



August 26, 2009

<b>DOCKET</b>	
<b>09-AB 1103-1</b>	
<b>DATE</b>	<u>8/26/2009</u>
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- TO:** Art Rosenfeld, Commissioner, California Energy Commission  
 Julia Levin, Commissioner, California Energy Commission
- FR:** California Business Properties Association  
 Building Owners and Managers Association of California  
 California Association of Realtors  
 California Building Industry Association  
 California Chamber of Commerce  
 California Manufacturers and Technology Association  
 California Retailers Association  
 International Council of Shopping Centers  
 National Association of Industrial and Office Properties, California Council
- CC:** John Moffatt, Office of Governor Schwarzenegger  
 Chris Mowrer, Office of the Secretary, Resources Agency  
 Andrew Zingale, Office of Assemblymember Saldaña  
 Robin Mayer, California Energy Commission  
 Martha Brook, California Energy Commission
- RE:** AB 1103 Pre-rulemaking Proceeding; Response to “Legal Framework for Regulations”

The above referenced organizations respectfully submit the following comments regarding draft regulations recently released by the California Energy Commission (CEC) on the AB 1103 Pre-rulemaking Proceeding. Insofar as the draft regulations implement the stated intent and the codified language of AB 1103, we do have some technical concerns that have been addressed in previous comments submitted to CEC staff.

However, we object strongly to a new program written into the regulations and referred to as the “Nonresidential Building Energy Performance Report.” This program is not authorized by the enabling legislation, raises significant privacy concerns, has no funding mechanism, and has not been tested nor even been actually developed, yet is proposed as a mandate on all real estate transactions in the state. Moreover, these proposed regulations fail to meet the necessity, authority, clarity and consistency standards of the California Administrative Procedure Act (Gov. Code Section 11349.1) and relative case law.

In addition to the concern that mandating such a program exceeds the legislative authorization, we are troubled that that the CEC would consider moving forward with mandating such a program that would impact virtually every commercial real estate transaction in the state without formally consulting the Department of Real Estate and taking into account concerns regarding impact on transactions from real estate professionals.

Although these concerns were raised at a recent workshop held by the CEC, they were not adequately examined, so we hope this letter and the information herein will help you better understand our concerns, and adjust the proposed regulations.

As background, AB 1103 (Chapter 533, Statutes of 2007; codified law is Public Resources Code Section 25402.10), and a clean-up bill, AB 531 (Saldaña) currently making its way through the Legislature, among other things, specifically mandates that Energy Star Portfolio Manager data (referred to as Energy Star or ESPM) be

disclosed at the time a building is sold, leased, or re-financed. Our organizations have been active stakeholders during the legislative process and as part of the CEC’s working group.

### **NONRESIDENTIAL BUILDING ENERGY PERFORMANCE REPORT – NOT AUTHORIZED**

The draft regulations (CEC-400-2009-011-SD; August 2009) create an entirely new benchmarking program and require it be used in addition to Energy Star. Neither AB 1103 nor AB 531 provide any such authorization for the CEC to create and mandate a new program. In fact, the Legislature specifically rejected giving the CEC authority to create such a program (or use an alternate program) more than once during the legislative process.

The “legal framework” presented by CEC staff to justify this new program relies on two arguments, 1) that the CEC has “broad authority” to promulgate energy efficiency regulation, and 2) vague statements of “intent” attributed to both Assemblymember Saldaña at some point in “June” and in the non-binding “findings and declarations” section of AB 1103. Unfortunately, the document completely ignores the existing statute (PRC 25402.10), clear legislative language, and all evidence to the contrary that the legislative intent was to keep this program focused solely on Energy Star.

Regarding the first argument, it has been clearly established that the CEC’s general power to regulate does not apply when the Legislature and Governor provide specific statutory direction such as in AB 1103. An agency can only issue rules or regulations that are consistent with and not in conflict with the enabling legislation, and the rules and/or regulations must be reasonably necessary to carry through the purpose of the legislation. In other words, the CEC cannot simply ignore statutory language to expand and/or create new programs via regulations because it may increase energy efficiency.

Many considerations are taken into account during the legislative process. In this case, AB 1103 was carefully crafted with the goal of increasing benchmarking by using a proven existing program (Energy Star) to assure that impacts on real estate transactions were minimized. The language codified in the Public Resources Code is very clear that building owners are to disclose Energy Star data and in two different instances the statute provides that no further obligation is required on the part of the building owner or as part of the real estate transaction:

**Public Resources Code 25402.10 Subsection (d) specifies use of Energy Star:**

(d) On and after January 1, 2010, an owner or operator of a nonresidential building **shall disclose the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager benchmarking data and ratings** for the most recent 12-month period to a prospective buyer, lessee of the entire building, or lender that would finance the entire building. (Emphasis added).

Furthermore, the statute clearly states, in two different parts of the law, that a building owner shall not be required to do more than provide the Energy Star data:

**Public Resources Code 25402.10 Subsection (d) states providing Energy Star is all that is needed for compliance:**

If the data is delivered to a prospective buyer, lessee, or lender, a property owner, operator, or **his or her agent is not required to provide additional information, and the information shall be deemed to be adequate** to inform the prospective buyer, lessee, or lender (Emphasis added).

Finally, the statute provides protection from a requirement of providing additional information is repeated again in subsection (e) of the statute:

**Public Resources Code 25402.10 Subsection (e) states that the section does not require any further disclosure beyond existing disclosures and Energy Star:**

(e) Notwithstanding subdivision (d), **this section does not increase** or decrease the duties, if any, of a property owner, operator, or his or her broker or agent under this chapter or **alters** the duty of a seller, agent, or broker **to disclose the existence of a material fact affecting the real property.** (Emphasis added).

We believe this is unambiguous statutory language that clearly prescribes boundaries for any regulations and plainly communicates the author’s and Legislature’s intent.

During the workshop CEC staff pointed to the “Home Energy Rating Program” as an example of a program implemented under the CEC’s broad authority to validate pursuit of the program in question. However, the point is not made because the program used as an example is indeed grounded with clear legislative/statutory authority dating back to SB 1207 from 1992 which specifically directed the CEC to create the Home Energy Rating Program.

Again, we want to emphasize that although the CEC may have authority to implement energy efficiency programs when clearly and specifically directed by the Legislature, it does not have authority to ignore or exceed statutes that clearly outline program parameters. In the case of AB 1103, the Legislature provided specific direction that building energy consumption disclosures shall use Energy Star data and it in no way authorized or implied creation of a whole new program. Mandating such a program needs statutory authority and funding before it can be required as part of every real estate transaction in the state.

## NO QUESTION OF LEGISLATIVE INTENT

Page two of the “Legal Framework” justification for exceeding language in AB 1103 contains the following “argument” for intent:

*Comments by Assemblyman Saldaña posted in June support establishing a California rating system, as the EPA system does not cover every building and thus there is a need to “bridge the gap” between EPA ratings and, quote, “needs specific to California.”*

We are surprised that such a vague statement made fully a year and a half after the bill was signed into law would be used by CEC staff to rationalize an attempt at such a major expansion of policy, especially since there is ample evidence to the contrary.

Firstly, if the author of the bill, Assemblymember Saldaña, wanted to assure that the CEC develop a wholly new program, then that authorization would not have been voluntarily stricken from the bill. The legislative record shows that language contained in the first version of AB 1103 (introduced 02/23/2007) did indeed propose to authorize CEC to create such a program. However, that proposed authorization was amended out of the bill by the author on 03/29/2007 prior to its first policy hearing in Assembly Natural Resources on 04/24/2007, and was replaced with the clear direction to use only Energy Star. On a bipartisan vote, the committee approved the version of the bill that includes the Energy Star language.

After being amended out of the bill, authorization for CEC to create such a program, or use an alternative to Energy Star, never appeared in AB 1103, although it was suggested for consideration – and rejected – during the Second House Policy Committee.

Both of the preceding actions are clear indications that the Legislature discarded with cognizance exactly what the CEC regulations are currently trying to mandate.

The following is a compendium of every legislative analysis of AB 1103, which clearly shows that the author and other legislators not only understood they were specifically mandating use of Energy Star (note: the acronym for “ESPM” is used in these analyses to refer to Energy Star Portfolio Manager), but also specifically rejected granting flexibility for the CEC to use or create additional programs:

- 04-23-2007 Assembly Committee on Natural Resources analysis of the bill discusses sole use of Energy Star Portfolio Manager (ESPM) and makes no mention of authority for CEC to use or create a separate program. Immediate previous version of bill did contain authority for CEC to create a separate program; however that was **SPECIFICALLY AMENDED OUT OF THE BILL** prior to the bill being heard.
- 04-25-2007 Assembly Third Reading Floor analysis discusses sole use of Energy Star Portfolio Manager (ESPM) and makes no mention of authority for CEC to use or create a separate program.
- 06-16-2007 Senate Energy, Utilities and Communications Committee analysis notes that there are other benchmarking tools aside from ESPM, including a California-specific tool designed by LBNL. The analysis states “*The author and committee may wish to consider giving the CEC the flexibility to change to a different benchmarking tool if appropriate.*” However, such an amendment was not adopted and the **CEC WAS NOT GIVEN FLEXIBILITY** to consider any benchmarking program other than ESPM.
- 06-20-2007, 08-29-2007, 09-05-2007 & 09-08-2007 Senate Floor Analysis. All analyses clearly state ESPM the sole program mandated in this bill. Although each analysis mentions that CEC has discussed a separate benchmarking system, nothing in the analyses implies or suggests that the bill provided authority for CEC to implement anything but ESPM. Per the Senate Policy Committee analysis it is clear that the Legislature did indeed consider providing CEC flexibility to use its own, or other programs, however **THE LEGISLATURE SPECIFICALLY CHOSE NOT TO GRANT CEC AUTHORITY TO USE ANYTHING BUT ESPM.**
- 9-12-2007 Assembly Concurrence Floor Analysis discusses sole use of Energy Star Portfolio Manager (ESPM) and makes no mention of any alternative or additional program.

Finally, it should be noted that AB 1103 did not go through a fiscal committee. Since an existing federal program was going to be used, it was determined that the state would not have to develop anything and would therefore bear no additional costs. This further speaks to the fact that the legislative intent was not for the state to devise a new and separate program, which would have been tagged as having a fiscal impact.

Again, we believe these draft regulations clearly exceed the statutory authority of the CEC and ask that they be adjusted to remove the Nonresidential Building Performance Report until such time that the statutory authority is provided and funding for the program is secured.

Unfortunately, the focus on this issue has diverted the discussion from many important technical issues inherent in implementing this program. The CEC regulatory process should be focused on devising an Energy Star-based program that can be implemented in the most efficacious manner possible.

Thank you for taking our views into consideration. If you have any questions, comments, or would like additional context or information, please contact on behalf of the coalition either Matthew Hargrove, California Business Properties Association ([mhargrove@cbpa.com](mailto:mhargrove@cbpa.com) – 916-443-4676) or Elizabeth Gavric ([elizabethg@car.org](mailto:elizabethg@car.org) – 916-492-5200).

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