

No. 07 – 71576

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIFORNIA ENERGY COMMISSION, Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al., Respondents

APPEAL OF ADMINISTRATIVE ACTION

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND  
BRIEF OF AMICI CURIAE GAS APPLIANCE MANUFACTURERS  
ASSOCIATION, INC. AND AIR-CONDITIONING AND  
REFRIGERATION INSTITUTE, INC. IN SUPPORT OF  
RESPONDENT UNITED STATES DEPARTMENT OF ENERGY  
AND FOR AFFIRMANCE OF THE DECISION OF THE AGENCY**

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v.

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**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE**

The Gas Appliance Manufacturers Association, Inc. and the Air-  
Conditioning and Refrigeration Institute, Inc. respectfully move for leave to  
file the attached brief of amici curiae in support of respondent United  
States Department of Energy and urging affirmance of the decision of the  
agency.

## INTEREST OF MOVANTS

The Gas Appliance Manufacturers Association, Inc. ("GAMA") is a nonprofit national trade association of manufacturers of residential and commercial space heating and water heating appliances and related components and accessories. GAMA represents the interests of these manufacturers before federal and state legislative and regulatory bodies on matters of industry-wide concern.

Many consumer products within GAMA's scope are subject to national minimum energy efficiency standards prescribed by the federal Energy Policy and Conservation Act of 1975 ("EPCA"), Pub. L. 94-163, 89 Stat. 871 (1975), as amended by the National Appliance Energy Conservation Act of 1987 ("NAECA"), Pub. L. 100-12, 101 Stat. 103 (1987), *codified at* 42 U.S.C. §§ 6291-6309, or by the United States Department of Energy ("DOE") pursuant to authority granted to the agency by EPCA, as amended. These products include residential furnaces, boilers, water heaters, pool heaters and direct heating equipment (non-ducted room heaters). *See* EPCA §§ 325(e), (f), 42 U.S.C. §§ 6295(e), (f). Certain types of commercial equipment within GAMA's scope are also subject to minimum energy efficiency standards prescribed by EPCA, as amended by the Energy Policy Act of 1992 ("1992 EPACT"), Pub. L. 102-486, 106 Stat.

2776, *codified at* 42 U.S.C. §§ 6311-6317, or by DOE pursuant to authority granted to the agency by EPCA, as amended. These products include commercial warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters and unfired hot water storage tanks. *See* EPCA § 342(a), 42 U.S.C. § 6313(a). On behalf of the GAMA membership, representatives of GAMA regularly participate in DOE rulemaking activities to review and update federal minimum energy efficiency standards for GAMA-covered products or to update DOE-prescribed test procedures used to measure the efficiency performance of these products.

The Air-Conditioning and Refrigeration Institute, Inc. (“ARI”) is a nonprofit national trade association of manufacturers of residential and commercial air conditioning equipment and commercial refrigeration equipment and related components and accessories. ARI represents the interests of these manufacturers before federal and state legislative and regulatory bodies on matters of industry-wide concern.

Many consumer products within ARI’s scope are subject to minimum energy efficiency standards prescribed by EPCA, *supra*, as amended by NAECA, *supra*, or by DOE pursuant to authority granted to the agency by EPCA, as amended. These products include residential central air conditioners and residential central air conditioning heat pumps. *See* EPCA

§ 325(d), 42 U.S.C. § 6295(d). Certain types of commercial equipment within ARI's scope are also subject to minimum energy efficiency standards prescribed by EPCA, as amended by 1992 EPACT, *supra*, or by DOE pursuant to authority granted to the agency by EPCA, as amended. These products include small and large commercial package air conditioning and heating equipment, packaged terminal air conditioners and heat pumps. *See* EPCA § 342(a), 42 U.S.C. § 6313(a). On behalf of the ARI membership, representatives of ARI regularly participate in DOE rulemaking activities to review and update federal minimum energy efficiency standards for ARI-covered products or to update DOE-prescribed test procedures used to measure the efficiency performance of these products.

EPCA, as amended by NAECA, provides for strong federal preemption of state and local regulation of the energy efficiency, energy use or water use of EPCA-covered consumer products with certain limited exceptions. *See* EPCA § 327, 42 U.S.C. § 6297. EPCA, as amended by 1992 EPACT, generally extends such federal preemption to EPCA-covered commercial equipment within the respective scopes of GAMA and ARI. *See* EPCA § 345(b)(2), 42 U.S.C. § 6316(b)(2).

The federal preemption provisions of EPCA are extremely important to GAMA and ARI and their respective memberships and are the main

reason our industries supported passage of NAECA and 1992 EPACT. Uniform national standards allow manufacturers to achieve economies of scale in manufacturing and to maximize product distribution efficiencies. State and local regulatory requirements with the attendant administrative burdens placed on manufacturers by state and local regulatory agencies make product manufacturing and distribution less efficient, resulting in increased costs for manufacturers and higher product prices for appliance and equipment purchasers. Any weakening of EPCA federal preemption would be a threat to the continued health of our industries and would undermine the consensus support which made possible the passage of NAECA and the equipment efficiency standards provisions of 1992 EPACT.

EPCA does provide that a state may petition DOE for a waiver of federal preemption so that a state regulation concerning the energy efficiency, energy use or water use of a consumer product covered by EPCA can take effect with respect to products sold in that state. *See* EPCA § 327(d)(1)(A), 42 U.S.C. § 6297(d)(1)(A). However, NAECA, amending EPCA, established very stringent criteria that a state must meet to obtain a waiver of federal preemption. *See* EPCA §§ 327(d)(1)(B), (C), 42 U.S.C. §§ 6297(d)(1)(B), (C). 1992 EPACT, further amending EPCA, made these waiver criteria applicable as well to petitions for waivers of federal

preemption of state and local regulation of EPCA-covered commercial equipment. *See* EPCA § 345(b)(2)(D), 42 U.S.C. § 6316(b)(2)(D).

The very first petition for a waiver of federal preemption under EPCA since the passage of NAECA was denied by DOE and is the subject of the instant appeal to this Court by the California Energy Commission (“CEC”). The question before the Court posed by the CEC’s appeal is therefore one of first impression. This is the first time any court has been asked to interpret the EPCA waiver of federal preemption provisions. Although the state regulation in issue has to do with the water use of an EPCA-covered product, the EPCA federal preemption provisions apply equally to state and local regulation of water use, energy efficiency and energy use. Thus, however this Court decides the CEC’s appeal, a precedent will be set that most probably will materially affect the outcome of any future waiver of federal preemption petitions filed by the State of California or any other state respecting EPCA-covered products within the respective product scopes of GAMA and ARI. Our two associations therefore have a vital interest in how this Court interprets the EPCA provisions regarding state petitions for waivers of federal preemption.

**WHY THE AMICI BRIEF IS DESIRABLE AND WHY THE**  
**MATTERS ASSERTED ARE RELEVANT TO THE**  
**DISPOSITION OF THE CASE**

The CEC, the petitioner in this case, is seeking a reversal of the decision of DOE denying the CEC's petition for a waiver of federal preemption to allow California water use standards for residential clothes washers, an EPCA-covered product, to take effect and be enforced. DOE denied the CEC waiver petition on the basis that the CEC failed to satisfy the criteria prescribed by Section 327(d) of EPCA, as amended by NAECA, 42 U.S.C. § 6297(d), for justification of a waiver of federal preemption. The CEC asks this Court to find that DOE committed legal errors in interpreting and applying the EPCA waiver of federal preemption provisions. The task before this Court therefore is to examine and interpret Section 327(d) of EPCA to determine if DOE correctly applied its provisions to the CEC's waiver petition.

The provisions of EPCA relating to waiver of federal preemption of state and local regulation of the energy efficiency or energy use of EPCA-covered products were substantially changed by the NAECA amendments to EPCA in 1987. These provisions were part and parcel of a consensus agreement between the regulated industries and efficiency standards

advocacy groups acting in consultation with the CEC to establish a more effective federal appliance efficiency standards regime. In return for stronger federal preemption of state and local regulation of their products, appliance manufacturers agreed to legislate national standards and a prescribed schedule for DOE to update the national standards. The consensus agreement was presented to Congress and enacted as NAECA.

GAMA and ARI both played essential roles in the negotiation of NAECA and securing its passage by Congress as representatives of the interests of the manufacturers of many different types of products covered by EPCA. One of the undersigned, Joseph Mattingly, was personally involved in the drafting of NAECA, including the waiver of federal preemption procedures and criteria contained in Section 327(d) of EPCA, as amended by NAECA. The accompanying brief reflects our intimate knowledge of the origins and intent of the NAECA federal preemption provisions in general, and of the NAECA waiver of federal preemption provisions in particular, and contains information offered to help the Court in determining whether DOE correctly applied these criteria in this case.

Additionally, GAMA and ARI continue to speak for many of the industries that manufacture EPCA-covered products and for whom the federal preemption afforded by EPCA remains extremely important. Any

significant weakening of federal preemption will result in additional marketplace uncertainty for manufacturers and will greatly complicate product distribution. As previously mentioned, the Court's opinion and decision in this case will undoubtedly affect the disposition of future petitions for waivers of federal preemption respecting products manufactured by the industries we represent. It is of utmost importance to our industries that this Court not weaken the federal preemption provisions of EPCA, and the information and views contained in the accompanying brief are presented with that concern in mind. We ask the Court to recognize the enormous stake the industries we represent have in the outcome of this case and accept the matters asserted in the accompanying brief as relevant to its disposition.

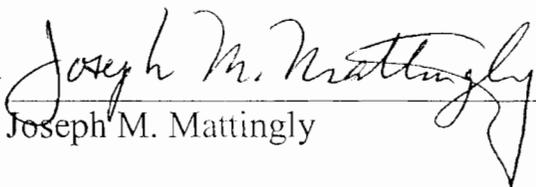
CONCLUSION

For the foregoing reasons, this Court should grant this motion for leave to file the attached brief of amici curiae in support of the respondent United States Department of Energy and urging affirmance of the decision of the agency.

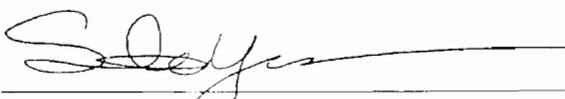
Dated: December 14, 2007

Respectfully submitted,

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## CORPORATE DISCLOSURE STATEMENT

The Gas Appliance Manufacturers Association, Inc. (GAMA), a non-stock, nonprofit trade association, has no parent corporation, and no publicly held corporation owns stock in GAMA.

The Air-Conditioning and Refrigeration Institute, Inc. (ARI), also a non-stock, nonprofit trade association, has no parent corporation, and no publicly held corporation owns stock in ARI.

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**IDENTITY, SOURCE OF AUTHORITY**  
**AND INTEREST OF AMICI CURIAE**

The Gas Appliance Manufacturers Association, Inc. (“GAMA”) is a nonprofit national trade association of manufacturers of residential and commercial space heating and water heating appliances and related components and accessories. These products include residential and commercial furnaces, boilers and water heaters, and residential pool heaters and direct heating equipment (non-ducted room heaters).

The Air-Conditioning and Refrigeration Institute, Inc. (“ARI”) is a nonprofit national trade association of manufacturers of residential and commercial air conditioning equipment and commercial refrigeration equipment and related components and accessories. These products include residential central air conditioners and residential central air conditioning heat pumps, small and large commercial package air conditioning and heating equipment, and commercial packaged terminal air conditioners and heat pumps.

Amici are authorized to file this brief under Fed. R. App. P. 29(b).

GAMA and ARI have an interest in the disposition of this case because they represent the interests of manufacturers of consumer and commercial products covered by the federal Energy Policy and Conservation

Act of 1975 (“EPCA”), Pub. L. 94-163, 89 Stat. 871 (1975), as amended by the National Appliance Energy Conservation Act of 1987 (“NAECA”), Pub. L. 100-12, 101 Stat. 103 (1987), *codified at* 42 U.S.C. §§ 6291-6309, and further amended by the Energy Policy Act of 1992 (“1992 EPACT”), Pub. L. 102-486, 106 Stat. 22776, *codified at* 42 U.S.C. §§ 6311-6317. EPCA, as amended by NAECA and 1992 EPACT, preempts state and local regulation of the energy efficiency, energy use or water use of EPCA-covered products with certain limited exceptions. *See* EPCA §§ 327, 345(a), (b), 42 U.S.C. §§ 6297, 6316(a), (b).

In a case of first impression, this Court is being asked to interpret the provisions of EPCA under which a state may petition the United States Department of Energy (“DOE”) for a waiver of federal preemption to allow a state regulation of EPCA-covered products to take effect and be enforced. GAMA and ARI have an interest in this matter because the disposition of this case will serve as precedent for the disposition of any future petitions for waivers of federal preemption under EPCA by California or other states respecting products manufactured by member companies of GAMA and ARI.

## STATEMENT OF FACTS

On September 16, 2005, the California Energy Commission (“CEC”) petitioned DOE for a waiver of federal preemption under Section 327(d) of EPCA, *supra*, 42 U.S.C. § 6297(d), to allow CEC-prescribed water efficiency standards for residential clothes washers to become effective. In accordance with EPCA procedural requirements, DOE published a notice of receipt of the CEC’s petition in the February 6, 2006 *Federal Register* and solicited comments on the petition. On April 6, 2006, both GAMA and ARI submitted comments to DOE in opposition to the granting of a waiver of federal preemption to the CEC. These comments questioned whether the CEC’s petition satisfied the statutory criteria for obtaining a waiver of federal preemption. More specifically, the GAMA and ARI comments questioned whether the CEC had established that the State of California has “unusual and compelling State or local energy or water interests” and whether the CEC had met its burden of proof in its attempt to show that the clothes washer water efficiency standards are needed to meet such State or local interests. DOE published a notice denying the CEC’s waiver petition in the December 28, 2006 *Federal Register*. Following an unsuccessful request to the agency for reconsideration of its decision, the CEC petitioned this Court for review on April 23, 2007.

## ARGUMENT

### I. **EPCA, as amended by NAECA, Imposes a Heavy Burden of Proof on States Petitioning for a Waiver of Federal Preemption**

This Court has previously recognized that NAECA was the product of a compromise between appliance trade associations and efficiency standards advocates which aimed to fix a national appliance efficiency standards program that had proved ineffective. *See Air Conditioning and Refrigeration Institute, et al. v. Energy Resources Conservation and Development Commission, et al.*, 410 F. 3d 492, 499 (9<sup>th</sup> Cir. 2005) (*hereinafter ARI v. CEC*).\* The trade associations, which included GAMA and ARI, acting on behalf of their member companies, agreed to initial legislate national appliance efficiency standards and a schedule for periodic updating of the initial standards by DOE in return for stronger federal preemption of state and local regulation of EPCA-covered products. The consensus agreement was presented to Congress and enacted as NAECA.

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\* In *ARI v. CEC*, the issue before the Court was the applicability of Section 327(a) of EPCA, as amended by NAECA, 42 U.S.C. § 6297(a) (“Preemption of testing and labeling requirements”) to CEC regulations requiring appliance manufacturers to report information to the CEC and to mark products with respect to the energy efficiency or energy use of EPCA-covered products. Unlike the instant case, *ARI v. CEC* did not concern an appeal of the disposition of a petition for a waiver of federal preemption by DOE under Section 327(d) of EPCA, 42 U.S.C. § 6297(d).

One way NAECA strengthened federal preemption was to make it more difficult for states to obtain a waiver of federal preemption. Previously, EPCA, as amended by the National Energy Conservation Policy Act of 1978 (“NECPA”), Pub. L. 95-619, 92 Stat. 3206 (1978), allowed waivers of federal preemption upon a showing by a state petitioner that the state had a significant state or local interest to justify the local regulation and upon a finding by DOE that the state regulation would not unduly burden interstate commerce. NECPA § 424(a), 92 Stat. at 3264. NAECA substituted language to make waivers of federal preemption much harder to justify. In the words of this Court, citing the legislative history of NAECA,

NAECA also made it more difficult for states to obtain waivers of preemption for more stringent state efficiency standards; in order to obtain a waiver, NAECA required states to establish by a preponderance of the evidence that state regulation was justified by unusual and compelling state or local interests. 42 U.S.C. § 6297(d) (1)(B)-(C); *see* S. Rep. No. 100-6 at 9. The reason for the broader preemption standards 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.’ S. Rep. No. 100-6 at 4.

*ARI v. CEC*, *supra*, 410 F.3d at 500, *citing* S. Rep. No. 100-6, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1987).

A state petitioning DOE for a waiver of federal preemption under Section 327(d) of EPCA now has a three-fold burden of proof. To make a case for obtaining a waiver, the petitioner must establish that it has “unusual and compelling State or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(B). To do this, the petitioner must pass two tests. First, the petitioner must establish that its state or local energy or water interests are “substantially different in nature or magnitude than those prevailing in the United States generally.” 42 U.S.C. § 6297(d)(1)(C)(i). Second, the petitioner must establish that there are no alternative approaches to energy or water savings, including market incentives, which would be as cost-effective and reliable as the State regulation in achieving the desired energy or water savings. 42 U.S.C. § 6297(d)(1)(C)(ii). Even if these two tests can be met the petitioner has a third burden of proof to overcome, *i.e.* that the state regulation is needed to meet the unusual and compelling state or local energy or water interests. 42 U.S.C. § 6297(d)(1)(B).

In cases where the petitioner has met its burden of proof, a waiver of federal preemption is still not automatic. DOE may not grant a waiver if other interested parties show that the state regulation would “significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis.” 42 U.S.C. § 6297(d)(3). Additionally,

DOE may not grant a waiver if other interested parties establish that the state regulation would likely eliminate from the state marketplace EPCA-covered products having substantially the same performance characteristics (including reliability), features, sizes, capacities and volumes as products available in the state at the time DOE rules on the waiver petition. 42 U.S.C. § 6297(d)(4).

If the petitioner has met its burden of proof and other interested parties opposing the petition have not met theirs, DOE may grant the waiver petition. However, DOE may not permit the State regulation to become effective for at least three years after the waiver is granted. 42 U.S.C. § 6297(d)(5)(A).

## **II. DOE Was Right to Deny the CEC's Waiver Petition.**

### **A. Although DOE Was Right to Deny the CEC's Petition for Other Reasons, DOE Erred in Finding That the Petition Demonstrated That California's Water Interests Are "Substantially Different in Magnitude Than Those Prevailing in the United States Generally."**

Although DOE correctly denied the CEC's petition on other grounds discussed below, DOE determined that the CEC did demonstrate that California's water interests are substantially different in magnitude than water interests prevailing in the United States generally. 71 *Fed. Reg.* at 78162. Interpreting the statutory phrase "substantially different in nature or

magnitude than those prevailing in the United States generally,” 42 U.S.C. § 6297(d)(1)(C)(i), DOE focused on the meaning of the word “generally.”

DOE found the word defined in dictionaries as “widely” or “commonly,” but in a *non-sequitur* concluded that the word really means the national average. *Id.* at 78161.

If Congress had meant for DOE to use only national average energy interests or conditions as the basis for assessing whether a state’s local energy or water interests deserve special recognition, it could easily have said so. Instead, the statute requires states petitioning for a waiver of federal preemption to establish not just that their local energy or water interests are more severe than the national average, but that they are unusual or uncommon. If there are several other states that face very similar water supply conditions as California, California’s water supply conditions should not necessarily be considered unusual or uncommon, even if such conditions are more severe than the national average. DOE therefore should have required the CEC to compare California’s water interests against those of other arid states with growing populations, such as Nevada, Arizona and Texas, and not simply against some national average.

Moreover, if one among many states in a region facing common energy or water supply conditions is granted a waiver, it follows that the

other states will expect the same treatment, and the result would be the same as if DOE had prescribed regional standards. DOE has no legal authority to prescribe regional standards for EPCA-covered products.

DOE further erred in its analysis by shifting the burden of proof on the question of whether California's water supply conditions are substantially more severe than those of other states or regions from the petitioner to those opposing the petition. *See 71 Fed. Reg.* at 78160-61. DOE said that any comparison of California's water interests with those of other states "is better addressed when conducting the necessary analysis of costs and burdens, not when considering the nature and magnitude of a State's water interests." *71 Fed. Reg.* at 78161. Opponents of the petition have the burden of proof when the analysis shifts to consideration of the extent to which a state regulation granted a waiver of federal preemption would unduly burden interstate commerce such as by leading to a proliferation of state appliance efficiency requirements. *See Section 327(d)(3), 42 U.S.C. § 6297(d)(3)*. However, under the statute it is the responsibility of the petitioner to prove that its local situation is "unusual and compelling;" it is not the responsibility of other interested parties to prove the opposite.

**B. DOE Correctly Determined That the CEC Petition Did Not Provide Sufficient Analysis to Support a Finding That California’s Water Interests Are “Unusual and Compelling.”**

A major reason for DOE’s denial of the CEC’s waiver petition was DOE’s finding that the CEC “failed to establish that the State regulation proposed in the California petition is necessary or preferable as compared to other alternatives.” 71 *Fed. Reg.* at 78164. DOE explained that the petition did not provide supporting analysis for the CEC’s estimates of the costs and benefits of its proposed regulation, nor did the petition indicate where in the CEC’s rulemaking record such analysis could be found, making it impossible for DOE to determine if the CEC’s estimates were reasonable. *Id.* at 78163. DOE further explained that the CEC’s petition provided no analysis of the costs and benefits of California-based non-regulatory alternatives, but instead relied improperly on national estimates DOE published in 2000 in evaluating non-regulatory alternatives to DOE’s own energy efficiency standards for residential clothes washers. *Id.* Because of these defects in the CEC’s petition DOE said it lacked the information needed to determine whether the California regulation is necessary or preferable to non-regulatory alternatives. *Id.* at 78164. Since these defects in the CEC’s petition by themselves made the state regulation unworthy of a waiver of federal preemption DOE saw no reason to consider whether the

CEC had established that the state regulation is needed to meet the state's water interests. *Id.*

In its appeal to this Court, the CEC responds to DOE's finding that the CEC's waiver petition was defective because the petition did not provide the required supporting analysis by commenting that the information was available to DOE in the CEC's rulemaking record. Petitioner's Opening Brief at 21. According to DOE, the CEC did not indicate where in the CEC's rulemaking record the analysis could be found. 71 *Fed. Reg.* at 78163. In no case where a state has petitioned DOE for a waiver of federal preemption should DOE be expected or required to do the petitioner's job of eliciting or presenting the evidence for justification of a waiver. DOE should not be required to search the CEC's rulemaking record to find information that might be used to justify a waiver of federal preemption for the CEC's clothes washer standards. It is the CEC's job, not DOE's, to assemble the evidence needed to support a waiver of federal preemption.

DOE was also well within its rights not to accept its own five-year old analysis of the relative costs and benefits of alternatives to a national energy efficiency standard for residential clothes washers as a substitute for the CEC doing its own homework to examine alternatives to clothes washer water efficiency standards in California. The CEC concedes that its

discussion of non-regulatory alternatives in its waiver petition relied at least in large part on the earlier DOE analysis. Petitioner's Opening Brief at 25. Being the author of the 2000 study, DOE is certainly in the best position to know the extent to which information contained in that study is relevant to the California market, and evidently DOE determined that its earlier findings were not very relevant at all to the issues the CEC was required to address in its waiver petition.

It is not enough for a state seeking a waiver of EPCA federal preemption to address non-regulatory alternatives to the state regulation in issue by relying on generic treatises of standards alternatives or the experiences of others that do not specifically evaluate conditions, institutions, practices, costs and benefits in the petitioner's state. EPCA requires the waiver petitioner "to show that it has engaged in a rational planning process in which the State has reviewed the cost-effectiveness of various alternatives to State appliance standards." H.R. Report No. 100-11, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1987). It is not rational or responsible for the CEC or for DOE to dismiss an alternative to regulation simply because some federal or state entity outside of California saw fit to do so. DOE should not be expected to countenance attempts by a petitioner to shortcut justification of a waiver of federal preemption by offering non-specific information or

analysis. Whatever analysis is offered as evidence that the California regulation is necessary or preferable to alternatives must be specific to California.

**C. It Has Not Been Established That the CEC Regulation is “Needed” to Meet California’s Water Interests.**

The CEC asks this Court to remand this matter to DOE with an instruction that the CEC has established that its clothes washer standards are needed to meet California’s state and local water interests. Petitioner’s Opening Brief at 50-51. But it has not been established that the CEC has met its burden of proof on the “need” issue. As mentioned previously, because DOE determined that the CEC failed to demonstrate that California’s water interests are “unusual and compelling,” DOE justifiably saw no reason to consider whether the CEC met its additional burden of proof to establish that its regulation is “needed” to meet such interests.

If and when DOE is called upon to consider a new or amended CEC waiver petition, and assuming that the CEC is then able to meet its other burdens of proof, DOE would have to consider the precise extent of the contribution of residential clothes washer water use to California’s overall water supply conditions. If the contribution of residential clothes washers is relatively insignificant, DOE would have to conclude that the California clothes washer water efficiency standards are not needed to resolve the

state's water supply concerns. Also, it should be remembered that manufacturers of residential clothes washers agreed to stronger federal regulation of these products in return for greater protection from state and local regulation. Other contributors to California's water supply concerns that do not enjoy protection from state and local regulation as part of a national standards program should have priority over EPCA-covered products as candidates for state regulation.

**D. DOE Was Right to Deny the CEC Waiver Petition Because the CEC Regulation Would Result in the Unavailability of Top-Loading Residential Clothes Washers.**

Even if the CEC had fully met its burden of proof, DOE determined that it could not grant the waiver petition for another reason. DOE found based on comments received from other parties that “the proposed California standard would result in the unavailability of top-loading residential clothes washers in the California market” because there are no top-loading residential clothes washers on the market today that meet the 2010 Water Factor (WF) standard (6.0 WF) contained in the California regulation. 71 *Fed. Reg.* at 78167. The CEC concedes that there are no top-loading residential clothes washers in today's market that meet the 6.0 WF standard, but asserts that “quite likely” there will be some that do by the 2010 effective date of the standard. Petitioner's Opening Brief at 49-50.

This Court should not require DOE to “buy into” such speculation, especially since the stringent waiver of federal preemption provisions of EPCA discourage leniency on the part of DOE in evaluating waiver petitions. The whole point of EPCA, as amended by NAECA, is that any forcing of the appliance market to new levels of efficiency is not to be left to state regulation but rather is to be the function of the federal government in periodically updating federal minimum efficiency standards. If products are not already available in substantial quantities to meet a 6.0 WF mandate, that fact alone is reason enough to deny the CEC’s waiver petition.

In a final desperate maneuver to save its waiver petition, the CEC requests the Court to direct DOE to consider whether a 6.3 WF standard, rather than the 6.0 WF standard contained in the CEC regulation, merits a waiver of federal preemption. Petitioner’s Opening Brief at 50-51. In effect, the CEC is asking the Court to rewrite its regulation and to amend its waiver petition. We respectfully submit that it would be improper for the Court to do so.

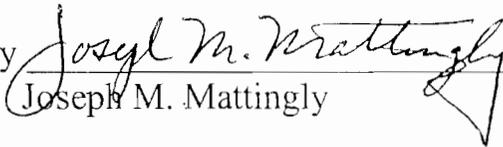
CONCLUSION

The Court should affirm DOE's decision to deny the petition of the CEC for a waiver of federal preemption respecting the CEC's clothes washer water efficiency standards.

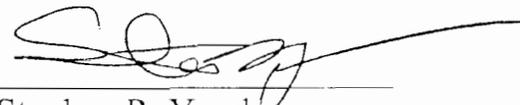
Dated: December 14, 2007

Respectfully submitted,

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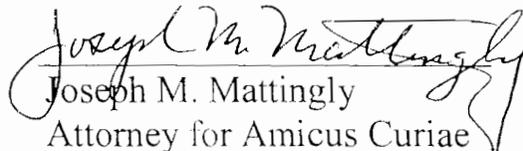
CERTIFICATE OF COMPLIANCE PURSUANT TO

CIRCUIT RULE 32-1

Case No. 07-71576

I certify that pursuant to Fed. R. App. P. 29(d) and 9<sup>th</sup> Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points and contains 3337 words as calculated by the Microsoft Word 2003 word processing system used to prepare the brief.

December 14, 2007

  
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## CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2007, I served the foregoing **Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae Gas Appliance Manufacturers Association, Inc. and Air-Conditioning and Refrigeration Institute, Inc. in Support of Respondent United States Department of Energy and for Affirmance of the Decision of the Agency** on each of the following persons at their respective mailing addresses indicated below by placing a true copy enclosed in a sealed envelope with postage fully prepaid in the U.S. mail:

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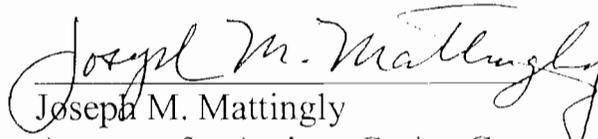
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