

BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

RHEEM MANUFACTURING CO.,
RHEEM MANUFACTURING
COMPANY AND RHEEM
MANUFACTURING COMPANY,

Respondent.

Case No. 20157198

OAH No. 2016061094

ORDER OF DECISION

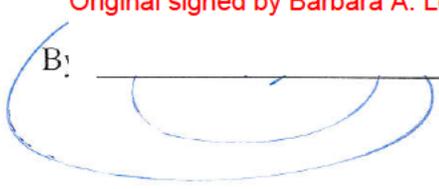
DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Toxic Substances Control as its Decision in the above-entitled matter.

This Decision shall become effective on October 7th, 2016.

IT IS SO ORDERED this 4th day of October 2016.

Original signed by Barbara A. Lee

B: _____


BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA

In the Matter of the Enforcement Order
Against:

RHEEM MANUFACTURING COMPANY,

ID No. ARD065308066,

Respondent.

Agency Case No. HWCA 20157198

OAH No. 2016061094

PROPOSED DECISION

Administrative Law Judge Gene K. Cheever, Office of Administrative Hearings, State of California, heard this matter on August 18, 2016, in Sacramento, California.

Robert Sullivan, Senior Attorney, represented the Department of Toxic Substance Control (Department), Environmental Protection Agency.

Paul J. Beard, Attorney at Law, Alston & Bird LLP, represented Rheem Manufacturing Company (respondent).

Evidence was received on August 18, 2016. The record remained open for the Department to submit a complete Enforcement Order and documents constituting additional portions of Exhibits P, Q, and R, by September 1, 2016, and for respondent to file objections, if any, by September 8, 2016. The Department filed a complete Enforcement Order without objection from respondent. It was admitted for jurisdictional purposes as Exhibit 17. The record was deemed closed and submitted for decision as of September 8, 2016.

FACTUAL FINDINGS

1. On April 8, 2016, the Department issued an Enforcement Order against respondent. The Department alleged respondent committed two violations of California Code of Regulations, title 22, section 66274.5, subdivision (a), and ordered respondent to prepare a Thermostat Collection Program and pay a \$36,581 penalty. Respondent filed a notice of defense and requested a hearing. At hearing, respondent stipulated it was only contesting the amount of the monetary penalty in the Enforcement Order.

2. Respondent argues the amount of the penalty cannot be upheld for three reasons. One, the relevant statutes and regulations do not authorize a “joint liability” penalty to be assessed against a single manufacturer in a collective program and the penalty assessed against respondent amounts to a joint liability penalty. Two, the amount of the penalty must be adjusted down because the Department did not correctly take into account mitigation factors that the statutes and regulations require be taken into account. And three, the penalty is unconstitutional under the United States Constitution’s excessive fines clause of the Eighth Amendment and/or the equal protection clause of the Fourteenth Amendment.

Background of the Violations

3. The Mercury Thermostat Collection Act of 2008 (Act) is set forth in Health and Safety Code sections 25214.8.10 et seq.¹ At least 5.1 million mercury-added thermostats were sold in California. The Act addresses the collection and disposal of mercury-added thermostats that are taken out-of-service.

4. Respondent did not make or produce mercury-added thermostats. It branded and sold mercury-added thermostats in California that were produced by others. Given this action, respondent was a “manufacturer” as that term is defined in section 25214.8.11, subdivision (a), and was required to operate a “program,” either individually or collectively with other manufacturers, to collect and dispose of the thermostats. (§ 25214.8.12, subs. (a)(1) & (2).)

5. Pursuant to the Act, respondent elected to join 29 other manufacturers to operate a program, the Thermostat Recycling Corporation (TRC) program, to collect and dispose of the thermostats.² At all relevant times, respondent was a member of the TRC program for purposes of the Act.

6. Section 25214.8.13, subdivision (i), and California Code of Regulations, title 22, section 66274.8, require a group of manufacturers that operates a program to submit annual reports to the Department identifying the total number of out-of-service mercury-added thermostats collected by the program for the calendar year. The TRC program submitted the required annual reports for its members for the calendar years 2009 through 2015. The “collection data” presented in the annual reports is accurate.

¹ All further section references are to the Health and Safety Code unless otherwise noted.

² The 30 manufacturer members of the TRC program constitute all the manufacturers that operated a program under the Act at all times relevant to the Enforcement Order.

7. The annual reports also identified the TRC program's expenses, on a national basis, for the year.³ The 2015 annual report was the only report that allocated expenses for TRC's efforts performed in California. The annual reports show total TRC program expenses of: 2009 (\$648,126); 2010 (\$713,728); 2011 (\$870,760); 2012 (\$921,003); 2013 (\$1,040,649); and 2015 (\$1,406,319). The 2015 annual report shows the following categories and expenses on a nationwide basis, and as allocated to California.

Program Component	Total Expenses	California
TRC Staff & Admin.	\$625,205	\$44,137
Recycling Costs	\$347,555	\$31,955
Incentive/Promotional	\$42,224	\$12,598
New Collection Containers	\$10,960	\$0
Travel	\$81,152	\$10,656
Legal	\$21,228	\$1,253
Direct Expense Marketing & Outreach	\$277,995	\$16,618
Total (expenses)	\$1,406,319	\$117,217

8. The 2013 annual report shows the following categories and amounts of expenses on a nationwide basis.

Program Component	Total Expenses
TRC Staff & Admin.	\$423,400
Recycling Costs	\$317,874
Insurance	\$15,437
Statutory Incentive Payments	\$23,955
New Collection Containers	\$21,936
Travel	\$32,608
Legal	\$27,696
Direct Expense for Marketing & Outreach	\$177,743
Total (expenses)	\$1,040,649

9. California Code of Regulations, title 22, section 66274.5, set a performance requirement for manufacturers or groups of manufacturers to collect 65,100 mercury-added thermostats in 2013.⁴ Since the requirement did not go into effect until July 1, 2013, the pro-

³ The portion of the 2012 and 2014 annual reports admitted into evidence did not include the portion of the reports showing the program expenses. The portion of the 2013 annual report admitted into evidence included the program expenses for 2012 and 2013.

⁴ No evidence was introduced showing that any person submitted data to the Department pursuant to California Code of Regulations, title 22, section 66274.4, subdivision (b), to seek a change in the performance requirements.

rated share (July 1 through December 31, 2013) was 32,550 for 2013. The TRC program collected 13,655 mercury-added thermostats in 2013 during the pro-rated time period. For 2014, the regulation set a performance requirement for manufacturers or groups of manufacturers to collect 95,400 mercury-added thermostats in 2014. The TRC program recovered 22,453 mercury-added thermostats in 2014.

Summary of Violations, Enforcement Orders and Consent Orders

10. On July 3, 2014, the Department issued a summary of violation (2013 SOV) to each of the 30 manufacturer members of the TRC program notifying each member that it had failed to meet the performance requirement for 2013. Each member, including respondent, contested the 2013 SOV on a number of factual and legal grounds.

11. On June 9, 2015, the Department issued a summary of violation (2014 SOV) to each of the 30 manufacturer members of the TRC program notifying each member that it had failed to meet the performance requirement for 2014. Respondent received its 2014 SOV that stated respondent was required to collect 95,400 mercury-added thermostats for 2014, but collected only 22,453 mercury-added thermostats during 2014. Each member, including respondent, contested the 2014 SOV on a number of factual and legal grounds.

12. On February 10, 2016, 25 of the 30 TRC program manufacturer members (settling member(s)) entered into a Consent Order with the Department pursuant to sections 25187 and 25214.8.17 to resolve the 2013 SOVs and the 2014 SOVs. The Consent Order stated the parties wished "to avoid the uncertainty and expense of administrative and/or judicial proceedings that would be necessary to resolve the 2013 and 2014 SOVs" and that it constituted a "full settlement" of all the violations alleged in the 2013 and 2014 SOVs. The settling members agreed in the Consent Order to pay a penalty to the Department of \$625,000 and to take all actions detailed in a "Plan for Compliance" that was attached as an exhibit. Respondent and four other TRC members did not enter into this Consent Order.

13. On April 8, 2016, the Department issued its Enforcement Order against respondent. The Department determined respondent had chosen to be a member of the TRC program to fulfill its program obligations, and respondent had committed two violations of California Code of Regulations, title 22, section 66274.5, subdivision (a). The Department cited respondent with one violation for its failure to meet the out-of-service mercury-added thermostat collection requirements in 2013 by collecting "125 of the required 65,100 thermostats in California." The Department cited respondent with a second violation for its failure to meet the out-of-service mercury-added thermostat collection requirements in 2014 by collecting "159 of the 95,400 thermostats in California." The Department ordered respondent to prepare a Thermostat Collection Program and pay a \$36,581 penalty.

14. On April 8, 2016, the Department also issued separate Enforcement Orders against each of the four other TRC program manufacturing members that did not enter into the Consent Order (Manufacturers 1 through 4). The Department determined that each of the four had chosen to be a member of the TRC program to fulfill its program obligations, and

that each manufacturer had committed two violations of California Code of Regulations, title 22, section 66274.5, subdivision (a). The Department cited each manufacturer with one violation for its failure to meet the out-of-service mercury-added thermostat collection requirements in 2013. It cited Manufacturers 1 through 4 for the violations of collecting 178, 0, 73, and 46, respectively, of the required 65,100 mercury-added thermostats in 2013. The Department also cited each manufacturer with a second violation for its failure to meet the out-of-service mercury-added thermostat collection requirements in 2014. It cited Manufacturers 1 through 4 for the violations of collecting 31, 0, 107, and 20, respectively, of the 95,400 mercury-added thermostats in 2014. The Department ordered Manufacturers 1 through 4 to pay the Department \$35,511, \$35,000, \$36,049, and \$35,239, respectively. The Department also ordered each manufacturer to prepare a Thermostat Collection Program pursuant to section 25214.8.13.

15. In June and July of 2016, Manufacturers 1 through 4 entered into their own Consent Orders with the Department to resolve the alleged violations. Each Consent Order stated the parties wished “to avoid the expense of litigation in connection” with their disputes concerning the Enforcement Orders and that each Consent Order represented a “fair, reasonable, and equitable settlement of the 2013 and 2014 alleged violations....”

16. In their Consent Orders, Manufacturers 1 through 4 each agreed to pay the Department \$25,000 as a “full and final settlement sum” of the alleged violations. Manufacturer 1 also agreed to provide documents to the Department to show it had closed its business so it would no longer be subject to the Act. If Manufacturer 1 did not timely provide the documents, it agreed to pay the Department \$35,511 as an assessed penalty.

Department's Determination of Respondent's Monetary Penalty

17. As stated above, respondent contests its \$36,581 penalty. Keith Kihara testified at hearing regarding how the Department determined the penalty. Mr. Kihara has been the Enforcement Division Chief for the Department's Hazardous Waste Management Program since February 2015. He joined the Department in 1988. He spent 12 years working as an inspector before he became a Branch Chief and then the Enforcement Division Chief. He has been involved with many enforcement actions for the Department since 1988.

18. Mr. Kihara stated the Department followed the California Code of Regulations to calculate the penalty. It determined the maximum penalty for each violation by respondent was \$25,000, for a total maximum penalty of \$50,000. (Health & Saf. Code § 25189.2, subd. (b).) To determine the amount of the penalty to assess from no penalty up to the maximum penalty, the Department considered the: (1) potential harm to public health and safety and the environment; and (2) the extent of deviation from hazardous waste management requirements. For both the potential harm and the extent of deviation, the Department considered whether each violation should be categorized as “major,” “moderate,” or “minimal” in accordance with the regulations. (Cal. Code Regs., tit. 22, § 66272.62.)

19. For respondent's 2013 violation, the Department considered that mercury is a neurotoxin that, when exposed to the environment, has serious effects on public health and the environment, and is difficult and expensive to clean up. Mercury can become airborne and can spread throughout the environment. The volume of mercury involved was not great, but was not minimal given the serious harm that can result from small amounts being released into the environment. As a result, the Department determined respondent's 2013 violation to be moderate for potential harm. The Department considered respondent's extent of deviation to be moderate given the number of mercury-added thermostats the TRC program collected during the July 1 through December 31, 2013 time period with the collection requirement number of 32,550.⁵ The Department then considered the matrix set forth in the California Code of Regulations, title 22, section 66272.62, subdivision (d), and applied the lowest amount of moderate range of \$15,000 as respondent's initial penalty. The Department did not make an adjustment, up or down, to the initial penalty based on the respondent's intent in committing the violation. The Department adjusted respondent's \$15,000 initial penalty upward based on an economic benefit derived by respondent for the violation. The Department determined the economic benefit that respondent derived from its 2013 violation to be \$165 by using the TRC program's estimate of \$2.37 cost for disposal per mercury-added thermostat multiplied by the number of thermostats respondent did not have to dispose of given its violation. This resulted in a 2013 base penalty of \$15,165.

20. For respondent's 2014 violation, the Department used the same process and considerations as it did for respondent's 2013 violation, with the following exceptions. The Department determined that the extent of deviation for respondent's 2014 violation was major given that the results of collection by the TRC program during 2014 were significantly under the collection requirement number of 95,400. The Department determined \$20,000 as respondent's initial penalty. The Department also determined the economic benefit that respondent derived from its 2014 violation to be \$1,416 by using the TRC program's estimate of \$2.37 cost for disposal per mercury-added thermostat multiplied by the number of thermostats respondent did not have to dispose of given its violation. This resulted in a 2014 base penalty of \$21,416.

21. The 2013 and 2014 total base penalty was \$36,581. The Department did not make any adjustments, upward or downward, to the total base penalty based on respondent's cooperation, prophylactic effect, compliance history and/or ability to pay.

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⁵ He testified the Department did not use the "125 of the required 65,100 thermostats" referenced in paragraph 2.3 of respondent's Enforcement Order to calculate the penalty.

Respondent's Mitigation Evidence

22. Respondent did not call anyone to testify at the hearing on its behalf. It submitted exhibits, including a declaration of Don Harter,⁶ Vice-President and General Manager of respondent's Parts Division, and a stipulation with the Department concerning exhibits and undisputed facts.

23. Of the 5.1 million mercury-added thermostats sold in California, respondent branded 1,695. Respondent's thermostats account for about 3 one-hundredths of one percent of the mercury-added thermostats sold in California. At all relevant times, respondent has been a member of the only collection program, the TRC program, to collect and dispose of the thermostats in California pursuant to the Act.

24. Between 2009 and 2015, the TRC program collected 599 of respondent's branded mercury-added thermostats. The TRC program collected a total of 115,194 mercury-added thermostats during this time. Respondent's branded mercury-added thermostats account for about one-half of one percent of the total collected.

25. In 2013, of all the 20,878 mercury-added thermostats collected by the TRC program in California, the TRC program collected 125 of respondent's branded mercury-added thermostats. In 2014, of all the 20,178 mercury-added thermostats collected by the TRC program in California, the TRC program collected 159 of respondent's branded mercury-added thermostats.

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⁶ On August 24, 2016, the Department submitted a "Notice of Intent to Cross Examine Harter" and "Notice of Intent to Cross Examine Gorsen" that were executed and served on respondent on August 10, 2016. The Department requested they be marked for identification purposes. They address the declarations of Don Harter and Maureen Gorsen, Exhibits W and X, respectively, that were both executed on August 8, 2016. At the hearing, respondent's Exhibit W was admitted into evidence over the Department's hearsay objection, and respondent's Exhibit X was not admitted into evidence based on the Department's objection that it constituted privileged settlement discussions. On September 1, 2016, respondent objected to the Department's August 24, 2016, request to add the notices of intent to the record because the record did not remain open for this purpose and it constitutes an effort by the Department to make an objection to Exhibits X and Y that the Department did not make at the hearing. The notices of intent are marked for identification purposes as Exhibits 21 and 22, respectively. Respondent's Exhibit W is admitted pursuant to Government Code section 11513, subdivision (d), and considered to the extent permitted therein. Respondent's Exhibit X remains excluded from evidence.

Discussion

MAXIMUM PENALTY AMOUNT

26. The Health and Safety Code permits the Department to issue a penalty against a person of up to \$25,000 per violation of the Act or a regulation issued pursuant to the Act. Section 25187, subdivisions (a)(1) and (2), state in pertinent part:

(a)(1) The department ... may issue an order ... imposing an administrative penalty, for any violation of this chapter or any ... regulation ... issued or adopted pursuant to this chapter, whenever the department ... determines that a person has violated ... this chapter ... or any ... regulation ... issued or adopted pursuant to this chapter.

(2) In an order proposing a penalty pursuant to this section, the department ... shall take into consideration the nature, circumstances, extent, and gravity of the violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the proposed penalty, and the prophylactic effect that the imposition of the proposed penalty would have on both the violator and the regulated community as a whole.

Section 25189.2, subdivision (b), states in pertinent part:

a person who violates a provision of this chapter or a ... regulation ... issued or adopted pursuant to this chapter, is liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) for each violation of a separate provision

Section 25118 defines a "person" for purposes of sections 25187 and 25189.2, in pertinent part, as:

an individual, trust, firm, joint stock company, business concern, partnership, limited liability company, association, and corporation, including, but not limited to, a government corporation.⁷

⁷ Respondent argues the word "person" as used in sections 25187 and 25214.8.17 should be read as "persons" for purposes of the Department's two violations against the 30 TRC program's member manufacturers as a "group" such that all 30 manufacturers are "subject collectively to a maximum penalty of \$25,000" for each violation, or a maximum penalty of \$50,000 against the entire group for the two violations. Respondent cites to

27. Section 25214.8.11, subdivision (a), defines a “manufacturer” as:

A business concern that owns or owned a name brand of mercury-added thermostats sold in this state before January 1, 2006.

Respondent agrees it is a manufacturer. The Act requires a manufacturer to establish and maintain a program. Section 25214.8.11, subdivision (d), defines a “program” as:

a system for the collection, transportation, recycling, and disposal of out-of-service mercury-added thermostats that is financed, as well as managed or provided, by a manufacturer or collectively with other manufacturers.”

The Act permits a manufacturer to establish a program individually or collectively with other manufacturers. (§ 25214.8.12 (subd. (a)(2).) Respondent admits it elected to operate a program collectively with 29 other manufacturers - the TRC program. The Act requires “each manufacturer,” not each “program,” to collect out-of-service mercury-added thermostats in compliance with the Act and the regulations adopted pursuant to the Act. (§ 25214.8.13 (subd. (a).)

28. Respondent also admits that its “program” did not collect out-of-service mercury-added thermostats in compliance with the Act and regulations for 2013 and 2014. Respondent committed two violations, and pursuant to sections 25187 and 25214.8.17, the Department could seek up to a maximum of \$25,000 against respondent for each violation.

DEPARTMENT’S CALCULATION OF PENALTY

29. California Code of Regulations, title 22, section 66272.60 et seq., provide for the Department to assess administrative penalties in accordance with the procedures set forth in the regulations. The testimony of Mr. Kihara was persuasive evidence that the Department assessed the administrative penalty against respondent in accordance with the regulations. The evidence of the administrative penalties assessed against Manufacturers 1 through 4 in the April 8, 2016 Enforcement Orders evidenced that the Department treated respondent equally and consistently with regard to the same violations the Department

section 13 which states, “The singular number includes the plural, and the plural the singular.” Section 5, however, states, “Unless the provision or context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this code.” The provision and context of other specific Health and Safety Code sections and regulations do not allow for respondent’s interpretation.

pursued against respondent.⁸ The Department established by a preponderance of the evidence that it appropriately calculated the penalty assessed against respondent.

RESPONDENT'S CONSTITUTIONAL ARGUMENTS

30. Respondent argues the administrative penalty of \$36,581 violates the United States Constitution's excessive fines clause in the Eighth Amendment and the equal protection clause in the Fourteenth Amendment. Respondent bears the burden of proof on these defenses by a preponderance of the evidence.

31. Respondent acknowledges that under the excessive fines clause, the penalty must bear "some relationship to the gravity of the offense that it is designed to punish." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334.) The Department's penalty sought to punish respondent for its failure to collect and dispose of the required number of mercury-added out-of-service thermostats in 2013 and 2014. Mr. Kihara testified that a small amount of mercury that becomes exposed to the environment can cause serious public health and environmental issues and be expensive to clean up. California considers this to be a public policy concern as evidenced by its enactment of the Act and the regulations issued pursuant to the Act. The amount of money respondent and the TRC program spent in California to comply with the Act's requirements was minimal. The penalty assessed against respondent does bear a reasonable relationship to the gravity of respondent's violations. Respondent did not submit sufficient evidence to establish by a preponderance of the evidence that the penalty was a violation of the excessive fines clause set forth in the Eighth Amendment.

32. Respondent acknowledges that under the equal protection clause, "[a] rational relationship between the disparity of treatment and some legitimate governmental purpose" must exist for state action to be consistent with the equal protection clause. (*Armour v. City of Indianapolis* (2012) 132 S.Ct. 2073, 2080.) Respondent argues the fact that the Department imposed the same penalty against all 30 TRC program manufacturer members, regardless of individual fault, contribution, or other mitigating circumstances, establishes a violation of the equal protection clause. Respondent's argument was not persuasive. First, the evidence showed that each TRC program manufacturing member agreed to collectively operate the program to satisfy the performance requirements set forth in the regulations. Although the manufacturers agreed to act collectively, the Act still required "each manufacturer" individually to collect the mercury-added out-of-service thermostats in compliance with the regulations. When they did not do so as a group, they each violated the Act and its regulations. Second, the evidence does not support respondent's equal protection argument. As to the 25 settling members that entered into the initial Consent Order, the evidence shows they collectively agreed to pay the Department a \$625,000 penalty, but no evidence shows how much of the \$625,000 each settling member agreed to pay. As to Manufacturers 1 through 4, they each agreed to pay \$25,000 to the Department (with Manufacturer 1 having a condition placed on it). Further, as to all 29 TRC

⁸ The administrative penalties the Department assessed against Manufacturers 1 through 4 varied from a low of \$35,000 to a high of \$36,581 (respondent's penalty).

program manufacturing members that entered into consent orders, they consented to pay the amounts they agreed to pay and to do so to avoid the risk of further litigation. In sum, respondent did not submit sufficient evidence to establish by a preponderance of the evidence that the penalty was a violation of the equal protection clause set forth in the Fourteenth Amendment.

LEGAL CONCLUSIONS

Jurisdiction and Burdens

1. Section 25187 and 25214.8.17 authorize the Department to assess a monetary penalty when the Department determines that a person has violated the Act or any regulation adopted pursuant the Act.

2. The Department bears the burden of proof to establish the facts supporting the appropriateness of the amount of the penalty by a preponderance of the evidence. (Evid. Code, §§ 115, 500.) Respondent bears the burden of proof to establish the facts supporting its affirmative defenses by a preponderance of the evidence. (*Ibid.*)

Cause

3. Cause exists for the Department to assess a monetary penalty against respondent pursuant to sections 25187 and 25214.8.17 by reason of the matters set forth in Factual Findings 1 through 11 for respondent's failure to meet the performance requirements in 2013 set forth in California Code of Regulations, title 22, section 66274.5, for collection of mercury-added out-of-service thermostats.

4. Cause exists for the Department to assess a monetary penalty against respondent pursuant to sections 25187 and 25214.8.17 by reason of the matters set forth in Factual Findings 1 through 11 for respondent's failure to meet the performance requirements in 2014 set forth in the California Code of Regulations, title 22, section 66274.5, for collection of mercury-added out-of-service thermostats.

Amount of Penalty

5. By reason of the matters set forth in Factual Findings 3 through 26 and 29 through 31, the Department established by a preponderance of the evidence that the amount of the penalty it assessed against respondent pursuant to sections 25187 and 25214.8.17 was appropriate.

6. By reason of the matters set forth in Factual Findings 3 through 29, respondent did not establish by a preponderance of the evidence that the amount of the penalty assessed against it by the Department should be reduced.

7. By reason of the matters set forth in Factual Findings 3 through 32, respondent did not establish by a preponderance of the evidence that the amount of the penalty assessed against it by the Department violates the excessive fines clause of the Eighth Amendment of the United States Constitution.

8. By reason of the matters set forth in Factual Findings 3 through 32, respondent did not establish by a preponderance of the evidence that the amount of the penalty assessed against it by the Department violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

ORDER

The Enforcement Order against respondent Rheem Manufacturing Company is **AFFIRMED**.

DATED: September 20, 2016

Original signed by Gene K. Cheever

GENE K. CHEEVER
Administrative Law Judge
Office of Administrative Hearings