

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Docket No.

Petitioners,

v.

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

Respondents.

PETITION FOR REVIEW

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

Dated: November 4, 2019

Respectfully submitted,

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Dated: August 29, 2019.

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DEPARTMENT OF ENERGY

10 CFR Part 430

RIN 1904-AE26

**Energy Conservation Program:
Definition for General Service Lamps**

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

ACTION: Final rules; withdrawal.

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

DATES: The final rules published on January 19, 2017 (82 FR 7276 and 82 FR 7322), are withdrawn effective October 7, 2019.

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

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

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I. Authority and Background

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94-163 (42 U.S.C. 6291-6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as "covered products"), which includes general service lamps (GSLs), the subject of this final rule. Amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA) directed DOE to conduct two rulemaking cycles to evaluate energy conservation standards for GSLs. (42 U.S.C. 6295(i)(6)(A)-(B)) GSLs are currently defined in EPCA to include general service incandescent lamps

(GSILs), compact fluorescent lamps (CFLs), general service light-emitting diode (LED) lamps and organic light-emitting diode (OLED) lamps, and any other lamps that the Secretary of Energy (Secretary) determines are used to satisfy lighting applications traditionally served by general service incandescent lamps. (42 U.S.C. 6291(30)(BB))

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

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

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

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

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

On January 19, 2017, DOE published two final rules concerning the definition of GSL. 82 FR 7276; 82 FR 7322. The January 2017 definition final rules amended the definitions of GSIL and GSL by bringing certain categories of lamps that had been excluded by statute

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

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

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

II. Synopsis of Final Rule

In this rule, DOE withdraws the revised definitions of GSL and GSIL established in the January 2017 definition final rules which would otherwise take effect on January 1, 2020.

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

III. Discussion of Comments

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

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

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

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

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

1. Imposition of the Backstop

DOE received comments from the National Electrical Manufacturers Association (NEMA), Westinghouse Lighting, Signify North America Corporation (Signify), GE Lighting, and the American Lighting Association (ALA) agreeing with DOE's statement in the February 2019 NOPR that the backstop standard in 42 U.S.C.

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

There were also commenters who disagreed with DOE's preliminary determination in the February 2019 NOPR regarding the application of the backstop. Such commenters include Earthjustice, the Natural Resources Defense Council (NRDC), Sierra Club, U.S. Public Interest Research Group and Environment America (collectively, the Joint Commenters), the Appliance Standards Awareness Project and 13 co-signing organizations³ (ASAP), the California Energy Commission (CEC), Pacific Gas and Electric Company (PG&E) and San Diego Gas and Electric

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

(SDG&E), and the Attorney Generals of California, New York, New Jersey, Oregon, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, North Carolina, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia and the City of New York (collectively, the State Attorneys General). These commenters assert the backstop standard was triggered by DOE's failure to complete a rulemaking in accordance with 42 U.S.C. 6295(i)(6)(A)(i)–(iv). Thus, beginning on January 1, 2020, the commenters believe that the sale of any GSLs having a luminous efficacy less than 45 lm/W is unlawful under EPCA. (See Joint Commenters, No. 335 at p. 4) Additionally, the Joint Commenters noted that DOE cannot use its inaction to complete a rulemaking as a result of the Appropriations Rider to allow it to indefinitely block the application of the backstop standard for GSLs. (Joint Commenters, No. 335 at p. 7) PG&E and SDG&E further noted that the pre-emption exemption in 42 U.S.C. 6295(i)(6)(A)(vi) would serve no purpose if DOE had no limitation on its timeline to complete the rulemaking. (PG&E and SDG&E, No. 348 at pp. 4–5) PG&E and SDG&E also discounted the argument that DOE needs to take an additional action to make the backstop enforceable. Instead, they stated the backstop was triggered by DOE's failure to comply with clauses (i)–(iv) in section 6295(i)(6)(A) of EPCA and that these provisions have binding effect without the need for prior notice and opportunity for comment, similar to the manner in which DOE finalized the backstop requirements for rough service and vibration service lamps, which were treated as a mere administrative formality. (PG&E and SDG&E, No. 348 at p. 5)

By law, the Secretary must initiate a rulemaking by January 1, 2014 to determine whether standards in effect for GSLs should be amended and whether exemptions for certain incandescent lamps should be maintained or discontinued based, in part, on exempted lamp sales. (42 U.S.C. 6295(i)(6)(A)(i)) If the Secretary determines that standards in effect for GSILs should be amended, the Secretary is obligated to publish a final rule establishing such standards no later than January 1, 2017. (42 U.S.C. 6295(i)(6)(A)(iii)) If the Secretary makes a determination that standards in effect for GSILs should be amended, failure by the Secretary to publish a final rule by January 1, 2017, in accordance with the criteria in the law, would result in the imposition of the backstop provision in

42 U.S.C. 6295(i)(6)(A)(v). That backstop requirement would require that the Secretary prohibit the sale of any GSL that does not meet a minimum efficacy standard of 45 lm/W.

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

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

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

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

for GSILs need to be amended. To that end, DOE has issued a proposed determination published elsewhere in this issue of the **Federal Register**.

2. EPCA's Anti-Backsliding Provision

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

On the contrary, commenters including the Joint Commenters, ASAP, the National Association of State Utility Consumer Advocate (NASUCA), CEC, PG&E/SDG&E, the State Attorneys General, the United States Senators, Consumer Groups, Colorado Office of Consumer Counsel, Connecticut Dept. of Energy and Environmental Protection, and the Emmett Institute on Climate Change and the Environment at UCLA School of Law (Emmett Institute) all asserted that DOE's proposal in the February 2019 NOPR would violate the anti-backsliding provision in 42 U.S.C. 6295(o) of EPCA. By narrowing the scope of the term "general service lamp," the Joint Commenters stated that DOE's proposed action will exempt from the backstop standard all lamp types excluded from the GSL definition in this rulemaking. Instead of meeting the 45 lm/W backstop standard level, each lamp of a type excluded from the definition of GSL will have to meet a weaker energy conservation standard, or no standard at all. Accordingly, in repealing the January 2017 final definitions, the Joint Commenters argued DOE is reducing the minimum energy efficiency required of those lamps that it is excluding from the term "general service lamp," which is an action the anti-backsliding provision forbids. (Joint Commenters, No. 335 at p. 10) The Joint Commenters stated that the anti-backsliding provision applies not only to DOE actions that amend the numerical level of a standard, but also to actions that alter the scope of a standard by exempting products. (Joint Commenters, No. 335 at p. 4) Similarly, the State Attorneys General asserted that, according to the court in *Hearth, Patio and Barbecue Ass'n v. U.S. DOE*,⁵ definitional changes can result in the imposition of otherwise inapplicable numerical standards. (State Attorneys

General, No. 350 at p.7) The Emmett Institute cited *NRDC v. Abraham*⁶ to support its anti-backsliding argument, noting that it is irrelevant that the GSL standards for the seven categories of lamps have not yet reached their effective date, as these lamps became subject to GSL standards at the time the January 2017 definition final rules were published. (Emmett Institute, No. 341 at pp. 4–5) The Joint Commenters rejected DOE's argument in the February 2019 NOPR that its proposal to withdraw the GSL and GSIL definitions could not be considered backsliding because the proposal does not constitute an amendment of an existing energy conservation standard. The Joint Commenters pointed out that in the February 2019 NOPR, DOE claimed that the proposed rule fit within a categorical exclusion from National Environmental Policy Act (NEPA) review that applies to certain rulemakings that establish energy conservation standards for consumer products and industrial equipment. These commenters asserted that DOE cannot simultaneously avail itself of this exemption while at the same time asserting that its instant action is not an energy conservation standard rulemaking, but rather a precursor to any standards development for GSILs. (Joint Commenters, No. 335 at p. 21; *see also* State Attorneys General, No. 350 at p. 28)

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

⁴ See Docket ID: EERE-2017-BT-STD-0057.

⁵ 706 F.3d 499 (D.C. Cir. 2013).

⁶ 355 F.3d 179 (2nd Cir. 2004).

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

Furthermore, even if the backstop requirement in EPCA were to apply, it would operate as a sales prohibition for any GSL that does not meet a minimum efficacy standard of 45 lm/W. The anti-backsliding provision states that the Secretary cannot prescribe any amended *standard* that would allow greater energy use or less efficiency. EPCA defines an energy conservation standard for consumer products as a performance standard that prescribes a minimum efficiency level or maximum quantity of energy usage for a covered product or, in certain circumstances, a design requirement. (42 U.S.C. 6291(6)) In contrast, a sales prohibition in EPCA is tied to whether a transaction in commerce can occur with respect to a covered product, but the prohibition is

not itself a standard.⁷ Because the scope of a sales prohibition is not the same as a standard, the minimum efficacy standard of 45 lm/W mandated by the backstop's sales prohibition is unchanged by this final rule. The anti-backsliding provision in 42 U.S.C. 6295(o) limits the Secretary's discretion only in prescribing standards, not sales prohibitions, and thus is inapplicable to the backstop requirement for GSLs in 42 U.S.C. 6295(i)(6)(A)(v). Therefore, DOE has the authority to change the scope of what lamps would apply to any sales prohibition for GSLs, assuming the backstop applied.

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

B. Withdrawal of Revised GSL and GSIL Definitions

1. General Authority

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

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

PG&E and SDG&E, and similarly, the State Attorneys General, stated that DOE will have acted beyond the express scope of its statutory authority. (PG&E and SDG&E, No. 348 at p. 4; *see also* State Attorneys General, No. 350 at p. 10)

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

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

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

2. Five Specialty Incandescent Lamps

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

NEMA, with the support of other commenters such as Westinghouse Lighting, Signify, GE Lighting, and ALA, agreed with DOE's preliminary determination, and noted that DOE has already decided to discontinue the exemption of rough service lamps and vibration service incandescent lamps in accordance with the specific statutory regulatory regime for those lamps stated in the statute. NEMA stated the specific conditions precedent for the regulation of three other types of exempt incandescent lamps specifically called out by Congress in 42 U.S.C. 6295(l)(4) have not occurred, and therefore discontinuance of the exemptions for

those three lamps is unwarranted under the statute. (NEMA, No. 329 at p. 41) DOE also received comments objecting to its proposed exemptions for the five specialty incandescent lamps on the grounds of "double regulation." PG&E and SDG&E pointed out that GSLs are already defined by statute to include both GSILs and CFLs, both of which are also regulated by separate statute, and clearly intended by Congress to be subject to the backstop requirement. (PG&E and SDG&E, No. 348 at p. 6) PG&E and SDG&E stated that with DOE's interpretation of the statute, there is no scenario where these five lamp types could ever be considered GSLs, which is in direct conflict with Congress's instructions in 42 U.S.C. 6295(i)(6)(A)(i)(II) to DOE to consider discontinuing their exemptions statuses. Additionally, the Joint Commenters commented that the NOPR points to no evidence indicating that regulating the five tracked lamps as GSLs would create confusion, nor does it even begin to explore how the standards for GSLs would interact with the standards currently imposed for rough service and vibration service lamps. The Joint Commenters noted that EPCA requires that DOE provide justification for its conclusion to discontinue these five exempted lamps with substantial evidence per 42 U.S.C. 6306(b)(2). (Joint Commenters, No. 335 at p. 16)

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

The regime for potential regulation of the five lamp types was added to the statute in the same enactment that required DOE to consider standards for GSLs, *i.e.*, the Energy Independence and Security Act of 2007, Public Law 110–140, *see* section 321(a)(4). Moreover, in both instances the criteria stated in the statute for consideration for standards was based on sales of the subject lamps. If Congress had intended for these five lamp types to be considered for potential inclusion under the GSL authority there would have been little reason to have also established a separate process for potential imposition of energy conservation standards using similar criteria. As such, DOE agrees that, using this logic, these five lamp types could not be GSLs. However, DOE disagrees that this

interpretation conflicts with Congressional instruction in 42 U.S.C. 6295(i)(6)(A)(i)(II). Notably, the language in this section refers to "exemptions for certain incandescent lamps." Thus, this provision still has meaning even if the five (l)(4) lamps are excluded from applicability.

3. Incandescent Reflector Lamps

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

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

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

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

DOE does not have the authority to regulate IRLs as GSLs, because the statute plainly states, in 42 U.S.C. 6291(30)(BB)(ii)(I), that the term "general service lamp" does not include the list of lamps that were excluded from the term general service incandescent lamp (which includes reflector lamps). The statute then continues by specifically excluding any general service fluorescent lamp or incandescent reflector lamp. 42 U.S.C. 6291(30)(BB)(ii)(II). The notion that DOE was given a "broad grant of authority provided in 42 U.S.C. 6295(i)(6)(A)(i)(II) to remove these exemptions" attempts to suggest that DOE has the authority by rule to amend

a statute. Simply put, DOE does not have that authority. DOE has to implement the law as written. And, where Congress has spoken directly to an issue it is not within the agency's power to act in contravention of that statement. To the extent that one might argue the statute is unclear on this point, DOE believes that it is the best reading (and, consequently, a reasonable reading) of the statute that Congress's express statements in two distinct provisions that IRLs are not GSLs should be interpreted as meaning that Congress intended that DOE not consider IRLs to be GSLs. Apart from consideration as a GSL, DOE continues to have the authority to establish energy conservation standards applicable to IRLs under separate requirements set by Congress in 42 U.S.C. 6295(i)(3).

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

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

EPCA defines the term GSL to include any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by GSILs. (42 U.S.C. 6291(30)(BB)(i)(IV)). In the 2017 GSL Rule, DOE determined that lamps that would satisfy the same applications as traditionally served by GSILs are ones that would provide overall illumination and can functionally be a ready substitute, or "convenient unregulated alternative" for lamps already covered as GSILs. 82 FR 7277. To inform its assessment as to which GSL exclusions should be maintained, DOE also used sales data, as the statute directs in 42 U.S.C. 6295(i)(6)(A)(i)(II). *Id.* Consequently, the definitions of GSL and GSIL adopted in the January 2017 definition final rules included a broad array of specialty incandescent lamps and candelabra base lamps, such as T-Shape, B, BA, CA, F, G16–1/2, G25, G30, S, and M–14 lamps. In the February 2019 NOPR, and in direct response to stakeholder comments, DOE proposed to withdraw the revised definitions of GSIL and GSL which added T-shape lamps and B, BA, CA, F, G16–1/2, G25, G30, S, and M–14 lamps to the definition of GSIL, agreeing with commenters that it may have overstepped its limited authority by

relying on factors which Congress did not intend it to consider. 84 FR 3125. In the February 2019 NOPR, DOE further acknowledged it is unlikely Congress intended that DOE have broad discretion to regulate an incandescent lamp out of existence based on an assumption that manufacturers could make and sell an LED version of the lamp or that Congress authorized DOE to eliminate "convenient unregulated alternatives" that DOE concluded could undercut this unstated intent of Congress. *Id.* Along these lines, DOE also proposed to withdraw its revision to the GSL definition that included all lamps having an ANSI base, such as candelabra base lamps. DOE preliminarily determined that overbreadth in its January 2017 definition final rules had the consequence of including lamps such as candelabra base lamps as GSILs, even though such lamps could not meet the statutory definition of GSIL since such lamps do not have a medium screw base. New data submitted by NEMA also indicated that DOE's estimated shipment numbers for candelabra base incandescent lamps were potentially too high by a factor of more than two. *Id.*

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

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

In contrast, DOE received numerous comments from stakeholders asserting that DOE failed to provide an adequate reason for its departure from its previous interpretation of congressional intent. (See State Attorneys General, No. 350 at p. 12) For example, the Joint Commenters stated that, in basing its decision to discontinue exemptions for non-pear lamps on unit sales in combination with other factors, DOE was acting entirely within its discretion under EPCA. (Joint Commenters, No. 335 at p. 18) Similarly, the Joint Commenters noted that DOE lawfully invoked its authority under 42 U.S.C. 6291(30)(BB)(i)(IV) to include candelabra lamps within the definition of general service lamp. (Joint Commenters, No. 335 at p. 20) The Joint Commenters, as well as PG&E and SDG&E commented that this provision does not require that a bulb be able to fit within the definition of general service lamp; the provision simply requires that the bulb be able to serve the same lighting application. *Id.* (PG&E

and SDG&E, No. 348 at 7) Similarly, the California Investor Owned Utilities (CA IOUs) commented at the public meeting for the February 2019 NOPR that, while GSILs typically have a medium screw base, GSLs are supposed to also capture CFLs, GSLEDs, and OLEDs, and those have more than just [medium screw]⁸ base types. (CA IOUs, Public Meeting Transcript, No. 44 at p. 92) PG&E and SDG&E and the Joint Commenters also asserted that NEMA’s updated shipment information for candelabra lamps does not support a repeal. The Joint Commenters stated that the February 2019 NOPR ignores the limited role of shipment information in deciding whether a lamp is “used to satisfy lighting applications traditionally served by general service incandescent lamps.” (Joint Commenters, No. 335 at p. 20) Similarly, PG&E and SDG&E commented that DOE’s previous usage of the concept of “lamp-switching potential” to address non-sales-based considerations was supported by various stakeholders as a means for proactively addressing product loopholes that would otherwise proliferate. (PG&E and SDG&E, No. 348 at p. 6) DOE’s assertion that it must depend only on sales for evidence of lamp switching to warrant the discontinuation of exemptions would remove DOE’s discretion to maintain or discontinue exemptions, which is contrary to Congress’s express intent in EISA. (PG&E and SDG&E, No. 348 at p. 6)

The definition of “general service lamp” includes specific categories of lamps, along with “any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps.” 42 U.S.C. 6291(30)(BB)(i). DOE determines that its January 2017 definition final rules that treated specialty lamps such as T-Shape, B, BA, CA, F, G16–1/2, G25, G30, S, M–14 and candelabra base lamps as GSLs is not consistent with the best reading of the statute, because such lamps are not used in the same applications as the standard general service incandescent lamp. The exemptions from the GSIL definition for the specific shapes listed in the previous sentence generally apply to lamps of 40 watts or less. DOE agrees with NEMA that traditional general service incandescent lighting applications do not include light bulbs that provide only a limited range of light output, such as light bulbs with very

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

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

for discontinuing its exemption under the statute.

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

5. Supplemental Definitions

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

congressional definition of the medium base compact fluorescent lamp. (NEMA, No. 329 at p. 34)

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

C. Additional Issues

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

1. Preemption

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

Federal energy conservation requirements generally supersede state laws or regulations concerning energy conservation standards. (42 U.S.C. 6297(a)-(c)) Absent limited exceptions, states generally are precluded from adopting energy conservation standards for covered products both before an energy conservation standard becomes effective, and after an energy conservation standard becomes effective. (42 U.S.C. 6297(b) and (c)) However, the statute contains three narrow exceptions to this general preemption provision specific to GSLs in 42 U.S.C. 6295(i)(6)(A)(vi). Under the limited exceptions from preemption specific to GSLs that Congress included

in EPCA, only California and Nevada have authority to adopt, with an effective date beginning January 1, 2018 or after, either:

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

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

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

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

2. Manufacture Date in Lieu of Sales Prohibition

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

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

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

3. Consumer/Environmental Harm

DOE received many comments, including 64,145 bulk comments contained in batched form letters, two spreadsheets, and executive correspondence surrounding the alleged uncertainty introduced by the February 2019 NOPR and its potential to increase costs for retailers and consumers while damaging the environment. (See ASAP, No. 331 at p. 8; NEEA, No. 358 at p. 2; Ceres BICEP Network, No. 313 at p. 3; Green Mountain Power, No. 259 at p. 1; United States Climate Alliance, No. 270 at pp. 1–2) The Sierra Club and NRDC filed several comments from individuals through a form letter process. The Sierra Club submitted comments from 3,788 individuals strongly urging DOE to abandon its proposal stating that it would cost Americans billions in electricity bills and put millions of tons of greenhouse gases and pollutants in the atmosphere. These commenters also stated that application of more stringent requirements for recessed lighting, chandeliers, and other decorative fixtures beginning in 2020 will save consumers nearly \$12 billion annually. Additionally, they noted that the adoption of lighting standards have already greatly increased the market for high-efficiency LED bulbs and the proposal was taking them in the wrong direction. (Sierra Club, No. 236, 238, 240, 244, 246, 390, 392, 395, 397, 399, 401, 403, 405, 407, 408, 410, 412, 414, 415, 417, 421, 423, 424 at all pages) The NRDC submitted comments from 46,945 individuals stating strong opposition to DOE's proposal to narrow the scope of light bulbs covered by what commenters understood as the upcoming 2020 backstop. Further, these commenters stated that DOE's proposal would cost consumers billions of dollars in additional annual energy costs and increase carbon emissions by millions of tons. (NRDC, No. 343, 359 at spreadsheet attachment) NASUCA commented that consumers of essential utility service stand to lose environmental benefits and millions of dollars in energy efficiency savings if the DOE rolls back lighting standards.

(NASUCA, No. 347 at p. 4) NEEA noted that the proposal, if finalized, will cause utilities in the Northwest region to replace the lost energy savings either by building more power plants or by creating more utility programs around other products to achieve the savings through much less cost-effective means. (NEEA, No. 358 at p. 1) The Energy Strategy Coalition⁹ asserted that the February 2019 NOPR would hinder technological progress and make it harder for them to reduce their systems' emissions and provide cost-saving programs to customers (Energy Strategy Coalition, No. 324 at p. 3) The California Municipal Utilities Association, SMUD, CEC, PG&E and SDG&E, the Consumer Federation of America and the National Consumer Law Center (Consumer Groups), the United States Senate, and the Colorado Energy Office also generally noted that substantial consumer benefits are threatened by DOE's withdrawal of the definition final rules as, among other things, it will result in increased energy consumption and higher electricity bills. (SMUD, No. 312 at p. 2; CEC, No. 332 at p. 4; PG&E and SDG&E, No. 348 at pp. 1–2; Consumer Groups, No. 310 at p. 2; United States Senate, No. 377 at p.1 and Colorado Energy Office, No. 330 at p. 1) Joint commenters from utilities/energy associations (collectively, NorthWestern Energy),¹⁰ as well as comments from the Sunrise Bay Area Hub, estimated that DOE's proposal to rescind the 2017 definition of GSL would reduce household energy savings by an average of \$100 every year (as of 2025). (NorthWestern Energy, No. 327 at p. 1; Sunrise Bay Area Hub, No. 317 at p. 1) Many of these commenters, as well as the Green Energy Consumers Alliance, the American Chemical Society, the New York State Assembly Commission on Science and Technology, the Nevada

Governor's Office of Energy, and the Connecticut Department of Energy and Environmental Protection also asserted that the February 2019 NOPR will release even more carbon emissions from the power sector. (Green Energy Consumers Alliance, No. 322 at p. 1; American Chemical Society, No. 298 at p. 1; the New York State Assembly Commission on Science and Technology, No. 321 at p. 1; the Nevada Governor's Office of Energy, No. 171 at p. 1; and the Connecticut Department of Energy and Environmental Protection, No. 261 at p.2) Further, the State Attorneys General, CEC and the Emmett Institute commented that DOE's proposed action has significant environmental effects which must be evaluated under NEPA. (State Attorneys General, No. 350 at p. 27; CEC, No. 332 at p. 5; and Emmett Institute, No. 341 at p. 7) Emmett Institute stated that the February 2019 NOPR would almost certainly result in a significant increase in energy consumption once numerous categories of lamps are no longer subject to EPCA standards. The State Attorneys General added that the proposed rule violates other environmental laws, including the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act. (State Attorneys General, No. 350 at p. 31)

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

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

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

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

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

Further, although the February 2019 NOPR relied on the same categorical exclusion used in the January 2017 definition final rules that were met with no objections,¹² this rulemaking, as DOE has earlier explained, is not the adoption of an energy conservation standard, and is distinct from the types of rules that would accurately fall under Categorical Exclusion B5.1(b). Like the January 2017 definition final rules, this action does not establish an energy conservation standard, but rather only defines certain statutory terms (here, by adhering to the existing definitions in the statute). Moreover, as previously noted, the 2017 definition final rules are not yet in effect. Consequently, DOE's action in this rule does not result in a change to the environmental effect of the existing rule being amended. (10 CFR 1021.410) A change that would

result in a measurable environmental impact would be the product of a separate regulatory action, such as setting energy conservation standards which this rule does not adopt. DOE's action here maintains the scope of the definitions of GSL and GSIL as that of the statute and withdraws a broader scope and supplemental definitions prior to their having taken effect. These actions are limited to identifying which lamps are defined as GSLs and GSILs and do not cause a change to the environmental effect of the existing rule. In fact, this action maintains the status quo. As such, this action, therefore, fits within this A5 categorical exclusion and its use meets DOE's obligations to evaluate the environmental impact of its proposed action under NEPA.

4. Data

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

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

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

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

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

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

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

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

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

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

Commenters provided different views on the scope of retailers affected by uncertainty. NEMA noted that large retail hardware stores and urban/suburban retail stores tend to move light bulbs through the distribution channel than specialty retail stores or rural retail stores. (NEMA, No. 329 at p. 42) LEDVANCE noted that all types of retailers, and other upstream stakeholders in the supply chain, are affected by uncertainty regarding the January 2020 date. (LEDVANCE, No. 326 at p. 5) Among the sources of uncertainty LEDVANCE listed that

components could be stranded, packaging must be recycled/scrapped at cost, contracts with suppliers and customers that cannot be fulfilled may result in financial penalties, excess inventory must be scrapped, and that last minute product reset is challenging with possibly lower pricing requirements. *Id.* The California Municipal Utilities Association (CMUA) provided a different perspective and stated that retailers that have already adjusted their procurement activities to reflect the 2017 definitions will be harmed. (CMUA, No. 328 at p. 3)

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

The Colorado Office of Consumer Counsel (COCC) and the Colorado

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

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

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

technical support document or other analyses for the definition change.

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

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

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

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

B. Review Under Executive Order 13771

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

1. Analytical Approach

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

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

As a result of prior confusion regarding whether the 45 lm/W backstop had been triggered, it is likely that there would be substantial variation in what retailers understand to be prohibited for sale after January 1, 2020. In the face of this uncertainty, retailers would be compelled to continue to order and stock the full suite of lamp offerings to avoid losing customers to a competitor that offers a more

comprehensive lamp selection, with retailers risking stranded inventory. However, the retailer's financial risk of keeping the shelves well-stocked goes beyond the cost of the retailer inventory stranded on the retailer's shelves and warehouses. The retailer's financial liability starts from the moment a purchase order is placed in the supply chain. Under most conditions, once an order is placed the retailer cannot cancel or modify the order without penalty. (NEMA, No. 329 at p. 43; LEDVANCE, No. 326 at p. 5) Thus, the applicable inventory losses include all losses associated with product orders cancelled when a prohibition for which a retailer is not adequately able to anticipate and plan is effective. This inability to take appropriate action in advance of the prohibition on sales would create costs associated with potential stranded work in progress and inventory in manufacturer warehouses as well as the distribution channel. (NEMA, No. 329 at p. 42; LEDVANCE, No. 326 at p. 5) Contractually, the risks and costs could be shared between retailer and others in the supply chain, but in all likelihood, and for sake of simplicity, the analysis assumes that all inventory costs are entirely passed on to the retailer. The analysis does not include explicit financial penalties for cancelled orders because those values are captured in the analysis as opportunity costs to the retailer in the form of lost sales revenue for all lamps in the distribution chain.

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

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

2. Cost Estimate

NEMA’s confidential estimates of total domestic shipments for the years 2015 to 2018 were used to forecast future shipments. An exponential forecast was determined to be the best fit to the data provided. The analysis uses manufacturer shipments as a

surrogate for unit sales because it is presumed that retailer inventories remain fairly constant from year to year such that annual shipments track closely with actual unit sales. Shipments were assumed to be equally spread among months of the year. Based on comments from industry, as few as 6 weeks or as many as 6 months of incandescent lamp sales may be at risk. Thus, a low-end and high-end estimate were calculated based on the two different time frames.

3. Results

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

TABLE 1—SUMMARY OF COST IMPACTS

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

TABLE 2—SUMMARY OF ANNUALIZED COST IMPACTS

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

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

C. Review Under the Regulatory Flexibility Act

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

DOE has made its procedures and policies available on the Office of the General Counsel’s website (<http://energy.gov/gc/office-general-counsel>).

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

For manufacturers of GSLs, the SBA has set a size threshold, which defines those entities classified as “small businesses” for the purposes of the statute. DOE used the SBA’s small business size standards to determine whether any small entities would be subject to the requirements of the rule See 13 CFR part 121. The size standards are listed by NAICS code and industry description and are available at <https://www.sba.gov/document/support-table-size-standards>. Manufacturing of GSLs

is classified under NAICS 335110, “Electric Lamp Bulb and Part Manufacturing.” The SBA sets a threshold of 1,250 employees or less for an entity to be considered as a small business for this category.

To estimate the number of companies that could be small businesses that manufacture GSLs covered by this rulemaking, DOE conducted a market survey using publicly available information. DOE’s research involved information provided by trade associations (*e.g.*, NEMA¹³) and information from DOE’s Compliance Certification Database,¹⁴ EPA’s ENERGY

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

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

STAR Certified Light Bulbs Database,¹⁵ previous rulemakings, individual company websites, SBA's database, and market research tools (e.g., D&B Hoover's reports¹⁶). DOE used information from these sources to create a list of companies that potentially manufacture or sell GSLs and would be impacted by this rulemaking. DOE screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a "small business," or are completely foreign owned and operated. DOE determined that eight companies are small businesses that maintain domestic production facilities for general service lamps.

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

D. Review Under the Paperwork Reduction Act of 1995

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

instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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

E. Review Under the National Environmental Policy Act of 1969

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

F. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final rule and has determined that it does not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of state regulations as to energy conservation for the products that are the subject of this

final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

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

H. Review Under the Unfunded Mandates Reform Act of 1995

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

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

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

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

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

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

J. Review Under Executive Order 12630

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

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

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

that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

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

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

M. Congressional Notification

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

V. Approval of the Office of the Secretary

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

List of Subjects in 10 CFR Part 430

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

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

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

Daniel R Simmons,

Assistant Secretary, Energy Efficiency and Renewable Energy.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

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

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Parts 12 and 141

[USCBP–2016–0075; CBP Dec. No. 19–11]

RIN 1651–AB02

Technical Correction to Centers of Excellence and Expertise Regulations

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

ACTION: Final rule; technical correction.

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

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

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

SUPPLEMENTARY INFORMATION: