

DOCKETED

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Document Title:	Randy J. Walsh Comments: Growing Opposition to the Secret, Exclusionary, Fragmented and Failing Process by Which AB 1103 Was Repealed and a Replacement Energy Use Disclosure Program Introduced through AB 802 in September 2015.
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Comment Received From: Randy J. Walsh

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Growing Opposition to the Secret, Exclusionary, Fragmented and Failing Process by Which AB 1103 Was Repealed and a Replacement Energy Use Disclosure Program Introduced through AB 802 in September 2015.

Please see attached copy of correspondence to Governor Brown.

Additional submitted attachment is included below.

08 April 2016

The Honorable Jerry Brown
Governor, State of California
c/o State Capital, Suite 1173
Sacramento, California 95814

Via Fax: 916.558.3160

Re: Growing Opposition to the Secret, Exclusionary, Fragmented and Failing Process by Which AB 1103 Was Repealed and a Replacement Energy Use Disclosure Program Introduced through AB 802 in September, 2015.

Dear Governor Brown:

On Friday, March 25, 2016, I participated remotely and with great reservation, in the CEC Staff Workshop regarding the Initial Proposal to Implement the Building Energy Use Data Access and Public Disclosure Provisions of AB 802 (Williams, Chapter 590, Statutes of 2015).

As in a number of workshops or presentations over the past several years, no evidence, conclusive analysis or representations of market demand was presented to make a compelling business case that merits further development of any energy use disclosure programming – nor were any attempts made to address the number of significant objections that have been raised since the repeal of AB 1103. This entire process needs to be shut down and scarce resources diverted to other, more meaningful and potentially more productive efforts to reduce energy use in the State of California. Energy use disclosure programming won't have the intended benefits – it can't. It is a fundamentally flawed and misguided policy and continued efforts without full stakeholder engagement and without complete transparency only serves to reinforce the lack of credibility and contribution to persistent market confusion the California Energy Commission has introduced – repeatedly and over many years.

My initial objections have been communicated previously and elsewhere; I stand behind my requests and recommendations and now add the following concerns and reservations that are worth your time and consideration:

In my experience, Energy Star Portfolio Manager is a “pedestrian” platform; it is designed for the masses, but works best at the site or building level in the hands of a knowledgeable and experienced professional. It is not designed for wholesale data management at the City or State level, but is being made to function as such due to great marketing by the EPA and growing political pressures. Because of the various levels of user familiarity and expertise and the many possible input variations of building types, uses, sizes and characteristics, State wide outputs from Portfolio Manager with a few exceptions, are not a reliable source of large-scale data.

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Portfolio Manager can be a great starting point – and it was confirmed at the Staff Workshop, that building profile counts shared by the EPA include a potentially significant number of incomplete, inactive or abandoned building profiles. Because it is free and “easy” to use, on the user side, there is no downside to creating multiple user accounts or duplicate building profiles populated with fresh data; this is much simpler than trying to track down an existing user name or old password. The State of California should insist that the EPA integrate an audited and verifiable process by which the number of inactive, incomplete or stale building profiles and any duplicate building profiles are recognized, tracked and accurately reflected in user account or building profile counts released to the public. Without this level of scrutiny, any numbers or counts culled from Portfolio Manager should be regarded as informational only and not actionable.

In the revised presentation materials posted to Docket 15-OIR-05 by CEC Staff on April 6, 2016, the possible extent of these variances can be seen on Page 7, titled, “Approximate Building and Property Counts, California.” Staff presented some numbers generated from the CoStar database – a reputable and highly respected on-line and fee-based source of property information used by the commercial real estate industry across the country and which may or may not include all physical buildings in the State of California. According to the records in CoStar, there are approximately 6,952 commercial buildings over 50,000 square feet with 2 or more tenants in the State of California and approximately 11,110 multi-family properties considered “disclosable” – meaning they fall at or above the size threshold established by the CEC and therefore are required to comply with AB 802.

On that same page, Portfolio Manager reports a count of 19,312 buildings over 50,000 square feet in the system, but does not present any information about the number of tenants in a building so we can’t get a direct and measurable variance – and that’s the problem. In reviewing the companion document listing the caveats for the Portfolio Manager building counts, I think the case can be made that the data presented by EPA bears absolutely no comparison to the actual number of physical buildings in the State of California – “disclosable” or not. This is not a reliable data set; but is being used to support mandatory use of Portfolio Manager. Without better information, we may be led to believe that Energy Star Portfolio Manager has greater market adoption or reach than it actually does. This is a data point better identified sooner rather than later.

From a Data Trends Report prepared and distributed by Energy Star Portfolio Manager and titled Benchmarking and Energy Savings, the EPA attempts to answer their own question posed in the first paragraph, “Do buildings that consistently benchmark energy performance save energy?” Their answer is in the affirmative, based on a 2.4% reduction in energy use across a 35,000-plus subject building data set representing a three-year study period – 2008 through 2011. Not included in this report is the cause for the reductions; did properties affect behavioral changes, install energy efficiency measures or just adjust or clean up the data in the building profile? We don’t know. A reader is expected to come away from this

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report with the impression that using Portfolio Manager to benchmark energy use will result in reduced energy use consumption – which could be misleading. Without a similar summary of the performance of a control group of similar buildings over the same time period, the conclusions presented in this report should be considered informational only – and not necessarily actionable, nor sufficient to formally and legally select Portfolio Manager as a State-wide reporting tool.

The potential number of “disclosable” buildings in the commercial category – reported as 6,952 – is not footnoted and is without caveats to better explain this building count or to summarize the many building use types represented. It is important to know how many of these “disclosable” buildings are potentially eligible for an Energy Star Score? How many of these counted buildings will find comparable Energy Use Intensity (EUI) metrics provided by EPA – currently 88 different types. How many of these buildings have a use type that falls into neither of these categories and so will find no benefit in using Portfolio Manager.

These are important questions, because the best performance metrics available from Portfolio Manager are weather-normalized and are only available to those building use types – currently approximately 21 types - eligible for an Energy Star Score. An additional group of building use types – currently approximately 60 types – may find the calculated EUI metrics useful, but it isn’t necessary to use Portfolio Manager to calculate these metrics, they can be calculated in a spreadsheet. All that is needed is the type of subject energy, the unit measurement of that energy, the quantity of each of the subject energies and a multiplier available from the internet or from the Energy Star Portfolio Manager, Technical Reference, Thermal Energy Conversions. Once calculated, the results can be compared to the list of reference statistics included in the Energy Star Portfolio Manager, Technical Reference, U.S. National Median Reference Values for All Portfolio Manager Property Types. There may be some value in this comparison, but it is not an apples-to-apples performance comparison, it is not weighted based on the information in the building profile and it is not weather-normalized so the value of this information is questionable – and certainly limited. There must be a number of building types for which an Energy Star Score is not available and for which a comparative Energy Use Intensity metric is available from Portfolio Manager. This is an important number to know, sooner rather than later.

Starting from the reported 6,952 “disclosable” buildings and subtracting the number of buildings for which comparison performance metrics are not available and subtracting the number of buildings who can calculate Energy Use Intensity without using Portfolio Manager, we are left with the number of buildings eligible for an Energy Star Score and which can find Portfolio Manager very useful. If, from this remainder, the number of “disclosable” building types already using Energy Star Portfolio Manager or which have already earned the Energy Star Label are subtracted, the CEC would have a more accurate count of the number of buildings not already using Portfolio Manager and have a better sense of the number of additional buildings that would benefit from a performance comparison. This is an important baseline for determining the need for and cost effectiveness of a State-wide energy use disclosure program and is something we should know sooner, rather than later.

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On the multi-family side, a much larger number of buildings are considered “disclosable,” and since Portfolio Manager has recently developed an Energy Star Score for Multi-family properties, there may be more opportunity for increased reporting within the multi-family community. The difficulty here is the business relationship created in the lease agreement that clearly outlines the expectations and responsibility for energy use and energy costs between Owner and Occupier.

These business relationships are based on established business practices, contract law and current State regulations. The difficulty in trying to impose mandatory whole-building reporting is that both parties need to cooperate in providing data and collaborate to implement any efficiency measures; once the lease agreements are signed, this can be very difficult and even problematic. Any building-related service performed at a property requires a contract with a single party and that is usually the Owner. Any space-related service performed at a property will also require a contract and that contract can be between the contractor and the Owner or the contractor and the occupier. In either case, the liability for performance is between the parties to the contract. There really isn’t an alternative mechanism in place by which Owner and Occupier can agree to another set of terms that fall outside of existing lease and rental agreements – and neither party would benefit by a cooperative contractual relationship with a third party, like a utility service provider where either / or one / both of the parties take on some / all of the liability. This just isn’t the nature of our business. Resolving this dilemma by ignoring its essential elements and forcing Owners to collect and report on Occupier energy usage – without a contract or agreement in place creates unnecessary and unreasonable liability for both parties, regardless of the level of cooperation provided by the utility companies in aggregating data and regardless of any regulatory language. Insensitivity to this key market element may foster unnecessary conflict between the Owner and the Occupier, may negatively impact a critical business relationship and will certainly reduce the ability and willingness of all parties to fulfill mandatory reporting requirements in a meaningful and impactful way.

So, understanding the potential benefit of requiring a small, but unknown, number of buildings to publically report private operating data should be a very high priority, and this priority should be enforced by the Governor, the Commission and our elected officials. In December 2015, most, if not all, of the utility companies submitted a “disclosure-readiness” report and so far, there are no estimates of the potential implementation expense or the ongoing support costs that will be required by staff and systems to fulfill the mandatory reporting requirements. At this point, there is no clear measure of the costs involved and these should be known sooner, rather than later.

In the end, despite internal documents provided by the California Energy Commission that shows a significant increase in AB 1103 compliance disclosure over the initial 14 months of implementation, the California Energy Commission saw it necessary to coordinate a repeal of AB 1103 and to replace it with another energy use disclosure program with guidelines, eligibility thresholds and reporting deadlines to be worked out in the future over the next several years. To the list of objections and complaints I have already submitted to your office, to Chairperson Weisenmiller, to Commissioner McAllister and to

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Assemblymember Das Williams' office, I add the following issues raised above and provide a more encompassing critique of this process below.

1. After more than eight years, the California Energy Commission has yet to put forth a feasibility study, an impact study, a realistic project budget or accurate financial analysis to determine the cost effectiveness of a mandatory State-wide disclosure program or articulate a compelling and persuasive business case to support this endeavor any further. The potential financial obligation on ratepayers and taxpayers must be elucidated and considered – first!
2. After more than eight years, the California Energy Commission has yet to prove that a mandatory energy use disclosure program can be any more impactful than a voluntary program; or that a mandatory energy use disclosure program generates greater energy use reductions to the degree that the difference between mandatory disclosure and voluntary participation is so great and offers such benefit that legislative and regulatory involvement is required.
3. After more than 8 years, the California Energy Commission has yet to provide any documentation to show that the Commission has thoroughly vetted the Energy Star for Commercial Buildings program or the Portfolio Manager platform to the degree that it can determine that it is the best and only solution for State-wide reporting. So far, I have seen no formal recognition of the operational challenges and limitations of Portfolio Manager or justification for not selecting a private software platform to collect and manage data, nor have I seen a list of technical performance expectations of Energy Star Portfolio Manager by the Commission.
4. After more than eight years, two commissioners, multiple staff changes, a revolving group of participating stakeholders, a continued lack of regulatory transparency, insufficient stakeholder engagement and especially as evidenced by the secret and intentionally exclusive negotiations that resulted in repeal of AB 1103 and introduction of AB 802, there is not one person or group who is in a position that allows them to impartially and objectively monitor this process from a higher-level and with a longer-term perspective that can hold the State and the Commission accountable for their actions – and for the “failure” of AB 1103..
5. After more than 8 years, the California Energy Commission has now facilitated – intentionally or not – a disjointed and confusing process that has now become so extremely fragmented that a complete reset is required. If the California Energy Commission can make a compelling business case and provide adequate analysis to support the continued consideration of any type of energy use disclosure program, the California Energy Commission must actively, consistently and in a meaningful way engage all qualified and invested individuals or groups provided that one or more understand and have experience with commercial real estate practices, understand and demonstrate experience in increasing energy efficiency at the building level and who understand and have a working knowledge of and technical expertise with the Energy Star Portfolio Manager software platform.
6. After more than eight years and after several instances of open hostility expressed in a public setting by Commissioner McAllister towards small business owners and consultants attempting to assist building owners in complying with the former AB 1103 regulation, the California Energy Commission has yet to put forth their Small Business Development and Diversity Outreach Action Plan.

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While I believe that I have my facts straight and can truthfully and credibly support my opinions and conclusions, I am certainly happy to be proven wrong. The easiest way for you to do that, Governor, is to publish to Docket 15-OIR-05 any documents that can clarify, contradict or refute any of the issues and inadequacies I have outlined above and elsewhere in my previous communications. After all, this seems to be a reasonable level of disclosure and transparency of our elected and appointed officials.

I remain available for questions or further conversation. Thank you for your time and consideration. I look forward to receiving a written response to this correspondence and hope it includes some tangible action steps that clearly communicate the level of performance and engagement expected of the Commission by the Governor, reinforces your high standard of transparency and civic participation, maintains your commitment to aggressive climate action goals and furthers your commitment to small and minority-owned businesses throughout the State of California.

In advance, I thank you for your immediate intercession and involvement.

Sincerely,



Randy, J. Walsh
San Diego Energy Desk

Copy: CEC Docket 15-OIR-05
Chairman Weisenmiller, California Energy Commission
Commission McAllister, California Energy Commission
Assemblymember Das Williams
Ms. Martha Guzman-Aceves, Deputy Legislative Secretary, Office of the Governor