

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ENERGY COMMISSION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents.

ASSOCIATION OF HOME APPLIANCE MANUFACTURERS,
Intervenor.

On Petition for Review of an Order
Issued by the Department of Energy

BRIEF FOR THE RESPONDENTS

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JURISDICTIONAL STATEMENT

The order under review, a denial of a petition for a waiver of federal preemption, was issued by the Department of Energy (DOE) and published in the Federal Register on December 28, 2006. See 71 Fed. Reg. 78157 (ER 139). Petitioner California Energy Commission (CEC) requested administrative reconsideration of the denial on January 29, 2007 (January 27 was a Saturday). ER 1. Pursuant to DOE regulations, that request was deemed denied on February 28, 2007. See 10 C.F.R. § 430.48(c). The petition for review was filed on April 23, 2007.

CEC invokes the jurisdiction of this Court under 42 U.S.C. § 6306(b)(1). As we explain below, that statute does not apply to this case because a denial of a

petition for waiver is not “a rule prescribed under section 6293, 6294, or 6295 of” Title 42; it is instead an order issued pursuant to 42 U.S.C. § 6297(d). For that reason, this Court lacks jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Federal law preempts state regulation of energy or water usage by residential clothes washers (among other appliances). CEC petitioned DOE for a waiver to allow California to regulate water usage by such washers, and DOE denied CEC’s petition. This case presents the following questions:

1. Whether 42 U.S.C. § 6306(b)(1) confers jurisdiction on the court of appeals for direct review of DOE’s order denying a petition for waiver of federal preemption.
2. If so, whether DOE’s order was arbitrary, capricious, or otherwise contrary to law.

STATEMENT OF THE CASE

A. Nature of the Case

This case seeks judicial review of an agency order denying a waiver of federal preemption under the Energy Policy and Conservation Act (EPCA). EPCA expressly preempts state regulation of energy efficiency, energy use, or water use of products covered by federal energy efficiency standards, including residential clothes washers. The statute also gives DOE the authority to consider petitions by states for waivers of federal preemption. DOE has authority to grant a waiver if the state “establishe[s] by a preponderance of the evidence that such State regulation is needed to meet

unusual and compelling State or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(B). The statute also defines the criteria constituting unusual and compelling interests, requires DOE to follow notice and comment rulemaking procedures in considering a waiver petition, and sets out additional factors that DOE must consider, including a minimum three-year limitation on the effective date of a state regulation, the effect of a state regulation on product availability, and the burden it would impose on manufacturers and others nationwide. Ibid.

CEC petitioned for a waiver to allow California to regulate the water usage of residential clothes washers. DOE provided public notice, considered public comments, and denied the CEC petition. As the agency explained in the order under review, there were three independent reasons for the denial: First, CEC’s proposed regulations purported to take effect on January 1, 2007, far less than the statutory three-year minimum, and CEC did not provide any information necessary to support a different effective date. Second, CEC did not meet the statutory standard, which requires a state to show unusual and compelling water interests. CEC contended that a cost-benefit analysis showed that its regulation would be preferable to non-regulatory alternatives, but CEC’s petition did not support its conclusions with the underlying data that would have allowed DOE to determine whether the statutory standard was satisfied. Third, the record demonstrated that CEC’s proposed regulation would make a class of washers unavailable in California, requiring denial of the waiver petition. See 71 Fed. Reg. 78157-78158 (ER 139-140).

Instead of filing an action in district court under the Administrative Procedure Act (APA), CEC brought a petition for review directly in this Court. The government moved to dismiss the petition for review, on the ground that the Court lacks original jurisdiction to consider a petition for review of a DOE order denying a waiver petition. The Appellate Commissioner denied the motion without prejudice to the Court's consideration of the issue following full briefing.

B. Statutory Scheme

1. This case concerns federal preemption of state regulations under Part B of Title III of the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, §§ 321-339, 89 Stat. 871, 917-932, as amended and codified at 42 U.S.C. §§ 6291-6309 (“Energy Conservation Program for Consumer Products Other Than Automobiles”). The relevant provisions of EPCA were enacted in 1975 and were amended in 1987 by the National Appliance Energy Conservation Act (NAECA), Pub. L. No. 100-12, 101 Stat. 103, 126.

Those provisions establish federal energy conservation standards for specified consumer appliances, including refrigerators, freezers, air conditioners, water heaters, dishwashers, televisions, furnaces, ranges, ovens, and clothes washers and dryers.¹ See 42 U.S.C. § 6295. EPCA also authorizes DOE to establish new or amended standards by regulation. Ibid. In addition to the energy conservation standards,

¹ Those provisions of EPCA also provide for similar standards governing water usage of specified plumbing products, such as showerheads, faucets, and toilets. See 42 U.S.C. § 6292(a)(15)-(18).

EPCA also established federal testing procedures and labeling requirements related to those standards. See 42 U.S.C. §§ 6293-6294.

EPCA expressly preempts state laws and regulations governing energy consumption or water use by products covered by a federal standard. See 42 U.S.C. § 6297. As relevant here, EPCA generally preempts state regulation of energy or water use by appliances covered by a federal energy conservation standard, unless DOE has granted a waiver authorizing the state regulation. “[N]o State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product unless the regulation * * * is a regulation which has been granted a waiver under subsection (d) of this section[.]” 42 U.S.C. § 6297(c)(2).

2. A state may petition DOE for a waiver of EPCA’s express statutory preemption:

“Any State or river basin commission with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use for any type (or class) of covered product for which there is a Federal energy conservation standard under section 6295 of this title may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.” 42 U.S.C. § 6297(d)(1)(A).

The statute provides for waiver of federal preemption “if the Secretary finds * * * that the State * * * has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(B). The key statutory term – “unusual and

compelling State or local energy or water interests” – is specifically defined by the statute to mean interests that “are substantially different in nature or magnitude than those prevailing in the United States generally.” 42 U.S.C. § 6297(d)(1)(C)(i). The definition also requires the state to demonstrate that “the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.” 42 U.S.C. § 6297(d)(1)(C)(ii). Finally, the statute directs DOE (and the petitioning state) to evaluate those costs, benefits, and burdens “within the context of the State's energy plan and forecast, and, * * * within the context of the water supply and groundwater management plan, water quality program, and comprehensive plan (if any) of the State or river basin commission for improving, developing, or conserving a waterway affected by water supply development.” Ibid.

DOE must evaluate a state petition for preemption in a notice and comment proceeding. 42 U.S.C. § 6297(d)(2). DOE is prohibited from granting a state’s preemption petition “if the Secretary finds that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis.” 42 U.S.C. § 6297(d)(3). EPCA also requires a minimum three-year waiting period between the grant of a waiver of preemption and

the effective date of a state regulation: “No final rule prescribed by the Secretary under this subsection may * * * permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation[.]” 42 U.S.C. § 6297(d)(5)(A).

3. EPCA separately provides for direct judicial review of certain DOE rules in a federal court of appeals. Rules promulgated under 42 U.S.C. §§ 6293, 6294, and 6295 – establishing federal energy conservation standards, testing procedures, or labeling requirements – may be reviewed directly by a federal court of appeals, on a petition for review: “Any person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6295 of this title may, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule.” 42 U.S.C. § 6306(b)(1). EPCA confers jurisdiction on the courts of appeals to review a rule promulgated under sections 6293, 6294, or 6295, pursuant to the standard of review set forth in the APA: “Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter.” 42 U.S.C. § 6306(b)(2).

STATEMENT OF FACTS

1. EPCA, as amended by NAECA in 1987, established federal energy conservation standards for residential clothes washers, including a requirement that washers manufactured beginning in 1988 include an unheated rinse water option. See 42 U.S.C. § 6295(g). That statutory standard was amended by a more comprehensive and rigorous federal regulatory standard in 2001, in which DOE established energy conservation requirements for five product classes of washers, with new standards taking effect in 2004 and becoming more stringent in 2007. See 10 C.F.R. § 430.32(g); 71 Fed. Reg. 78158 (ER 140).²

The California legislature in 2002 directed CEC to develop regulations imposing water efficiency requirements for residential clothes washers sold in California. See 71 Fed. Reg. 78160 (ER 142). The California legislation also required that CEC's regulation require water efficiency standards for residential clothes washers at least as stringent as the federal water efficiency standards for commercial clothes washers. Ibid. Finally, the legislation directed CEC to adopt (proposed) regulations by January 2004, and to file a petition for waiver of federal preemption by April 2004, with the goal of having the state regulations take effect by January 1, 2007. Ibid.³

² EPCA does not authorize or establish federal water use requirements for residential clothes washers. See 71 Fed. Reg. 78158 (ER 140). Nevertheless, energy and water use are closely linked in such appliances. See, e.g., 53 Fed. Reg. 17712, 17715 (May 18, 1988).

³ The California legislation did not address the minimum three-year phase-in period required by EPCA. See 42 U.S.C. § 6297(d)(5)(A).

CEC responded by adopting a proposed regulation that would take effect in two phases. In 2007, the regulation would require a “water factor” (WF) of 8.5, which would be reduced to 6.0 in the second phase, to take effect in 2010.⁴ See ibid.; ER 64. On September 16, 2005, CEC filed a petition with DOE, seeking a waiver of federal preemption under EPCA, 42 U.S.C. § 6297(d). That petition was incomplete, and CEC provided the missing information on December 5, 2005. DOE accepted CEC’s application as complete by letter dated December 23, 2005, and issued a public notice of the petition in the Federal Register on February 6, 2006. See 71 Fed. Reg. 6022 (ER 154). Pursuant to EPCA and DOE’s regulatory procedures, DOE invited public comment on CEC’s preemption-waiver petition, and the agency received 78 comments. See 71 Fed. Reg. 78160 (ER 142).

2. DOE denied CEC’s petition for a waiver of federal preemption. The agency’s decision was issued on December 21, 2006 and published in the Federal Register on December 28, 2006. See 71 Fed. Reg. 78157, 78168 (ER 139, 150). DOE cited three independent reasons for denying the petition. First, “DOE does not have the statutory authority to prescribe a [waiver] rule for California that would become effective by January 1, 2007” because EPCA requires an “effective date at least three years following publication of the [DOE waiver] final rule.” 71 Fed. Reg. 78157. DOE was unable to alter the effective date because CEC neither requested an alternate effective date nor provided information sufficient for DOE to determine

⁴ For the purpose of CEC’s petition, “water factor” is the volume of water consumed per cycle divided by the capacity of the clothes washer. See 71 Fed. Reg. 71860.)

whether an alternate effective date would satisfy the statutory requirements. Ibid. Second, DOE concluded that CEC failed to establish that California has unusual and compelling water interests, as defined by EPCA, because “CEC did not provide sufficient support for what CEC alleges to be the costs and benefits of the California regulation,” and CEC also failed to “provide an appropriate analysis of non-regulatory alternatives.” Ibid. Third, the administrative record demonstrated that the proposed California “regulation would likely result in the unavailability of a class of residential clothes washers in California.” Ibid.

Before explaining its conclusions in detail, DOE reviewed the relevant regulatory and statutory provisions, including the legislative history of the waiver provision. See 71 Fed. Reg. 78158-78160 (ER 140-142). DOE emphasized that the statute imposes a “high bar” for those seeking a waiver of federal preemption, 71 Fed. Reg. 78162, and that the petitioner must shoulder the burden of proof to satisfy the statutory criteria by a preponderance of the evidence. See 71 Fed. Reg. 78159. The agency noted that CEC’s petition was the first request for a preemption waiver since Congress enacted “more stringent” standards in NAECA in 1987. 71 Fed. Reg. 78159 (ER 141). DOE then reviewed the statutory criteria in light of the administrative record here.

First, DOE considered whether CEC had demonstrated that California’s water interests are substantially different in nature or magnitude from those prevailing in the United States generally. See 71 Fed. Reg. 78160-78162 (ER 142-144). Although CEC failed to satisfy the burden concerning the nature of the state’s water interests,

DOE concluded that CEC's petition did meet the statute's alternate requirement that a state demonstrate a substantially greater difference in the magnitude of its water interests. 71 Fed. Reg. 78162 (ER 144). The agency relied on "total demand considered in conjunction with the likely increase in demand that will accompany California's projected population growth and the value of water saved." Ibid. Therefore, DOE concluded that CEC had satisfied the requirement that the state's water interests are substantially different from those prevailing in the United States generally.

Second, DOE analyzed the costs, benefits, and burdens of California's proposed regulation. 71 Fed. Reg. 78162-78164 (ER 144-146). EPCA requires a comparison of "the costs, benefits, burdens, and reliability of * * * water savings resulting from the State regulation" with similar measures of "alternative approaches." 42 U.S.C. § 6297(d)(1)(C)(ii). CEC submitted "estimates of the costs and benefits associated with the California regulation," but "it did not provide a sufficient explanation of the analysis supporting its estimates." 71 Fed. Reg. 78163 (ER 145). Instead, CEC pointed to its own state regulatory proceedings, asserting that "the economic assumptions and data inputs used in this analysis were vigorously tested in the Commission's public rulemaking process that led to the adoption of [the proposed state regulation]." Ibid. (quoting ER 80). DOE observed that CEC had not identified where to find the underlying assumptions, data, and analysis in the state regulatory record, and that "CEC did not provide sufficient explanation of the underlying assumptions and data in its petition." Ibid. "Without the underlying

analysis of CEC's assumptions and data inputs, DOE is unable to determine whether the cost and benefit estimates provided are reasonable, and is unable to determine that the California Petition meets EPCA requirements." Ibid.

CEC also failed to identify the costs, benefits, and burdens of non-regulatory alternatives. CEC independently analyzed only one such alternative: rebates for more efficient washers. Beyond that approach, CEC relied entirely on DOE's own nationwide analysis of alternatives to the national energy efficiency standard. As DOE explained, that reliance was inapt. Data concerning national costs and benefits "do not consider the costs and benefits of alternative, California-based programs," and CEC did not demonstrate that the national estimates would be comparable to results in California. 71 Fed. Reg. 78163 (ER 145). Moreover, DOE's nationwide alternatives study looked at "a voluntary energy efficiency target, rather than a voluntary water use reduction target," and thus was not comparable even apart from the geographic discrepancy. Ibid.

DOE concluded that CEC's petition "failed to establish by a preponderance of the evidence that California has an unusual and compelling water interest, within the meaning of that term as defined by EPCA." 71 Fed. Reg. 78164 (ER 146) (internal quotation marks omitted). Although the magnitude of California's water interest is substantially different from that of the nation as a whole, CEC "failed to establish that the State regulation proposed in the California Petition is necessary or preferable as compared to other alternatives." Ibid.

DOE also analyzed the administrative record to determine whether the proposed state regulation would “significantly burden the manufacturing, marketing, distribution, sale or servicing of residential clothes washers on a national basis.” 71 Fed. Reg. 78164 (ER 146) (citing 42 U.S.C. § 6297(d)(3)). Manufacturers provided comments asserting that the proposed regulation would compel the withdrawal of some models of residential clothes washers from the California market, limiting the ability of manufacturers to recoup their investments. But those assertions “were presented in general terms and did not provide specific estimates of the cost burden resulting from the potential elimination of products from the California market.” Id. at 78166 (ER 148). Similarly, industry commenters failed to buttress their assertions of harm to competition and to smaller entities with “cost data that would allow DOE to determine the extent of this difficulty and its significance to smaller manufacturers.” Ibid. And in the context of an asserted burden resulting from redesign and production of compliant washers, industry commenters “did not provide a breakdown of the costs associated with shifting production * * * or redistributing compliant residential clothes washers to California,” and “did not provide specific information indicating whether manufacturers would have difficulty in shifting production and distribution within the lead time provided by the California regulation.” Ibid. Because California is the only state to seek a waiver of federal preemption for residential clothes washer water usage, DOE did not consider the effect of a proliferation of state standards. 71 Fed. Reg. 78166-78167 (ER 148-149). But the absence of data precluded a determination that the proposed state regulation

“would significantly burden manufacturing, marketing, distribution, sale or servicing of the covered product on a national basis.” 71 Fed. Reg. 78167 (ER 149).

Finally, DOE considered whether the proposed state regulation would result in the unavailability in California of certain types of residential clothes washers. Because “there are no top-loading residential clothes washer[s] in the current market that would comply with the 6.0 WF level of the proposed California regulation,” and “[n]either CEC nor any other commenter has asserted or demonstrated that such a product exists,” DOE determined that “the proposed California standard would result in the unavailability of toploading residential clothes washers in the California market.” 71 Fed. Reg. 78167 (ER 149).

3. CEC sought administrative reconsideration of DOE’s denial of the requested waiver. See ER 1-31. But that petition for reconsideration pointed to no additional evidence, despite DOE’s analysis of the shortcomings of the administrative record. Instead, CEC’s reconsideration petition contained only conclusory assertions and reiterations of the same legal arguments that had already been considered and rejected. Consistent with its regulations, DOE took no action on the reconsideration request, which was deemed denied after 30 days. See 10 C.F.R. § 430.48(c).

SUMMARY OF ARGUMENT

CEC presented DOE with inadequate information to show that EPCA’s statutory standards for waiver were satisfied, and DOE concluded that CEC’s failure to shoulder the statutory burden of proof warranted denial of the waiver petition.

DOE's decision here is subject to review in district court under the general grant of federal question jurisdiction and the cause of action provided by the APA. Instead of pursuing that established mechanism for judicial review, CEC has instead sought direct review in this Court. But Congress authorized that unusual review mechanism only for rules promulgated under specified statutory authority (rules establishing federal standards for energy efficiency, testing, or labeling under 42 U.S.C. §§ 6293, 6294, or 6295). See 42 U.S.C. § 6306. The DOE order at issue here – denying a petition for a waiver under section 6297(d) – is not a rule at all: it does not establish new federal requirements, but only leaves in place the background principle of no state regulation, as imposed by Congress. And the decision under review was not promulgated under DOE's rulemaking authority in sections 6293-6295. It is thus not within the limited original jurisdiction conferred on the courts of appeals for direct review of specified DOE rules. Any review should therefore begin in district court, not this Court.

If this Court were to conclude that it has jurisdiction, it should sustain DOE's decision. DOE provided three independent reasons for denying the California waiver petition, and this Court can affirm on the basis of any one of the three.

First, DOE explained that CEC had failed to comply with the statutory three-year minimum phase-in period for a proposed state regulation. Indeed, California's waiver petition was not even completed until December 2005, barely a year before the purported effective date of the proposed regulation in January 2007. CEC cannot now complain that it was up to DOE to determine an alternative effective date, when

the petition failed on its face to comply with the statute's three-year minimum limit for a proposed regulation's effective date. And CEC failed to provide data that would allow a determination of an alternative date.

Second, DOE explained that CEC had failed to meet its burden of proof to show that the costs, benefits, and burdens of the proposed regulation demonstrated that it was necessary and preferable to non-regulatory alternatives. CEC pointed to its own state administrative docket and asserted that all questions concerning costs and benefits had been adequately addressed there. But that does not suffice under EPCA. Because CEC failed to provide DOE with the data and assumptions underlying the state's cost-benefit analysis, the petition did not satisfy the burden of showing that the proposed state regulation would satisfy the stringent statutory standards Congress imposed in EPCA.

Third, DOE concluded that commenters had shown that California's proposed regulation would result in the unavailability of traditional top-loading clothes washers in the state. CEC's waiver petition treated both front-loading and top-loading washers together, and did not provide information sufficient to determine whether a partial waiver (allowing California to regulate only front-loaders) would satisfy the statutory standards. Here too, CEC's failure to provide sufficient information prevented DOE from granting even a partial waiver.

Finally, even if this Court were to find fault with all three of DOE's grounds for denying the petition, the proper remedy would be a remand for DOE to reconsider the petition. CEC's request for an extraordinary order directing DOE to grant the

waiver petition without further agency deliberation is contrary to established principles of administrative law.

STANDARD OF REVIEW

This Court determines its own subject-matter jurisdiction de novo. See, e.g., Industrial Customers of Northwest Utilities v. Bonneville Power Admin., 408 F.3d 638, 644 (9th Cir. 2005). If the Court has jurisdiction under EPCA, 42 U.S.C. § 6306(b)(1), judicial review of DOE's administrative decision would proceed under the familiar, deferential standards established by the Administrative Procedure Act (APA). See 42 U.S.C. § 6306(b)(2) ("the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter"); 5 U.S.C. § 706(2)(A) (court's review limited to determining whether agency order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). In reviewing the agency's decision, the Court must accord considerable deference to the agency's expertise in administering its own statutory scheme. If Congress has spoken directly to the "precise question at issue," the Court must give effect to its "unambiguously expressed intent." Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-843 (1984). If, however, the statute is silent or ambiguous with respect to the specific issue, or when Congress has expressly assigned a matter to the agency's discretion, the Court should defer to the agency's interpretation, so long as that interpretation is reasonable. Id. at 843-44.

ARGUMENT

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION.

A. CEC should have sought judicial review in the first instance in federal district court under the APA. This Court lacks jurisdiction over a petition for direct review of agency action in the absence of a specific statutory grant of jurisdiction. As the Court has explained, “unless Congress specifically maps a judicial review path for an agency, review may be had in federal district court under its general federal question jurisdiction.” Owner-Operators Independent Drivers Ass'n v. Skinner, 931 F.2d 582, 585 (9th Cir. 1991); accord, e.g., International Bhd Teamsters v. Pena, 17 F.3d 1478, 1481 (D.C. Cir. 1994) (“Unless a statute provides otherwise, persons seeking review of agency action go first to district court rather than to a court of appeals.”).

There is no specific statutory grant of jurisdiction that authorizes CEC’s petition for review. EPCA provides for direct review in the courts of appeals only of “rule[s] prescribed under section 6293, 6294, or 6295 of” Title 42. 42 U.S.C. § 6306(b)(1). The order denying CEC’s petition for a waiver of preemption is not “a rule prescribed under section 6293, 6294, or 6295 of” Title 42; it is not a rule at all, but an order, and it is issued pursuant to 42 U.S.C. § 6297(d). Because EPCA does not authorize this Court to undertake direct review of orders issued pursuant to § 6297(d), this Court lacks jurisdiction over the petition for review.

EPCA singles out those areas in which DOE may impose regulatory requirements on manufacturers of consumer products, and authorizes review of those

regulations directly in an appellate court. But review of other DOE administrative decisions – including the agency's decision concerning preemption of state law at issue here – like the vast bulk of decisions by federal agencies, remain reviewable in district court in the first instance, with an opportunity to seek appellate review of an adverse final judgment.

As the D.C. Circuit has explained, in the absence of a specific statute granting the right of direct review, agency action is “directly reviewable in a district court under some appropriate head of its jurisdiction, for courts of appeals have only such jurisdiction as Congress has chosen to confer upon them.” Cutler v. Hayes, 818 F.2d 879, 887 n.61 (D.C. Cir. 1987); see also, e.g., Stone v. INS, 514 U.S. 386, 405 (1995) (statutes providing for judicial review “are jurisdictional in nature and must be construed with strict fidelity to their terms”); Five Flags Pipe Line Co. v. Department of Transportation, 854 F.2d 1438, 1439-1440 (D.C. Cir. 1988).

This Court has recognized and applied these principles in interpreting other statutes implemented by DOE. In NRDC v. Abraham, 244 F.3d 742 (9th Cir. 2001), the Court held that it lacked original jurisdiction to hear a petition for review of a DOE decision concerning radioactive waste management, promulgated under the agency's authority under the Atomic Energy Act (AEA), which does not provide for direct review in the appellate courts. The petitioner there argued that the Court could assert jurisdiction under the Nuclear Waste Policy Act (NWPA), which authorized a petition for direct appellate review of a DOE decision under that statute. See 42 U.S.C. § 10139(a). But the Court held that it lacked jurisdiction because the DOE

decision was issued under the AEA, not the NWPA. Likewise, in this case, because the DOE preemption-waiver decision was issued under § 6297(d), not under one of the provisions specifically mentioned in § 6306(b)(1), the Court lacks jurisdiction over the petition for review.

Congress spoke clearly in EPCA, identifying only three specific (and similar) rulemaking provisions that can give rise to orders directly reviewable in a court of appeals. See, e.g., Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991) (referring to Clean Water Act’s “specificity demonstrat[ing] that Congress did not intend court of appeals jurisdiction over all [agency] actions taken pursuant to the Act”). Elsewhere in the same provision, defining the administrative procedures for promulgating those and other rules, Congress grouped those same provisions (sections 6293, 6294, and 6295) with the provision at issue here (section 6297) and another provision (section 6298, which provides DOE with general rulemaking authority to carry out EPCA). See 42 U.S.C. § 6306(a)(1) (“In addition to the requirements of section 553 of Title 5, rules prescribed under section 6293, 6294, 6295, 6297, or 6298 of this title shall afford interested persons an opportunity to present written and oral data, views, and arguments with respect to any proposed rule.”). The omission of any reference to section 6297 in EPCA’s direct-review provision cannot be deemed a mistake, oversight, or ambiguity. Congress knew how to group relevant portions of the statute together for specific purposes and it did so here, excluding section 6297 from the direct-review procedure and leaving judicial review to be governed by the APA.

B. The D.C. Circuit recently rejected an argument similar to CEC’s. See Public Citizen, Inc. v. NHTSA, 489 F.3d 1279, 1287-1289 (D.C. Cir. 2007). The Safety Act authorizes a petition for review of a NHTSA “order prescribing a motor vehicle safety standard,” 49 U.S.C. § 30161(a), and the petitioners there had sought such an order, but the agency denied the petition. Petitioners argued that the statute should be read to encompass review of orders denying petitions for rulemaking, as well as orders promulgating such rules. But the D.C. Circuit properly rejected that counter-textual argument.⁵

The D.C. Circuit also rejected petitioners' argument that “ambiguities in statutes providing for direct court of appeals review of agency action should not be construed against such review.” Public Citizen, 489 F.3d at 1287 (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985)). The court explained that, because the agency order at issue was not within the terms of the limited appellate court jurisdiction conferred by statute, “the plain terms of the statute dictate that judicial review of NHTSA's denial of a petition for rulemaking must begin in district courts – not in courts of appeals.” Ibid.

Similarly, the D.C. Circuit concluded that the All Writs Act did not require a different result in Public Citizen. See 489 F.3d at 1288. The D.C. Circuit has held

⁵ CEC has an even weaker argument than the petitioners in Public Citizen. In both cases, the agency denied a petition for a new rule, but here there would be no direct review even if DOE had granted the waiver petition. EPCA’s direct-review provision does not encompass section 6297(d) at all. All DOE administrative decisions concerning preemption waiver petitions – even a decision granting such a petition – are excluded from the limited grant of jurisdiction to the appellate courts in section 6306.

in other cases that it could review some agency decisions (or inaction) under such a theory. See, e.g., Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (TRAC). And this Court has followed that precedent. See Public Utility Comm'r v. Bonneville Power Admin., 767 F.2d 622 (9th Cir. 1985) (court of appeals has jurisdiction over agency actions that would affect court's future jurisdiction where statute commits review of final agency action to court of appeals). But that reasoning does not aid CEC here. This case, like Public Citizen, “involves neither unreasonable delay in responding to the rulemaking petition nor a withdrawn rule.” 489 F.3d at 1288. As in that case, DOE's denial of the waiver petition “in no way interfered with [this Court's] jurisdiction.” Ibid.

C. DOE's decision here is not related to, or equivalent to, a rulemaking under section 6295. EPCA, in section 6295, grants DOE rulemaking authority to promulgate federal energy conservation standards for appliances. Separately, in section 6297, EPCA expressly preempts state regulation “concerning the energy efficiency, energy use, or water use of” any appliance subject to a federal standard issued under EPCA section 6295. 42 U.S.C. § 6297(b)-(c). Finally, section 6297(d) authorizes DOE to consider a petition by a state, seeking a waiver of EPCA's federal preemption. As in Public Citizen, EPCA's distinct statutory provisions “underscore[] the distinction” between the two types of proceedings. Public Citizen, 489 F.3d at 1287. Denying a section 6297 waiver petition “is not synonymous with” a rule promulgated under section 6295 establishing federal energy conservation standards.

Ibid.⁶ Section 6297 establishes a separate grant of authority to DOE concerning EPCA's preemptive effect on state regulations, and is not equivalent to DOE's authority to promulgate federal standards under section 6295.

DOE's task is quite different in each undertaking. In a rulemaking under section 6295, DOE must determine national standards in the broad context of the national need for energy or water conservation. See 42 U.S.C. 6295(o)(2)(B)(VI). By contrast, the question whether to grant a waiver of federal preemption for a particular state is a much narrower inquiry, guided by different statutory factors, which are focused on state or local interests. See 42 U.S.C. § 6297(d)(1)(C), (3).

The Second Circuit's decision in NRDC v. Abraham, 355 F.3d 179 (2d Cir. 2004), is not to the contrary. NRDC did not address the jurisdictional question presented in this case – whether a preemption-waiver decision under section 6297 is reviewable in the appellate courts in the first instance. The court there reviewed a DOE rule promulgated under section 6295, as well as related orders concerning the effective date of that rule, also promulgated pursuant to the agency's indisputable regulatory authority under section 6295. By contrast, the order at issue here, denying CEC's petition for a waiver of preemption, was promulgated pursuant to DOE's separate preemption-waiver authority under section 6297(d), and thus was not an act

⁶ Petitioners in Public Citizen made a similar unsuccessful argument, contending that a denial of a petition for rulemaking was equivalent to an order reaffirming the existing safety standard. The D.C. Circuit held that the Safety Act's judicial review provision was not ambiguous in its omission of such an order from direct appellate court review. Public Citizen, 489 F.3d at 1287.

undertaken by DOE under its section 6295 grant of regulatory authority to establish federal standards for appliances.

CEC cannot prevail here merely by arguing that Congress could reasonably have chosen to expand the jurisdiction of the appellate courts by drafting section 6306 differently. Nor, as we have shown, can the exclusion of section 6297(d) waiver orders be deemed an oversight. “The best evidence of [the statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.” Public Citizen, 489 F.3d at 1288 (quoting W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991)). Notably, the Second Circuit in NRDC also recognized “the premise that, absent a specific grant of statutory authority elsewhere, subject matter jurisdiction regarding review of agency rulemaking falls to the district courts under federal question jurisdiction.” NRDC, 355 F.3d at 192-193 (citing Teamsters, 17 F.3d at 1481). That “default rule of federal question jurisdiction over agency rulemaking in the district court,” ibid., governs here.

II. DOE CORRECTLY EXPLAINED THAT CEC’S WAIVER PETITION FAILED TO MEET THE BURDEN OF PROOF TO SATISFY EPCA’S STATUTORY STANDARDS.

DOE identified three independent reasons warranting denial of CEC’s preemption waiver petition, each of which flowed from CEC’s failure to provide adequate information to DOE to allow the federal agency to make an informed decision. To prevail, CEC would have to show that all three reasons were arbitrary or capricious. As explained below, CEC cannot carry that burden.

Instead of remedying the shortcomings in its petition or filing a new petition including the necessary information, either of which would allow DOE to evaluate the proposed state regulation according to the statutory standards for a waiver of preemption, CEC has simply reiterated its view (in the petition for review in this Court, as in the petition for administrative reconsideration before DOE) that DOE does not need to know the underlying information, or that DOE should be obliged to dig up the data on its own, without any assistance from CEC. That is not the law, and CEC cannot prevail on the basis of the record here.

Congress enacted EPCA with an express preemption provision. See 42 U.S.C. § 6297. The purpose of that preemption clause is to avoid a patchwork quilt of inconsistent state standards governing energy and water usage by appliances, ensuring the nationwide availability of essential consumer products. “As a result, industry would avoid the burdens of a patchwork of conflicting and unpredictable State regulations.” S. Rep. No. 100-6, at 12 (1987). Accordingly, DOE correctly concluded that the statute “establishes a high bar for granting a waiver request.” 71 Fed. Reg. 78162 (ER 144).

DOE also emphasized that “Congress placed the burden on the petitioner * * * to establish facts and to meet the statutory criteria ‘by a preponderance of the evidence.’” 71 Fed. Reg. 78159 (ER 141). The legislative history amply supports DOE’s interpretation of the statute that the agency is charged with implementing. See S. Rep. No. 100-6, at 9 (“This subsection provides new and more stringent criteria that a State must establish by a preponderance of the evidence in order to receive an

exemption.”). The legislative history also makes clear that states will not easily obtain a waiver of preemption: “States may petition DOE to be waived from Federal preemption, but achieving the waiver is difficult.” Id. at 2.⁷ Thus, CEC has an uphill battle to overturn DOE’s denial of the petition for waiver, especially in light of the deferential APA standard of review.

CEC does not dispute that a state bears the burden of proof of demonstrating that its proposed regulation satisfies the statutory standards in EPCA (as amended by NAECA). DOE’s determination that the statute imposes such a burden is entirely reasonable, and is entitled to Chevron deference. And the burden of proof is significant here because the statute requires DOE to render a decision on a state’s waiver petition within six months to one year – an extraordinarily short period for a notice and comment proceeding. Without holding the state petitioner to the statutory burden of proof, DOE could not address the complex issues raised by the statutory standard in the time allotted under the statute. CEC’s position in this Court – that DOE should have ferreted out answers to the questions left open in the California petition – is impracticable and inconsistent with the statutory scheme.

⁷ This was a change from the original EPCA preemption waiver standards, as the legislative history of NAECA makes clear. See S. Rep. No. 100-6, at 4 (referring to DOE’s earlier “general policy of granting petitions from States requesting waivers from preemption”). “Because of this trend [of proliferating state standards], appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed.” Ibid.

A. The Effective Date Of California’s Proposed Regulation Would Have Violated EPCA’s Three-Year Minimum Transition Period.

As DOE explained, the proposed state regulation did not comply with the three-year minimum effective date requirement in EPCA. The CEC regulation purported to take effect on January 1, 2007, four days after the publication of DOE’s decision. “The requested effective date of 2007 would not allow for the minimum three-year lead time required by EPCA.” 71 Fed. Reg. 78160. That conclusion is indisputably correct, and CEC does not contend otherwise.

Instead, CEC argues that DOE should have sua sponte crafted a different state regulation, and that DOE should have come up with its own effective date for such a regulation. See CEC Br. 32-34. But EPCA does not empower DOE to take such a step. Rather, the statute imposes a burden of proof on the state seeking a waiver of federal preemption to demonstrate that the proposed state regulation satisfies the statutory standards, and the three-year minimum lead time is an essential element of those standards.

“Congress placed the burden on the petitioner * * * to establish facts and to meet the statutory criteria by a preponderance of the evidence.” 71 Fed. Reg. 78159 (ER 141) (internal quotation marks omitted). That statutory burden is substantial, in light of the “new and more stringent criteria [added by NAECA in 1987] that a State must establish by a preponderance of the evidence in order to receive an exemption.” S. Rep. No. 100-6, at 9 (1987), quoted in 71 Fed. Reg. 78159. CEC was thus obliged to demonstrate that a different effective date would satisfy EPCA’s statutory criteria,

or at least to provide data that would allow DOE to make such a determination. But CEC did not make such a showing; nor did CEC provide the underlying data that would have allowed DOE to consider an alternative effective date.

For example, a petition for waiver must include market trend data, including the availability of particular appliance types and models in different years. The costs and benefits of a regulation must be evaluated against a baseline of what would likely occur absent the regulation. CEC's petition was based entirely on its proposed regulation, including the 2007 effective date, and to the extent that CEC provided data (as we explain below, the data CEC provided was inadequate), it was linked to those dates. See ER 81-87, 95-97. CEC did not provide data showing how the costs and benefits of its proposed regulation would change based on different effective dates; nor did CEC demonstrate that the costs and benefits would remain unchanged if a different effective date were chosen.

DOE could not have sua sponte chosen a later effective date because CEC failed to justify any date other than January 1, 2007. DOE explained this shortcoming in its denial order:

“[I]t is not clear what impact a revised effective date would have on the analyses provided by CEC and interested parties. If the effective dates of the two-tiered standard were each set three years beyond that of the California regulation, or if the first tier were eliminated, the water savings and costs could be different from that presented in the California petition as well as in comments provided by interested parties.” 71 Fed. Reg. 78160 (ER 142).

CEC's opening brief does not answer these concerns. Instead, CEC attacks a straw man, asserting that the waiver scheme here would require unrealistic prescience

by a state petitioning for a waiver. See CEC Br. 33-34 (“DOE’s interpretation * * * would put the states in the impossible situation of having to guess precisely when DOE is likely to grant a waiver.”). But DOE’s denial says no such thing. DOE clearly explained that the agency was unable to consider any alternate date because CEC failed to provide data that would justify a later effective date under EPCA’s standards. If CEC had provided supporting data demonstrating that EPCA’s statutory standards could be met with a different date than the “nominal effective date” (CEC Br. 33-34) that the petition was based on, then DOE could have established a later effective date. But CEC cannot submit a minimal petition, without including underlying data, and then complain when DOE is unable to conclude that the petition satisfies the statutory standards.

This is not a matter of “having to guess precisely when DOE is likely to grant a waiver.” CEC Br. 34. It simply requires a recognition that the statute requires a three-year minimum transition period, and a state petitioner must include sufficient data to allow DOE to consider alternative dates if the preemption-waver proceeding will continue past the three-year transition period based on what CEC refers to as a “nominal” effective date. CEC Br. 33-34.

CEC’s argument rings particularly hollow because CEC was on notice from the date the application was filed that the “nominal” effective date would not comply with EPCA’s three-year phase-in requirement. This is not a circumstance where DOE’s delay or any third-party conduct contributed to any confusion about the effective date. CEC first submitted its waiver petition in September 2005, and did not

complete it until December of that year – barely more than a year before the “nominal” effective date of the proposed regulation. CEC’s failure to present analyses and data to support a later effective date is insupportable in light of the timing of its own petition.

B. California Did Not Demonstrate “Unusual and Compelling * * * Interests.”

EPCA requires a state seeking a preemption waiver to demonstrate that the “State regulation is needed to meet unusual and compelling State or local energy or water interests.” 42 U.S.C. § 6297(d)(1)(B). The statute specifically defines that key term to require a state to make two showings. First, the state must demonstrate that its 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 state must also prove that “the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.” 42 U.S.C. § 6297(d)(1)(C)(ii).

1. Here, DOE concluded that California’s water interests were different in magnitude (though not different in nature) from those of the United States generally. 71 Fed. Reg. 78162 (ER 144). But CEC failed to provide the data showing that it had correctly analyzed the costs and benefits of water savings from the proposed

regulation, and showing that the state regulation would be preferable to alternative approaches. “While CEC provided its estimates of the costs and benefits associated with the California regulation, it did not provide a sufficient explanation of the analysis supporting its estimates.” 71 Fed. Reg. 78163 (ER 145). Without that explanation of “CEC’s assumptions and data inputs, DOE is unable to determine whether the cost and benefit estimates provided are reasonable, and is unable to determine that the California Petition meets EPCA requirements.” Ibid. CEC failed to satisfy its statutory burden of proof concerning the costs and benefits of the proposed regulation, and DOE denied the waiver petition on that ground.

CEC submitted its own cost-benefit conclusions, but gave DOE no way to look behind CEC’s assertions or independently test the assumptions and data underlying CEC’s conclusions. “CEC stated that * * * ‘the economic assumptions and data inputs used in this analysis were vigorously tested in [CEC’s] public rulemaking process that led to the adoption of this standard.’” 71 Fed. Reg. 78163 (ER 145) (quoting ER 80). CEC apparently believed that its own rulemaking proceedings should suffice, and that DOE need not question the reasonableness of CEC’s underlying analysis. But that is not what EPCA provides. Federal law preempts state regulation of energy and water use by covered appliances, unless DOE – the federal agency that applies federal statutory standards – determines that there is a good reason for an exception to the uniformity of federal law. It is not enough that a state thinks there is a good reason for an exception – presumably, every state would reach

such a conclusion if permitted to do so, but that is contrary to the express purpose of preemption.

CEC argues that “a full explanation of all the Petition’s assumptions , data, and analyses – indeed, the entire California rulemaking record – was readily available to the agency.” CEC Br. 21-22. But CEC failed to identify “where within the [state agency] record the relevant assumptions, data, and analysis could be located, nor did CEC submit any of that information to DOE.” 71 Fed. Reg. 78163 (ER 145).

DOE gave a concrete example of CEC’s failure to “provide sufficient explanation of the underlying assumptions and data in its petition.” 71 Fed. Reg. 78163 (ER 145):

“CEC did not provide a sufficient explanation of how it derived its estimates of incremental first costs; in fact, CEC did not even attempt to do so. CEC simply presented its estimates of incremental first costs, by standard level, and asserted that they were consistent with (though different than) DOE’s incremental first cost estimate for its 2000 rulemaking [on energy efficiency standards].” Ibid.⁸

Before this Court, for the first time, CEC identifies a specific document in the state administrative docket that it now says “provided much of the analysis used in the CEC rulemaking.” CEC Br. 22 (citing 2003 Pacific Gas & Electric (PG&E) study). CEC did not submit that document to DOE, nor did CEC point to it as a

⁸ CEC mischaracterizes the agency’s decision by asserting that the “example” in DOE’s explanation of the shortcomings of the CEC petition, 71 Fed. Reg. 78163 (ER 145), was “[t]he only specific assumption or data that DOE found inadequate,” CEC Br. 22. The problem of incremental first costs merely demonstrated a concrete particularization of CEC’s overarching failure to supply the underlying information necessary to allow DOE to assess whether the CEC waiver petition satisfied EPCA’s standards.

source of the assumptions and data underlying CEC's cost-benefit analysis of alternatives.  we have explained, it did not suffice for CEC to point to its own administrative docket, without more, to support the specific cost-benefit analysis at issue. CEC's suggestion that DOE was required to search the state agency's docket for potentially relevant information is contrary to established principles of administrative law. In addition to disregarding the burden of proof that EPCA imposes on a state petitioning for a waiver of preemption, CEC's approach here – by referring for the first time on judicial review to information buried in a separate proceeding, instead of submitting that information to DOE – deprived the public of the opportunity to comment on the proceedings, as required by EPCA. See 42 U.S.C. § 6297(d)(2) (requiring notice and comment procedures for waiver proceedings). And, in light of the limited statutory schedule (six months to one year), CEC's failure to provide the information left the agency unable to conclude that the proposed state regulation would satisfy the statutory standards for a waiver of preemption.⁹

2. CEC also failed to demonstrate that the proposed California regulation would be preferable to alternatives. Although CEC's petition addressed several alternatives, only one – a rebate program – was based on data specific to California.

⁹ Even if the PG&E study had been provided to DOE, its cursory analysis would not satisfy CEC's burden of proof to demonstrate to DOE that the cost-benefit analysis was correct and based on valid information. For example, the PG&E study lacked a detailed explanation of the values and assumptions that underlie the cost-benefit analysis. Many of the inputs used in the analysis are based on assumptions and generalizations, which are not themselves explained or justified in the study. And the study derives the most extreme values from possible ranges, instead of using averages or calculating the effect of different values within a range.

See 71 Fed. Reg. 78163 (ER 145). “With regard to other non-regulatory programs, CEC cited DOE’s 2000 analysis of alternatives to DOE’s own energy efficiency standards for residential clothes washers as an approximate assessment of the cost of the proposed State standards versus alternatives.” Ibid. But that comparison was invalid for two reasons. First, CEC extrapolated from national data in the DOE study without demonstrating that the national data accurately reflected conditions in California. Ibid. (“The cost and benefit estimates provided in the DOE analysis are national estimates * * * and do not consider the costs and benefits of alternative California-based programs; the estimates certainly do not evaluate the standards being advocated in the California Petition.”). Second, the 2000 DOE study was based on energy efficiency standards (and a comparison of non-regulatory alternatives aimed at improving energy efficiency), not measures of reducing water usage. Ibid. (“In addition, we note that the voluntary consensus alternative presented by CEC was for a voluntary energy efficiency target, rather than a voluntary water use reduction target.”). For both reasons, DOE concluded that CEC failed to carry its burden of demonstrating the superiority of its proposed regulation to alternative, non-regulatory measures. 71 Fed. Reg. 78164 (ER 146).

CEC argues that “nothing in the law requires that the alternatives considered by a state must be * * * state-specific.” CEC Br. 23. That assertion ignores the purpose of the statutory standards as well as the nature of federal preemption. More importantly, however, CEC’s argument disregards the governing principles of Chevron deference.

DOE reasonably interpreted the statute to require that a state seeking a waiver of preemption under EPCA show the superiority of the proposed state regulation as compared to alternative, non-regulatory measures aimed at the same purpose, within the same state. EPCA itself is silent on this question, as CEC's argument admits. See CEC Br. 23 ("nothing in the law requires * * *"). That silence confirms the institutional responsibility of DOE, the implementing agency, to fill the statutory gap by interpreting the meaning of EPCA's language and structure.

"Congress has [not] directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. For that reason, the Court must "move to the second step" of Chevron, under which the court "must defer to the agency's interpretation if it is based on a permissible construction of the statute." California Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 847 (9th Cir. 2003) (internal quotation marks omitted). The deference due under Chevron's second step is virtually dispositive here: A court must give the agency's interpretation "controlling weight" as long as the agency's construction is reasonable and not "manifestly contrary to the statute." Chevron, 467 U.S. at 844-45.

DOE's interpretation is plainly reasonable. The statute calls for a comparison between regulation and non-regulatory alternatives. For such a comparison to be valid, the alternatives considered must (by definition) be comparable. Because the proposed regulation would be limited to the state seeking a waiver, it is eminently sensible for DOE to look at non-regulatory alternatives that are similarly limited. 

CEC does not even mention Chevron in its argument concerning DOE's interpretation of the statute. Instead, CEC argues that the Court should adopt a different interpretation of the statute, citing a pre-Chevron case. See CEC Br. 23 (citing American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982)). But CEC, like a reviewing court, "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, 467 U.S. at 844; see also, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation"); CHW West Bay v. Thompson, 246 F.3d 1218, 1223 (9th Cir. 2001) ("even if the agency's interpretation is not * * * the one the court would have chosen, it should nevertheless stand if it is reasonable").

In any event, CEC's argument is mistaken. EPCA sets forth a statutory standard for waiving preemption that must be applied in a wide variety of circumstances, involving different states and regions, which have different concerns, and also involving both energy and water use. The term "production" – on which CEC hangs its entire argument – is more obviously relevant to a proposed state regulation concerning energy efficiency than one addressed to water usage. Comparison of energy production within a state is obviously relevant. And CEC does not dispute that DOE interpreted the statute reasonably with respect to comparisons concerning "water savings," which is the only issue in this case.

3. Finally, CEC suggests that DOE was altogether barred from denying the waiver petition on the ground of CEC's failure to sustain its burden of proof because DOE had earlier accepted the petition for filing as complete. See CEC Br. 20-21. That argument rests on a misunderstanding of both the significance of the agency's formal acceptance of a petition and the basis for DOE's denial here.

CEC points to the regulation specifying how a state may petition for a waiver of preemption. See 10 C.F.R. § 430.42 ("Filing Requirements"), quoted in CEC Br. 21. That regulation specifies that, "[w]ithin fifteen (15) days of the receipt of a petition, the Secretary will either accept it for filing or reject it, and the petitioner will be so notified in writing." 10 C.F.R. § 430.42(f)(1). The regulation also makes clear that a petition must include all the information required for DOE to make a determination under the statute. Ibid. ("Only such petitions which conform to the requirements of this subpart and which contain sufficient information for the purposes of a substantive decision will be accepted for filing.").

Here, DOE notified CEC on December 23, 2005, that the agency had accepted the waiver petition for filing (following CEC's provision of required information it had omitted from its initial petition). See 71 Fed. Reg. 78160 (ER 142). That step began the notice and comment process, setting in motion the substantive consideration of the CEC petition. See 71 Fed. Reg. 6022 (Feb. 6, 2006) (soliciting public comment). But the formal acceptance of CEC's petition did not involve or require any substantive analysis of whether the petition satisfied the standards set forth in EPCA for granting such a petition. The terms of the statute would have

precluded a substantive determination at such an early stage. See 42 U.S.C. § 6297(d)(2) (requiring notice and comment procedures for waiver proceedings). Nothing in the agency’s regulation, or the procedures used here, could have led anyone to believe that a formal acceptance of a petition as complete would preclude DOE from determining that the petitioner failed to satisfy the statutory burden of proof. See 54 Fed. Reg. 6062, 6067 (Feb. 7, 1989) (“The Department's regulations, as contained in today's notice, require a petition to include a copy of the State's energy plan and forecast, and any other information the petitioner believes is pertinent or the Department may require.”). By analogy, this Court has accepted and filed CEC’s opening brief, presumably concluding that it satisfies the formal requirements of the rules of appellate procedure, but the Court is not bound to rule in CEC’s favor if it determines that the brief is ultimately unconvincing. The two determinations are quite separate.

CEC also misrepresents the nature of DOE’s denial of the petition here. CEC asserts that DOE “relied on the Petition’s allegedly ‘insufficient information for the purposes of a substantive decision,’ as a justification for denying the petition.” CEC Br. 21 (emphasis and alteration in CEC Br.; citation omitted) (quoting 10 C.F.R. § 430.42(f)(1)); see also CEC Br. 20 (“DOE determined that California’s evidence was legally inadequate.”). But DOE denied CEC’s petition because CEC failed to shoulder its burden of proof to demonstrate that the proposed state regulation was necessary or preferable to non-regulatory alternatives. See 71 Fed. Reg. 78163 (ER 145) (“CEC’s reliance on DOE’s 2000 analysis to address the costs and benefits of

non-regulatory programs is inappropriate, and does not satisfy CEC's burden of demonstrating by a preponderance of the evidence that the costs, benefits, burdens and reliability of water savings resulting from the State regulation would make such regulation preferable or necessary when measured against alternative approaches."').¹⁰

CEC's argument amounts to a claim of waiver. But a government agency does not waive compliance with a statute merely by accepting a petition for filing, or deeming it complete for that purpose. If CEC were correct that an initial determination of completeness could preclude any later examination of evidence submitted, the business of government (state as well as federal) would grind to a halt. Notably, CEC does not assert that it (or any of its fellow state agencies) follows such a ridiculous interpretation of its own regulatory authority. Indeed, CEC offers no authority or analogous circumstance in which an agency is so bound.

4. CEC provided only its own conclusions concerning the cost-benefit analysis, and failed to identify the underlying data and assumptions that would have allowed DOE to confirm the accuracy of that analysis. CEC's waiver petition was thus demonstrably inadequate to satisfy the burden of proof imposed by the statute. See 71 Fed. Reg. 78164 ("EPCA places the burden on CEC of demonstrating by a preponderance of the evidence that the costs and benefits of its proposed standard

¹⁰ Even if this were a situation in which DOE first deemed CEC's waiver petition to be complete (in the sense that CEC now argues is equivalent to a merits determination of adequacy), the agency in the decision under review adequately explained its reasons for reaching a different conclusion after careful study. See California v. FCC, 39 F.3d 919, 925 (9th Cir. 1994) (APA standard requires "a reasoned analysis indicating that prior policies and standards are being deliberately changed"), cert. denied, 514 U.S. 1050 (1995).

make the standard preferable or necessary when compared to alternatives.”). DOE’s denial on that ground was amply supported by the record and by the agency’s cogent explanation.

C. The Proposed California Regulation Would Result In The Unavailability Of Top-Loading Residential Clothes Washers.

DOE also denied the CEC waiver petition on the separate and independent ground that commenters established “there are no top-loading residential clothes washer[s] in the current market that would comply with the 6.0 WF level of the proposed California regulation, and that therefore the proposed California standard would result in the unavailability of top-loading residential clothes washers in the California market.” 71 Fed. Reg. 78167 (ER 149). EPCA prohibits DOE from granting a waiver of preemption in such circumstances. See 42 U.S.C. § 6297(d)(4) (“The Secretary may not prescribe a rule under this subsection if the Secretary finds * * * that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding * * *.”).

CEC does not dispute that there are currently no top-loading washers that would meet the proposed state regulatory standard of 6.0 WF by January 1, 2010. But CEC contends that “the evidence shows that 6.0 WF top-loaders are in fact likely to be available by 2010.” CEC Br. 28. That assertion is contrary both to the governing standard of review and to the contents of the record here. Under the APA, this Court

does not engage in a de novo assessment of the record, but asks only whether the agency decision is supported by the record. See, e.g., Calmat Co. v. Department of Labor, 364 F.3d 1117, 1121 (9th Cir. 2004) (agency’s “findings of fact must be sustained unless they are unsupported by substantial evidence in the record as a whole”) (citing 5 U.S.C. § 706(2)); Akootchook v. United States, 271 F.3d 1160, 1164 (9th Cir. 2001) (court "carefully search[es] the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors") (quoting Hjelvik v. Babbitt, 198 F.3d 1072, 1074 (9th Cir.1999)). DOE’s decision is supported by the record and reflects the agency’s expert judgment.

CEC cites only one page of one comment in support of its view that compliant top-loaders could be developed. See CEC Br. 50 (citing ER 235). But that comment offers only a conclusory prediction by a utility company, not a careful analysis by an entity familiar with the exigencies and difficulties of manufacturing and marketing appliances. And a single comment contradicting DOE’s finding is not sufficient to demonstrate that the agency’s finding lacks support in the record. CEC fails to discuss the manufacturers’ comments detailing why traditional top-loaders cannot comply with the proposed state regulation. See, e.g., ER 188-199. And those comments amply support DOE’s determination that the preponderance of evidence shows the unavailability of top-loaders that could meet the proposed state regulatory standard.

The agency's predictive judgment concerning the likely behavior of manufacturers was plainly reasonable, and was entitled to deference. See, e.g., Public Citizen, Inc. v. NHTSA, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) ("Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.") (internal quotation marks and citation omitted); Southern Pacific Transp. Co. v. ICC, 871 F.2d 838, 842 (9th Cir. 1989) ("Such predictive judgments, when based upon credible evidence, are best left to the expertise of the administrative agency familiar with the industry.").

DOE also found there was no basis for a partial waiver to allow California to regulate other classes of washers. CEC criticizes "DOE's all-or-nothing approach," and argues that DOE should have granted a waiver for all standards except the second-phase of top-loading washers. CEC Br. 29. But DOE merely responded to CEC's all-or-nothing approach in its petition, which did not distinguish between classes of residential clothes washers. See ER 64. DOE concluded that CEC had not sought – or presented the agency with information sufficient to allow – a decision on different water use standards for "individual classes of residential clothes washers." 71 Fed. Reg. 78167 (ER 149). CEC argues that DOE could have granted a partial waiver without such information, and that "the California Petition made clear there are four separate standards." CEC Br. 29. But the petition actually made clear that, "[b]ecause top-loading and front-loading washers are quite similar, this Petition

generally treats the 2007 standards as a single standard (i.e., top-loading and front-loading together), and also treats the 2010 standards as a single standard.” ER 64.

In any event, DOE also explained why it would make no sense to allow state regulation of front-loading washers only (which are already more efficient and more expensive than top-loaders). Such a lopsided approach “would likely further increase the existing price differential between top- and front-loading washing machines,” which in turn “could well increase purchases of less water efficient residential clothes washers, and potentially offset the intended benefit.” 71 Fed. Reg. 78167 (ER 149). DOE was “concerned that differing maximum WF levels established for specific classes of residential clothes washers could have negative consequences for water savings in California.” Ibid. It is no answer to suggest that DOE could have chosen another, perhaps also reasonable, approach. See CEC Br. 31-32. The agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). DOE “cogently explain[ed] why it has exercised its discretion in a given manner,” and based its decision “on a consideration of the relevant factors,” carefully exercising its expert judgment. Ibid. The decision was not arbitrary or capricious.

III. CEC MISUNDERSTANDS THE AVAILABLE REMEDY.

A. Finally, CEC disregards fundamental principles of administrative law by urging that DOE’s role on any remand should be cut short. If CEC were to prevail

on its challenges to all three independent reasons DOE gave for denying the preemption-waiver petition, the proper remedy would be a remand for DOE to reconsider the petition under EPCA's statutory standards, as interpreted by the Court. CEC is mistaken to suggest that the court should instead remand with instructions to grant CEC's petition. See CEC Br. 38-51.

Judicial review of DOE's section 6297(d) waiver decision is governed by the APA, whether directly (on the jurisdictional ground that CEC should have brought this case in district court) or by express statutory reference in EPCA. See 42 U.S.C. § 6306(b)(2) ("the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief under that chapter"). And basic principles of administrative law leave no doubt that "the normal course of action when the record fails to support an agency's decision 'is to remand to the agency for additional investigation or explanation.'" Sierra Club v. EPA, 346 F.3d 955, 963 (9th Cir.) (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)), *op. amended*, 352 F.3d 1186 (9th Cir. 2003), cert. denied, 542 U.S. 919 (2004), quoted in CEC Br. 38.

CEC argues that "'rare circumstances' here make this one of the 'exceptional cases' where a remand with instructions * * * is appropriate." CEC Br. 38 (quoting Sierra Club, 346 F.3d at 963). But there are no rare circumstances here. This is a routine administrative law case, in which a disappointed petitioner argues that a federal agency should have reached a different decision, and attacks the agency's reasoning.

This is not an instance of “the government's intransigence in following Congress's mandate.” Earth Island Institute v. Hogarth, 494 F.3d 757, 770 (9th Cir. 2007). Unlike Earth Island, no court has ever ruled against DOE’s application of section 6297 – indeed, CEC’s is the first ever petition seeking a waiver of federal preemption under that provision of EPCA, as amended in 1987. Nor is there any hint of impropriety in DOE’s good-faith determination that it could not resolve CEC’s petition without the underlying data, which CEC failed to provide. Unlike Earth Island, there is no allegation of improper political influence nor any determination that the agency repeatedly failed to take particular steps compelled by the governing statute. Nor, as in Sierra Club, is there any hint of reliance on an extra-statutory factor. The dispute here is simply over how to interpret and apply a statute that has never before been before the agency, let alone a court.

CEC’s only argument is that this Court should limit DOE’s discretion on remand because “[n]one of DOE’s rationales for rejecting the waiver involves a factual finding by the agency on any of the applicable statutory criteria.” CEC Br. 38. But that argument demonstrates precisely why DOE must have the authority to review the petition on remand if this Court were to grant the petition for review. This is not a circumstance in which “further administrative proceedings would serve no useful purpose.” Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996), quoted in Sierra Club, 346 F.3d at 963.

DOE has not yet had an opportunity to compare the merits of CEC’s claim that the costs and benefits of its proposed regulation warrant a waiver and outweigh the

costs and benefits of alternative approaches, because CEC did not submit or identify the underlying data for DOE to review. If this Court were to conclude that CEC is not obliged to supply that data, the agency on remand should not be foreclosed from considering the data (assuming it can be found). Likewise, if DOE erred in denying the waiver petition, the agency must have an opportunity to consider whether any alternative effective date would satisfy EPCA's three-year statutory transition period. And if the Court were to conclude that DOE's explanation of the unavailability of top-loading washers is somehow inadequate, "the normal course of action is to remand to the agency for additional investigation or explanation." Sierra Club, 346 F.3d at 963.¹¹

There is no need for the Court to weigh the evidence, as CEC urges in its lengthy reiteration of its arguments before DOE. See CEC Br. 39-50. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." Florida Power, 470 U.S. at 744 (citing FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984); Camp v. Pitts, 411 U.S. 138 (1973)). The APA (incorporated in 42 U.S.C. § 6306, if that provision were to apply) limits the Court's role to reviewing the agency's order. And EPCA directs DOE, not a reviewing court, to determine whether

¹¹ DOE's determination that CEC's proposed regulation would result in the unavailability of top-loading washers in California is "a factual finding by the agency on [an] applicable statutory criteri[on]." CEC Br. 38 Thus, even by petitioners' own (unsupportable) theory, a general remand would be appropriate if this Court were to grant the petition for review.

California's proposed regulation satisfies EPCA's standards for a waiver of preemption.

CEC's effort to cut short DOE's regulatory review is particularly egregious because CEC has at every turn defied DOE's reasonable requests for the information supporting CEC's analysis and assertions. During the rulemaking process, CEC never identified the crucial data and assumptions. And after DOE's denial, CEC submitted a conclusory and redundant petition for administrative reconsideration, instead of simply remedying the lacunae in its petition for a waiver. Finally, CEC filed a petition for review in this Court (which lacks jurisdiction), instead of submitting an updated and compliant petition for waiver to DOE.

B. CEC also points to a passing statement in an interlocutory DOE administrative order that referred to "proposed rule[s]" waiving federal preemption under section 6297(d). 71 Fed. Reg. 35419, 35420 (June 20, 2006) (ER 152) (DOE order extending deadline for decision). That reference to proposed rules has no significance (and DOE gave it none; it is not even mentioned in the order under review). There is no dispute between the parties that a DOE decision granting a petition for waiver of federal preemption constitutes a final rule and does not merely initiate a new rulemaking proceeding.

This is not an issue if the Court denies or dismisses CEC's petition for review. But even if the Court remands, there is no need for any unusual remedy on this count because DOE does not dispute that a grant of a waiver-preemption petition, if authorized by EPCA, would result in a final rule.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed or denied.

Respectfully submitted,

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DECEMBER 2007

CERTIFICATE OF SERVICE

I hereby certify that I have, this 11th day of December, 2007, served two copies of the foregoing Brief For The Respondents, by sending them by First Class Mail, postage prepaid. The Brief will also be filed by First Class Mail, postage prepaid.

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