May 3, 2019

ATTORNEY GENERAL RAOUL OPPOSES DEPARTMENT OF ENERGY PROPOSAL TO END COST-SAVING ENERGY STANDARDS FOR LIGHTBULBS

Chicago — Attorney General Kwame Raoul joined a coalition of attorneys general and New York City in opposing the Department of Energy's (DOE) proposal to overturn energy efficiency requirements for certain lightbulbs.

In comments submitted today, Raoul and the coalition assert that the DOE's proposal would hurt consumers who would no longer receive the economic benefits from these savings. The proposal by the DOE would exclude decorative general service and incandescent lightbulbs from meeting heightened minimum energy efficiency requirements. These requirements – which create significant energy savings for consumers – were imposed by the Energy Policy and Conservation Act during the Obama administration.

"The Department of Energy has proposed to roll back lightbulb regulations that both save consumers money on their power bills and cause enormous reductions in climate change-causing carbon emissions," Raoul said. "We cannot afford to go backwards and repeal this critically important rule."

Raoul and the coalition urge the DOE to maintain the stricter definitions enacted in 2017, which included decorative lightbulbs, such as candelabras and globe lamps. The original rule prohibits retailers from selling lightbulbs, including these decorative types of bulbs, that do not meet the minimum standard of 45 lumens per watt. In its current proposal, the DOE would remove decorative lightbulbs from those defined under the rule. The proposal would cost consumers $12 billion each year in lost electricity savings by 2025, or $100 per household per year.

Raoul and the attorneys general argue that by reversing the 2017 Lamp Rules, the DOE would enact a less stringent standard in violation of the Energy Policy and Conservation Act. In addition, the attorneys general point out that the DOE's proposal is unlawful under the Administrative Procedure Act.

Joining Raoul in submitting the comments are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Oregon, Vermont, Washington, as well as New York City.

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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