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## **CalCERTS Regulatory Review of Revised Draft Report - Part 1**

*Additional submitted attachment is included below.*



July 24, 2023

Via CEC Docket 22-BSTD-03

Mr. Drew Bohan  
Executive Director  
California Energy Commission  
1516 Ninth Street, MS-39  
Sacramento, CA 95814  
[Drew.bohan@energy.ca.gov](mailto:Drew.bohan@energy.ca.gov)

**CalCERTS Comments on Revised Draft Staff Report - Proposed Regulations: Part One**

On July 12, 2023, CalCERTS, Inc. (CalCERTS) was able to meet with California Energy Commission Staff and other approved HERS Providers to discuss the Revised Draft Staff Report (TN#250298). Those discussions were exceedingly helpful. The CalCERTS Team appreciated the time and opportunity to better understand the Commission's intentions for many of the new regulations.

During the meeting, the Commission proposed discussion on the following topics:

- Program Mission
- Conflict of Interest
- Accepting Data
- Quality Assurance
- Rater of Record
- Application Materials
- Training
- Authority
- Data Reporting

CalCERTS was able to provide important perspectives on many of these issues and was able to identify key reports and data from Providers that were *omitted* by the Commission Staff in its review of the HERS Program. Commission Staff was appreciative and receptive and asked CalCERTS to submit further information to the docket.

The amount of newly proposed rules and regulations in the Revised Draft Staff Report is overwhelming for stakeholders to digest and review in the amount of time allotted. It would take months for CalCERTS to work through the 40+ pages of proposed language that *substantially redesigns* the Field Verification and Diagnostic Testing Program. However, all efforts are being made to submit comments quickly. CalCERTS will submit comments and suggestions in piecemeal fashion to get the Commission information as quickly as possible.

This is **Part One** of the regulatory review, focusing on the Conflicts of Interest sections and Conflicted Data mandate. Please see redline and comments in the attachment to this letter.

Since the Field Verification and Diagnostic Testing Program is an existing program and is already operating under the Title-20 HERS Regulations, the Commission’s requirements under the California Administrative Procedures Act to justify all proposed regulations is *much higher* than if creating a program from scratch where businesses could decide whether to participate. Specifically, because each line of the proposed regulations impacts California ratepayers and hundreds of preexisting small businesses, the regulations *must* be substantiated as both necessary and cost effective. Even “good ideas” must be supported.

CalCERTS is dedicated to helping the Commission adopt new rules and regulations that are both necessary and cost effective. New and novel ideas that are not supported by data should not be included in this rulemaking.

Sincerely,

The CalCERTS Operations Team

Enclosures



(916) 985-3400



[www.calcerts.com](http://www.calcerts.com)



[support@calcerts.com](mailto:support@calcerts.com)



31 Natoma, Suite 120  
Folsom, CA 95630



## **Attachment 1**

### **CalCERTS Comments on Revised Draft Staff Report - Proposed Regulations: Part One**

# CalCERTS Select Comments on APPENDIX B: Proposed Regulations – Part 1.

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**JA7.3 Introduction -- The CalCERTS Data Registry already records the registration date in conjunction with the signature, as identified in the proposed regulation/clarification for JA7.3. This appears to be a clarification of existing requirements without implementing new mandates. CalCERTS supports this addition as drafted.**

## ***JA7.3 Introduction***

A Data Registry is a web service with a user interface and database maintained by a Registration Provider that provides for registration of residential or nonresidential compliance documentation used for demonstrating compliance with Part 6. ...

The registration process is completed only when an authorized registration signer signs the compliance document electronically; whereupon the Data Registry automatically performs the following actions:

(a) Adds the registration signer's electronic signature to the document's signature block

1. The date of the registration signer's electronic signature shall be appended to the document or as part of the signature block.

**JA7.5.2.6 - The regulatory language below in JA7.5.2.6 should be removed from the proposed regulations. At this time, the Commission lacks information and evidence that supports mandating a 72-hour window for document registration for CF-3Rs. This is a guess of what is reasonable without data to substantiate. Evidence is needed to show the 72-hour limit will improve the accuracy or reliability of a rating since this rule would impact existing operations of small businesses.**

**This proposal was intended to compromise on the suggestion in the first draft report of setting limits on the number of verifications a Rater can do in a day. This compromise is not supportable. A better compromise or solution is needed.**

**One suggestion is that high volume Raters be subject to increased scrutiny by Providers. For example, the data Registries could be required to flag projects with long delays in data reporting or flag a Rater with high volume of verifications in a specific time. Projects or Raters that are flagged will be subject to increased scrutiny. This proposal more closely matches the existing rules for the FV&DT Program and the burden on the Commission to adopt the rule is less.**

**As proposed, the Commission will not have the information or evidence needed to support 72-hours restriction/limitation for the rulemaking review. It is possible the Commission could have the evidence or information needed to adopt this rule in the future for further rulemakings.**

### **JA7.5.2.6 Date of Field Verification and Diagnostic Tests**

Certificates of verification documents regarding field verification and diagnostic testing performed by a certified ECC-Rater intended for registration shall include the date of the test. Certificates of verification documents of field verification and diagnostic testing may only be registered within 72 hours of the test. In the case of system outage, the ECC-Rater will be given an additional 24 hours to register the certificates of verification.

**JA7.5.6.1 - The following regulatory language in section JA7.5.6.1 should be removed from the proposed regulations or significantly modified. The section indicates that photos *may* be used and then proposes limitations and restrictions on those photos. The limits are arbitrary and will dissuade the use of photos. This is counterproductive to what the Commission is trying to accomplish. Photos should be encouraged. Innovation should be encouraged. Any limitations on photos should be properly construed in the regulations to not limit the use of new technology and tools.**

**The below requirement on time and location stamp limit the use of more modern and accepted technologies. A CEC guidance document on the use of photos would work better than setting specific regulations that will be outdated quickly. As written Providers would be dissuaded from allowing photos. An alternative would be to encourage Providers to encourage Raters to use photos to expedite QA reviews and safeguard against consumer complaints.**

### **JA7.5.6.1 Photographic Documentation for Registered Documents**

If a registered compliance document is associated with photographic evidence, the photograph shall be stored as a Joint Photographic Experts Group (JPEG) file and comply with the following requirements:

- Photographs shall not to be issued with registered compliance documents.
- Photographs shall be stored by the ECC-Provider and made available to the Commission upon request.
- Photographs shall show the specific equipment being tested, or measure being verified.
- Photographs shall include sufficient background to identify the location of the project site.
- Photographs shall include a time and location stamp

**Definitions for § 10-102: Given the broad scope of new rules proposed for the FV&DT program there needs to be careful consideration of all the new terms that need to be identified and defined. For example, Rater of Record, or Rating Firm of Record need to be included in the definition section.**

## **Addition of Definitions to Section 10-102 of Part 1 of the Building Standards**

**ENERGY CODE COMPLIANCE (ECC) PROGRAM** is the program for field verification and diagnostic testing as set forth in Section 10-103.3 to verify the construction of new buildings and additions and alterations to existing buildings comply with the requirements of the Energy Code.

**ECC-PROVIDER** is an organization approved by the Commission to administer the ECC program pursuant to the requirements of Section 10-103.3.

**ECC-RATER** is a person trained, tested, and certified by an ECC-Provider to perform field verification and diagnostic testing for the ECC program pursuant to the requirements of Section 10-103.3.

**ECC-RATER COMPANY** is an organization certified by an ECC-Provider to offer field verification and diagnostic testing services by the ECC-Rater Company's ECC-Raters for the ECC program pursuant to the requirements of Section 10-103.3.

**TRIENNIAL CODE CYCLE** is the three-year period for which a particular cycle of California's building codes is effective, as used and defined by State Building Standards Law and the California Building Standards Commission pursuant to Health and Safety Code 18901 et seq.

**Verified ECC-Rater** is an ECC-Rater that has achieved the status of "Verified" as set forth in Section 10-103.3(d)5B. **[The term "Verified" should be reviewed. The terms verified and certified are very similar. Once we get through review of the QA terminology, alternative terms to replace "Verified" should be considered, one suggestions is "Exemplary".]**

**Conflicts of Interest & Conflicted Data: Comments are included in the proposed regulatory sections below. With this rulemaking there is an opportunity to address conflicts of interests between Providers and Rating Companies. CalCERTS hopes the Commission will take this opportunity to address the undue influence of key program stakeholders.**

**The Commission should make clear the permissibility of undisclosed contracts between ratings companies and Providers for registration of compliance certificates. Zero certificate pricing, and deep discounts, favoring specific rating companies, were marketing strategies used by CHEERS that were permissibly condoned by Commission under the existing HERS Program. This rulemaking should make clear what is permissible and**



## **whether undisclosed contracts for the registration of compliance certificates are conflicts of interest.**

### **Addition of Section 10-103.3 to Part 1 of the Building Standards 10-103.3 Administrative Procedures for the Energy Code Compliance Program**

(a) **Scope.** The requirements in this section apply to ECC-Providers, ECC-Raters, and ECC-Rater Companies performing work relating to field verification and diagnostic testing for the Energy Code Compliance (ECC) Program to verify the construction of new buildings and additions and alterations to existing buildings comply with the requirements of the Building Energy Efficiency Standards.

#### **(b) General Provisions.**

##### **1. Conflicts of Interest.**

###### **A. Prohibition of Conflicts of Interest.**

- i. ECC-Providers shall be independent from, and have no financial interest in, ECC-Rater Companies or ECC-Raters. **[CEC should use this opportunity to clarify the permissibility of pricing agreements between Providers and Rating Companies for certificate registration.]**

**CEC is requesting Providers to collect pricing information from Rating Companies to assess whether pricing is reasonable for truthful accurate and complete ratings. However, the rules need to be clarified as to whether the CEC will require disclosure of pricing between Providers and Raters and Rating Companies.**

**Undisclosed pricing agreements/contracts between Providers and large rating companies had been deemed conflicts of interest by most CEC leadership until approximately 2017 when the Commission changed its position. With this rulemaking, this rule should be clarified in the regulations.**

**One proposal could be that Providers must adhere to their publicly advertised pricing for compliance document registration for all ECC Rater Companies.**

**This would also make clear to the Commission and stakeholders when Providers offer \$0 certificate pricing which prevents application of quality assurance and**

**reveals improper influence exerted by Rater Companies on Providers.]**

- ii. ECC-Providers, ECC-Raters, and ECC-Rater Companies shall be independent from, and have no financial interest in, the builder, designer, or subcontractor installer of energy efficiency installations field verified or diagnostically tested.
- iii. For the purposes of this subdivision, a "financial interest" includes:
  - a. a business entity in which the entity or individual has a direct or indirect investment worth \$2,000 or more, or in which the entity or individual is a director, officer, partner, trustee, or employee. However, this prohibition on investments does not include ownership of less than five percent of a publicly traded company.
  - b. an ownership interest, debt agreement, or employer/employee relationship.
- iv. ECC-Providers, ECC-Raters, and ECC-Rater Companies, or principals of an ECC-Provider or ECC-Rater Company shall not **knowingly** perform field verification or diagnostic tests services for builders, designers, or subcontractors owned or operated by close familial relatives. For purposes of this subdivision, "close familial relative" means a spouse, domestic partner, or cohabitation partner or a parent, grandparent (including greats), sibling, child, grandchild (including greats) of the individual or spouse, domestic partner, or cohabitation partner, and any person living in the same household.
- v. ECC-Raters and ECC-Rater Companies shall not perform any construction activity on a project site for which a construction permit is issued and for which they will or are reasonable expected to perform field verification or diagnostic testing services.
- vi. ECC-Raters or ECC-Rater Companies shall provide a report to the building or project owner for field verification or diagnostic testing services performed on the project site. The report may be provided through a contractor or other project representative to the building or project owner but must be a conspicuous and separate document from other documents provided by the contractor or project representative. The report must include all of the following elements:
  - a. The ECC-Rater's or ECC-Rater Company's name, logo (if any), contact information, and certification number.
  - b. The ECC-Provider data registry link and registry numbers for all compliance documents registered by the ECC-Rater or ECC-Rater Company for the project.
  - c. An itemization of each field verification or diagnostic test

performed for the project and pass or fail result.

vii. Prior to starting any field verification or diagnostic testing at a project site, the ECC-Rater or ECC-Rater Company must register a form, signed by the building owner, in which the owner consents to the ECC-Rater entering the relevant premises and performing the tests onsite. Failure to register a signed consent form will make the ECC-Rater or ECC-Rater Company subject to discipline as described in Sections 10-103.3(d)7 and 10-103.3(d)8. **[CEC Staff discussed with Providers that a compromise on this section is possible. CalCERTS would like to support a mandate that Raters provide true and complete contact information for every project. This mandate would be enforced by the Providers and would remove the encumbrance on Rating Companies of having to register a signed consent form. Proper contact information is essential for Quality Assurance and data verification and would help protect the consumer and facilitate communication with the homeowner. This compromise would remove impediments on getting projects permitted and inspected but also allows better communication and oversight to protect consumers.]**

viii. Once an ECC-Rater has registered a failed field verification or diagnostic test, that ECC-Rater shall become the ECC-Rater of Record (ROR) for the specific field verification or diagnostic test at the project site. Except as provided in subdivision (a) below, only the ROR may register a subsequent passing field verification or diagnostic test previously registered as a failure. **[Rater of Record needs to be defined in the definitions to include the Company so that Rating firms can continue to manage workflow and failing projects is not disincentivized.]**

a. Under any of the following circumstances, the ECC-Provider may release a project from the ROR **~~but must perform a shadow audit (Section 10-103.3(d)5Cii) for the new ECC-Rater retests for the failed field verification or diagnostic test:~~**

- (i) The ROR agrees to release the project.
- (ii) The ROR is physically unable to continue work on the project due to injury, misfortune, or availability.
- (iii) The ROR's certification has been suspended (Section 10-103.3(d)7C) or decertified (Section 10-103.3(d)7D).
- (iv) The ROR is unwilling to continue work on the project.

**[This provision introduces new costs to the program. The way this provision is written there is no discretion on whether a shadow audit is warranted. Providers will need to absorb costs with this mandate.]**

**The requirement to stop and conduct an audit will impact permitting, encouraging existing homes to proceed without a permit. If the ROR agrees to release the project, the concerns of rater shopping has been addressed.**

**It is unclear why the additional costs of a shadow audit had been introduced and/or how an audit can be justified in a costs analysis. Prohibitions on rater shopping is helpful, beyond that, any impediment to registering fails and getting them corrected by an installer should be avoided. A data audit on the project would be more economically feasible if it can be justified as necessary.]**

- b. The ECC-Provider shall lock the project compliance documentation within the data registry by address and permit number and shall not allow any further compliance documents to be registered for a failed test at a project site other than from the ROR or allowable substitute under subdivision (a) above. **[This is doable but does not prevent the project from being introduced into a different registry under a different name. It is a good initial safeguard to rater shopping.]**
- c. An ECC-Provider shall not **knowingly** 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. **[How would the Providers know? Will Providers be required to notify each other of locked projects? Notifications between registries are feasible.]**
  - (i) ECC-Providers shall submit a complaint to the Commission (Section 10-103.3(d)6B) upon suspected violation of this requirement.
  - (ii) Upon investigation, the Commission may take disciplinary action against an ECC-Provider (Section 10-103.3(d)15) or recommend disciplinary action against an ECC-Rater or ECC-Rater Company (Sections 10-103.3(d)7 and 10-103.3(d)8).

ix. **Use of Registered Certificates.** The use of registered certificates, including Certificates of Compliance, Certificates of Installation, and Certificates of Verification, is limited to the demonstration and documentation of the project compliance with the Building Energy Efficiency Standards. Other uses of registered certificates is only permitted for projects that have been completed and are closed within the data registry. **[It is unclear what this**

provision is intended to address.]

### Conflicted Data

Providers will not be able to adhere to the rules on conflicted data without significant disruption to the data registry and to construction practices. There is a lot of new language in this section that needs to be carefully edited. It is understood that the Commission does not want flawed data to be submitted to the document repository; however, these provisions specifically do not distinguish between false/inaccurate data and conflicted data.

“Removing” data from the registry is problematic, especially after a certificate or occupancy has been issued or a Project Status Report (PSR) has been reviewed by an AHJ as complete. Would those items need to be clawed-back? How?

Why would the Commission want data “removed” rather than flagged? Removing conflicted data from the registry would erase information and work product. This proposal opens Pandora’s Box. This needs to be discussed with the Registry programmers specifically.

What is verified conflicted data? Please define. Is it data with a true rather than perceived conflict? Or, is verified inaccurate/false data? Conflicted data is not necessarily false. For example, a Provider may be refused access to do a quality assurance audit for reasons that are reasonable. With these rules, that would be a conflict and the Provider would be required to remove data for the entire sample group. Such an obligation would cost rating companies thousands of dollars and would stop construction for that project.

CalCERTS would like to work with the Commission to find a way that incentivizes reliable data without asking Providers to “remove” data from their systems. The liability of purging work product of our clients from the registry would be so immense that these rules would have to be ignored out of necessity. This would result in the opposite objectives of this rulemaking.

Importantly, Raters who act unethically due to conflicts of interest should be decertified and prevented from conducting FV&DT. Data should be flagged, reviewed, and when possible corrected. Sections highlighted are areas of significant concern.

**B. Conflicted Data.** The prohibitions on conflicts of interest specified in Section 10-103.3(b)1A apply to any data collected by an ECC-Rater. Any data collected by an ECC-Rater when they have a conflict of interest, regardless of its accuracy, shall be considered conflicted data. Any data

collected through sampling procedures (Building Energy Efficiency Standards, Reference Appendix RA2.6) where the ECC-Provider is refused access to perform an onsite quality assurance audit (Section 10-103.3(d)5Ci) shall be considered conflicted data.

- i. ECC-Providers shall not accept or store, conflicted data on their systems. ECC-Providers may demonstrate that they have fulfilled this requirement by, for example:
  - a. Requiring ECC-Raters to affirmatively indicate, upon submitting any data to the ECC-Provider, that the data is not conflicted data, or that the ECC-Rater had a conflict of interest at the time the data was collected, but had express written approval from the Executive Director waiving the conflict.
  - b. Any other process approved by the CEC.
- ii. ECC-Providers shall take all reasonable steps to detect, deter, isolate, and **remove conflicted data from their systems**, including in compliance documents and Compliance Registration Packages. ECC-Providers may demonstrate that they have taken all reasonable steps, for example:
  - a. Requiring ECC-Raters to complete training, prior to certification, regarding the requirements of Section 10-103.3(b)1A, including that it applies to data, or by some other reasonable method to deter conflicted data.
  - b. Instituting a desk audit program that assesses data submitted to the ECC-Provider pursuant to Section 10-103.3(d)5Civ to confirm whether or not the submitting ECC-Rater had a disqualifying conflict of interest pursuant to Section 10-103.3(b)1A at the time of the data's submission, or by some other reasonable method to detect conflicted data.
  - c. Investigating and, as necessary, **removing conflicted data** from the FV&DT Provider's system, or otherwise identifying and quarantining that data as conflicted, including pursuant to Section 10-103.3(b)1Bvi. Any other process approved by the CEC.
- iii. ECC-Providers may not **knowingly** use, rely on, sell, or offer for sale, any conflicted data for any purpose other than to detect, deter, isolate, and remove conflicted data from their systems, or to otherwise prevent the generation or transmission of conflicted data.
- iv. ECC-Raters and ECC-Rater Companies may not **knowingly** submit any conflicted data without the express written approval of the Executive Director. ECC-Raters and ECC-Rater Companies may fulfill this requirement by for example,

- a. Affirmatively indicating, upon submitting any data to the ECC-Provider, that the data is not conflicted data, or that the ECC-Rater or ECC-Rater Company had a conflict of interest at the time the data was collected, but had express written approval from the Executive Director excusing the conflict.
  - b. Any other process approved by the CEC.
- v. Any ECC-Rater or ECC-Rater Company may apply to the Executive Director for express written approval excusing a conflict of interest under this section. **[Could the CEC please provide examples of what is contemplated for this provision? It is hard to understand, and examples would be helpful.]**
  - a. Such an application must include the following information: an explanation of the conflict of interest, the beginning and ending date of the conflict of interest (if any), and written justification providing compelling and persuasive evidence that (1) the conflict of interest will not result in inaccurate data, and (2) unnecessary hardship will result from the application of the prohibition on conflicted data in this instance.
  - b. The Executive Director may grant such written approval only if the Executive Director finds there is compelling and persuasive evidence of the factors identified in Section 10-103.3(b)1Bva.
  - c. Unsupported or general assertions of trustworthiness or accuracy are neither compelling nor persuasive evidence of the factors identified in Section 10-103.3(b)1Bva.
  - d. The Executive Director may, at their discretion, request additional information, provide express written approval, provide conditional express written approval, or reject the request. If an applicant does not receive a reply within 120 calendar days, their request is denied.
- vi. Upon identifying data that may be conflicted, the ECC-Provider shall perform a desk audit to assess whether the data is in fact conflicted data, such as by contacting the submitting ECC-Rater or ECC-Rater Company and asking them to confirm, in writing, whether the data was conflicted or not. Upon discovery of a violation of the conflict of interest restrictions in Section 10-103.3(b)1A, the ECC-Provider shall use this gathered information to initiate discipline action pursuant to against either of (or both of) the ECC-Rater (Section 10-103.3(d)7) and ECC-Rater Company (Section 10-103.3(d)8) responsible for the registered data in question. **[What is verified conflicted data? See comment above. Please provide further examples.]**
- vii. ECC-Providers shall remove verified conflicted data (Section 10-

103.3(b)1Bvi) from the data registry and inform all of the following of the removal of the data and what field verification and diagnostic tests reliant on the data are invalidated: the homeowner, ECC-Rater, ECC-Rater Company, authority having jurisdiction over the issued construction permit, and the Commission.

## 2. Prohibition on False, Inaccurate, or Incomplete Information

- A. ECC-Providers shall not **knowingly** accept, store, or disseminate untrue, inaccurate, or incomplete information or information received through actions not conducted in compliance with these regulations, including information related to field verification and diagnostic testing information, field verification and diagnostic test results, or results on a certificate of compliance or certificate of installation documents.
- B. ECC-Providers shall not **knowingly** accept payment or other consideration in exchange for use of their data registry to report a field verification and diagnostic test result that was not conducted and reported in compliance with these regulations. **[It is unclear the purpose of this language. What is the intent or how is the intent different than section A above? The Commission addressing payment is a new concept to the regulations. Is it intended to mandate refunds for removed conflicted data? This would disincentive Providers from identifying and addressing issues.]**
- C. Only the ECC-Rater who performs a field verification and diagnostic test shall have signature authority for compliance documents related to the field verification and diagnostic test documents. **[Is this specific to Certificates of Verification or all Certificates? Please specify. Otherwise, this could be construed more broadly, and limit signature authority as already defined in the code. This provision would need a cost analysis if construed more broadly.]**