



National Electrical Manufacturers Association

The association of electrical equipment
and medical imaging manufacturers
www.nema.org

September 10, 2020

Legislative Counsel Bureau
Attn: Ms. Brenda Erdoes, Legislative Counsel
Legislative Building – Legal Division
401 S. Carson Street
Carson City, NV 89701

Via email to erdoes@lcb.state.nv.us

Re: LCB File No. R100-19, Nevada's General Service Lamp Rulemaking

Dear Ms. Erdoes:

On behalf of the National Electrical Manufacturers Association ("NEMA"), I write to request that you exercise your authority to prevent finalization of a proposed rule involving "general service lamps" that violates federal law, violates the Nevada Administrative Code, and would harm Nevada businesses and citizens.

Summary

In the Energy Policy and Conservation Act ("EPCA") and its amendments, 42 U.S.C. § 6291 *et seq.*, Congress enacted a comprehensive set of energy-efficiency standards and a process for the Department of Energy ("DOE") to create new standards and amend existing standards. And because Congress was concerned that a patchwork set of state-level energy standards would harm manufacturers as well as retailers and consumers, it included in EPCA a broad preemption provision displacing state energy-conservation regulations "concerning" products that EPCA covers. EPCA covers several lighting products, including a class of light bulbs known as "general service lamps" (the standard size light bulb found in most home light sockets, which can include incandescent, halogen, compact fluorescent, and LED technologies).

The regulation proposed by the Governor's Office of Energy, N.R.S. § 701.260, ("Nevada GSL rule") seeks to define general service lamps differently than federal law and would prohibit sales of such lamps after January 1, 2021, that do not satisfy an energy efficiency standard of 45 lumens-per-watt. EPCA preempts the Nevada GSL rule because the rule seeks to regulate what is exclusively within federal authority and imposes a 45 lumens-per-watt standard that DOE has already expressly rejected for general service lamps. This proposed sales ban—scheduled to take effect in a few short months—would impose disruptive, burdensome, and expensive obligations on retailers and consumers during the heart of the holiday season in the middle of a global viral pandemic.

NEMA previously submitted comments on the Nevada GSL rule to the Governor's Office of Energy on November 4, 2019. A copy of our letter is attached. NEMA now appeals to you in your capacity as Legislative Counsel to inform you of the violations of federal law and the

Nevada Administrative Code that the Nevada GSL would cause. The Nevada GSL rule is not “suitable for incorporation in the Nevada Administrative Code” under NRS § 233B.063 because it would violate federal law. Therefore, NEMA requests that you revise the Nevada GSL rule by striking it entirely and returning it to the Governor’s Office of Energy with an explanation of its legal flaws and vulnerabilities to legal challenge.

I also write to notify you of a material inaccuracy on the statement submitted to your office by the Governor’s Office of Energy under Nevada Administrative Code Chapter 701. Pursuant to NRS § 233B.066(j), the information statement submitted to your office must include the following: “If the regulation includes provisions that are more stringent than a federal regulation which regulates the same activity, a summary of those provisions.” The statement submitted to your office on August 26, 2020 by the Governor’s Office of Energy incorrectly represents that “There are no provisions that duplicate or are more stringent than federal standards.” The Nevada GSL rule is, in fact, more stringent than federal law because it defines general service lamps more broadly than federal law and imposes a more stringent energy efficiency standard than federal law. That is the unmistakable purpose of the Nevada GSL rule.

This is not a minor technical violation of the Nevada Administrative Code. This inaccuracy goes to the very heart of the constitutional and statutory problems with the Nevada GSL rule—it is squarely preempted by federal law and would violate federal law if enacted. NEMA requests that you require the Governor’s Office of Energy to accurately describe in detail how the Nevada GSL regulation is more stringent than federal law. At a minimum, any further action to promulgate the Nevada GSL rule should be postponed by one year (or longer if necessary to resolve Nevada’s related litigation involving the federal definition of general service lamps and their efficiency standards), which will also allow adequate time for your office to consider the Nevada GSL rule’s procedural and substantive violations of state and federal law.

General Scope of Federal Preemption of State Light Bulb Standards

EPCA establishes a comprehensive federal regulatory framework for a variety of consumer and industrial products that use electricity. 42 U.S.C. § 6291 *et seq.* It “was enacted in 1975 as part of a ‘comprehensive national energy policy.’” *Nat’l Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1362, 1364 (D.C. Cir. 1985). DOE implements EPCA by establishing test procedures and setting energy-conservation standards for covered products. See 42 U.S.C. §§ 6293, 6295(a).

The scope of federal preemption under EPCA is tied to the definition of “covered products.” Covered products are those products listed in 42 U.S.C. § 6292(a); products that DOE classifies as covered products to serve the purposes of the statute, 42 U.S.C. § 6292(b); and products for which Congress otherwise directs DOE to set standards. EPCA sets initial energy conservation standards for products listed in 42 U.S.C. § 6295(a)(1), and it authorizes DOE to set new or amended energy standards for covered products. *Id.* § 6295(a)(2).

Congressional legislation and DOE rulemakings under EPCA governing light bulbs have been extensive. They touch every one of the elements of the comprehensive regulatory scheme for covered products: definitions of federally regulated products, § 6291; test procedures, § 6293; labeling and information disclosure requirements, § 6294; energy conservation standards, § 6295; and certification and enforcement, §§ 6296, 6303–04. Congressional enactments affecting

lighting products began in 1987 with the regulation of fluorescent lamp ballasts. It expanded with amendments to EPCA in 1992, 2005, and 2007 to include different types of light bulbs and lighting fixtures.

To ensure that EPCA’s energy policy would indeed be “comprehensive,” and to respond to manufacturers’ concerns about being exposed to disparate efficiency standards, Congress included broad express preemption provisions for state energy conservation standards in the 1987 amendments to EPCA. **With certain exceptions not applicable here, “for any covered product, no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product.”** 42 U.S.C. § 6297(c). EPCA preempts state energy conservation regulation of covered products both *before* federal energy conservation standards are effective, 42 U.S.C. § 6297(b), and *after* they become effective, *id.* § 6297(c). Particularly relevant here is the express prohibition on state regulation of EPCA-covered products for which energy efficiency standards have already been established and are effective.

The Ninth Circuit has held that “[t]he legislative history [of EPCA] demonstrates that Congress intended to preempt state energy efficiency standards.” *Air Cond. and Refrig. Inst. v. Energy Res. Cons. and Dev. Comm’n*, 410 F.3d 492, 500 (9th Cir. 2005). EPCA’s preemption of state energy conservation is “broad;” the breadth of preemption was designed “to counteract the systems of separate state appliance standards that had emerged” because of the DOE’s prior policy of granting states’ exemption requests. *Id.*

The Nevada GSL Rule is Preempted Because it Seeks to Regulate Covered Products

The scope of lighting products that are “covered products” under EPCA—again, those products for which no state regulation shall be effective—is broad. It includes the following types of lighting products. See 42 U.S.C. § 6291 and 10 C.F.R. § 430.2.

Covered Product		
LAMPS	Definition	An Example
General service incandescent lamp	“a standard incandescent or halogen type 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.” Specifically excluding over 20 types of other medium base incandescent lamps from definition.¹	

¹ Definition does not include --- “(I) An appliance lamp, (II) A black light lamp, (III) A bug lamp, (IV) A colored lamp, (V) An infrared lamp, (VI) A left-hand thread lamp, (VII) A marine lamp, (VIII) A marine signal service lamp, (IX) A mine service lamp, (X) A plant light lamp,

Intermediate base incandescent lamp	“a lamp that uses an intermediate screw base as described in ANSI C81.61-2006, Specifications for Electric Bases.”	
Candelabra base incandescent lamp	“a lamp that uses candelabra screw base as described in ANSI C81.61-2006, Specifications for Electric Bases.”	
Medium base rough service incandescent lamp	“a lamp that -- (1) Has a minimum of 5 supports with filament configurations that are C-7A, C-11, C-17, and C-22 as listed in Figure 6-12 of the IESNA Lighting Handbook (incorporated by reference; see § 430.3), or similar configurations where lead wires are not counted as supports; and (2) Is designated and marketed specifically for 'rough service' applications, with (i) The designation appearing on the lamp packaging; and (ii) Marketing materials that identify the lamp as being for rough service.”	 NOTE: Wattage now capped at 40 watts; may only be sold in packages of one. Sales limit exceeded, activating backstop standard.
Medium base vibration service incandescent lamp	“a lamp that -- (1) Has filament configurations that are C-5, C-7A, or C-9, as listed in Figure 6-12 of the IESNA Lighting Handbook (incorporated by reference; see § 430.3) or similar configurations; (2) Has a maximum wattage of 60 watts; (3) Is sold at retail in packages of 2 lamps or less; and (4) Is designated and marketed specifically for vibration service or vibration-resistant applications, with -- (i) The designation appearing on the lamp packaging; and (ii) Marketing materials that identify the lamp as being vibration service only.”	 Note: Wattage now capped at 40 watts; may only be sold in packages of one. Sales limit exceeded, activating backstop standard.
3-Way Lamps	A “3-way incandescent lamp” includes an incandescent lamp that—(i) employs 2 filaments, operated separately and in combination, to provide 3 light levels; and (ii) is designated on the lamp packaging and marketing materials as being a 3-way incandescent lamp.	 Sale Limit Standard. If exceeded, backstop standard

(XI) A reflector lamp, (XII) A rough service lamp, (XIII) A shatter-resistant lamp (including a shatter-proof lamp and a shatter-protected lamp), (XIV) A sign service lamp, (XV) A silver bowl lamp, (XVI) A showcase lamp, (XVII) A 3-way incandescent lamp, (XVIII) A traffic signal lamp, (XIX) A vibration service lamp, (XX) A G shape lamp (as defined in ANSI C78.20-2003 and C79.1-2002 with a diameter of 5 inches or more, (XXI) A T shape lamp (as defined in ANSI C78.20-2003 and C79.1-2002) and that uses not more than 40 watts or has a length of more than 10 inches, (XXII) A B, BA, CA, F, G16-1/2, G-25, G30, S, or M-14 lamp (as defined in ANSI C79.1-2002 and ANSI C78.20-2003) of 40 watts or less.”

		activated.
High Lumen Lamps	A general Service Incandescent Lamp that emits light between 2,601 and 3,300 lumens. These lamps are used in general service applications when high light output is needed.	 Sale Limit Standard. If exceeded, backstop standard activated.
Shatter-Resistant Lamp	“Shatter Resistant lamp, shatter-proof lamp, and shatter-protected lamp” mean a lamp that—(i) has a coating or equivalent technology that is compliant with NSF/ ANSI 51 [National Sanitation Foundation/American National Standards Institute] and is designed to contain the glass if the glass envelope of the lamp is broken; and (ii) is designated and marketed for the intended application, with—(I) the designation on the lamp packaging; and (II) marketing materials that identify the lamp as being shatter-resistant, shatterproof, or shatter-protected.	 Sale Limit Standard. If exceeded, backstop standard activated.
Incandescent reflector lamp	“Any lamp (commonly referred to as a reflector lamp) which is not colored or designed for rough or vibration service applications, that contains an inner reflective coating on the outer bulb to direct the light, an R, PAR, ER, BR, BPAR, or similar bulb shapes with E26 medium screw bases, a rated voltage or voltage range that lies at least partially within 115 and 130 volts, a diameter which exceeds 2.25 inches, and has a rated wattage that is 40 watts or higher.”	
Medium base compact fluorescent lamp	“an integrally ballasted fluorescent lamp with a medium screw base and a rated input voltage of 115 to 130 volts and which is designed as a direct replacement for a general service incandescent lamp.” Specifically excluding specialty lamps from definition. ²	

² Definition does not include --- “(I) any lamp that is-- (aa) specifically designed to be used for special purpose applications; and (bb) unlikely to be used in general purpose applications, such as the applications described in subparagraph (D); or (II) any lamp not described in subparagraph (D) that is excluded by the Secretary, by rule, because the lamp is-- (aa) designed for special applications; and (bb) unlikely to be used in general purpose applications.”

General service fluorescent lamp	“any <i>fluorescent lamp</i> which can be used to satisfy the majority of fluorescent lighting applications, but does not include any lamp designed and marketed for the following non-general application:³” <i>Fluorescent lamp</i>: “a low pressure mercury electric-discharge source in which a fluorescing coating transforms some of the ultraviolet energy generated by the mercury discharge into light, <i>including only the following</i>: (1) Any straight-shaped lamp (commonly referred to as 4-foot medium bipin lamps) with medium bipin bases of nominal overall length of 48 inches and rated wattage of 25 or more; (2) Any U-shaped lamp (commonly referred to as 2-foot U-shaped lamps) with medium bipin bases of nominal overall length between 22 and 25 inches and rated wattage of 25 or more; (3) Any rapid start lamp (commonly referred to as 8-foot high output lamps) with recessed double contact bases of nominal overall length of 96 inches; (4) Any instant start lamp (commonly referred to as 8-foot slimline lamps) with single pin bases of nominal overall length of 96 inches and rated wattage of 49 or more; (5) Any straight-shaped lamp (commonly referred to as 4-foot miniature bipin standard output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 25 or more; and (6) Any straight-shaped lamp (commonly referred to 4-foot miniature bipin high output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 44 or more.”	
General service Light-emitting diode lamp	To be defined by the Secretary of Energy. 84 FR at 46669.	

³ “Definition does not include --- “(1) Fluorescent lamps designed to promote plant growth; (2) Fluorescent lamps specifically designed for cold temperature applications; (3) Colored fluorescent lamps; (4) Impact-resistant fluorescent lamps; (5) Reflectorized or aperture lamps; (6) Fluorescent lamps designed for use in reprographic equipment; (7) Lamps primarily designed to produce radiation in the ultra-violet region of the spectrum; and (8) Lamps with a Color Rendering Index of 87 or greater.”

High intensity discharge lamp	“(A) an electric-discharge lamp in which-- (i) the light-producing arc is stabilized by the arc tube wall temperature; and (ii) the arc tube wall loading is in excess of 3 Watts/cm. (B) Inclusions. The term “high intensity discharge lamp” includes mercury vapor, metal halide, and high-pressure sodium lamps described in subparagraph (A).”	
General service lamp	“includes-- (I) general service incandescent lamps; (II) compact fluorescent lamps; (III) general service light-emitting diode (LED or OLED) lamps; and (IV) any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps.” Specifically excluding over 20 types of other lamps from definition. ⁴	See examples of general service incandescent lamp, compact fluorescent lamp, and general service LED lamp above.
BALLASTS		
Fluorescent lamp ballast	“a device which is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation.”	
LIGHTING FIXTURES		
Metal halide lamp fixtures	“a light fixture for general lighting application designed to be operated with a metal halide lamp and a ballast for a metal halide lamp.”	
Illuminated exit signs	“a sign that-- (A) is designed to be permanently fixed in place to identify an exit; and (B) consists of an electrically powered integral light source that-- (i) illuminates the legend ‘EXIT’ and any directional indicators; and (ii) provides contrast between the legend, any directional indicators, and the background.”	
Torchieres	“a portable electric lamp with a reflector bowl that directs light upward to give indirect illumination”	

⁴ Definition does not include “(I) any lighting application or bulb shape described in (the list of lamps excluded from the definition of general service incandescent lamp); or (II) any general service fluorescent lamp or incandescent reflector lamp.”

Traffic signals and pedestrian modules	“a standard 8-inch (200mm) or 12-inch (300mm) traffic signal indication that-- (A) consists of a light source, a lens, and all other parts necessary for operation; and (B) communicates movement messages to drivers through red, amber, and green colors.” “a light signal used to convey movement information to pedestrians.”	
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With one exception, these covered products have long been subject to federal energy conservation standards,⁵ beginning with standards for incandescent reflector lamps and general service fluorescent lamps in the Energy Policy Act of 1992 and amended by DOE several times, standards for fluorescent lamp ballasts established by DOE in 2000 and amended by Congress and DOE several times, standards for medium base compact fluorescent lamps, illuminated exit signs, torchieres, traffic signal and pedestrian modules in the Energy Policy Act of 1992, and general service incandescent lamps, intermediate base incandescent lamps, and candelabra base incandescent lamps in the Energy Independence and Security Act of 2007 (“EISA-2007”). More recently, DOE adopted energy conservation standards for rough service incandescent lamps and vibration service incandescent lamps as directed by Congress, 42 U.S.C. § 6295(l)(4), and these became covered products.

Federal preemption therefore extends to the following covered products. The applicable federal standards appear in the middle column.

Light Source (Lamp)	Applicable Federal Energy Conservation Standard	NV State Regulation Preempted?
General service lamp	84 F.R. 46661, 46672 (Sept 5, 2019); 84 F.R. 71626 (Dec. 27, 2019)	Yes
General service incandescent lamp	10 CFR 430.32(x)(1) (adopting EISA-2007 efficacy standards)	Yes
Medium base compact fluorescent lamp	10 CFR 430.32(u) (adopting EPCA 2005 standards)	Yes
General service LED lamp	TBD 84 F.R. 46661, 46672 (Sept 5, 2019)	Yes
Incandescent reflector lamp	10 CFR 430.32(n)(6) Efficacy standards	Yes
Intermediate base incandescent lamp	10 CFR 430.32(x)(3) (adopting EISA 2007 standards: 40W max)	Yes
Candelabra base incandescent lamp	10 CFR 430.32(x)(2) (adopting EISA-2007 standards: 60W	Yes

⁵ The one exception is the high intensity discharge lamp. DOE conducted a rulemaking to establish energy conservation standards for this lamp but concluded the agency could not economically justify any standard. 80 FR 76355 (12/5/2015).

	max)	
Medium base rough service incandescent lamp	10 CFR 430.32(bb)(1) 40W max Single-package marketing limit	Yes
Medium base vibration service incandescent lamp	10 CFR 430.32(bb)(2) 40W max Single-package marketing limit	Yes
General service fluorescent lamp	10 CFR 430.32(n)(4) Efficacy standards	Yes
High intensity discharge lamp (incl. mercury vapor, metal halide, and high-pressure sodium lamps)	None 80 FR 76355 (12/5/2015)	Yes

The Nevada GSL rule seeks to regulate a broad swath of these covered products and is therefore expressly preempted under 42 U.S.C. § 6297(b) and (c).

The Statutory Preemption Exemptions for Nevada Do Not Apply

There are two narrow provisions of EPCA that override this broad preemption for certain standards enacted by Nevada and California in limited circumstances relating to general service lamps. They do not apply here. 42 U.S.C. § 6295(i)(6)(A)(vi)(I) and (II) provide:

Neither section 6297(b) of this title nor any other provision of law shall preclude California or Nevada from adopting, effective beginning on or after January 1, 2018--

(I) a final rule adopted by the Secretary in accordance with clauses (i) through (iv);

(II) if a final rule described in subclause (I) has not been adopted, the backstop requirement under clause (v)

On December 27, 2019, DOE issued a final rule implicating subclause (I) that declined to amend efficiency standards for general service incandescent lamps because a higher energy conservation standard could not be economically justified. 84 FR 71626 (Dec. 27, 2019). Nevada may therefore issue a final rule under subclause (I) that exactly mirrors the final DOE rule. The Nevada GSL fails that requirement because it seeks to regulate beyond the provisions of the final DOE rule and would impose a 45 lumens-per-watt efficiency standard that DOE has expressly rejected.

The Nevada GSL rule is, however, nearly identical to a definition of general service lamps found in a 2017 DOE final rule that DOE later withdrew before the 2017 rule's effective date of January 1, 2020. 82 FR 7276, 7322 (Jan. 19, 2017) (withdrawn by 84 FR 46661 (Sept. 5, 2019)). Nevada—together with other states and plaintiffs—is suing DOE to challenge that withdrawal. *New York v. U.S. Dep't of Energy*, No. 19-3652 (2nd Cir.). Briefing is complete but oral argument has not yet occurred. Nevada is also suing to challenge DOE's final rule declining to

amend energy conservation standards for general service incandescent lamps (and thereby rejecting a 45 lumens-per-watt efficiency standard). 84 FR 72626 (Dec. 27, 2019) (DOE rule being challenged); *New York v. U.S. Dep't of Energy*, No. 20-742 (2nd Cir.) (case challenging the rule). The second case is stayed pending the outcome of the first case. Nevada may not short-circuit the very judicial process it has invoked by issuing a rule that presumes a total litigation victory by Nevada in both cases.

The “backstop” preemption exemption under subclause (II) also does not apply. The fact that DOE issued the rule in December of 2019 rather than before January 1, 2017 does not trigger the backstop. “**If** the Secretary [of DOE] determines that the standards in effect for general service incandescent lamps should be amended, the Secretary shall publish a final rule not later than January 1, 2017, with an effective date that is not earlier than 3 years after the date on which the final rule is published.” 42 U.S.C. § 6295(i)(6)(A)(iii) (emphasis added). The January 1, 2017, statutory deadline is premised on DOE first determining that standards for general service incandescent lamps should be amended. DOE only fails to meet the requirement in (A)(iii) if it determines that standards for those lamps should be amended and fails to publish a rule imposing standards by January 1, 2017. In other words, (A)(iii) does not establish an absolute obligation on DOE 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).

This is not just NEMA’s view. It is also DOE’s: “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 determined not to amend standards for GSILs, and thus no obligation exists for DOE to issue a final rule setting standards for these lamps in accordance with 42 U.S.C. § 6295(i)(6)(A)(i)-(iv).” 84 FR 71639 (Dec. 27, 2019).

The statutory mandate in Nevada Assembly Bill 54 is not an obstacle to stopping the Nevada GSL rule. Although that provision directed the Governor’s Office of Energy to implement a rule, the statute was enacted on May 27, 2019—before DOE issued its final rules governing the definition of general service lamps and deciding not to change the energy efficiency standards for those lamps. While the Nevada Director of the Office of Energy is purporting to act pursuant to the legislative directive of AB 54, DOE has made clear in its final rule that Nevada lacks the authority to regulate general service lamps, thereby voiding as a matter of federal law the conflicting directive of AB 54.

The Nevada GSL Rule Also Fails Under Principles of Conflict Preemption Because It Deviates from the Federal Definition of General Service Lamp

The Nevada GSL rule is subject to conflict preemption principles and fails them. A state regulation is obstacle preempted—a species of conflict preemption—where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (citation omitted); see also *O’Neal v. Smithkline Beecham Corp.*, 551 F. Supp. 2d 993, 1002 (E.D. Cal. 2008) (same). The existence of a separate, express preemption provision “does not bar the ordinary working of

conflict preemption principles.” *Hillman v. Maretta*, 569 U.S. 483, 498 (2013) (internal quotation marks and citation omitted).

The Nevada GSL rule stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in EPCA. State law is preempted where it would interfere with a balance Congress struck in federal legislation—even where the state “attempts to achieve one of the same goals as federal law.” *Id.* That is because “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” *Id.* (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)). EPCA provides a comprehensive federal regulatory framework for energy-efficient lighting. See, e.g., *Bldg. Indus. Ass’n of Washington v. Washington State Bldg. Code Council*, 683 F.3d 1144, 1146 (9th Cir. 2012) (describing EPCA as a “comprehensive federal regime regulating energy and water conservation standards for certain consumer appliances”). And under EPCA, “Congress gave [DOE] primary responsibility for promulgating regulations prescribing a ‘minimum level of energy efficiency or a maximum quantity of energy use’ for the covered consumer product.” *Id.* Allowing Nevada to expand the definition of “general service lamp” and to apply distinct energy-conservation standards to those lamps would present an obstacle to Congress’s stated intent.

Nevada’s definition of general service lamp differs in several respects from DOE’s definition (such as by including intermediate and candelabra bases and reflector lamps) and imposes a 45-lumens-per-watt standard where DOE has expressly rejected such a standard. Allowing Nevada to override DOE’s determinations would erode the “careful balance struck by Congress” with respect to energy-efficient lighting. *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133, 1137 (D.N.M. 2010) (holding that parts of the City of Albuquerque’s energy conservation code were preempted by the EPCA because the minimum efficiency standards in the code were more stringent than those set forth in EPCA); *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1174 (E.D. Cal. 2006) (finding that plaintiffs stated a claim for EPCA preemption where California’s regulation would stand as an obstacle to EPCA’s objectives). Indeed, Nevada’s proposed regulation would “subject these lamps types to two separate standards and create confusion among regulated entities as to which one applies.” 84 FR at 46,666. It is precisely patchwork regulation of this kind that Congress intended EPCA to prevent. *Air Conditioning*, 410 F.3d at 500.

Quite simply, there cannot be two definitions of general service lamp under the law. This is a classic case of conflict preemption, which limits state authority to enforce a definition that conflicts with a federal definition of the same term in the context of a comprehensive regulatory scheme like EPCA.

Nevada Businesses and Consumers Will be Harmed by a January 1, 2021 Effective Date

The Nevada GSL rule’s definition and 45-lumens-per-watt standard would ban the sale of many types of commonly used light bulbs in Nevada. In addition to the revenue implications of the ban on manufacturers, the Nevada GSL rule would burden suppliers and retailers, including small businesses in Nevada. Suppliers and retailers will be forced to interpret a complicated rule with abstruse terminology, inclusions, exclusions, exceptions, and exceptions to the exclusions. Businesses that interpret the regulation incorrectly may remove product from shelves that

comply with the regulation or inadvertently continue to sell a banned product, thereby risking enforcement action and reputational harm.

Even for those suppliers and retailers that interpret the rule correctly, there are the logistical and administrative challenges involved in identifying the light bulbs at issue and removing them from inventory. And the timing could hardly be worse. These obligations—if not delayed and prevented by your office—would hit suppliers and retailers during the busiest shopping season of the year. The ongoing viral pandemic complicates things even more, with businesses juggling the challenges and adaptations of the new retail environment of masks, partitions, physical distancing, frequent cleaning, and workforce challenges. A small business trying to turn a profit for the year during the holiday shopping season should not be forced to scramble to identify and remove light bulbs from its shelves.

Moreover, when retailers remove light bulbs from their inventory, those products must be replaced with adequate substitutes. There is lead time for ordering and delivering new products, and consumers in need of specific light bulbs during that gap period can be left without the product they need.

Retailers and suppliers must also do something with the banned bulbs. They most likely would seek to have the manufacturer take them back. Even if that transaction were free to the supplier or retailer, they would still be faced with the logistical challenges of removing the product from the shelves, storing it, arranging with the manufacturer for the return, and facilitating the return.

Conclusion

NEMA requests that you exercise your legal oversight role to stop the Nevada GSL rule. The rulemaking process violates the Nevada Administrative Code by representing that the rule is no more stringent than federal law, which it is. The Nevada GSL rule is squarely preempted by EPCA and is not saved by any preemption exceptions. The rule would harm Nevada businesses and consumers and give them only months to comply during a busy holiday season during an ongoing viral pandemic. This rule should be stopped. At a minimum, however, any further action to promulgate the rule should be postponed by one year (or longer if necessary to resolve Nevada's related litigation), which will also allow adequate time for your office to consider the rule's procedural and substantive violations of state and federal law.

I would appreciate the opportunity to discuss these issues with you at your earliest convenience. I can be reached at peter.tolsdorf@nema.org or (202) 251-7449. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Peter Tolsdorf". The signature is fluid and cursive, with the first name "Peter" and last name "Tolsdorf" clearly distinguishable.

Peter Tolsdorf,
General Counsel, NEMA



National Electrical Manufacturers Association

The Association of Electrical Equipment and
Medical Imaging Manufacturers
www.nema.org

November 4, 2019

David Bobzien, Director
Nevada Governor's Office of Energy
755 North Roop Street, Suite 202
Carson City, NV 89701

RE: Proposed Nevada Appliance Efficiency Standards for General Service Lamps
Proposed amendment to Chapter 701, Nevada Administrative Code pursuant to AB 54
Amending Nevada Revised Statutes 701.260.

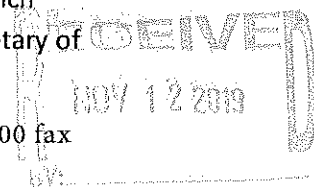
Dear Director Bobzien:

I regret that the National Electrical Manufacturers Association did not learn of the October 1, 2019 workshop on this subject until after that date had passed. Please accept this letter as our written comments and interest to initiate a dialogue and resolve a conflict between the proposed Nevada regulation and statute referenced above and federal law, the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §6291 et seq, as applied to general service lamps. The conflict arises from the express federal preemption provisions in EPCA at 42 U.S.C. §6297(b) and (c). Pragmatically, the proposed regulation may also portend problems for Nevada citizens and businesses.

A cornerstone of EPCAⁱ is section 6297, expressly providing for federal preemption of state energy conservation regulations subject to congressionally-specified exceptions in the statute. Federal preemption applies both beforeⁱⁱ and afterⁱⁱⁱ a federal energy conservation standard is effective. In the absence of a statutory exception, federal preemption applies even if the Secretary of Energy determines not to prescribe a standard because a standard cannot be economically justified, is not technologically feasible, or will not result in significant energy savings.^{iv} Courts have recognized that section 6297(b) and (c) represent a "broad preemption provision."^v "The reason for the broader preemption of energy conservation standards," explained the U.S. Court of Appeals for the Ninth Circuit, "was to counteract the systems of separate state appliance standards that had emerged as a result of the DOE's 'general policy of granting petitions from States requesting waivers from preemption,' which caused appliance manufacturers to be confronted with 'a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans.'"^{vi}

Section 6297(b) and (c) provide that "unless" there is an express exception to federal preemption in the federal statute, beginning March 17, 1987, State energy conservation regulations concerning energy efficiency or energy use for a covered product under the Energy Policy and Conservation Act (EPCA) are "no[t] . . . effective."^{vii} State regulations are void if there is not an exception to preemption specified in EPCA.

Federal preemption applies to what EPCA calls a "covered product," a product to which Congress has legislated a federal energy conservation standard in EPCA or directed the Secretary of



Energy to prescribe federal energy conservation standards by rulemaking. The scope of a covered product --- and hence the scope of federal preemption --- is determined by the definition of the product that Congress has assigned to it in the statute or the definition that the Secretary of Energy has assigned to it in a regulatory rulemaking.

In the case of lighting products, the covered products include:

- General service lamps such as the general service incandescent lamp, medium screw base compact fluorescent lamp, and the general service LED lamp.
- Intermediate base incandescent lamps and candelabra base incandescent lamp
- Incandescent reflector lamp
- Medium screw base rough service incandescent and vibration service incandescent lamps
- General service fluorescent lamp and high intensity discharge lamp
- Fluorescent lamp ballast
- Metal halide lamp fixture, illuminated exit sign, torchieres, traffic signal modules and pedestrian modules

There are two points that bear upon our discussion.

First, with the *potential* exception of general service lamps, Congress has provided no exception to preemption for Nevada with respect to any of the lamps or other lighting components identified above. Nevada State laws purporting to apply energy conservation standards for these covered products are therefore “no[t] effective” --- void --- under 42 U.S.C. §6297(b) and (c) and the Supremacy Clause of the Constitution, Art. VI, clause 2. Nevada cannot enforce state energy conservation standards for those covered products. I will elaborate further on Nevada’s exception to preemption for general service lamps below.

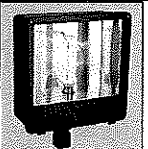
Second, the scope of federal preemption turns on the scope of the covered product as defined by Congress in EPCA, or by the Secretary of Energy. Table I below sets out the federal definitions for these covered products, which are found at 42 U.S.C. §6291 and 10 C.F.R. §430.2:

TABLE I
FEDERALLY-COVERED LIGHTING PRODUCTS UNDER ENERGY POLICY AND CONSERVATION ACT
FOR WHICH STATE REGULATION IS GENERALLY VOID

Covered Product		
LAMPS	Definition	An Example
General service incandescent lamp	“a standard incandescent or halogen type 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.” Specifically excluding over 20 types of other medium base incandescent lamps from definition.^{viii}	

Intermediate base incandescent lamp	"a lamp that uses an intermediate screw base as described in ANSI C81.61-2006, Specifications for Electric Bases."	
Candelabra base incandescent lamp	"a lamp that uses candelabra screw base as described in ANSI C81.61-2006, Specifications for Electric Bases."	
Medium base rough service incandescent lamp	"a lamp that -- (1) Has a minimum of 5 supports with filament configurations that are C-7A, C-11, C-17, and C-22 as listed in Figure 6-12 of the IESNA Lighting Handbook (incorporated by reference; see § 430.3), or similar configurations where lead wires are not counted as supports; and (2) Is designated and marketed specifically for 'rough service' applications, with (i) The designation appearing on the lamp packaging; and (ii) Marketing materials that identify the lamp as being for rough service."	 NOTE: Wattage now capped at 40 watts; may only be sold in packages of one.
Medium base vibration service incandescent lamp	"a lamp that -- (1) Has filament configurations that are C-5, C-7A, or C-9, as listed in Figure 6-12 of the IESNA Lighting Handbook (incorporated by reference; see § 430.3) or similar configurations; (2) Has a maximum wattage of 60 watts; (3) Is sold at retail in packages of <u>2</u> lamps or less; and (4) Is designated and marketed specifically for vibration service or vibration-resistant applications, with -- (i) The designation appearing on the lamp packaging; and (ii) Marketing materials that identify the lamp as being vibration service only."	 Note: Wattage now capped at 40 watts; may only be sold in packages of one.
Incandescent reflector lamp	"Any lamp (commonly referred to as a reflector lamp) which is not colored or designed for rough or vibration service applications, that contains an inner reflective coating on the outer bulb to direct the light, an R, PAR, ER, BR, BPAR, or similar bulb shapes with E26 medium screw bases, a rated voltage or voltage range that lies at least partially within 115 and 130 volts, a diameter which exceeds 2.25 inches, and has a rated wattage that is 40 watts or higher."	
Medium base compact fluorescent lamp	"an integrally ballasted fluorescent lamp with a medium screw base and a rated input voltage of 115 to 130 volts and which is designed as a direct replacement for a general service incandescent lamp." Specifically excluding specialty lamps from definition.^{ix}	
General service fluorescent lamp	"any fluorescent lamp which can be used to satisfy the majority of fluorescent lighting applications, but does not include any lamp designed and marketed for the following non-general application: ^x "	

	<i>Fluorescent lamp:</i> "a low pressure mercury electric-discharge source in which a fluorescing coating transforms some of the ultraviolet energy generated by the mercury discharge into light, <i>including only the following:</i> (1) Any straight-shaped lamp (commonly referred to as 4-foot medium bipin lamps) with medium bipin bases of nominal overall length of 48 inches and rated wattage of 25 or more; (2) Any U-shaped lamp (commonly referred to as 2-foot U-shaped lamps) with medium bipin bases of nominal overall length between 22 and 25 inches and rated wattage of 25 or more; (3) Any rapid start lamp (commonly referred to as 8-foot high output lamps) with recessed double contact bases of nominal overall length of 96 inches; (4) Any instant start lamp (commonly referred to as 8-foot slimline lamps) with single pin bases of nominal overall length of 96 inches and rated wattage of 49 or more; (5) Any straight-shaped lamp (commonly referred to as 4-foot miniature bipin standard output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 25 or more; and (6) Any straight-shaped lamp (commonly referred to 4-foot miniature bipin high output lamps) with miniature bipin bases of nominal overall length between 45 and 48 inches and rated wattage of 44 or more."	
General service Light-emitting diode lamp	To be defined by the Secretary of Energy. 84 F.R. at 46669.	
High intensity discharge lamp	"(A) an electric-discharge lamp in which-- (i) the light-producing arc is stabilized by the arc tube wall temperature; and (ii) the arc tube wall loading is in excess of 3 Watts/cm. (B) Inclusions. The term "high intensity discharge lamp" includes mercury vapor, metal halide, and high-pressure sodium lamps described in subparagraph (A)."	
General service lamp	"includes-- (I) general service incandescent lamps; (II) compact fluorescent lamps; (III) general service light-emitting diode (LED or OLED) lamps; and (IV) any other lamps that the Secretary determines are used to satisfy lighting applications traditionally served by general service incandescent lamps." Specifically excluding over 20 types of other lamps from definition.^{xi}	See examples of general service incandescent lamp, compact fluorescent lamp, and general service LED lamp above.

BALLASTS		
Fluorescent lamp ballast	"a device which is used to start and operate fluorescent lamps by providing a starting voltage and current and limiting the current during normal operation."	
LIGHTING FIXTURES		
Metal halide lamp fixtures	"a light fixture for general lighting application designed to be operated with a metal halide lamp and a ballast for a metal halide lamp."	
Illuminated exit signs	"a sign that-- (A) is designed to be permanently fixed in place to identify an exit; and (B) consists of an electrically powered integral light source that-- (i) illuminates the legend 'EXIT' and any directional indicators; and (ii) provides contrast between the legend, any directional indicators, and the background."	
Torchieres	"a portable electric lamp with a reflector bowl that directs light upward to give indirect illumination"	
Traffic signals and pedestrian modules	"a standard 8-inch (200mm) or 12-inch (300mm) traffic signal indication that-- (A) consists of a light source, a lens, and all other parts necessary for operation; and (B) communicates movement messages to drivers through red, amber, and green colors." "a light signal used to convey movement information to pedestrians."	

With one exception, these covered products have been long subject to federal energy conservation standards,^{xii} beginning with standards for incandescent reflector lamps and general service fluorescent lamps in the Energy Policy Act of 1992 and amended by the Secretary of Energy several times, standards for fluorescent lamp ballasts established by the Secretary of Energy in 2000 and amended by Congress and the Secretary of Energy several times, standards for medium base compact fluorescent lamps, illuminated exit signs, torchieres, traffic signal and pedestrian modules in the Energy Policy Act of 1992, and general service incandescent lamps, intermediate base incandescent lamps, and candelabra base incandescent lamps in the Energy Independence and Security Act of 2007 (EISA-2007). More recently, the Secretary of Energy adopted energy conservation standards for rough service incandescent lamps and vibration service incandescent lamps as directed by Congress in EISA-2007, 42 U.S.C. §6295(f)(4), and these became covered products.

In Table II below, we set out the current federal standards for the different types of lamps that are covered products under EPCA.

TABLE II

Light Source (Lamp)	Applicable Federal Energy Conservation Standard	NV State Regulation Preempted?
General service lamp	See below TBD 84 F.R. 46661, 46672 (Sept 5, 2019)	Yes
General service incandescent lamp	10 CFR 430.32(x)(1) (adopting EISA-2007 efficacy standards)	Yes
Medium base compact fluorescent lamp	10 CFR 430.32(u) (adopting EPCA 2005 standards)	Yes
General service LED lamp	TBD 84 F.R. 46661, 46672 (Sept 5, 2019)	Yes
Incandescent reflector lamp	10 CFR 430.32(n)(6) Efficacy standards	Yes
Intermediate base incandescent lamp	10 CFR 430.32(x)(3) (adopting EISA 2007 standards: 40W max)	Yes
Candelabra base incandescent lamp	10 CFR 430.32(x)(2) (adopting EISA-2007 standards: 60W max)	Yes
Medium base rough service incandescent lamp	10 CFR 430.32(bb)(1) 40W max Single-package marketing limit	Yes
Medium base vibration service incandescent lamp	10 CFR 430.32(bb)(2) 40W max Single-package marketing limit	Yes
General service fluorescent lamp	10 CFR 430.32(n)(4) Efficacy standards	Yes
High intensity discharge lamp (incl. mercury vapor, metal halide, and high- pressure sodium lamps)	None 80 FR 76355 (12/5/2015)	Yes

The Nevada State Legislation and Regulation

AB 54 was adopted by the Nevada legislature on May 21, 2019 and signed by Governor Sisolak on May 27, 2019. AB 54 amended N.R.S. 701.260 and directed your office to establish an energy conservation standard for general service lamps that must meet or exceed 45 lumens per watt with respect to general service lamps sold in Nevada on and after January 1, 2020, and further directed your office to define by regulation "general service lamp." The Department's proposed definition of general service lamps include lamps that are not "general service lamps" under EPCA, but yet are covered products outside of the definition of general service lamps.

The scope of Nevada's proposed definition of general service lamp is entirely derivative of a now-withdrawn definition published by the Secretary of Energy on January 19, 2017 at 82 Fed.Reg. 7276, 7321-22 as modified at 82 Fed.Reg. 7322, 7333. See Proposed Regulation of the Director of the Office of Energy, Lighting Standards (September 3, 2019). That definition was never effective and was recently withdrawn by the Secretary of Energy under a Final Rule published on September 5, 2019, 84 F.R. 46661 (Sept. 5, 2019) after the Secretary concluded that the January 19, 2017 definition ignored the "clear" and "plain" reading of the definition of general service lamp in EPCA, had misconstrued its authority to discontinue exemptions for certain incandescent lamps in a manner that was not consistent with the best reading of the statute, and otherwise exceeded the authority granted to the Secretary of Energy by Congress in the EISA-2007. In short, the Secretary's January 19, 2017 was unlawful.

Included in the now-withdrawn federal definition of general service lamp and Nevada's definition of general service lamp are the following eight covered lighting products for which Nevada's legislation respecting energy conservation standards for general service lamps have been and remain void: (1) general service incandescent lamps, (2) incandescent reflector lamps, (3) intermediate base incandescent lamps, (4) candelabra base incandescent lamps, (5) rough service incandescent lamps, (6) vibration service incandescent lamps, (7) medium base compact fluorescent lamps, and (8) general service light-emitting diode (LED) lamps. Only the first is a general service lamp. *As explained earlier in this letter, each of these types of lamps have been and remain covered products subject to federal preemption of state energy conservation standards regardless of whether they are part of the definition of "general service lamp" or not.* The federal energy conservation standards for the eight covered products identified in Table II remain in force and effect and have not been withdrawn, repealed or otherwise voided and there is no expectation that will be the case.

We note that the Secretary of Energy is completing a rulemaking for one of these covered products, general service incandescent lamps, and has indicated that DOE expects to complete this rulemaking by the end of this year. See 84 Fed.Reg. 46830 (Sept. 5, 2019) (notice of proposed determination). Further, DOE has also indicated that it is considering standards for general service lamps in connection with its general service incandescent lamp determination, 84 Fed.Reg. 46661, 46662 (Sept. 5, 2019), which includes consideration of a 45 lumen per watt standard for general service lamps. 42 U.S.C. §6295(i)(6)(A)(ii)(II) ("shall include consideration of a minimum standard of 45 lumens per watt for general service lamps").^{xiii} This rulemaking has significance --- one way or the other, to be determined --- for Nevada's exception to preemption with respect to general service lamps.

Nevada's potential exception to preemption for general service lamps is set forth at 42 U.S.C. §6295(i)(6)(A)(vi)(I) and (II):

Neither section 6297(b) of this title nor any other provision of law shall preclude California or Nevada from adopting, effective beginning on or after January 1, 2018--

(I) a final rule adopted by the Secretary in accordance with clauses (i) through (iv);

(II) if a final rule described in subclause (I) has not been adopted, the backstop requirement under clause (v);

As cited above, the Secretary of Energy has indicated he is in the final stages of adopting the final rule referred to in subclause (I) above. If the final rule is adopted, Nevada's exception to preemption is entirely based on the Secretary's final rule. Because Nevada's exception to preemption is tied to the forthcoming federal rule, the Office of Energy's December 18, 2019 hearing on its proposed regulation should be deferred until the DOE's final rule is adopted.^{xiv} The legislature's 45 lumen per watt standard may or may not be within Nevada's exception to preemption. That depends upon whether the Secretary of Energy adopts a 45 lumen per watt standard for general service lamps or does not complete the rulemaking. The Office of Energy must await the outcome of this rulemaking.

Furthermore, Nevada's federal exception to preemption is limited to "general service lamps", and there is no question that term derives its meaning entirely from federal law. The proposed Nevada definition of general service lamp is inconsistent with the federal definition of general service lamp and creates a clear case of conflict with federal law where EPCA's express federal preemption is construed broadly. The definition of general service lamp must mirror the federal definition. The proposed Nevada definition should not be adopted. Furthermore, the breadth of this definition includes several niche incandescent light bulbs that, if banned, will present problems for Nevada citizens and businesses if a 45 lumen per watt efficacy standard is applied to them.

As the national trade association for manufacturers of a wide variety of electrical products, including manufacturers of the federally-covered lighting products described in this letter, the National Electrical Manufacturers Association (NEMA) requests on behalf of our Member manufacturers who make and sell these covered products in interstate commerce that the Office of Energy confirm that it will not enforce the above-referenced provisions relating to general service lamps as applied to the eight covered products.

If you believe it would be appropriate to confer or meet and confer on any issue raised in this letter, we are available to meet and confer with your office. I can be contacted at (703) 841-3280 or by email at Clark.Silcox@nema.org.

Very truly yours,



Clark R. Silcox
General Counsel

ⁱ The Energy Policy and Conservation Act, 42 U.S.C. §6291 et seq, often referred to as "EPCA," was enacted in 1975 and has been amended numerous times thereafter.

ⁱⁱ See 42 U.S.C. §6297(b).

ⁱⁱⁱ See 42 U.S.C. §6297(c).

^{iv} *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1363 (D.C. Cir. 1985) ("A determination that no standard is warranted for a particular appliance, like the issuance of a mandatory standard, preempts any state-law efficiency requirements for the appliance, although the state may then apply to the Secretary for an exemption from the preemption provision.").

^v *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 2008 U.S. Dist. LEXIS 106706 (D.N.M. 2008).

^{vi} *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 500 (9th Cir. 2005).

^{vii} The term "effective" means, in this context, "being in effect." See *Teton Cnty. Republican Cent. Comm. v. Hansen*, 2016 U.S. Dist. LEXIS 53000 at * (D. Id. 2016) (quoting Merriam-Webster Dictionary). "The ordinary meaning of "effect" in this context is: "the quality or state of being operative." Webster's Third New Int'l Dictionary 724 (unabridged. 1993). In turn, "operative" in context means: "having the power of acting: exerting force or influence." Webster's Third New Int'l Dictionary 1581 (unabridged ed. 1993)." *In re Wedblad*, 2012 Bankr. LEXIS 303 at *11 (D. Or. 2012). In short, State regulations concerning energy efficiency or energy use for a covered product are not "operative" and have "no power of exerting force or influence" unless a congressionally specified exception exists.

^{viii} Definition does not include --- "(I) An appliance lamp, (II) A black light lamp, (III) A bug lamp, (IV) A colored lamp, (V) An infrared lamp, (VI) A left-hand thread lamp, (VII) A marine lamp, (VIII) A marine signal service lamp, (IX) A mine service lamp, (X) A plant light lamp, (XI) A reflector lamp, (XII) A rough service lamp, (XIII) A shatter-resistant lamp (including a shatter-proof lamp and a shatter-protected lamp), (XIV) A sign service lamp, (XV) A silver bowl lamp, (XVI) A showcase lamp, (XVII) A 3-way incandescent lamp, (XVIII) A traffic signal lamp, (XIX) A vibration service lamp, (XX) A G shape lamp (as defined in ANSI C78.20-2003 and C79.1-2002 with a diameter of 5 inches or more, (XXI) A T shape lamp (as defined in ANSI C78.20-2003 and C79.1-2002) and that uses not more than 40 watts or has a length of more than 10 inches, (XXII) A B, BA, CA, F, G16- 1/2, G-25, G30, S, or M-14 lamp (as defined in ANSI C79.1-2002 and ANSI C78.20-2003) of 40 watts or less."

^{ix} Definition does not include --- "(I) any lamp that is-- (aa) specifically designed to be used for special purpose applications; and (bb) unlikely to be used in general purpose applications, such as the applications described in subparagraph (D); or (II) any lamp not described in subparagraph (D) that is excluded by the Secretary, by rule, because the lamp is-- (aa) designed for special applications; and (bb) unlikely to be used in general purpose applications."

^x "Definition does not include --- "1) Fluorescent lamps designed to promote plant growth; (2) Fluorescent lamps specifically designed for cold temperature applications; (3) Colored fluorescent lamps; (4) Impact-resistant fluorescent lamps; (5) Reflectorized or aperture lamps; (6) Fluorescent lamps designed for use in reprographic equipment; (7) Lamps primarily designed to produce radiation in the ultra-violet region of the spectrum; and (8) Lamps with a Color Rendering Index of 87 or greater."

^{xi} Definition does not include ---“(I) any lighting application or bulb shape described in [the list of lamps excluded from the definition of general service incandescent lamp]; or (II) any general service fluorescent lamp or incandescent reflector lamp.”

^{xii} The one exception is the high intensity discharge lamp. DOE conducted a rulemaking to establish energy conservation standards for this lamp but concluded the agency could not economically justify any standard. 80 FR 76355 (12/5/2015).

^{xiii} It is well understood that when Congress asks an agency or other body to “consider” something, Congress is not mandating the outcome. “To ‘consider’ means to ‘reflect on,’ ‘think about,’ ‘deliberate,’ ‘ponder’ or ‘study.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 483 (1993). It does not mean to ‘adhere to,’ ‘be bound by’ or ‘follow.’” *U.S. v. Bruce*, 285 F.3d 69, 73 (D.C. Cir. 2002); “This instruction to ‘consider’ such information as is “relevant” can hardly be read as a strict dictate. ‘Consider’ means ‘examine’ or ‘inspect.’ Black’s Law Dictionary 306 (6th ed. 1990).” *J.H. Miles & Co., Inc. v. Brown*, 910 F.Supp. 1138, 1156 (E.D.Va.,1995). Accord, Oxford Dictionary of English (2010) (“consideration/n. careful thought, typically over a period of time.”); Oxford Dictionary of English (2010) (“consider/v. think carefully about something, typically before making a decision”). Thus, Congress did not mandate a 45 lumen per watt standard for general service lamps.

^{xiv} That is implicit in the statutory text describing Nevada’s exception to preemption. Nevada can only act after the Secretary has acted one way or the other. Nevada can act after the Secretary has determined standards for general service incandescent lamps and general service lamps under subclause (v)(I). Even in the case of the “backstop” standard referenced in 42 U.S.C. §6295(i)(6)(A)(vi)(II), that standard is not self-executing but requires the Secretary of Energy to act by banning the sale of general service lamps that do not meet an efficacy standard of 45 lumens per watt. The Secretary of Energy has not done that. See 84 Fed.Reg. at 46663-64.