

DOCKETED	
Docket Number:	22-BSTD-03
Project Title:	2022 Field Verification and Diagnostic Testing OIR Proceeding
TN #:	251470
Document Title:	Kevin Kane - CHEERS Comments on Revised Draft Staff Report - Proposed Regulations
Description:	N/A
Filer:	System
Organization:	Kevin Kane
Submitter Role:	Other Interested Person
Submission Date:	8/2/2023 10:44:53 PM
Docketed Date:	8/3/2023

*Comment Received From: Kevin Kane
Submitted On: 8/2/2023
Docket Number: 22-BSTD-03*

CHEERS Comments on Revised Draft Staff Report - Proposed Regulations

Additional submitted attachment is included below.

August 2, 2023

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 Ninth Street, MS-39
Sacramento, CA 95814
drew.bohan@energy.ca.gov

Re: CEC docket 22-BSTD-03 – CHEERS Comments on Revised Draft Staff Report - Proposed Regulations

CHEERS appreciates the opportunity to meet with California Energy Commission Staff on July 12, 2023, to discuss the Revised Draft Staff Report.

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

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

The proposed regulation changes in the Revised Draft Staff Report are significant and affect the entire HERS industry. Enclosed in this document are:

1. Written responses to the ideas and comments discussed with Staff on July 12, 2023.
2. CHEERS comments regarding the Revised Staff Report; comments in line with report text sections for reference and clarity.

Restructuring the Field Verification and Diagnostic Testing Program is a substantial undertaking; CHEERS remains committed to collaborating with the CEC to ensure the restructuring objective serves the interest of the HERS ecosystem.

CHEERS is grateful for the opportunity to participate in this workshop and looks forward to future opportunities to collaborate with the CEC. CHEERS is dedicated to helping the Commission adopt new rules and regulations that are necessary, reasonable, and cost effective.

Sincerely,

The CHEERS Team

HERS Program Mission

The Revised Draft Staff Report offers several revisions that appear to suggest that the role of the HERS Provider will evolve to be a consumer protection agency.

HERS Provider's mission is to create and maintain Title 24 registries, support the implementation of the state's energy efficiency programs and policies by training, certifying, and overseeing the performance and compliance of the HERS Raters.

Per the CEC's website:

- "HERS Providers oversee Raters conducting Title 24 Energy Code compliance verification in residential and nonresidential newly constructed buildings and in additions and alterations of existing buildings."
 - HERS Providers create and maintain Title 24 registries, train and certify HERS Raters, create Quality Assurance Programs, conduct quality assurance on HERS Raters' work, and report annually to the CEC certain data as required by the HERS Regulations.
 - HERS Providers maintain a directory of Raters qualified to verify the work of licensed contractors, including heating, ventilation, and air-conditioning (HVAC), insulation, and plumbing trades.
 - The HERS Program, also called the Field Verification and Diagnostic Testing Program (FV&DT), 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 FV&DT testing on the appropriate features. If the system fails, the contractor is required to fix it.

The proposed changes that suggest the HERS Providers evolve to become consumer protection agencies represent new and undefined requirements for the Providers to administer.

When a HERS Rater identifies non-compliance with energy efficiency standards during their evaluation, they may inform the homeowner, builder, or general contractor. The responsible party would then be expected to address the non-compliance issue(s) to meet the required energy efficiency standards. It is then up to the relevant authorities to take appropriate action if there are violations of building codes or regulations. HERS Providers/Raters do not have regulatory authority over contractors or building code enforcement.

State agencies accountable for consumer protection related issues in the HERS industry 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. Statewide Investigative Fraud Team (SWIFT): SWIFT is a specialized investigative unit within the CSLB that focuses on pursuing and prosecuting unlicensed contractors and contractor fraud.
 - b. The Public Affairs Office of the CSLB provides information to consumers, including homeowners, about their rights and responsibilities when hiring contractors.
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.”
3. Department of Consumer Affairs (DCA): The DCA is an umbrella agency that oversees various professional licensing boards, including the CSLB. They handle consumer complaints and provide resources to protect the interests of California residents.
4. California Department of Housing and Community Development (HCD): HCD is responsible for overseeing the construction of manufactured homes, mobile homes, and other forms of factory-built housing. They ensure compliance with building standards and safety regulations.
5. California Department of Justice - Office of the Attorney General: The Attorney General's office handles consumer complaints and investigates fraudulent practices related to contractors and construction services.
6. Local Building Departments: Local building departments or agencies are responsible for enforcing building codes and regulations at the city or county level. Homeowners can reach out to their local building department if they have concerns about construction projects or contractors in their area.

These agencies work together to protect homeowners and ensure that construction work is performed safely, ethically, and in compliance with relevant laws and regulations.

CHEERS recognizes its responsibility for the training, certification, and direct oversight of technicians (Raters) to ensure energy code compliance. Furthermore, CHEERS recognizes its responsibility to operate a data registry to ensure new construction and alteration projects are compliant with the California Energy Code.

CHEERS requests the CEC reconsider the proposed changes that incorporate the role as a consumer protection agency to the Providers and refer to those agencies currently responsible for protecting the consumer.

Quality Assurance

CHEERS initial comments showed how the proposed changes to the QA Program shifted the focus from addressing those that are purposefully registering false or inaccurate data to those issues derived from a lack of training or skills. CHEERS proposes the following revised language to allow the Providers to identify and address both types of failures as they best see fit.

- i. Onsite Audits. An onsite audit is performed by the Provider following field verification and diagnostic testing by an Rater it certified. Onsite audits may be performed at the invitation of the homeowner, through the complaint or other processes. Onsite audits may also be performed at the direction of the Provider. For an onsite audit the Provider shall independently repeat the field verification and diagnostic test to determine if it was accurately performed and whether all data was accurately collected and reported by the ECC-Rater. This information shall be included in the annual reporting to the Commission (Section 10-103.3(d)11E) or provided in response to a request by the Commission. Onsite audits shall comply with the following:
- ii. Shadow Audits. A shadow audit requires the Provider to audit the Rater as they perform a field verification and diagnostic test and collect and report the data. The Provider's auditor shall observe and may not aid the Rater during the shadow audit. When a Provider Quality Assurance Review has identified a need for additional onsite training, the Provider may elect to conduct a shadow audit be performed by the Provider for the Rater it has certified. A shadow audit shall also be performed if requested by the Commission.

Data Reporting

CHEERS recognizes the value of data mining the registry for market insights and the responsibility to provide the CEC with requested reports, within reason. CHEERS is exploring opportunities to analyze historical data, user behavior, market trends, and business performance. This intellectual property offered by CHEERS enables the opportunity to devise effective strategies and make data-driven decisions. CHEERS welcomes the opportunity to collaborate with the CEC on requested proprietary data, data format and frequency while ensuring confidentiality.

Examples of data reporting CHEERS is interested in providing the HERS industry include the following:

- **Predictive Analytics:** Create predictive models that may forecast future outcomes based on historical data.
- **Improved Marketing and Customer Relations:** By analyzing customer data, CHEERS is interested in gaining insights into customer preferences, buying behavior, and segmentation. This information enables enhanced marketing campaigns and personalized customer experiences, leading to higher customer satisfaction and retention.
- **Fraud Detection and Risk Management:** Data mining can be used to identify unusual patterns or anomalies in data, making it valuable for fraud detection and quality assurance.
- **Decision Support:** Data mining provides valuable insights that support decision-making at various levels within an organization. It helps managers and executives gain a deeper understanding of the business landscape and make more informed choices.

Overall, data mining unlocks the potential of vast datasets, enabling CHEERS to explore data-driven market opportunities.

CHEERS Comments on APPENDIX B: Proposed Regulations

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.

Response: CHEERS agrees with the CEC that Providers shall be independent from and have no financial interest, defined as investment in Rater Companies or Raters. CHEERS supports the commercial market enabling Providers to provide market driven incentives to secure short- and long-term agreements with leveraging various commercial options including enhance services, customized features and price discounts based on commercially accepted terms.

vii. Prior to completing any field verification or diagnostic testing at a project site, the ECC-Rater or ECC-Rater Company must collect 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. This form must be submitted to the Providers Data Registry prior to the registration of the Certificates of Verification. Failure to submit 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.

Response: CHEERS supports requiring Raters to provide complete contact information for every project. Complete contact information is required for Quality Assurance and data verification.

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.

- a. *Under any of the following circumstances, the ECC-Provider may release a project from the ROR*
 - (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.*

Response: This would require a shadow audit in many situations when one is not warranted or needed, adding significant costs to the HERS system with little added benefit.

- 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.*

Response: This will not prevent Raters from registering projects in a different registry using a different name.

- c. *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 Provider data registry.*

Response: It is unclear how a Provider would know whether it is accepting compliance documents for a project that has failed field verification or diagnostic testing in other Provider registry. There are significant data transmission, mapping and database hurdles to consider here.

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.*
 - 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 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 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.*

Response: CHEERS understands “conflicted data” is defined as data obtained by a Rater who may have conflict of interest. CHEERS agrees Providers shall be independent from, and have no financial interest in, Rater Companies or Raters. However, Providers should not be held accountable to determine whether a Rater Company or Rater has a financial interest with a builder or contractor. While CHEERS understands and agrees with the CEC’s objective to prevent conflicted data stored in the registries, it is unclear how Providers would know Raters have a conflict of interest and be able to restrict Raters from storing such conflicted data in their registries.

Similarly, asking Providers to potentially remove data from their registries under certain conditions is unreasonable and will lead to construction delays, cost increases, and a reduction in compliance. Example, if a Provider is refused access to a set of homes that were immediately occupied after construction, that could mean dozens of homes would be thrown into compliance limbo if those homes were part of sample groups.

CHEERS is interested in collaborating with the CEC to define “reasonable steps to detect, deter, isolate, and **flag** data from their systems, including in compliance documents and Compliance Registration Packages”. CHEERS agrees with the CEC that Raters ought 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.

2. Prohibition on False, Inaccurate, or Incomplete Information

A. ECC-Providers shall not 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 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.

Response: CHEERS views section A above and Section B to be addressing the same issue. Providers must not knowingly accept bad information or payment for bad information.

Select Comments on APPENDIX B: Proposed Regulations – Quality Assurance

5. Quality Assurance. An ECC-Provider shall maintain a quality assurance program to ensure appropriate oversight of the ECC-Raters it certifies. This program shall, at a minimum, include the following:

A. Quality Assurance Staff. ECC-Providers shall maintain the necessary qualified staff to ensure a functioning quality assurance program that includes, at a minimum, performing the types of quality assurance reviews listed in Section 10-103.3(d)5 on ECC-Raters. Any form of audit is subject to the same standards of required conduct as any other field verifications and diagnostic tests and is also subject to Quality Assurance review. Quality Assurance staff may not include active ECC-Raters.

B. ECC-Rater. An ECC-Rater is designated as a “Verified ECC- Rater” once the ECC-Rater has been (1) continuously certified as an ECC- Rater for a minimum of five years and (2) confirmed for designation by the applicable ECC-Provider after passing all required quality assurance audits within a 12-month period, including at least one annual quality insulation installation (QII) shadow audit, one non-QII shadow audit, one in-lab audit, and one desk audit.

C. Types of Quality Assurance Review. Quality Assurance Review shall take the form of onsite audits, shadow audits, laboratory audits, and desk audits.

Response: CHEERS initial comments illustrated how proposed changes to the QA Program shifted the focus from addressing those that are purposefully registering false or inaccurate data to those issues derived from a lack of training or skill.

CHEERS proposes the following to allow the Providers to identify and address both types of failures as they best see fit.

Onsite Audits: An onsite audit is performed by the ECC-Provider following field verification and diagnostic testing by an ECC-Rater it certified. Onsite audits may be performed at the invitation of the homeowner, through the complaint or other processes. Onsite audits may also be performed at the direction of the Provider. For an onsite audit the ECC-Provider shall independently repeat the field verification and diagnostic test to determine if it was accurately performed and whether all data was accurately collected and reported by the ECC-Rater. This information shall be included in the annual reporting to the Commission (Section 10-103.3(d)11E) or provided in response to a request by the Commission. Onsite audits shall comply with the following:

Shadow Audits: A shadow audit requires the ECC-Provider to audit the ECC-Rater as they perform a field verification and diagnostic test and collect and report the data. The ECC-Provider's auditor shall observe and may not aid the ECC-Rater during the shadow audit. When a Provider Quality Assurance Review has identified a need for additional onsite training, CHEERS may elect to conduct a shadow audit be performed by the Provider for the Rater it has certified. A shadow audit may also be performed if requested by the Commission. The Commission should attend these audits to better understand training scenarios and other issues uncovered in the field.

Laboratory Audits: Lab Audits have proven to be an unnecessary cost for the Provider to maintain. Providers should have a choice for meeting the Quality Assurance requirements as illustrated in the HERS Provider manual. CHEERS values onsite blind audits that are determined from irregularities discovered during desk audits. A greater volume of audits is achievable using desk audits resulting in larger audit pools conducted at a lower cost. Onsite blind audits enable Provider QA resources to verify the irregularities discovered during desk audits, allowing the Providers to offer a more comprehensive report to the Rater regarding Rater performance in the field and the trend between what was uncovered during the desk audits and verified during onsite blind audits.

It is CHEERS' opinion that shadow audits result in false positive due to Raters performing their duties as required due to a Provider resource monitoring their field activities. While shadow audits may be a method for providing field training for Raters, it also positions shadow audits as a continuing education option requiring QA resources provided by the Provider to spend more time in the field training Raters rather than verifying the Rater conducted their duties as required by the HERS industry.

CHEERS suggests CEC require Raters to provide accurate contact information for their projects to help Providers schedule QA appointments with the property builder/owner.

- i. Onsite Audits. An onsite audit is performed by the ECC-Provider following field verification and diagnostic testing by an ECC-Rater it certified. For an onsite audit the ECC-Provider shall independently repeat the field verification and diagnostic test to determine if it was accurately performed and whether all data was accurately collected and reported by the ECC-Rater. This information shall be included in the annual reporting to the Commission (Section 10- 103.3(d)11E) or provided in response to a request by the Commission. Onsite audits shall comply with the following:*
- a. Onsite audits must not be performed in the presence of the ECC-Rater and can be performed any time after the ECC-Rater has left the project site.*
 - b. ECC-Raters must not be informed that their field verification and diagnostic test is receiving an onsite audit until the onsite audit is complete and the results are documented.*

- c. Onsite audits shall follow the audit requirements in the Building Energy Efficiency Standards Reference Appendices RA1, RA2, RA3, RA4, NA1, and NA2.*
- d. The ECC-Provider shall issue a pass to the ECC-Rater and ECC-Rater Company if the onsite audit results show compliance with the passing requirements for onsite audits as indicated in the Building Energy Efficiency Standards Reference Appendices RA1, RA2, RA3, RA4, NA1, and NA2.*

Response: CHEERS agrees onsite audits are to be performed by the Provider following a complaint by the homeowner or any other process deemed necessary. CHEERS proposes desk audits be utilized as a method for identifying irregularities thus justifying an onsite audit. This method of combining desk audits to justify onsite audits enables the Provider the opportunity to provide the Rater with comprehensive, verified reporting that justifies an onsite audit and potential continued education/training. CHEERS agrees with the CEC that onsite audits should be conducted without informing the Rater and in support of the homeowner.

It is important to point out that a HVAC system that passes QA audit is not always a system that functions to homeowner expectations. If an HVAC system is slightly over/undersized, or a 6" duct is used where an 8" should have been, homeowner comfort can drive repeated QA visits only to find installation issues that have nothing to do with energy code compliance.

- f. Onsite audits shall be performed for every seventh sample group used in a single residential development.*

Response: How is this reflective on the Rater's performance? This is asking the Providers to onsite audit a home a Rater likely never stepped in. What benefit does the HERS Program receive for this substantial cost? The resulting data cannot be used to discipline a Rater if a Rater never inspected the house.

- h. Onsite audits shall include the use of photograph evidence to be recorded in the ECC-Provider data registry as provided in Building Energy Efficiency Standards Reference Appendix JA7.5.6.1.*

Response: CHEERS currently requests photographs and videos to be included with all T24 projects. CHEERS recommends including geolocation and timing elements be required to dissuade bad actors from repurposing photos from other projects. Without getting too specific on photo requirements, photos should present sufficient information to portray an accurate representation of the picture subject.