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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION and AMERICAN LIGHTING ASSOCIATION, Plaintiffs, **v.** **CALIFORNIA ENERGY COMMISSION; DAVID HOCHSCHILD, Chairman, and JANEA A. SCOTT, KAREN DOUGLAS, J. ANDREW McALLISTER, and PATTY MONAHAN, Commissioners, in their official capacities,** Defendants.	Case No. 2:19-CV-02504-KJM-DB **OPPOSITION OF CALIFORNIA ENERGY COMMISSION, ET Al., TO MOTION FOR TEMPORARY RESTRAINING ORDER** Date: December 27, 2019 Time: 9:00 A.M. Courtroom: 3 Judge: Hon. Kimberly J. Mueller Trial Date: Not Set Action Filed: December 13, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

Plaintiffs National Electrical Manufacturers Association (NEMA) and the American Lighting Association (ALA) (collectively Plaintiffs) have the burden of proof to show all four factors required for a temporary restraining order (TRO). Plaintiffs fail as to all four factors. Under the first two factors, they cannot show that they are likely to prevail on the merits or that their members will suffer irreparable harm. Under the last two factors, the balance of equities tips against Plaintiffs, and issuance of the TRO is against the public interest.

As discussed in more detail below, the Energy Policy Conservation Act (EPCA), as modified by the Energy Independence and Security Act (EISA), the statute at the center of this proceeding, did two things relevant to this litigation: it instituted a backstop energy efficiency standard for general service lamps if the United States Department of Energy (DOE) failed to timely commence a rulemaking to consider similar energy efficiency standards, and, most importantly, it provided California three distinct exceptions to preemption: one in the event DOE established an applicable standard, and two if it did not. Notably, it also allowed California to institute standards in accordance with the exceptions two years earlier than the backstop was scheduled to take effect: January 1, 2018 versus January 1, 2020 for the backstop. This is a clear indication of Congressional intent to provide California (and to a lesser extent Nevada, which was also included in two of the three exceptions) special status in implementing energy efficiency standards applicable to general service lamps.

II. SUMMARY OF ARGUMENT

DOE was required to initiate a rulemaking by January 1, 2014 to consider whether to amend efficiency standards for general service lamps (GSLs) and whether "exemptions for certain incandescent lamps should be maintained or discontinued." 42 U.S.C. § 6295(i)(6)(A)(i). [1]Governing law required DOE to publish a final rule for GSLs by January 1, 2017. 42 U.S.C. § 6295(i)(6)(iii), however, it failed to do.

[1] The failure was largely due to budget appropriations riders that DOE claimed prevented it from conducting the rulemaking. Consol. Appropriations Act 2012, Pub. L. No. 112-74 § 315, 125 Stat. 786, 879.

On January 19, 2017, DOE published two final rules expanding the definition of GSLs (the definitional rules), effective January 1, 2020. 82 Fed. Reg. 7276 & 82 Fed. Reg. 7322. The definitional rules themselves did not establish standards for the expanded list of GSLs. Instead, DOE's failure to conduct and conclude a rulemaking for GSL standards did two things: That failure (1) triggered a national 45 lumens/watt (lm/W) "backstop" standard for GSLs (Backstop Standard), and (2) make available to California two exceptions from preemption, allowing California to regulate them either by instituting the backstop standard itself or by establishing "any…regulations relating to these covered products adopted pursuant to State statute in effect as of December 19, 2007." 42 U.S.C. § 6295(i)(6)(A)(vi)(II), (III). Since the Backstop Standard applied to the expanded list of GSLs, the law's anti-backsliding provision (42 U.S.C. § 6295(o)) prevents any subsequent action on the part of DOE that would weaken the standard, discussed below.

DOE's actions have consequences. As explained above, DOE's failure to initiate the GSL rulemaking by January 1, 2014 and complete it in accordance with 42 U.S.C. § 6295(i)(6)(A)(i)-(iv) by January 1, 2017 or publish a final standards rule by January 1, 2017 that produced savings greater than or equal to a standard 45 lumens/watt triggered the Backstop Standard. Under that standard, 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), DOE's failure to engage in a timely rulemaking also lifted preemption for California under 42 U.S.C. § 6295(i)(6)(A)(vi)(II)-(III), allowing it, effective January 1, 2018, to adopt a 45 lm/W standard for GSLs as well as "any California regulations relating to these covered products adopted pursuant to State statute in effect as of December 19, 2007." The regulations at issue here were adopted pursuant to Cal. Pub. Res. Code § 25402, which was in effect by December 19, 2007.

The California Energy Commission (Commission) anticipated DOE's failure to act, and, as permitted by the rescission of federal preemption discussed above, adopted a 45 lm/W GSL Rule effective January 1, 2018, and rules further increasing the efficiency of LED Lamps and Small Diameter Directional Lamp (SDDL) effective January 1, 2018 and July 1, 2019. In November

2019, the Commission aligned its definition of GSLs with DOE's 2017 definition, adding five of the lamps at issue here, subjecting these lamps to the 45 lm/W standard.

Issues raised by Plaintiffs in this case are similar to issues involved in a prior case where NEMA sued the Commission in August 2017, challenging the Commission's prior GSL rules. *National Electrical Manufacturers Association v. California Energy Commission*, 2017 WL 6558134 (2017). This Court denied NEMA's motion for judgement on the pleadings, and the action was subsequently dismissed. In its ruling, this Court favorably noted the Commission's position that DOE's failure to meet the provisions of the federal statute triggered the Backstop Standard, discussed above, and lifted preemption as to GSL standards (including definitions included in such standards) under 42 U.S.C. § 6295(i)(6)(A)(vi)(II)-(III).

On February 8, 2019 DOE issued a Notice of Proposed Rulemaking purporting to repeal the January 19, 2017 definitional rules. DOE published its purported final rule September 5, 2019. 84 Fed. Reg. 46661. The legality of this repeal is the subject of litigation filed by the California Attorney General and 15 other states on November 4, 2019.

Plaintiffs maintain that the January 19, 2017 definitional rules were based on a misreading of the law. Regardless of whatever basis DOE or Plaintiffs allege for DOE's purported repeal of the prior rules, the Commission was and remains clearly authorized to regulate the additional lamps at issue in this case, because DOE's failure to observe the statutory 2014 and 2017 deadlines lifted the law's preemptive effect with respect to California. Additionally, DOE's attempt to repeal the definitional rules is prevented by the federal statute's anti-backsliding rule which prohibits DOE from "prescribing any amended standard which increases maximum allowable energy use… of a covered product." 43 U.S.C. § 6295(o). The January 19, 2017 definitional rules are protected by the law's anti-backsliding provision since the rules took effect, the Backstop Standard was triggered, and the rules merely defined the products subject to the Backstop Standard. Even standards that take effect prospectively are subject to the anti-backsliding rule and enjoy its protection. *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004) (*Abraham*).

Moreover, DOE's purported repeal of the expanded GSL definitional rules is ineffective, as discussed in more detail below, since it violates the federal Administrative Procedures Act (APA). Just as NEMA was not entitled to the relief it sought from this Court in 2017, Plaintiffs are not entitled to the relief they seek from this Court in this proceeding. As discussed below, because Plaintiffs fail to satisfy their burden, this Court should preserve the status quo established by Congress and DOE's properly finalized 2017 definitional rules, and deny Plaintiffs' motion for a TRO.

III. BACKGROUND

A. Statutory and Regulatory Background

1. Evolving Federal Regulation of Energy Efficiency

Congress enacted the Energy Policy Conservation Act in 1975. Pub. L. 94-163 (December 22, 1975) (EPCA). Congress designed EPCA to create a comprehensive national energy policy to "reduce domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs." *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1364 (D.C. Cir. 1985) (*Herrington*) [quoting S.Rep. No. 516, 94th Cong., 1st Sess. 116-17 (1975)].

To achieve this end, EPCA contained measures for the improvement of energy efficiency of thirteen named home appliances that contributed significantly to energy demand, referred to in EPCA as "covered" products. Congress authorized DOE's predecessor, the Federal Energy Administration, to designate additional products that made similar contributions to energy demand. *Abraham*, *supra*, 355 F.3d 179, 185. EPCA originally focused on a voluntary, market-based approach that emphasized product testing and labelling, together with voluntary targets.

Congress revisited EPCA in 1987, when it passed the National Appliance Energy Conservation Act, Pub. L. 100-12 (March 17, 1987) (NAECA). *Abraham*, 355 F.3d at 186. This time, rather than relying on DOE or voluntary standards, Congress set efficiency standards that "in most cases are as strong as, or stronger than, any State standards" for 12 covered products.[2]

[2] Congress also set a schedule under which DOE was to review these standards and determine whether they should be amended. *Abraham*, 355 F.3d at 187. But to ensure that these standards were not relaxed over time, Congress included an anti-backsliding provision, preventing DOE from setting any amended standard that "increases the maximum allowable

S. Rep. No. 100-6, at 2 (1987). NAECA also contained a preemption provision that largely remains in place today, providing that, in general, these federal standards would preempt state standards. *Id.* But Congress also recognized the progress that California had made in setting appliance energy efficiency standards, noting that "[b]ecause the State of California has already enacted standards and has been very active on this issue, special provisions are included in the bill relating to these State standards." *Id.* at 3.

Congress added lamps to EPCA in 1992, when it added general service fluorescent lamps and incandescent reflector lamps to the list of covered products and set energy efficiency standards for these lamps. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2821, 2824 (October 24, 1992). In 2005, Congress established standards for medium screw base compact fluorescent lamps. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 629, 631 (August 8, 2005).

Major categories of lamps, however, including general service incandescent lamps (GSILs), were still not covered by EPCA or subject to federal efficiency standards. In 2004 the Commission helped fill those gaps by establishing the nation's first energy efficiency standards for GSILs.[3] And in 2006, the Commission adopted even more stringent standards for these lamps.[4]

Congress addressed GSLs in 2007, when it passed the Energy Independence and Security Act (Pub. L. 110-140, Stat. 1492 (December 19, 2007) (EISA). EISA defines a "general service lamp" as including: "(I) general service incandescent lamps;[5] (II) compact fluorescent lamps;

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energy use, or decreases the minimum required energy efficiency of a covered product." National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, 101 Stat. 103, 114 (1987).

[3] Cal. Code Regs., tit. 20, § 1605.3(k)(2), Table K-3 (2005); see also Appliance Efficiency Regulations Rulemaking, Docket #04-AAER-1, http://energy.ca.gov/appliances/archive/2004rulemaking/notices/2004-12-22_ORDER_ADOPT.PDF

[4] Cal. Code Regs., tit. 20, § 1605.3(k)(2), Table K-3 (2006); see also Appliance Efficiency Regulations Rulemaking, Docket #05-AAER-2. http://www.energy.ca.gov/appliances/archive/2006rulemaking1/documents/2006-04-26_hearing/2006-06-12_ORDER_ADOPTING.PDF

[5] EISA defines "general service incandescent lamp" as "a standard incandescent or halogen lamp that-- (I) is intended for general service applications; (II) has a medium screw base; (III) has a lumen range of not less than 310 lumens and not more than 2,600 lumens; and (IV) is capable of being operated at a voltage range at least partially within 110 and 130 volts." A number of lamp types are excluded from this definition. 42 U.S.C. § 6291(30)(D).

(III) general service light-emitting diode . . . lamps; and (IV) 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). This definition excludes: "(I) any lighting application or bulb shape [excluded from the definition of a general service incandescent lamp]; or (II) any general service fluorescent lamp or incandescent reflector lamp." 42 U.S.C. § 6291(30) (BB)(ii).

EISA also expanded the list of lamps constituting "covered products" under EPCA. Congress expanded the list by adding GSILs to the enumerated covered products, but it did not add the broad class of GSLs, or general service LED lamps to that list. 42 U.S.C. § 6292(a)(14). In addition to including GSLs on the list of covered products, Congress established energy efficiency standards for GSILs. EISA §. 321(a)(3), 121 Stat. at 1577-79.[6]

EISA also established a process to ensure that efficiency standards for GSLs are strengthened over time. In particular, EISA required DOE to initiate a rulemaking by January 1, 2014, to determine whether to amend standards for GSILs and whether to end exemptions for certain incandescent lamps. 42 U.S.C. § 6295(i)(6)(A)(i). If DOE determined that standards in effect for GSILs should be amended, it was required to publish a final rule by January 1, 2017, amending the standards. 42 U.S.C. § 6295(i)(6)(A)(iii). The statute also establishes the Backstop Standard, which mandated that, if DOE "fails to complete a rulemaking in accordance with clauses (i) though (iv) or if the final rule does not produce savings that are greater than or equal to the savings from a minimum efficacy standard of 45 lumens per watt," then "the Secretary shall prohibit the sale of any general service lamp that does not meet a minimum efficiency standard of 45 lumens per watt," beginning January 1, 2020. 42 U.S.C. § 6295(i)(6)(A)(v). The statute also contains preemption exceptions for California and Nevada, both in the event DOE did in fact publish a final rule and in the event it did not. 42 U.S.C. § 6295(i)(6)(A)(v). In the case of

[6] Due to a drafting error, the EISA provisions establishing initial standards for general service incandescent lamps were superseded by other amendments in a subsequent section of EISA and were not codified into the U.S. Code. *See* notes following 42 U.S.C. § 6295 (discussing amendments made by sections 321 and 322 of EISA to 42 U.S.C. § 6295(i)). DOE adopted the initial standards for general service incandescent lamps that Congress established in EISA. *See* 10 C.F.R. §430.32(x)(1).

California, if DOE failed to publish its final rule in accordance with clauses (i) through (iv) by January 1, 2017, it had the option of either adopting the Backstop Standard or "any . . . regulations relating to these covered products adopted pursuant to State statute in effect as of December 19, 2017." 42 U.S.C. § 6295(i)(6)(A)(vi)(II)-(III).

As discussed below, DOE did not finalize a rule according to subclauses (i) – (iv), and, therefore, the Backstop Standard has been triggered and two out of the three exceptions to preemption, provided in 42 U.S.C. § 6295(i)(6)(A)(vi) are available to California (and one to Nevada).

In 2013, DOE initiated a rulemaking that purported to consider whether to adopt new and amended energy efficiency standards for GSLs, issuing a notice of public meeting and availability of framework document, and seeking comments and relevant data "on any subject within the scope of the rulemaking." Energy Efficiency Program for Consumer Products: Energy Conservation Standards for General Service Lamps, 78 Fed. Reg. 73,737 (Dec. 9, 2013). DOE was unable to consider amended standards for GSILs in this rulemaking, however, because Congress had passed the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 315, 125 Stat. 785 (2012) (Appropriations Rider). This Appropriations Rider prohibited DOE from using any funds to implement or enforce standards for GSILs. U.S. Dept. of Energy, Energy Conservation Standards Rulemaking Framework Document for General Service Lamps, at 11 (Dec. 2, 2013). ("Because section 315 appears to curtail any further activity to implement or enforce standards for GSILs, DOE will not be including lamps that meet the definition of GSIL in the GSL rulemaking at this time.")[7] Therefore, the rule initiated by DOE in 2013 did not meet the necessary requirements established by Congress in 42 U.S.C. § 6295(i)(6)(A)(i).

In March 2016, DOE published a notice of proposed rulemaking (NOPR), proposing a revised definition for GSLs and energy efficiency standards for certain GSLs. Energy Efficiency Program: Energy Conservation Standards for General Service Lamps, 81 Fed. Reg. 14,528 (proposed Mar. 17, 2016). DOE still did not consider amending the standards for GSILs because

[7] Available at https://www.regulations.gov/contentStreamer?documentId=EERE-2013-BT-STD-0051-0002&contentType=pdf.

the Appropriations Rider had been continued in other appropriations bills. *See*, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 313(1), 128 Stat. 2103 (2014). In this 2016 NOPR, DOE asserted that the Appropriations Rider prevented it from assessing whether to amend standards for GSLs. 81 Fed. Reg. at 14,540 ("Due to the Appropriations Rider, DOE is unable to perform the analysis required in clause (i) of 42 U.S.C. 6295(i)(6)(A). As a result, the backstop in 6296(i)(6)(A)(v) is automatically triggered.").

On October 18, 2016, DOE published a notice of proposed definitions and data availability for GSLs. Energy Conservation Program: Energy Conservation Standards for General Service Lamps, 81 Fed. Reg. 71794 (proposed Oct. 18, 2016). In this notice, DOE proposed to expand the definition of GSLs to include, among other things, certain previously exempted lamp types. This notice explicitly did not include any proposed energy efficiency standards for the lamps, however. *Id.* As a result, DOE was unable to meet its statutory obligation to consider a minimum efficiency standard of 45 lm/W. 42 U.S.C. § 6295(i)(6)(A)(ii).

On January 19, 2017, DOE published two final rules that established definitional rules for GSLs (the "expanded definition"), which effectively applied the standards for GSLs to the lamps included in those expanded definitions. One final rule expanded the definition of GSL to include various other base types and lamp shapes and eliminated some of the exemptions for specified EISA-exempt lamps. Energy Conservation Program: Energy Conservation Standards for General Service Lamps, 82 Fed. Reg. 7276 (Jan. 19, 2017). The other final rule expanded the definition of GSL to include incandescent reflector lamps. Energy Conservation Program: Energy Conservation Standards for General Service Lamps, 82 Fed. Reg. 7322 (Jan. 19, 2017). Both rules were scheduled to take effect January 1, 2020. 82 Fed. Reg. at 7276; 82 Fed. Reg. at 7322.

On August 15, 2017, DOE issued a notice of data availability and request for information, in order to "inform its decision on whether to amend standards for GSILs." Energy Conservation Program: General Service Incandescent Lamps and Other Incandescent Lamps Request for Data, 82 Fed. Reg. 38,613 (Aug. 15, 2017) [hereinafter "GSL Data Request"]. DOE explicitly acknowledged that the final rule resulting from the 2016 NOPR and expanding the definition

published on January 19, 2017 could not analyze GSILs due to the Appropriations Rider. GSL Data Request 82 Fed. Reg. 38,614.

On February 8, 2019, DOE published a new NOPR seeking to withdraw the properly finalized expanded definition of GSLs. Energy Conservation Program: Energy Conservation Standards for General Service Lamps, 84 Fed. Reg. 3120 (proposed Feb. 11, 2019) (2019 Proposed Withdrawal). Despite significant opposition to the legality of such an unprecedented reversal of DOE's well-documented justifications for expanding the definition of GSLs, DOE finalized the unlawful withdrawal on September 5, 2019. Energy Conservation Program: Definition for General Service Lamps, 84 Fed. Reg. 46,661, 46,662 (Sept. 5, 2019) [hereinafter the GSL Final Withdrawal]. This GSL Final Withdrawal is currently the subject of litigation brought by 15 State Attorneys General, including California.

2. California's Long History of Regulating Energy Efficiency Standards

The Commission was established in 1974, when the California Legislature passed the Warren-Alquist Act (the Act). 1974 Cal. Stat. 501-540. In passing the Act the Legislature recognized that the rapid rate of growth in energy use at that time was due in part to inefficient and unnecessary uses of energy and that continuation of this trend would result in serious depletion of the State's resources and threaten the State's economy and environment. *Id.* at 501. The Legislature created the Commission to oversee the development of generation and transmission facilities and "to employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, thereby reducing the rate of growth of energy consumption, prudently conserve energy resources, and assure statewide environmental, public safety, and land use goals." *Id.* at 502. Since that time, California has been a leader in setting appliance energy efficiency standards. As the Ninth Circuit Court of Appeals has acknowledged, "California boasts an extensive and laudable appliance efficiency program." *Air Conditioning and Refrigeration Institute v. Energy Res. Conservation and Dev. Comm'n*, 410 F.3d 492, 495 (9th Cir. 2005) (*Air Conditioning*). California Public Resources Code section 25402 is the centerpiece of this program; it authorizes the Commission to "[p]rescribe, by regulation, standards for minimum operating efficiency" for appliances. [16]

Consistent with the law and California's history of setting the bar for efficiency standards, California has led the multi-state litigation mentioned above, challenging the DOE's unlawful withdrawal of the January 19, 2017 definitional rules. Since DOE failed to publish a final rule amending the standards for GSILs by January 1, 2017, federal law authorizes California to adopt regulations requiring a 45 lm/W standard for GSLs effective January 1, 2018, two years before the standard applies nationally. 42 U.S.C. § 6295(i)(6)(A)(vi). The Commission's backstop regulation applies to "(1) GSILs; (2) compact fluorescent lamps; (3) general service light-emitting diode (LED or OLED) lamps; and (4) any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by [GSLs]." Cal. Code Regs., tit. 20, § 1602(k). The standard adopted through this regulation applies to GSLs sold or offered for sale in California that are manufactured on or after January 1, 2018. The federal Backstop Standard bans all sales of non-complying GSLs nationally beginning January 1, 2020, regardless of the date of manufacture. The California regulation covers lamps that qualify as GSLs under state (Cal. Code Regs., tit. 20 §1602(k)) and federal (42 U.S.C. § 6291(30)(BB)) definitions (which are identical and both include some types of LED lamps). The Commission adopted this regulation pursuant to California Public Resources Code section 25402 (which was in effect December 19, 2007).[8]

B. Procedural Background

1. California's Regulation of GSL Standards

a. EISA's Express Exceptions to Preemption

In addition to directing DOE to undertake a specified rulemaking on GSLs, *supra*, Congress acknowledged California's leadership on energy efficiency in EISA by including three express exceptions from preemption. First, if DOE met its statutory obligations to establish a final rule in accordance with 42 U.S.C. § 6295(i)(6)(A)(i)-(iv), then California and Nevada could adopt that final rule two years early. 42 U.S.C. § 6295(i)(6)(A)(vi)(I). Because DOE did not meet its statutory obligations, there is no final federal rule for California or Nevada to adopt under this

[8]EISA contains preemption exceptions applicable to California. If DOE failed to adopt a final rule in accordance with EISA, California is allowed to adopt, effective beginning on or after January 1, 2018 (1) the backstop requirement and (2)"any California regulation relating to these covered products adopted pursuant to State statute in effect as of December 19, 2007." 42 U.S.C. §6295(i)(6)(A)(vi).

exception. However, Congress contemplated DOE's potential failure to meet its obligations, and provided two additional exceptions should this happen.

The second express exception to preemption states that if DOE fails to satisfy its statutory requirement to adopt a final rule pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv), then California and Nevada may adopt the 45 lm/W backstop standard for GSLs on January 1, 2018, two years before the Backstop Standard would go into effect nationwide. 42 U.S.C. § 6295(i)(6)(A)(vi)(II).

The third express exception to preemption, which is available only to California, states that if DOE fails to satisfy its statutory obligations to adopt a final rule regarding GSLs by January 1, 2017, pursuant to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv), then California may adopt regulations related to "these covered products" (GSLs) based on a State statute in effect as of December 19, 2007 (EISA's effective date). 42 U.S.C. § 6295(i)(6)(A)(vi)(III). The applicable State statute is the Warren-Alquist Act. Cal. Pub. Res. Code § 25402(c).

b. The Commission's Rulemaking

Anticipating that DOE would not complete a GSLs rulemaking as required by EISA, on December 3, 2008, the Commission adopted regulations that established a 45 lm/W standard for GSLs, effective on January 1, 2018. *See* Initial Statement of Reasons Proposed Amendments to Appliance Efficiency Regulations at 1 and 7 (Docket No. 08-AAER-1A, Aug. 8, 2008).[9] In this 2008 rulemaking, the Commission adopted the federal statutory definition of GSLs into its regulations. Cal. Code Regs. tit.20, § 1602(k).

DOE failed to meet its statutory obligations to publish a final rule according to 42 U.S.C. § 6295(i)(6)(A)(i)-(iv) by January 1, 2017, thereby triggering the Backstop Standard and associated exceptions to preemption. Because DOE failed to meet its statutory obligations, California's 45 lm/W backstop standard went into effect on January 1, 2018.

On March 30, 2017, the Commission issued a regulatory advisory indicating that the 45 lpw backstop that was set to go into effect on January 1, 2018 would only apply to the definition of

[9] Available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=47852" https://efiling.energy.ca.gov/GetDocument.aspx?tn=47852; see also, 2008 Rulemaking on Appliance Efficiency Regulations, Order 08-1203-11 (Dec. 3. 2008), available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=49300.

GSLs in California's regulations and that "[t]he definitions recently adopted by DOE and published in the Federal Register on January 19, 2017, are not applicable to the California Appliance Efficiency Regulations until they are adopted by the California Energy Commission in a rulemaking," Regulatory Advisory, Appliance Efficiency Regulations for Lamps: Effective Dates (March 30, 2017).[10]

Shortly after the 2017 Regulatory Advisory, on April 21, 2017, the Commission issued an invitation to participate in a rulemaking to expand the scope of GSLs, as indicated in the 2017 Regulatory Advisory.[11] Although Plaintiffs claim that the Commission's rulemaking process "lay dormant…until the weeks leading up to the Department's withdrawal" (MPA 8:27; see also MPA 9:1-5), from May to October 2017 the Commission held two public webinars, established two public comment periods, and conducted a public workshop to review the Commission's proposal. Draft Staff Report: Analysis of General Service Lamps (Expanded Scope) (August 3, 2018) [hereinafter "Draft Staff Report"]. NEMA, as well as some of its individual members, participated in this pre-rulemaking stage of the proceedings. *See*, e.g. NEMA's Comment: Re: General Service Lamps, Docket No. 17-AAER-07 (June 16, 2017)[12]

This extensive public engagement led to the Commission's Draft Staff Report in 2018, which described the basis for the Commission's proposal to align the state definition of GSLs with the federal definition. Draft Staff Report (August 3, 2018). ALA provided comments on the Draft Staff Report. See, American lighting Association Comments on Draft Staff Report Analysis of General Service Lamps (Expanded Scope) (Sept. 13, 2018)[13] NEMA also provided written comments. See, NEMA Comments on CEC Staff Report Analysis of General Service Lamps (Expanded Scope) 17-AAER-07 (September 17, 2018)[14]

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[10] Available at https://ww2.energy.ca.gov/appliances/documents/2017-03-30_Regulatory_Advisory_Lighting.pdf.

[11] General Service Lamps" Docket; Available at https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=17-AAER-07

[12] Available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=219137&DocumentContentId=26718.

[13] Available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=224698&DocumentContentId=55256.

[14] Available at

The Commission initiated the formal rulemaking process on August 15, 2019, during which it accepted public comment on the proposal. Again, NEMA submitted comments during this public comment period.[15] The Commission stated that the purpose of the rulemaking was, among other things, intended "to incorporate the federal definitions published on January 19, 2017, and the 45 lumen-per-watt efficacy standard into both state and federal efficiency standards for general service lamps." Revised Notice of Proposed Action at 4 (August 25, 2019).[16] Additionally, in order to be consistent with federal statute, the state would prohibit sales of GSLs that could not meet the existing 45 lm/W backstop standard beginning on January 1, 2020. *Id.* at 5. The Commission unanimously adopted this expanded definition on November 13, 2019.[17]

IV. ARGUMENT

To succeed in convincing this Court to issue a TRO, Plaintiffs bear the burden of establishing: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of injunctive relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A TRO or preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*; see also *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) [plaintiffs "face a difficult task in proving that they are entitled to this 'extraordinary remedy.'"] Moreover, the "clear showing" requirement imposed on the moving party is particularly strong when a party seeks a temporary restraining order. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

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https://efiling.energy.ca.gov/GetDocument.aspx?tn=224730&DocumentContentId=55291.

[15] See, NEMA Comments on CEC Notice of Proposed Action General Service Lamps (Expanded Scope 19-AAER-04. Available at: https://efiling.energy.ca.gov/GetDocument.aspx?tn=229971&DocumentContentId=61456.

[16] Available at: https://efiling.energy.ca.gov/GetDocument.aspx?tn=229530&DocumentContentId=60941

[17] See, Resolution Adopting Order. Available at: https://efiling.energy.ca.gov/GetDocument.aspx?tn=230816&DocumentContentId=62434.

As discussed below, plaintiffs fail to satisfy their burden of proof on any of the four elements. Because failure to satisfy the burden of proof on any one of the four elements is fatal to an application for injunctive relief, plaintiffs' motion must be denied.

A. Plaintiffs are not likely to succeed on the merits.

1. The Commission's regulations are not preempted

There can be no dispute that EPCA includes exceptions to federal preemption for California (and Nevada) with respect to the regulation of energy efficiency standards for GSLs. Two years ago, when NEMA challenged certain Commission energy efficiency regulations on grounds of express and implied conflict preemption, this Court denied NEMA's motion for judgment on the pleadings because this Court concluded it "cannot foreclose the possibility that exceptions to preemption under § 6295(i)(6)(A)(vi) apply to CEC's regulations." *Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n*, No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *8 (E.D. Cal. 22, 2017).

As described below, Plaintiffs cannot sustain their burden to demonstrate a likelihood of success on the merits because California had clear statutory authority to adopt the expanded definition of GSLs, which includes the specified five lamp types, in light of DOE's failure to meet its statutory obligations and its January 2017 rulemaking. As discussed above, DOE did not finalize a rule in accordance with its statutory objectives, the Commission appropriately relied on the express exceptions to preemption afforded by 42 U.S.C. § 6295(i)(6)(A)(vi)(II) and (III) to (1) adopt its November 13, 2019 rule expanding the definition of GSLs and (2) apply the 45 lm/W "backstop" standard to them. The relevant exception to preemption allows the Commission to adopt "any California regulations relating to these covered products adopted pursuant to State statute in effect as of December 19, 2007." 42 U.S.C. § 6295(i)(6)(A)(vi)(III). The Commission engaged in a lengthy public process to adopt DOE's expanded definition for GSLs in accordance with the authority granted by the Warren-Alquist Act. Cal. Pub. Res. Code § 25402(c). Therefore, by virtue of its exception to preemption and its state authority, the Commission properly adopted DOE's expanded definition of GSLs on November 13, 2019. Therefore, the

Commission's rule is neither expressly preempted nor does it frustrate Congress's purpose to allow California to adopt such a rule.

DOE's subsequent action more than two years later, on September 5, 2019, purporting to repeal its previously adopted definition of GSLs failed to comply with governing statutory and procedural standards, and is currently subject of litigation. Accordingly, Plaintiffs cannot assert that their reliance on DOE's challenged action establishes a foundation for a reasonable likelihood of success on the merits of their preemption claims.

Furthermore, the Commission's definition of GSLs does not present an obstacle to Congress's purpose "to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products." 42 U.S.C. § 6201(5). When this Court denied NEMA's motion for judgment on the pleadings on implied conflict preemption grounds, it considered and rejected NEMA's blanket assertion that Commission regulations that established standards more stringent than DOE's standards inevitably constitute an obstacle to Congress's objectives:

> NEMA has not shown that CEC regulations imposing energy efficiency standards under preemption exception provisions create an obstacle to Congress's objectives of conserving energy and improving energy efficiency. Even the possibility that DOE might choose less stringent standards than California's, if and when it does publish a final rule addressing GSL and GSIL standards, may not present an obstacle to Congress's objectives. [Citation omitted.]"

Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n, No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *9-10 (E.D. Cal. 22, 2017).

As this Court further observed, "Concerns about patchwork regulations are minimal because California is the only state permitted to implement its own regulations beyond adopting the backstop requirement." *Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n,* No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *9-10 (E.D. Cal. 22, 2017) [Citing 42 U.S.C. § 6295(i)(6)(A)(vi)(II)-(III).] This Court concluded, "Ultimately, NEMA fails to show a conflict between federal and state standards or an obstacle to Congress's objectives where CEC has exercised a preemption exception provided by the statute itself." *Id.*

The five lamps at issue remain part of the federal definition of GSLs and were properly included in the Commission's 2019 rule. Therefore, California is not subject to express preemption from regulating these lamps. Similarly, because the Commission's 2019 GSL definition is constant with DOE's 2017 expanded definition and clearly comports with Congress's intent to allow California to adopt such a rule, there is no conflict that would result in preemption. Accordingly, Plaintiffs cannot assert that their reliance on DOE's challenged action establishes a foundation for a reasonable likelihood of success on the merits of their preemption claims.

2. DOE's 2019 withdrawal of the expanded definition is unlawful and does not affect the scope of California's exception to preemption

a. DOE's withdrawal violates EPCA's anti-backsliding provision, 42 U.S.C. § 6295(o)(1)

EPCA explicitly prohibits DOE from prescribing "any amended standard which increases the maximum allowable energy use…or decreases the minimum required energy efficiency, of a covered product." 42 U.S.C. § 6295(o)(1). Congress established this anti-backsliding provision "to maintain a climate of relative stability with respect to future planning by all interested parties." House Rpt. 100-11 at 22 (March 3, 1987). The market confusion and harm created by DOE's 2019 withdrawal is exactly what Congress intended to protect against. State Attorneys General from 15 states, including California, submitted comments on a wide range of substantive legal and procedural issues in response to DOE's September 5, 2019 NOPD that purported to backtrack on the duly issued January 19, 2017 expanded definition of GSLs. Request for Judicial ("RJN"), Ex. 1 [November 4, 2019 Comments of State Attorneys General]

Because the 45 lm/W backstop had been triggered on January 1, 2017, when DOE properly finalized the rule expanding the definition in 2017, the lamps within the scope of the new definition immediately became subject to the backstop, effective January 1, 2020. Although the January 2017 expanded definition was not effective until January 1, 2020, it is a final rule's publication date, as opposed to its effective or compliance date, that triggers the anti-backsliding provision. *See Abraham*, *supra*, 355 F.3d 179, 196 (2d Cir. 2004) (finding that "section 325(*o*)(1) [of EPCA, codified as 42 U.S.C. § 6295(o)(1)] must be read to restrict DOE's subsequent discretionary ability to weaken that standard at any point thereafter. In other words, publication

must be read as the triggering event for the operation of section 325(o)(1)."). Therefore, DOE's 2019 withdrawal seeks to change the scope of GSLs such that some lamps would become subject to a less stringent standard than 45 lm/W and some lamps would no longer be subject to any standard. This action clearly violates EPCA's anti-backsliding clause and is, therefore, unlawful.

b. DOE's withdrawal is arbitrary and capricious and violates the Administrative Procedure Act

In addition to being prohibited by EPCA's anti-backsliding provision, DOE's 2019 regulation purporting to repeal the 2017 rulemaking is unlawful because it was arbitrary and capricious and otherwise failed to comply with the Administrative Procedure Act (APA). If an agency decides to change direction on an adopted regulation, it must explain why the previously stated rationale in support of the original regulation is no longer valid and explain any inconsistencies between its prior findings in enacting the rule and its decision to repeal it. In choosing to reverse course two years after the expanded definition was adopted, DOE did neither. See, e.g., *Air Alliance Houston v. E.P.A.*, 906 F.3d 1049 (D.C. Cir. 2018), and *California v. United States Dept. of Interior*, 2019 U.S. Dist. LEXIS 66300. DOE asserted that regulation of 3-way, vibration service, rough service, and shatter-resistant lamps as GSLs was unsupported because these lamps were already subject to a separate statutory provision based on unit sales and should not be subject to a separate standard as GSLs. 84 Fed. Reg. 3124. DOE, however, had previously addressed this point in 2017 and concluded that the separate provision cited did not mean that Congress intended to exclude these lamps from consideration as GSLs and a plain reading of the statute did not prevent DOE from regulating these lamps as GSLs if it determined that they were "used to satisfy lighting applications traditionally served by general service incandescent lamps"; DOE made these necessary determinations with regard to these lamps in 2017. Where there are two overlapping provisions, courts have given effect to both; having two provisions covering the same product is not grounds for an agency to ignore one of the provisions.[18] *Friends of the Earth v. E.P.A.*, 446 F.3d 140, 144-5 (D.C. Cir. 2006). DOE does

[18] Here at would be reasonable to find no conflict, particularly where the purpose of the federal statues at issue are to promote and encourage energy efficiency of appliances.

not offer any other explanation as to why it is reversing its previous position or show that the "new policy is permissible under the statute." *Federal Commissions Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Nor does DOE provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox*, *supra,* at 515-16; *id.* at 537 (Kennedy, J., concurring). DOE cannot "simply disregard contrary or inconvenient factual determinations that it made in the past." *Air All. Houston, supra*, 906 F.3d 1049, 1067 (D.C. Cir. 2018). Therefore, DOE's 2019 regulation was arbitrary and capricious and unlawful. DOE's decisions on the other lamps in the 2019 regulation suffer from the same fatal flaws.

c. Plaintiffs' reliance on DOE's assertions that California is preempted is inaccurate as a matter of law

Plaintiffs rely on DOE's September 5, 2019 NOPD to assert that DOE actually completed the rulemaking within the statutory deadline, such that the express exceptions to preemption in 42 U.S.C. § 6295(i)(6)(vi)(I) and (II) do not apply. Among other things, the September 5, 2019 NOPD claims that DOE's December 9, 2013 initiation of rulemaking and data collection[19] "satisfied the requirements to initiate a rulemaking by January 1, 2014." 84 Fed. Reg. 46,661, 46,663. This is wrong as a matter of fact and law for no less than three reasons.

First, DOE repeatedly stated in several rulemaking documents subsequent to the December 9, 2013 notice that the process would not establish energy conservation standards for GSLs due to a congressional appropriations restriction.[20] Indeed, in the prior litigation challenge to the Commission's energy efficiency regulations, this Court noted that "a question remains whether DOE actually initiated this rulemaking, especially when DOE has repeatedly indicated that it was not able to undertake the analysis required by clause (i)," and "DOE's own statements from December 2, 2013 through March 17, 2016 cast doubt on NEMA's claim that DOE actually

[19] DOE's Notice of Public Meeting and Availability of Framework Document was 78 Fed. Reg. 73737 (December 9, 2013).

[20] 81 Fed. Reg. 14528, 14540-14541 (Mar. 17, 2016). ("[T]he October NOPDDA neither implemented nor sought to enforce any standard. Rather, the October 2016 NOPDDA sought to define what constitutes a GSIL and what constitutes a GSL under 42 U.S.C. § 6295(i)(6)(A)(i)(II), an exercise distinct from establishing standards.")

initiated the prescribed rulemaking procedure when it lacked the funds to conduct the required analysis." *Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n*, No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *7 (E.D. Cal. 22, 2017).

Second, the scope of the September 5, 2019 NOPD fails to include "consideration of a minimum standard of 45 lumens per watt for general service lamps," as required by 42 U.S.C. § 6295(i)(6)(A)(ii). By DOE's own admission and reliance on 42 U.S.C. § 6295(i)(6)(A)(i), the September 5, 2019 NOPD is the intended rulemaking referenced in clause (i), stating: "DOE is publishing this NOPD in satisfaction of EPCA's requirement to determine whether the standards for GSILs should be amended." 84 Fed. Reg. 46830, 46832 (citing 42 U.S.C. § 6295(i)(6)(A)(i) and (iii)). The September 5, 2019 NOPD reflects it considered only incandescent technologies and did not consider 45 lm/W as a minimum standard. 84 Fed. Reg. at 46837, 46836-840. DOE thereby failed to satisfy clause (ii) triggering the exceptions to preemption in clauses (vi)(II) and (vi)(III), which specifically grant a preemption exception to California if a California statute in effect as of December 19, 2007 provided the Commission with authority to regulate GSL.[21] The Warren-Alquist Act was enacted in 1974. Pursuant to this state statutory authority, the Commission promulgated regulations establishing energy efficiency standards for GSLs.

Third, DOE's September 5, 2019 NOPD fails to comply with the statutorily imposed deadline for completing the rulemaking process. DOE was required to "publish a final rule not later than January 1, 2017, with an effective date that is not earlier than 3 years after the date on which the final rule is published." 42 U.S.C. § 6295(i)(6)(A)(iii). The January 1, 2017 deadline to publish a final rule (with a three-year period for implementation) is congruent with the January 1, 2020 effective date of the "backstop" standard of 45 lm/W in the event DOE did not establish a rule adopting different standards. 42 U.S.C. § 6295(i)(6)(A)(v). This Court found that DOE did not complete a final rulemaking by January 1, 2017: "Although clause (iii) might only require a final rule by January 1, 2017 "[i]f" GSIL standards need to be amended, reading § 6295(i)(6)(A)

[21] "[I]n the case of California, if a final rule described in subclause (I) has not been adopted, any California regulations relating to those covered products adopted pursuant to State statute in effect as of December 19, 2007" are not subject to "section 6296(b) of this title nor any other provision of law." 42 U.S.C. § 6295(i)(6)(A)(vi)(III).

as a whole precludes a conclusion that DOE has up to January 1, 2020 to complete a final rulemaking when it has not yet begun to address standards for GSLs." *Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n*, No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *8 (E.D. Cal. 22, 2017). This Court therefore concluded, "Because NEMA has not established as a matter of law that the Secretary has adopted a final rule "in accordance with clauses (i) through (v)," the court cannot foreclose the possibility that exceptions to preemption under § 6295(i)(6)(A)(vi) apply to CEC's regulations." *Id.*

In sum, Plaintiffs are not likely to succeed on the merits of either of their preemption claims because the express statutory exceptions from preemption are available to the Commission based on the facts. Pursuant to 42 U.S.C. § 6295(i)(6)(A)(vi), because DOE failed to satisfy its statutory requirements, California is authorized to establish regulations concerning GSLs pursuant to its state statutory authority. Moreover, DOE's purported withdrawal of the expanded definition was unlawful because it failed to comport with EPCA and the APA.[22] DOE's statements that California is preempted are inaccurate as a matter of law in light of the indisputable chronology of DOE's rulemaking in this area since 2013. Finally, DOE's statements are irrelevant because, as a general matter, agencies lack legal authority to determine the preemptive effect of statutes,

[22] DOE's 2019 repeal also failed to comply with the National Environmental Policy Act ("NEPA"), the Endangered Species Act, the Coastal Zone Management Act, and the National Historic Preservation Act, and was therefore unlawful. DOE's repeal was a major federal action subject to NEPA, requiring an environmental analysis. DOE failed to conduct one, erroneously arguing that its action maintained the status quo and was subject to a categorical exemption. (84 Fed. Reg. 3,120, 3,128.) As discussed above, DOE's action repealed significant energy efficiency provisions, which will lead to a significant increase in energy consumption. The categorical exemption cited by DOE cannot be used if the action would "have the potential to cause a significant increase in energy consumption in a state or region." 10 C.F.R. Part 1021, App. B, § B5.1. Therefore, DOE could not rely on this exemption and was required to conduct an analysis pursuant to NEPA.

DOE's actions will lead to an increase in the emissions of air pollutants and greenhouse gases, adding to the problem of climate change and its many attendant effects. Therefore, DOE was obligated to consult with the Secretary of Interior as required by the Endangered Species Act (16 U.S.C. § 1536), which it failed to do, and failed to carry out its program consistent with the policies of a state managing an affected coastal zone as required by the Coastal Zone Management Act (16 U.S.C. § 1451 et seq.) and failed to take into account the effects of its action on any historic property as required by the National Historic Preservation Act (54 U.S.C. § 306108).

absent express delegation from Congress giving them such authority. *Am. Tort Reform Ass'n. v. Occupational Safety & Health Admin.*, 738 F.3d 387 (D.C. Cir. 2013); *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). EPCA does not delegate to DOE authority to decide whether a given state law is preempted. 42 U.S.C. §§ 6297(b), (c); 6295(i)(6)(A)(vi); Cf. 30 U.S.C. § 1254(g) ["Secretary shall set forth any State law or regulation which is preempted and superseded by the Federal program."]

B. Plaintiffs' members fail to satisfy their burden to show irreparable harm.

The declarations submitted by Plaintiffs are insufficient to demonstrate the "clear showing" of likelihood of irreparable harm. *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 678 F.3d 112, 114 (Fed. Cir. 2012). The declarations all include the same boilerplate assertions that "the regulation of lamps within the expanded definition will disrupt the marketplace and harm our customers" and references to "logistical costs associated with removing goods from store shelves" and "loss of customer goodwill." Gatto Decl., ¶ 14; Dolan Decl., ¶14, Page Decl., ¶ 15; Strainic Decl., ¶ 22. In light of the burden of proof that Plaintiffs, as moving party, must satisfy, such assertions about speculative losses are insufficient to satisfy Plaintiffs' burden to demonstrate to this Court that it should exercise its equitable discretion to grant the extraordinary remedy of injunctive relief. *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 772 (9th Cir. 1984) [findings that plaintiff would lose goodwill and "untold" customers held speculative].

Plaintiffs' declarants' assertions of potential lost revenue due to the prohibition on selling non-compliant lamps in California are insufficient for at least two reasons. First, the estimates of lost revenue are based on the percentage of sales that California represents in the market for the five lamp types. California's market share is minimal. Dolin Decl., ¶ 8 ["approximately 3% of our U.S. sales"]; Page Decl., ¶ 8 ["approximately ten percent (10%)"]; Strainic Decl., ¶16 [approximately 11-12%]; Gatto Decl., ¶9 [approximately 12.5%]. The market of the other states that do not enjoy California's specific express exceptions from preemption constitutes 88.5% to 97% of national sales for the five lamp types. See *id.* Plaintiffs' industry members can continue to ship to, and sell from, any of the other states that do not include the five lamp types within the definition of GSLs.

Second, the estimates of lost revenue are objectively overstated in light of the allegations included in Plaintiffs' complaint that sales of the lamp types have been in decline. Compl. ¶ 60 ["By 2018, domestic U.S. shipments of three-way incandescent lamps had declined over 30% since 2011," "By 2018, domestic U.S. shipments of shatter-resistant lamps had declined over 75%," since 2011," "By 2018, domestic U.S. shipments of lumen incandescent lamps had declined over 92%." Independent of the Commission's inclusion of the five lamp types within the definition of GSLs, market forces continue to reduce the sales of such product types. Accordingly, Plaintiffs' members cannot credibly assert that they will miss out on a steady market within California, which like the rest of the nation, is in significant decline.

Plaintiffs also allege implementation of the Commission's regulation would cause logistical changes in the supply chain, "including costs associated with removal of lamps, restocking, staffing, and other expenses." MPA at 19:16-19. None of Plaintiffs' declarants specify, much less attempt to quantify such generically described costs. Plaintiffs' declarants also complain about the limited time period between the Commission's adoption of the rule on November 13, 2019, and the effective date of January 1. 2020. This is misleading because it ignores the fact that Plaintiffs and their members participated in the Commission's rulemaking as early as the summer of 2017, shortly after the Commission initiated the rulemaking for the regulation at issue. RJN, Ex. 2 [June 16, 2017 comment letter from NEMA]; Ex. 3 [August 27, 2018 presentation re industry comments by NEMA], Ex. 4 [September 13, 2018 comment letter from ALA]. There can be no dispute that Plaintiffs and their members were well-aware and actively participated as stakeholders during the Commission's rulemaking process. Indeed, Plaintiffs' members have been able to comply with California's unique 45 lm/W rule for all other GSLs since 2018.

Moreover, until September 5, 2019, when DOE purported to withdraw its January 19, 2017 expanded definition of GSLs, and the backstop 45 lm/W standard was set to go into effective nationwide on January 1, 2020, Plaintiffs should have reasonably anticipated the Commission's regulation at issue. From the summer of 2017, when Plaintiffs submitted comments on the Commission's proposed rulemaking, to September 5, 2019 – a span of more than two years – Plaintiffs had sufficient knowledge of the need to prepare for compliance as of January 1, 2020.

Accordingly, Plaintiffs' allegations that their members will suffer harm from logistical costs to secure compliant product in California because the cycle from manufacture to distribution of light bulbs to retail stores ranges from four to 12 months (Compl., ¶ 11) reflects Plaintiffs' bad judgment. Even with a four to 12-month lead time to adjust to the new California standard, Plaintiffs' members had more than sufficient opportunity to prepare to comply with the pending regulation. Plaintiffs should not be able to leverage their bad judgment in their effort to obtain the extraordinary relief of a TRO or injunction.

C. The balance of the equities favors the Commission.

Plaintiffs' allegations about economic harm are insufficient to weigh the balance of hardships in their favor. Plaintiffs acknowledge that sales of the five lamp types incorporated into the definition of GSLs "have dropped precipitously in recent years." MPA at 23:4-5. Plaintiffs erroneously claim that this means California's energy efficiency and cost savings concerns are "increasingly minimal." In fact, it is Plaintiffs' members' purported economic hardship that is "increasingly minimal" in light of the "precipitously" declining demand for the five lamp types.

The Commission has an ongoing statutory mandate as California's primary energy policy and planning agency to increase energy efficiency which in turn creates significant economic and environmental benefits for Californians. As such, the applicable provisions of the Warren-Alquist Act mandate and authorize the Commission to adopt rules and regulations, as necessary, to reduce the inefficient consumption of energy by prescribing efficiency standards for appliances whose use requires a significant amount of energy. Cal. Pub. Resources Code §§ 25213, 25218(e), 25402(a)-(c). Indeed, "Congress has also recognized California's vanguard role in energy efficiency, providing statutory exceptions to preemption for California [in EPCA]." *Nat'l Elec. Mfr. Assn'n v. Cal. Energy Comm'n*, No. 2:17 CV-01625-KJM-AC, 2017 WL 6558134, at *5 (E.D. Cal. 22, 2017).

The purpose of the regulation at issue is to increase energy efficiency savings in the State by revising the efficiency standards for GSLs. RJN, Ex. 5 [Initial Statement of Reasons at p. 2]. The hardships imposed if the regulation is enjoined would be the loss of the economic and environmental benefits to California citizens and consumers of lighting products. The standards

in the regulation will result in utility bill costs savings to ratepayers, and lower statewide energy use. The estimated electricity savings during the first year (2020) range from $193 million to $387 million. After full stock turnover, once all non-compliant products have been replaced by more energy efficient lamps, the estimated electricity savings range from $736 million to $2.474 billion. RJN, Ex. 6 [Supplemental Staff Analysis for General Service Lamps (Expanded Scope) at 7-8].

Significant California institutions and advocates recognized the economic benefits that would result from implementation of the proposed regulation. In public comment at a Commission hearing, the representative of California investor owned utilities encouraged the Commission to implement the proposed regulation on January 1, 2020 without delay: "[O]ur analysis strongly suggests that the potential to achieve these [electricity] savings is front-loaded. If the California effective date is delayed by just two years, the 30-years savings total will suffer a 21 percent lost through 2052." RJN, Ex. 7 [Transcript, November 6, 2019 at 8:17-21. At the final Commission hearing, the California investor owned utilities reiterated their request that the Commission implement the energy efficient standards as planned on January 1, 2020 "to secure the front-loaded savings afforded by this rulemaking." RJN, Ex. 8 [Partial Transcript Item #5, November 13, 2019, at 12:7-10]. The Consumer Federation of America also supported the proposed regulation: "In addition, there are broader economic benefits when the commercial and industrial sectors save on lighting costs, consumers benefit through lower costs on goods and services." *Id.* at 13:15018. The Public Advocate's Office of the California Public Utilities Commission supported the proposed regulation on the grounds that "it is appropriate for ratepayers to wind down their financial commitment and for the compulsory standards to take over" because highly efficient lighting is now widespread, high quality and inexpensive, utility ratepayers should no longer subsidize efforts to spur market development of such products. *Id.* at 17:2-11. The California Association of Ratepayers for Energy Savings joined in support as well:

> Ask California energy ratepayers, CARES members have two main concerns. The first, preserving the environment we all live in. And second, saving money on their energy costs. The CEC's proposed action addresses both those concerns and makes tremendous improvements to California energy policy. By our estimates, conserving up to 13,600 gigawatt hours of [electricity] and saving consumers an average of $210

> per household per year. These are meaningful savings that Californians simply don't have the luxury of giving up.

Id. at 19:6-14.

The balance of the equities weighs decisively in the Commission's favor. The regulations promote cost savings to all users of electricity in California and benefit the environment by reducing electricity demand. Plaintiffs' members' claims of monetary loss is nonspecific and speculative as the data show sales of such products are "precipitously" declining, consistent with the ongoing loss of market share for the five lamp types.

D. Injunctive relief is not in the public interest.

In the context of considering the public interest, courts of equity "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The public interest inquiry generally addresses the impact upon nonparties of granting or withholding injunctive relief. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). Where the injunction's reach would be narrow and affect only the parties with no impact on nonparties, the public interest is a neutral factor. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Here, in contrast, where an injunction would have the potential for public consequences, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965). [internal quotes omitted].

Plaintiffs claim that the public interest favors allowing consumers of the five lamp types to replace their existing lamps with the same energy-ineffective product past January 1, 2020. MPA at 24:19-27. Plaintiffs offer nothing in terms of evidence regarding the turnover of the five lamp types. Plaintiffs admit that sales of such lamps "have dropped precipitously in recent years." *Id.* at 23:4-5. Furthermore, the evidence indicates that the five lamp types identified by Plaintiffs have cost-effective and available replacement products.[23] Accordingly, there is no evidence that

[23] 2018 Draft Staff Report, Chapter 7: Technical Feasibility. Available at

consumers will not be able to find energy-efficient replacement lamps. The inescapable conclusion is that Plaintiffs' claimed monetary harm is speculative, and the marketplace for such products is "precipitously" decreasing as time goes by. In contrast, the various stakeholders in the rulemaking process that urged the Commission to adopt and implement the regulation at issue without delay on January 1, 2020, relied on enormous aggregate reductions in energy costs to California businesses and consumers. These are quantifiable, material benefits to the public and the environment that serve the public interest. An injunction would delay these front-loaded benefits, and thereby disserve the wider public interest. Accordingly, like the other three, this factor weighs against Plaintiffs' request for extraordinary relief.

V. CONCLUSION

Plaintiffs' failure to sustain their burden of proof as to only one of the four elements for obtaining injunctive relief would be fatal to their motion for a TRO. In light of the facts and the applicable law, Plaintiffs have failed to sustain their burden of proof as to any one element, let alone all four elements. This Court should therefore deny Plaintiffs' motion for TRO and injunctive relief and allow the Commission to enforce the pending regulation.

Dated: December 26, 2019

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