



June 17, 2010

TO: California Energy Commission
Dockets Office, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

DOCKET

09-AB 1103-1

DATE JUN 17 2010

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FR: California Business Properties Association	California Grocers Association
Building Owners & Managers Association of CA	California Manufacturers and Technology Association
California Association of Realtors	California Retailers Association
California Building Industry Association	International Council of Shopping Centers
California Chamber of Commerce	NAIOP of California, the Commercial Real Estate Development Association

**RE: Docket No. 09-AB 1103-01; REVISED STAFF DRAFT,
Publication # CEC-400-2010-004-SD. Posted: May 17, 2010**

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. Overall, we think the latest iteration of the regulations are a great improvement, however we do have some lingering policy and technical concerns, which we respectfully submit for your consideration.

In summary, here are our primary concerns and suggestions:

- 1) The regulations should clearly state that buildings that receive an ENERGY STAR Benchmark and/or “California Energy Performance Disclosure Report” (CA Disclosure) data are not required to provide additional information to the CEC unless they are voluntarily submitting the information for further analysis.
- 2) The CEC should be clear in communicating that the proposed “California Building Energy Performance Rating” is different and separate from the CA Disclosure and that it is strictly voluntary and not required to fulfill the requirements of this regulation.
- 3) The CA Disclosure should only be required once the program is functional, has been tested, and program support is available to property owners, operators, or their agents, and others who may be required or authorized and/or contracted to use the program from the CEC for such purposes.
- 4) “Safe Harbor” should be provided for those building owners acting in good faith that cannot get utility information or otherwise cannot reasonably complete the disclosure in the specified timeframe.

We think these are relatively easy issues to address and hope we can work through them with the Energy Commission before 45-day language is released. Attached are some suggested language changes, along with a more in-depth discussion of our concerns. We hope you will take our comments in the helpful spirit in which they are offered and look forward to working with Commissioners and staff on these issues.

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 – 916-443-4676) or Elizabeth Gavric, California Association of REALTORS® (elizabethg@car.org – 916-492-5200).

*Detailed Comments Regarding
Docket No. 09-AB 1103-01; REVISED STAFF DRAFT,
Publication # CEC-400-2010-004-SD. Posted: May 17, 2010*

CA DISCLOSURE UNWARRANTED WHEN ENERGY STAR SCORE IS DISCLOSED

Our greatest concern is disclosure of information above and beyond the ENERGY STAR data required by the authorizing legislation, AB 1103 (Chapter 533, Statutes of 2007; Public Resources Code Section 25402.10), and the clean-up bill, AB 531 (Chapter 323, Statutes of 2009), contained in provisions in the regulations related to the “California Energy Performance Disclosure Report” (CA Disclosure).

Public Resources Code 25402.10 Subsection (d) specifies: *“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.”*

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 to the other party in the financial transaction:

Public Resources Code 25402.10 Subsection (d): *“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).*

Since the law is clear in this regard, we request that the regulations be clarified in a manner that states a transaction is in compliance with this law by providing ENERGY STAR and/or the CA Disclosure information. Anything beyond that may be encouraged, but is voluntary only. We have no issues with voluntary use of the California Building Energy Performance Rating and believe that it may prove to be a useful tool, but it should be clear that providing such information to the CEC is not mandatory, as that is an overbroad requirement not authorized by the underlying law.

Furthermore, we are concerned that the CA Disclosure module is not yet publicly available for peer and industry review. Current concerns about data disclosure and data aggregation combined with inherent uncertainties in implementing untested programs necessitates a period of testing and training, and identifying support for resources prior to imposing a mandate for statewide application.

We also remain concerned that the underlying law does not support or authorize a regulatory mandate for providing all energy information to the CEC. Neither AB 1103 nor AB 531 provide any such authorization for the CEC to mandatorily collect all information for every non-residential real estate transaction. In fact, the Legislature specifically rejected giving the CEC authority to create such a program more than once during the legislative process.

There is no need to provide this information to fulfill the disclosure requirements that these regulations are seeking to implement.

IMPACT ON REAL ESTATE TRANSACTIONS

These proposed regulations do not appear 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 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.

SAFE HARBOR NEEDED

We also request that the regulations include a provision to provide a “safe harbor” to a building owner acting in good faith that cannot get the necessary information to benchmark the building or who cannot complete the disclosure within the specified timeframe. As we have learned throughout this regulatory proceeding there are some situations where energy data might not be readily available, or accurate, for upload to the ENERGY STAR Portfolio Manager.

For example, if a tenant is considering multiple buildings and the California Energy Performance Disclosure Report is not available at or before the time the owner presents the lease, due to information not being made available by the utility within 15 days of receiving the request (as outlined in section 1683 (b)) – we could lose ability to present leases in a timely/competitive manner.

The same challenge exists if loans are held up due to lack of 3rd party (utility) compliance or due to IT challenges with the CA Energy Performance Disclosure Report. Neither of which a building owner has any control over.

Since the responsibility, and in many cases the ability, for obtaining that information is not within the legal scope of a building owner or third party manager (most notably the situation where utilities provide service directly to tenants), some type of safe harbor should be present to allow a transaction to move forward.

FUNDING

We are concerned that the CEC has not identified any funding for implementation of this program, nor dedicated any staff resources to help educate the public and assist those who are having technical difficulty. This regulation will apply to every real estate business and financial transaction in the state, and consumers should have a centralized resource to contact if there are difficulties.

CA SPECIFIC RATING SYSTEM - OTHER CONCERNS

Although we understand the intent behind the California Building Energy Performance Rating (the “paw prints”), and do not object to it as long as it is strictly a voluntary program, we have some concerns that we would like to share.

First and foremost, much like the “market confusion” the CEC was concerned would be created by the state adopting CALGreen “tiers” during the Green Building Code discussion, we point out that CEC is now proposing a similar rating system that could create market confusion with ENERGY STAR. Ultimately we think the market will be able to resolve confusion in both instances, but want to make sure the CEC internally resolves its own concerns and provides clear policy direction with regard to such market confusion.

We are also concerned this rating program could provide a false impression of building performance, based on tenant energy usage, which in many cases the landlord does not have any control over. As far as we can tell, the California specific rating system will not be sophisticated enough to differentiate between different tenant energy use patterns, or account for building vacancies, which may wildly fluctuate in the number of “paw prints” it assigns to the building based on the time of use. Additionally, industrial buildings can see significant shifts in primary function (dry storage vs. refrigerated storage vs. manufacturing) and in energy use as a result of the operations depending on the tenant. The landlord does not dictate the operations of the tenants and may be penalized in the market for a perceived lack of building efficiency.

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DRAFT REGULATIONS
Implementing AB 1103 (2007, Saldaña)
Revised May 17, 2010

California Code of Regulations
Title 20. Public Utilities and Energy
Chapter 4. Energy Conservation
Article 9. Nonresidential Building Energy Performance
Statements and Disclosures

Section 1680. Purpose

This article implements procedures, pursuant to Public Resources Code section 25402.10, for reporting energy use data and disclosing energy use data and energy efficiency ratings for nonresidential buildings in California.

Note: Authority cited: Sections 25213, 25218(e), and 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Section 1681. Scope

This article applies to all nonresidential buildings in California.

Note: Authority cited: Sections 25213, 25218(e), and 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Section 1682. Definitions

The following definitions apply to this article:

- (a) "Building Owner" means a person possessing title to the building, or an agent authorized to act on behalf of the person possessing title.
- (b) "California Energy Performance Disclosure Report" means a Customized Report Format established by the Energy Commission which is available within the U.S. EPA Portfolio Manager. The Report shall contain all data necessary to generate a Portfolio Manager Energy Performance Rating, or if a Rating is not available, to generate a Portfolio Manager Energy Use Index. Report data shall include, but not be limited to:
 - (1) the Portfolio Manager building identification number;
 - (2) facility name, address, and owner;
 - (3) ending date of the 12-month reporting period;
 - (4) date of the Report;

- (5) total floor space in square feet;
 - (6) building characteristics as defined by Portfolio Manager by building type;
 - (7) Portfolio Manager Energy Performance Rating, if available;
 - (8) building Energy Use Index;
 - (9) national average Energy Use Index for the Portfolio Manager building type;
 - (10) all available energy use data applicable to the building, including but not limited to, electricity, natural gas, and renewable energy; and
 - (11) site energy use in kBtus.
- (c) “Energy Commission” means the California Energy Commission.
 - (d) “Energy” means electricity, natural gas, heating oil, or other product sold by a utility to a customer of a nonresidential building, or renewable electricity generated on the building’s site.
 - (e) “ENERGY STAR® Label” means the EPA label awarded to buildings receiving an Energy Performance Rating of 75 or higher.
 - (f) “Energy Performance Rating” means the EPA energy efficiency measurement represented by a score from 1 to 100, which is normalized for a building’s characteristics, operations, and weather.
 - (g) “Energy Use Data” means kilowatt hours, therms, or other measures of energy use by a nonresidential building.
 - (h) “Energy Use Index” or “EUI” means the building’s energy use measured in kBtus per square foot per year.
 - (i) “Entire Building” means the portion of the building for which the owner possesses title.
 - (j) “EPA” means the U.S. Environmental Protection Agency.
 - (k) “kBtus” means kilo British thermal units.
 - (l) “Nonresidential Building” means a building of an occupancy type A, B, E, I-1, I-2, M, R1, S, and type U parking garages, as defined in the California Building Code, title 24, section 302 et seq. (2007).
 - (m) “Portfolio Manager” means the EPA’s online tool for managing building energy use data.
 - (n) “Statement of Energy Performance” means the EPA statement of a building’s Energy Use Index, characteristics, contact information, and if available, the building’s Energy Performance Rating.
 - (o) “Tenant” means a person leasing space in a nonresidential building.
 - (p) “Utility” means an entity providing energy to a nonresidential building owner or tenant.

Note: Authority cited: Sections 25213, 25218(e), and 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code; Sections 302 et seq., Title 24, California Building Code.

Section 1683. Creation of ENERGY STAR® Portfolio Manager Account; Utility Release of Data; Release of Data to Energy Commission; Receipt of Statement of Energy Performance

- (a) According to the implementation schedule specified in Section 1685, and at least 30 days before, if possible, a disclosure is required by Section 1684, a building owner shall open an account at the U.S. EPA’s ENERGY STAR® Portfolio Manager website, and in that account:
 - (1) provide contact information;
 - (2) identify the building and the Portfolio Manager building type;

Comment [mgh1]: Recognizing that some sales may take less than 30 days to complete.

- (3) identify all utility company meters and utility company accounts serving the building;
 - (4) provide building characteristics specified by Portfolio Manager for the building type;
 - (5) authorize all utility companies serving the building to release energy use data to the owner's Portfolio Manager account; and
 - (6) request all utility companies serving the building to release all energy use data from the most recent 12 months to the owner's Portfolio Manager account.
- (b) Within 15 days of receiving a request from a building owner to release energy use data to the U.S. EPA's Portfolio Manager, a utility company shall upload the entire building's energy use data to the building owner's Portfolio Manager account, subject to the following conditions:
- (1) a utility company shall release tenant energy use data to the building owner's Portfolio Manager account solely for the purpose of complying with Public Resources Code section 25402.10;
 - (2) a building owner shall use and disclose tenant energy use data solely for the purpose of complying with Public Resources Code section 25402.10.
- (c) After all utility companies serving a building have uploaded the building's energy use data, the building owner shall, in sufficient time to comply with the schedule specified in Section 1685, use the Portfolio Manager account to:
- (1) generate a Statement of Energy Performance for the building, and
 - (2) generate ~~an a~~ California Energy Performance Disclosure Report ~~and electronically submit the Report to the Commission. Disclosure of this information to the CEC for further analysis shall be on a voluntary basis.~~

Note: Authority cited: Sections 25213, 25216.5(d), 25218(e), 25320, 25402.10, Public Resources Code. Reference: Sections 25402.10, 25321, 25322, Public Resources Code.

Section 1684. Disclosure of Statement of Energy Performance and California Energy Performance Disclosure Report

According to the schedule established in Section 1685, a building owner shall disclose the U.S. EPA's Portfolio Manager's Statement of Energy Performance and the California Energy Performance Disclosure Report:

- (a) at or before the time the owner presents a sales contract to a prospective buyer;
- (b) at or before the time the owner presents a lease for the entire building to a prospective lessee; and
- (c) at or before the time the owner presents a loan application to finance the entire building to a prospective lender.
- ~~(e)(d)~~ **"SAFE HARBOR LANGUAGE"**

Note: Authority cited: Sections 25213, 25218(e), and 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Comment [mgh2]: We are concerned at the availability of this function within portfolio manager, and question whether this should be mandated prior to some rudimentary testing and a plan at the CEC to provide help/support to those who may experience technical difficulty when using the system.

Comment [mgh3]: Reporting to the CEC all data related to energy use in all non-residential private buildings is above and beyond the scope of AB 1103 /AB 531 or the Commission's existing statutory authority.

Encouraging building owners to take the further step of voluntarily reporting this data to the CEC to receive a "California Building Energy Performance Rating" is acceptable. However, it should be clear this is not mandatory to fulfill the requirements of AB 1103/AB 531.

Comment [mgh4]: The regulations should provide "Safe Harbor" for a property owner that, for some reason outside their control, is unable to benchmark the building and/or provide CA Disclosure information. The most likely scenario is that the building owner is unable to get tenant energy information in a master meter situation from either the tenant or the local utility.

Section 1685. Implementation Schedule for Disclosures

- (a) On and after ~~January~~ **June** 1, 2011, a building owner shall disclose, pursuant to Section 1684, the Statement of Energy Performance and the California Energy Performance Disclosure Report for a nonresidential building that:
- (1) has a total floor space measuring 50,000 square feet or more, or
 - (2) is solely occupied by the owner and has a total floor space measuring 1,000 square feet or more.
- (b) On and after January 1, 2012, a building owner shall disclose, pursuant to Section 1684, the Statement of Energy Performance and the California Energy Performance Disclosure Report for a nonresidential building that has a total floor space measuring 10,000 to 50,000 square feet.
- (c) On and after July 1, 2012, a building owner shall disclose, pursuant to Section 1684, the Statement of Energy Performance and the California Energy Performance Disclosure Report for a nonresidential building that has a total floor space measuring 1,000 to 10,000 square feet.

Note: Authority cited: Sections 25213, 25218(e), and 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Comment [mgh5]: We are concerned that the CEC is not providing any time to make sure that impacted parties are aware of this requirement. As well, we are also concerned that there is not an education/communications plan being discussed.