

FINAL STATEMENT OF REASONS
FOR
PROPOSED BUILDING STANDARDS
OF THE
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
REGARDING THE CALIFORNIA PLUMBING CODE
CALIFORNIA CODE OF REGULATIONS, TITLE 24, PART 5

The Administrative Procedure Act requires that every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. The rulemaking file shall include a final statement of reasons. The Final Statement of Reasons shall be available to the public upon request when rulemaking action is being undertaken. The following are the reasons for proposing this particular rulemaking action:

UPDATES TO THE INITIAL STATEMENT OF REASONS

(Government Code Section 11346.9(a) (1) requires an update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the state agency is relying that was not identified in the initial statement of reasons, the state agency shall comply with Government Code Section 11347.1)

No data or any technical, theoretical or empirical study, report, or similar document on which the state agency is relying has been added to the rulemaking file that was not identified in the Initial Statement of Reasons.

During this rulemaking, HCD has made some substantive and non-substantive changes. Non-substantive changes address grammatical, editorial language revisions and/or ambiguities. Substantive changes modify the originally intended regulatory effect.

The Initial Statement of Reasons stated that the Department of Housing and Community Development (HCD) intended to complete the necessary tasks to legally adopt cross-linked polyethylene (PEX) and, if necessary, HCD would either propose amendments or withdraw all or portions of the initial proposal. The California Environmental Quality Act (CEQA) Final Environmental Impact Report (FEIR) is the document upon which HCD, in coordination with the California Building Standards Commission, relied to make its plumbing proposals relating to PEX. This document and its various versions may be found at <http://www.bsc.ca.gov/pec.htm>. A chronological account of updates to the Initial Statement of Reasons is listed below.

The following sections were revised after the first 45-day comment period that ended on May 12, 2008:

Non-substantive revision: Section 402.3.3
Substantive revisions: Section 604.1 and Table 6-4

The following sections were withdrawn after the first 45-day comment period that ended on May 12, 2008:
Sections 203, 905.4 Exception, 906.1 Exception, 909.1, 909.1.1, 909.1.2, 909.1.3, 909.1.4, and 909.1.5

The following section was revised after the second 45-day comment period that ended on August 25, 2008:
Section 604.1 and Table 6-4

No changes were made after the subsequent 15-day comment period that ended on December 9, 2008.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

(Pursuant to Government Code Section 11346.9(a) (2), if the determination as to whether the proposed action would impose a mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for the finding(s))

The Department of Housing and Community Development has determined that the proposed regulatory action would not impose a mandate on local agencies or school districts.

OBJECTIONS OR RECOMMENDATIONS MADE REGARDING THE PROPOSED REGULATION(S)

(Government Code Section 11346.9(a) (3))

The following is HCD's summary of and response to comments specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the actions or reasons for making no change:

COMMENTS AND RESPONSES 1 THROUGH 4 WERE RECEIVED DURING THE FIRST 45-DAY COMMENT PERIOD.

(Text with the proposed changes clearly indicated was made available to the public from March 28, 2008 until May 12, 2008.)

COMMENTS AND RESPONSES 5 THROUGH 11 WERE RECEIVED DURING THE SECOND 45-DAY COMMENT PERIOD.

(Text with the proposed changes clearly indicated was made available to the public from July 11, 2008 until August 25, 2008.)

NO COMMENTS AND RESPONSES WERE RECEIVED DURING THE SUBSEQUENT 15-DAY COMMENT PERIOD.

(Text with the proposed changes clearly indicated was made available to the public from November 25, 2008 until December 9, 2008.)

INTRODUCTION TO RESPONSE TO COMMENTS

During the 2007 Annual Code Adoption Cycle regarding the California Plumbing Code, all public comments received by the Department of Housing and Community Development (HCD) concerned Cross-Linked Polyethylene (PEX), Air Admittance Valves (AAV), and Non-Water Supplied Urinals (Waterless Urinals). In preparing the Final Statement of Reasons for these building products, HCD has addressed comments both individually or grouped together. In most cases, HCD has grouped the comparable comments addressing a building product together, choosing to provide one global response. Our reasoning is that most comments directed toward a specific product, whether pro or con, made a parallel supposition, remark, or desired the same outcome.

When considering building products, the proposing agency must always balance the potential benefits against the potential risks. When approving a product new to the California Plumbing Code, HCD has an obligation to be reasonably assured that the product does not produce an unreasonable risk to health or safety. If a new product is excluded from the code, there is undoubtedly an economic consequence to the manufacturers and distributors of the product, as well as a potential loss of choice to consumers. However, when balancing the interests, HCD resolves close questions in favor of protecting the health and welfare of the public.

In contrast, when contemplating actions that will hamper the use of an already widely accepted, used and available product, HCD must weigh additional factors. This is particularly true when a material has undergone scrutiny for inclusion in a model code, but is restricted by the California version of that code. One such factor is the negative effects of causing a market disruption. Market disruption could have a very real economic impact on the manufacturers, retailers and installers of the product. Equally significant are

the implications of eliminating the product for those consumers that have homes in which the product has been used. The mere appearance that California has determined that a product warrants exclusion from the code when, in fact, it has made no such determination, could result in a loss of market value of these homes and the fear for some homeowners that the product may result in a catastrophic failure. In this balancing of interests, HCD must be prudent before removing a product from usage unless there is reasonable and compelling evidence that such an action is appropriate.

In each case, HCD has evaluated the submitted comments and concluded:

1. PEX is included in the 2006 Uniform Plumbing Code (UPC) but not approved for use by HCD in the 2007 California Plumbing Code (CPC). The use of PEX piping is permitted in model code publications not adopted by California, such as the 2006 International Plumbing Code. The California Building Standards Commission (CBSC) is the lead agency currently working to ensure compliance with the California Environmental Quality Act (CEQA) specific to the use of PEX piping in California. A draft Environmental Impact Report (EIR) regarding the use of PEX piping is currently available on the CBSC website and is available at: http://www.documents.dgs.ca.gov/bsc/prpsd_chngs/documents/2007/pex_deir_5_9_08.pdf.

Relying upon the underlying data in the draft EIR, and to mitigate concerns addressed in the prepared document, HCD amended its initial proposed Express Terms. The revised proposed Express Terms document was made available during a second 45-day comment period. Based upon stakeholder comments, changes to the revised proposed Express Terms were also made after the second 45-day comment period resulting in an additional 15-day comment period.

2. Air Admittance Valves (AAV) are not included in the 2006 Uniform Plumbing Code (UPC). In part, because HCD adopts the UPC by reference, AAVs are not included in the California Plumbing Code (CPC). However, use of AAVs has been included in national model codes for over a decade. This is substantiated by approval of AAVs dating back to the 1995 edition of the CABO One and Two Family Dwelling Code. Currently, AAVs are included in the International Residential Code (IRC) and International Plumbing Code (IPC). In addition, HCD continues to recognize use of AAV's in "Information Bulletin 76-1", allowing AAVs under an alternate approval method for manufactured and factory-built housing.

During the final weeks of the first comment period, HCD became aware of a code change proposal initiated by the State of Louisiana, Department of Health and Hospitals, to the Department of Housing and Urban Development (HUD). The code change proposal intends to remove Anti-Siphon Trap Vent Devices from the Manufactured Home Construction Safety Standards found in Part 3280, Subpart G. In its initial proposal, HCD stated, "Air admittance valves have been approved by HUD in the Manufactured Home Construction Safety Standards as "Anti-siphon trap vent devices" since June 15, 1976.

HCD is electing to be cautious and continue its review at this time. This includes evaluating findings or any determination made by HUD prior to inclusion of AAVs in the California Plumbing Code. This action is not a prohibition of the use of air admittance valves in California. Local building officials remain authorized to make approvals pursuant to the State Housing Law on a case-by-case basis through the alternate approval provision, or by ordinance upon an expressed finding that it is reasonably necessary because of local climatic, geological, or topographical conditions.

3. A non-substantive modification was made to the proposed Express Terms regarding non-water supplied urinals based upon stakeholder comment.

COMMENTS RECEIVED DURING THE FIRST 45-DAY COMMENT PERIOD ARE LISTED BELOW. (The text with proposed changes clearly indicated was made available to the public from March 28, 2008 until May 12, 2008.)

NOTE: The complete text of each individual comment and any referenced materials may be reviewed at the following internet address: http://www.bsc.ca.gov/prpsd_chngs/pc_07_comment.htm.

- 1. COMMENTERS:**
- Geoff Lancaster (**EM-2**) [<mailto:GLancaster@SantaBarbaraCA.gov>]
City of Santa Barbara
Subject: PEX E.I.R.
Submitted via e-mail
- Michael Cudahy (**EM-6**)
Plastic Pipe and Fittings Association (PPFA)
800 Roosevelt Road
C-312 Glen Ellyn IL 60137

COMMENTS: EM2 and EM-6, Sections 604.11 thru 604.13: With regard to PEX, both commenters support the adoption of PEX. While commenter **EM-2** did not direct comment to any specific code sections proposed, he too sought relief to the prohibition of PEX piping in California. An excerpt from commenter **EM-6** has been provided herein. "Plastic Pipe and Fittings Association (PPFA) supports the statewide approval of PEX and the full adoption of the model plumbing code. We believe that full adoption is the proper course of action so a level playing field exists for all materials and participants in the building industry. Any unwarranted, politically motivated, or special interest restriction in the California State Code negatively impacts the public, interstate commerce and builders by limiting choices of materials and likely increases project cost. Plastic piping materials are safe, proven, and energy and water saving materials that simply out perform alternatives at lower installed costs and there is no reason to limit their application."

RESPONSE: HCD appreciates and acknowledges the support of both commenters for the inclusion of PEX piping in the California Plumbing Code. The California Building Standards Commission (CBSC) is the lead state agency and is proceeding through a process of full compliance with CEQA, including the completion and adoption of a legally adequate EIR. HCD has worked in coordination with the CBSC and the other proposing state agencies to ensure compliance under CEQA and the nine-point criteria. Please refer to the Final EIR (FEIR) for any concerns relating to environmental impacts of PEX and CBSC responses to comments received during the DEIR comment period. Title 14, California Code of Regulations (CCR) Section 15088, requires lead agencies to respond to comments on their EIR.

- 2. COMMENTER:**
- Thomas Enslow (**EM-5**)
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814-4715

COMMENT: EM-5, Sections 604.1, 604.11, 604.11.1, 604.11.2, 604.13, 604.13.1, 604.13.2 and Table 6-4 with regard to PEX.

- 1) The California Building Standards Commission must disapprove or require further study of the proposed PEX and PEX-AL-PEX amendments until a legally adequate EIR is completed.
- 2) Preparation of an EIR is required prior to adoption of the proposed PEX and PEX-AL-PEX amendments.
- 3) The proposals to approve PEX fail to meet at least two of the Nine-Point Criteria.

- a) Approval of PEX and PEX-AL-PEX without first completing a legally adequate EIR would not be in the public interest in ensuring informed self-government and in protecting public health and safety and the environment.
- b) Approval of PEX and PEX-AL-PEX without first completing a legally adequate EIR would be unreasonable, arbitrary and unfair as proposing adoption of building standards in a manner contrary to law and without full disclosure, evaluation and mitigation of evident impacts.

CONCLUSION

Substantial evidence has been submitted demonstrating that approval of the proposed PEX and PEX-AL-PEX amendments may result in significant impacts on public health and the environment. Such impacts include contamination of drinking water due to leaching and permeation, premature degradation and failure, increased risk of Legionella, increased solid waste disposal impacts and increased fire hazards. Full compliance with CEQA is necessary to disclose the extent of these potential impacts and to consider alternative pipe materials and mitigation measures.

RESPONSE: PEX has been reviewed, tested, and listed by approved national testing agencies and has been included in the national model codes. In addition to consideration of these approvals and prior to HCD's adoption of the proposed changes to the CPC regarding the use of PEX, HCD, in coordination with the lead state agency, the California Building Standards Commission (CBSC), is proceeding through a process of full compliance with CEQA, including the completion and adoption of a legally adequate EIR. Please refer to the Final EIR (FEIR) for any concerns relating to environmental impacts of PEX.

HCD and other adopting state agencies have determined that the proposed changes comply with the nine-point criteria, including the points identified in the comment. Any factual determinations used in the nine-point analysis shall be considered conclusive by the CBSC unless the CBSC finds and sets forth in writing the factual determination is arbitrary and capricious or substantially unsupported by the facts.

HCD believes that it is in the public's interest to adopt a standard (point three of the nine-point criteria) that has been reviewed through the CEQA EIR process and all measures found within the EIR have been addressed in the proposed regulations.

HCD believes that the proposed regulations are not unreasonable, arbitrary, unfair, or capricious to adopt a standard (point five of the nine-point criteria) that has been reviewed through the CEQA EIR public disclosure process and all measures found within the EIR have been addressed in the proposed regulations.

Supplementary Note: References to Sections 604.13, 604.13.1, and 604.13.2 listed on the commenter's cover sheet were not found in the body of that public comment. PEX-AL-PEX is not part of the EIR, because the building standards regarding the use of PEX-AL-PEX are not being changed. Therefore, comments relating to this product are not relevant to the proposed changes nor addressed in this response.

3. COMMENTERS: Thomas Enslow (**EM-3**)
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA. 95814-4715

Daniel Gleiberman (**EM-8**)
Falcon Waterfree Technologies
10900 Wilshire Blvd. Suite 1500
Los Angeles, CA 90024

COMMENTS: EM-3 and EM-8, Sections 211.0, 216.0, 402.3.3, 405.2, 1003.1, and 1005.0 with regard to Non-Water Supplied Urinals. The above-listed persons made similar comment, protest, and analysis of HCD's proposed adoption of non-water supplied urinals. Both persons commented on five (5) sections listed above. Only commenter **EM-8** addressed Section 216.0 also listed above. Collectively, the commenters have stated that HCD's proposed Express Terms for non-water supplied urinals are inconsistent, vary and conflict with Health and Safety Code Section 17921.4 as enacted by AB 715, Chapter 499, Statutes 2007. Further discourse avowed that HCD's proposed regulations are overbroad, permit unlawful installation, lack sufficient guidance, concluding that the proposed Express Terms should be amended for clarity and consistency and that without revision to Sections 211.0, 216.0, 402.3.3, 405.2, 1003.1, and 1005.0 as recommended, the proposed regulations would not comply with the nine-point criteria established in Health and Safety Code Section 18930.

GENERAL RESPONSE TO ALL COMMENTS AND ALL SECTIONS PERTAINING TO NON-WATER SUPPLIED URINALS: HCD appreciates and acknowledges the views and suggestions of the commenters. Their interest is characterized by the breadth and scope of their comments. Below, each of the six sections proposed by HCD with regard to non-water supplied urinals is addressed. HCD maintains that it has worked within its statutory authority while promulgating these regulations.

Supplementary Note: Reference to Sections 402.3.1 or 402.3.2 listed on commenter **EM-3's** cover sheet was not found in the body of that public comment. In addition, the cover letter mistakenly references Section 504.2.1 regarding non-water supplied urinals; consequently, HCD provided no response.

COMMENT Section 211.0 Insanitary, Exception: Both comments suggest adding additional language to the end of the proposed exception for "Non-water supplied urinals." One commenter desires to direct the user to Section 402.3.3, while the other commenter proposes adding the language "that are cleaned and maintained in accordance with manufacturer's instructions."

RESPONSE: This exception intended to identify that a non-water supplied urinal does not provide a flush of water to maintain the fixture receptor in a sanitary condition. The exception alerts the code user to a departure from conventional thought and a general rule established under insanitary conditions.

Code definitions do not direct the code user to the general or specific requirements contained in the body of regulations. While the suggestion to add a pointer to reference Section 402.3.3 is laudable, it is unnecessary and inconsistent with the format and arrangement of the California Plumbing Code.

Manufacturer cleaning and maintenance instruction is one of the requirements required for approval of non-water supplied urinals in California. Implementing the suggested comment would imply that HCD has determined one requirement merits more consideration or weight than another requirement. Additional evidence would be necessary for HCD to make such a determination. HCD will consider this suggestion during the development of future plumbing rulemaking packages. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

COMMENT Section 216.0 Non-Water Supplied Urinal: The commenter believes that HCD is required to adopt the definition of “non-water consuming urinal” as written in ASME standard A112.19.19-2006.

RESPONSE: The definition of “non-water supplied urinal” proposed by HCD is sufficient and clear, providing easy identification for the code user. There is no legislative mandate requiring HCD to reprint statute or replicate an ASME standard within regulations. Copying an ASME standard or definition without prior consent may infringe upon copyright restrictions. HCD did not request ASME approval to reprint the A112.19.19-2006 definition of non-water consuming urinal. HCD has evaluated the comment and no new code change has been proposed as a result of this comment.

COMMENT Section 402.3.3: Both commenters express a belief that all six conditions contained in AB 715, Health and Safety Code Section 17921.4, require exact replication within HCD’s proposed Express Terms. An additional comment states Section 402.3.3 unlawfully permits urinals that do not comply with ASME A112.19.19-2006. A final comment recommends additional language revisions to remove unintended vagueness.

RESPONSE: HCD agrees with the suggestion to remove the word “conforming” from Item 2 of Section 402.3.3 to increase clarity. In addition, reference to the statute was placed at the end of Section 402.3.3 directing any interested party to Health and Safety Code Section 17921.4. Adding a pointer to statute is consistent with formatting utilized elsewhere in the California Building Standards Code. These modifications have no change in regulatory effect.

HCD maintains a commitment to limit the reproduction of statute within regulation and our proposed regulations have been mindful of that commitment. This effort is highly praised by a large representation of HCD stakeholders. HCD balances this principal with the understanding that sometime statutory language warrants inclusion or requires reference within regulation. Presently, there is no legislative mandate requiring HCD to replicate an entire statute within regulation. Reprinting statute in regulation could also be considered overlapping and duplicative, contrary to the California Building Standards Commission nine-point criteria established in Health and Safety Code Section 18930 (a)(1).

HCD believes it has incorporated all six requirements specified in AB 715 for non-water supplied urinals. They were carefully considered and then placed in the proposed Express Terms by means of definition, exception, and in Chapter 4, Plumbing Fixtures and Fittings. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

The inclusion of Reference Standards in Table 14-1 for non-vitreous ceramic and plastic urinal fixtures within HCD’s proposed Express Terms is not contrary to HCD statutory authority. Communication established with the legislative staff of the author of AB 715 revealed that no intent to exclude plastic, non-vitreous ceramic or other approved materials existed. To create a prohibition of these material types, manufacture, or sale of waterless fixture technology could cause undue hardship upon manufacturers that utilize these materials. This is a type of market disruption which could have an economic impact on manufacturers, retailers, installers and could limit consumer choice of these products. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

COMMENT Section 405.2, Exception: Commenter **EM-3** stated that the proposed exception to Section 405.2 is “overbroad and fails to provide needed guidance.” The commenter recommended that HCD provide additional language excluding non-water supplied urinals only from the requirement “thoroughly washing the fixture at each discharge.” The commenter felt that the HCD exception, as proposed, allowed the approval of other prohibited conditions such as invisible seals, unventilated spaces and floor trough urinals. Commenter **EM-8** again suggested that HCD add a reference to Section 402.3.3.

RESPONSE: Commenter **EM-3** correctly presumed that HCD added an exception to Section 405.2 “Prohibited Urinals,” principally to address “thoroughly washed at each discharge.” Adding this exception was consistent with other exceptions added by HCD in its overall proposed adoption of waterless urinal

fixtures. Other examples of exceptions utilized by HCD are found in Section 211.0 for insanitary conditions and Section 1005.0 for trap seals.

HCD's review of the UPC "Illustrated Training Manual" revealed that prohibitions of Section 405.2 were intended to apply to conventional urinal fixtures and not waterless urinals. Specifically, Section 405.2 was meant to apply to long narrow trough urinal fixtures utilizing a spray bar (as the water supply). These fixture types inadequately wash the urinal fixture walls, which is the principal insanitary condition identified. In addition, the commenter provides no evidence, nor was any discovered by HCD, that confirms waterless urinal fixtures conforming to requirements applicable to California, utilize either invisible seals or unventilated space. Furthermore, the floor and wall-hung type trough urinal fixtures identified in Section 405.2 were also intended to address conventional trough urinals that utilize water. HCD does not intend to exempt waterless urinal fixtures from compliance with any prohibited condition established in Section 405.2 or elsewhere in this code, when applicable. HCD has not made any determination in its review that floor-type or wall-hung type non-water supplied trough urinal designs fail to meet the guidelines or requirements established for approval. To restrict a product merely by association or its identity as a trough urinal would be arbitrary and nonsensible. Such a determination could limit innovation and technology and consumer choice. The responsibility to evaluate and determine fixture compliance remains a fundamental and essential duty of the Authority Having Jurisdiction. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

COMMENT Section 1003.1 Exception: Both comments suggest adding a reference to Section 402.3.3 after the proposed exception.

RESPONSE: HCD previously accepted commenter **EM-3**, Mr. Thomas Enslow's, suggestion at the Plumbing, Electrical, Mechanical and Energy (PEME) Code Advisory Committee meeting and agreed to add ASME Standard A112.19.19-2006 to the end of both exceptions proposed in Chapter 10.

Adding a reference to Section 402.3.3 as suggested, while laudable, is unnecessary. References to the ASME standards are already in place and this is sufficient to guide and assist the code user. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

COMMENT Section 1005.0 Exception: Commenter **EM-8** suggests that HCD should "simply change the word "water" everywhere it appears in this Section 1005.0 to "liquid" which would accomplish the same change as the exception proposed by HCD." Comment **EM-8** suggests that HCD "adopt the definition of "trap" for waterless urinals contained in ASME A112.19.19-2006 to provide additional guidance."

RESPONSE: Health and Safety Code Section 17921.4 required that a trap seal shall comply with the California Plumbing Code. The California Plumbing Code, which is based upon the 2006 Uniform Plumbing Code, recognizes that "A trap seal shall have a water seal of not less than two (2) inches (51 mm)." The liquid sealant currently utilized in a non-water supplied urinal is inconsistent with trap seal requirements of Section 1005.0.

HCD is mindful that commenter **EM-8**, Mr. Daniel Gleiberman, also submitted this code change proposal to IAPMO, requesting that they also replace "water" with "liquid" in Section 1005.0. The IAPMO Plumbing Technical Committee approved this code change proposal. This approval, however, did not ensure inclusion into the 2009 UPC. Timely information was unavailable to track the outcome of this code proposal and HCD is unable to amend our proposal without delay to the entire plumbing package. In the interim, the exception proposed by HCD is sufficient to accomplish its intended effect. HCD will continue to monitor the IAPMO triennial code adoption process. HCD will consider this suggestion during the development of future plumbing rulemaking packages. HCD has evaluated the comment and no new code change has been proposed as a result of this comment.

HCD did not propose adoption of a new definition for “trap” during this rulemaking. HCD continues the adoption of trap as defined in Chapter 2 of the CPC. ASME Standard A112.19.19-2006 does not define a trap seal, only the trap seal’s depth. Liquid seal is also undefined by ASME A112.19.19-2006 and the California Plumbing Code. It is unclear what beneficial guidance is provided by implementing the commented suggestion. In addition, the suggestion to adopt a new definition for trap is not part of the HCD proposed Express Terms and this rulemaking. Thus, this comment and suggestion falls outside the scope of this rulemaking. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

4. COMMENTERS: Bob Adler (**EM-1**)
City of San Jose Planning, Building & Code Enforcement
200 E. Santa Clara St. Room 200
San Jose CA 95113

Richard Betti (**EM-7**)
City of San Jose Planning, Building & Code Enforcement
200 E. Santa Clara St. Room 200
San Jose CA 95113

Thomas Enslow (**EM-4**)
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814-4715

COMMENTS: EM-1, EM-4, and EM-7 Sections 905.4, 906.1, 909.1, 909.1.1, 909.1.2, 909.1.3, 909.1.4, 909.1.5, and 909.1.1 with regard to Air Admittance Valves: Three (3) comments opposing the adoption of Air Admittance Valves (AAV) were received. Commenters **EM-1** and **EM-7** made similar protests, disapproving HCD’s proposed Express Terms. The objections were that AAVs cannot maintain a 1 to 1 equivalency; AAVs perform well under clinical procedures and testing requirements, but can and do fail regularly in field application; and that they are not equivalent to current California Plumbing Code requirements. An additional objection was made because AAVs use a moving part. Commenter **EM-4** disputed HCD’s proposed adoption of AAVs on additional grounds. The commenter believes that CEQA requirements apply, including an EIR, before this product can be approved for use in California. Second, the commenter stated that the CBSC incorrectly reported a Code Advisory Committee recommendation and the error violated California Building Standards Administrative Code, and challenging this error required an additional 45-day comment period.

RESPONSE: HCD strongly disagrees with the position that an EIR is required or necessary for approval of this product. During the past 10 months, HCD has conducted extensive internal department review of AAVs and has evaluated a considerable volume of information both pro and con. HCD believes neither the evidence submitted nor the information reviewed thus far corroborates the claims made by commenter **EM-4**. The claim lacks the substantive or substantiated facts necessary to compel an EIR. Further, HCD believes the evidence submitted does not constitute a significant environmental impact in accordance with CEQA. The concerns raised by the commenter can be mitigated by adherence to ASSE standards, following manufacturer installation and maintenance guidelines, and consumer education. In addition, HCD review has made no determination of fact with regard the commented positions offered by commenters **EM-1** and **EM-7**.

HCD withdrew its proposed Express Terms for AAVs providing rationale with the revised proposed Express Terms made available during the second 45-day comment period. HCD’s rationale is repeated in Item 2 of the “Introduction to Response to Comments” at the beginning of this document.

A second 45-day comment period has nullified the objection raised to a perceived CBSC error with regard to recommendations made at the Code Advisory Committee meeting.

COMMENTS RECEIVED DURING THE SECOND 45-DAY COMMENT PERIOD ARE LISTED BELOW
(The text with proposed changes clearly indicated was made available to the public from July 11, 2008 until August 25, 2008.)

NOTE: The complete text of each individual comment and any referenced materials may be reviewed at the following internet address: http://www.bsc.ca.gov/prpsd_chngs/pc_07_comment.htm.

- 5. COMMENTERS:**
- Dick Stubendorf **(EM-A)** [<mailto:RStubendorf@ci.santa-cruz.ca.us>]
Chief Building Official
809 Center St. Room 206
Santa Cruz, CA 95060
- Thomas R. Steele **(EM-C)**
Hardwood Creations
555 Vanguard Way
Brea, CA 92821
- Steven R. Hartshorn **(EM-D)**
Orange Pacific Plumbing, Inc.
901 Via Rodeo
Placentia, CA 92870
- David Keefe **(EM-E)**
Trilogy Plumbing, Inc.
184 E. Liberty Avenue
Anaheim, CA 92801
- Bruce Wick **(EM-F)**
California Professional Association of Specialty Contractors (CALPASC)
1150 Brookside Ave., Ste. Q
Redlands, CA 92373
- Wayne Taylor **(EM-G)**
Golden West Plumbing, Inc.
1247 N. Batavia St.
Orange, CA 92867
- Gregory R. Colgate **(EM-H)** [[SMTP:GCOLGATE@NEWERATILE.COM](mailto:GCOLGATE@NEWERATILE.COM)]
New Era Tile & Stone, Inc.
Submitted via e-mail
- Richard Ahrens **(EM-J)**
Sierra West Construction
24744 Connie Court
Auburn, CA 95602

Tom Calhoun **(EM-K)**
150 Flocchini Circle
Lincoln, CA 95648

Richard Hallinan **(EM-L)**
Executive Plumbing, Heating and Air
9129 Stellar Court
Corona, CA 95833

Victor A. Franco **(EM-P)**
Sheehan Construction, Inc.
221 Gateway Rd. West, Suite 405
Napa, CA 94558-6623

Mike Taylor **(EM-R)**
RCR Plumbing and Mechanical, Inc.
12620 Magnolia Avenue
Riverside, CA 92503

Marushkah Kurtz **(EM-T)**
Cal Pac Sheet Metal, Inc.
2720 S. Main Street, Unit B
Santa Ana, CA 92707

Jay Burnett **(EM-U)**
Delta Faucet Company
55 E. 111th Street
P. O. Box 40980
Indianapolis, IN 46280

COMMENTS: EM-A, EM-C, EM-D, EM-E, EM-F, EM-G, EM-H, EM-J, EM-K, EM-L, EM-P, EM-R, EM-T, and EM-U, Section 604.1 and Table 6-4 with regard to PEX piping: The commenters listed above approve of the use of PEX piping in California and approve the proposed agency modifications to PEX regulations.

RESPONSE: HCD appreciates and acknowledges all the comments offering support for the proposed regulations with regard to the inclusion of PEX piping in the California Plumbing Code.

6. COMMENTER: Thomas Enslow **(EM-B)**
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814-4715

COMMENT: EM-B, Section 604.1 and Table 6-4 with regard to PEX piping:

COMMENT I. The DEIR corroborates many of the concerns that we have long raised regarding this product, including the leaching of methyl tertiary-butyl ether (“MTBE”) and tert-butyl alcohol (“TBA”) in amounts that greatly exceed the state standards for health, taste and odor, the permeation of PEX pipe by outside contaminants and the potential premature degradation and rupture of PEX pipe. Unfortunately, the DEIR has only partially performed its duties under CEQA. Numerous potential impacts of this Project are simply ignored or are dismissed without foundation.

The Coalition for Safe Building Materials (members include California Pipe Trades Council, the Sierra Club, the Planning and Conservation League, Communities for a Better Environment, the Consumer Federation

of California and the Center for Environmental Health), (“the Coalition”), commented in June on inadequacies in the DEIR. Their comments addressed the following concerning PEX piping and fittings:

- Inadequate description of the project;
- Inadequate mitigation of contamination due to leaching of MTBE and TBA;
- Failure to disclose potential impacts of Ethyl tertiary butyl ether (“ETBE”) leaching;
- Improper deferral of analysis and mitigation of Proposition 65 chemicals leaching;
- Failure to evaluate the potential for Bisphenol A leaching;
- Inadequate mitigation of the risk of permeation of toxic substances;
- Inadequate mitigation of the risk of failure due to surrounding materials and environmental conditions;
- Failure to evaluate reports of widespread failures;
- Failure to evaluate risk of illness due to more biomass than found in copper or CPVC;
- Failure to evaluate adequately the impacts of solid waste disposal; and
- Failure to evaluate the risk of toxic smoke in building fires.

RESPONSE: The comment is directed towards environmental issues evaluated and analyzed in the EIR. The Final EIR (FEIR) has adequately addressed these concerns expressed by the commenter. Interested parties may review the EIR for responses to these concerns. The proposed regulations are reliant upon the EIR, which addressed all potential impacts on the environment that may be caused by the statewide adoption of PEX.

COMMENT II. The restrictions and conditions imposed on the use of PEX in the July 10, 2008 Post-Hearing Modifications to Text of Proposed Building Standards are a commendable attempt to address the potential health, safety and performance impacts identified in the DEIR. Unfortunately, they fall well-short of what is required under CEQA and what is necessary to ensure protection of installers, consumers, homeowners and building occupants.

The PEX mitigation measures proposed in the July 10, 2008 Post-Hearing Modifications to Text of Proposed Building Standards are almost identical to the measures proposed by the May 2008 PEX DEIR. Accordingly, the analysis and critique of these measures in our June 23, 2008 Coalition Comments remain valid and include the following:

1. California standards must be amended to require certification for all chemicals for which NSF has standards that may leach from PEX, not just MTBE, TBA and Proposition 65 chemicals.
2. California drinking water standards must also be amended to address the DEIR’s identification of potentially significant leaching of chemicals that are not currently regulated by California drinking water standards, such as Bisphenol A and ETBE.
3. The requirement to certify that PEX pipe meets California Proposition 65 standards must be clarified to provide Proposition 65 safe harbor levels for three Proposition 65 chemicals, butyl benzyl phthalate, toluene diamine and carbon black.
4. As long as a specific testing protocol is required, any accredited third party certifying listing agency should be qualified to certify that PEX meets California standards, not just NSF.
5. In a water service area that has detectable levels of MTBE or TBA in the drinking water, the measures should be amended to require that all contractors must install PEX specially-certified to have no detectable levels of MTBE or TBA unless they first provide evidence to the authority having jurisdiction that the building’s water supply has no detectable levels of MTBE or TBA.
6. The requirement to either protect PEX installed in soil with a sleeve or obtain a clean Phase I Environmental Site Assessment to reduce the risk of permeation impacts to a level of insignificance should be revised to prohibit any installation of PEX below slab or between the water meter and the building structure. A 1991 study found that soil contamination occurred mainly after pipe installation, suggesting that soil analysis prior to pipe installation would not significantly decrease the number of permeation incidents.

7. The requirement that PEX tubing installed in continuously recirculating hot water systems shall meet the requirements of NSF P171 CL-R where chlorinated water is supplied to the system is grossly inadequate to address the potential failure impacts identified in the DEIR and in the administrative record. Moreover, this requirement does not address the DEIR's allowance of ASTM Standard F2023 in non-recirculating hot water systems, only ensuring an adjusted lifetime protection from chlorinated water of 25 years, when other PEX chlorine-resistance standards are available that ensure an adjusted lifetime protection from chlorinated water of 40 years.
8. The proposed restrictions also fail to address:
 - Failure to evaluate reports of widespread failures;
 - Failure to evaluate risk of illness due to more biomass than found in copper or CPVC;
 - Failure to evaluate adequately the impacts of solid waste disposal; and
 - Failure to evaluate the risk of toxic smoke in building fires.

RESPONSE: The comment is directed towards issues evaluated and analyzed in the EIR. The Final EIR (FEIR) has adequately addressed these concerns expressed by the commenter. Please see the EIR for responses. The proposed regulations are reliant upon the EIR, which addressed all potential impacts on the environment that may be caused by the statewide adoption of PEX.

COMMENT III. The Plastic Pipe and Fittings Association (“PPFA”) June 23, 2008 objections to the imposition of conditions on the approval of PEX lack foundation, misrepresent the evidence in the record and misrepresent the Project setting.

A. PPFA attempts to downplay the impacts from potential pipe failure. Moreover, the PPFA letter misrepresents both the evidence in the record and the Project setting.

- PPFA first argues that mitigation of the potential PEX impacts identified in the PEX DEIR is not required because “...use of PEX will result in lesser potential public health and environmental impacts – even without mitigation – than the most widely used pipe material allowed under the existing regulations, copper.” It incorrectly assumes that identifying the impacts of copper obviate the need to evaluate and mitigate the performance, health and safety impacts associated with PEX. CEQA requires the identification of all project impacts, even if the project as a whole is environmentally preferable to the no-project alternative. Potential copper impacts are not even relevant in the consideration of alternatives since approval of PEX would not provide any alternative to copper that isn’t already provided by CPVC or other approved pipe materials.
- PPFA next incorrectly claims that there is no evidence that PEX tested to the current national consensus standards will fail “prematurely”, when there is evidence of widespread failures in Washington and other states of PEX tested and certified to national consensus standards. PPFA also argues that PEX installed in recirculating systems should not be required to meet NSF P171-CL-R for chlorine resistance, because recirculating systems are not widespread in California, ignoring the issue of those that are installed. PPFA also incorrectly claims that the California Building Standards Commission may not require compliance with P171-CL-R because it is not a national consensus standard, though there is no requirement that national specifications, published standards and model codes adopted by the California Building Standards Commission be consensus standards.
- PPFA also claims that premature failure of PEX pipe is not a significant impact because “it is not reasonable to assume that mold of any kind, let alone toxic mold, would form and persist undetected, subjecting anyone to a ‘significant health risk.’” However, homeowners have, in fact, suffered from mold problems as a result of PEX and PEX fitting failures, and this claim assumes, without foundation, that all PEX failures would be immediately noticeable and immediately repaired. Second, this claim’s relying upon mitigation of PEX failures after they happen supports a finding that this is a potentially significant impact, which the California Building Standards Commission has the authority to mitigate to prevent such failures before they occur. Third, this comment overlooks the impact of water and structural damage caused

by PEX failures on the physical environment, which may be regarded as significant effect under CEQA even where toxic black mold does not occur.

- PPFA also makes the unsubstantiated claims that the Project would reduce the potential for mold growth because chloramine use is increasing; that the use of chloramines appears to be less aggressive to PEX than copper; that chloramines are known to adversely affect copper pipe; and that there is already substantial evidence of copper pipe failures. First, there is no evidence that chloramines are less aggressive to PEX, which is directly attacked by chloramines, than to copper, which may be corroded if chloramination is not properly optimized. Second, the PPFA Comments ignore the current Project setting which allows the use of not just copper pipe but also CPVC pipe, about which it makes no claims of greater risk than PEX for toxic mold growth or failure due to exposure to chloramines. Third, even if copper pipe may fail in corrosive water and soil conditions, this does not relieve the lead agency of its duty to mitigate potential impacts related to PEX pipe.

B. NSF toxicity standards are appropriately evaluated by reference to California drinking water standards.

1. PPFA argues that the DEIR improperly relies on California Maximum Contaminant Levels (“MCLs”) as a threshold of significance to evaluate leaching impacts, because they are drinking water standards designed to guard against adverse health effects due to long term exposure. However, for MTBE, NSF Short Term Exposure Standards and long term exposure standards are all the same: 100 ppb, 10 times the California MCL for MTBE. Meeting NSF 61 short term and long term standards without mitigation, the proposed building standards would thus approve PEX formulations that could leach MTBE up to 100 ppb for the lifetime of the product.

PPFA also inaccurately claims that the test results provided by NSF and contained in Appendix F of the DEIR demonstrate that MTBE and TBA level released from PEX decline relatively rapidly to below regulatory levels. These test results, however, are of limited evidentiary value. First, even short term exposures to MTBE above California MCLs pose a public health risk because MTBE is a genotoxic carcinogen. Second, the NSF test results for less than 20 samples do not provide data for all 271 PEX products that would be approved by this proposed regulatory action. Third, the NSF test results are incomplete, preliminary and rely on a regression model that NSF admits “may not be the most suitable model to extrapolate” even the Day 90 level, much less to estimate leaching rates of up to two years later. This regulatory action approves not just the 271 types of PEX that currently exist on the market meeting certain standards, but also any new types of PEX that may enter the market in the future. Accordingly, additional mitigation is required to ensure that both current and future forms of PEX that would be approved under this regulatory action will meet California standards for MTBE.

2. Short term leaching from PEX must be disclosed and evaluated by the Lead Agency in order to protect construction workers, who are often the first persons to consume water from newly installed pipe. Moreover, because construction workers move from one job site to the next, they will be repeatedly exposed to higher levels of MTBE leaching.

3. *In Re Groundwater Cases* is not applicable nor is its underlying analysis contrary to the DEIR’s application of California drinking water standards. PPFA claims that the Court of Appeal case *In Re Groundwater Cases* prohibits the application of California Drinking Water MCL or Action Level standards as a threshold of significance in an EIR. The case, however, is not applicable to the California Building Standards Commission’s current proceedings, because the Commission is not seeking to impose liability on PEX manufacturers pursuant to PUC and DPH regulations as the court held. However, in the case’s underlying analysis, the Court’s statement that MCLs and Action Levels are intended to protect against the possible health risk of prolonged exposure to contaminants rather than acute, or short term, exposure is generally correct, supporting the decision of the lead agency to use California MCL levels as the threshold of significance for leaching impacts.

4. PPFA's suggestion to rely on privately set NSF 61 standards for TBA over standards set by the responsible state regulatory agencies would result in an unconstitutional delegation of authority. Not only are NSF standards less protective than California's, the Legislature has expressly entrusted DPH with the jurisdiction over the setting of MCLs, Action Levels and other technical drinking water standards. Relying on privately set NSF 61 standards instead of standards set by the DPH would result in an unconstitutional delegation of regulatory authority to a private entity. Deficiencies in NSF standards demonstrated by the Coalition include:

1. NSF allowable levels of contamination are higher than those determined by California agencies to protect human health.
2. NSF testing and certification process is confidential.
3. NSF is a private entity and not accountable to the public.
4. NSF is funded almost entirely by manufacturers whose products are listed and tested by NSF.
5. NSF contaminant standards are based on those manufacturers' studies.
6. Industrial participants have an economic stake in the results of NSF testing and certification processes.

C. PPFA's opposition to the requirement to meet California taste and odor standards lacks foundation or relevance. Although water purveyors may deliver water that exceeds taste and odor standards but meets MCL health standards, such taste and odor impacts are still significant under CEQA and must be mitigated, if feasible mitigation measures are available.

D. PPFA's opposition to the mitigation for cumulative leaching impacts in buildings with MTBE or TBA contaminated water lack substance, because it claims that most California water sources are below applicable drinking water standards. However, the proposed mitigation for cumulative impacts is narrowly tailored to only apply to water sources that do have detectable MTBE contamination.

E. PPFA's objection to permeation mitigation measures lacks relevance, claiming that mitigation for existing projects is not required. However, CEQA applies to new discretionary approvals, not to existing regulations.

RESPONSE: The comment is directed towards issues evaluated and analyzed in the EIR. The Final EIR (FEIR) has adequately addressed these concerns expressed by the commenter. Please see the EIR for responses. The proposed regulations are reliant upon the EIR, which addressed all potential impacts on the environment that may be caused by the statewide adoption of PEX. While the CBSC recognizes the comments responding to comment by PPFA, these comments are not relevant to the proposed regulations or process.

COMMENT IV. The PEX Amendment Notice is procedurally defective because it fails to include the agencies' justification under the nine-point criteria of Section 18930. Section 18929.1's requirement to provide the public written notice of the "justification" for the proposed building standards clearly refers to justification under the nine-point criteria of Section 18930.

- First, Section 18930's requirement that building standards be justified under the nine-point criteria is the only "justification" provided for in the California Building Standards Law.
- Second, Section 18929.1 requires the procedures for public review to meet the intent of Section 18930, thus underscoring that this section must be consulted when justifying proposed standards to the public.
- The PEX Adoption Notice, however, fails to provide to the public written notice of HCD's, CBSC's, OSHPD's or DSA's justification for the proposed standards under the nine-point criteria analysis.
- The failure to include the nine-point criteria justification in the PEX Adoption Notice effectively precludes the public from critically analyzing the agencies' justification for their proposed building standards.
- The Initial Statement of Reasons contained in the PEX Adoption Notice is limited to the bare elements required under Government Code Section 11346.2 and fails to include its justification in terms of the Section 18930 criteria, violating the notice requirements of Section 18929.1.

- The 2007 notice for the proposed PEX amendments must be revised and re-circulated with a copy of the nine-point analysis of HCD, CBSC, OSHPD and DSA in order to correct this error.

RESPONSE: The comments are not directed toward specific proposed language but rather directed toward the process. The commenter's suggestion that Health and Safety Code (HSC) Section 18929.1 requires the notice to provide justification under the nine-point criteria is an interpretation that is not consistent with the CBSC's regulations.

HSC Section 18929.1 directs the CBSC to develop regulations setting forth the procedures for an annual code adoption cycle. The section listed five items that must be included in the regulatory process. One of these items is the justification for the proposed changes. The CBSC's regulations adopted pursuant to this section became effective on March 12, 1994.

Article 1-9, Section 1-900 (g) defines "justification" as follows:

(g) "Justification" means an initial statement of reasons and the information needed to complete a notice of proposed action, including a determination as to the effect of the code change on housing costs.

As stated in the regulations, justification, for purposes identified in HSC Section 18929.1, is the ISOR and not justification to the nine-point criteria as purported by the commenter. As the commenter notes, HSC Section 18930 requires each agency to provide an analysis that is satisfactory to the CBSC that justifies the approval to the nine-point criteria. This nine-point criteria analysis is provided separately from the ISOR. Additionally, this is the process that all previous code change proposals have followed.

The ISOR that provides the rationale for the proposed changes to the CPC is specific to its reliance on the EIR for approval and meets the requirements of the Administrative Procedure Act and Building Standards regulations.

During the code adoption cycle, the Code Advisory Committees review all code proposed changes to the nine-point criteria. In addition, the nine-point analysis has been developed by the proposing and adopting agencies and will be available to the CBSC at the action meeting for the Commissioners to review and approve to their satisfaction.

COMMENT V. The proposed statewide approval of PEX without first finalizing a legally adequate EIR fails to meet at least two of the nine-point criteria.

A. Approval of PEX without first preparing an adequate EIR would not be in the public interest, being in violation of the law. Further, the statewide approval of PEX would also be contrary to the public interest due to the numerous significant environmental and public health and safety impacts associated with these products, even with the newly proposed restrictions and requirements.

B. Statewide approval of PEX without first preparing a legally adequate and technically complete EIR would be unreasonable, arbitrary and unfair. Allowing the statewide approval of PEX based upon the inadequate analysis contained in the PEX DEIR is a clear violation of CEQA not justifiable under the nine-point criteria. Furthermore, the proposed statewide approval of PEX is unfair and unreasonable due to the substantial evidence of potential significant impacts associated with this approval.

RESPONSE: HCD has coordinated its efforts with the CBSC who is the lead state agency in the preparation of the EIR. The CBSC has been working with consultants and the responsible state agencies to adequately address all environmental concerns related to the statewide adoption of PEX. HCD is aware that the Final EIR (FEIR) must be adopted and certified prior to the adoption and approval of the proposed regulatory changes relating to PEX.

COMMENT VI. Conclusion

The comments, expert reports, studies and other evidence submitted herein to HCD and the California Building Standards Commission demonstrates that the statewide approval of PEX and PEX fittings may result in numerous significant impacts on public health and the environment, even with the recently proposed revisions.

The evidence submitted further demonstrates that the PEX DEIR fails to adequately evaluate and mitigate these impacts. As a result, the proposed approval of PEX would be contrary to the public interest.

The California Building Standards Commission must also correct the procedural errors of the PEX Amendment Notice to meet the notice and justification requirements of the APA and of Health and Safety Code sections 18929.1 and 18930.

The State Pipe Trades Council respectfully requests that the California Building Standards Commission require full compliance with CEQA, including the completion of a legally adequate EIR, prior to adopting the proposed amendments approving PEX. Until a legally adequate EIR is completed and feasible, meaningful mitigation is imposed, the PEX amendments proposed by HCD, CBSC, OSHPD and DSA must be disapproved or, in the alternative, held for further study.

RESPONSE: All of the items expressed in the conclusion were addressed in the responses to the commenter above.

Supplemental Note: Sections 604.11, 604.11.1, and 60411.2, listed on the public comment form, were not amended as part of the HCD revised proposed Express Terms published for a second 45-day comment period. Please refer to HCD's response listed for comment **EM-5**, Item 2, of the first 45-day comment period responses above.

7. COMMENTER: Jack Beuschel (**EM-I**)
Studor Inc.
720 Brooker Creek Blvd
Oldsmar, FL 34677

COMMENT: EM-I, Sections, 905.4, 906.1, 909.1, 909.1.1, 909.1.2, 909.1.3, 909.1.4, 909.1.5, 909.1.1 with regard to Air Admittance Valves: The commenter disapproves of the proposed Express Terms being withdrawn by HCD. The commenter believes rationale offered by HCD for the removal of AAVs is based upon incorrect information. The commenter further suggests that HCD reinstate the proposed Express Terms as initially proposed.

RESPONSE: HCD appreciates and acknowledges the commenter's position concerning the inclusion of AAVs in the California Plumbing Code. HCD withdrew its proposed Express Terms for AAVs providing rationale with the revised proposed Express Terms made available during the second 45-day comment period. HCD's rationale is repeated in Item 2 of the "Introduction to Response to Comments" at the beginning of this document. HCD will consider this suggestion during the development of future plumbing rulemaking packages. HCD has evaluated the comment and no new code change has been proposed as a result of this comment.

8. COMMENTER: Thomas Enslow **(EM-M)**
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814-4715

Neil Bogatz **(EM-Q)**
IAPMO
5001 East Philadelphia St.
Ontario, CA 91761

COMMENTS: EM-M and EM-Q, Section 604.1 with regard to PEX piping:

Mr. Bogatz and Mr. Enslow note that it is important to emphasize at the outset that IAPMO takes no position on the substance of the California Building Standards Commission's Proposed Amendments addressing the use of PEX pipe in California.

They write instead to offer a technical objection to the form of the California Building Standards Commission's Proposed Amendments. Specifically, IAPMO objects to the proposed designation of a particular Listing Agency, i.e., NSF International, to perform the conformity assessment certification contemplated by the Proposed Amendments. "We believe that a regulation mandating product certification by a single, designated Listing Agency is unprecedented in the California Building Standards Code, serves no legitimate policy rationale, is unnecessarily narrow and may violate the California Constitution's prohibition against "special statutes."

They offer an amendment to the proposed PEX regulations to substitute "certification by an accredited third party Listing Agency" for "NSF certification" where it occurs.

CBSC staff has indicated that the special designation of NSF may have arisen over a concern that different Listing Agencies may use varying testing protocol to determine compliance with the supplemental California leaching standards. This concern, however, does not support the selection of NSF as the sole-designated Listing Agency. If testing protocol is, in fact, a concern of the agencies, such a concern may be better addressed by the addition of the following requirement to Section 604.1:

"Testing protocol for certification to meet the relevant California Maximum Contaminant Level (MCL), secondary MCL, notification, or Safe Harbor level or other applicable Proposition 65 levels shall receive approval by the California Department of Public Health prior to certification by an accredited third party Listing Agency for human consumption uses in California".

RESPONSE: HCD in coordination with the CBSC revised Table 6-4 Ffootnote³ to read "PEX tubing shall meet the requirements of NSF P171 CL-R, ASTM F 876-08 or an equivalent or more stringent standard..." in response to IAPMO's request.

In response to the comment and to information within the EIR, a decision was made to withdraw the portion of Section 604.1 to which the comments refer.

9. COMMENTER: Jeremy Brown **(EM-O)**
NSF International
P. O. Box 130140
Ann Arbor, MI 48113

COMMENT: EM-O, Section 604.1:

NSF supports the addition of PEX Water Piping to the California Plumbing Code. NSF does have editorial suggestions to the current proposed language within Section 604.1, which we believe will clarify the intent.

All PEX pipe, tube, and fittings carrying water in potable water systems intended to supply drinking water for human consumption to fixtures and appliances shall also receive NSF certification pursuant to approved test protocols. Certification based on the approved test protocols by NSF shall satisfy the requirement of having normalized concentrations that any leached concentrations of methyl-tert-butyl ether (MTBE), tertiary butyl alcohol (TBA), or California Proposition 65 chemicals identified as potential extractants based on a formulation review of PEX pipe, tube or fittings that are below the relevant California Maximum Contaminant Level (MCL), secondary MCL, notification, or Safe Harbor level or other applicable Proposition 65 level for those chemicals. The tubing shall be physically marked in a manner that indicates the pipe is NSF certified to be in compliance with this section for human consumption uses in California.

The first proposed modification refers to an approved protocol and defines the requirements of the protocol. The term “normalized concentration” is the more relevant to California drinking water criteria than “leached concentration.” The leached concentration may vary greatly depending upon the test conditions. The normalized concentration is the value-leached concentration that has been adjusted to reflect the potential contaminant concentration at the tap.

The second change clarifies how the applicable Proposition 65 chemicals will be identified and appropriately focuses the certification to the potential contaminants from PEX and materials within PEX systems.

Lastly, the marking should demonstrate compliance with the specific code requirement rather than the broad concept of human consumption which might imply end uses not addressed by the plumbing code such as beverage dispensing, food dispensing or direct consumption.

RESPONSE: HCD appreciates and acknowledges the comment and suggestions. In response to the comment and to information within the EIR, HCD in coordination with the CBSC made a decision to withdraw the portion of Section 604.1 to which the comments refer. The text with proposed changes clearly indicated was made available to the public during a 15-day comment period from November 25, 2008 until December 9, 2008. No public comments were addressed to HCD during the 15-day comment period.

10. COMMENTER: Thomas Enslow **(EM-N)**
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814-4715

COMMENT: EM-N, Sections 211.0, 402.3.1, 402.3.2, 402.3.3, 504.2.1, 1003.1, and 1005.0 with regard to Non-Water Supplied Urinals: The commenter supports HCD’s removal of the word “conforming” from Section 402.3.3, but has expressed concern over the reference to Health and Safety Code Section 17921.4 placed at the end of that section. Additional reference is made to proposed Express Terms, Sections 211.0, 402.3.1, 402.3.2, 1003.1 and 1005.0.1.

RESPONSE: HCD appreciates and acknowledges the comments with regard to non-water supplied urinals and welcomes positive feedback with regard to removal of the word “conforming” from Section 402.3.3.

Adding a pointer in Section 402.3.3 to reference the Health and Safety Code section is consistent with HCD formatting, current and past practice. Pointers directing the code user to statute have been used routinely and successfully in various parts of the California Building Standards Code. Similar text directing the code user to the Health and Safety Code was also provided in Sections 402.2.1 and 402.3.1 of the initial proposed Express Terms by HCD during the first 45-day comment period. There were no comments or criticisms with regard to these proposals. The California Plumbing Code utilizes this method to direct the code user to additional information within statute for both water heaters and CPVC. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

Please see **EM-3** and **EM-8 (Comment #3)** above; specifically, HCD responses regarding “non-water supplied urinals”. Those responses cover comments for HCD’s proposed Express Terms unchanged after the first 45-day comment period. The proposed Express Terms commented upon, but not revised, subsequent to the first 45-day comment period fall outside the scope of the second 45-day comment and response period. No additional comments are provided for those sections.

Supplementary Note: Section 504.2.1 listed on the commenter’s cover sheet and within the text was not part of HCD’s proposed Express Terms. In addition, page two of Comment **EM-N** references the term “conformity” which was a term not used by HCD in its express terms.

11. COMMENTER: Dan Gleiberman (**EM-S**)
Falcon Waterfree Technologies
10900 Wilshire Blvd., Suite 1500
Los Angeles, CA 90024

COMMENT: The commenter believes that HCD’s revised proposed Express Terms amending Section 402.3.3 “does not serve the public interest” and the added language directing the code user to the Health and Safety Code “does not guarantee that these codes can be applied equitably and uniformly across the state.” The commenter also resubmitted a copy of his comments and recommendations, dated May 12, 2008, previously received by HCD during the first 45-day comment period. New arguments and comments not directed toward the revised proposed Express Terms were also presented.

RESPONSE: HCD appreciates and acknowledges the comments with regard to non-water supplied urinals and welcomes positive feedback with regard to removal of the word “conforming” from Section 402.3.3.

Adding a pointer in Section 402.3.3 to reference the Health and Safety Code section is consistent with HCD formatting, current and past practice. Pointers directing the code user to statute have been used routinely and successfully in various parts of the California Building Standards Code. Similar text directing the code user to the Health and Safety Code was also provided in Sections 402.2.1 and 402.3.1 of the initial proposed Express Terms by HCD during the first 45-day comment period. There were no comments or criticisms with regard to these proposals. The California Plumbing Code utilizes this method to direct the code user to additional information within statute for both water heaters and CPVC. HCD has evaluated the comments and no new code change has been proposed as a result of these comments.

Please see **EM-3** and **EM-8 (Comment #2)** above; specifically, HCD responses regarding “non-water supplied urinals”. Those responses cover comments for HCD’s proposed Express Terms unchanged after the first 45-day comment period. The proposed Express Terms commented upon, but not revised, subsequent to the first 45-day comment period fall outside the scope of the second 45-day comment and response period. No additional comments are provided for those sections.

NO COMMENTS AND RESPONSES WERE RECEIVED DURING THE SUBSEQUENT 15-DAY COMMENT PERIOD.

(Text with the proposed changes clearly indicated was made available to the public from November 25, 2008 until December 9, 2008.)

DETERMINATION OF ALTERNATIVES CONSIDERED AND EFFECT ON PRIVATE PERSONS

(Government Code Section 11346.9(a) (4))

The Department of Housing and Community Development has determined that no alternative considered would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

REJECTED PROPOSED ALTERNATIVE THAT WOULD LESSEN THE ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

(Government Code Section 11346.9(a) (5))

No proposed alternatives were received by the Department of Housing and Community Development that would lessen the adverse economic impact on small businesses.