

INITIAL STATEMENT OF REASONS**PROPOSED REGULATIONS****APPLIANCE EFFICIENCY STANDARDS ENFORCEMENT REGULATIONS****California Code of Regulations
Title 20, Division 2, Chapter 4, Article 4, Section 1609****California Energy Commission****DOCKET NUMBER 12-AAER-1****AUGUST 25, 2014****PROBLEM STATEMENT**

Senate Bill 454 (Pavley, Chapter 591, Statutes of 2011), codified as Section 25402.11 to the Public Resources Code (PRC), provided for the assessment of monetary penalties for violations of the state's *Appliance Efficiency Regulations*, promulgated by the Energy Commission pursuant to Public Resources Code Section 25402.1(c), and codified in Title 20, Division 2, Chapter 4, Article 4, Sections 1601-1608. The *Appliance Efficiency Regulations* establish minimum energy and water efficiency standards for certain appliances sold or offered for sale in California, and require covered appliances to be certified and properly marked before they can be sold or offered for sale in California. The energy and water efficiency standards established by the *Appliance Efficiency Regulations* must be cost-effective for consumers over the life of the appliance, as required by PRC Section 25402(c)(1).

PRC Section 25402.11 provides for the assessment of a monetary penalty of up to \$2500 for each violation of the *Appliance Efficiency Regulations*, enforceable through either an administrative enforcement process created by the Energy Commission, or through civil litigation. PRC Section 25402.11 authorizes the Energy Commission to create an administrative enforcement process for the assessment of penalties for violations of the *Appliance Efficiency Regulations*. It also specifies several

factors which the Energy Commission, or a court, must consider in assessing monetary penalties for violations of the *Appliance Efficiency Regulations*, including:

- A. The nature and seriousness of the violation
- B. The number of violations
- C. The persistence of the violation
- D. The length of time over which the violation occurred
- E. The willfulness of the violation
- F. The violator's assets, liabilities, and net worth, and
- G. The harm to consumers and to the state that resulted from the amount of energy wasted due to the violation.

In adopting SB 454, the Legislature found that “significant quantities” of appliances are sold or offered for sale in California that do not meet the state’s energy and water efficiency standards. It also recognized that inadequate certification of appliances sold in California undermines the state’s ability to manage its energy consumption, conserve resources, reduce greenhouse gas emissions and protect consumers and businesses. It found that these violations saddle consumers with hidden, long-term operational costs and represent unfair competition that dramatically impacts the viability of conscientious California businesses.

BENEFITS

By establishing an administrative enforcement process, the proposed regulations provide for the enforcement of the *Appliance Efficiency Regulations* through a process that is more efficient and less costly than civil litigation for both the Energy Commission and prospective respondents to enforcement actions. This will allow for more comprehensive enforcement of the *Appliance Efficiency Regulations* by the Energy Commission, which may increase compliance with the water and energy efficiency standards established therein.

Increased compliance with the *Appliance Efficiency Regulations* would mean that fewer inefficient, wasteful appliances would be sold in stores and online to California residents. According to the US

EPA, “State appliance efficiency standards establish minimum energy efficiency levels for appliances and other energy-consuming products. These standards typically prohibit the sale of less efficient models within a state.”¹ A paper by the Center for Progressive Reform concluded that,

“Improving appliance energy efficiency standards will benefit consumers, manufacturers, and the environment. Consumers will save money on their electric bills and likely enjoy updated appliances at a lower cost as a result of improved standards. Manufacturers stand to gain from increased sales and lowered production costs. The environment will benefit from reduced natural resource consumption and lowered greenhouse gas emissions.”²

The regulations will protect consumers from the hidden long-term costs of operating appliances that needlessly waste energy or water, and will lower their utility bills.³ According to a study by the ACEEE⁴, “Efficiency standards have played a major role in saving energy and water and reducing utility bills.” ACEEE also found that “as products have become more efficient:

- 1) Performance generally stayed the same or improved,
- 2) Manufacturers offered new features to consumers, and
- 3) Prices declined or stayed the same for five of the nine products (which were studied) for which...(there was)...price data, and for the other four products, observed price increases are outweighed by electricity bill savings.”

Enforcement of the *Appliance Efficiency Regulations* will also help protect conscientious businesses located in California and elsewhere, both large and small, from unfair competition. Manufacturers that properly design, manufacture, test, mark and certify their appliances to meet California’s standards and requirements, often complain about companies that have not invested the same amount of time, effort and resources into making compliant products. Companies that sell appliances that are not in compliance, profit from this lack of compliance and put businesses that “play by the rules” at a financial disadvantage. The efficient enforcement of, and assessment of penalties for noncompliance with, the *Appliance Efficiency Regulations* through an administrative enforcement process will help “level the playing field” for conscientious businesses that make and sell only appliances that meet the state’s energy and water efficiency standards, and may increase their market share. Improved compliance by

¹ “Clean Energy/Environment Guide to Action: Policies, Best Practices, and Action Steps for States,” US EPA, April 2006 (<http://epa.gov/statelocalclimate/resources/action-guide.html>)

² “States Can Lead the Way to Improved Appliance Energy Efficiency Standards,” Briefing Paper No. 1210 by the Center for Progressive Reform, Alexandra B. Klass, Lesley K. McAllister, and Wayland Radin, August 2012

³ “Energy Efficiency Performance Standards: The Cornerstone of Consumer-Friendly Energy Policy,” Consumer Federation of America, Mark Cooper, October 2013.

⁴ “Better Appliances: An Analysis of Performance, Features, and Price as Efficiency has Improved,” Report Number A132, Joanna Mauer, Andrew deLaski, Steven Nadel, Anthony Fyer, and Rachel Young, May 2013.

manufacturers may also mean reduced production costs, increased sales, higher profit margins and increased employment.⁵ One analysis showed that “appliance, equipment and lighting standards are a cost-effective public policy instrument that creates significant energy savings, which in turn, generate larger macroeconomic benefits such as increased net employment and associated wage and salary benefits.”⁶

Increased compliance with the *Appliance Efficiency Regulations* will also mean energy savings statewide, resulting in reduced growth in the demand for energy, and less need to build new power plants, resulting in the avoidance of associated greenhouse gas emissions and air pollution.⁷

PURPOSE

The purpose of Section 1609 of Title 20 of the California Code of Regulations is to establish an administrative enforcement process for violations of the *Appliance Efficiency Regulations* and for the assessment of administrative civil penalties as allowed by Section 25402.11 of the Public Resources Code (PRC).

The following Section and subsections have been added to the *Appliance Efficiency Regulations*, California Code of Regulations, Title 20, sections 1601-1608.

Section 1609. Administrative Civil Penalties

Section 1609(a)(1): To specify that any person may be in violation of the standards promulgated pursuant to PRC Section 25402(c) when they sell or offer for sale an appliance that is not listed in the Energy Commission’s *Appliance Efficiency Database*, and that this violation may incur a penalty for each unit sold or offered for sale.

⁵ “States Can Lead the Way to Improved Appliance Energy Efficiency Standards,” supra note 2.

⁶ “Appliance and Equipment Efficiency Standards: A Money Maker and Job Creator,” Report Number ASAP-8/ACEEE-A111, American Council for an Energy Efficient Economy and Appliance Standards Awareness Project, Rachel Gold, Steve Nadel, John A. “Skip” Laitner, and Andrew deLaski, January 2011.

⁷ “Energy Efficiency as a Low-Cost Resource for Achieving Carbon Emissions Reductions: A Resource of the National Action Plan for Energy Efficiency,” National Action Plan for Energy Efficiency, Prepared by William Prindle, ICF International, Inc. (www.epa.gov/eeactionplan)

Section 1609(a)(2): To specify that manufacturers and distributors may be in violation of the standards promulgated pursuant to PRC Section 25402(c) if the appliances they manufactured or distributed for use in California are sold or offered for sale without being marked, tested, certified and in compliance with applicable energy or water efficiency standards in the *Appliance Efficiency Regulations*, and that this violation may incur a penalty for each unit sold or offered for sale.

Section 1609(a)(3): To specify that knowingly making a false statement under penalty of perjury to avoid compliance with California's appliance energy and water efficiency standards may result in administrative civil penalties.

Section 1609(b)(1): To specify that an administrative civil penalty may be imposed up to the maximum allowed by PRC Section 25402.11, and may be applied to each unit of an appliance sold or offered for sale, and to each false statement to the Energy Commission.

Section 1609(b)(2): To specify that administrative civil penalties may be assessed to more than one person or business in a supply chain depending upon their culpability for the sale or offer for sale of an appliance in California.

Section 1609(b)(3): To restate the seven factors specified in PRC Section 25402.11 that must be considered when assessing the amount of an administrative civil penalty; to clarify that an alleged violator's financial information may only be used to reduce an administrative civil penalty; to specify two additional factors that must be considered, but only for reducing the amount of an administrative civil penalty.

Section 1609(c): To specify how alleged violators will be notified of a potential violation, and what information must be provided to the alleged violator.

Section 1609(d): To specify that settlement is an option at any time during the enforcement process, and that settlement may include penalties and remedies to promote compliance.

Section 1609(e): To specify the adjudicative process for imposing an administrative civil penalty, once a Notice of Violation (NOV) has been issued, if settlement cannot be reached.

Section 1609(f): To clarify that this new enforcement process does not preclude the Energy Commission from exercising its existing statutory and regulatory authority.

Section 1609(g): To clarify that alleged violators may appeal a decision of the Energy Commission to a superior court.

NECESSITY

Section 1609(a)(1): Any person or business who sells or offers an appliance for sale that is not certified for sale in California, as required by section 1608(a), has committed a violation of the Appliance Efficiency Regulations. This subsection is necessary to ensure that any person or business that commits such a violation of the Appliance Efficiency Regulations may be subject to an administrative civil penalty. This section addresses questions raised by stakeholders in pre-rulemaking comments as to who specifically may be held responsible for selling uncertified appliances in California.

Section 1609(a)(2): This subsection is necessary to establish liability for manufacturers, importers, and distributors that indirectly cause violations of the Appliance Efficiency Regulations, and to avoid incentivizing deliberate ignorance on the part of such entities that uncertified appliances they manufacturer, import or distribute may be subsequently sold or offered for sale in California. A manufacturer may cause violations of the Appliance Efficiency Standards regulations by placing an appliance not certified for sale in California into a stream of commerce which ultimately leads to the appliance being sold or offered for sale in California, even though the manufacturer has not sold or offered the appliance for sale in California directly. Similarly, an importer or distributor who participates in the stream of commerce for such an appliance may be responsible for the uncertified appliance being illegally sold in California, without selling or offering the appliance for sale in California directly. On the other hand, where a manufacturer, distributor or importer does not intend for an appliance to be sold in California, and takes reasonably prudent precautions to avoid the

appliance being sold in California, it should not be liable for a violation of the Appliance Efficiency Regulations if the appliance is subsequently sold or offered for sale in California due to circumstances beyond its control. This section addresses questions raised by stakeholders in pre-rulemaking comments as to who specifically may be held responsible for selling uncertified appliances in California. It also addresses concerns expressed by some stakeholders that manufacturers, importers, and distributors might be assessed penalties for uncertified appliances that are not intended for sale in California, but which make their way in to California markets due to circumstances beyond their control.

Section 1609(a)(3): This subsection is necessary to reduce the potential for fraud in the certification of appliances. It responds to the desire of stakeholders for a “level playing field.”

Section 1609(b)(1): This subsection is necessary to clarify that the upper limit for an administrative civil penalty that may be assessed for a violation of the appliance efficiency standards, as set forth in Section 1609(a), is the amount set forth in PRC Section 25402.11. The limit established by statute is referenced to avoid duplication and potential inconsistencies in the event of an amendment to the statutory limit.

Section 1609(b)(2): This subsection is necessary to identify who may be subject to an administrative civil penalty for a violation of section 1608(a), when more than one sale occurs along a supply chain within California (e.g., a manufacturer’s sale to a distributor in California and then a distributor’s sale to a California retailer). This responds to the desire of stakeholders to know which person or business may be subject to administrative civil penalties.

Section 1609(b)(3): This subsection is necessary to clarify the factors the Energy Commission will consider in determining the amount of an administrative civil penalty. The clarifications and additions to the factors set forth in PRC Section 25402.11(a)(2) are necessary to provide small businesses and others with the means to reduce a penalty that might be an undue burden. They are also necessary to encourage the resolution of a violation prior to involvement by the Energy Commission or to encourage cooperation with the Energy Commission during an investigation, and respond to the desire of

stakeholders for an administrative enforcement process that is fair and consistent, that rewards positive behavior and that results in appropriate penalties. In order to articulate all of the factors the Energy Commission will consider in assessing a penalty in one place, some of the factors set forth in Section 25402.11(a)(2) were repeated verbatim, while others were rearranged or modified slightly. This repetition was necessary to preserve the clarity in accordance with Government Code Section 11359.1(a)(3), and meets the standard for “nonduplication” as set forth in 1 CCR Section 12(b)(1).

Section 1609(c): This subsection is necessary to ensure that an alleged violator is given clear and adequate notice that it may be in violation of the *Appliance Efficiency Regulations*, which will include the basis for the violation and how penalties may be assessed.

Section 1609(d): This subsection is declarative of existing law, set forth in Government Code section 11415.60. It is included to encourage and promote resolution through settlement.

Section 1609(e): This subsection is necessary to identify the steps the Energy Commission must follow to impose an administrative civil penalty through an administrative adjudicative process, according to the California Government Code.

Section 1609(f): This subsection is necessary to clarify for the regulated community that the Energy Commission may exercise all of its authority under the law, in addition to the assessment of penalties, (e.g., to remove appliances from the *Appliance Efficiency Database*, thereby making it illegal to sell specified appliances in California.)

Section 1609(g): This subsection is necessary to explain the process for appealing the imposition of a penalty by the Commission. This subsection is not necessary to establish a process for judicial review, because statutory provision referenced, PRC Section 25534.2(a) and (b), would govern the process for seeking judicial review of a decision of the Energy Commission to assess an administrative civil penalty irrespective of this regulation. However, there is potential for confusion because the Energy Commission has more than one statutory process for judicial review, depending on the subject of the

decision. Furthermore, the specific provisions governing the judicial review of the Energy Commission supersede the general provisions for reviewing adjudicative decisions of administrative agencies set forth in Code of Civil Procedure Section 1094.5. It therefore enhances the clarity of the regulations and avoids potential confusion to remind readers of the statutory provision that applies to this process.

STUDY, REPORTS, AND DOCUMENTS RELIED UPON

The Commission relied on the following documents in preparing this Initial Statement of Reasons.

“Clean Energy/Environment Guide to Action: Policies, Best Practices, and Action Steps for States,” US EPA, April 2006, <http://epa.gov/statelocalclimate/resources/action-guide.html>

“States Can Lead the Way to Improved Appliance Energy Efficiency Standards,” Briefing Paper No. 1210 by the Center for Progressive Reform, Alexandra B. Klass, Lesley K. McAllister, and Wayland Radin, August 2012

“Energy Efficiency Performance Standards: The Cornerstone of Consumer-Friendly Energy Policy,” Consumer Federation of America, Washington, D.C., Mark Cooper, October 2013

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“Appliance and Equipment Efficiency Standards: A Money Maker and Job Creator,” Report Number ASAP-8/ACEEE-A111, American Council for an Energy Efficient Economy and Appliance Standards Awareness Project, Rachel Gold, Steven Nadel, John A. “Skip” Laitner and Andrew deLaski, January 2011

“Energy Efficiency as a Low-Cost Resource for Achieving Carbon Emissions Reductions: A Resource of the National Action Plan for Energy Efficiency,” National Action Plan for Energy Efficiency, Prepared by William Prindle, ICF International, Inc. www.epa.gov/eeactionplan

“HISTORICAL Summary—Appliance Standards Enforcement, Enforcement Matters Snapshot, Appliances and Existing Buildings Office,” California Energy Commission, May 30, 2012

FISCAL IMPACT ANALYSIS

The regulations apply only to the California Energy Commission. The Energy Commission will implement the proposed regulations with existing staff and resources, so there will be no impact to its budget or the State’s, except that penalties collected through enforcement may be available to promote compliance and enforcement with the *Appliance Efficiency Regulations* upon appropriation by the Legislature. There will be no other fiscal impact to any local or state government entity.

ECONOMIC IMPACT ANALYSIS

Cost Impacts on Representative Persons or Businesses

California Government Code Section 11342.535 defines “Cost Impact” as the “direct” costs that a “representative private person or business” would incur to comply with proposed regulations. These proposed regulations require compliance by the Energy Commission, but not by “representative private persons or businesses” (i.e., appliance manufacturers, distributors and retailers).

Businesses that sell regulated appliances in California must comply with the State’s appliance efficiency standards and certification requirements found in the *Appliance Efficiency Regulations* (California Code of Regulations, Title 20, Sections 1601-1608). If they do not comply with the provisions in Sections 1601-1608, then the Energy Commission may currently initiate enforcement action. The proposed regulations, to be located in Section 1609, will give the Energy Commission one more enforcement tool, which complements the existing enforcement authority specified in existing statute and regulations. The proposed regulations establish an administrative process for assessing civil penalties, when businesses violate Sections 1601-1608. When the Energy Commission considers assessing civil penalties for violations of Sections 1601-1608, it will be required to comply with Section 1609. Businesses must comply with the existing Sections 1601-1608 and the Energy Commission will be required to comply with the new Section 1609. Therefore, businesses that make, distribute or sell regulated appliances in California will not experience any direct compliance costs as a result of the proposed enforcement regulations.

Although not considered “cost impacts” as defined in California Government Code Section 11342.535, administrative civil penalties or fines may result from the enforcement process. However, it is likely that most of the enforcement cases opened by the Energy commission will be resolved without resort to judicial actions or penalties, as has been true in the past.⁸ In twelve years of compliance enforcement, from January 1989 through May 2012, the Energy Commission opened 331 enforcement cases and resolved 279 cases. Of the 279 cases resolved, almost 47% resulted in compliance or progress toward compliance, while 41% required no further action. Only 5% resulted in the withdrawal of certification or the removal of products from the database, and no case resulted in a civil penalty. Only one case,

⁸ *Historical Summary—Appliance Standards Enforcement, Enforcement Matters Snapshot*, Appliances and Existing Buildings Office, California Energy Commission, May 30, 2012

which was referred to the Sacramento District Attorney's Office in 2009, resulted in a court settlement in which a manufacturer was ordered to pay \$15,000.

The creation or elimination of jobs

There is no indication that the regulations will create or eliminate jobs in California. However, the regulations should level the playing field for conscientious California businesses that lose market share, sales and profits to non-compliant businesses outside of the State. The regulations should help California businesses gain back market share, sales and profits, increasing the likelihood of job creation within California.

The creation of new businesses or the elimination of existing businesses

There is no reason to believe that the regulations will increase or decrease the number of businesses selling appliances in California. The demand for appliances is driven by the size and health of the State's economy, and the number of residents, not by how the Energy Commission administers the State's Appliance Efficiency Program. California is the eighth largest economy in the world with almost 40 million residents.

The expansion of businesses currently doing business in California

As stated above, the regulations should "level the playing field" for conscientious California businesses that lose market share, sales and profits to non-compliant businesses outside of the State. The regulations should help California businesses gain back market share, sales and profits, increasing the likelihood that they will expand to meet market demand.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE IMPACT DIRECTLY AFFECTING BUSINESS

The regulations will have no impact on the thousands of California businesses selling many of the approximately 380,000 active appliance models that are currently in compliance with the State's appliance efficiency standards and certification requirements. Furthermore, the regulations will encourage compliance by those businesses that are currently out of compliance. This should provide a more "level playing field," protecting conscientious California businesses, including small businesses.

Furthermore, pursuant to PRC Section 25402.11(b), businesses are already subject to a civil penalty, with the same maximum as the administrative civil penalty established by these regulations, for a violation of the appliance efficiency standards promulgated pursuant to PRC Section 25402(c); the regulations only create an administrative process for assessing a penalty. The regulations do not create any additional “exposure” for businesses.

ALTERNATIVES TO THE REGULATIONS

The Energy Commission was limited in its consideration of alternatives to the regulations due to the specific nature of PRC Section 25402.11, which authorizes the establishment of an administrative enforcement process for the assessment of administrative civil penalties for violations of PRC Section 25402(c). This Section specifies that the regulations must comply with the administrative adjudication requirements of the Administrative Procedures Act (APA) found in Chapter 4 (commencing with Section 11400) and Chapter 4.5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The regulations were therefore narrowly constructed within the limits provided in the APA and PRC Section 25402.11. In addition, statute specifies seven factors that must be considered when assessing administrative civil penalties.

One of the statutory factors [subsection (b)(3)(J)] is a “violator’s assets, liabilities and net worth.” The Energy Commission plans to apply this factor only in order to lessen the burden on small business. The Energy Commission will only consider this factor to reduce an administrative penalty, rather than to increase an administrative penalty. Therefore, it will be up to the respondent to decide whether to exert the effort to provide data on “assets, liabilities and net worth” to try to reduce the penalty amount. Use of the factor to increase penalties was rejected, because it would increase the burden of respondents to provide financial information – which could be substantial for large entities and raise confidentiality concerns -- even when that information is unlikely to result in a reduction in penalty.

The Energy Commission also added two factors, which provide alleged violators with the means to reduce a penalty by proactively correcting a violation or by cooperating with the Energy Commission in its investigation. The Energy Commission considered the omission of these two additional factors to the

seven factors specified by PRC Section 25402.11(a)(2), but found that the additions were necessary and appropriate to reward the good faith efforts on the part of potential violators to comply and cooperate with the enforcement of the *Appliance Efficiency Regulations*.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

Pursuant to authority established in the United States Code, Title 42, Chapter 77, Subchapter III, Part A and Part A-1, the U.S. Department of Energy promulgates efficiency standards for certain appliances, codified in Code of Federal Regulations (CFR), Title 10, Chapter II, Parts 429, 430, and 431. In some cases, these federal regulations preempt the State of California's Appliance Efficiency Standards set forth in Title 20, Section 1601 *et seq.* of the California Code of Regulations.

The State of California's *Appliance Efficiency Regulations* are enforceable only to the extent they are not preempted by federal law, including Title 10, Chapter II, Parts 429, 430, and 431 of the Code of Federal Regulations. The proposed regulations create an administrative enforcement process for the state of California's *Appliance Efficiency Regulations* only to the extent they are not preempted by federal law. Neither these aforementioned CFR provisions, nor any other federal law, provide for the enforcement of state's *Appliance Efficiency Regulations*. Consequently, the proposed regulations do not duplicate or conflict with federal law.