



April 30, 2012

Submitted via email to: [docket@energy.ca.gov](mailto:docket@energy.ca.gov)

Ms. Karen Douglas  
Commissioner  
California Energy Commission  
1516 Ninth Street  
Sacramento, California 95814

<b>DOCKET</b>	
<b>12-AAER-1</b>	
DATE	<u>APR 30 2012</u>
RECD.	<u>APR 30 2012</u>

Dear Commissioner Douglas:

This comment is submitted jointly by the National Electrical Manufacturers Association, the Association of Home Appliance Manufacturers, and Air Conditioning, Heating and Refrigeration Institute. Together, our associations represent a broad range of federally-covered products regulated by the appliance efficiency laws in the Energy Policy and Conservation Act (EPCA) and the Department of Energy and Federal Trade Commission regulations promulgated pursuant to EPCA. While there may be other issues our associations may wish to raise in addition to this letter, these joint comments address the subject of federal pre-emption of state energy conservation regulation as they apply to the proposed CEC Title 20 enforcement regulations.

Section 327 of EPCA contains an express preemption provision. 42 U.S.C. §6297. Subject to certain exceptions listed in the statute, the general rule is that if a federal energy conservation standard has been promulgated by Congress or by the Department of Energy, “no State regulation, or revision thereof, concerning the energy efficiency, energy use, or water use of the covered product shall be effective with respect to such covered product.” The California Energy Commission has listed among its Appliance Efficiency Regulations both “federally regulated” appliances, consumer products and industrial equipment, and “non-federally regulated” appliances, consumer products, and industrial equipment.<sup>1</sup> The CEC’s standards for federally regulated products mimic their federal counterpart where a standard exists. See generally, Cal.CodeRegs, Title 20 §1605.1. Uniquely California state energy conservation standards have been adopted by the CEC with respect to products that fall outside the definitions of covered products under EPCA.<sup>2</sup> Notwithstanding the listings of the federal standards in the CEC’s Appliance Efficiency Regulations for federally regulated products, the legal status of these

<sup>1</sup> Definitions of the terms are found in Cal.CodeRegs., Title 20, §1602.

<sup>2</sup> Implied preemption could, in some cases, apply to product standards that fall outside of the federal covered product definitions. *E.g., Pacific Merchant Shipping Assn. v Goldstene*, 517 F.3d 1108 (9<sup>th</sup> Cir. 2008).

standards under the Supremacy Clause of the Constitution and EPCA, 42 U.S.C. §6297, is that they are not effective and therefore unenforceable. In previous conversations with CEC staff, it has been explained to us that the presence of the federal standards in the CEC's Appliance Efficiency Regulations for federally regulated products is purely contingent: if federal energy conservation standards were ever repealed, California wants to have a legal scheme in place to ensure that no void appears in California law and policy. Hence, there is no intent or understanding for California to enforce federal law, except as expressly permitted by EPCA.

The structure of EPCA's enforcement provisions further reveals that Congress intended, with one recent exception, to make the federal government primarily responsible for enforcement of federal energy conservation standards. Enforcement of federal energy conservation laws and regulations under EPCA is expressly invested in the Secretary of Energy and the Federal Trade Commission under Section 333 of EPCA. 42 U.S.C. §6303. The ability of persons to enforce EPCA's appliance efficiency laws and regulations is limited entirely to the circumstances set forth in section 335, and only after the federal agencies have declined to act. 42 U.S.C. §6305. A special provision added by the Energy Independence and Security Act of 2007 ("EISA 2007") provided the lone exception for state attorneys general to pursue *injunctive relief only* in the case of "a general service incandescent lamp that does not comply with the applicable standard established under section 6295(i) of this title or an adapter prohibited under section 6302(a)(6) of this title." 42 U.S.C. §6304.

We are cognizant of California's ability to require companies selling regulated products in California --- both federally-regulated and state-regulated products --- to include data respecting their products in the CEC's appliance efficiency database and to certify to the CEC pursuant to section 1606 of Title 20. *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, 410 F.3d 492 (9<sup>th</sup> Cir. 2005). But the Request for Information dated February 1, 2012 issued by the Commission requesting comments on specific questions relative to enforcement is ambiguous with respect to the Commission's intent concerning the enforcement of standards on federally-regulated products. It not only refers to initiating enforcement with respect to uncertified products, which by itself is not problematic, but it also refers generally to taking appropriate legal action to "restrain and discourage the sale or offering for sale of products that fail to meet the applicable standard(s)" without distinguishing between federally-regulated and non-federally regulated products.

Section 1608 authorizes the Energy Commission to take appropriate legal action to restrain and discourage the sale or offering for sale of products that fail to meet the applicable standard(s), which include seeking appropriate judicial action. The Commission's enforcement paradigm is primarily complaint-based, i.e., the Commission is alerted to an uncertified appliance being sold or offered for sale within the State, and Commission staff initiates the enforcement process.

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We specifically request that in connection with this proceeding the CEC clarify that the State of California will not endeavor to enforce state regulations adopting federal regulations applicable to covered products and equipment under EPCA.

Respectfully,

A handwritten signature in black ink that reads "Kyle Pitsor". The signature is written in a cursive, flowing style.

Kyle Pitsor  
Vice President, Government Relations  
National Electrical Manufacturers Association

On behalf of:

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