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CHEERS Comments on Revised Draft Staff Report

Additional submitted attachment is included below.

CHEERS

1610 R St, Ste 200, Sacramento, CA 95811
www.cheers.org

Via CEC Docket 22-BSTD-03
June 21, 2023

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 Ninth Street, MS-39
Sacramento, CA 95814

CHEERS submits the following comments in response to the FV&DT Pre-rulemaking Workshop #3 held June 9th, 2023 which covered the changes made in the Revised Draft Staff Report issued on May 24th, 2023. The comments below are provided by CHEERS as initial feedback to the workshop presentations, discussion, and corresponding Staff reports. They are intended as preliminary commentary to be followed up with additional support, and likely other ideas, as the OIR process moves forward. CHEERS welcomes the the opportunity to collaborate and reiterates our willingness to work with Staff and the industry to achieve the desirable outcomes originally intended of the HERS program.

General Comments

HERS Program Mission

Per the California Energy Commission's (CEC) website: "The California Energy Commission is leading the state to a 100 percent clean energy future for all. As the state's primary energy policy and planning agency, the Energy Commission plays a critical role in creating the energy system of the future - one that is clean, is modern, and ensures the fifth largest economy in the world continues to thrive."

- The CEC is the State's primary energy policy and planning agency

Per the CEC's website: "The HERS Program, also called the Field Verification and Diagnostic Testing Program, is a way to ensure that the various features of a home meet the California Building Energy Efficiency Standards (Energy Code). If work requires HERS testing, a rater will perform field verification and diagnostic testing on the appropriate features. If the system fails, the contractor is required to fix it."

- The HERS Program ensures compliance with the California Building Energy Efficiency Standards (Energy Code)

The CEC's website goes on to define the role of the Provider: "Approved by the CEC, HERS providers are companies who train, certify, and oversee the performance and behavior of HERS raters. They are also approved to operate data registries. A registry is where project compliance forms (the forms hosting the data on the particular energy efficiency feature) are completed and stored for review by the builder or contractor, building department officials, CEC staff, and the building owner. These registries may be found on the provider's website and may be accessible to the homeowner."

- The Providers train, certify, and oversee the performance and behavior of the HERS raters while maintaining a registry to ensure project compliance with the Energy Code

The CEC has informally introduced a new expectation that positions the Providers as "consumer protection agencies". This is a new, undefined requirement for the Providers to be required to administer. CHEERS respectfully suggests the CEC hold the appropriate state agency accountable as consumer protection agencies as they pertain to residential and non-residential construction matters.

Appropriate State agencies accountable for consumer protection related issues include:

1. Contractors State Licensing Board (CSLB): "The Contractors State License Board protects consumers by regulating the construction industry through policies that promote the health, safety, and general welfare of the public in matters relating to construction."
    a. The CSLB "**protects consumers** by regulating the construction industry."

2. California Public Utility Commission (CPUC): "CPUC is dedicated to ensuring that you have safe, reliable utility service at reasonable rates, protecting against fraud, and promoting the health of California's economy."
    a. The CPUC "**protects against fraud"**

CHEERS appreciates and expects the CEC to require Providers to train, certify and oversee the performance and behavior of HERS raters. Moreover, CHEERS recognizes its responsibility in approving and operating data registries to ensure new construction and alteration projects are compliant with the California Energy Code. Finally, CHEERS requests the CEC reconsider the proposed changes related to consumer protection in the recent Staff Report and reassigns the consumer protection responsibility to the appropriate agencies.

Conflict of Interest

- CHEERS appreciates the staff's response to the stakeholder feedback that is shown in the revised language.
- CHEERS supports homeowner notification/education on Rater accountability, however there are some challenges with the current proposed language.
    - The proposed language stipulates that "prior to starting any field verification or diagnostic testing, the Rater or Rater Company must register a form, signed by the building owner, in which the owner consents to the Rater entering the premises and performing the verification". Failure to do so will result in disciplinary action.
        - First challenge - how would a Provider know that this form was registered prior to the start of the FVDT?
            - If this process is subject to disciplinary action, the process must be structured in such a way that the Provider can check the data and cross reference with other data to ensure compliance.
        - Second challenge - in what format would this "form" exist? It would likely need to be a document that exists outside the registry so that it can be presented to the building owner, they can review it and then sign it, which would make it impossible to be "registered" in the traditional sense.
            - This creates an additional hurdle to Provider oversight of this regulation.
        - Third challenge - what is the process the Rater must follow should the building owner refuse access to the site?
- CHEERS proposes that any Provider oversight be limited to a review of the project site in the registry to determine if the "form" is present and not include validation as to when the "form" was "registered".

Providers "Accepting" Data

- Providers accept large amounts of data.
    - Hundreds of thousands of documents and millions of data points
- Providers employ several validation processes, both schema based as well as other internal processes, to ensure to the best of our ability that only compliant data is accepted into the registry.
    - Compliant data cannot be confused with untrue or "conflicted" data.
- When Providers read language like "ECC-Providers shall not accept or store, conflicted data on their systems.", that is an unreasonable requirement that holds a penalty of disciplinary action.
- Providers have never knowingly accepted untrue or "conflicted" data.

- CHEERS would propose that language should focus on Providers "knowingly accepting" untrue or conflicted data.
- CHEERS asks that when proposing new regulations, there's proper consideration as to how a Provider would be able to demonstrate compliance with that regulation. For example,
    - An ECC-Provider shall not accept compliance documents for registration for a project that has an active failed field verification or diagnostic tests in any other ECC-Provider data registry.
- Providers do not have access to each other's databases and therefore would not be able to enforce this proposed regulation.
- The Providers would need more time to consider a possible solution.

Quality Assurance

- What is the goal of the QA program?
    - First, prevent bad actors from continuing to operate in the industry.
    - Second, address training related failures.
        - The current structure is very limiting and forces a provider to put all its resources towards basic compliance with the regulations and leaves little room for innovation.
        - The proposed structure ignores the first and primary task and instead shifts the focus to training related failures. Shadow and laboratory audits are great for addressing training related failures but will do nothing to address the more damaging failures committed by bad actors.
- Providers agree that the QA programs need to be regulated, but too strict regulations will have the Providers focusing on complying with the regulations versus focusing on addressing the first and primary task, bad actors, in the most effective way.
- The Providers propose discussing this further in a working session where the objective would be to find a balance between regulatory quotas and effective, flexible quality assurance programs.

Subjective Staff Review of Application Materials

- The proposed language requires things like the laboratory, the laboratory training, and the application as a whole to be reviewed by staff members without a well-defined scope that Providers can use as a guide to build and create their processes.
- The subjective nature of these staff reviews leads to inconsistencies between the Providers and even each code cycle review. What was acceptable one code cycle becomes deficient the next due only to staff changes and their interpretation of the code language.
    - For example, a rubric that outlines what topics must be covered versus just the high-level subject. Or outlining what the staff member will be looking for when they review the laboratory setting so the Provider knows ahead of time what is expected and then builds the laboratory to that standard. These same principles can be applied to the entire review process so that as staff changes, the review process remains consistent.

Need For a Working Session

- While CHEERS understands that the CEC, being a government entity that must comply with a myriad of rules and regulations, may not be able to communicate and work with various stakeholders with the ease of those operating in the private sector, we feel that a working session with staff is necessary to talk through the proposed regulations.
- This free sharing of goals and ideas will allow all parties to contribute to improving the program we all rely on. Those that operate solely in the private market know the value of these working sessions as they are at the core of every thriving business and industry. We look forward to working with staff and other stakeholders in whatever form these working sessions may take.

CHEERS
1610 R St, Ste 200, Sacramento, CA 95811
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Comments Specific to Proposed Code Language

1. JA7.5.2.6 - 72 hours
    a. It is unclear as to the purpose of this requirement. It would seem to possibly be a replacement for the previously proposed limit on the number of verifications that could be registered in a 24-hour time frame. The purpose of that requirement was to prevent Raters from registering more documents than could be feasibly completed in a 24-hour period. This new requirement does not accomplish that task and therefore is not a reasonable replacement.
    b. If this requirement were to remain, there would be additional challenges associated with its implementation. For example;
        i. How will Providers know when the 72-hour timeframe begins? We are only collecting a date, not a time.
        ii. What about editing the document after 72 hours?
        iii. Does the data become "conflicted" or "untrue" after 72 hours?
        iv. How would a Rater remedy a violation of this requirement?
2. JA7.5.6.1 - Photographs
    a. The wording for this regulation appears to imply that it is optional. Adding regulation to something Raters are currently doing voluntarily will dissuade them from continuing this behavior. This proposed regulation serves no purpose if it is not required.
3. RA1.2 - Winter Setup
    a. The Winter Setup method was developed to address an issue that Raters face when trying to verify Refrigerant Charge during the colder months. To date, not a single verification has been able to utilize this method as no manufacturer has approved the use of this method to verify their equipment. Unless the CEC can show that manufactures are likely to approve this method, the addition of this language serves no purpose and should be removed along with the Winter Setup method as a whole.
4. RA2.1 - Special Inspector
    a. It remains unclear why this designation needs to be removed. Having the designation of "Special Inspector" allows the Rater to carry with them a weight that gives substance to their work. They are acting on behalf of the building inspector by performing part of the energy efficiency inspection that they are unable to do. Removal of this designation will do more harm than good. If any changes are to be made, we would recommend that the mandate to "demonstrate competence" be removed and that it be at the sole discretion of the building official. For example, the regulation would read in part "special inspectors by the enforcement agencies and <u>at the request of the enforcement agency</u>, the Rater shall demonstrate…"
5. 10-103.3(b)1Avii - Building Owner Registered "Form"
    a. We support homeowner notification/education on Rater accountability, however there are some challenges with the current proposed language.
    b. The proposed language stipulates that "prior to starting any field verification or diagnostic testing, the Rater or Rater Company must register a form, signed by the building owner, in which the owner consents to the Rater entering the premises and performing the verification". Failure to do so will result in disciplinary action.
        i. First challenge - how would a Provider know that this form was registered prior to the start of the FVDT?
            1. If this process is subject to disciplinary action, the process must be structured in such a way that the Provider can check the data and cross reference with other data to ensure compliance.

ii. Second challenge - in what format would this "form" exist? It would likely need to be a document that exists outside the registry so that it can be presented to the building owner, they can review it and then sign it, which would make it impossible to be "registered" in the traditional sense. This creates an additional hurdle to Provider oversight of this regulation.
iii. Third challenge - what is the process the Rater must follow should the building owner refuse access to the site?
iv. Additional questions
    1. Will building owners be required to create a user account with the Provider for the sole purpose of "registering" this "form"?
    2. What if the building owner is not the one contracting for the work/verification?
    3. What if the building owner refuses to sign the form but is willing to let the Rater perform their FV&DT?

c. CHEERS would propose that any Provider oversight be limited to a review of the project site in the registry to determine if the "form" is present and not include validation as to when the "form" was "registered".

6. 10-103.3(b)1Aviii - Rater of Record
    a. The proposed regulations need to be updated to account for Rater Companies (RCOR). In order for large Rater Companies to maintain a high level of efficiency, they will often send a different Rater to a project when a previously failed FV&DT is ready for retesting. The regulation, as it is currently written, would prevent Rater Companies from continuing with this model which would ultimately increase costs and slow down the verification process.
    b. In addition, it is not clearly stated that registration of FV&DT is a requirement. If the ROR/RCOR does not register the failure, this requirement will be unable to accomplish the intended goal. The requirement to register failed FV&DT will need to be clearly stated and failure to do so will be subject to disciplinary action.
7. 10-103.3(b)1Aviiia - ROR Shadow Audit
    a. If the ROR is willing to release the project or is unable to continue work, the project would then not qualify under the definition of "Rater shopping", which this regulation is intended to address. The requirement for a "Shadow Audit" is excessive and unnecessary in this circumstance and would imply that any Rater that replaces another, even for a valid reason, is suspect and must be monitored by their Provider. The regulation, as written, would eliminate the possibility of the project being "Rater shopped" and invalidates any need for additional Provider oversight of the replacement Rater's work. An acceptable alternative would be a requirement that the replacement Rater provide photo documentation of their verification.
8. 10-103.3(b)1Aviiib - Lock project compliance documentation
    a. Restricting the responsible person to the Rater/Rater Company on a failed form or on a site with a failed form can be done easily, but this will not stop a user from creating an entirely new site to bypass this restriction.
    b. This will be a programming challenge due to the workflow. Permit numbers are not added until after the project is created and 1R's are signed. A slight change to the address (Street instead of St.) would allow the project to be newly created and a similar tactic could be used for the permit number. It should also be noted that not all CF1R documents are associated with a unique address. A large property with a main house and secondary dwelling can have the same address, further complicating the programming challenge.
    c. 10-103.3(b)1Aix - Use of Registered Certificates
    a. The purpose of this requirement is unclear. Please provide an explanation for the inclusion of this language.
10. 10-103.3(b)1Bia - Conflicted Data Rater Statement
    a. Any statements affirming compliance with regulation should be covered by the standardized responsible person signature statement found on the Certificate of Verification. It should not be the

responsibility of the Provider to require additional affirmations. If CEC staff does not believe that this prohibition is clear in the standardized signature statement, that statement should be modified in lieu of this proposed language.

11. 10-103.3(b)1Biib - Conflicted Data - Desk Audit
    a. It is unclear how this would be achieved. What data point/s that are available for Provider review in the Registry database would indicate that the Rater had a conflict of interest at the time the data was submitted?
12. Removing Conflicted Data
    a. Insert CalCERTS notes
13. 10-103.3(c) - Provider Approval
    a. The proposed language requires things like the laboratory, the laboratory training, and the application as a whole to be reviewed by staff members without a well-defined scope that Providers can use as a guide to build and create their processes. The subjective nature of these staff reviews leads to inconsistencies between the Providers and even each code cycle review. What was acceptable one code cycle becomes deficient the next due only to staff changes and their interpretation of the code language. For example, a rubric that outlines what topics must be covered versus just the high-level subject. Or outlining what the staff member will be looking for when they review the laboratory setting so the Provider knows ahead of time what is expected and then builds the laboratory to that standard. These same principles can be applied to the entire review process so that as staff changes, the review process remains consistent.
14. 10-103.3(d)1 - Rater Training - Cross-Provider certification
    a. It has long been a common practice for Raters to certify with multiple Providers, with no guidance from the regulations as to how a Provider should address this other than to treat them like a new, uncertified applicant. We propose that existing Raters should not be required to meet any training or testing requirements when applying to a secondary Provider, given that Rater is in good standing with their current Provider. A Rater in good standing with one Provider should be allowed certification with any other Provider. The Rater would still need to sign the Rater Agreement and provide any other documentation requested by the Provider as part of the application process.
15. 10-103.3(d)1C - Code Cycle Update
    a. The proposed language contains conflicting statements. The first sentence states that the Rater will need to be trained only on the changes made during the code cycle update. The following sentence then states that the training will need to include all the materials outlined in 10-103(d)1A, including basic building science concepts and worksite safety. The language needs to be revised to clarify that the training only needs to comply with the relevant portions of 10-103(d)1A.
16. 10-103.3(d)5A - Quality Assurance Staff
    a. The proposed regulation makes mention of, for the first time, the concept of Quality Assurance (QA) staff being subject to a Quality Assurance review. What is not included are guidelines supporting this concept. Will the proposed regulations include when a QA staff QA review will be required or who will perform this QA staff QA review? The full regulation must be included in the proposed language for review and comment.
17. 10-103.3(d)5Cid - QA - Onsite Audit - Pass/Fail criteria
    a. The proposed language seems to imply that if the system being tested during the Onsite Audit meets the criteria outlined in the applicable Reference Appendices section, then the Audit is deemed a "Pass". This begs the question, is the purpose of this Audit simply to determine if the system in is compliance with T24 requirements or to determine if the Rater performed their verification correctly? For example, using a duct leakage test with a target leakage of 100 cfm where the Rater reported a leakage rate of 98 cfm and the QA auditor reports a result of 104 cfm. This would fail per the criteria listed. On the other end of the spectrum, you have the same system where the Rater reports 50 cfm and the QA auditor reports 98 cfm. This would pass per the criteria

listed. However, the second scenario is a huge red flag pointing to a likelihood that the Rater did not perform the test correctly or reported untrue results and the first is within an expected tolerance. The results of these Onsite Audits produce results opposite of what we would expect. We propose that CEC staff develop a set of standards for each FV&DT that are to be used by every provider to determine if the QA auditor's results are within an acceptable range when compared to the Raters reported results.

18. 10-103.3(d)5Cif - Onsite Audit for Sample Groups
    a. This requirement will be a de facto elimination of RNC sampling. Builders will not risk having their whole project be deemed "conflicted data" should they not be able to comply with this regulation. It is also unclear as to what this regulation is meant to achieve. If the Rater and installing contractor know that the seventh sample group will be tested, this knowledge allows them to ensure that each home in the group is in a compliant state regardless of the state of the homes in previous and future sample groups. If the goal is to assess the status of sampled homes to determine if they are in compliance with T24, identifying a specific group nullifies the assessment.
19. 10-103.3(d)5Ciia - Shadow Audit Scheduling
    a. The proposed language states that "The ECC-Rater shall be informed of the shadow audit on the day of the audit…". How is the Provider supposed to schedule a shadow audit if they have not communicated with the Rater to identify their schedule? Is the expectation that the Provider contact a Rater in the morning and then join them on whatever jobs they may have scheduled for the day, if they even have any jobs scheduled that day? That would be an unreasonable and terribly inefficient method for scheduling.
    b. The proposed language states that the homeowner "shall grant entry" and then is immediately followed by "If entry is refused". If the homeowner can refuse entry, what is the purpose of the "shall grant entry" language. Again, if the Provider is expected to send QA staff to a site where they might be denied entry, this is an unreasonable and inefficient method for performing audits. The Providers should be allowed to communicate not only with the Rater, but also with the building owner to confirm access to the site prior to sending QA staff to the site.
20. 10-103.3(d)5Ciid - Shadow Audit Checklist
    a. This checklist must be provided for review and comment.
21. 10-103.3(d)5Ciii - In-Lab Audit Frequency
    a. The proposed regulation stipulates that every Rater pass an In-Lab Audit every year and once every three years for "Verified" Raters. This is excessive for any Rater that has minimum experience and unnecessary for "Verified" Raters. The goal of this audit is not clearly stated. It would appear that this audit is meant to assess the level of knowledge of the Rater and their ability to correctly perform FV&DT. Once a Rater has demonstrated their ability to correctly perform these verifications, the efficacy of this requirement diminishes significantly. We would propose a trigger based on the number of sites verified for new users as a follow-up to their initial training. If they can demonstrate their ability to correctly perform the verification, further In-Lab Audits will be meaningless. If they are unable to correctly perform the verification, the Rater would be required to complete additional training and be subject to additional In-Lab Audits.
22. 10-103.3(d)5Ciiif - In-Lab Audit - Prohibition on providing equipment
    a. This limitation will create difficulties for Raters that need to travel by air to get to the laboratory. Shipping their equipment to the site will be costly and create scheduling issues while their equipment is in transit. Having equipment on site for the Rater to select from will not diminish the efficacy of the audit. A Rater should be permitted to bring their own equipment but there should not be a requirement that they must do so.
23. 10-103.3(d)5Civ - Desk Audits
    a. The proposed language seems to indicate that the Rater will be completing and be responsible for CF1R and CF2R documents and as part of the Desk Audit, Provider QA staff will review these

documents for consistency and accuracy and penalize Raters if they do not meet this standard. Raters are specifically prohibited from being responsible for CF1R and CF2R documents and there are no regulations that outline a process where a Rater would review these documents for consistency and accuracy and report their findings. How would a Rater be held responsible for something that is not their responsibility? If CEC staff wants Raters to review and certify the consistency and accuracy of CF1R and CF2R documents, protocols will need to be developed that provide instruction on how this is to be achieved and documented.

24. 10-103.3(d)5Civa - Desk Audit "Variance's"
    a. It is our position that any "variance" or other threshold that is used to determine the result of an audit be set by the CEC. There is a need for consistency between Provider QA programs that can only be achieved by a set of standards set at the regulatory level that all Providers must abide by. This consistency allows Raters and Rater Companies to know and understand the standard they will be held to regardless of which provider that particular site was registered with. It also prevents Raters from "Provider shopping" based on a Providers QA Program by not allowing one Provider from having a less stringent set of standards that may be appealing to certain Raters. This would be in alignment with other proposed regulations that intend to deal with Raters moving from one Provider to another due to QA failures.
25. Remedy for Failed QA
    a. Insert CalCERTS notes
26. 10-103.3(d)10B - Data Access
    a. This request is unreasonable. The abilities listed here require the expertise of a high-level database programmer and cannot be easily made available to people without this expertise. A tool that would allow this level of access would be prohibitively expensive. We would propose that CEC staff take advantage of existing language that allows for a data repository to be created and utilize that repository for data analysis.
27. 10-103.3(d)11Giiic - Annual Reporting - Registered data comparison
    a. The proposed language indicates that the Provider is to determine whether the total number of FV&DT registered by each company matches the total number of FV&DT registered by each company. What is the source of the data that is to be compared to the Providers database? What is the purpose of this regulation?
28. 10-103.3(d)15 - Provider Discipline - "Severe violation"
    a. In the definition of "Severe violation", it includes "knowingly creating false field verification or diagnostic testing documents." Providers do not create field verification or diagnostic testing documents. It is unclear why this language was included in this definition for Providers.
29. 10-103.3(f)2D - Rater Company - Required Conduct - Document Author
    a. The proposed regulation specifically identifies the Certificate of Compliance and Certificate of Installation as documents which a Rater Company can act as the document author but leaves out the Certificate of Verification. Is it correct to interpret this as only the Rater who performed the FV&DT can act as the document author? This would be a significant change to the current process which allows Rater Company staff to act as document author for CF3R documents and only requires the Rater who performed the FV&DT to be the Responsible Person. All the large Rater Companies have built their process around this ability to let office staff act as the document author while the Rater does what they are best at out in the field, performing FV&DT. Any Rater Company that utilizes this process would need to entirely revamp their entire business model which would undoubtedly result in higher costs to the consumer.
30. 10-103.3(f)2Fiv - Rater Company - "Cost of services" report
    a. It is our position that this report should not be submitted to the Provider. It appears that the Provider is only acting as a passthrough for this information and therefore could be submitted directly to the CEC for their analysis.

31. 10-103.3(f)2I - Rater Company provide FV&DT information
    a. The proposed language seems to imply that a Rater Company can perform FV&DT and therefore provide untrue, inaccurate, or incomplete test information. The role and abilities of a Rater Company require additional clarification. The language appears to conflate the roles of a Rater Company and a Rater and apply the same rules even if not applicable. We support the creation of the role of Rater Company but recognize that there is additional clarification needed.

Thank you for your consideration,
Kevin Kane
Chief Operating Officer