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FINAL STATEMENT OF REASONS

Adoption of Appliance Efficiency Standards Enforcement
Regulations

California Code of Regulations, Title 20,
Division 2, Chapter 4, Article 4, Section 1609
Appliance Efficiency Regulations

California Energy Commission
Docket Number 12-AAER-01

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CALIFORNIA
ENERGY COMMISSION

Edmund G. Brown Jr., Governor

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I. INTRODUCTION

This document is the Revised Final Statement of Reasons (FSOR) and Updated Informative Digest required by Government Code Section 11346.9.

Public Resources Code (PRC) Section 25402(c)(1) requires the Energy Commission to set efficiency standards for appliances that use a significant amount of energy or water statewide. The purpose is to reduce the unnecessary or wasteful use of energy and water. These standards and related requirements are located in the state's *Appliance Efficiency Regulations* (California Code of Regulations (CCR), Title 20, Sections 1601-1608).

PRC Section 25402.11 authorizes the Energy Commission to establish an administrative enforcement process for fairly and efficiently addressing violations of the *Appliance Efficiency Regulations*. It authorizes monetary penalties of up to \$2,500 for each violation. Such penalties would be enforced through either a civil court proceeding, or an administrative proceeding in accordance with the Energy Commission's proposed regulations.

The proposed regulations will add Section 1609: Administrative Civil Penalties. This section will specify what types of violations may be subject to a monetary penalty, what factors must be considered in determining the amount of a monetary penalty, what process must be followed to impose a monetary penalty, and how to appeal a decision by the Energy Commission.

It is anticipated that the addition of the new administrative enforcement process will help to ensure the environmental and economic benefits of the State's appliance energy and water efficiency standards.

II. PROCEDURAL HISTORY OF THE RULEMAKING

The Energy Commission conducted extensive pre-rulemaking activities. This included an initial scoping workshop on March 23, 2012, and a public workshop on February 25, 2014 to review and evaluate draft regulations. On August 25, 2014, the Energy Commission posted a Notice of Proposed Action (NOPA), Initial Statement of Reasons (ISOR) and the Express Terms on the Energy Commission's website. The NOPA was provided to every person on the Energy Commission's appliance mailing list and Appliance List-serve, and to a representative number of small business enterprises or representatives, and to every person who had requested notice of such matters, including the Secretary of Natural Resources.

On August 29, 2014, the Office of Administrative Law (OAL) published the NOPA in the California Regulatory Notice Register. The NOPA announced that the Energy Commission would be considering adoption of regulations to establish an administrative enforcement process for the *Appliance Efficiency Regulations*.

The NOPA included a public hearing date of October 20, 2014, and provided for a comment period of more than 45 days. A revised NOPA was posted on September 2, 2014, indicating a change in hearing time from 10 a.m. to 2 p.m. on October 20, 2014.

The Energy Commission received written and oral comments from several stakeholders on the proposed regulations, and considered these comments carefully. On November 17, 2014, the Energy Commission adopted the Express Terms published on August 29, 2014, with a minor change to the manner in which a Notice of Violation shall be served as specified in the proposed Section 1609(c). The Energy Commission initially found this to be a non-substantial change pursuant to Government Code Section 11346.8(c) and Section 40 of Title 1 of the California Code of Regulations.

After adoption, the Energy Commission prepared a FSOR and submitted the final rulemaking package to the OAL on March 2, 2015. On April 13, 2015, the Energy Commission withdrew the regulation from consideration by the OAL, based in part on concern expressed by OAL that the post-notice modification to the proposed Section 1609(c), clarifying the manner in which a Notice of Violation shall be delivered, was a substantial change requiring 15-day notice before adoption. OAL also expressed concern that the proposed Section 1609(b)(3)(B), addressing consideration of the history and persistence of violations in the calculation of administrative penalties, lacked clarity.

On April 23, 2015, the Energy Commission published both revised Express Terms for Section 1609, and a notice of the availability of the revisions and of an Energy Commission hearing to consider adoption of Section 1609 as amended. The revised Express Terms clarified the manner in which a notice of violation shall be delivered, as well as the consideration of the persistence and history of violations. The Energy Commission also published an addendum to the ISOR, explaining the necessity of limiting consideration of the persistence of past violations to the previous seven years.

The Energy Commission held a hearing on May 13, 2015, to consider adoption of the revised Express Terms. After considering all of the comments received on the revised Express Terms, the Energy Commission unanimously approved the resolution adopting the revised Express Terms. The Energy Commission also found the adoption of Section 1609 not subject to the California Environmental Quality Act because of the “common sense” exemption under Section 15061(b)(3) of Title 14 of the CCR, as well as the categorical exemptions set forth in Sections 15308 and 15321 of this Title. This determination was supported by a legal memorandum in the record.

III. INCORPORATION BY REFERENCE OF MATERIAL FROM THE NOTICE OF PROPOSED ACTION (Government Code Section 11346.9(d))

The adopted Express Terms do not substantially deviate from the originally proposed text. Therefore, in accordance with Government Code Section 11346.9(d), the Energy Commission determines that this FSOR can satisfy the requirements of this section by incorporating by reference various parts of the September 2, 2014 Revised NOPA. The specific information incorporated is noted in the discussion of each requirement below.

IV. UPDATE TO THE INTIAL STATEMENT OF REASONS (Government Code Section 11346.9(a)(1))

Government Code Section 11346.9(a)(1) requires the FSOR to contain an update of the information contained in the ISOR. Other than the changes noted below, no other changes to the ISOR are necessary, and those items required to be included in the ISOR that are not addressed herein are hereby incorporated by reference.

The revised Express Terms published April 23, 2015, made the following revisions to the originally proposed regulation:

Section 1609(b)(3)(B). The persistence of the violation, meaning a responsible person's history of past violations of this Article over the previous seven years, ~~and the number of such violations.~~

Section 1609(b)(3)(C). The number of violations arising from the course of conduct that is the subject of the enforcement proceeding.

Section (c) Notices of Violation.

The Executive Director, or his designee, shall send a written Notice of Violation to any by certified mail (registered mail to non-U.S. destinations) or other means that provide actual notice to the person in violation of this Article.

The following discussion explains the problem, purpose, rationale, and benefits of the revisions to the proposed regulations. It supplements the discussion of these factors in the ISOR and prior FSOR.

Problem: The original language stated "The persistence of the violation, meaning a responsible person's history of past violations of this Article over the previous seven years, and the number of such violations." It was not clear whether "the number of such

violations” was limited to the same previously-defined seven-year period, or whether this number included all such violations regardless of when they occurred.

Purpose: The purpose of the revised Section 1609(b)(3)(B) is to explain the meaning of “persistence of the violation,” which is specified in PRC Section 25402.11(a)(2)(C) as one of the factors that will be considered in assessing administrative civil penalties.

Rationale: Section 1609(b)(3)(B) is necessary to explain that “persistence of the violation” means the responsible person’s history of past violations of the *Appliance Efficiency Regulations* over the past seven years. Consideration of the history of past violations is limited to those violations occurring in the previous seven years in order to provide a temporal limit on past misconduct serving as a potentially aggregating factor, both out of considerations of fairness, and because violations that occurred more than seven years in the past are less relevant. Consideration of the history of violations includes consideration of the number, nature, severity, and other characteristics of such violations; therefore separate reference to the “number of such violations” was unnecessary and was eliminated.

Benefits: The revised language makes clear for manufacturers and other responsible persons that past conduct will be considered fairly in the assessment of monetary penalties.

Problem: The original language was unclear because it combined past and current conduct.

Purpose: The purpose of the revised Section 1609(b)(3)(C) is to clarify that “number of violations” is a separate consideration from the “persistence of the violation,” and to explain that the “number of violations” refers to the number of violations that are related to the course of conduct that is the subject of the enforcement proceeding.

Rationale: The revised Section 1609(b)(3)(C) is necessary because the “number of violations” is specified in PRC Section 25402.11.(a)(2)(B) as a factor that must be considered in assessing administrative civil penalties. Unlike “persistence of the violation,” which refers to historic violations in the last seven years that may be unrelated to the current enforcement action, the “number of violations” refers to violations that are the subject of, or related to, the current enforcement action.

Benefits: The revised language makes clear for manufacturers and other responsible persons that past conduct will be fairly considered in the assessment of monetary penalties.

Problem: The original language did not assure that responsible persons would actually receive a Notice of Violation before the Energy Commission took action to impose a monetary penalty.

Purpose: The purpose of the revised Section 1609(c) is to clarify that the “notice of violation” must be sent “by certified mail (registered mail to non-U.S. destinations) or other means that provide actual notice” to the violator.

Rationale: This change was made in response to comments from stakeholders, to clarify that the Notices of Violation will be sent by certified or registered mail, consistent with other

notices provided under the *Appliance Efficiency Regulations*, and the Energy Commission's general complaint process (see e.g. Sections 1232(a)(2), 1606(c)(3), 1606(d) and 1608(c)(3) of Title 20 of the CCR), and to ensure the violator receives actual notice of the enforcement action.

Benefits: The revised language will improve communication between the Energy Commission and responsible persons. This will facilitate a fairer, more appropriate outcome for responsible persons as a result of the Energy Commission's enforcement proceedings.

V. MATERIALS RELIED UPON THAT WERE NOT AVAILABLE FOR PUBLIC REVIEW PRIOR TO THE CLOSE OF THE PUBLIC COMMENT PERIOD (California Government Code Section 11346.9(a)(1))

No new materials were relied upon that were not already identified in the ISOR and all materials relied upon were available for public review.

VI. DETERMINATION WHETHER REGULATIONS IMPOSE A MANDATE UPON LOCAL AGENCIES OR SCHOOL DISTRICTS (California Government Code Section 11346.9(a)(2))

As determined by the Energy Commission in a resolution adopted May 13, 2015, the proposed regulations will not impose any mandate on local agencies or school districts.

VII. SUMMARY OF COMMENTS RECEIVED AND THE ENERGY COMMISSION'S RESPONSES (California Government Code Section 11346.9(a)(3))

The following summarizes and responds to all comments on the Express Terms or 45-day language received during the rulemaking that were directed at the regulations or the process by which they were adopted.

A single response is provided for similar comments to ensure clarity and uniformity. The comments are organized by subject matter and by stakeholder.

Subject: Identifying & Verifying Responsible Parties

Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE); (collectively known as the Investor Owned Utilities or IOUs): Comments from Patrick Eilert, Principal, Codes and Standards, PG&E, and Martha Garcia, Manager, Codes and Standards Engineering Services, SCGC, in a letter dated October 20, 2014.

Comment: The IOUs support language that explicitly identifies all of the parties that may be responsible for complying with the *Appliance Efficiency Regulations*, including manufacturers, distributors, and sellers of products.

Comment: The IOUs recommend “verification mechanisms” for all product distribution channels, including contractor-vendor relationships. The IOUs specifically recommend a verification mechanism that ensures that equipment installed in buildings is in full compliance with the state’s energy and water efficiency standards. In some situations, there is no building inspection or other currently required audit to verify compliance with the standards. Such a mechanism would help to ensure that “unique sales exemptions are not exploited,” as in cases where pool pump motors are offered for sale as commercial products but are installed in residential applications.

Comment: The IOUs suggest that a random audit program could help to enforce a verification mechanism.

Responses to Comments by the IOUs

The regulations were modified to clarify who may be liable for a violation.

The public draft presented at the February 2014 workshop only specified “persons” and manufacturers. The regulations now apply to any responsible person along an entire supply chain, including manufacturers, distributors, retailers and contractors.

Verification mechanisms were not included in the regulations.

A verification mechanism already exists in the *Appliance Efficiency Regulations*. Section 1608(a) of the *Appliance Efficiency Regulations* requires that any regulated appliance may be sold or offered for sale in California only if the appliance is certified as compliant and is listed in the Energy Commission's Appliance Efficiency Database. This database is publically accessible. It provides the opportunity for consumers, retailers, utilities and others to verify that regulated appliances may be sold or offered for sale in California.

A random audit program was not included in the regulations.

The regulations already allow for random audits. The Energy Commission routinely contracts with market research firms to conduct random appliance surveys in retail stores throughout California, in catalogs and on the internet. The purpose of the surveys is to randomly audit compliance with the appliance certification requirements in the *Appliance Efficiency Regulations*. In addition, Section 1608(d) requires the Energy Commission to periodically inspect appliances sold or offered for sale in the state to ensure that regulated appliances conform to applicable efficiency design standards and marking requirements. The Energy Commission may also request test reports from manufacturers to verify that an appliance meets the applicable efficiency standards. Furthermore, the Energy Commission is required by Section 1608(e) to periodically cause the testing of covered appliances to determine whether appliances meet applicable efficiency standards.

Subject: Structure of Monetary Penalties

American Lighting Association (ALA): Comments from Richard D. Upton, CCE, President and CEO, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) in a letter dated October 20, 2014, and at the October 20, 2014 Public Hearing.

Comment: ALA urges the Energy Commission to not adopt a penalty structure based on *unit* sales. Rather, it recommends assessing penalties "per incident" or transaction. ALA asserts that a \$2,500 per unit penalty assessed for the sale of 500 - 1,000 items "could ruin a small company."

Comment: It also recommends that penalties "should be higher for those businesses that clearly are not doing business within the rules and are found to be in violation multiple times" to achieve "effective compliance with fines per occurrence."

Association of Home Appliance Manufacturers (AHAM): Comments from Rob McArver, Vice President, Policy & Governmental Relations in a letter dated October 13, 2014 and from Kevin Messner, President, PoliticalLogic, at the Public Hearing on October 20, 2014, and at the Energy Commission’s Business Meeting on November 17, 2014.

Comment: AHAM recommends a \$500,000 maximum penalty for any related series of violations to prevent “unfair enforcement or threats from government.” It asserts that the U.S. Consumer Product Safety Commission (CPSC) limits civil penalties to \$15 million and points out that CPSC is dealing with life and safety issues. AHAM believes, therefore, that the regulations should cap penalties “at a much lower level” because the Energy Commission’s regulations enforce energy and water efficiency standards.

Comment: AHAM asserts that a “violation” is not well defined. It believes that if violations were to be assessed on “a per product basis and millions of products were sold; the possible penalty could be extraordinarily high and unreasonable beyond any possible harm to California and its customers.” It believes this could lead to “prosecutorial abuse and patently unfair government heavy-handedness over a company threatening the company’s very existence.” AHAM believes this is possible, even though it realizes that the regulations enumerate a number of factors that the Energy Commission shall consider when determining an administrative civil penalty, including a violator’s net worth and whether a penalty would create an undue burden. AHAM believes this does not provide a “sure means to rein-in an overzealous government official” because this is just one of the factors that must be considered. It understands the need to provide penalties to deter and penalize noncompliance, but that the amount of a penalty, or threat of penalty, should be consistent with the violation. “As an extreme example, no one would accept a government giving themselves the power and authority to impose ‘a possible maximum sentence of life imprisonment for a parking violation.’” Finally, AHAM asserts that since the law does not “require” the Energy Commission to promulgate penalty regulations, it has the discretion in such regulations to set maximum penalties, “absent extraordinary circumstances.”

Natural Resources Defense Council (NRDC): Comment from Christa Heavey, Sustainable Energy Fellow, and Pierre Delforge, Director, Energy Efficiency in the High Tech Sector in a letter dated October 20, 2014 and Christa Heavey orally at the Energy Commission’s Business Meeting on November 17, 2014.

Comments: NRDC recommends that the Energy commission not set a cap on penalties. NRDC believes it would be impossible to set an overall cap that would be appropriate in all circumstances given the huge diversity of appliances sold in California, and their differing sales volumes and energy consumption. Furthermore, it asserts that an overall cap on penalties would be contrary to the clear statutory language, which establishes a maximum penalty per violation. NRDC also asserts that a cap disregards the factors the Energy Commission shall consider in evaluating the amount of a particular fine; one of which is

included to protect violators against prohibitive penalties. That factor requires the Energy Commission to consider whether a potential penalty would create an “undue burden.”

NRDC believes that redefining violations on a per-model or per-product line basis, could lead to confusion and difficulty in assessing fines. As an example, a single product line could include different product configurations or subcomponents from different manufacturers, causing some appliances within the product line to not comply with California standards. In that case, it would be difficult to fairly assess a penalty per-product line, when not all of the products in that line violated the standard.

Furthermore, NRDC believes that redefining violations per model or product line could lead to insignificant and ineffective fines, even where a violation has led to a very large increase in energy costs to appliance owners. For example, a large manufacturer may sell hundreds of thousands of units of one model that do not comply with the standard. If violations are defined per model, this could result in a total penalty of \$2,500, and therefore not serve as a significant deterrent to violating the appliance efficiency standards. NRDC believes that penalties need to be related to the level of harm caused to consumers. In this situation, harm is defined as energy wasted, and is clearly a function of the number of units sold.

NRDC agrees with the per-unit framework and supports Energy Commission discretion, as limited by the clear statutory guidelines, in determining appropriate penalties on a case-by-case basis.

Osram Sylvania: Comment from Mark Lien, Director of Governmental Relations at October 20, 2014 Public Hearing.

Comment: Osram Sylvania believes that there is the potential to over-fine or under-fine a violator based on violations *per unit*. Mr. Lien asked that the concept be reviewed before adoption.

Power Tool Institute (PTI): Comment from Larry Albert, Chairman, PTI Standby Power Subcommittee in a letter dated October 8, 2014.

Comment: PTI recommends a cap of no more than \$100,000.00 per annum for each battery charger model or family of models that are found to be in violation. PTI’s “principal concern” is with Section 1609(b), which provides for a civil penalty of up to \$2,500 for each *unit* sold or offered for sale in violation of the *Appliance Efficiency Regulations*. PTI believes this was an “unfortunate interpretation of the usual *per violation* penalty.” For manufacturers of power tool battery chargers, it asserts that many units could be shipped “before a manufacturer is found guilty of a violation.” It believes this could lead to an “excessive total penalty” to a manufacturer for a single charger model, “representing a single design and therefore a single violation.”

PTI stated that while a penalty should be large enough to dissuade a manufacturer from deliberately violating the *Appliance Efficiency Regulations*; it should not be so large as to “imperil manufacturers when the violation is the outcome of a simple mistake.” PTI notes that California’s Rigid Plastic Packaging Container (RPPC) program, which provides a “similar regulatory enforcement” regime, imposes a maximum per annum penalty of \$100,000.

Responses to Comments on Structure of Monetary Penalties

The regulations were not revised to define violations in terms of incident, occurrence, or transaction; or per model or product line.

The Energy Commission is bound by statute and the existing *Appliance Efficiency Regulations*. The *Appliance Efficiency Regulations* specify that “any unit of any appliance” within the scope of Section 1601 may only be sold or offered for sale if it meets the requirements of Section 1608(a)(1)-(4). If any unit does not meet the requirements, then a violation occurs for each unit that was sold or is offered for sale. In determining the amount of a penalty, PRC Section 25402.11(a)(1) sets a limit of \$2,500 per violation. By inference, there is limit on penalties of \$2,500 per unit in violation of the *Appliance Efficiency Regulations*.

Also, defining violations on a per model or per product line basis, could lead to confusion and difficulty in assessing fines, if units within the model or product line differ in their energy or water efficiency. It could also limit the deterrent effect. If a large appliance manufacturer, for example, sold thousands of units of one model, generating millions of dollars in sales, the penalty might be \$2,500 total. This would clearly be inadequate to deter potential violators from selling large energy consuming appliances that do not meet the state’s energy and water efficiency standards.

The regulations were not modified to include a cap or maximum penalty.

As mentioned above, PRC Section 24502.11(a)(1) already sets a cap of \$2,500 per violation. Furthermore, Section 1609(b)(3) establishes a number of factors which the Energy Commission must consider in assessing a penalty. In many cases, it is expected that consideration of these factors will result in a penalty that is less than the maximum. However, it is important that potential penalties be large enough to provide a deterrent to potential violators and to penalize chronic or severe violations. Due to the number and variety of appliance types covered by the *Appliance Efficiency Regulations* (including small LED lamps and large refrigerator-freezers), as well as the variety and complexity of supply chain relationships, it would be difficult to set an overall cap that would be appropriate and fair for all businesses in all circumstances.

The regulations also provide the means to mitigate a potential penalty. The Energy Commission added three mitigating factors to the seven factors required by PRC Section 25402.11. The first, described in Section 1609(b)(3)(G), requires the Energy Commission to consider the number of persons responsible for the violation. The second, described in

Section 1609(b)(3)(H)), requires the Energy Commission to consider a violator's efforts to correct a violation prior to the initiation of an enforcement action. The third, described in Section 1609(b)(3)(I), requires the Energy Commission to consider the cooperation of an alleged violator during its investigation. Furthermore, Section 1609(b)(3)(J) allows a violator to voluntarily provide financial information to demonstrate that reduction in a penalty is necessary to avoid an "undue burden."

Subject: Assessing Consistent and Proportional Penalties

American Lighting Association (ALA): Comments from Richard D. Upton, CCE, President and CEO, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) in a letter dated October 20, 2014 and from Eric Jacobson at the Public Hearing on October 20, 2014.

Comment: ALA recommends that neither a manufacturer nor retailers should be penalized for selling non-compliant products "that were shipped to them in error."

Comment: ALA recommends the Energy Commission establish a "very prescriptive" process for determining penalties. It believes that "if those administering the program have broad discretion in determining the Energy Commission's intent, we could see a circumstance where an aggressive interpretation could lead to an egregious and inappropriate fine."

Association of Home Appliance Manufacturers (AHAM): Comments from Rob McArver, Vice President, Policy & Governmental Relations in a letter dated October 13, 2014 and from Kevin Messner, President, PoliticalLogic, at the Public Hearing on October 20, 2014.

Comment: The regulations should state that Energy Commission will only impose penalties that are "consistent and proportional with penalties imposed in prior enforcement actions." AHAM believes that the rule should specifically state that the Energy Commission will not impose a monetary penalty or will impose a reduced monetary penalty when there is no harm to consumers from energy wasted due to the violation. AHAM also suggests that penalties for "no-harm" violations be minimal (e.g., \$500 for first violation, \$1,000 for second, etc.). Section 25402.11 to the Public Resources Code states that the "commission *may* [emphasis added] adopt regulations."

Responses to Comments on Assessing Consistent & Proportional Penalties

The Energy Commission did not predetermine in the regulations that it would not impose a penalty, or would impose a penalty of a certain amount for every particular violation.

The regulations require a rational, systematic deliberation based on the application of ten factors to the unique facts and circumstances of a case. The application of these factors to different situations will result in different conclusions, and different penalties, if any. For example, the application of these factors to a certification violation resulting from an inadvertent clerical error involving the sale of a hundred of light bulbs will result in a much different conclusion than the willful sale of thousands of large appliances that do not meet the state's water or energy efficiency standards. The regulations will allow the Energy Commission to treat mistakes differently than willful violations, and will ensure that a penalty, if any, is fair and fits the violation.

The regulations do not establish a prescriptive process for assessing penalties.

The Energy Commission cannot establish a rigid standardized system of penalties. Section 1609 requires consideration of ten factors as they each apply to case-specific facts and circumstances. To set a one-size-fits-all penalty scheme would result in unfair and inconsistent treatment among regulated businesses.

Furthermore, the regulations do not give staff "broad discretion" to levy "egregious and inappropriate" penalties. The process established in Section 1609(e) requires a case to be heard by an Administrative Law Judge (ALJ) or the Energy Commission with assistance from an ALJ. After the hearing, the Energy Commission (not staff) will issue or adopt a decision, including whether to impose a monetary penalty, after a full vetting of the evidence in light of the required ten factors.

The regulations do not state that the Energy Commission will only impose penalties that are "consistent and proportional with penalties imposed in prior enforcement actions."

Consideration of the ten factors set forth in Section 1609(b)(3) will ensure that the Energy Commission's enforcement actions are consistent and proportional for the cases under consideration.

Subject: Avoiding Duplication of Federal Regulations

Association of Home Appliance Manufacturers (AHAM): Comments from Rob McArver, Vice President, Policy & Governmental Relations in a letter dated October 13, 2014, and Kevin Messner, President, PoliticalLogic at the October 20, 2014 Public Hearing.

Comment: AHAM states that the Energy Commission may not create a "redundant enforcement scheme for preempted products," meaning that the Energy Commission may not regulate appliances that are preempted by federal law. AHAM suggests that the regulations should be clear about this. Furthermore, the association suggests that having "duplicative and inconsistent enforcement" would not well serve consumers, businesses or the environment.

Goodman Manufacturing: Comment from Aniruddh Roy at the Public Hearing on October 20, 2014.

Comment: Mr. Roy asked how the state-specific enforcement authority applies to products that are subject to federal regulation. Mr. Roy further asked the Energy Commission to provide examples and FAQs about preemption in our final rule, or in a compliance manual similar to that for the building standards.

Response to Comment on Avoiding Duplication of Federal Regulations

The regulations do not address the issue of “redundant enforcement.”

Adoption of Section 1609 to create a process for assessing administrative civil penalties does not affect the preemption status of any substantive provision of the *Appliance Efficiency Regulations*. The state’s *Appliance Efficiency Regulations* are only enforceable to the extent they are not preempted by federal law. It is unnecessary to adopt a regulation to state this basic legal principle. Furthermore, because federal appliance standards change regularly, it would be difficult for the state regulations to comprehensively state which regulations are preempted at any given time. As the Energy Commission implements the *Appliance Efficiency Regulations*, it might be appropriate to issue guidance or FAQs regarding the preemption specific appliances; however, such guidance would be inappropriate for a regulation.

Subject: Applying Regulations Only to Newly Certified Appliances

Association of Home Appliance Manufacturers (AHAM): Comment from Rob McArver, Vice President, Policy & Governmental Relations in a letter dated October 13, 2014, and from Kevin Messner, President, PoliticalLogic, at the Public Hearing on October 20, 2014.

Comment: The regulations should make clear that these enforcement regulations only apply to appliances certified after the date the regulations become effective.

Response to Comments on Applying Regulations Only to Newly Certified Appliances

The enforcement provisions set forth in Section 1609 will only apply to violations that occur after Section 1609 goes into effect.

This means that the Energy Commission may seek administrative civil penalties for a sale or offer for sale in violation of the *Appliance Efficiency Regulations* that occurs after Section 1609 becomes effective, or for a false statement made after Section 1609 becomes effective.

However, a sale or offer for sale after Section 1609 becomes effective may violate a standard that was in effect previously, and administrative civil penalties may be assessed for such a violation. To limit the enforcement provisions to violations of standards adopted after the enforcement provisions go into effect would undermine enforcement of the existing *Appliance Efficiency Regulations*, which is contrary to the intent of the legislature in adopting PRC Section 25402.11.

Subject: Delivery of Notice of Violations

American Lighting Association (ALA): Comments from Richard D. Upton, CCE, President and CEO, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) in a letter dated October 20, 2014, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) at the October 20, 2014 Public Hearing.

Comment: ALA urges the Energy Commission to provide a minimum of two warning letters to alleged violators. They recommend that these letters be sent via registered or certified mail.

Comment: ALA recommends that manufacturers be allowed 120 days to take “corrective action” to avoid an enforcement action. It believes that 120 days is “actually the minimum time” for a manufacturer to rewrite specifications, order, retest, manufacture, ship and distribute a product that may be found to be noncompliant. ALA strongly disagrees with the language in Section 1609 (e)(1), which states that an enforcement action may not begin sooner than 30 days after issuance of a Notice of Violation.

Association of Home Appliance Manufacturers (AHAM): Comments from Rob McArver, Vice President, Policy & Governmental Relations in a letter dated October 13, 2014, and from Kevin Messner, President, PoliticalLogic, at the Public Hearing on October 20, 2014.

Comment: AHAM recommends that the regulations require Notices of Violations be sent via certified mail. It believes this will ensure that alleged violators actually receive the Notices of Violation. AHAM wants a public explanation if this requirement is not included in the regulations. It also wants the regulations to require the Energy Commission provide “a confidential, pre-violation notification to a company that allows them 30-days to correct” an alleged violation, or point out in the FSOR that the Energy Commission’s current enforcement process (which already provides numerous opportunities for communication) will continue to include these opportunities.

Responses to Comments on Sending Notices of Violation by Certified or Registered Mail:

The new enforcement regulations do not require a minimum of two warning letters to an alleged violator.

The Energy Commission's enforcement process already provides multiple opportunities for alleged violators to remedy a violation and settle their case. When the Energy Commission becomes aware that a regulated appliance may be in violation of the *Appliance Efficiency Regulations*, it begins a pre-enforcement investigation. Typically, this involves initiating communication by calling or emailing a responsible person at the business that makes or sells the product. In addition, the Energy Commission typically sends a First Notice to a manufacturer or retailer. During the course of a thorough investigation, the Energy Commission typically communicates with a business on many occasions, by phone, email, letter, and face-to-face. The Energy Commission typically works with a violator to achieve compliance and settle the case. If an agreement cannot be reached, the Energy Commission only then sends a Notice of Violation, which provides one more opportunity for a violator to remedy a violation and settle the case.

The regulations were modified to require that the Notice of Violation be delivered by certified or registered mail, or by any other means that would assure actual receipt by an alleged violator.

This is similar to existing provisions in Sections 1232(a)(2), 1606(c)(3), 1606(d), and 1608(c)(3).

As noted above, this clarifies the notice process without making a substantial change.

The regulations were not changed to allow violators 120 days to remedy a violation before the Energy Commission could take any enforcement action.

In passing Senate Bill 454 (Pavley, Chapter 591, Statutes of 2011), which authorized the proposed enforcement regulations, the Legislature was attempting to address "significant quantities of appliances" that are being sold or offered for sale in California that do not meet the state's energy and water efficiency standards. According to the Legislature, this results in "substantial loss to consumers" and "represents unfair competition that dramatically impacts the viability of legitimate businesses." The purpose of SB 454, which is codified in PRC Section 25402.11, was to provide a deterrent to violators, and to level the playing field for all businesses. As mentioned above, the Energy Commission provides ample time and opportunity for violators to remedy violations. There is no limit in regulations as to how long the Energy Commission may give to achieve compliance. This can be negotiated on a case-by-case basis, depending on the facts of the case as applied the ten factors. It might be that a violator is given more or less time to remedy a violation based on the nature of the business, and the circumstances of the case. However, in order for the regulations to have the desired deterrent effect, compliance cannot be the only remedy. Businesses must know

that a violation of the *Appliance Efficiency Regulations* may also result in an administrative civil penalty.

The regulations do not provide for a “confidential, pre-violation notification to a company that allows them 30-days to correct” an alleged violation.

As discussed above, the Energy Commission will always provide compliance assistance, but must reserve the right to exercise all of its statutory authority to initiate an adjudicative proceeding and assess administrative civil penalties for violations of the *Appliance Efficiency Regulations*.

Subject: Regulating Online Retailers

American Lighting Association (ALA): Comments from Richard D. Upton, CCE, President and CEO, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) in a letter dated October 20, 2014, and from Eric Jacobson, CAE, Executive Vice President and President Designate (2015) at the October 20, 2014 Public Hearing.

Comment: ALA requests that the Energy Commission inform stakeholders of its plans to “notify and enforce your regulations with all internet sellers, both large and small companies, including those with or without a physical location within California.” ALA insists that internet sellers should be treated the same as brick and mortar retailers, so that stores located in California are not disadvantaged.

Association of Home Appliance Manufacturers (AHAM): Comments from Kevin Messner, President, PoliticalLogic, at the Public Hearing on October 20, 2014.

Comment: AHAM strongly supports the regulation of online retailers, and asks that the Energy Commission make its intent to do so clear in the FSOR.

Natural Resources Defense Council (NRDC): Comment from Christa Heavey, Sustainable Energy Fellow, and Pierre Delforge, Director, Energy Efficiency in the High Tech Sector, in a letter dated October 20, 2014.

Comment: Although NRDC believes the regulations, as written, clearly cover online sales, it recommends that the Energy Commission make its intent to regulate online sales explicit in the regulations or in the FSOR. NRDC believes that online sales may represent a disproportionate share of violations based on its market research.

Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE):

Comments from Patrick Eilert, Principal, Codes and Standards, PG&E, and Martha Garcia, Manager, Codes and Standards Engineering Services, SCGC, in a letter dated October 20, 2014.

Comment: The IOUs believe that online sales create vast opportunities for the sale of non-compliant products, whether intentional or not. To address this, they recommend online retail channels should be explicitly identified and held subject to penalties in order to incentivize the development of compliance verification procedures and labeling. The IOUs suggest that such labeling could indicate to the consumer whether the product can be legally sold in California. “As an example of online labeling practices regarding code compliance, Amazon.com offers the Rinnai V65IP 6.6 GPM Indoor Low NOx Tankless Propane Water Heater¹ that contains a label which indicates that the product ‘meets’ California and Texas NOx emission standards.” The IOUs suggest that although this type of labeling is a good start, it ultimately relies on the consumer’s final decision to select for products that meet these requirements rather than limiting the consumer’s purchasing options. They believe that other compliance mechanisms, such as ones that prohibit product purchases by identifying the shipping destination zip code, offer stronger opportunities for compliance and should be pursued.

Response to Comments on Regulating Online Retailers

The regulations were not changed to explicitly identify internet sellers as subject to the provisions of CCR Title 20 Sections 1601-1608 and the new Section 1609.

The Energy Commission considers internet sales to be covered by Section 1609, in the same manner as sales by California “brick and mortar” retailers. Internet sellers will be subject to the same requirements as retail stores. To convey that message, the Energy Commission will be reaching out to internet sellers as part of its compliance assistance program.

The regulations are intended to provide an administrative process for assessing penalties for violations of the *Appliance Efficiency Regulations*. The new enforcement regulations in Section 1609 are intended to enhance compliance with Sections 1601-1608, including the marking (labeling) requirements in Section 1607. The new enforcement regulations were not intended to redesign the certification, testing, or marking (labeling) requirements or efficiency standards found in Sections 1601-1608. However, we will continue to work with our utility partners to ensure that all regulated appliances are properly labeled.

Subject: Marking of Appliances

Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE):

Comments from Patrick Eilert, Principal, Codes and Standards, PG&E, and Martha Garcia, Manager, Codes and Standards Engineering Services, SCGC, in a letter dated October 20, 2014.

Comment: We support the inclusion of explicit language that further articulates the requirements and enforcement procedures regarding the marking of appliances with the date of manufacture. The labeling of date of manufacture on a product is a crucial component of accurate assessments of compliance. We commend the Energy Commission for explicitly noting the requirement in Section 1608(a)(2)(B) and its consequences in the 45-day language as it may increase compliance. However, there are many instances in which the location of the label, complexity of the date and label format, and lack of label durability prevent auditors, service technicians, and consumers from accurately interpreting data and assessing compliance.

Comment: We urge the Energy Commission to further clarify the application of enforcement in cases where the labels are unable to be found or interpreted beyond the point of manufacture.

Comment: Furthermore, the Energy Commission should articulate that this labeling requirement should apply to products refurbished and remanufactured, such as residential pool pumps and motors.

Response to Comments on Marking of Appliances

The new enforcement regulations do not include language that further articulates the requirements and enforcement procedures regarding the marking of appliances with the date of manufacture.

The purpose of the rulemaking is to implement the Energy Commission's authority in PRC Section 25402.11 to establish an administrative enforcement process for assessing administrative civil penalties for violations of the *Appliance Efficiency Regulations*. This is done by adding a new Section 1609: Administrative Civil Penalties. The rulemaking intentionally does not address existing Sections of the *Appliance Efficiency Regulations* (Sections 1601-1608), which include Section 1607: Marking of Appliances. The marking requirements in Section 1607 are explicit and are covered by the new administrative enforcement process in Section 1609. No further clarification is necessary.

The marking requirements in Section 1607 address name, model number, and date of manufacture. This information must be permanently, legibly, and conspicuously displayed on an accessible place on each unit. If the date is in a code that is not readily understandable

to the layperson, the manufacturer must immediately, upon request, provide the code to the Energy Commission. When the Energy Commission becomes aware of any appliance that is not properly marked, it may take enforcement action. With the new enforcement regulations, such enforcement action may now include an administrative civil penalty.

The requirements in the *Appliance Efficiency Regulations*, including the marking requirements, apply only to new appliances, not refurbished or remanufactured. This is stated clearly in the first paragraph of Section 1601. Scope, "This Article applies to the following types of new appliances." The enforcement provisions in Section 1609 may therefore only apply to new appliances.

Subject: Applying the Regulations to Private Individuals

Steve Uhler, private individual: Questions in letter dated October 20, 2014, and at the October 20, 2014 Public Hearing.

Question: Will the enforcement regulations preclude me from developing, installing, or operating a solar device on his property?

Question: Is it illegal for me to purchase an appliance that is not in the *Appliance Efficiency Database*?

Responses to Mr. Uhler's Questions:

The new enforcement regulations do not preclude anyone from developing, installing, or operating a solar device on their property. The regulations provide an administrative process that must be followed by the Energy Commission in assessing monetary penalties for violations of the state's energy and water efficiency standards, and certification requirements, for covered appliances. The regulations do not pertain to local permitting or development.

It is not illegal for a consumer to purchase an appliance that is not in the Appliance Efficiency Database. However, it is a violation of the *Appliance Efficiency Regulations* for a manufacturer, retailer or other business to sell or offer for sale a covered appliance that does not meet the state's efficiency standards or certification requirements.

The following comments were not directed at the proposed action or the rulemaking process. Therefore, responses are not required. (California Government Code Section 11346.9(a)(3))

However, Energy Commission staff has been and continue to be available to answer these questions personally.

Subject: Operation of the Energy Commission's Enforcement Program

American Lighting Association (ALA): Comments from Richard D. Upton, CCE, President and CEO, and Eric Jacobson, CAE, Executive Vice President and President Designate (2015) in a letter dated October 20, 2014.

Comment: ALA strongly urges the California Energy Commission to operate its enforcement program with its own staff; without contracting or using third parties.

Comment: ALA urges the California Energy Commission to provide impacted manufacturers and retailers, including internet companies, with pertinent information on a continuing basis to insure they are aware of the regulations and the impact they could have.

Subject: Certification of Appliances

Husmann Corporation: Ron Shebik, Regulatory Compliance Manager in a letter dated October 10, 2014.

Question: How often must the manufacturer update the Appliance Database and will the California Energy Commission harmonizes a database with the Department of Energy?

Question: How does the Energy Commission determine which cases will be tested? Is there a determined verification process established? How will the Energy Commission guarantee a tested product is in the factory OEM condition and does not include field retrofits or add-ons?

Question: Where will commercial refrigerated display case equipment be tested?

Question: Will the manufacturer be allowed to witness the testing?

The following summarizes and responds to all comments on the Revised Express Terms or 15-day language, even though most of the comments were unrelated to the proposed revisions or the process by which the 15-day language was adopted.

Natural Resources Defense Council (NRDC): Comment from Christa Heavey, Sustainable Energy Fellow, and Pierre Delforge, Director, Energy Efficiency in the High Tech Sector, in a letter dated May 8, 2015.

Comment: NRDC supports the clarifications made to the 45-day Language and recommends approval of the 15-day Language.

Response to Comment: This comment does not require a response.

Association of Home Appliance Manufacturers (AHAM): Comments from Rob McArver, Vice President, Policy & Government Relations in a letter dated May 9, 2015, and Kevin Messner, President, PoliticalLogic at the May 13, 2015 Adoption Hearing.

Comment 1: AHAM “appreciates” the change requiring Notices of Violation be sent by certified or registered mail or by other means that will ensure actual receipt.

Response to Comment 1: This comment does not require a response.

Comment 2: AHAM reiterates its comment on page 12 urging the Energy Commission to avoid duplication of federal regulations.

Response to Comment 2: Please see the “Response to Comment on Avoiding Duplication of Federal Regulations” on page 13.

Comment 3: AHAM reiterates its recommendation on page 8 that the regulations should cap the maximum penalty at \$500,000.

Response to Comment 3: Please see “The regulations were not modified to include a cap or maximum penalty” on pages 10.

Comment 4: AHAM reiterates its recommendation on page 11 that penalties be consistent and proportional.

Response to Comment 4: Please see “Responses to Comments on Assessing Consistent & Proportional Penalties” on page 11.

Comment 5: AHAM reiterates its recommendation on page 13 that the regulations should only apply to certifications made after the regulation’s effective date.

Response to Comment 5: Please see “Response to Comments on Applying Regulations Only to Newly Certified Appliances” on page 13.

Comment 6: AHAM reiterates its recommendation that the “CEC should provide a confidential, pre-violation notification to a company that allows them 30-days to correct.”

Response to Comment 6: Please see “The regulations do not provide for a “confidential, pre-violation notification to a company that allows them 30-days to correct” an alleged violation” on page 16.

Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE): California Edison (SCE) (collectively known as the Investor Owned Utilities or IOUs):

Comments from Patrick Eilert, Principal, Codes and Standards, PG&E; Sue Kristjansson, Codes and Standards and ZNE Manager, SCGC; Steven M. Long, Manager, Energy Codes and Standards, DSM Engineering, SCE; and Chip Fox, Residential Programs and Codes &

Standards Manager, SDG&E in a letter dated May 12, 2015 (the Joint Comments of the IOUs on the 15-day Language).

Comment 1: Recommend modifying the Proposed Section 1609 to develop a verification mechanism to ensure appliances with multiple end-use standards are sold for and installed as intended. Also recommend modification to Section 1606 Table X to provide appliance-specific designations for pool-pump motors and other products with application specific-standards.

Response to Comment 1: The regulation and verification of end-uses of specific appliances is beyond the scope of this rulemaking, which pertains to enforcement of appliances generally. These issues would be more appropriately addressed in a substantive rulemaking related to Sections 1601-1608 of the *Appliance Efficiency Regulations*, or possibly the Title 24 Building Standards. The specific recommendation to make changes to Table X in Section 1606 is beyond the scope of the proposed regulation.

Comment 2: Recommend modifying Section 1609(a)(1) as follows: “Any person, including a retailer, manufacturer, contractor, installer, importer or distributor, that sells or offers for sale an appliance, which is not listed in the Appliance Efficiency Database and/or does not meet the regulations applicable to its end-use, is in violation of Section 1608(a)(1) and may be subject to an administrative civil penalty for each unit of the appliance that was sold or is offered for sale.”

Responses to Comment 2: Section 1609(a)(1) provides that “Any person,” including an installer, that sells or offers for sale a noncompliant product is subject to an administrative civil penalty. Therefore the addition of the word “installer” is unnecessary.

The proposed regulations only cover appliances for which there are applicable standards. The addition of the recommended language, “and/or does not meet the regulations applicable to its end-use,” is therefore unnecessary.

Comment 3: Reiterates its recommendation that internet retailers or wholesale sellers should be addressed explicitly in the regulatory language.

Response to Comment 3: Please see “Responses to Comments on Regulating Online Retailers, on page 18.

Comment 4: Support language that explicitly articulates marking requirements, including manufacturing date.

Response to Comment 4: This comment does not require a response. See also “Response to Comments on Marking of Appliances” on page 18.

Michael Orr, Executive Director, Foundation for Pool and Spa Industry Education, in email dated May 12, 2015.

Comment 1: Raises similar issues to those raised in Comment 2 of the Joint Comments of the IOUs on the 15-day Language. Recommends adding “installer” to the description of who may be subject to an administrative civil penalty in Section 1609(a)(1). Recommends adding “and/or is affected by the relevant Regulations, is in violation....” Recommends that vendors should be subject to audit or inspection.

Response to Comment 1: Section 1609 provides that any person, including an installer, who sells or offers for sale a noncompliant product is subject to an administrative civil penalty. Therefore the addition of the word “installer” is unnecessary.

The proposed regulations only cover appliances for which there are applicable standards. The addition of the recommended language, “and/or does not meet the regulations applicable to its end-use,” is therefore unnecessary.

The creation of a verification mechanism for audits or inspections is beyond the scope of the proposed regulation.

Comment 2: Proposes that purchasers of non-compliant products (single-speed with a motor capacity of 1 THP or greater) be required to sign a statement that they will not be used on residential filtration applications. Raises a number of issues associated with the current Appliance Efficiency Standards as they pertain to pool pumps and motors.

Response to Comment 2: The regulation of pool pumps and motors or other specific appliances is beyond the scope of the proposed regulation. See Response to Comment 1 to the Joint Comments of the IOUs on the 15-day Language.

Comment 3: Recommends requiring that appliances be both listed and /or meet the requirements...”

Response to Comment 3: See Response to Comment 2 to the Joint Comments of the IOUs on the 15-day Language.

Comment 4: Recommends that installations completed for charge should be considered as a part of the product sale, and enforcement authority should be extended to that part of the overall product sale.

Response to Comment 4: The *Appliance Efficiency Regulations* apply to the sale or offer for sell of covered **appliances**, not services (Section 1601: Scope). Therefore, treating services as sales in the proposed Section 1609 would be inappropriate.

Comment 5: Recommends that purchasers of non-compliant pumps and motors be required to sign a statement on the invoice or sales slip, assuring the vendor that the product will not be used for a non-compliant application.

Response to Comment 5: See Response to Comment 1 to the Joint Comments of the IOUs on the 15-day Language.

Comment 6: Supports Gary Fernstrom's comments with respect to the regulation of the end-use of certain appliances, including pool pumps.

Response to Comment 6: See Response to Comments for Gary Fernstrom below.

Gary Gockel, Licensed Swimming Pool Contractor, in a Letter dated May 12, 2015, and in comments at the Adoption Hearing held May 13, 2015.

Comment 1: Raises issues related to the regulation of pool pumps and motors that were similarly raised in the email from Michael Orr and the Joint Comments of the IOUs on the 15-day Language. Recommends changing Section 1609(a)(1) as follows:

Any person, including a retailer, manufacturer, contractor, *installer*_importer or distributor, that sells or offers for sale an appliance, which is not listed in the Appliance Efficiency Database, *and/or is affected by the relevant provisions of the Appliance Regulations*, is in violation. . .

Response to Comment 1: Installers that sell or offer for sale non-compliant appliances are already included in Section 1609(a)(1). Mr. Gockel does not explain the intended meaning of the phrase "and/or affected by the relevant provisions of the Appliance Regulations"; the Energy Commission does not believe this phrase is necessary or enhances the clarity of Section 1609(a)(1), and therefore declines to adopt this phrase.

Comment 2: Recommends requiring purchasers of single speed motors with a capacity of 1 THP or greater to sign a statement that they will not be used on residential filtration applications. Raises concerns about the Appliance Efficiency Database for pool pumps and motors. At the hearing, Mr. Gockel raised a concern that Section 1609 does not address appliance specific applications such as pool pumps and motors, and expressed concern about the accuracy of the Appliance Efficiency Database related to pool pumps and motors.

Response to Comment 2: Appliance specific applications, including the end-use of pool pumps and motors, and the Appliance Efficiency Database for pool pumps and motors are beyond the scope of the proposed regulation. See response to Comment of Michael Orr and to Comment 1 of the Joint Comments of the IOUs on the 15-day Language.

Paul Lin, Manager of Corporate Energy Marketing Programs, Regal-Beloit Corporation, in an email dated May 12, 2015, and by telephone at the Adoption Hearing held May 13, 2015.

Comment: Raises concerns about Appliance Efficiency Database for pool pumps and motors, and the inability to list products in the database.

Response to Comment: The Appliance Efficiency Database, which includes pool pumps and motors are beyond the scope of the proposed regulation. Appliance Efficiency Staff is working with Mr. Lin to understand and address his concern.

The Association of Pool and Spa Professionals, in a letter from Jennifer Hatfield dated May 12, 2015.

Comment: Expresses concern that Section 1609(a)(1) does not reference “installers,” and that this subsection extends Title 20 to appliances not subject to regulation. Recommends modifying Section 1609(a)(1) as follows:

Any person, including a retailer, manufacturer, contractor, *installer*_importer or distributor, that sells or offers for sale an appliance, which is not listed in the Appliance Efficiency Database, *and is affected by the relevant regulation*, is in violation. . .

Response to Comment: Installers that sell or offer for sale non-compliant appliances are already included in Section 1609(a)(1). The Appliance Efficiency Regulations apply only to regulated appliances, and Section 1609(a)(1) does not expand the scope to unregulated appliances.

Gary Fernstrom, representing PG&E in a phone conversation on May 11, 2015, and at the Adoption Hearing on May 13, 2015.

Comment: Raises similar issues to those raised in Comment 1 of the Joint Comments of the IOUs on the 15-day Language. Mr. Fernstrom suggests adding language to the Section 1609 to ensure that products with multiple possible end-uses, such as pool pumps and motors, as well as certain faucets, be installed for their “intended” use. He recommends developing a verification mechanism at the point-of-sale, and specifically referencing “installers” in Section 1609(a)(1). Mr. Fernstrom also expressed concerns about the Appliance Efficiency Database for pool pumps and motors.

Response: As noted in the response to similar comments, the end-use of specific appliances, including pool pumps and motors, the creation of a verification mechanism for the end-use of such appliances, and the Appliance Database for pool pumps and motors, are all beyond the scope of this rulemaking, and would more appropriately be addressed in another rulemaking related to Sections 1601-1608 of the *Appliance Efficiency Regulations*, or

the building standards under Title 24. Section 1609 provides that any person, including an installer, who sells or offers for sale a noncompliant product is subject to an administrative civil penalty. Therefore, the addition of the word “installer” is unnecessary.

Comments Completely Unrelated to the 15-day Language

Steve Uhler, private citizen, in an email dated April 29, 2015:

Comment: Mr. Uhler identified issues with our current appliance database.

Response: We are addressing issues, such as the issues he identified, as we proceed with the current Appliance Database Modernization Project.

VIII. CONSIDERATION OF ALTERNATIVE PROPOSALS (California Government Code Sections 11346.9(a)(4) & 11346.9(a)(5))

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 alternative the Energy Commission considered, at the request of stakeholders, was the imposition of a cap on penalties that could be assessed for violations associated with a particular model number. Such a cap could lessen the adverse economic impact of the enforcement regulations on prospective violators, including small businesses. This proposal was rejected because the Energy Commission determined that it was unnecessary, and could undermine the benefits of the proposed regulations.

The Energy Commission determined the proposed cap was unnecessary because PRC Section 25402.11(a)(1) already sets a cap of \$2,500 per violation. And Section 1609(b)(3) establishes a number of factors that the Energy Commission must consider in assessing a penalty. An additional cap on penalties could also undermine the benefits of the proposed regulations. It is important that potential penalties be large enough to provide a deterrent to potential violators and to penalize chronic or severe violations. Due to the number and variety of appliance types covered by the *Appliance Efficiency Regulations* (ranging from small LED lamps to large refrigerator-freezers), as well as the variety and complexity of

supply chain relationships, it would be difficult to set a universal cap that would be appropriate, fair, and effective for all businesses in all circumstances. Furthermore, a cap on penalties associated with a particular model number could result in lower penalties than would otherwise be dictated by consideration of the factors listed in PRC Section 25402.11(a)(2), including the harm to consumers and the state based on the amount of energy wasted, which could undermine the intent of the legislature in enacting this provision. For these reasons, the Energy Commission rejected this alternative.

Ultimately, the Energy Commission determined that no alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the policy underlying the Appliance Efficiency Regulations and the enforcement authority set forth in PRC Section 25402.11.

IX. UPDATED INFORMATIVE DIGEST (Government Code Section 11346.9(b))

In accordance with Government Code Section 11346.9(d), the Informative Digest contained in the NOPA is incorporated by reference.

The Energy Commission revised Section 1609(b)(3)(B) to delete reference to the “number of such violations” from the definition of “persistence of the violation,” and added Section 1609(b)(3)(C) to clarify that the “number of violations arising from the course of conduct that is the subject of enforcement” is a separate factor to be considered in assessing an administrative civil penalty.

The Energy Commission added language to Section (c) to clarify that a Notice of Violation must be sent “by certified mail (registered mail to non-U.S. destinations) or other means that provide actual notice to the person in violation.” This change was made to clarify that the Notices of Violation will be sent by certified or registered mail, consistent with other notices provided under the *Appliance Efficiency Regulations* and the Energy Commission’s general complaint process, and to ensure the violator receives actual notice of the enforcement action.

There have been no other changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the NOPA.