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California Energy Commission REGULATIONS

FINAL STATEMENT OF REASONS TO AMEND THE COMPLIANCE SCHEDULE FOR THE NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM OF THE CALIFORNIA ENERGY COMMISSION

California Code of Regulations, Title 20,
Division 2, Chapter 4, Article 9, Section 1682

California Energy Commission
Docket Number 15-OIR-03

Office of Administrative Law



CALIFORNIA
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I. Introduction

This document is the Revised Final Statement of Reasons (FSOR) and Updated Informative Digest required by Government Code Sections 11346.5(a)(19), 11346.9, and 11347.3(b)(2).

The California Energy Commission (Energy Commission) proposes to adopt this regulation to certify and make permanent the emergency regulation effective September 2, 2014, amending subdivision (c) of Section 1682 of Title 20 of the California Code of Regulations, to change the effective date in the schedule of implementation for nonresidential buildings with total gross square foot area measuring at least 5,000 square feet and up to 10,000 square feet from July 1, 2014, to July 1, 2016.

The proposed action is taken under the authority of Public Resources Code (PSR) Section 25213,¹ which generally authorizes the Energy Commission to adopt rules and regulations as necessary to carry out the provisions of the Warren-Alquist Act, set forth in Division 15 of the PRC, and Section 25402.10, which requires owners and operators of nonresidential buildings to provide energy use and benchmarking data to prospective buyers, lessees, and lenders of the entire building, and requires the Energy Commission to set a schedule of compliance. The Energy Commission's regulations implementing Section 25402.10 are set forth in Sections 1680 through 1684 of Title 20 of the California Code of Regulations, and the schedule for compliance is in Section 1682. PRC Section 25402.10 together with the implementing regulations are commonly referred to as the Nonresidential Building Energy Use Disclosure Program (the program).

II. Procedural History of the Rulemaking

The Energy Commission previously adopted the express terms of the proposed regulation through an emergency regulation pursuant to Government Code Section 11346.1 on July 22, 2014, which was approved by the Office of Administrative Law on September 2, 2014, and effective on that date. The Energy Commission readopted the emergency regulation pursuant to Government Code Section 11346.1(h) on February 25, 2015, to extend the emergency regulation for 90 days to allow time for the emergency regulation to be certified and made permanent. The Office of Administrative Law approved the readoption on March 4, 2015. The purpose of this rulemaking is to certify and adopt the emergency regulation on a permanent basis, pursuant to Government Code Section 11346.1(e).

The adopted Express Terms do not substantially deviate from the originally proposed text. Therefore, in accordance with Government Code Section 11346.9(d), the Energy Commission determines that this Final Statement of Reasons can satisfy the requirements of this section by incorporating by reference various parts of the September 2, 2014 Revised Notice of Proposed Action.

¹ All section references are to the Public Resources Code unless otherwise noted.

III. Incorporation by Reference of Material from the Notice of Proposed Action (Government Code Section 11346.9(d))

The adopted Express Terms do not deviate from the originally proposed text. Therefore, in accordance with Government Code Section 11346.9(d), the Energy Commission determines that this Final Statement of Reasons can satisfy the requirements of this section by incorporating by reference various parts of the Notice of Proposed Action published February 13, 2015.

IV. Update to the Initial Statement of Reasons (Government Code Section 11346.9(a)(1))

There are no updates to the Initial Statement of Reasons.

V. Materials Relied Upon That Were Not Available for Public Review Prior to the Close of the Public Comment Period (California Government Code 11346.9(a)(1))

No new materials were relied upon that were not already identified in the Initial Statement of Reasons and all materials relied upon were available for public review.

VI. Determination Whether Regulations Impose A Mandate Upon Local Agencies or School Districts (Government Code Section 11346.9(a)(2))

The proposed regulations do not impose any mandate on local agencies or school districts.

VII. Summary of Comments Received and the Energy Commission's Responses (California Government Code Section 11346.9(a)(3))

The Energy Commission received comments from one individual on the proposed regulation.

Comments of Mr. Randy Walsh

Mr. Randy Walsh submitted comments on March 30, 2015, opposing the proposed regulatory action, and recommending that the Energy Commission not postpone any further the implementation of the program for nonresidential buildings of at least 5,000 and up to 10,000 square feet. Mr. Walsh cited five reasons for his position.

First, Mr. Walsh argues that “there was and is no emergency related to implementation of the program that justified the emergency regulation delaying the implementation of the program for nonresidential buildings of at least 5,000 and up to 10,000 square feet.” He points out that there was very low compliance for the first six months of program implementation, from January 1, 2014, through July 1, 2014, during which time the program applied to nonresidential buildings of at least 10,000 square feet, and asserts that such low compliance does not represent an emergency scenario. He also argues that without fines or penalties for noncompliance, the level of cooperation may end up being inconsequential. Mr. Walsh states that “postponing such a significant part of the regulation at such an early time in the life of [the program] creates market confusion and continues to convey a sense of ambivalence and equivocation in full implementation.”

Second, Mr. Walsh argues:

“[T]he California Energy Commission has created the greatest barrier to full implementation of AB 1103 by unilaterally defining a data confidentiality protocol that is in direct conflict with established and recognized codes and regulations protecting customer confidentiality of data released by utilities. As a result, the utilities and energy providers are requiring individual account holder authorizations before data is released, adding both time and costs to a compliance project. This barrier impacts all buildings attempting to comply with AB 1103, and a workable solution to these conflicts should be the highest priority of the Commission until a solution can be found and implemented. The utility companies have clearly communicated to the Commission for years that they are prevented from complying with the language of AB 1103 due to the conflicts with existing data confidentiality regulations and lack of clear direction.”

Third, Mr. Walsh suggests:

“The California Energy Commission may be misreading the market when it comes to costs, capacity or resources available to the smaller building owners undertaking AB 1103 compliance. The CEC has no definitive or conclusive market information about project pricing or the level of utility cooperation and has not built a compelling case to support continued postponement.”

He argues that the barriers to compliance identified in the Notice of Proposed Action “are not unique to buildings in the 5,000-10,000 square foot classification, but are, in fact, inherent in all AB 1103 compliance projects.”

Fourth, Mr. Walsh objects that “the decision making process behind the postponement is lacking transparency,” and describes “a growing feeling among key stakeholders who have

contributed input and suggestions to the CEC... that their feedback is being ignored.” He states, “As AB 1103 continues to develop, it is important that the CEC develop a productive working relationship with these Key Stakeholders who can provide valuable insight.”

Fifth, Mr. Walsh argues that “this postponement gains us nothing and the structural deficiencies of the regulation remain.”

Response to Comments of Mr. Walsh

Mr. Walsh generally opposed the proposed regulation because he disagrees with the policy decision to delay implementation of the Nonresidential Building Energy Use Disclosure Program to buildings of at least 5,000 and up to 10,000 square feet until July 1, 2016. The Energy Commission believes the proposed regulation is appropriate for the reasons stated in the Initial Statement of Reasons. The specific points raised by Mr. Walsh are addressed below.

Regarding Mr. Walsh’s first point, as the Energy Commission explained in its Finding of Emergency for the Emergency Regulation, the low rate of compliance during the first six months of implementation was in large part the reason for delaying implementation for smaller buildings of at least 5,000 and up to 10,000 square feet:

“Given the breadth of concerns about the existing regulatory framework and barriers to compliance, the Commission believes significantly expanding the Program on July 1, 2014 is contrary to the interest of the public. Unless it is amended, the schedule for compliance set forth in [the original] Section 1682(c) of Title 20 would expand the Program to buildings half the size of those currently subject to the program. This expansion has the potential to create market confusion, which could cause delays and drive up transaction costs in commercial real estate transactions.”

(Finding of Emergency for Proposed Emergency Regulations to Amend the Compliance Schedule for the Nonresidential Building Energy Use Disclosure Program, page 3, *available at* www.energy.ca.gov/ab1103/notices/2014-07-22_Note_to_Consider_Adoption_Emergency_Regs_1682c_and_11346-1_on_July_22_2014.pdf, Attachment B to Notice.) The Energy Commission found that expanding the program to smaller buildings without first resolving barriers to compliance with the program “would also place a greater burden on smaller building owners, which may lack the expertise, resources, or capacity necessary to overcome current barriers to compliance without incurring undue expense.” (Ibid.) The Energy Commission continues to believe that it is appropriate to delay implementation of the program for smaller buildings until the program regulations can be revised to reduce barriers to compliance, as is the purpose of the proposed regulations. There is no evidence that this delay will “exacerbate market confusion” or “convey a sense of ambivalence and equivocation” about the program. The Energy Commission agrees with Mr. Walsh that authority to assess fines for noncompliance could increase the rate of compliance.

Regarding Mr. Walsh’s second point, the Energy Commission is working to revise its program regulations, including those provisions addressing confidentiality and the provision of data by utilities, to better facilitate compliance. The purpose of the proposed regulation is to delay

implementation for buildings of at least 5,000 and up to 10,000 square feet until these more comprehensive revisions to the program regulations can be finalized and adopted.

Regarding Mr. Walsh's third point, the decisions to adopt the emergency regulation delaying program implementation for buildings of at least 5,000 and up to 10,000 square feet until July 1, 2016, and to adopt the proposed regulation to certify and make permanent the emergency regulation, were not based on "definitive or conclusive market information about project pricing or the level of utility cooperation." Rather, as explained above, it was based on a determination that allowing the program to expand to substantially smaller buildings without first overcoming barriers to compliance "ha[d] the potential to create market confusion, which could cause delays and drive up transaction costs in commercial real estate transactions." (See Finding of Emergency, page 3.) It was also based on a concern that although the barriers to compliance affect buildings of all sizes, there was reason to believe that smaller buildings would be more impacted, and the rate of compliance for smaller buildings would be even lower than the rate of compliance for larger buildings. The validity of these concerns was supported by evidence presented at the workshop held July 2, 2014, on the Informational Proceeding for the Nonresidential Building Energy Use Disclosure Program. (See Transcript for July 2 Workshop (WT) at 23-24, 37, 40-41, 73-74, 83-84, 98-99, 111-112, and 121-122, *available at* www.energy.ca.gov/ab1103/documents/2014-07-02_workshop/2014-07-02_ab1103_transcript.pdf; see also Response to Comments on Proposed Emergency Regulation to Amend EUDP Compliance Schedule in 20 CCR §1682(c).)

Regarding Mr. Walsh's fourth point, the Energy Commission regrets that Mr. Walsh feels the Energy Commission's efforts to address barriers to compliance with the program have lacked transparency. The Energy Commission held multiple workshops and hearings on the issue of postponement in its adoption and certification of the emergency regulation, and has also held workshops on barriers to compliance with the program generally. We strongly agree with Mr. Walsh's suggestion that "as AB 1103 continues to develop, it is important that the CEC develop a productive working relationship with these Key Stakeholders who can provide valuable insight." Following the Public Hearing, Energy Commission staff had a phone meeting with Mr. Walsh on April 16, 2015, to share the Commission's in-depth reasoning behind program decisions and get feedback from Mr. Walsh regarding industry insight and stakeholder barriers. Mr. Walsh expressed satisfaction with the information shared and suggested an ongoing working group, perhaps once a month. Energy Commission staff welcomed the suggestion and encouraged Mr. Walsh to connect back with staff with convening details.

Regarding Mr. Walsh's fifth point, the purpose of the proposed regulation is not to address "structural deficiencies" with the program, but to certify the emergency regulation delaying implementation of the program for buildings of at least 5,000 and up to 10,000 square feet until July 1, 2016, to allow for the completion of a separate process to address such deficiencies.

VIII. Consideration of Alternative Proposals (California Government Code Sections 11346.9(a)(4) & 11346.9(a)(5))

The Energy Commission was limited in its consideration of alternatives to the proposed regulatory action because the purpose of the proposed regulation is to certify and make permanent an existing emergency regulation. The scope of the emergency regulation itself is quite limited in scope, delaying the effective date for buildings of at least 5,000 and up to 10,000 square feet from July 1, 2014, until July 1, 2016.

The Energy Commission determined that no alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing.

No alternatives were proposed to the Energy Commission that would lessen any adverse impact on small business.

IX. Updated Informative Digest (Government Code Section 11346.9(b))

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.