

**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:
GSIL2019STD0022@ee.doe.gov
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).

(CO₂) emissions.² Efficiency standards for light bulbs alone are expected to cumulatively save 1.5 trillion kilowatt hours of energy and reduce CO₂ 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;

²See 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-%202017-2016.pdf>.

³Appliance 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.

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

⁵NOPD, 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

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 Rulemaking¹³

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 March 17, 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 rules¹⁷ 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

²⁷See 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 rider³² 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,

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

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 boilers⁴³, 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 underestimated 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

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:

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-efficient substitutes” as replacements for the baseline incandescent lamps, DOE limited its analysis to commercially available *incandescent* products.⁶³ Finding none, it modeled a “more-efficient 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

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

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.

Respectfully submitted,

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