable an analysis of the second issue dealt with in this final rule—that is, the degree to which clarifying applicability of the 2020 backstop will reduce uncertainty in the market. This analysis is unrelated to Issue 1, which deals with the definitions that are changed by this final rule.

DOE received responses to these seven data questions from multiple commenters. In particular, NEMA, LEDVANCE, and ALA provided data dealing with the retail channel pipeline, travel time for wholesale goods, length of time lamps sit on a retail shelf, and the proportion of bays, sales, or inventory that constitutes lighting products. (NEMA, No. 329 at pp. 42–44; LEDVANCE, No. 326 at pp. 1–5; ALA, No. 308 at pp. 3–4)

Commenters provided information on procurement cycles for lamp retailers, including timeframes for procurement and transit. NEMA provided a high level generalization of the manufacturer experience in working with retail customers, indicating that the total time between the retailer's initial factory order and when a consumer can purchase a good can range from 4 weeks to 6 months or longer. (NEMA, No. 329 at p. 44) NEMA states that the purchase cycle begins when a purchase order is placed with the lamp factory, based on retailer demand. For lower to medium volume products, retailers typically place regular stocking orders based on a one to two week lead time for cartons and pallets. However, NEMA stated that a longer lead time (60 to 75 days) is needed for larger, full container orders to deliver directly to a retailer's distribution center. Once received, the goods remain in a retailer's distribution center between two and four weeks until the goods are shipped to individual store locations based on individual item/store demand. (NEMA, No. 329 at pp. 43–44) LEDVANCE further illustrated the upstream timing considerations and stated that it takes on average three months from the start of the process of procuring raw materials until the release of component shipment to the factory, although the time will vary depending on the source of the materials. This timeframe includes paperwork, placing binding orders, shipping components from remote sources, clearing customs (for international components), and transportation to the facility. After components arrive, production will take two or three months and once released from production it may take 5–14 more days to rout the final product from the distribution center to the retail customer. (LEDVANCE, No. 326 at pp. 2–3)

Other factors, such as retailer-specific contracts and ''safety stock'', may also affect how retailers stock lamps. For example, LEDVANCE stated that contract terms with certain retailers will mandate inventory levels. Such contracts specify that LEDVANCE provide multiple months of inventory, particularly for new items. In addition, LEDVANCE stated that it carries 2–3 months of component inventory in ''safety stock'' in order to meet all customer demands. (LEDVANCE, No. 326 at pp. 2–3) In total, LEDVANCE asserted that it takes between 5 and 12 months, including transit, for a lamp to move from source through a major retailer's distribution centers to the store. LEDVANCE stated that most

[11] 10 CFR part 1021, subpart D, appendix 5A Interpretative rulemakings with no change in environmental effect, (''Rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended.'').

[12] 82 FR 7276, 7319; 82 FR 7322, 7331; 10 CFR part 1021, appendix B5.1(b).

retailers have on average three months of inventory between their story and distribution centers. (LEDVANCE, No. 326 at p. 2) NEMA asserted that individual stores will carry sufficient inventory to prevent having empty shelf space. (NEMA, No. 329 at pp. 43–44) LEDVANCE submitted confidential data on three years of total industry shipments of lamp types, showing that a significant number of units are in transit and/or in a distribution center or on shelf, awaiting order and/or purchase. (LEDVANCE, No. 326 at p. 3)

Once goods are at the retail site, NEMA estimated that lower to medium demand products and specialty seasonal demand products (*e.g.* colored lights) may sit on a store shelf between 30 and 90 days, while retailers prefer to maintain at least two weeks of inventory for high demand products. (NEMA, No. 329 at pp. 43–44) Commenters generally agreed that timeframes to sale vary by lamp type. ALA commented that specialty lamps, which are lower-volume products, spend significantly longer time on store shelves, while LED A lamps move through inventory systems at faster rates. Approximately 70 percent of sales in the specialty lamp category are incandescent lamps. (ALA, No. 308 at p. 3) NEMA agreed that high-volume lamps tend to through retail channels more quickly than lower-volume specialty lamps, including those at subject in the 2019 NOPR. NEMA asserted that because these specialty lamps have a longer shelf-life, they would entail greater exposure to risk from a sales prohibition order such as that contemplated by the ''backstop.'' (NEMA, No. 329 at p. 42)

Commenters generally agreed on the proportion of space at major retailers that is devoted to lighting products. LEDVANCE estimated that lighting and luminaires can occupy between 5% and 10% of a DIY retailer's floor space (LEDVANCE, No. 326 at p.3) and ALA retailers estimate about 6%–10% percent of showroom and warehouse space is used for lamps (ALA, No. 308 at p. 3).

Commenters provided different views on the scope of retailers affected by uncertainty. NEMA noted that large retail hardware stores and urban/suburban retail stores tend to move light bulbs through the distribution channel than specialty retail stores or rural retail stores. (NEMA, No. 329 at p. 42) LEDVANCE noted that all types of retailers, and other upstream stakeholders in the supply chain, are affected by uncertainty regarding the January 2020 date. (LEDVANCE, No. 326 at p. 5) Among the sources of uncertainty LEDVANCE listed that components could be stranded, packaging must be recycled/scrapped at cost, contracts with suppliers and customers that cannot be fulfilled may result in financial penalties, excess inventory must be scrapped, and that last minute product reset is challenging with possibly lower pricing requirements. *Id.* The California Municipal Utilities Association (CMUA) provided a different perspective and stated that retailers that have already adjusted their procurement activities to reflect the 2017 definitions will be harmed. (CMUA, No. 328 at p. 3)

Commenters presented differing views regarding the burden or benefits associated with open bays. LEDVANCE commented that open bays present significant problems in that customers are frustrated by a lack of products and choices and retailers lose sales opportunities as a result. (LEDVANCE, No. 326 at pp. 3–5) In the February 2019 NOPR public meeting, NRDC noted that freeing up space on retailers' shelves could be a benefit instead of a burden as there are other products that could also provide revenue. (NRDC, Public Meeting Transcript, No. 44 at p. 144) LEDVANCE agreed in part that open bays provide an opportunity for new product, but noted that filling the open bays takes time, and there may be added reset costs. (LEDVANCE, No. 326 at pp. 3–5) LEDVANCE elaborated that identifying and sourcing new products for an open retail bay can require 6–12 months, including identifying and qualifying the source, setting up the new vendor, product testing time, price negotiation, purchase orders, transit from the source, and initiating new data setup in store registers. (LEDVANCE, No. 326 at pp. 3–5) ALA stated that the typical supply chain for a traditional lighting retailer is roughly 30 days. (ALA, No. 308 at p. 4) LEDVANCE added that lamp sales are seasonal and affected by scheduled events, which requires manufacturers to prepare three months earlier to have adequate inventory to meet demand. (LEDVANCE, No. 326 at pp. 3–5) From the perspective of retailers, updating the layout and product offerings requires planning time, advanced scheduling, and execution time. Big box retailers schedule line reviews for lamps using fast changing technologies, such as LED lamps; these line review may take 4–6 months followed by a shelf reset 8–10 months after the start of the cycle. Convenience retailers are less likely to schedule line reviews, and may schedule shelf refreshes in the spring and the fall. *Id.*

The Colorado Office of Consumer Counsel (COCC) and the Colorado Energy Office (CEO) noted that uncertainty may be enhanced by DOE's rulemaking as a result of potential legal challenges. COCC and CEO stated that multiple organizations have indicated that they might pursue litigation, which would not be resolved until well into 2020. As a result, COCC and CEO stipulated that retailers, who will be responsible for compliance with a potential 45 lm/W backstop, will be uncertain whether lamps shipped in 2019 will be legal to sell when they arrive at the stores. (COCC, No. 319 at p. 3; CEO, No. 330 at p. 2)

DOE also received comments on its overall use of data in the rulemaking. Many commenters were confused as to which aspect of its rulemaking DOE intended to analyze, and did not distinguish between Issue 1 and Issue 2 of the February 2019 NOPR. For example, PG&E and SDG&E commented that DOE's use of data in the rulemaking does not justify its withdrawal of the exemption discontinuations from the 2017 definition final rules. (PG&E and SDG&E, No. 348 at p. 8) They commented that the February 2019 NOPR did not explain how submitted data helped to inform the proposal. They argued DOE claimed that the data serves to establish retailer burden but does not explain how the data that is provided is relevant. Nor does DOE address how retailer burden itself plays any role in DOE's proposal. PG&E and SDG&E also noted the proposal only focuses on burden of some retailers, while totally discounting burdens on retailers who are committed to selling LED lamps and have proactively based their business plans on the forthcoming standards. These commenters stated that DOE does not consider burdens on consumers, forward thinking manufacturers and retailers and utilities. (PG&E and SDG&E, No. 348 at p. 8) Ceres BICEP Network similarly commented, noting that DOE is putting extraordinary weight on sales data from NEMA to revisit a definition that is now two years old, a reversal that will only create more confusion in the marketplace. (Ceres BICEP Network, No. 313 at p. 3)

Historically, DOE has not conducted analysis of its definitional rules. In its January 2017 definition final rules, DOE explained that the analytical requirements to which DOE is subject apply, by their terms, only when DOE prescribes a new or amended standard. By contrast, a rule that alters definitions does not establish or materially change any standard, and the same analytical requirements do not apply. *See* 82 FR 7278; see also 84 FR 3125. As a result, this rule is not accompanied by a

technical support document or other analyses for the definition change.

As DOE noted in the previous section, this rule does not prevent consumers from buying the lamps they desire, including efficient options; the same is true for retailers. In response to CMUA, those retailers who prefer to stock only LEDs are in no way prohibited from doing so under this final rule. Per PG&E/SDG&E's comments, DOE takes this opportunity to clarify that retailer burden does not play a role in DOE's definition changes. Rather, DOE sought to clarify the applicability of the 2020 backstop, which involved a sales prohibition that, if it applied, would burden retailers who must transition their lighting stock. DOE only uses data and supporting analysis in this rule to illustrate the scope of uncertainty in the market regarding the applicability of the backstop sales prohibition. DOE agrees with NRDC that retailers may replace lighting products with higher-revenue products; however, this does not negate the very real transition costs to retailers who switch out their stock. In addition, due to the particulars of the retail supply chain, such a transition is likely to take a significant amount of time, and some retailers may forego revenue if they are unable to find a timely product replacement. The analysis that DOE provides in this final rule addresses those transition and opportunity costs.

In the February 2019 NOPR, DOE said that the agency would attempt to quantify the uncertainty created by its prior rulemakings in the proceeding. In particular, DOE noted that it had created substantial uncertainty by making apparently conflicting statements about the applicability of the backstop requirement. DOE anticipates that having clarified that the backstop does not apply has and will result in measurable effects on the markets for certain incandescent lamps, including rough-service, vibration service, 3-way, shatter resistant, high-lumen, candelabra, halogen, and globe lamps. Further, significant uncertainty existed in the retail market regarding the scope of lamps that may be available for sale, which DOE had failed to clarify in previous statements or rulemakings. As a result of this uncertainty, retail outlets had not been able to plan adequately for a potential change in stock, or lack thereof. This uncertainty creates cost for retailers, and this clarification is expected to reduce those uncertainty costs.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

This final rule constitutes a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under Executive Order 13771

This final rule is considered an E.O. 13771 deregulatory action. Details on the estimated costs of this rule can be found below.

1. Analytical Approach

This rulemaking clarifies that DOE has not yet taken the predicate actions to trigger the 45 lm/W backstop. DOE must still make a determination regarding whether to amend standards for GSILs, which would affect whether the 45 lm/W backstop standard would apply to general service lamps. Clarifying this applicability removes any uncertainty that exempted lamps, such as those at subject in this rulemaking, would be subject to the 45 lm/W backstop requirement. Clarifying this point will result in measurable effects on the markets for certain incandescent lamps, including vibration service, 3-way, shatter resistant, high-lumen, candelabra, halogen, and globe lamps.

The analysis that follows quantifies the cost savings to the retail market associated with resolving uncertainties as to which lamps may be sold as of January 1, 2020 as a result of clarifying applicability of the 2020 backstop. The February 2019 NOPR requested information on the potential range of cost savings associated with the proposed action. The information received was used to quantify how many lamps were affected by uncertainty surrounding the 2020 backstop and the extent to which retailers would have borne costs associated with changes in inventory throughout the distribution chain.

As a result of prior confusion regarding whether the 45 lm/W backstop had been triggered, it is likely that there would be substantial variation in what retailers understand to be prohibited for sale after January 1, 2020. In the face of this uncertainty, retailers would be compelled to continue to order and stock the full suite of lamp offerings to avoid losing customers to a competitor that offers a more comprehensive lamp selection, with retailers risking stranded inventory. However, the retailer's financial risk of keeping the shelves well-stocked goes beyond the cost of the retailer inventory stranded on the retailer's shelves and warehouses. The retailer's financial liability starts from the moment a purchase order is placed in the supply chain. Under most conditions, once an order is placed the retailer cannot cancel or modify the order without penalty. (NEMA, No. 329 at p. 43; LEDVANCE, No. 326 at p. 5) Thus, the applicable inventory losses include all losses associated with product orders cancelled when a prohibition for which a retailer is not adequately able to anticipate and plan is effective. This inability to take appropriate action in advance of the prohibition on sales would create costs associated with potential stranded work in progress and inventory in manufacturer warehouses as well as the distribution channel. (NEMA, No. 329 at p. 42; LEDVANCE, No. 326 at p. 5) Contractually, the risks and costs could be shared between retailer and others in the supply chain, but in all likelihood, and for sake of simplicity, the analysis assumes that all inventory costs are entirely passed on to the retailer. The analysis does not include explicit financial penalties for cancelled orders because those values are captured in the analysis as opportunity costs to the retailer in the form of lost sales revenue for all lamps in the distribution chain.

Quantifying the inventory at risk requires that the analysis estimates the dollar value of lamps within the supply chain when the prohibition would be effective, in particular the dollar value of those lamps subject to the prohibition. From comments received, DOE estimates that lamp inventory turns over approximately 2 to 9 times per year, placing at risk as few as 6 weeks or as many as 6 months of lamp sales. (NEMA, No. 329 at p. 44; ALA, No. 308 at p. 3; LEDVANCE, No. 326 at p. 2) If the shelf space stays empty, the financial loss equals the entire lost revenue at the retail level. In theory, if the shelf space is gradually filled with other products the financial loss is reduced. But the loss is reduced by only a fraction of the replacement retail revenue since contrary to the stranded lamps inventory which has already been paid to suppliers, the replacement products to fill the vacated shelf space has not been paid. In previous rulemakings for GSLs DOE estimated that product costs represented approximately 66 percent of the retail price of GSLs (accounting for

replacement product costs). Furthermore, in practice, identifying, qualifying, and sourcing new products is a process requiring many months (LEDVANCE, No. 326 at pp. 3–4).

2. Cost Estimate

NEMA's confidential estimates of total domestic shipments for the years 2015 to 2018 were used to forecast future shipments. An exponential forecast was determined to be the best fit to the data provided. The analysis uses manufacturer shipments as a surrogate for unit sales because it is presumed that retailer inventories remain fairly constant from year to year such that annual shipments track closely with actual unit sales. Shipments were assumed to be equally spread among months of the year. Based on comments from industry, as few as 6 weeks or as many as 6 months of incandescent lamp sales may be at risk. Thus, a low-end and high-end estimate were calculated based on the two different time frames.

3. Results

DOE estimates that if retailers had on their shelves incandescent lamps and were prohibited from selling them, the lost revenue in 2020 would range from $64.3 million to $257 million (in 2016$). Sales of subject incandescent lamps over the analyzed time period (approximated by shipments) range from 37.8 million to 151 million lamps with an average lamp price of $1.70 (in 2016$).

TABLE 1—SUMMARY OF COST IMPACTS

Category	Present value (thousands 2016$)	Discount rate (percent)
Cost Savings		
Reduction in Uncertainty	$57,098–$228,393	3
	$49,027–$196,108	7
Total Net Cost Impact		
Total Net Cost Impact	($57,098)–($228,393)	3
	($49,027)–($196,108)	7

TABLE 2—SUMMARY OF ANNUALIZED COST IMPACTS

Category	Annualized value (thousands 2016$)	Discount rate (percent)
Annualized Cost Savings		
Reduction in Uncertainty	$1,713–$6,852	3
	$3,432–$13,728	7
Total Net Annualized Cost Impact		
Total Net Cost Impact	($1,713)–($6,852)	3
	($3,432)–($13,728)	7

The final rule yields annualized cost savings of between approximately $3.4 million and $13.7 million using a perpetual time horizon discounted to 2016 at a 7 percent discount rate.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed the withdrawal of the revised definitions for GSL, GSIL and related terms under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certifies that this final rule does not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is set forth in the following paragraphs.

For manufacturers of GSLs, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule See 13 CFR part 121. The size standards are listed by NAICS code and industry description and are available at *https://www.sba.gov/document/support-table-size-standards*. Manufacturing of GSLs is classified under NAICS 335110, ''Electric Lamp Bulb and Part Manufacturing.'' The SBA sets a threshold of 1,250 employees or less for an entity to be considered as a small business for this category.

To estimate the number of companies that could be small businesses that manufacture GSLs covered by this rulemaking, DOE conducted a market survey using publicly available information. DOE's research involved information provided by trade associations (*e.g.,* NEMA [13]) and information from DOE's Compliance Certification Database,[14] EPA's ENERGY

[13] National Electric Manufacturers Association | Member Products | Lighting Systems | Related Manufacturers, *http://www.nema.org/Products/Pages/Lighting-Systems.aspx* (last accessed September 26, 2018).

[14] DOE's Compliance Certification Database | Lamps—Bare or Covered (No Reflector) Medium Base Compact Fluorescent, *http://www.regulations.doe.gov/certification-data* (last accessed September 26, 2018).

STAR Certified Light Bulbs Database,[15] previous rulemakings, individual company websites, SBA's database, and market research tools (*e.g.,* D&B Hoover's reports [16]). DOE used information from these sources to create a list of companies that potentially manufacture or sell GSLs and would be impacted by this rulemaking. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a ''small business,'' or are completely foreign owned and operated. DOE determined that eight companies are small businesses that maintain domestic production facilities for general service lamps.

DOE notes that this final rule withdraws the revised definitions of GSIL and GSL that are effective in 2020 in order to maintain the existing regulatory definitions of these terms, which is the same as the statutory definitions of these terms, including exclusions of certain lamp types. As a result, certain lamps will continue to be exempt from complying with current Federal test procedures and any applicable Federal energy conservation standards. For this reason, DOE concludes and certifies that the withdrawal of the definitions does not have a significant economic impact on a substantial number of small entities, and the preparation of a FRFA is not warranted.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of GSLs must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for GSLs, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. *See generally* 10 CFR part 429. The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

E. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this proposed action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A5 because it is a rulemaking that amends an existing rule that does not change the environmental effect of the rule and meets the requirements for application of a CX. See 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an EA or EIS.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final rule and has determined that it does not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of state regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on state, local, and tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The

[15] ENERGY STAR Qualified Lamps Product List, *http://downloads.energystar.gov/bi/qplist/Lamps_Qualified_Product_List.xls?dee3-e997* (last accessed September 26, 2018).

[16] Hoovers | Company Information | Industry Information | Lists, *http://www.hoovers.com* (last accessed June 27, 2019).

UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of state, local, and tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/gc/office-general-counsel.* DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule does not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), DOE has determined that this final rule does not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action to withdraw the revised definitions of GSL, GSIL and supplemental definitions is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

Signed in Washington, DC, on: August 28, 2019.

Daniel R Simmons,

Assistant Secretary, Energy Efficiency and Renewable Energy.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ Accordingly, the final rules published in the **Federal Register** on January 19, 2017 (82 FR 7276 and 82 FR 7322), amending 10 CFR 430.2, which were to become effective on January 1, 2020, are withdrawn effective October 7, 2019.

[FR Doc. 2019–18940 Filed 9–4–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Parts 12 and 141

[USCBP–2016–0075; CBP Dec. No. 19–11]

RIN 1651–AB02

Technical Correction to Centers of Excellence and Expertise Regulations

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule; technical correction.

SUMMARY: On December 20, 2016, U.S. Customs and Border Protection (CBP) published an interim final rule in the **Federal Register**, which established the Centers of Excellence and Expertise (Centers) as a permanent organizational component of the agency and transitioned certain operational trade functions to the Center directors that traditionally resided with the port directors. This technical correction clarifies two sections of CBP regulations that do not currently reflect CBP's operational structure or the objective of the ''Regulatory Implementation of the Centers of Excellence and Expertise'' interim final rule. This document amends CBP regulations to correct the discrepancies.

DATES: This final rule is effective on September 5, 2019.

FOR FURTHER INFORMATION CONTACT: Lori Whitehurst, CBP Office of Field Operations, by telephone at (202) 344–2536 or by email at *lori.j.whitehurst@cbp.dhs.gov;* or Susan S. Thomas, CBP Office of Field Operations, by telephone at (202) 344–2511 or by email at *susan.s.thomas@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

COMMENTS OF ATTORNEYS GENERAL OF CALIFORNIA, NEW YORK, NEW JERSEY, OREGON, COLORADO, CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NORTH CAROLINA, VERMONT, WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, THE DISTRICT OF COLUMBIA AND THE CITY OF NEW YORK

May 3, 2019

Comments submitted via e-mail:
GSL2018STD0010@ee.doe.gov
U.S. Department of Energy
Appliance and Equipment Standards Program

Re: Docket No. 2019-01853
RIN 1904-AE26
Energy Conservation Program: Energy Conservation Standards for General Service Lamps

The undersigned State Attorneys General and local governments respectfully submit these comments in response to Department of Energy (DOE)'s proposal to withdraw two final lighting efficiency rules[1] adopted by DOE on January 19, 2017 (hereinafter, Definition Rules). The Definition Rules revise the definitions of general service lamp (GSL) and general service incandescent lamp (GSIL).[2] On February 11, 2019, DOE published its Notice of Proposed Rulemaking (NOPR) for the withdrawal of the Definition Rules, seeking public comment by May 3, 2019.[3]

The Definition Rules, adopted by DOE pursuant to Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291, *et seq*., as amended, expanded the definition of GSLs and GSILs to include a wide range of commonly-used light bulbs, including 3-way bulbs, cone-shaped reflector bulbs used in recessed and track lighting, candle-shaped bulbs used in chandeliers and sconces, and round globe-shaped bulbs used in bathroom lighting fixtures. Approximately three billion –nearly half -of all lighting sockets in U.S. homes contain these types of bulbs.[4]

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[1] 82 Fed. Reg. 7,276 (Jan. 19, 2017); 82 Fed. Reg. 7,322 (Jan. 19, 2017).
[2] Lamp is a term used within the lighting industry and DOE's energy efficiency program to refer to light bulb. GSILs are a subset of GSLs. 42 U.S.C. § 6291(30)(BB)(i)(II).
[3] The NOPR and request for comments is titled, *Energy Conservation Program: Energy Conservation Standards for General Service Lamps*, 84 Fed. Reg. 3,120 (February 11, 2019).
[4] *See* Appliance Standards Awareness Project and American Council for an Energy-Efficient Economy (ACEEE) Statement, "Rollback of Light Bulb Standards Would Cost Consumers Billions - $100 Per Household Each Year" (February 6, 2019), *available at* https://aceee.org/press/2019/02/rollback-light-bulb-standards-would (citing ASAP/ACEEE Issue Brief, "US Light Bulb Standards Save Billions for Consumers But Manufacturers Seek a Rollback" (July 2018), *available at* https://aceee.org/sites/default/files/bulb-standards-0803-2.pdf and SAP/ACEEE

INTRODUCTION

The Definition Rules are critically important because they confer tangible consumer and energy savings. By 2025, the Definition Rules will conserve approximately 80 billion kilowatt hours of electricity annually, saving consumers at least $12 billion in annual electricity costs, equal to nearly $100 per household per year.[5] In addition, the Definition Rules are projected to significantly reduce greenhouse gas emissions and other air pollutants harmful to public health and the environment. It is estimated that by 2025, the Definition Rules on an annual basis will reduce 34 million metric tons of climate-changing carbon dioxide, 19,000 tons of nitrogen oxide, and 23,000 tons of sulfur dioxide emissions. Indeed, even DOE-funded research confirms the Definition Rules' "disproportionately large potential for energy savings."[6]

Rigorous research led by experts at thirteen Federal agencies has recently determined that climate change is human caused; that continued growth in emissions will produce economic losses across all sectors of the United States' economy; that mitigation measures do not "yet approach the scale necessary to avoid substantial damages to the economy, environment and human health over the coming decades; and that in the absence of more significant global mitigation efforts, "[i]t is very likely that some physical and ecological impacts will be irreversible for thousands of years, while others will be permanent."[7]

On these facts alone, the United States cannot afford to reverse its Definition Rules where the consumer and environmental benefits are enormous and industry is ready to comply.

As discussed below, DOE's proposed repeal of the Definition Rules ("Proposed Action") is contrary to law, undermines EPCA's legislative intent, and would unconscionably increase greenhouse gas emissions and consumers' energy costs. DOE's Proposed Action is unlawful for the following reasons: (1) it would violate EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1); (2) DOE has no inherent authority in EPCA to exempt the lamp products at issue; (3) DOE's reversal is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*.; (4) DOE has failed to evaluate the environmental impacts of its Proposed Action under the National Environmental Policy Act, 42 U.S.C. § 4332, *et seq*.; and (5) DOE's Proposed Action violates other environmental laws, including the Endangered Species Act, 16 U.S.C. § 1536 *et seq*., the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq*., and the National Historic Preservation Act, 54 U.S.C. § 306108. We therefore urge DOE to withdraw its proposed repeal of the Definition Rules.

Issue Brief Appendices (July 2018), *available at* https://aceee.org/sites/default/files/pdf/policy-brief/bulb-standards-appendices.pdf).

[5] *Id.* Because energy efficient light bulbs such as compact fluorescent (CFL) bulbs and light-emitting diode (LED) bulbs last ten to fifteen times longer than traditional incandescent bulbs, consumers will also save money from fewer bulb purchases. *See* https://www.energy.gov/energysaver/save-electricity-and-fuel/lighting-choices-save-you-money/how-energy-efficient-light (last visited May 2, 2019).

[6] *See* Kantner *et al*., Lawrence Berkeley National Laboratory, "Impact of the EISA 2007 Energy Efficiency Standard on General Service Lamps" (January 2017), *available at* https://ees.lbl.gov/sites/default/files/lbnl-1007090-rev2.pdf, at 3.

[7] *See* U.S. Global Change Research Program, "Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II" (D.R. Reidmiller *et al*. eds., 2018), https://nca2018.globalchange.gov/ (the "Assessment") at 26, 73, 1347.

BACKGROUND

On January 19, 2017, after conducting an extensive and thorough rulemaking pursuant to EPCA, 42 U.S.C. § 6295(i)(6)(A)(i)(II), DOE published the Definition Rules, which expanded the definitions of GSLs and GSILs to include most lamp types found in households nationwide.[8] The new GSL and GSIL definitions included certain categories of lamps that were initially statutorily exempt from energy conservation standards under ECPA, but which Congress expressly directed DOE to reevaluate.[9] Specifically, the Definition Rules discontinued exemptions for reflector lamps; rough service lamps; shatter resistant lamps; 3-way incandescent lamps; vibration service lamps; T shape lamps of 40 watts (W) or less or length of 10 inches or more; B, BA, CA, F, G16-1/2, G25, G30, S, M-14 lamps of 40W or less; and incandescent reflector lamps.[10] The Definition Rules also included high-lumen[11] (2,601 and 3,300 lumens) incandescent lamps in the GSL and GSIL definitions.

DOE took this action in January 2017 because it was ordered to do so by Congress. Amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA 2007 Amendments)[12] directed DOE to conduct two rulemaking cycles to evaluate energy conservation

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[8] 82 Fed. Reg. 7,276; 82 Fed. Reg. 7,322.

[9] *See* 42 U.S.C. § 6295(i)(6)(A)(i)(II).

[10] Incandescent reflector lamps, which represent the largest share of previously exempt lamps are separately addressed in the Definition Rule published at 82 Fed. Reg. 7,322.

[11] "Lumen" refers to the amount of light produced and "watt" refers to the amount of energy used to produce the light.

[12] Pub. L. 110-140; 42 U.S.C. 6295(i)(6) provides, in relevant part:

(6) Standards for general service lamps.—

(A) Rulemaking before January 1, 2014.—

(i) In general.—Not later than January 1, 2014, the Secretary shall initiate a rulemaking procedure to determine whether—

(I) standards in effect for general service lamps should be amended to establish more stringent standards than the standards specified in paragraph (1)(A); and

(II) the exemptions for certain incandescent lamps should be maintained or discontinued based, in part, on exempted lamp sales collected by the Secretary from manufacturers.

(ii) Scope.—The rulemaking—

(I) shall not be limited to incandescent lamp technologies; and

(II) shall include consideration of a minimum standard of 45 lumens per watt for general service lamps.

(iii) Amended standards.—If the Secretary determines that the standards in effect for general service incandescent lamps should be amended, the Secretary shall publish a final rule not later than January 1, 2017, with an effective date that is not earlier than 3 years after the date on which the final rule is published.

(iv) Phased-in effective dates.—The Secretary shall consider phased-in effective dates under this subparagraph after considering—

(I) the impact of any amendment on manufacturers, retiring and repurposing existing equipment, stranded investments, labor contracts, workers, and raw materials; and

(II) the time needed to work with retailers and lighting designers to revise sales and marketing strategies.

(v) Backstop requirement.—If the Secretary fails to complete a rulemaking in accordance with clauses (i) through (iv) or if the final rule does not produce savings that are greater than or equal to the savings from a minimum efficacy standard of 45 lumens per watt, effective beginning January 1, 2020, the Secretary shall prohibit the sale of any general service lamp that does not meet a minimum efficacy standard of 45 lumens per watt.

standards for GSLs.[13] For the first rulemaking cycle, Congress directed DOE to initiate a rulemaking no later than January 1, 2014, to evaluate whether to amend energy conservation standards for GSLs. It also directed DOE to determine whether exemptions for certain incandescent lamps should be maintained or discontinued.[14] Further, for this first cycle of rulemaking, the EISA 2007 Amendments provided that DOE must consider a minimum efficiency standard of 45 lm/W and phased-in effective dates.[15] If DOE determined that the standards in effect for GSILs should be amended, 42 U.S.C. § 6295(i)(6)(A)(iii) required DOE to publish a final rule by no later than January 1, 2017.

Congress further specified that in the event that DOE failed to complete its rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv) or the final rule from such first rulemaking cycle did not produce savings greater than or equal to the savings from a minimum efficacy standard of 45 lumens per watt (lm/W), a "backstop" would be triggered, 42 U.S.C. § 6295(i)(6)(A)(v). Pursuant to the backstop, DOE must prohibit sales of GSLs that do not meet a minimum efficiency standard of 45 lm/W beginning on January 1, 2020.[16]

DOE satisfied some, but not all of its rulemaking obligations set forth in 42 U.S.C. § 6295(i)(6)(A). For example, DOE never made a final determination whether to amend GSL standards. Instead, it issued the Definition Rules pursuant to its obligation to evaluate whether to maintain or discontinue certain definitional exemptions. As a result, EPCA's 45 lm/W backstop was triggered, and the vast majority of light bulbs sold in the U.S. beginning January 1, 2020 became subject to that standard. While inefficient incandescent and halogen bulbs are unable to meet this new standard, the standard is easily met by CFL and LED bulbs, which require a small fraction of the energy used by incandescent and halogen bulbs to produce an equivalent amount of light.[17] Due to improvements in lighting technology and lighting efficiency standards, LED replacement bulbs are now available in a wide range of shapes, light outputs and beam angles to meet consumers' lighting needs.[18]

On February 11, 2019, DOE published the subject NOPR to rescind the Definition Rules and revert to the definitions of GSL and GSIL as they existed before the Definition Rules were adopted. DOE's proposed repeal of the Definition Rules would significantly limit the universe of lamps subject to energy conservation standards. DOE claims that its proposed definition is "more legally justifiable than the definitions contained in the January 2017 [Definition Rules]."[19] In the NOPR, DOE asserts that its proposed repeal of the Definition Rules would ensure that only those lamps intended by Congress to be GSILs and GSLs under EPCA would be subject to the agency's energy conservation standards and that reverting to the definitions supplanted by the Definition Rules, which DOE wrongly characterizes as maintaining the "status quo,"[20] would not violate EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1).[21] DOE's assertions are incorrect.

[13] 42 U.S.C. § 6295(i)(6)(A)-(B).
[14] 42 U.S.C. § 6295(i)(6)(A)(i).
[15] 42 U.S.C. § 6295(i)(6)(A)(ii), (iv).
[16] 42 U.S.C. § 6295(i)(6)(A)(vi).
[17] See ASAP/ACEEE Issue Brief and Appendices.
[18] *Id.*
[19] 84 Fed Reg. 3,120, 3,123.
[20] 84 Fed. Reg. 3,123.
[21] 84 Fed. Reg. 3,123.

I. DOE's Proposed Repeal of the January 19, 2017 Definition Rules Would Violate EPCA's Anti-Backsliding Provision, 42 U.S.C. § 6295(o)(1).

DOE's Proposed Action is barred by EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1). That provision states: "The [DOE] Secretary may not prescribe any amended standard which increases the maximum allowable energy use…or decreases the minimum required energy efficiency, of a covered product." Significantly, Congress amended EPCA in 1987 to include the anti-backsliding provision to ensure steady increases in the efficiency of products covered under DOE's appliance efficiency program.[22] EPCA's prohibition against backsliding also "serves to maintain a climate of relative stability with respect to future planning by all interested parties."[23]

As explained further below, DOE's failure to complete its rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(1)(i)-(iv) has triggered EPCA's 45 lm/W minimum efficiency backstop standard for GSLs, 42 U.S.C. § 6295(i)(6)(A)(v), and the Definition Rules subjected a wide range of lamps used for general lighting purposes to that backstop. However, DOE's proposed repeal of the Definition Rules would reinstate exemptions for those lamps, leaving them subject to significantly less stringent efficiency standards,[24] or in some cases, subject to no efficiency standards at all. Because the Proposed Action would increase the maximum allowable energy use for such lamps, EPCA's anti-backsliding provision forbids DOE from undertaking that action.

A. EPCA's 45 lm/W Backstop Was Triggered by DOE's Failure to Complete Rulemaking Pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv).

DOE triggered EPCA's 45 lm/W backstop minimum efficiency standard applicable to general service lamps, 42 U.S.C. § 6295(i)(6)(A)(v), when it failed to complete a rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv). DOE failed to meet congressionally-imposed procedural milestones, which included adopting final amended GSIL standards by January 1, 2017. The backstop was triggered, at the latest, on January 1, 2017.

DOE acknowledges that it has not completed its rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv).[25] Moreover, in *National Electrical Manufacturers Association v. California Energy Commission*, No. 2:17-CV-01625-KJM-AC, 2017 U.S. Dist. LEXIS 211213 (E.D. Cal. Dec. 21, 2017) the court declined to find that DOE had adopted a final rule pursuant to 42 U.S.C. § 6295(i)(6)(A)(i-iv). Thus, by its terms, EPCA's 45 lm/W backstop has been triggered, and no further action by DOE is needed for the sales prohibition against non-compliant

[22] National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, 1987 U.S.C.C.A.N. (101 Stat.) 103, 114; *see NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004).
[23] House Rpt. 100-11 at 22 (March 3, 1987).
[24] *E.g.*, current minimum efficiency standards for incandescent reflector lamps are 10.5 – 15 lm/W. *See* 42 U.S.C. 6295(i)(B); 10 C.F.R. § 430.32 (n)(6-7).
[25] *See* 84 Fed. Reg. 3,120, 3,122 ("The determination on whether to amend standards for GSILs remains a decision DOE is obligated to make and will be addressed in a separate rulemaking proceeding."); *National Electrical Manufacturers Association v. California Energy Commission*, No. 2:17-CV-01625-KJM-AC, 2017 U.S. Dist. LEXIS 211213 (E.D. Cal. Dec. 21, 2017) (California entitled to regulate covered lamps under preemption exemption because DOE had not adopted final rule pursuant to 42 U.S.C. § 6295(i)(6)(A)(i-iv)).

lamps to take effect on January 1, 2020.[26] Indeed, DOE's January 18, 2017 "Statement Regarding Enforcement of the 45 LPW General Service Lamp Standard" clearly acknowledged the inescapable consequence of its failure to complete rulemaking prescribed by 42 U.S.C. § 6295(i)(6)(A): "[EPCA], as amended, requires that effective beginning January 1, 2020, DOE shall prohibit the sale of any [GSL] that does not meet a minimum efficacy standard of 45 lumens per watt."[27]

DOE now asserts that the backstop has not been triggered because 42 U.S.C. § 6295(i)(6)(A)(iii) requires a final GSIL standards rule by January 1, 2017 *only if* DOE determines that standards for GSILs should be amended.[28] According to DOE, because the agency has yet to decide whether to amend the standard, it is not obliged to issue a final standard by any deadline and the backstop provision is not triggered. DOE's interpretation of its statutorily mandated duties defies logic, contradicts the overall framework of EPCA and must be rejected. As DOE itself observed: "[T]he regulatory program that EISA 2007 established was a preference and presumption for a 45 lm/W standard."[29] The statute gives DOE the option to establish an alternative set of standards, on condition that those standards would achieve energy savings at least as great as would a 45 lm/W standard, but the statute neither states nor supports the proposition that delaying a final determination pursuant to 42 U.S.C. § 6295(i)(6)(A)(i) whether to amend a standard can be used to avoid triggering the backstop standard. Given the urgency of Congress's mandate to force improvements in new lighting technologies and its carefully crafted timetable for action, it defies logic that the EISA 2007 Amendments would grant DOE a trump card to stall the nation's transition to the next generation of highly efficient lamps.[30]

B. All Lamps Within the Scope of the January 19, 2017 Definition Rules Became Subject to the 45 lm/W Backstop Upon DOE's Publication of the Rules.

The lamps that DOE now seeks to exempt became subject to the 45 lm/W backstop and EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), when DOE published its Definition Rules in the Federal Register on January 19, 2017. The new GSL and GSIL definitions were made final on that date. That the new definitions do not go into effect until January 1, 2020 is irrelevant in applying the backstop and anti-backsliding provisions. Under EPCA, it is a final rule's publication date, as opposed to its effective or compliance date, that triggers application of the anti-backsliding provision.[31] In *Abraham*, DOE sought to roll back final, published central air conditioning efficiency standards by delaying the standards' effective date and replacing the standards with less stringent ones. The Second Circuit Court of Appeals set aside DOE's action

[26] *See* 82 Fed. Reg. 7276, 7,278 (Jan. 19, 2017) ("Congress expressed a strong preference for 45 lm/W as an efficacy standard. If the U.S. DOE takes no other action that will be the standard for GSLs").
[27] https://www.energy.gov/sites/prod/files/2017/01/f34/Statement%20on%20Enforcement%20of%20GSL%20Standard%20-%201.18.2017.pdf (last visited May 2, 2019).
[28] *See* 84 Fed. Reg. 3,120, 3,123.
[29] *See* 82 Fed. Reg. 7,276, 7,282.
[30] Congress first adopted national light bulb standards in 2007 as part of the EISA 2007 Amendments. The standards established a two-stage transition to energy-efficient light bulbs. First stage standards, which took effect over a three-year period starting in 2012 and was applicable only to "A-type" (the most common, pear-shaped) incandescent light bulbs, required efficiency savings of 25 – 30% as compared to traditional incandescent bulbs. The 45 lm/W backstop standard represents the second stage standard.
[31] *See Abraham*, 355 F.3d 179, 196.

based on EPCA's anti-backsliding provision. In doing so, the court rejected DOE's argument that a final rule's effective date controls the triggering of the anti-backsliding provision, noting that to hold otherwise would allow DOE to "insulate itself from [the provision's] operation indefinitely by suspending the effective date."[32] In this case, DOE's publication of the Definition Rules triggered EPCA's anti-backsliding provision.

Significantly, the Definition Rules have already had an important impact notwithstanding their January 1, 2020 effective date: they have provided certainty to lighting market stakeholders that the nation's transition to significantly improved lighting efficiency is in full swing. For more than two years, manufacturers, retailers, consumers, and regulators have anticipated the ban on sales of lamps failing to meet the 45 lm/W GSL standard. Thus, contrary to DOE's assertions,[33] lamps within the scope of the Definition Rules are subject to the 45 lm/W standard from which DOE may not backslide. If DOE issues a final rule exempting those lamps from meeting requirements applicable to all GSLs, that action would manifestly reduce the efficiency standard for those lamps in violation of 42 U.S.C. § 6295(o)(1).

DOE contends that its Proposed Action "cannot possibly constitute the amendment of an existing energy conservation standard to permit greater energy use or a lesser amount of energy efficiency," in violation of EPCA's anti-backsliding provision for several reasons,[34] none of which are defensible. First, DOE points out that its proposal considers withdrawing two final rules that DOE stated explicitly were not energy conservation standards. However, DOE's characterization of its actions is not determinative. By amending the definition of GSL to include previously-exempt lamps, the Definition Rules subjected those lamps to the 45 lm/W backstop standard imposed by Congress. For example, in *Hearth, Patio and Barbecue Ass'n v. U.S. DOE*,[35] which involved a challenge to a DOE final rule expanding the definition of "vented hearth heaters" to include decorative fireplaces, the court observed that definitional changes can result in the imposition of otherwise inapplicable numerical standards. Thus, EPCA's anti-backsliding provision is triggered, regardless of whether DOE's action amends a numerical standard or the scope of a standard's applicability. Moreover, DOE itself has consistently maintained this interpretation in rulemakings and administrative action involving other covered products.[36]

Second, DOE argues that a congressional appropriations rider[37] prevented it from making a determination regarding the need for amending standards applicable to GSILs. While DOE's interpretation of the rider may have impeded its evaluation of whether to amend standards pursuant to 42 U.S.C. § 6295(i)(6)(A), the rider itself did not contain any language modifying or delaying the operation of the backstop. Had Congress intended to suspend or repeal the schedule

[32] *Id.* at 199-200.
[33] *See* 84 Fed. Reg. 3,120, 3,123.
[34] *Id.*
[35] 706 F.3d 499, 507-08 (D.C. Cir. 2013).
[36] For example, DOE declined to exempt modified spectrum lamps from linear fluorescent lamp standards due to its interpretation of EPCA's anti-backsliding provision, (74 Fed. Reg. 24,080, 34,099 (July 14, 2009). Similarly, DOE distinguished its authority to exempt certain spa lamps pursuant to 42 U.S.C. § 6291(30)(E) from the constraints posed by the anti-backsliding provision. 76 Fed. Reg. 55,609, 55,611 (Sept. 8, 2011). DOE has also observed that establishing a separate product class subject to a lower efficiency standard for certain electric storage water heaters would be barred by the anti-backsliding provision, 76 Fed. Reg. 12, 969, 12,980 (Feb. 26, 2013).
[37] 2012 Consolidated Appropriations Act, Pub. L. 112-74, 125 Stat. 786, 879.

set forth in 42 U.S.C. § 6295(i)(6)(A), it could have easily done so. There is no basis now to infer that Congress intended such action.[38] The congressional rider is therefore irrelevant to whether the backstop was triggered and DOE's proposed repeal would constitute unauthorized backsliding.

DOE also points to its failure to finalize its March 2016 proposed rule concerning GSL standards as a defense to backsliding claims. This, however, does not mitigate the backsliding effect of increasing the maximum energy use permitted for lamps within the scope of DOE's Proposed Action. Even in the absence of a final rule amending numerical GSIL standards, as measured against the 45 lm/W backstop, DOE's repeal of the Definition Rules would violate EPCA's prohibition against backsliding.

Finally, DOE contends that "the withdrawal of definitions that have not yet taken effect results in the maintenance of the current definitions of the relevant terms. Retaining the status quo cannot constitute backsliding."[39] We note that DOE's July 2017 settlement of the National Electrical Manufacturers Association (NEMA)'s legal challenge to the Definition Rules did not result in the Rules' vacatur, amendment or suspension.[40] Nor did it in any way address or affect the operation of the backstop.[41] Thus, to the contrary, the status quo here is maintained by keeping the definitions in the Definition Rules in place, as they have been finalized, published, and widely relied on in anticipation of their taking effect months from now on January 1, 2020.

C. Congress Sought to Ensure Progress in Lighting Efficiency Despite DOE Delay.

The plain language and history of amendments to EPCA reflect Congress's desire to propel advancements in lighting efficiency notwithstanding DOE's legacy of delayed standard-setting. For example, the EISA 2007 Amendments established efficiency standards for a variety of products and created a framework for gradually increasing the minimum efficiency required of those products. As bi-partisan omnibus energy legislation,[42] the EISA 2007 Amendments incorporated provisions contained in House and Senate energy bills introduced in the 110th Congress (H.R. 3221 and S. 2017) which, among other things, imposed a mandatory backstop requirement for general service lighting and authorized state enforcement of that requirement. Congress intended, and industry understood, that the provisions of the EISA 2007 Amendments which added 42 U.S.C. § 6295(i)(6)(A) could result in the phase-out of inefficient incandescent bulbs. For example, testimony presented by NEMA during a public hearing on S. 2017 acknowledged that the 45 lm/W backstop would automatically become the standard for GSLs in 2020 if DOE missed its statutory rulemaking deadline, effectively eliminating halogen and incandescent products unable to meet that standard.[43] It is notable that the EISA 2007 Amendments' lighting efficiency provisions enjoyed the general support of efficiency advocates and the lighting industry alike. Now, 12 years after the enactment of the EISA 2007

[38] *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 662 (2007) (no presumption of congressional repeal unless legislative intent is clear and manifest).
[39] 84 Fed. Reg. 3,123.
[40] *National Electric Manufacturers Assoc. v. DOE*, 4th Cir. No. 17-1341 (July 7, 2017).
[41] *Id.*
[42] H.R. 6, which would ultimately become the EISA 2007 Amendments, was not accompanied by a conference report (see Rep. Dingell statement, 153 Cong. Rec. H35931, December 18, 2007).
[43] *See* Sen. Hearing Report 110-195 at 37.

Amendments, DOE is inexplicably staking out positions contrary to the amendments' plain language and the intent of Congress in enacting them.

Allowing DOE to repeal the Definition Rules and establish exemptions from the GSL standard would nullify EPCA's backstop and anti-backsliding provisions – two congressionally-established bulwarks against DOE delay and intransigence. As discussed, the EISA 2007 Amendments were adopted in direct response to DOE delay and were designed to spur agency action. Similarly, the anti-backsliding provision was intended to ensure progress toward higher efficiency standards and stability. Against this backdrop, it defies credulity that Congress would have granted DOE unfettered discretion to evade its responsibilities by delaying action, or worse, by exempting products from coverage through definitional changes.[44]

II. DOE Lacks Inherent Authority Under EPCA to Exempt These Lighting Products.

DOE's Proposed Action seeks to exempt certain lamps from efficiency standards applicable to GSLs, but EPCA does not grant DOE authority to create an exemption under these circumstances. In contrast to DOE's broad authority to expand the classes of products subject to EPCA,[45] Congress has not afforded DOE similar latitude to exempt products generally, nor granted DOE specific authority to exempt the lamps at issue here.[46]

EPCA grants DOE limited authority to create exemptions in specific instances. For example, DOE has the power to modify the definition of "commercial pre-rinse spray valve" to exclude certain classes of products,[47] to limit which transformers qualify as "distribution transformers,"[48] to revise the definitions of "small duct," "high velocity systems," "through-the-wall-central air conditions" and "heat pumps,"[49] and to grant exemptions for certain types or classes of electric motors.[50] Had Congress granted DOE sweeping authority to exempt any product, these specific grants of authority would be redundant.[51] Thus, EPCA's specific grants of authority to DOE to exempt certain classes of products demonstrates DOE's lack of general authority to exempt products.

Because EPCA does not confer DOE general authority to exempt products, DOE's proposed exemption can only be justified by a specific grant of authority. However, DOE's

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[44] *See Abraham*, 355 F.3d at p. 197 (due to anti-backsliding provision, DOE lacked "unfettered ... discretion" to delay, and then revise downward, final standards for air conditioners); *see South Coast Air Quality Management Dist. v. E.P.A.*, 472 F.3d 882, 900 (D.C. Cir. 2006) (Clean Air Act's anti-backsliding provision barred EPA from re-defining "controls" to exclude certain requirements which would have effect of worsening air quality).

[45] EPCA, for instance, permits DOE to qualify lamps as GSLs upon determining that they are "used to satisfy lighting applications traditionally served by GSILs. 42 U.S.C. § 6291(30)(BB)(i)(IV).

[46] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[47] 42 U.S.C. § 6291(33)(B)(ii).

[48] *Id.* § 6291(35)(B)(iii).

[49] *Id.* § 6295(d)(4)(A)(iii).

[50] *Id.* § 6313(b)(3).

[51] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

authority to create exemptions in the area of lighting is limited to three very specific sets of circumstances, none of which are present here.

First, EPCA permits DOE to exclude from the term "medium base compact fluorescent lamp" any lamp that is "designed for special applications" and "unlikely to be used in general purpose applications."[52] Second, EPCA allows DOE to exclude from the terms "fluorescent lamp" and "incandescent lamp" any lamp as to which DOE makes "a determination that standards for such lamp would not result in significant energy savings because such lamp is designed for special applications or has special characteristics not available in reasonably substitutable lamp types."[53] By contrast, EPCA provides no such grant of authority to DOE to exempt lamps from the definition of "General Service Lamp." Rather, the exemptions for "General Service Lamp" are specifically enumerated to include "any lighting application or bulb shape described in any of sub clauses (I) through (XXII) of subparagraph (D)(ii)"[54] and "any general service fluorescent lamp or incandescent reflector lamp."[55] The exemptions for "General Service Incandescent Lamp" are similarly enumerated, without any scintilla of language permitting DOE to add to those exemptions. Thus, rather than authorizing DOE to create new GSL and GSIL exemptions, Congress limited DOE's authority to determining whether to maintain or discontinue specifically-enumerated ones.

Third, EPCA authorizes DOE to "decrease the minimum required energy efficiency of any lamp to which standards are applicable under [42 U.S.C. § 6295(i)] if such action is warranted as a result of other Federal action (including restrictions on materials or processes) which would have the effect of either increasing the energy use or decreasing the energy efficiency of such product."[56] The Proposed Action, however, makes no mention of "other federal action" impacting the efficacy of general service lamps.[57] Without a factual basis evidencing some "other federal action," DOE's Proposed Action cannot be justified by this part of EPCA.

The limited and highly-specific provisions in EPCA permitting DOE to create exemptions evidence congressional intent to limit DOE's ability to create such exemptions. This contrasts sharply with the statute's broad grant of authority to DOE to expand covered product classes, and reflect the fact that EPCA and its amendments were largely enacted to continue expanding the classes of covered products, not to curtail them. Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer.[58] Here, DOE's Proposed Action does not fall into any of the three sets of circumstances in which DOE may exempt a lamp from coverage as a GSL or GSIL. Therefore, DOE's Proposed Action is unlawful.

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[52] *Id.* § 6291(30)(S)(ii)(II).
[53] *Id.* § 6291(30)(E).
[54] *Id*. § 6291(30)(BB)(ii)(I).
[55] *Id.* § 6291(30)(BB)(ii)(II).
[56] *Id*. § 6295(i)(7)(B).
[57] *See Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 534 (D.C. Cir. 1982) ("An agency adopting rules by notice and comment rule-making must provide a concise general statement of the rules' basis and purpose.").
[58] *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018); *see also FAG Italia S.P.A. v. U.S.* 291 F.3d 806, 816 (Fed. Cir. 2002) ("The absence of a statutory prohibition cannot be the source of agency authority.").

III. DOE's Proposed Withdrawal of the Definition Rules Is Not Supported by Evidence and Is Arbitrary and Capricious, and Violatesthe Administrative Procedure Act.

Even if EPCA had no anti-backsliding provision, and even if DOE had the authority to create (or re-create) exemptions, DOE's proposal to withdraw the Definition Rules and reverse its previous decisions to revoke exemptions would be arbitrary and capricious, violating bedrock principles of administrative law.

DOE regulates GSLs as "covered products" under 42 U.S.C. §§ 6291-6309, a program covering major household appliances and other consumer products. GSLs are currently defined in EPCA to include: GSILs, compact florescent lamps (CFLs), general service light-emitting diode (LED) lamps and organic light emitting diode (OLED) lamps, and – importantly – any other lamps that the Secretary of Energy determines "are used to satisfy lighting applications traditionally served by GSILs."[59] The only lamps initially exempted from EPCA's definition of GSL were general service fluorescent lamps, incandescent reflector lamps, and the list of lamps exempted from the definition of GSIL pursuant to 42 U.S.C. § 6291(30)(D)(ii[60]) (which were thought of as "specialty lamps").

In 2007, Congress instructed the Secretary to initiate a rulemaking "not later than January 1, 2014 … to determine whether … the exemptions for certain incandescent lamps should be maintained or discontinued based, in part, on exempted lamp sales collected by the Secretary from manufacturers." 42 U.S.C. § 6295(i)(6)(A).

In the 2017 rulemaking, DOE employed a methodical process. Before removing an exemption, it first determined whether the previously exempted lamp was "used to satisfy lighting applications traditionally served by GSILs."[61] That determination involved two steps: deciding the meaning of the phrase "used to satisfy lighting applications traditionally served by GSILs" and evaluating the usage of each lamp type. DOE looked at evidence regarding the existing and potential uses of those lamps, and also at lamp sales data. If DOE determined that a lamp (*e.g,* a lamp previously exempted as a "specialty lamp") was "used to satisfy lighting applications traditionally served by general service incandescent lamps," it was by definition a GSL.

DOE's authority under 42 U.S.C § 6291(30)(BB)(IV) to define a lamp as a GSL by determining that the lamp is "used to satisfy lighting applications traditionally served by general service incandescent lamps" is independent from DOE's authority – and obligation – to remove exemptions. In the 2017 rulemaking, DOE decided that an exemption should be revoked if a lamp "can provide general illumination and can functionally be a ready substitute for lamps already covered as GSLs." In making those evaluations, it looked to evidence on the existing and potential uses of those lamps, and at lamp sales data, as instructed in § 6295(i)(6)(A). Based on this analysis, on January 19, 2017, DOE exercised its authority under 42 U.S.C. § 6295(i)(6)(A)

[59] 42 U.S.C. § 6291(30)(BB); 84 Fed. Reg. 3,121.
[60] 42 U.S.C. § 6291(30)(BB)(ii).
[61] DOE stated that, "[w]hile 42 U.S.C. § 6295(A)(i)(II) does not expressly direct DOE to consider whether an exempted lamp is used to satisfy lighting applications traditionally served by GSLs, DOE has determined this consideration to be instructive in the overall assessment regarding the exemptions." 82 Fed. Reg. 7,290.

to issue two final rules discontinuing a number of these statutorily-created definitional exemptions.

By contrast, in its 2019 NOPR to repeal the 2017 Definition Rules, DOE appears to have abandoned any effort to employ a coherent process. Though DOE nowhere disputes its own previous interpretation of "used to satisfy lighting applications traditionally served by GSILs," it introduces new and different criteria that it now argues Congress intended it to use in evaluating whether to remove exemptions. DOE fails to provide an adequate reason for departing from its previous interpretation of congressional intent. Moreover, it completely ignores the solid evidence it relied upon in the 2017 rulemaking regarding lamp usage.

A. DOE's 2017 Interpretation of the Phrase "Used for Lighting Applications Traditionally Served By General Service Incandescent Lamps" Harmonized with Congressional Intent.

In the 2017 rulemaking, DOE concluded that a lamp "is used for lighting applications traditionally served by general service incandescent lamps" – and therefore should be included in the definition of GSL if it serves "general lighting applications." DOE stated that by "general lighting applications," DOE means lighting that provides an exterior or interior area with overall illumination."[62]

DOE's 2017 interpretation makes perfect sense because the definition of "general service incandescent lamps" states that they are lamps "intended for general service applications."[63] Although the statute does not define "general service application," it does define "general lighting application" as "lighting that provides an interior or exterior area with overall illumination."[64] Nothing in EPCA suggests the phrase "general service application" has some narrow, technical meaning that is different from "general lighting application." It seems self-evident that the function GSILs have "traditionally" performed is to provide "overall illumination." Thus, DOE's 2017 conclusion was firmly based on both the statutory language and common sense.

One lighting company, Maxim Lighting, provides a good commonsense explanation of the meaning of "general lighting" and "overall illumination":

> General Lighting provides an area with overall illumination. Also known as ambient lighting, general lighting radiates a comfortable level of brightness, enabling one to see and walk about safely. It can be accomplished with chandeliers, ceiling or wall-mounted fixtures, recessed or track lights, and with lanterns outside your home. A basic form of lighting that replaces sunlight, general lighting is fundamental to a lighting plan.[65]

DOE notably does not address its 2017 logic in the Proposed Action. The agency offers no alternative explanation of what "used for lighting applications …" means or what "general service application" means. DOE does not even try to explain what GSILs have "traditionally" done, other than provide overall illumination. If DOE now has a different interpretation in mind,

[62] 82 Fed. Reg. 7,302.
[63] 42 U.S.C. § 6291(30)(D)(i)(I).
[64] 42 U.S.C. § 6291(61).
[65] http://www.maximlighting.com//basic-types-lightings (last visited May 2, 2019).

the Proposed Action is unclear on what standard DOE is applying.[66] Because DOE does not now directly challenge or provide an alternative to the meaning DOE assigned to the phrase "used for lighting applications traditionally served by general service incandescent lamps," DOE's 2017 interpretation remains controlling.

B. DOE's 2017 Interpretation of Its Direction from Congress to Reconsider Exemptions Made Sense.

In its Definition Rule discontinuing seven of the twenty-two exemptions enumerated at 42 U.S.C. § 6291(30)(D)(ii), DOE stated it believed Congress directed it to apply the following standard when reevaluating exemptions:

> DOE believes that the purpose of the decision that [42 U.S.C. § 6295(i)(6)(A)(i)(II)] calls for is to ensure that a given exemption will not impair the effectiveness of GSL standards by leaving available a convenient substitute that is not regulated as a GSL …[67]

Therefore, consistent with that statutory purpose, DOE "based its decision on each exemption on an assessment of whether the exemption encompasses lamps that can provide general illumination and can functionally be a ready substitute for lamps already covered as GSLs." 82 Fed. Reg. 7,288.[68] DOE noted that EPCA's statutory purpose is to "achiev[e] energy conservation by imposing efficiency standards for general lighting[.]"[69] DOE recognized that if "ready substitute" alternative lamps existed, it would undermine Congress's intent in enacting EISA.

DOE's 2017 interpretation of congressional intent was eminently reasonable. Congress clearly set forth its desire to improve the pace of improvements to lighting efficiency by adopting 42 U.S.C. § 6295(i)(6)(A), which prescribed a timetable for DOE action. Congress wanted to ensure that lamps used in general service would be subject to stricter standards, thus reducing energy consumption.

In contrast, the Proposed Action would reinstate exemptions for certain lamps which would leave them subject to outdated efficiency standards significantly less stringent than the 45 lm/W backstop. For some lamps, the Proposed Action means no minimum efficiency standard would apply. DOE's Proposed Action would therefore thwart congressional intent to promote improved efficiency.

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[66] *See United Food & Commercial Workers Intern. Union, AFL- CIO, Local 150-A v. NLRB*, 880 F.2d 1422, 1436 (D.C. Cir. 1989) (explaining that agencies "must accept responsibility for clarifying and identifying the standards that are guiding its decisions … [a]s it is now, we are at a loss to know what kind of standard [the agency] is applying or how it is applying that standard to this record").

[67] 82 Fed. Reg. 7,288.

[68] DOE sometimes used the phrase "would provide a convenient unregulated alternative" as the equivalent of "can functionally be a ready substitute." *See, e.g.*, 82 Fed. Reg. 7288, 7297. It also referred to the potential for "lamp switching" in its analysis of whether a lamp could be a "ready substitute." *See., e.g.*, 82 Fed. Reg. 7293, 7295, 7297.

[69] 82 Fed. Reg. 7,234.

C. In 2017, DOE Addressed Each Exemption by Showing the That the Specific Lamp Type Was and Is Used for Lighting Applications Traditionally Served by General Service Incandescent Lamps and That Removing the Exemption Was Necessary to Implement Congressional Intent.

In 2017, for each of the lamp types at issue, DOE examined whether the lamp type served "general lighting applications" – *i.e..,* provided "overall illumination" – and whether it served, or could serve, as a "ready substitute" for, or "convenient unregulated alternative" to, a regulated GSL. DOE evaluated three categories of lamps, including (i) a group of 3-way, vibration service, rough service, and shatter-resistant lamps; (ii) a group of T, B, BA, CA, F, G16-1/2, G25, G30, S, and M-14 lamp types; and (iii) reflector lamps and incandescent reflector lamps.

i. 3-Way Lamps, Vibration Service Lamps, Rough Service Lamps, and Shatter-Resistant Lamps.

In 2017, DOE amassed a plethora of evidence showing that each lamp type is used for general lighting applications, and that based on their current sales and usage, the way they are marketed, and their physical characteristics, they would (if the exemptions were retained) functionally be a ready substitute for lamps already covered as GSLs, thus undermining congressional intent.

DOE determined that rough service lamps account for nearly 11 million annual sales[70] and are used for "lighting applications traditionally served by general service incandescent lamps."[71] DOE determined that vibration service lamps had an estimated 7 million in annual unit sales.[72] DOE observed that for both "rough service and vibration service lamps … sales have already increased as a result of standards for GSILs."[73] In 2017, DOE stated that "the sales of rough service and vibration service lamps have already showed that consumers view these lamps as convenient unregulated substitutes for GSILs."[74] Further, DOE observed that "for all three lamp types [vibration, rough and shatter-resistant] the consumer may be under the impression that they are purchasing primarily a more durable product . . . ."[75]

DOE's findings were firmly based on the evidence before it.[76] In 2014, the Natural Resources Defense Council (NRDC) and its partners provided evidence that exempted lamp

[70] 82 Fed. Reg. 7,291

[71] As Natural Resources Defense Council (NRDC), the Appliance Standard Awareness Project (ASAP), and others referenced in their Feb. 7, 2014 Joint comment response to the published Framework document, at least one company, Newcandescents, is dedicated to selling rough service lamps to consumers as a way to keep using incandescents for general lighting. EERE-2013-BT-STD-0051-0017 at 4-5. Larry Birnbaum, the founder of Newcandescents, described his strategy in a Fox News story: "When the government decided to ban incandescent lightbulbs, they left a loophole in the law. An opening," Birnbaum told FoxNews.com. "Well that was rough service [bulbs]." https://www.foxnews.com/tech/the-man-who-saved-the-lightbulb (last visited May 2, 2019).

[72] 82 Fed. Reg. 7,291.

[73] 82 Fed. Reg. 7,297.

[74] *Id.*

[75] *Id.*

[76] We note that a recent Notice of Data Availability, Federal Register, 84 Fed. Reg. 17362 (April 25, 2019) refers to tables indicating that sales of these four lamp types may have declined since 2017. But the sales of each still range from hundreds of thousands to millions of units. Moreover, as DOE said in 2017, it can "be appropriate to discontinue an exemption even when sales of those lamps are decreasing." 82 Fed. Reg. 7289. DOE can consider the

types, including vibration service and rough service lamps, are specifically marketed for general service use.[77] In 2016, the Appliance Standard Awareness Project (ASAP) and other efficiency advocates provided evidence that 3-way lamps, shatter-resistant lamps, rough and vibration service lamps were all being used as general service lamps and posed a loophole risk. They also confirmed that the terms "vibration service" and "rough service" were being used interchangeably.[78] And the Sylvania / Osram 2008 Lamp and Ballast Catalog listed "vibration resistant" and "rough service" lamps as "general purpose lamps."[79]

DOE found that "shatter-resistant lamps are capable of providing overall illumination . . . [and] are similar to rough service and vibration service lamps."[80] 82 Fed. Reg. 7,297. The evidence supported DOE's conclusion that these lamps are a "ready substitute" for regulated GSLs. Shatter-resistant lamps, with an estimated 689,000 in annual unit sales as of 2015,[81] are marketed to a general audience by entities such as www.1000bulbs.com, which tells consumers that even though incandescents are being phased out, especially in California, "even if you live in California, you can continue to get the incandescent bulbs you love right here at

"potential of lamp switching that may occur in response to any GSL standard … As noted by commenters, prior to the effective date of any new standard the sales trends of exempted lamps do not necessarily capture the potential for lamp switching … DOE is permitted to account for future changes in consumer behavior so as to avoid the creation of loopholes." 82 Fed. Reg. 8290. The lamp market after January 2020 will be different from the market before January 2020.

[77] "[E]xempted lamp types are already being used to meet general service lighting needs. In some cases, these products are specifically designed, priced, and marketed as replacements for conventional incandescent lamps. Some sellers have attempted to take advantage of the exemptions to build market share at the expense of more efficient alternatives. For example, NRDC purchased a 12-pack of vibration service lamps for $3. These lamps … look exactly like the conventional incandescent light bulb and cost only 25 cents each … the product demonstrates that vibration service products may be offered at prices significantly below the least costly compliant lamps (i.e., around $1.50 per lamp currently in multi-packs). Some sellers are also marketing rough service lamps for general service use. For example, a lighting store owner in New Jersey has a website selling rough service lamps as 'legal' incandescent lamps." Joint comment response to the public Framework document, EERE-2013-BT-STD-0051-0017 at 4-5.

[78] "The four lamp types … are loophole risks because they are capable of supplying general lighting applications, are available in shapes and lumen output packages that allow them to replace common GSILs, and are relatively inexpensive. Data released by DOE on April 7, 2016 show that shipments of vibration service lamps declined for years, in line with DOE's modeled shipment projections, and then experienced a sudden, steep rise over the last two years. This is a strong indicator that vibration service lamps are being marketed to exploit the loophole their exemption creates in current GSIL standards. An internet search shows vibration service A19 incandescent bulbs from 40 to 100 watts and from multiple manufacturers selling for as little as $0.40 apiece. The terms "vibration service" and "rough service" are also being used interchangeably and loophole exploitation in one may indicate loophole potential in the other." ASAP, NRDC *et al*., Joint comment response to the public Notice of proposed rulemaking, May 16, 2016, EERE-2013-BT-STD-0051-0064 at 6-7.

[79] EERE-2013-BT-STD-0051-0118 at 12, 13, 19.

[80] DOE found that "if a lamp is capable of being used in general lighting applications … that lamp is actually being used to some extent in applications traditionally served by GSILs." 82 Fed. Reg. 7302. This is an extremely reasonable finding: if hundreds of thousands of units of a lamp type are being sold, and they *can* be used in general lighting applications, one can assume they *are* being so used.

[81] 82 Fed. Reg. 7,291 (Table III).

1000Bulbs.com."[82] The retailer lists shatter-resistant lamps as one of the options consumers – including homeowners – can use to "continue to get the incandescent bulbs you love."[83]

Similarly, as the 2017 record showed, Sylvania markets shatter-resistant lamps as "suitable for everyday applications from the basement to the attic."[84] Although shatter-resistant lamps had "*only"* an estimated 689,000 in unit sales as of 2015,[85] given this type of marketing, it is self-evident that at least some of those 689,000 are being used for "lighting applications traditionally served by general service incandescent lamps." If the exemption is maintained, these lamps will continue to be sold as a "ready substitute for," or "convenient alternative" to, regulated GSLs, undermining Congress's intent to ensure that lamps used for "general service" purposes will meet strong new efficiency standards.

There is no doubt that 3-way incandescents – with over *32 million* in annual unit sales as of 2015[86] – are used for "lighting applications traditionally served by general service incandescent lamps."[87] As NRDC *et al*. pointed out in their February 2014 comments, 3-way lamps are a "common, widely-available product used to provide general service illumination in many homes and some commercial settings." And they also pointed out that the use of 3-ways as a ready substitute for regulated GSLs could easily expand:

> A 3-way lamp placed in a non 3-way socket operates on its middle setting. Thus, a manufacturer or seller seeking to circumvent the existing standards could market 30/70/100W inefficient 3-way incandescent lamps as a low cost replacement for the old 60W lamp and the 50/100/150W 3-way lamp as a replacement for the old 100W lamp. Currently, 3-way lamps can cost as little as $1.50 each at retail. The price of these lamps could come down significantly if any manufacturer or seller decides to ramp up volume in order to attempt to gain market share at the expense of compliant, efficient alternatives.[88]

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[82] *See* 1000 Bulbs, "Light Bulbs," https://www.1000bulbs.com/category/light-bulbs/ (last visited May 1, 2019).
[83] "Shatter-resistant light bulbs shouldn't be hard to find. The good news is that with 1000Bulbs.com, they aren't! Coated with special material to reduce the risk of damage from broken glass, these bulbs work great in a variety of applications, including boutiques, restaurants, hotels and homes." https://www.1000bulbs.com/category/shatter-resistant/ (last visited May 2, 2019).
[84] EERE-2013-BT-STD-0051-0159 ("Sylvania shatter-resistant suitable for everyday applications").
[85] We note that a recent Notice of Data Availability, *Federal Register*, 84 Fed. Reg. 17,362 (April 25, 2019), refers to tables indicating that sales of these four lamp types may have declined since 2017. But the sales of each still range from hundreds of thousands to millions. Moreover, as DOE said in 2017, it can "be appropriate to discontinue an exemption even when sales of those lamps are decreasing." 82 Fed. Reg. 7,289. DOE can consider the "potential of lamp switching that may occur in response to any GSL standard … As noted by commenters, prior to the effective date of any new standard the sales trends of exempted lamps do not necessarily capture the potential for lamp switching … DOE is permitted to account for future changes in consumer behavior so as to avoid the creation of loopholes." 82 Fed. Reg. 8,290. The lamp market after January, 2020 will be different from the market before January, 2020.
[86] 82 Fed. Reg. 7,291.
[87] DOE found in the March 2016 NOPR that "3-way lamps are able to provide overall illumination and therefore can be used in general lighting applications." 81 Fed. Reg. 14,548. As noted above, DOE also said that "if a lamp is capable of being used in general lighting applications … that lamp is actually being used to some extent in applications traditionally served by GSILs." 82 Fed. Reg. 7,302. For 3-way lamps, however, there was plenty of evidence that they *are* being so used – no assumptions necessary.
[88] Joint comment response to the public Framework document, EERE-2013-BT-STD-0051-0017 at 5.

California utilities, in February 2014, offered additional evidence that all four lamp types were likely being used for general lighting applications.[89] And the 2017 record includes the Osram 2014-15 Lamp and Ballast catalog, which describes 3-way lamps as "General Purpose Incandescent Lamps."[90] GE also describes 3-way bulbs as "general purpose."[91]

The evidence shows that all of these lamp types are currently "used for lighting applications traditionally served by general service incandescent lamps," and that continuing the exemptions would undermine congressional intent by allowing these lamps to continue to be sold as ready substitutes for regulated GSLs.

ii. The T, B, BA, CA, F, G16-1/2, G25, G30, S, and M-14 Lamp Types.

DOE's 2017 Definition Rules concluded that a category of shaped lamp types – T, B, BA, CA, F, G16-1/2, G25, G30, S, M-14 lamps of 40W or less[92] – are "frequently used in general lighting applications and … there is a significant risk for lamp switching," and therefore withdrew the exemption for such lamps."[93] The rulemaking record reveals that total annual unit sales for these lamp types exceeded 80 million units.[94] A quick Internet search reveals, for example, that G-shape lamps are used for bathroom lighting, T-shape lamps are used in kitchen lighting, and B- and C-shape lamps are used in chandeliers.[95]

DOE noted that "[h]igh annual sales indicate that the product is likely used in general lighting applications, because the sales of lamps for specialty applications tend to be relatively small compared to sales of general-purpose lighting."[96] For example, regarding T-shaped lamps specifically, DOE stated that "the T shape lamp category has one of the highest annual sales [an estimated 9,750,395 annual sales] of the 22 exempted lamp categories, thus suggesting that these lamps are likely used in general lighting applications."[97]

DOE cited NRDC's comment that the "B, BA, CA shape lamps ... are very common and could fit in many applications including table or desk lamps."[98] The record included evidence

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[89] California Investor-Owned Utilities, Joint comment response to the public Framework document, EERE-2013-BT-STD-0051-0018 at 6-7.
[90] EERE-2013-BTD-STD-0051-0113 at 41.
[91] EERE-2013-BT-STD-0051-0136 ("GE 3-way as general purpose").
[92] T-shape lamps actually had their own separate exemption, but DOE analyzed them along with the other "alphabet" lamp types.
[93] 82 Fed. Reg. 7,293. It is worth noting that DOE's 2017 concern for "lamp switching" was not limited to the idea that one kind of lamp might replace another in the same fixture. DOE observed that "the function traditionally provided by GSILs can … be provided by more than one type of fixture. In order to minimize the potential for loopholes, DOE has considered the potential for a consumer to change the type of lamp used in an existing fixture, and the potential change in the type of fixture used to provide the same function as traditionally provided by a fixture using a GSIL." 82 Fed. Reg. 7,290.
[94] 82 Fed. Reg. 7,291.
[95] *See* https://www.ledwatcher.com/light-bulb-shapes-sizes-and-base-types-explained/ (for B- and C-shape lamps), https://www.ledwatcher.com/light-bulb-shapes-sizes-and-base-types-explained/ (for T-shape lamps), and https://www.superbrightleds.com/blog/home-lighting-101-guide-understanding-light-bulb-shapes-sizes-codes/2315/ (for G-shape lamps) (all last visited May 2, 2019).
[96] 82 Fed. Reg. 7,288.
[97] 82 Fed. Reg. 7,294.
[98] 82 Fed. Reg. 7,295. There is no question that "table lamps" are among the "lighting applications traditionally served by general service incandescent lamps." As the retailer 1000bulbs.com states on its web site, "The most

that companies like Phillips Lighting market the various G lamp types as being "[f]or general or ambient lighting."[99] Thus, the evidence in the record before DOE in 2017 supported the conclusion that these lamps were, and are being used for "lighting applications traditionally served by general service incandescent lamps," and can "functionally be a ready substitute for lamps already covered as GSLs" – and the evidence continues to support that conclusion today.

iii. Reflector Lamps and Incandescent Reflector Lamps.

Reflector lamps make up a substantial part of the lamp market in the United States. In 2017, DOE concluded that there were actually two separate exemptions for reflector lamps: one for the "reflector lamps" referred to in 42 U.S.C. § 6291(30(D)(ii)(XI), and one for "incandescent reflector lamps" created by § 6291(30)(BB)(ii)(II). Accordingly, DOE provided separate sales estimates for each type. In the broader rulemaking that included "non-incandescent reflector lamp" reflector lamps, DOE estimated annual sales at 30 million.[100] In its rulemaking specific to incandescent reflector lamps, DOE estimated that incandescent reflector lamp sales "are approximately 270 million per year."[101]

DOE found that both types of reflector lamps are "used to satisfy lighting applications traditionally served by general service incandescent lamps." With respect to incandescent reflector lamps, DOE found that "[t]oday, incandescent reflector lamps are widely used for general illumination, just as GSILs are."[102] It stated that "[l]ighting in homes that traditionally was provided by A shape lamps in floor and table fixtures is being provided in newer construction through reflector lamps in recessed lighting."[103] And, it noted that "incandescent reflector lamps have higher annual sales than any of the twenty-two exempt lamp types, thus indicating that these lamps are likely used in general lighting applications."[104] With respect to "non-IRL" reflector lamps, DOE observed that annual unit sales of medium screw base lamps that are incandescent and do not meet the definition of IRL is the third highest of all sales of the 22 exempt lamp types, thus reflecting their likely use in general lighting applications.[105]

DOE also found that continuing the exemptions for reflector lamps would undermine congressional intent by allowing for the continued proliferation of a ready substitute for, or convenient unregulated alternative to, regulated GSLs. With respect to IRLs, DOE stated that:

> incandescent reflector lamps have higher annual sales than any of the 22 exempt lamp types, thus indicating that these lamps are likely used in general lighting applications. In addition, because IRLs are capable of providing overall illumination and could be used as

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familiar incandescent is the A-shape (A19) with a medium screw-in base that is common in general household lighting such as table lamps." https://www.1000bulbs.com/category/light-bulbs/ (last visited May 2, 2019).

[99] Philips specifically named some of the "G" lamp types at issue here: "Available in: G16.5 medium white: 25 and 40 watt;G30: 60 and 100 watt;G16.5 medium clear and G40 clear: 40 and 60 watt;G25 half-chrome:40 watt; G40 white: 40,60,100,150 watt; G25 clear and G16.5 white and clear cand.: 25,40,60 watt; G25 white:25,40,60,100 watt." EERE-2013-BT-STD-0051-0115 ("Philips 2018 Duramax Globe – G shapes as general or ambient lighting").

[100] 82 Fed. Reg. 7,292.

[101] 82 Fed. Reg. 7,381.

[102] 82 Fed. Reg. 7,325.

[103] 82 Fed. Reg. 7,329.

[104] 82 Fed. Reg. 7,329.

[105] 82 Fed. Reg. 7,293.

replacements for GSILs, there is also high potential for lamp switching. For these reasons, DOE is discontinuing the exemption from the GSL definition of IRLs.[106]

With respect to "non-IRL" reflector lamps, DOE stated "medium screw base reflector lamps are capable of providing overall illumination and could be used as a substitute for GSILs. Therefore, DOE found there was also high potential for lamp switching and subsequently creating a loophole."[107] Public comments revealed the growing use of reflector lamps for general illumination due to trends in new construction and lighting fashion.[108]

Evidence in the rulemaking records showed that both types of reflector lamps are already being used for general lighting applications, and continuing the exemption would undermine congressional intent by allowing the continued proliferation of a convenient unregulated substitute for regulated GSLs. The fact that reflector lamps are increasingly used in new construction means that "lamp-switching" is already occurring on a large scale: an entire sector is gradually adopting reflector lamps as a major source of general lighting. If that trend continues, and reflector lamps are left unregulated, Congress's intent to save energy by requiring greater efficiency in general service lamps will be thwarted.

D. DOE's Proposal to Restore These Exemptions Is Arbitrary and Capricious and Not In Accordance with Law.

DOE's Proposed Action relies on arguments DOE itself specifically addressed and rejected during the Definition Rules' rulemaking process. DOE now fails to address why its previously-stated rationale, including its specific factual findings, is no longer valid. DOE's proposal is therefore arbitrary and capricious and in violation of law. *See, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) (EPA action delaying effective date of chemical disaster rule was arbitrary and capricious because the agency failed to explain why its previously-stated rationale in support of rule implementation was no longer valid); *California v. United States DOI*, 2019 U.S. Dist. LEXIS 66300 (Department of Interior's repeal of regulations governing the payment of royalties on oil, gas and coal extracted from leased federal and tribal lands ("Valuation Rule") was arbitrary and capricious where the agency failed to explain the inconsistencies between its prior findings in enacting the Valuation Rule and its decision to repeal the rule).

i. DOE's Rationale for the Proposed Action for the 3-way, Vibration Service, Rough Service and Shatter-Resistant Lamps is Legally Invalid.

Abandoning its 2017 approach, DOE bases the Proposed Action on the premise that certain lamps are subject to a separate regulatory process, triggered by unit sales, under 42

[106] 82 Fed. Reg. 7,329.
[107] 82 Fed. Reg. 7,292.
[108] At DOE's October 21, 2016, public meeting pursuant to its Notice of Proposed Definition and Data Availability for General Service Lamps, Andrew DeLaski of ASAP explained how reflector lamps are actually used, and why they meet the statutory definition of general service lamp:

> So the traditional lighting in a home were A lamps, and the same home today is being lit up by reflector lamps. My office on the third floor of my house, I've got six reflector lamps on the ceiling, and that's how it's lit up … So the traditional lighting of a home that was reflective was an A lamp, is now being lit up by a reflector lamp.

Public Meeting Transcript, EERE-2013-BT-0051-0083 at 58.

U.S.C. § 6295(l)(4).[109] DOE contends that including such lamps within the definition of GSILs and GSLs "would subject these lamp types to potentially two separate standards … [T]o avoid any such double regulation, DOE proposes to withdraw the revised definitions of GSL and GSIL, and maintain the exclusion . . . ."[110] However, the existence of section 6295(l)(4) does not preclude regulation of these lamps as GSLs. Indeed, in 2017 DOE rejected the argument that section 6295(1)(4) would preclude regulation of these lamp types as GSLs, clarifying that the 42 U.S.C.§ 6295(l) process

> is not the only way in which DOE can regulate these lamps. The text of section 6295(i) and 6295(l) does not state that the section 6295(l) process operates to the exclusion of regulating these lamps as GSLs … [the 6295(l)] requirement is not inconsistent with the regulatory framework applicable to GSLs, and Congress' decision to set a separate backstop for those lamps … does not suggest that Congress meant to exclude them from the broader regulatory program.[111]

Courts have recognized that separate statutory provisions can cover the same subject or the same products. In *J.E.M. Ag Supply, Inc, v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001), the petitioners argued that the respondent's "utility patents" for its plant products, issued under 35 U.S.C § 101, were invalid on the grounds that two other, plant-specific laws – the Plant Patent Act of 1930 and the Plant Variety Protection Act – "provide the exclusive means of protecting new varieties of plants."[112] The court observed that no statute states "that plant patents are the exclusive means of granting intellectual property protection to plants,"[113] and that "this Court has not hesitated to give effect to two statutes that overlap . . . ."[114] Similarly, in *Friends of the Earth v. EPA*, 446 F.3d 140, 144-5 (D.C. Cir. 2006), the D.C. Circuit held that "[t]he existence of two conditions does not authorize EPA to ignore one of them."[115]

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[109] 42 U.S.C. § 6295(l)(4) requires DOE to consider efficiency standards for 5 categories of specialty lamps vibration service lamps, rough service lamps, 3-way incandescent lamps, shatter-resistant incandescent, and higher lumen (2,601–3,300 lm) incandescent lamps) if their respective lamp sales exceeded their predicted growth rate. Under this provision, DOE is required to track the sales data of these lamps annually, and initiate an accelerated rulemaking to establish standards if the annual unit sales of any of the lamp types exceed the benchmark estimate of unit sales by at least 100 percent. 42 U.S.C. § 6295(l)(4)(D)–(H). If DOE does not complete the accelerated rulemakings within one year from the end of the previous calendar year during which predicted sales were exceeded, there is a "backstop requirement" for each lamp type, which would establish, by statute, efficiency levels and related requirements. *Id.* On December 26, 2017, DOE published a final rule codifying the statutory backstop requirements for rough service lamps and vibration service lamps prescribed in 42 U.S.C. § 6295(l)(4)(D)(ii) and (E)(ii). In 2015, sales of rough and vibration service lamps exceeded statutory sales thresholds. Because DOE did not complete a rulemaking in the required time period, on December 26, 2017, DOE published a final rule codifying the statutory backstop requirements for those lamp types as prescribed in 42 U.S.C. §6295(l)(4)(D)(ii) and (E)(ii). 82 Fed. Reg. 60,845.

[110] 84 Fed. Reg. 3,124.

[111] 82 Fed. Reg. 7,296.

[112] 534 U.S. 124, 132.

[113] *Id*. at 132.

[114] *Id.* at 144.

[115] *See also Morton v. Mancari,* 417 U.S. 535, 550-551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Finally, here it is abundantly clear that section 6295(l) is not exclusive because *Congress specifically deleted previous statutory language suggesting that it was.* As Earthjustice and the Northwest Energy Efficiency Alliance explained in comments in 2014:

> Congress recently clarified that an exempted lamp's failure to exceed the sales threshold for regulation under section 325(l) does not dictate the coverage status of that lamp. In the American Energy Manufacturing Technical Corrections Act, Congress deleted the word "only" from the section 325(l) provision that had previously required that DOE "shall prescribe an energy efficiency standard for rough service lamps, vibration service lamps, 3-way incandescent lamps, 2,601-3,300 lumen general service incandescent lamps, and shatter-resistant lamps only in accordance with this paragraph." 42 U.S.C. § 6295(l)(4)(A) (emphasis added); *see also* AEMTCA § 10(a)(8), Pub. L. 112-210, 126 Stat. 1514, 1524 (2012). The amended text now recognizes that other provisions of EPCA – including section 325(i) – provide authority for DOE to regulate these lamps.[116]

Where, as here, an agency proposes to reverse its former position, the agency must display "awareness that it is changing position."[117] It must also give "good reasons" for the change and demonstrate that that the "new policy is permissible under the statute."[118] DOE has done none of the above. The Supreme Court has held that "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[119] Additionally, the Proposed Action is "arbitrary and capricious" in violation of the APA because DOE has relied on the existence of section 6295(l), which is a factor Congress "has not intended it to consider."[120]

DOE does not explain its change in legal approach or give a reason for abandoning its 2017 determinations that these four lamp types are "used for lighting applications traditionally served by general service incandescent lamps," and that continuing the exemption would allow them to compete with regulated GSLs as "convenient unregulated alternatives." Moreover, in entirely disregarding the factual record basis for the 2017 removal of these exemptions, DOE has failed to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[121] DOE has "simply disregard[ed] contrary or inconvenient factual determinations that it made in the past."[122] Accordingly, any action to exempt these lamps is arbitrary and capricious under the APA.

ii. DOE's Rationale for the Proposed Action for High Lumen Lamps is Similarly Invalid.

DOE's 2017 decision to include lamps between 2,601 and 3,300 lumens, which were never subject to a statutory exemption, within the GSL definition was based solely on its

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[116] Joint comment response to the public Framework document, EERE–2013–BT–STD–0051-0012 at 5 (Feb. 7, 2014).
[117] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[118] *Id.*
[119] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).
[120] *Massachusetts v. EPA*, 549 U.S. 497 533-34 (2007).
[121] *FCC v. Fox*, at 515-16; *id.* at 537 (Kennedy, J., concurring).
[122] *Air All. Houston v. E.P.A.*, 906 F.3d 1049, 1067 (D.C. Cir. 2018).

authority to include a lamp as a GSL if it is "used to satisfy lighting applications traditionally served by GSILs."[123] DOE's decision was based on evidence in the record that such lamps are, in fact, used in that way.[124] DOE noted that broadening the scope of the definition of GSL to include high-lumen lamps

> would ensure lamps currently exceeding 150 W are also covered and would remove any incentive for manufacturers to introduce slightly brighter bulbs as a means to avoid compliance with standards. Conventional 150 W incandescent lamps produce around 2,500–2,700 lumens, and [commenters] had noticed an increased amount of 150 W and 200 W incandescent lamps available in stores.[125]

In fact, comments submitted by California investor-owned utilities in 2014 indicated that "[a]lready several lamp types, including vibration service, rough service, high-lumen, and 3-way lamps, have emerged as loophole concerns in that they are competing for shelf space alongside standards-compliant halogen bulbs and their prices are coming down."[126]

DOE has made no attempt, as part of its proposed repeal, to refute its previous finding that lamps between 2,601 and 3,300 lumens are "used to satisfy lighting applications traditionally served by GSILs Instead, as with the four lamp categories described above, DOE relies solely on the argument that 6295(i)(6)(A)(i) is the exclusive means for regulation of such lamps. As discussed above, that argument is baseless and has already been rejected by DOE itself.

iii. DOE Does Not Adequately Refute its Earlier Finding that Specifically Shaped Lamp Types Are Properly Considered GSLs.

As to the T, B, BA, CA, F, G16-1/2, G25, G30, S, and M-14 lamps of 40W or less lamp types, DOE does not challenge its 2017 conclusion that these lamps are "used for lighting applications traditionally served by general service incandescent lamps" and that continuing their exemption would allow the continued sale of convenient unregulated alternatives to regulated GSLs. Instead, it claims that in 2017 it failed to use "unit sales" to determine "whether a consumer will actually or even likely switch from a more efficient general service lamp to a less efficient lamp and thereby undermine energy efficiency."[127] DOE states that it therefore erroneously "relied on factors that Congress did not intend it to consider, rather than actual unit sales," which violated the APA. [128] This is the only attempt DOE makes to re-determine what

[123] 42 U.S.C. § 6291(30)(BB).
[124] 82 Fed. Reg. 7,304-5.
[125] 81 Fed. Reg. 14,542.
[126] California Investor Owned Utilities, Joint comment response to the published Framework document, EERE-2013-BT-STD-0051-0018 at 6.
[127] 84 Fed. Reg. 3,125.
[128] 84 Fed. Reg. 3,125. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In the context of its discussion of these lamp types, DOE also states that "it is unlikely Congress intended that DOE have broad discretion to regulate an incandescent lamp out of existence based on an assumption that manufacturers could make and sell an LED version of the lamp." 84 Fed. Reg. 3,125. First, DOE in 2017 did not base its decisions primarily on such an "assumption;" it based its decision on actual statutory provisions. *See* 82 Fed. Reg. 7,290 ("DOE did consider the existence or absence of LED replacements, though not as the only reason to discontinue or maintain a GSIL exemption.") Second, Congress clearly did intend to drive the market toward LEDs. For example, in hearing testimony for S. 2017, which contained lighting efficiency provisions generally mirroring

criteria Congress intended it to use in reevaluating exemptions.[129] It is legally unsound for several reasons.

First, EPCA does not require DOE to undertake a "dynamic sales analysis" of "actual unit sales" in conducting a reevaluation of exemptions. Section 6295(i)(6)(II) states that the determination as to whether to maintain or discontinue an exemption is to be based, "in part, on exempted lamp sales collected by the Secretary from manufacturers." A general requirement to "consider" sales is very different from a requirement that DOE focus solely on specific sales data to prove that the lamps have been replacements for other specific lamps. The words "in part" make it clear that sales are to be only *one* aspect of the analysis. As noted above, DOE did, in fact, frequently refer to sales data in its decision-making process, noting the over 80 million annual unit sales of these bulb types as a group.

Second, the contention that Congress would require DOE to base its decision entirely on "actual unit sales" as of the time that it is reconsidering the exemption is unfounded because Congress instructed DOE to make standards for GSLs stricter by 2020. Congress directed DOE to start a process to reevaluate the exemptions by 2014. Thus, Congress would want DOE to consider the *likely impact* of the exemptions in the more strictly regulated market of the *future*, rather than solely on the market that exists *today*. DOE made this point in 2017:

> As noted by commenters, prior to the effective date of any new standard the sales trends of exempted lamps do not necessarily capture the potential for lamp switching … DOE is permitted to account for future changes in consumer behavior so as to avoid the creation of loopholes.[130]

It also makes no sense to suggest that Congress would have required DOE to determine whether a consumer would "likely switch from a more efficient general service lamp to a less efficient lamp" in order to withdraw an exemption. Congress's obvious intent, in requiring stricter standards, was to ensure that future consumers would replace *less* efficient lamps with

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those of EISA 2007, Senator Bingaman noted that the proposed EPCA amendments "establish[] a process to begin the transformation of the U.S. lighting market by phasing out inefficient incandescent lamps and replacing them with more efficient technologies." 2007 Hearing Rpt at 1. Similarly, Representative Harman noted "lighting technology has changed. There are alternatives on the market now that are far more energy efficient . . . . There are alternatives right around the corner, such as advanced halogen bulbs and light emitting diodes, so called LEDs, that will fundamentally change the way we light our homes and businesses. The energy that could be gained by switching to these more efficient alternatives is staggering." *Id*. at 4.

[129] DOE only invokes this reasoning in the context of this category of lamp types, and does not mention it in the context of the other categories, making it unclear if DOE is actually adopting a new interpretation of what Congress intended when it instructed DOE to reevaluate exemptions.

[130] 82 Fed. Reg. 7,327. Similarly, DOE also said

> The technical characteristics of lamps in a given exemption and the volume of sales of those lamps are among the considerations relevant to that assessment. High annual sales indicate that the product is likely used in general lighting applications, because the sales of lamps for specialty applications tend to be relatively small compared to sales for general-purpose lighting. However, sales data are not the only consideration. It may be appropriate to discontinue an exemption even though current sales are relatively low, if technical characteristics of the exempted lamps make them likely to serve as ready substitutes for GSLs once GSL standards are in place.

82 Fed. Reg. 7,288.

more efficient lamps. It is not necessary for consumers to "switch from a more efficient general service lamp to a less efficient lamp" for Congress's intent to be thwarted. Congress's intent will be thwarted if consumers simply replace one inefficient lamp with another.

DOE's new interpretation of congressional intent would produce absurd consequences. It would mean that even if DOE found that all lighting in new construction was provided by exempt lamps, DOE would be unable to revoke the exemption for those lamps because Congress was solely concerned with whether individual consumers were replacing non-exempt with exempt lamps.[131]

Once again, DOE has failed to offer "good reasons" for a change in position, or to demonstrate that that the "new policy is permissible under the statute.[132] Again, it entirely disregarding the factual record basis for the 2017 removal of these exemptions, DOE has failed to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[133] Instead, DOE has "simply disregard[ed] contrary or inconvenient factual determinations that it made in the past."[134]

iv. The Proposed Action Offers No Evidence or Good Reasons to Reverse DOE's 2017 Findings That Reflector Lamps and Incandescent Reflector Lamps Are Properly Considered GSLs.

In its Proposed Action, DOE offers no new analysis of how reflector lamps are used in households nationwide and no evidence to contradict its prior conclusion that they are used to satisfy lighting applications traditionally served by GSILs. It also does not refute its previous conclusion that maintaining the exemption undermines congressional intent by allowing the proliferation of non-regulated lamps that are used for general lighting purposes. Instead, DOE adopts industry arguments that reflector lamps cannot be included in the definition of GSL because "Congress twice excluded the incandescent reflector lamp from the definition of GSL."[135] Once again, DOE has failed to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[136] DOE has "simply disregard[ed] contrary or inconvenient factual determinations that it made in the past."[137] DOE's proposed action is therefore arbitrary and capricious. *See Air Alliance Houston v. EPA*, 906 F.3d 1049; *California v. United States DOI*, 2019 U.S. Dist. LEXIS 66300.

DOE's position has no basis in the statute. EPCA, 42 U.S.C. § 6295(6)(A)(II), mandates that DOE determine "[whether] the exemptions for certain incandescent lamps should be maintained or discontinued," and does not limit DOE's authority depending on how many times an exemption is mentioned. Nothing in the statute provides that "an exemption cannot be withdrawn if it appears twice." And 42 U.S.C. § 6291(30)(BB)(i)(IV) does not limit the category of general service lamps to lamps "that the Secretary determines are used to satisfy lighting

[131] In fact, as noted above, previously-exempt reflector lamps are a dominant form of general lighting in new construction.
[132] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[133] *Id*. at 515-16; *id.* at 537 (Kennedy, J., concurring).
[134] *Air All. Houston*, 906 F.3d at 1067.
[135] 84 Fed. Reg. 3,124.
[136] *Fox*, 566 U.S. at 515-16; *id.* at 537 (Kennedy, J., concurring).
[137] *Air All. Houston*, 906 F.3d at 1067.

applications traditionally served by general service incandescent lamps, *unless that lamp is subject to two statutory exemptions*."

Indeed, DOE explained in 2017 that Congress has not adopted two duplicative exemptions for reflector lamps. DOE addressed this "two exemptions" argument in 2017:

> Commenters also argued that DOE cannot discontinue the exemption for IRLs because, the commenters observed, the statute exempts these lamps from being GSLs twice …
>
> [T]hrough a careful exploration of sections 6291 and 6295, DOE believes the "reflector lamp" exemption in section 6291(30)(D)(ii) is not necessarily as broad as the IRL exemption. DOE believes "reflector lamp" was meant to encompass a different range of lamps, with a scope left to DOE to interpret, while IRL is a defined term with a broad scope. Thus, the "reflector lamp" and IRL exemptions are somewhat different in nature, and EPCA calls on DOE to decide whether to maintain or discontinue each …
>
> DOE infers that "reflector lamp" does not necessarily mean the same thing as "incandescent reflector lamp." Had Congress wanted to define "reflector lamp," it could easily have done so …[138]

In addition to relying on the "double exemption" argument, DOE now also adopts industry's argument that Congress meant to exclude IRLs because "IRLs are already regulated under another part of the statute and Congress did not want the Secretary regulating them in this proceeding."[139] This is the same argument – if a product is subject to one regulation, it cannot be subject to another – that DOE appeared to endorse with respect to the "four types" category, and it is refuted by the same precedents.[140]

DOE addressed this argument in 2017 as follows:

> Of course, DOE makes this decision cognizant of the fact that IRLs are already subject to minimum efficiency standards. However, DOE does not believe section 6295(i)(6) reveals an intention that, because of those standards, DOE should maintain the IRL exemption from being regulated as GSLs. The IRL standards in the statute dating from 1992 – which were the extant standards when EISA added subsection (i)(6) – are substantially less stringent than the standards that EISA section 321 specified for GSILs and even further less stringent than the GSL backstop. Given that some IRLs have long been used for general illumination, as discussed previously, it would be odd for Congress to have left open, unalterably, such a large loophole to its own standards. Rather, DOE believes that in enacting EISA 2007, Congress chose not to update the statutory standards for IRLs because instead it was directing DOE to decide whether to regulate those lamps as

[138] 82 Fed. Reg. 7,324.
[139] 84 Fed. Reg. 3,124.
[140] *See J.E.M. Ag Supply, Inc, v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001); *Friends of the Earth v. EPA*, 446 F.3d 140, 144-5 (D.C. Cir. 2006); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974); *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335-336 (2002), discussed *supra*.

> GSLs. Thus, the fact that IRLs are already subject to IRL-specific standards does not preclude DOE's decision in this final rule. It simply means that, consistent with EPCA, DOE is to perform a particular assessment for IRLs bearing in mind the existing standards. DOE has carried out that assessment.[141]

Again, in this rulemaking, DOE does not offer any explanation for its change of position on the "already regulated" argument. As noted above, "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[142] DOE has failed to offer "good reasons" for its change in position, or to demonstrate that that the "new policy is permissible under the statute."[143]

iv. DOE's Argument Regarding Candelabra Base Lamp Shapes Is Legally Groundless.

DOE is proposing, without any valid basis, to "withdraw the revised definition of GSL, which would maintain the current exclusion of candelabra base lamp shapes from the definition of GSL."[144] In addition to relying on the arguments asserted in support of exempting the lamp shapes discussed above, DOE attempts to justify an exemption for candelabra base lamps by claiming that the "January 2017 final rules had the consequence of including lamps such as candelabra base lamps as GSLs even though such lamps could not meet the statutory definition of GSILs because such lamps do not have a medium screw base."[145]

This is inappropriate for two reasons. First, the definition of "general service lamps" includes any lamps "that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps." A lamp can serve such lighting applications without itself being a GSIL.

Second, lamps without a medium screw base were never even the subject of an exemption from the GSL category. The statute exempted "any lighting application or bulb shape described in any of subclauses (I) through (XXII) of subparagraph (D)(ii)" – but "lamps without a medium screw base" does not appear on that list. Nor could it, because a screw base does not define the "application" or "bulb shape" of a lamp. As the California Energy Commission explained in its comments during the rulemaking, whether a lamp serves a "general service application" does not depend on its screw base or the type of socket it fills, as the role of the base is simply to provide a means to connect a bulb to power.[146] Even if there had been an exemption for lamps without a medium screw base, 42 U.S.C. § 6295(i)(6)(A) authorizes DOE to revoke exemptions.

In fact, even the pre-2017 *regulatory* definition of "general service lamp" (at 10 C.F.R. § 430.2) did not exclude candelabra base lamps. The prior definition said nothing about screw bases. It simply excluded – consistent with the statute – "any lighting application or bulb shape excluded from the "general service incandescent lamp" definition. Thus, even if DOE did restore

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[141] 82 Fed. Reg. 7,328.
[142] *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).
[143] *Fox, supra*, 556 U.S. 502, 515.
[144] *Id.*
[145] 84 Fed. Reg. 3,120, 3,125.
[146] California Energy Commission Comments in response to the published Framework document, EERE-2013-BT-STD-0051-0011 at 13 (Feb. 7, 2014).

the pre-2017 regulatory definition, it would not exempt candelabra base lamps (although it might exempt certain bulb shapes that are used in candelabras).

As with its attempts to restore exemptions for other lamp types, DOE's attempt to create an exemption for candelabra base lamp shapes has no basis in the statute.

IV. DOE Has Not Evaluated the Environmental Impacts of its Proposed Action Under NEPA.

By not conducting a thorough environmental review of the Proposed Action, DOE violates NEPA. DOE claims that its Proposed Action is categorically excluded from review under the National Environmental Policy Act, 42 U.S.C. §§ 4332 *et seq*. (NEPA) by categorical exclusion B 5.1 and "otherwise meets the requirements for application of a categorical exclusion."[147] According to DOE, the Proposed Action merely "maintains the existing definitions of a covered class of products" and therefore DOE does not need to prepare an environmental assessment or environmental impact statement under NEPA.[148]

First, the Proposed Action does not meet the express requirements of the categorical exclusion it relies on and therefore violates NEPA. Second, contrary to DOE's assertion, the Proposed Action is not a merely maintaining an existing definition. It is rescinding a prior final agency action (the Definition Rules) and eliminating the environmental benefits which directly result from the Definition Rules. In clear violation of NEPA, DOE has neither evaluated nor disclosed this information to the public. When viewed in this context, it is clear that DOE's Proposed Action has significant environmental effects which must be evaluated in an EIS under NEPA.

A. The Proposed Action Does Qualify for Treatment Under Any Categorical Exclusion.

The categorical exclusion B 5.1 is, by its terms, inapplicable to DOE's Proposed Action and its use is therefore arbitrary and capricious.[149] The provision DOE relies upon, B 5.1, categorically excludes from NEPA review, "[a]ctions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances."[150] However, the exclusion does not apply to DOE rulemakings or

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[147] 84 Fed. Reg. 3,128, citing 10 C.F.R. Part 1021, App. B, § B5.1(b). DOE's categorical exclusion determination is available at http://energy.gov/nepa/categorical-exclusion-cx-deteminations-cx.

[148] 84 Fed. Reg. 3,120, 3,128.

[149] *California v. Norton*, 311 F.3d 1162, 1175-1177 (9th Cir. 2002).

[150] 10 C.F.R. Part 1021, App. B, § B5.1 provides, in relevant part:

B5. Categorical Exclusions Applicable to Conservation, Fossil, and Renewable Energy Activities

B5.1 Actions to conserve energy or water

(a) Actions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances…. Covered actions do not include rulemakings, standard-settings, or proposed DOE legislation, except for those actions listed in B5.1(b) of this appendix.

(b) Covered actions include rulemakings that establish energy conservation standards for consumer products and industrial equipment, provided that the actions would not: …(4) have the potential to cause a significant increase in energy consumption in a state or region.

standards-setting unless such actions involve the establishment of energy conservation standards that would have no potential to cause a significant increase in energy consumption.[151]

DOE's use of B 5.1 is impermissible because the Proposed Action does not promote energy conservation. The Proposed Action would have a significantly detrimental effect on the environment. As noted earlier, by 2025, the Definition Rules are expected to save approximately 80 billion kilowatt hours of electricity, saving consumers at least $12 billion annually in electricity costs, an amount equal to nearly $100 per household per year. In addition, the Definition Rules are projected to eliminate, on an annual basis, emissions of 34 million metric tons of climate-changing carbon dioxide, 19,000 metric tons of nitrogen oxide, and 23,000 metric tons of sulfur dioxide by 2025. Rather than conserving energy or promoting energy efficiency, DOE's proposed repeal of the Definition Rules will increase harmful emissions, and increase annual electricity usage in an amount equivalent to the combined usage of all households in Pennsylvania and New Jersey.[152] Far from being environmentally benign or advantageous, the Proposed Action will loosen regulations on hundreds of millions of additional lamps and does not qualify for any categorical exclusion.

Second, B 5.1 only applies if the Proposed Action "would not … have the potential to cause a significant increase in energy consumption in a state or region."[153] Because DOE's Proposed Action has the potential to significantly increase energy consumption nationwide, the categorical exclusion B 5.1 does not apply.

B. DOE Mischaracterizes its Proposed Action as Merely Maintaining Existing Definitions.

DOE is not merely maintaining an existing definition because the definitions of GSLs and GSILs were changed on January 19, 2017 by DOE's adoption and publication of two final rules in the Federal Register, which subjected a wide range of lamps previously exempt from regulation to a 45 lm/W minimum efficiency backstop standard on January 1, 2020. The Definition Rules result in more efficient lighting, significant energy savings, and other quantifiable benefits to the nation, including reduced carbon dioxide, greenhouse gas emissions, and toxic air contaminants. Conversely, rescinding the Definition Rules will eliminate these savings and environmental benefits. DOE's mischaracterization of the current rulemaking as "maintaining" an existing definition is factually inaccurate and is an attempt to allow the agency to avoid addressing the actual environmental impact of its Proposed Action. *See Citizens for Clean Energy v. United States DOI*, 2019 U.S. Dist. LEXIS 67259 (Dist. Montana) (the Court held that DOI's lifting of a moratorium on coal-leasing on federal lands was a major federal action triggering NEPA review, rejecting agency's argument that it was merely restoring status quo).

[151] 10 C.F.R. Part 1021, App. B, § B5.1(a)-(b).
[152] ASAP/APCEEE Statement (Feb. 6, 2019).
[153] *Id.*

C. The Proposed Action is a Major Federal Action Affecting the Environment Which Requires An Environmental Impact Statement.

By failing to adequately evaluate the impacts of its Proposed Action in an environmental impact statement (or environmental assessment), DOE violates NEPA. DOE's failure to conduct a proper NEPA review is arbitrary and capricious.

NEPA is a procedural statute that requires federal agencies to assess the environmental consequences of their actions before those actions are undertaken.[154] For major federal actions significantly affecting the quality of the human environment, an agency must prepare an [EIS]. An EIS is a thorough analysis of the potential environmental impacts of a proposed federal action that that informs decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[155]

If there is a substantial question whether an action "may have a significant effect" on the environment, then the agency must prepare an Environmental Impact Statement (EIS).[156] An EIS should contain a discussion of significant environmental impacts and alternatives to the proposed action.[157] As a preliminary step, an agency may prepare an Environmental Assessment (EA) in order to determine whether a proposed action may "significantly affect[ ]" the environment and thereby trigger the requirement to prepare an EIS.[158] An EA is "a concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."

If DOE had complied with NEPA and taken a "hard look" at the environmental consequences of its repeal of the Definition Rules, the public would learn that the Proposed Action will significantly increase the nation's consumption of energy resources and emissions of both toxic air contaminants and the greenhouse gases which contribute to global warming.[159] DOE-funded research conducted by Lawrence Berkeley National Laboratory reveals the significant economic and environmental benefits conferred by the Definition Rules.[160] The Report concludes the backstop "results in significant energy savings of 27 quads and consumer net present value of $120 billion (at a seven percent discount rate) for lamps shipped between 2020 and 2049, and carbon dioxide emissions reduction of 540 million metric tons by 2030 for those GSLs not explicitly included in the EISA 2007 definition of a GSL."[161]

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[154] *Klamath–Siskiyou Wildlands Ctr. v. BLM,* 387 F.3d 989, 992-93 (9th Cir. 2004).
[155] *Id.*
[156] *See, e.g., Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir.1998).
[157] *See* 40 C.F.R. §§ 1502.1, 1502.14, 1508.7.
[158] *See* 40 C.F.R. § 1508.9(a)(1) (2007).
[159] Rigorous research conducted by experts at the U.S. Environmental Protection Agency, Department of Transportation, and 11 other Federal agencies have determined that climate change is human-caused, that continued growth in emissions will produce economic losses across all sectors, and that mitigation measures do not "yet approach the scale necessary to avoid substantial damages to the economy, environment and human health over the coming decades." *See* U.S. Global Change Research Program, "Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II," (D.R. Reidmiller et al. eds., 2018), https://nca2018.globalchange.gov/ (the "Assessment") at 26, 73, 1347.
[160] *See* https://ees.lbl.gov/sites/default/files/lbnl-1007090-rev2.pdf (last visited May 2, 2019).
[161] *Id.*

As DOE itself noted, the 2017 Definition Rules discontinued certain lamp exemptions in furtherance of Congress's overall goal of increasing lighting efficiency and eliminating potential loopholes around efficiency standards.[162] If including more categories of lamps in the definition of GSLs to be regulated under a tighter standard would not result in increased energy efficiency, then EPCA's entire regulatory scheme would be pointless.

In *Center for Biological Diversity v. National Highway Transportation Safety Administration (NHTSA)*, 538 F.3d 1172 (9th Cir. 2008), the Ninth Circuit overturned NHTSA's Finding of No Significant Impact (FONSI) on its adoption of Corporate Average Fuel Economy (CAFE) standards where the agency failed to consider the environmental impacts of the excess emissions which would result from NHTSA's failure to adopt more stringent standards. *Id.* at 1220-21. Although NHTSA performed an environmental review under NEPA, the Ninth Circuit struck down its FONSI because NHTSA failed to fully disclose and evaluate the environmental effects of not taking more comprehensive action.

In this case, unlike in *Center for Biological Diversity v. NHTSA*, 538 F.3d at 1220-21, DOE has performed no environmental review of its Proposed Action whatsoever, and, as discussed above relies on an inapplicable categorical exclusion to evade review. And here, DOE's Proposed Action rescinds its own Definition Rules exempting certain incandescent lamps from the congressionally-mandated 45 lm/W backstop standard applicable to GSLs. Indeed, it would allow such lamps to escape *any* regulation as GSLs, and thereby permit them to be less efficient and consume more energy than GSLs when the backstop becomes enforceable in 2020.

By mischaracterizing its Proposed Action as merely restating existing statutory definitions, DOE also fails to establish the proper baseline for its NEPA review. Establishing appropriate baseline conditions is critical to any NEPA analysis. *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). "Without establishing the baseline conditions which exist ... before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment and, consequently, no way to comply with NEPA."[163] Whatever method the agency uses, its assessment of baseline conditions "must be based on accurate information and defensible reasoning."[164]

In this case, DOE conveniently ignores the fact that the Definition Rules are final rules, which have been published in the Federal Register. The proper environmental baseline from which to evaluate the impacts of DOE's present proposal under NEPA must, at a minimum, take into account the full range of environmental benefits conferred by the expanded GSL definition and the operation of the backstop. *See Abraham*, 355 F.3d at 196 (publication of final rule is the "terminal act effectuating an amendment [and] regardless of the fact that manufacturers have a number of years to bring themselves into compliance, it becomes …the 'required' minimum efficiency standard"). DOE relies on an improper environmental baseline to allow it to evade NEPA review.

[162] 82 Fed. Reg. 7,277, 7,290.
[163] *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
[164] *Great Basin Resources Watch*, 844 F.3d at 1101.

V. DOE Must Consult with Federal Agencies on the Impacts of its Proposed Action Under the Endangered Species Act.

The Endangered Species Act's section 7, 16 U.S.C. § 1536, requires Federal agencies like DOE to consult with the Secretary of the Interior to ensure the Proposed Action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species."[165] As federal agencies such as the Fish and Wildlife Service have concluded, air pollution and climate change contribute substantially to biodiversity risk. DOE must consult with the Interior Secretary prior to finalizing this proposed rollback.

VI. The Proposed Action is Not Consistent with State Programs to Protect its Coast from the Effects of Climate Change.

The Coastal Zone Management Act, 16 U.S.C. §1451 *et seq*., requires federal programs that affect any land or water use or natural resource of the coastal zone to be carried out in a manner that is consistent, to the maximum extent practicable, with the policies of the State managing the coastal zone. The undersigned coastal states, including California, are vulnerable to sea level rise from climate change, and the Proposed Action will exacerbate that threat.

VII. DOE Has Failed to Consult Under the National Historic Preservation Act.

The National Historic Preservation Act, 54 U.S.C. § 306108, requires the "head of any Federal agency" embarking on a project to "take into account the effect of the undertaking on any historic property." Climate change and air pollution imperil historic properties throughout the country via direct degradation, sea level rise, fire, flood, and other forms of harm. DOE must consult with the relevant federal and state authorities and fully disclose any impacts.

CONCLUSION

DOE's proposed repeal of the Definition Rules is contrary to law, undermines EPCA's legislative intent, and would unconscionably increase both greenhouse gas emissions and consumers' energy costs. DOE's Proposed Action is unlawful for the following reasons: (1) it would violate EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1); (2) DOE has no inherent authority in EPCA to exempt the lamp products at issue; (3) DOE's reversal is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*.; (4) DOE has failed to evaluate the environmental impacts of its Proposed Action under the National Environmental Policy Act, 42 U.S.C. § 4332, *et seq*.; and (5) DOE's Proposed Action violates other environmental laws, including the Endangered Species Act, 16 U.S.C. § 1536 *et seq*., the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq*., and the National Historic Preservation Act, 54 U.S.C. § 306108. We therefore urge DOE to withdraw its proposed repeal of the Definition Rules.

Respectfully submitted,

[165] 16 U.S.C. § 1536(a)(2).

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COMMENTS OF ATTORNEYS GENERAL OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, ILLINOIS, COMMONWEALTH OF MASSACHUSETTS, MARYLAND, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEVADA, OREGON, VERMONT, WASHINGTON, AND THE CORPORATION COUNSEL OF THE CITY OF NEW YORK

November 4, 2019

Comments submitted via e-mail:
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U.S. Department of Energy
Appliance and Equipment Standards Program

Re: Docket No. EERE-BT-STD-0022
RIN 1904-AE76
Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps

The undersigned State Attorneys General and Corporation Counsel respectfully submit these comments in response to Department of Energy (DOE)'s proposed determination that energy conservation standards for general service incandescent lamps (GSILs) do not need to be amended.[1] DOE published its Notice of Proposed Determination (NOPD) in the Federal Register on September 5, 2019 and has invited public comment on its proposal by November 4, 2019.

As explained in greater detail below, DOE's proposed determination is contrary to law, frustrates Congressional intent to transition the nation to inexpensive, efficient and widely available lighting sources, and would significantly increase greenhouse gas emissions and consumers' energy costs. DOE's proposed determination is unlawful because: (1) it is not authorized by the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291 *et seq*.; (2) it is barred by EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1); (3) it is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*.; and (4) DOE has not complied with requirements for agency actions under the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq*., the Endangered Species Act, 16 U.S.C. § 1536; the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq*.; the National Historic Preservation Act, 54 U.S.C. § 306108; and Executive Order 13132, "Federalism," 64 Fed. Reg. 43,255 (Aug. 10, 1999). We therefore urge DOE to withdraw its proposed determination not to amend the GSIL standards.

I. Background

DOE's energy efficiency program generates substantial economic and environmental benefits: by 2030, DOE projects the program will have resulted in more than $2 trillion in cumulative utility bill savings for consumers and 2.6 billion tons in avoided carbon dioxide

[1] 84 Fed. Reg. 46,830 (Sept. 5, 2019). DOE subsequently published a correction addressing typographical errors that appeared in the September 5, 2019 NOPD. 84 Fed. Reg. 49,965 (Sept. 24, 2019).

(CO_2) emissions.[2] Efficiency standards for light bulbs alone are expected to cumulatively save 1.5 trillion kilowatt hours of energy and reduce CO_2 emissions by 700 million metric tons, equivalent to taking nearly 150 million cars off the road for a year, or more than enough to meet the electricity needs of every American household for one year. Consumers replacing inefficient incandescent bulbs with more efficient bulbs such as light emitting diodes (LEDs) realize savings through reduced energy costs and exponentially fewer bulb replacements.[3] According to DOE's own analysis, if DOE were to adopt strengthened GSIL standards,[4] the net present value of the benefits to the nation would equal $4.171 billion.[5] DOE must therefore exercise its standards-setting authority under EPCA to ensure continued progress in achieving energy efficiency.

A. Efficiency Standards Under EPCA

EPCA directs DOE to establish energy conservation standards covering most major household appliances and many types of commercial equipment. DOE's energy conservation program includes testing, labeling, and enacting energy conservation standards, plus product certification and compliance enforcement. Under EPCA, any new or amended standard DOE prescribes for consumer products must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. § 6295(o)(2)(A). Moreover, the standard must result in a significant conservation of energy. 42 U.S.C. § 6295(o)(3)(B).

In determining whether a standard is economically justified, DOE must consider the following seven factors:

> (1) The economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard;
>
> (2) The savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard;

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[2] *See* DOE Fact Sheet, "Saving Energy and Money with Appliance Equipment Standards in the United States" (Jan. 2017), *available at*: https://www.energy.gov/sites/prod/files/2017/01/f34/Appliance%20and%20Equipment%20Standards%20Fact%20Sheet-011917_0.pdf. *See also* DOE Fact Sheet, "Saving Energy and Money with Appliance and Equipment Standards in the United States" (Feb. 2016), *available at*: https://www.energy.gov/sites/prod/files/2016/02/f29/Appliance%20Standards%20Fact%20Sheet%20-%202-17-2016.pdf.

[3] Appliance Standards Awareness Project, "Appliance Standards Fact Sheet: Light Bulb Efficiency Standards" (June 2016), *available at* https://appliance-standards.org/sites/default/files/Fact_sheet_light_bulbs.pdf; *see also*, Kantner et al., Lawrence Berkeley National Laboratory, "Impact of the EISA 2007 Energy Efficiency Standard on General Service Lamps" (January 2017) available at https://ees.lbl.gov/sites/default/files/lbnl-1007090-rev2.pdf , at 3.

[4] GSILs are defined at 40 U.S.C. § 6291(30)(D) and currently subject to standards specified in 10 C.F.R. § 430.32(x).

[5] NOPD, Table V.7, "Cumulative Net Present Value of Quantifiable Consumer Benefits for GSILs and GSIL Alternatives; 30 Years of Shipments" at 46,854; Corrected NOPD, 84 Fed. Reg at 49,966.

(3) The total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary considers relevant.

42 U.S.C. § 6295(o)(2)(B)(i)(I)-(VII). Importantly, EPCA contains an anti-backsliding provision that states: "The [DOE] Secretary may not prescribe any amended standard which increases the maximum allowable energy use . . . or decreases the minimum required energy efficiency, of a covered product." 42 U.S.C. § 6295(o)(1). Congress amended EPCA in 1987 to include the anti-backsliding provision to ensure steady increases in the efficiency of products covered under DOE's appliance efficiency program.[6] EPCA's prohibition against backsliding also "serves to maintain a climate of relative stability with respect to future planning by all interested parties."[7]

DOE is prohibited from prescribing a standard if it is likely to result in the unavailability of performance characteristics (including reliability), features, sizes, capacities, and volumes found in existing covered products. 42 U.S.C. § 6295(o)(4). EPCA allows DOE to specify a higher or lower standard for a type or class of covered product when DOE determines that the product type or class has a "capacity or other performance-related feature" that justifies a higher or lower standard from that which applies to other products within that product group. 42 U.S.C. § 6295(q)(1)(B).

B. EPCA Requirements for GSL Rulemaking

Amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA)[8] directed DOE to conduct two rulemaking cycles to evaluate energy conservation standards for

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[6] National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, 1987 U.S.C.C.A.N. (101 Stat.) 103, 114; *see NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004).

[7] H.R.Rpt. No. 100-11 at 22 (March 3, 1987).

[8] Pub. L. 110-140; 42 U.S.C. § 6295(i)(6) provides, in relevant part:

(6) Standards for general service lamps.—

(A) Rulemaking before January 1, 2014.—

(i) In general.—Not later than January 1, 2014, the Secretary shall initiate a rulemaking procedure to determine whether—

(I) standards in effect for general service lamps should be amended to establish more stringent standards than the standards specified in paragraph (1)(A); and

(II) the exemptions for certain incandescent lamps should be maintained or discontinued based, in part, on exempted lamp sales collected by the Secretary from manufacturers.

(ii) Scope.—The rulemaking—

(I) shall not be limited to incandescent lamp technologies; and

(II) shall include consideration of a minimum standard of 45 lumens per watt for general service lamps.

GSLs.[9] For the first rulemaking cycle, Congress directed DOE to initiate a rulemaking no later than January 1, 2014 to evaluate whether to amend energy conservation standards for GSLs. It also directed DOE to determine whether exemptions for certain incandescent lamps should be maintained or discontinued.[10] The required scope of DOE's rulemaking included non-incandescent lamp technologies and consideration of a minimum standard of 45 lumens per watt (lm/W) for GSLs. EISA provided that DOE also consider the phase-in of effective dates.[11] Congress also provided that if DOE determined that the standards in effect for GSILs should be amended, DOE was required to publish a final rule by no later than January 1, 2017. 42 U.S.C. § 6295(i)(6)(A)(iii).

Significantly, Congress further specified that in the event that DOE failed to timely complete that rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv), or if the final rule from the rulemaking did not produce energy savings greater than or equal to the savings from a minimum efficacy standard of 45 lm/W,[12] then that 45 lm/W standard specified by Congress would be triggered as the "backstop" efficiency standard. 42 U.S.C. § 6295(i)(6)(A)(v). Pursuant to the Congressionally-imposed backstop, the sale of GSLs that do not meet the minimum efficiency standard of 45 lm/W is prohibited beginning on January 1, 2020. *Id.*

EISA further require DOE to initiate a second, similar rulemaking cycle by January 1, 2020. If DOE determines that standards are to be amended for GSILs, a final rule must be published by January 1, 2022 with an effective date at least three years after the final rule's publication. 42 U.S.C. § 6295(i)(6)(B)(iii).

> (iii) Amended standards.—If the Secretary determines that the standards in effect for general service incandescent lamps should be amended, the Secretary shall publish a final rule not later than January 1, 2017, with an effective date that is not earlier than 3 years after the date on which the final rule is published.
> (iv) Phased-in effective dates.—The Secretary shall consider phased-in effective dates under this subparagraph after considering—
> > (I) the impact of any amendment on manufacturers, retiring and repurposing existing equipment, stranded investments, labor contracts, workers, and raw materials; and
> > (II) the time needed to work with retailers and lighting designers to revise sales and marketing strategies.
>
> (v) Backstop requirement.—If the Secretary fails to complete a rulemaking in accordance with clauses (i) through (iv) or if the final rule does not produce savings that are greater than or equal to the savings from a minimum efficacy standard of 45 lumens per watt, effective beginning January 1, 2020, the Secretary shall prohibit the sale of any general service lamp that does not meet a minimum efficacy standard of 45 lumens per watt.

[9] 42 U.S.C. § 6295(i)(6)(A)-(B). General service lamps are defined at 42 U.S.C. § 6291(30)(BB) and include GSILs, compact fluorescent lamps (CFLs), general service LED lamps, organic LED lamps, and any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps.

[10] 42 U.S.C. § 6295(i)(6)(A)(i).

[11] 42 U.S.C. § 6295(i)(6)(A)(iv).

[12] While inefficient incandescent and halogen bulbs are unable to meet this new standard, the standard is easily met by CFL and LED bulbs, which require a small fraction of the energy used by incandescent and halogen bulbs to produce an equivalent amount of light. Due to improvements in lighting technology and lighting efficiency standards, LED replacement bulbs are now available in a wide range of shapes, light outputs and beam angles to meet consumers' lighting needs. Technology neutral standards incentivize switching to existing, commercially available options and pave the way to transition away from inefficient legacy technologies.

C. DOE's GSL Rulemaking[13]

In 2013, DOE initiated a rulemaking pursuant to 42 U.S.C. § 6295 (i)(6)(A)(i)(I), but limited the scope of the rulemaking to compact fluorescents (CFL) and LED lamps.[14] On March17, 2016, DOE issued a proposed rule to amend standards for GSLs, which did not address GSILs.[15] In 2017, DOE issued, pursuant to 42 U.S.C. § 6295 (i)(6)(A)(i)(II), final rules expanding the definitions of GSLs and GSILs to include a variety of commonly-used bulbs.[16] On September 5, 2019, DOE adopted a final rule repealing those rules[17] and announced its preliminary determination not to amend the GSIL standard.

DOE does not contend that it has completed a final rule in accordance with 42 U.S.C. § 6295(i)(6)(A)(i)-(iv). Indeed, according to DOE, its proposed determination marks but one step in DOE's rulemaking process pursuant to 42 U.S.C. § 6295(i)(6)(A).

D. DOE's Proposed Determination

According to the NOPD, DOE issued its proposed determination pursuant to EPCA, 42 U.S.C. § 6295(i)(6)(A), which requires DOE to initiate a rulemaking for GSLs that, among other requirements, determines whether standards in effect for GSILs should be amended. 42 U.S.C. § 6295(i)(6)(A)(i), (iii). For its analysis, DOE first examined the technological feasibility of more efficient GSILs. DOE found that options being used in similar commercially available products (incandescent reflector lamps or IRLs), such as halogen infrared coating (HIR) technology, could improve the efficacy of GSILs and therefore determined that amended energy conservation standards for GSILs are technologically feasible.

Once DOE determined that higher standards were technologically feasible, DOE estimated energy savings that would result from potential HIR-based energy conservation standards by conducting a national impacts analysis (NIA). In this case, DOE compared the no-new-standards case (projected energy consumption that reflects how the market for a product would evolve in the absence of amended standards) and the standards case (projected energy savings not from the new standard, but from product substitution).

Based on its analysis, DOE determined that there would be no energy savings or benefits from transitioning to the higher efficiency HIR technology. According to DOE, "[a]ny energy savings that might result from establishing a standard [] are the result of product shifting as consumers abandon GSIL-HIR products in favor of different product types having different performance characteristics and features."[18] DOE further noted that "EPCA prohibits DOE from prescribing an amended or new standard if that [] standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as

[13] A more detailed discussion of DOE's GSL rulemaking efforts is provided in our discussion regarding preemption in paragraph II.B.6., *infra*.
[14] DOE Energy Efficiency Program for Consumer Products: Energy Conservation Standards for General Service Lamps, "Notice of Public Meeting and Availability of Framework Document," 78 Fed. Reg. 73,737 (Dec. 9, 2013).
[15] 81 Fed. Reg. 14,528 (Mar. 17, 2016).
[16] 82 Fed. Reg. 7,276 (Jan. 19, 2017); 82 Fed. Reg. 7,322 (Jan. 19, 2017).
[17] 84 Fed. Reg. 46,661 (Sept. 5, 2019).
[18] 84 Fed. Reg. at 46,857.

those generally available in the United States at the time of the Secretary's finding. 42 U.S.C. § 6295(o)(4)."[19]

DOE then considered whether more stringent GSIL standards would be economically justified by conducting life-cycle cost and payback period analyses and estimating the net present value of consumers' total costs and benefits. This analysis examined, among other things, expected savings in operating costs of HIR lamps compared to any increase in their price or maintenance expenses. DOE noted that "[g]iven the high upfront cost and long payback period, these analyses do not anticipate that consumers will benefit from introduction of HIR lamp technology. Additionally, the recent experiences of two manufacturers who attempted and failed to market such products illustrates that they are not commercially viable… DOE believes there is uncertainty as to whether manufacturers would spend the capital required to produce HIR lamps given the low probability of recovering those costs as consumers substitute less costly products. Manufacturers could instead choose to forego the investment and produce other lighting products or exit the market entirely."[20]

Thus, DOE tentatively concluded that imposition of a standard requiring the use of HIR technology would not be economically justified because consumers' operating cost savings would be insufficient to recover their upfront costs. Because DOE tentatively concluded that amended standards for GSILs would not be economically justified, DOE did not conduct a utility impact analysis or emissions analysis.

1. Product Substitution and DOE's Consumer Choice Analysis

In its economic justification analysis, DOE identified, but did not consider, the likely real-world impact of heightened standards for GSILs: the switching by consumers to more efficient and less costly non-incandescent substitutes. DOE noted that,

> [i]f energy conservation standards for GSILs are amended, consumers may substitute alternative lamps that are not GSILs due to the high upfront cost and long PBP associated with the HIR technology…Thus, DOE considered several alternatives available to consumers that have the same base type (medium screw base) and input voltage (120 volts) as the baseline lamp. DOE considered two more efficacious lamps that consumers may choose: [a] CFL and an LED lamp.

84 Fed. Reg. at 46,841. Thus, DOE presented "for informational purposes only" a consumer choice analysis.[21] This analysis anticipated that most consumers would substitute other available products, such as LEDs, CFLs, and non-GSIL incandescent lamps (i.e., shatter-resistant lamps) if DOE were to amend the GSIL standards. In its LCC savings analysis using a substitution scenario, DOE modeled "how consumers would substitute other lamps (which are more efficient and sometimes less-expensive) and is intended to more accurately reflect the impact of a potential standard on consumers."[22] DOE estimated the net present value of the total national

[19] *Id.*
[20] 84 Fed. Reg. at 46,858.
[21] *Id*. at 46,841.
[22] *Id*. at 46,846.

consumer benefits in this substitution scenario would be $2.241 billion using a discount rate of 7 percent, and $4.171 billion using a discount rate of 3 percent.[23]

Despite the enormous savings identified in DOE's consumer choice analysis, DOE did not consider those savings in its evaluation of whether amended GSIL standards would be economically justified. DOE explained its basis for disregarding the projected benefits of a likely substitution scenario:

> While DOE presents the LCC of switching to substitute products as a replacement for the covered product, DOE cannot, in this determination, consider those LCC savings in making a determination as to whether amended standards for the covered products are economically justified because those LCC savings result from the unavailability of the covered product. Rather, DOE's determination must be based on the LCC savings resulting from establishing an amended standard for the covered product.

84 Fed. Reg. at 46,835. Citing 42 U.S.C. § 6295(o)(4), the agency further stated:

> DOE cannot find economic justification in a standard the purpose of which is to force the unavailability of a product type, performance characteristic or feature in contravention of EPCA.

Based on these considerations, DOE proposed not to amend energy conservation standards for GSILs.

II. Discussion

A. DOE's Proposed Determination Not to Amend the GSIL Standards is Not Authorized by EPCA.

As an initial matter, DOE's failure to issue its proposed determination for the first cycle rulemaking prior to the deadlines set forth in EPCA, 42 U.S.C. § 6295(i)(6)(A) means the proposed determination is untimely and would be without legal effect if finalized. Even assuming DOE retained authority to determine whether to amend the GSIL standards per 42 U.S.C. § 6295(i)(6)(A), its authority is limited by EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), and Congressional intent underlying EISA.

1. DOE's Proposed Determination is Untimely Under EPCA, 42 U.S.C. § 6295(i)(6)(A)(iii).

DOE was required to issue a first cycle determination regarding whether to amend the GSIL standards by no later than January 1, 2017. DOE has missed that deadline and cannot issue a determination now in an attempt to sidestep the consequence Congress established for DOE's potential delay: imposition of the 45 lm/W backstop. *See Bustamante v. Napolitano*, 582 F.3d 403 (2d Cir. 2009) (federal immigration agency had no jurisdiction to act on naturalization application where statute required agency to act within particular time period or lose jurisdiction to district court as consequence of failing to timely comply); *United States v. Hovsepian,* 359 F.3d 1144, 1161 (9th Cir. 2004) (where statute specifies consequence for failure to comply with

[23] *Id*. at 46,858; 84 Fed. Reg. at 49,966.

a deadline, agency that misses deadline loses authority to act); *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1075 n.3, 1080 (6th Cir.1994) (same); *cf. Brock v. Pierce County*, 476 U.S. 253, 259 (1986) (agency delay did not preclude jurisdiction where statute provided deadline but did not specify consequence of agency inaction). In *Bustamante*, the court determined that the statutory scheme at issue which imposed a deadline for the U.S. Customs and Immigration Service (USCIS) to act on a naturalization application within 120 days "aimed to provide USCIS with an incentive to decide applications in a timely fashion or risk losing jurisdiction to decide those applications in the first instance." 582 F.3d at 409.

In this case, EPCA's backstop provision sets forth a clear statutory consequence for DOE's failure to meet its first cycle rulemaking deadline. DOE missed the deadlines set forth in 42 U.S.C. § 6295(i)(6)(A) and the consequence of DOE's delay – the backstop – has been triggered. DOE is without authority to issue the proposed determination not to amend the GSIL standards and any final determination DOE may issue is void.

2. DOE's Proposed Determination Would Violate EPCA's Anti-Backsliding Provision, 42 U.S.C. § 6295(o)(1).

Even if DOE were authorized to consider at this juncture whether to amend the GSIL standards, EPCA's prohibition against backsliding, 42 U.S.C. § 6295(o)(1), limits the agency's authority to determining whether standards should be amended upwards from a baseline efficacy level of 45 lm/W. Yet, DOE has issued a determination that proposes to loosen the GSIL standards back down to the levels first promulgated in 2009, which are as low as 11 lm/W,[24] a dramatic backslide from the 45 lm/W backstop standard. DOE's proposed action is therefore barred by EPCA's anti-backsliding provision.

EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1), states: "[t]he [DOE] Secretary may not prescribe any amended standard which increases the maximum allowable energy use . . . or decreases the minimum required energy efficiency, of a covered product." Significantly, as noted above, Congress amended EPCA in 1987 to include the anti-backsliding provision to ensure steady increases in the efficiency of products covered under DOE's appliance efficiency program.[25] EPCA's prohibition against backsliding also "serves to maintain a climate of relative stability with respect to future planning by all interested parties."[26]

As explained further below, DOE's failure to complete its rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(1)(i)-(iv) has triggered EPCA's 45 lm/W minimum efficiency backstop standard for GSLs, 42 U.S.C. § 6295(i)(6)(A)(v). DOE's proposed determination attempts to roll back the 45 lm/W standard that will go into effect on January 1, 2020. Because the proposed determination would increase the maximum allowable energy use for GSILs, a subset of GSLs, EPCA's anti-backsliding provision forbids DOE from undertaking that action.

a. EPCA's 45 lm/W Backstop Was Triggered by DOE's Failure to Complete Rulemaking Pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv).

[24] *See* 10 C.F.R. § 430.32(x)(1).
[25] National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, 1987 U.S.C.C.A.N. (101 Stat.) 103, 114; *see NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004).
[26] H.R. Rep. No. 100-11 at 22 .

DOE triggered EPCA's 45 lm/W backstop minimum efficiency standard applicable to general service lamps, 42 U.S.C. § 6295(i)(6)(A)(v), when it failed to complete a rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv). DOE failed to meet Congressionally-imposed procedural milestones, which included adopting final amended GSIL standards by January 1, 2017. The backstop was triggered, at the latest, on January 1, 2017.

DOE does not dispute that it has not completed its rulemaking pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv). By its terms, EPCA's 45 lm/W backstop has been triggered, and no further action by DOE is needed for the sales prohibition against non-compliant lamps to take effect beginning January 1, 2020.[27]

DOE has asserted, in its final rule withdrawing the 2017 GSL and GSIL definition rules that the backstop has not been triggered, however, because 42 U.S.C. § 6295(i)(6)(A)(iii) requires a final GSIL standards rule by January 1, 2017 **only if** DOE determines that standards for GSILs should be amended.[28] According to DOE, because the agency has yet to decide whether to amend the standard, it is not obliged to issue a final standard by any deadline and the backstop provision is not triggered. That interpretation of EPCA is inconsistent with the statutory language establishing the backstop and would render its inclusion in the statute meaningless. The interpretation also contradicts the overall framework of EPCA. As DOE itself observed: "[T]he regulatory program that EISA established was a preference and presumption for a 45 lm/W standard."[29] The statute gives DOE the option to establish an alternative set of standards, on condition that those standards would achieve energy savings at least as great as would the 45 lm/W standard. However, the statute neither states nor supports the proposition that DOE's delaying a final determination pursuant to 42 U.S.C. § 6295(i)(6)(A)(i) on whether to amend a standard suspends the deadlines for completing the first cycle of rulemaking and prevents the backstop standard from being triggered. Given the urgency of Congress's mandate to force improvements in new lighting technologies and its carefully crafted timetable for action, it defies logic that the EISA would grant DOE the unfettered authority to stall the nation's transition to the next generation of highly efficient lamps.[30]

Importantly, the backstop has already had an important impact notwithstanding the fact that the standard is not yet in effect -- it has provided certainty to lighting market stakeholders that the nation's transition to significantly improved lighting efficiency is moving forward. Over the past year, manufacturers, retailers, consumers, and regulators have anticipated the ban on

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[27] *See* 82 Fed. Reg. 7,276, 7,316 (Jan. 19, 2017) (DOE statement that the backstop standard will apply if DOE "fails to complete the rulemaking as prescribed by EPCA by January 1, 2017"); and "Statement Regarding Enforcement of the 45 LPW General Service Lamp Standard" (DOE statement on January 18, 2017 acknowledging that sales of any GSL that do not meet the 45 lm/W backstop standard are prohibited as of 2020 and providing notice that DOE may exercise enforcement discretion in certain circumstances) *available at* https://www.energy.gov/sites/prod/files/2017/01/f34/Statement%20on%20Enforcement%20of%20GSL%20Standard%20-%201.18.2017.pdf.

[28] 84 Fed. Reg. at 46,664-46,665.

[29] *See* 82 Fed. Reg. 7,276, 7,282.

[30] Congress first adopted national light bulb standards in 2007 as part of the EISA 2007 amendments to EPCA. The standards established a two-stage transition to energy-efficient light bulbs. First stage standards, which took effect over a three-year period starting in 2012 and were applicable only to "A-type" (the most common, pear-shaped) incandescent light bulbs, required efficiency savings of 25 – 30% as compared to traditional incandescent bulbs. The 45 lm/W backstop standard represents the second stage standard.

sales of GSL lamps that do not meet the 45 lm/W standard. Thus, contrary to DOE's assertions,[31] the backstop established a GSIL standard of 45 lm/W from which DOE may not backslide. If DOE issues a final determination not to amend the current GSIL standards, that action would have no legal effect.

DOE argues that a congressional appropriations rider[32] prevented it from making a determination regarding the need for amending standards applicable to GSILs. While DOE's interpretation of the rider may have impeded its evaluation of whether to amend standards pursuant to 42 U.S.C. § 6295(i)(6)(A), the rider itself did not contain any language modifying or delaying the operation of the backstop. Had Congress intended to suspend or repeal the schedule set forth in 42 U.S.C. § 6295(i)(6)(A), it could have done so. There is no basis now to infer that Congress intended such action.[33] The congressional rider is therefore irrelevant to whether the backstop was triggered, and DOE's proposed determination would constitute unauthorized backsliding.

3. Congress Sought to Ensure Progress in Lighting Efficiency Despite DOE Delay.

DOE's proposed determination is inconsistent with Congressional intent. The plain language and history of amendments to EPCA reflect Congress' desire to propel advancements in lighting efficiency notwithstanding DOE's legacy of delayed standard-setting. For example, EISA established efficiency standards for a variety of products and created a framework for increasing their required efficiency. As bi-partisan omnibus energy legislation,[34] EISA incorporated provisions contained in House and Senate energy bills introduced in the 110th Congress (H.R. 3221 and S. 2017) which, among other things, imposed a mandatory backstop requirement for general service lighting and authorized state enforcement of that requirement. Congress intended, and industry understood, that the provisions of EISA that added 42 U.S.C. § 6295(i)(6)(A) could result in the phase-out of inefficient incandescent bulbs. For example, testimony presented by NEMA during a public hearing on S. 2017 acknowledged that the 45 lm/W backstop would automatically become the standard for GSLs in 2020 if DOE missed its statutory rulemaking deadline, effectively eliminating halogen and incandescent products unable to meet that standard.[35] It is notable that EISA's lighting efficiency provisions enjoyed the general support of both efficiency advocates and the lighting industry. Now, 12 years after the enactment of EISA, DOE is inexplicably staking out positions contrary to the amendments' plain language and Congress's intent in enacting them.

A closer examination of EISA's legislative history reveals clear congressional intent to rapidly transition the nation to more energy efficient lighting through, among other things, the elimination of inefficient, incandescent bulbs by 2020. Earlier bills in the House (H.R. 3221) and Senate (S. 2017) that laid the groundwork for H.R. 6, which would ultimately become EISA,

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[31] *See* 84 Fed. Reg. 3,120, 3,123.
[32] 2012 Consolidated Appropriations Act, Pub. L. No. 112-74, 125 Stat. 786, 879.
[33] *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 662 (2007) (no presumption of congressional repeal unless legislative intent is clear and manifest).
[34] H.R. 6, which would ultimately become the 2007 EISA Amendments, was not accompanied by a conference report (see Rep. Dingell statement, 153 Cong. Rec. H35931, December 18, 2007).
[35] *See* Sen. Hearing Report 110-195 at 37.

reflected the consensus position regarding phaseout of incandescent bulbs.[36] Legislative action in both chambers provided for DOE initiation of rulemaking to establish GSL standards and the imposition of a 45 lm/W (or its equivalent) backstop if DOE failed to carry out its rulemaking duties. To the extent Congress was concerned about limiting consumer choice in lighting, that concern was short-lived. For example, the December 6, 2007 Senate amendments to H.R. 6 contained language emphasizing the value of a rapid transition to newer technologies and its preference for mandatory, technology neutral standards.[37] While those amendments also reflected the Senate's desire for consumers to continue to enjoy multiple product choices, subsequent amendments to H.R. 6 deleted any language requiring the preservation of particular lighting technologies. By December 18, 2007, H.R. 6, the bill ultimately approved by Congress and signed into law contained no vestige of earlier Congressional concerns regarding the elimination of outdated, inefficient incandescent technology and its impact on consumer choice.[38]

EISA was adopted in direct response to DOE delay and was designed to spur agency action. Similarly, the anti-backsliding provision was intended to ensure progress toward higher efficiency standards and stability. Against this backdrop, it defies credulity that Congress would have granted DOE unfettered discretion to avoid the backstop by issuing a determination not to amend nearly three years after the deadline Congress set for DOE to carry out its GSL rulemaking responsibilities.[39]

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[36] For example, in hearing testimony for S. 2017, which contained lighting efficiency provisions generally mirroring those of EISA, Senator Bingaman noted that the proposed EPCA amendments "establish[] a process to begin the transformation of the U.S. lighting market by phasing out inefficient incandescent lamps and replacing them with more efficient technologies." *See* Sen. Hearing Report 110-195 at 1. Similarly, Representative Harman noted "lighting technology has changed. There are alternatives on the market now that are far more energy efficient…There are alternatives right around the corner, such as advanced halogen bulbs and light emitting diodes, so called LEDs, that will fundamentally change the way we light our homes and businesses. The energy that could be gained by switching to these more efficient alternatives is staggering." *Id*. at 4.

[37] *See* 153 Cong. Rec. H14270. The December 6, 2017 Senate amendment to H.R. 6 provided:

(b) SENSE OF THE SENATE.—It is the sense of the Senate that the Senate should—

(1) pass a set of mandatory, technology-neutral standards to establish firm energy efficiency performance targets for lighting products;

(2) ensure that the standards become effective within the next 10 years; and

(3) in developing the standards—

(A) establish the efficiency requirements to ensure that replacement lamps will provide consumers with the same quantity of light while using significantly less energy;

(B) ensure that consumers will continue to have multiple product choices, including energy-saving halogen, incandescent, compact fluorescent, and LED light bulbs; and

(C) work with industry and key stakeholders on measures that can assist consumers and businesses in making the important transition to more efficient lighting

[38] *See* 153 Cong. Rec. H16659, H16682. The December 18, 2007 Senate amendment omitted the language "ensure that consumers will continue to have multiple product choices, including energy-saving halogen, incandescent, compact fluorescent, and LED light bulbs" but included provisions requiring DOE to commence GSL rulemaking by 2014 and imposing a 45 lm/W backstop in 2020 should DOE fail to complete the necessary rulemaking. Indeed, Rep. Barton (R-Texas) lamented: "The light bulbs that light this Chamber right now will be illegal when this bill becomes completely implemented. The incandescent light bulb . . . is going to be outlawed." *Id*. at H16747.

[39] *See Abraham*, 355 F.3d at 197 (in light of anti-backsliding provision DOE lacked "unfettered . . . discretion" to delay, and then revise downward, final standards for air conditioners); *see generally S. Coast Air Quality Mgmt. Dist v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006) (Clean Air Act's anti-backsliding provision barred EPA from defining "controls" to arbitrarily exclude certain requirements and which would have effect of worsening air quality).

B. DOE's Proposed Determination is Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law.

Besides being untimely and barred by EPCA's anti-backsliding provision, DOE's proposed determination is arbitrary and capricious, an abuse of discretion and otherwise unlawful. DOE's analysis underlying the proposed determination is fundamentally flawed for several reasons. Additionally, DOE has not complied with numerous other federal requirements, including the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), the Endangered Species Act, the Coastal Zone Management Act, the National Historic Preservation Act, and Executive Order 13132.

1. DOE Improperly Interprets and Applies EPCA's "Features" Provision, 42 U.S.C. § 6295(o)(4).

DOE's proposed determination relies on an erroneous interpretation of EPCA's "features" provision, 42 U.S.C. § 6295(o)(4). DOE reads that provision as limiting its ability to consider benefits resulting from rational consumer and market responses to the growing number of high efficiency lighting options ushered in by increasingly stringent efficiency standards. DOE makes an unsubstantiated assertion that incandescent bulbs offer a unique lighting performance characteristic that other general service bulbs (i.e., LEDs, CFLs) do not. DOE's proposed determination creates a baseless regulatory impediment to a natural transition from inefficient incandescent lamps to widely-available, cheap and efficient substitutes. DOE's reasoning is a departure from its past practice and serves to fundamentally undermine EPCA's purpose.

In its proposed determination DOE has impermissibly interpreted EPCA's "features" provision to justify a standards-setting methodology that precludes consideration of the intended effect of increasingly strengthened efficiency standards: incentivizing efficacious, lower cost substitutes. In short, DOE has employed 42 U.S.C. § 6295(o)(4) to preserve incandescent lighting, a legacy technology that offers consumers no distinct lighting performance-related utility.

The harmful consequence of DOE's proposed determination is that notwithstanding increased choices and lowered prices for LED lamps, incandescent lamps would continue to make up a large part of the U.S. lighting market. Unless addressed by regulatory action such as an appropriate efficiency standard, the incandescent light bulb likely will remain available for purchase in the market even after they are no longer cost-effective for consumers.

2. DOE's Current Approach is an Unjustified Departure from Prior Standards-Setting Practice.

a. DOE Has Previously Considered Benefits Associated with Product Switching.

DOE's refusal to consider, as part of its economic justification analysis, reasonably anticipated energy and cost savings resulting from consumers choosing cheaper and more efficient lighting options such as LEDs and CFLs over higher cost incandescent bulbs is a departure from its own recent practice. In its 2015 final rule amending standards for general

service fluorescent lamps (GSFLs) and IRLs,[40] DOE explicitly considered the savings associated with product switching. Benefits and costs due to product switching were similarly considered in DOE's proposed rule for furnace standards. Here, DOE has no basis for departing from that approach.

In the GSFL/IRL final rule, DOE fully considered consumer choice in estimating the cumulative net present value of the total costs and savings for consumers that would result from the standards under consideration. DOE quantified the costs and benefits attributable to each trial standard level as the difference in total product costs and total operating costs between each standards case and the base case, *accounting for the effects of the standards on product switching and shipments*. There, DOE noted that "[a] portion of the savings in operating costs . . . is due to switching to products with lower operating costs. In particular, the adopted standard in the rulemaking is projected to increase the typical cost of 4-foot MBP lamps relative to 8-foot SP slimline or 4-foot Mini BP T5s, therefore driving some consumers to shift toward the latter two product classes, yielding a reduction in operating costs relative to the base case." [41]

Based on an approach that took into account the effects of the standards on product switching and shipments, DOE adopted a more stringent standard for GSFLs and determined that amending standards for IRLs would not be economically justified. Similarly, in DOE's supplemental proposed rule for residential furnaces and mobile home gas furnaces, DOE considered the product switching scenarios (i.e., switching to heat pumps) that would result in the case of a condensing furnace standard.[42] Similarly, in DOE's yet to be published final rule prescribing standards for commercial packaged boilers[43], the agency considered the impacts associated with building owners switching between different boiler equipment classes. Here, DOE has not adequately explained its basis for ignoring the full costs and benefits that would result from improved standards, including consumers' switching to more efficient alternatives.[44] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must provide a "satisfactory explanation" of its conclusion to justify its proposed action).

b. DOE Has Previously Determined That a Bulb's Lighting Technology Is Not a Performance Characteristic that Offers Unique Consumer Utility.

Significantly, DOE has interpreted 42 U.S.C. § 6295(o)(4) as limiting its authority to adopt a more stringent GSIL standard because doing so would result in the unavailability of a product characteristic or feature found in incandescent bulbs. However, a review of the performance characteristics of the GSIL alternatives that DOE selected for its substitution analysis reveals that those alternatives and incandescent bulbs share many of the same performance features.[45] For example, industry commenters have acknowledged that CFL and

[40] DOE Energy Conservation Program: Standards for General Service Fluorescent Lamps and Incandescent Reflector Lamps; Final Rule, 80 Fed. Reg. 2,015 (Jan. 2015).
[41] 80 Fed. Reg. 4,042, 4,135 (Jan. 26, 2015).
[42] 81 Fed. Reg. 65,720, 65,793 (June 23, 2016).
[43] On October 10, 2019, the United States Court of Appeals for the Ninth Circuit affirmed a district court order directing DOE to follow its own regulations and publish four final energy conservation standards, including standards for commercial package boilers. *NRDC v. Perry*, Nos. 18-15380, 18-1545.
[44] 42 U.S.C. § 6295(o)(2)(B)(i).
[45] *See* Table IV.7, "Alternative Lamps Consumers May Substitute for GSILs," 84 Fed. Reg. at 46,841.

LED lamps can be used to satisfy lighting applications traditionally served by incandescent general service lamps.[46] Indeed, the only performance characteristic unique to incandescent lamps may be their low lifetime and efficacy rate.[47] DOE's proposed determination repeatedly cites to 42 U.S.C. § 6295(o)(4) but fails to articulate which specific performance characteristic or feature would no longer be available.

DOE's past refusal to treat lamp technology as a unique performance feature for product classification purposes highlights the arbitrary nature of DOE's proposed determination and its preferential treatment for incandescent lamp technology. For example, in DOE's 2013 GSL Rulemaking Framework document, DOE acknowledged that it divides covered products into classes by: (a) the type of energy used; (b) the capacity of the product; or (c) any other performance-related feature that justifies different standard levels, such as features affecting consumer utility.[48] DOE further stated that it was considering establishing separate product classes for GSLs based on the following three factors: (1) ballast location (i.e., self-ballasted versus externally ballasted lamps); (2) cover (i.e., covered versus bare lamps); and (3) dimmability. Lamp technology was notably *not* a basis for differential treatment.[49]

Similarly, in DOE's 2014 GSL Preliminary Technical Support Document, DOE observed:

> In the framework document, DOE did not consider establishing separate product classes based on lamp technology. Rather, multiple lamp technologies could be present in a single product class . . . In evaluating GSLs, DOE determined that different lamp technologies do not offer consumers different utility.[50]

DOE has offered no reasonable basis to depart from its prior policy of treating differing lamp technologies as providing equivalent consumer utility. *See F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502 (2009) (when changing positions, an agency must "display awareness that it is changing position," show that "there are good reasons" for the reversal and demonstrate that its new policy is "permissible under the statute").

In the case of residential gas furnaces, DOE cautioned in its proposed furnace standards that:

> Tying the concept of "feature" to a specific technology would effectively lock-in the currently existing technology as the ceiling for product efficiency and eliminate DOE's ability to address

[46] 84 Fed. Reg. at 46,842.
[47] *Id.*
[48] DOE Rulemaking Framework Document for General Service Lamps (Dec. 2, 2013) at 16-17, *available at* https://www.regulations.gov/document?D=EERE-2013-BT-STD-0051-0002.
[49] *Id.*
[50] DOE Preliminary Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: General Service Lamps (Dec. 1, 2014) at 2-56, *available at* https://www.regulations.gov/document?D=EERE-2013-BT-STD-0051-0022. In that GSL rulemaking, which involved CFLs and LEDs, DOE determined that for use in a general service application, a CFL and LED lamp offer similar functionality. Therefore, DOE did not consider product class divisions based on lamp technology.

> technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality for the consumer. DOE is very concerned that determining features solely on product technology could undermine the Department's Appliance Standards Program. If DOE is required to maintain separate product classes to preserve less-efficient technologies, future advancements in the energy efficiency of covered products would become largely voluntary, an outcome which seems inimical to Congress's purposes and goals in enacting EPCA.[51]

DOE's concern over defining a "feature" by way of its technology in the furnace context applies with equal or greater force here, where a wide variety of general service LED and CFL bulbs are available today as convenient, drop-in substitutes.

DOE's proposed determination is inconsistent with positions it has taken in prior GSL rulemaking and DOE has failed to explain why its previously stated rationales and methodologies are no longer valid. DOE's proposal is therefore arbitrary and capricious and in violation of law. 5 U.S.C. § 706(2). *See, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018) (EPA action delaying effective date of chemical disaster rule was arbitrary and capricious because agency failed to explain why its previously-stated rationale in support of rule implementation was no longer valid); *California v. U.S. DOI*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (Department of Interior's repeal of regulations governing the payment of royalties on oil, gas and coal extracted from leased federal and tribal lands was arbitrary and capricious where agency failed to explain inconsistencies between prior findings and decision to repeal rule). "When an agency changes its position, it must 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *NRDC v. U.S. DOE*, 362 F. Supp. 3d 126, 144 (S.D.N.Y. 2019) (citing *Fox Television Stations*, 556 U.S. at 515 (DOE failure to follow agency precedent regarding the standard for issuing stay, without explanation, was arbitrary).

3. DOE Failed to Consider the Need for Energy Conservation as Required by 42 U.S.C. § 6295(o)(2)(B)(i)(VI).

Generally, in evaluating the need for national energy conservation pursuant to 42 U.S.C. § 6295(o)(2)(B)(i)(VI), DOE anticipates that energy savings from amended standards would likely result in improved security and reliability in the nation's energy system. Reduced demand for electricity also may reduce the cost of maintaining system reliability. Moreover, energy savings from strengthened standards would likely result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases.

DOE's failure to conduct an emissions analysis prior to issuing its proposed determination violates EPCA's requirement to evaluate the need for national energy and water conservation *as part* of its economic analysis. DOE cannot determine whether a heightened

[51] 80 Fed. Reg. at 13,138.

efficiency standard is economically justified without first evaluating the emissions benefits from that standard.

4. DOE Over-Estimated Costs Associated with More Stringent GSIL Standards Because the Agency Improperly Assumed Extended Sales of Shatter-Resistant Lamps.

DOE's economic analysis is flawed for the additional reason that the agency under-estimated the amount of projected energy savings in its product substitution scenario. For its analysis, DOE assumed that some consumers would substitute general service incandescent bulbs with shatter-resistant incandescent bulbs which are not subject to a federal standard. Shatter resistant bulbs consume more energy than other incandescent substitutes such as LEDs or CFLs. However, EPCA provides that if sales of shatter resistant bulbs exceed a certain limit, DOE must impose a wattage and sales packaging limit. 42 U.S.C. § 6295(l)(4)(H). By modeling shatter-resistant bulb sales for 30 years without regard to these limits, DOE over-estimated the energy use in the substitution scenario. Because DOE's energy use analysis provided the basis for other analyses, including DOE's energy savings and consumer operating cost savings assessment, the benefits of strengthened standards were under-valued. DOE must adjust its analysis to reflect that consumers would instead substitute GSILs with fewer inefficient shatter-resistant lamps and more highly-efficient LEDs and CFLs.

5. DOE's Belated, Piece-Meal GSL Rulemaking Violates EPCA.

DOE's piece-meal approach to GSL standards rulemaking violates Congress's command that DOE conduct its rulemaking in a timely and orderly fashion pursuant to 42 U.S.C. § 6295(i)(A)(6). DOE notes in the NOPD:

> EPCA requires that DOE make a determination whether standards in effect for general service lamps should be amended to establish more stringent standards than certain standards specified in EPCA. 42 U.S.C. 6295(i)(6)(A)(i)(I). In making that determination DOE is not limited to incandescent technologies and must consider a minimum standard applicable to GSLs of 45 lm/W. 42 U.S.C. 6295(i)(6)(A)(ii). DOE will make that determination and will consider a 45 lm/W standard in a subsequent document.[52]

DOE's delayed, segmented review of GSL and GSIL standards is inconsistent with the detailed, expeditious and logical rulemaking process Congress set forth in 42 U.S.C. § 625(i)(6)(A).[53]

6. DOE's Proposed Determination Mischaracterizes the Scope of Federal Preemption.

DOE's proposed determination also mischaracterizes the scope of federal preemption under EPCA. According to DOE, "none of the narrow exceptions from preemption provided for in 42 U.S.C. § 6295(i)(6)(A)(vi) are available to California and Nevada, and therefore all states, including California and Nevada, are prohibited from adopting energy conservation standards for

[52] 84 Fed. Reg. at 46,857.

[53] For example, 42 U.S.C. § 625(i)(6)(A) requires initiation of GSL rulemaking by 2014 so that a final rule addressing the full scope of GSLs, including GSILs, could be completed before the triggering of the backstop on January 1, 2017.

GSLs." As explained in detail below, California is entitled to exemption from preemption. With respect to other undersigned states, they are not preempted from regulating products outside the scope of EPCA.

a. DOE Lacks Delegated Authority to Declare that All States, Including California and Nevada, are Prohibited from Adopting Energy Conservation Standards for GSLs.

As a general matter, agencies lack legal authority to determine the preemptive effect of statutes, absent express delegation from Congress giving them such authority. *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387 (D.C. Cir. 2013); *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (Agencies "have no special authority to pronounce on preemption absent delegation from Congress."). EPCA does not delegate to DOE authority to decide whether a given state law is preempted. 42 U.S.C. § 6297(b), (c); 6295(i)(6)(A)(vi). *Cf.* 30 U.S.C. § 1254(g) ("Secretary shall set forth any State law or regulation which is preempted and superseded by the Federal program."); 49 U.S.C. § 5125(d)(1) ("A person . . . directly affected by a requirement of a State . . . may apply to the Secretary . . . for a decision on whether the requirement is preempted . . . ."); 47 U.S.C. § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement . . . ."). Nor is DOE entitled to deference for its interpretation of EPCA's preemption provision. *See Wyeth*, 555 U.S. at 576-577 (explaining that the Court has not deferred to an agency's conclusion that state law is preempted); *Grosso v. Surface Transportation Bd.*, 804 F.3d 110, 116 (1st Cir. 2015) (same). Accordingly, the agency should not finalize its proposed determination, nor its proposed analysis of the preemption provision at 42 U.S.C. § 6295(i)(6)(A)(vi).

b. The Exceptions to State Preemption are Available Because DOE Failed to Adopt a Final Rule in Accordance with Clauses (i) through (iv).

EPCA affords California and Nevada three options to adopt standards for GSLs:

> (I) A final rule adopted by the Secretary in accordance with clauses (i) through (iv);
> (II) If a final rule described in subclause (I) has not been adopted, the backstop requirement under clause (v); or
> (III) In the case of California, if a final rule described in subclause (I) has not been adopted, any California regulations relating to these covered products adopted pursuant to State statute in effect as of December 19, 2007.

42 U.S.C. § 6295(i)(6)(A)(vi). These exceptions provided by Congress expressly allow California and Nevada to regulate GSLs despite EPCA's general preemption provision at 42 U.S.C. § 6297(b), (c).

Here, California may avail – and has availed – itself of the second and third exceptions because DOE has not adopted a final rule in accordance with clauses (i) through (iv).[54] 42 U.S.C. § 6295(i)(6)(A)(vi). Moreover, contrary to DOE's assertion that the third exception to preemption does not apply because "there are no California efficiency standards for GSLs in effect as of 2007,"[55] the third exception is, in fact, available to California. DOE misreads the statutory language. Specifically, the phrase, "in effect as of December 19, 2007," modifies and applies to the phrase "State statute" and not to "any California regulations."[56] Thus, so long as California does not rely on statutory authority in effect after December 19, 2007, for the adoption of regulations governing GSLs, then this exception is still available.

Similarly, Nevada may also avail itself of the second exception because DOE has not adopted a final rule in accordance with clauses (i) through (iv). 42 U.S.C. § 6295(i)(6)(A)(vi).

The plain language of the statute is clear and, as discussed below in detail, DOE has failed to fulfill the four required elements prescribed in 42 U.S.C. § 6295(i)(6)(A)(i)-(iv). Failure to fulfill any one of these four elements results in the state preemption exceptions (II) and (III) being triggered. DOE's interpretation of 42 U.S.C. § 6295(i)(6)(A) and the preemption provision is wholly inconsistent with the legislative intent behind the EISA amendments.[57]

i. DOE Failed to Initiate a Rulemaking by January 1, 2014.

To avert the imposition of the backstop, DOE must have, by January 1, 2014, "initiate[d] a rulemaking to determine whether standards in effect for GSLs should be amended to establish more stringent standards than the standards specified in paragraph (1)(A)." DOE has not fulfilled this requirement. DOE issued this NOPD on September 5, 2019, over five years after the deadline. Although DOE published a notice of availability of a framework document in December 2013, this notice did not serve as an initiation of the required rulemaking under 42 U.S.C. § 6295(i)(6)(A)(i). In its final rule, issued September 5, 2019, "Energy Conservation

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[54] California has adopted the backstop requirement of 45 lm/W for GSLs manufactured on or after January 1, 2018. Cal. Code Regs., tit. 20, § 1605.3(k).

[55] 84 Fed. Reg. 46,661, 46,669 (Sept. 5, 2019).

[56] *Nat'l Elec. Mfrs. Ass'n. v. Cal. Energy Comm'n*, No. 2:17-CV-01625-KJM-AC, 2017 WL 6558134, at *9-10 (E.D. Cal. Dec. 22, 2017); Earthjustice Comments to Energy Conservation Program: Energy Conservation Standards for General Service Lamps (Mar. 17, 2016), Docket ID EERE-2013-BT-STD-0051, p. 7.

[57] *See, e.g.*, 153 CONG. REC. H14260-01, 2007 WL 4269990, at H14266 (Dec. 6, 2007) (statement of Rep. Harman) ("In this bill, we ban, by 2012, the famously inefficient 100-watt incandescent bulb . . . We phase out remaining inefficient bulbs by 2014, and by 2020 light bulbs will be three times more efficient, paving the way for the use of superefficient LEDs manufactured in the U.S. by 2020."); 153 CONG. REC. H14270-04, 2007 WL 4269996, at H14820 (Dec. 6, 2007) (Sense of Senate Concerning Efficient Lighting Standards) ("The Senate finds that . . . there are radically more efficient lighting alternatives in the market . . . [and] national policy can support a rapid substitution of new, energy-efficient light bulbs for the less efficient products in widespread use[.]"); *Hearing Before the United States Senate Energy and Natural Resources Committee to Receive Testimony on the Status of Energy Efficient Lighting Technologies and on S. 2017, the Energy Efficient Lighting for a Brighter Tomorrow Act*, S. Hrg. 110-195, 110th Congress (Sept. 12, 2007) (statement of Rep. Harman, Member, House of Representatives) ("Our amendment bans the outdated 100-watt incandescent light bulb by 2012, phases out all inefficient lighting by 2014, and requires that light bulbs sold in the United States be at 300 percent as efficient as today's 100-watt incandescence by 2020."), *available at* https://www.govinfo.gov/content/pkg/CHRG-110shrg39385/html/CHRG-110shrg39385.htm.

Program: Definition for General Service Lamps," DOE claims that this 2013 notice of availability "satisfied the requirements in 42 U.S.C. § 6295(i)(6)(A)(i) to initiate a rulemaking by January 1, 2014."[58] This is inaccurate for many reasons.

First, DOE repeatedly stated in several rulemaking documents subsequent to the December 2013 notice that this rulemaking process was not one to establish energy conservation standards for GSLs, pursuant to clause (i), due to a congressional appropriations restriction.[59]

Second, by DOE's own admission and reliance on 42 U.S.C. § 6295(i)(6)(A)(i), *this* current NOPD is the intended rulemaking referenced in clause (i), stating: "DOE is publishing this NOPD in satisfaction of EPCA's requirement to determine whether the standards for GSILs should be amended."[60]

Finally, at least one federal court has questioned whether DOE initiated rulemaking pursuant to clause (i) when it issued the December 2013 notice. In 2017, the U.S. District Court for the Eastern District of California stated that "a question remains whether DOE actually initiated this rulemaking [in December 2013], especially when DOE has repeatedly indicated that it was not able to undertake the analysis required by clause (i)," and that "DOE's own statements . . . cast doubt on [the] claim that DOE actually initiated the prescribed rulemaking procedure . . . ." *Nat'l Elec. Mfrs. Ass'n.*, 2017 WL 6558134, at *7. DOE failed to fulfill this requirement in clause (i) and, therefore, the exceptions to state preemption in clauses (vi)(II) and (vi)(III) have been triggered.

ii. The Scope of DOE's Proposed Determination is Improperly Narrow and Violates EPCA.

In the rulemaking prescribed by 42 U.S.C. § 6295(i)(6)(A)(i), EPCA required DOE to consider different technologies beyond incandescent lamp technologies and to consider a minimum standard of 45 lm/W for GSLs. 42 U.S.C. § 6295(i)(6)(A)(ii). In fact, as the legislative history shows, this 45 lm/W minimum standard for GSLs was a major reason why states (with the exception of California and Nevada) were preempted from regulating GSLs covered under EPCA.[61]

DOE, however, expressly recognizes these requirements in its NOPD, but then ignores them:

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[58] 84 Fed. Reg. 46,661, 46,663.

[59] 81 Fed. Reg. 14528, 14540-14541 (Mar. 17, 2016) ("Due to the Appropriations Rider, DOE is unable to perform the analysis required in clause (i) of 42 U.S.C. 6295(i)(6)(A). As a result, the backstop in 6296(i)(6)(A)(v) is automatically triggered."); 81 Fed. Reg. 71794, 71798 (Oct. 18, 2016) ("DOE is not conducting any analysis in support of establishing energy conservation standards for GSILs."); 82 Fed. Reg. 7276, 7288 (Jan. 19, 2017) ("[T]he October 2016 NOPDDA neither implemented nor sought to enforce any standard. Rather, the October 2016 NOPDDA sought to define what constitutes a GSIL and what constitutes a GSL under 42 U.S.C. 6295(i)(6)(A)(i)(II), an exercise distinct from establishing standards.").

[60] 84 Fed. Reg. 46,830, 46,832 (citing to 42 U.S.C. § 6295(i)(6)(A)(i) and (iii)).

[61] *Hearing Before the United States Senate Energy and Natural Resources Committee*, *supra* note 57, (statement of Rep. Harman) ("[I]n exchange for preemption, our language requires that the lighting industry meet very tough efficiency standards – approximately 45-50 lumens per watt by 2020 . . .").

> DOE notes that EPCA requires that DOE make a determination whether standards in effect for general service lamps should be amended to establish more stringent standards than certain standards specified in EPCA. 42 U.S.C. 6295(i)(6)(A)(i)(I). In making that determination DOE is not limited to incandescent technologies and DOE must consider a minimum standard applicable to GSLs of 45 lm/W. 42 U.S.C. 6295(i)(6)(A)(ii). DOE will make that determination and will consider a 45 lm/W standard in a subsequent document.

84 Fed. Reg. 46,830, 46,857.

Furthermore, throughout the NOPD, DOE makes clear it considered *only* incandescent technologies and did not consider 45 lm/W as a minimum standard. For example, in Table IV.1, DOE lists all the GSIL technology options it considered for the market and technology assessment; all of the options were limited to incandescent technologies.[62] Even when DOE was evaluating "more-efficacious substitutes" as replacements for the baseline incandescent lamps, DOE limited its analysis to commercially available *incandescent* products.[63] Finding none, it modeled a "more-efficacious substitute" based on a halogen infrared substitute that DOE had previously determined was not economically justified.[64] DOE failed to fulfill clause (ii) and, therefore, the exceptions to state preemption in clauses (vi)(II) and (vi)(III) have been triggered.

iii. DOE Failed to Publish a Final Rule Amending GSIL Standards by January 1, 2017.

EPCA also required DOE to publish a final rule no later than January 1, 2017, if DOE determined that standards for GSILs should be amended. 42 U.S.C. § 6295(i)(6)(A)(iii). The effective date of such a final rule may not be earlier than three years after the date on which the final rule is published. *Id*. DOE has not fulfilled this requirement.

DOE initiated this rulemaking, prescribed by 42 U.S.C. § 6295(i)(6)(A)(i) when it issued the NOPD on September 5, 2019. As clause (iii) makes clear, DOE must provide at least three years from the publication of its final rule before the rule becomes effective. However, the backstop requirement in clause (v) provides that if DOE fails to complete a rulemaking in accordance with clauses (i) through (iv), then the backstop standard of 45 lm/W will take effect on January 1, 2020. Hence, the January 1, 2017 deadline to publish a final rule (with a three-year grace period) is congruent with the January 1, 2020 effective date of the backstop standard. *See Nat'l Elec. Mfrs. Ass'n.*, 2017 WL 6558134, at *9 ("Although clause (iii) might only require a final rule by January 1, 2017, if GSIL standards need to be amended, reading § 6295(i)(6)(A) as a whole precludes a conclusion that DOE has up to January 1, 2020 to complete a final rulemaking when it has not yet begun to address standards for GSLs.").

[62] 84 Fed. Reg. at 46,837.
[63] *Id*. at 46,839-840.
[64] *Id*. at 46,836-837, 46,840.

Once this January 1, 2017 deadline passed, DOE was unable to legally publish a standard that would become effective prior to the January 1, 2020 effective date of the backstop standard and related prohibition on the sale of any GSL that does not meet that standard.[65] DOE failed to fulfill clause (iii) and, therefore, the exceptions to state preemption in clauses (vi)(II) and (vi)(III) have been triggered.

DOE interprets clause (iii) to mean that it first has to determine whether to amend standards for GSLs or GSILs and then the obligation to issue a final rule by a date certain follows.[66] DOE goes on to state that because it has not yet made this predicate determination, the obligation to publish a final rule does not yet exist. DOE applies this same interpretation to its conclusion that the exceptions to state preemption have not been triggered.[67] However, as explained above, there is no requirement in the statute for DOE to make a threshold determination before the exceptions to state preemption provided in clause (vi) can take effect. Moreover, interpreting the statute to require a threshold determination before undertaking the required rulemaking would lead to an absurd and improper result with respect to the exceptions to preemption.[68]

iv. DOE Failed to Consider Phased-In Effective Dates.

Finally, in conducting the rulemaking for amending GSL standards, EPCA required DOE to "consider phased-in effective dates . . . after considering (I) the impact of any amendment on manufacturers, retiring and repurposing existing equipment, stranded investments, labor contracts, workers, and raw materials; and (II) the time needed to work with retailers and lighting designers to revise sales and marketing strategies." 42 U.S.C. § 6295(i)(6)(A)(iv). These considerations were critical to achieving Congress's intent to "phase out . . . inefficient bulbs by 2014" and to make lamps "three times more efficient by 2020, paving the way for the use of superefficient LEDs manufactured in the U.S. by 2020," because clause (iii) provided flexibility to the lighting industry and manufacturers to meet these new requirements.[69] DOE failed to

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[65] *See* California Energy Commission Comment to Energy Conservation Standards for General Service Lamps; Notice of Proposed Rulemaking and Request for Comment, Docket ID EERE-2018-BT-STD-0010-0332, p. 2.
[66] 84 Fed. Reg. 46,661, 46,664.
[67] *Id*. at 46,669.
[68] *See* PG&E and SDG&E Comment to Energy Conservation Standards for General Service Lamps; Notice of Proposed Rulemaking and Request for Comment, Docket ID EERE-2018-BT-STD-0010-0348, pp. 4-5; *see also Nat'l Elec. Mfrs. Assoc.*, 2017 WL 6558134, at *9 ("…NEMA's position that DOE can publish a final rule amending GSL or GSIL standards any time before January 1, 2020 and still preclude California from exercising the preemption exceptions under § 6295(i)(6)(A)(vi) would lead to an absurd result. Here, were DOE able to wait to publish a final rule, then the multiple preemption exceptions available to California 'effective beginning on or after January 1, 2018' would serve no purpose. Specifically, permitting California or Nevada to adopt 'the backstop requirement under clause (v)' would be mere surplusage in light of the backstop requirement triggering on its own 'effective beginning January 1, 2020.'. . . Here, § 6295, when read as a whole, contemplates DOE's publishing a final rule in accordance with clauses (i) through (iv) before the January 1, 2020 backstop requirement would trigger, or by January 1, 2017 if that final rule would amend GSIL standards. The preemption exception permitting California regulations with an effective date as early as January 1, 2018 reflects a deadline for DOE to publish a final rule in accordance with clauses (i) through (iv) before California may adopt its own regulations or adopt the backstop requirement two years early.").
[69] *See* 153 CONG. REC. H14260-01, *supra* note 57 (statement of Rep. Harman); 153 CONG. REC. H14270-04, *supra* note 57 (Sense of Senate Concerning Efficient Lighting Standards).

undertake these required considerations and, therefore, the exceptions to state preemption in clauses (vi)(II) and (vi)(III) have been triggered.

7. DOE Has Not Evaluated the Environmental Impacts of its Proposed Determination Under NEPA.

DOE has determined that its proposed determination is categorically excluded from review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, pursuant to Categorical Exclusion A4 under 10 C.F.R. part 1021, subpart D. In so doing, DOE has violated NEPA, has failed to follow the applicable regulations, and has acted in contravention of controlling case law. For the reasons discussed below, DOE's decision to apply, without any reasoning, Categorical Exclusion A4 to its proposed determination – rather than conduct an environmental impact statement (EIS) or environmental assessment (EA) – is arbitrary and capricious. *NRDC v. Herrington*, 768 F.2d 1355, 1432-33 (D.C. Cir. 1985) (rejecting, as arbitrary and capricious, DOE's refusal to conduct an EA because DOE was required, and failed, to produce convincing reasons not to undertake NEPA review).

In addition, DOE makes a vague and confusing statement about "complet[ing] its NEPA review before issuing the final action." By this statement, it is unclear whether DOE is, in fact, carrying out a NEPA review. If it is, it has violated the statute and its own regulations by failing to timely share its EA or EIS, concurrent with this NOPD. 10 C.F.R. § 1021.213(b) ("DOE shall begin its NEPA review of a proposed rule . . . while drafting the proposed regulation . . ."). Regardless, the purpose of NEPA is "to ensure that federal agencies take a hard look at the environmental consequences of their actions early enough so that it can serve as an important contribution to the decision making process." *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (internal quotation marks omitted). DOE has failed to do so for the proposed determination and, therefore, the action does not comply with NEPA.

DOE should undertake the appropriate and required NEPA review, including preparation of an EIS. In performing this review, DOE must consider all direct, indirect, and cumulative impacts resulting from this rulemaking. 40 C.F.R. § 1508.25.

a. DOE's Proposed Determination is a Major Federal Action Affecting the Environment.

Under NEPA, DOE is required to prepare a detailed statement on the environmental impacts of a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C)(i). If there is a substantial question whether an action may have a significant effect on the environment, then DOE must prepare an EIS. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin. (NHTSA)*, 538 F.3d 1172, 1185 (9th Cir. 2008). DOE may choose, as a preliminary step, to prepare an EA to determine whether a proposed action may significantly affect the environment. *Id.*

This rulemaking is a major federal action under applicable NEPA regulations . 40 C.F.R. § 1508.18(a) ("Actions include . . . new or *revised* agency rules, regulations, plans, policies, or procedures") (emphasis added); 10 C.F.R. § 1021.103 (DOE NEPA regulation adopting the

Council on Environmental Quality (CEQ) regulations at 40 C.F.R. parts 1500 through 1508); 10 C.F.R. § 1021.213(b) ("DOE shall begin its NEPA review of a proposed rule . . . while drafting the proposed regulation . . . ."); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1025 (9th Cir. 2007) ("Rules are federal actions under the regulations published by the CEQ.") (*citing* 40 C.F.R. § 1508.18(a)).

Moreover, by failing to look beyond GSILs and consider a minimum standard of 45 lm/W – as clause (ii) required DOE to do – this proposed determination would have a significant effect on the environment by increasing the use of energy and, in turn, increasing the amount of air emissions and air pollutants released. In fact, DOE expressly recognizes that increased energy standards for GSILs would reduce the environmental impact, but then concedes it will not conduct a utility impact analysis or emissions analysis, in addition to doing no NEPA analysis:

> Energy savings from amended standards also would likely result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases primarily associated with fossil-fuel based energy product. Because DOE has tentatively concluded amended standards for GSILs would not be economically justified for the potential standard level evaluated based on the [payback period] analysis, DOE did not conduct a utility impact analysis or emissions analysis in this NOPD.

84 Fed. Reg. 46,830, 46,835. *See Ctr. for Biological Diversity*, 538 F.3d at 1219 ("Since EPCA's overarching goal is energy conservation, consideration of more stringent . . . standards that would *conserve more energy* is clearly reasonably related to the purpose of the [Corporate Average Fuel Economy (CAFE)] standards. Energy conservation and environmental protection are not coextensive, but they often overlap.").

Clause (ii) clearly states that DOE's rulemaking "shall not be limited to incandescent lamp technologies," and that DOE "shall include consideration of a minimum standard of 45 lumens per watt for [GSLs]." 42 U.S.C. § 6295(i)(6)(A)(ii). In this proposed determination, DOE declined to follow either prescribed element on the basis that GSILs cannot meet a 45 lm/W standard. 84 Fed. Reg. 46,859. However, this tentative conclusion illustrates DOE's obvious misunderstanding of what this statutory amendment was intended to achieve.[70] Accordingly, DOE reached the wrong conclusion regarding the appropriateness of more stringent standards and, thus, is foregoing the energy – and emissions – savings measured by the difference between an appropriate GSL standard (which would be at least as, if not more, efficient as the backstop standard) and the current GSIL standard.

In *Center for Biological Diversity*, the Ninth Circuit overturned the National Highway Traffic Association's (NHTSA) Finding of No Significant Impact (FONSI) on its adoption of Corporate Average Fuel Economy (CAFE) standards where the agency failed to consider the environmental impacts of the excess emissions, which would result from NHTSA's failure to adopt more stringent standards. 538 F.3d at 1220-21. Although NHTSA performed an environmental review under NEPA, the Ninth Circuit struck down its FONSI because NHTSA

[70] *See supra* note 57.

failed to fully disclose and evaluate the environmental effects of not taking more comprehensive action. In particular, the agency failed to consider the cumulative impacts of greenhouse gas (GHG) emissions on climate change and the environment. *Id*. at 1215-17.

Like NHTSA in *Center for Biological Diversity*, DOE faces the obligation to perform a NEPA analysis to understand the environmental impacts that would result from DOE's failure to consider a higher energy conservation standard for GSILs. However, unlike in *Center for Biological Diversity*, in this case, DOE has performed no environmental review of its proposed determination whatsoever, and instead relies on an inapplicable categorical exclusion to evade review. *See id*. at 1217 ("The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."). Furthermore, as explained above, DOE recognizes that higher standards would actually result in reduced emissions of GHGs and air pollutants.

Accordingly, DOE must undertake the necessary NEPA analysis of its rulemaking, and its failure to do so for this proposed determination is arbitrary and capricious. *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 476-78 (2d Cir. 2012) (vacating agency's rulemaking, which the court considered to be a major federal action, because of deficient NEPA review).

b. DOE's Proposed Determination Does Not Qualify for a Categorical Exclusion.

In this NOPD, DOE erroneously determines that Categorical Exclusion A4 applies to its rulemaking. 84 Fed. Reg. 46,859. DOE's decision to apply this categorical exclusion, rather than undertake the necessary level of NEPA review required for this major federal action, is arbitrary and capricious for the following reasons.

i. The Proposed Determination is not an Interpretation or Ruling of an Existing Regulation.

DOE invokes Categorical Exclusion A4, stating that this proposed determination "is an interpretation or ruling in regards to an existing regulation . . ." 84 Fed. Reg. 46,830, 46,859. However, this NOPD is neither an interpretation nor a ruling regarding an existing regulation and, thus, this exclusion does not apply.

This standalone rulemaking was done under EPCA to determine whether the energy conservation standards for GSLs should be amended. 42 U.S.C. § 6295(i)(6)(A)(i)(I); 84 Fed. Reg. at 46,831, 46,832 ("DOE is issuing this NOPD pursuant to the EPCA requirement that DOE must initiate a rulemaking for GSLs that . . . determines whether standards in effect for GSILs . . . should be amended. (42 U.S.C. 6295(i)(6)(A))" *and* "DOE is publishing this NOPD in satisfaction of EPCA's requirement to determine whether the standard in effect for GSILs should be amended. (42 U.S.C. 6295(i)(6)(A)(i) and (iii))"). In so doing, DOE was required to consider specific technologies, as well as a minimum standard. Although this process involved the review of the existing standards for GSILs, this rulemaking went far beyond merely ascertaining the meaning or outcome of an existing rule.

Furthermore, the undersigned were unable to find any past instance – within the Federal Register or on DOE's Categorical Exclusion Determinations Web page – where DOE's Office of Energy Efficiency and Renewable Energy had relied on Categorical Exclusion A4 to support its determination not to undertake NEPA review for a proposed action.[71] The undersigned found only one instance where DOE had relied on Categorical Exclusion A4 in a determination issued by the Office of Science to provide funding for contractor support to its Chicago Office in the performance of its acquisition and assistance responsibilities, cost/price analysis responsibilities, and human resources responsibilities.[72] This one example is consistent with DOE's own interpretation that the kinds of actions falling within Appendix A of its Categorical Exclusions – which includes A4 – are "routine administrative, financial, and personnel actions."[73] This proposed determination certainly is not a routine administrative, financial, or personnel action and requires an appropriate NEPA analysis.

ii. DOE Failed to Consider the Extraordinary Circumstances Related to this Rulemaking That May Affect the Significance of the Environmental Effects of This Rulemaking.

To find that a proposal is subject to a categorical exclusion, 10 C.F.R. §1021.410(b)(2) requires DOE to make a determination that there are no "extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal." Section 1021.410(b)(2) explains that "[e]xtraordinary circumstances are unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources."

In this case, not only did DOE fail to make this requisite determination, but there are, in fact, extraordinary circumstances that may affect the significance of the environmental effects from the NOPD. Specifically, as explained above, DOE expressly recognizes that "energy savings from amended standards also would likely result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gas emissions . . ." 84 Fed. Reg. 46,835. Yet, DOE declined to undertake key analyses – utility impact analysis and emissions analysis – that would substantiate this claim and failed to consider stricter, amended standards. *Id*. This latter failure also violated EPCA, which required DOE to consider a minimum standard of 45 lm/W. 42 U.S.C. § 6295(i)(6)(A)(ii)(II).

DOE was required to, *at the very least*, fully explain its determination that a categorical exclusion applied. *See California*, 311 F.3d at 1177 ("Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least

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[71] *See* U.S. DEPARTMENT OF ENERGY, OFFICE OF NEPA POLICY AND COMPLIANCE, "Categorical Exclusion (CX) Determinations" *available at* https://www.energy.gov/nepa/nepa-documents/categorical-exclusion-cx-determinations, last visited on October 14, 2019.

[72] U.S. DEPARTMENT OF ENERGY, OFFICE OF NEPA POLICY AND COMPLIANCE, "Categorical Exclusion Determinations: A4" (showing existing regulations that relied on Categorical Exclusion A4), *available at* https://www.energy.gov/nepa/categorical-exclusion-determinations-a4, last visited October 14, 2019.

[73] U.S. DEPARTMENT OF ENERGY, General Counsel Scott Blake Harris, *Online Posting of Certain DOE Categorical Exclusion Determinations Policy Statement*, 74 Fed. Reg. 52,129 (Oct. 9, 2009).

explain why the action does not fall within one of the exceptions."); *Reed v. Salazar*, 744 F. Supp. 2d 98, 116-18 (D.D.C. 2010) ("[W]here there is substantial evidence in the record that an extraordinary circumstance might apply, an agency may act arbitrarily and capriciously by failing to explain its determination that a categorical exclusion is applicable."). DOE instead summarily concludes, without any explanation, that the proposed determination "is an interpretation or ruling in regards to an existing regulation." 84 Fed. Reg. 46,859.

iii. DOE Failed to Consider Reasonably Foreseeable Connected and Cumulative Actions.

DOE also violated DOE's NEPA regulations by improperly segmenting its proposed determination. To find that a proposal is subject to a categorical exclusion, 10 C.F.R. § 1021.410(b)(3) requires DOE to determine that its "proposal has not been segmented to meet the definition of a categorical exclusion." Further, 10 C.F.R. § 1021.410(b)(3) requires DOE to consider, in the scope of its NEPA review, connected and cumulative actions. DOE's refusal to consider connected and cumulative actions in this rulemaking was arbitrary and capricious. *Bosworth*, 510 F.3d at 1026-27.

Actions are connected if they "(i) automatically trigger other actions which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2).

For its rulemaking concerning whether to amend standards for GSLs, EPCA required DOE to consider other technologies beyond incandescent lamp technologies and to consider a minimum standard of 45 lm/W. DOE ignores these requirements and instead states it would consider these elements "in a subsequent document." 84 Fed. Reg. 46,859. These required elements are both connected and cumulative to the current proposed determination that DOE was mandated to consider. Separating out these connected and cumulative actions was arbitrary and capricious. *See Del. Riverkeeper v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (agency violated NEPA by impermissibly segmenting connected actions and failing to meaningfully assess cumulative impacts of related actions).

8. DOE Must Consult with Federal Agencies on the Impacts of its Proposed Determination Under the Endangered Species Act.

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, requires federal agencies like DOE to consult with the Secretary of the Interior to ensure the proposed determination is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat of such species." As federal agencies such as the Fish and Wildlife Service have concluded, air pollution and climate change contribute substantially to biodiversity risk. DOE must consult with the Interior Secretary prior to finalizing this proposed determination.

9. The Proposed Determination is Not Consistent with State Programs to Protect Coasts from the Effects of Climate Change.

The Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq*., requires federal programs that affect any land or water use or natural resource of the coastal zone to be carried out in a manner that is consistent, to the maximum extent practicable, with the policies of the State managing the coastal zone. The undersigned coastal states, including California, are vulnerable to sea level rise from climate change. The proposed determination will exacerbate that threat and is therefore inconsistent with relevant state coastal policies and the Coastal Zone Management Act.

10. DOE Has Failed to Consult Under the National Historic Preservation Act.

The National Historic Preservation Act, 54 U.S.C. § 306108, requires the "head of any Federal agency" embarking on a project to "take into account the effect of the undertaking on any historic property." Climate change and air pollution imperil historic properties throughout the country via direct degradation, sea level rise, fire, flood, and other forms of harm. DOE must consult with the relevant federal and state authorities and fully disclose any impacts.

11. DOE Has Failed to Consult Under Executive Order 13132.

Executive Order 13132, "Federalism," 64 Fed. Reg. 43,255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing actions that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the authority supporting any action that would limit States' discretion and to carefully assess the need for such actions. The Executive Order also requires agencies to have a process to ensure meaningful and timely input by State and local officials in the development of policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 Fed. Reg. 13,735 (Mar. 14, 2000). This consultation process includes, among other things, DOE notice to state and local officials of the proposed action, provision of estimated state and local impacts, and invitation to participate in developing regulatory options or policy alternatives.

DOE has tentatively determined that its proposed determination not to amend the GSILs standard will "not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." According to DOE, no further action is required by Executive Order 13132 because states can petition DOE for exemption from such preemption pursuant to 42 U.S.C. § 6297.

DOE's failure to consult with the undersigned states and local governments regarding the proposed determination violates Executive Order 13132. A mechanism for states' ability to petition for exemption from preemption based on "unusual or compelling" state interests is not a substitute for intergovernmental consultation. As DOE is aware, several states have adopted or are considering adopting energy conservation standards for lighting and other products. DOE's

repeal of earlier rules and change in positions on key issues during rulemaking has the potential to frustrate states' energy and climate change policies and creates confusion among consumers and the regulated community. In addition, DOE's failure to engage in intergovernmental consultation on issues with potential preemption implications negatively affects states that rely on DOE adoption and implementation of stringent national standards.

III. Conclusion

DOE's proposed determination not to amend the GSIL standards is contrary to law, frustrates Congressional intent to transition the nation to more efficient lighting sources, and would significantly increase greenhouse gas emissions and consumers' energy costs. DOE's proposed determination is unlawful because it violates EPCA, is arbitrary and capricious, and is otherwise not in accordance with a multitude of other federal laws. DOE should therefore withdraw its proposed determination.

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