



January 14, 2008

CALIFORNIA ENERGY COMMISSION
Attention: Docket No. 07-BSTD-1
Dockets Office
1516 Ninth Street, MS-4
Sacramento, CA 95814

DOCKET 07-BSTD-1	
DATE	JAN 14 2008
RECD.	JAN 17 2008

RE: Building Efficiency Standards – Docket # 07-BSTD-1

TO THE MEMBERS OF THE CALIFORNIA ENERGY COMMISSION:

The Department of General Services (DGS) hereby submits written comments on the above-referenced proposed regulations that would revise the California Energy Building Code, contained in Title 24 of the California Code of Regulations, Part 1 and 6. According to the Notice of Proposed Action (NOPA), dated November 16, 2007, the public comment period runs from November 16, 2007 through January 30, 2008.

DGS challenges the proposed amendments to Section 10-105 of Part 1 (Administrative Regulations) of Title 24 of the California Code of Regulations.

The California Energy Commission (CEC) proposes to adopt amendments to the Administrative and Energy Efficiency provisions of the California Building Standards Code. The proposed amendments to Section 10-105 of Part 1 of the California Building Standards Code read as follows:

SECTION 10-105 – ENFORCEMENT BY THE COMMISSION

(a) **Where there is No Local Enforcement Agency.** Before new construction may begin in an area where there is no local enforcement agency, ~~and on any proposed governmental agency building for which there is no enforcement agency,~~ the executive director ~~must~~ shall determine in writing that the building design conforms to the requirements of Part 6. The person proposing to construct the building shall submit the information described in Section 10-103(a)2 and 10-103(a)3 to the executive director when such a determination is sought.

(b) **Where the Enforcement Agency is a State Agency.** No construction of any state building, or any other building subject to enforcement by a state agency, shall commence until the Department of General Services or the state agency that otherwise has jurisdiction over the property reviews the plans for the proposed building and certifies to the Commission's Executive Director that the plans

conform to the requirements of Part 6 and the information described in Section 10-103(a)2 and 10-103(a)3 has been submitted to the state agency. Each state agency shall designate the person in the agency who shall be responsible for enforcement of the requirements of Part 6 and shall notify the Commission's Executive Director. The Commission's Executive Director shall annually update a list of persons responsible for enforcement of the requirements of Part 6.

~~(b)~~ **Where the Local Enforcement Agency Fails to Enforce.** If an ~~local~~ enforcement agency fails to enforce the requirements of this article or of Part 6, the ~~commission~~ Commission, after furnishing 10 days written notice, may condition building permit issuance on submission of the information described in Sections 10-103(a)2 and 10-103(a)3 to the executive director and on his or her written determination that proposed construction conforms to the requirements of Part 6.

1. In General

The California Building Standards Law generally provides for the promulgation of building standards by state agencies. State agencies that adopt or propose building standards must do so in compliance with the procedures of the Administrative Procedure Act (APA),¹ which are then approved or adopted by the Building Standards Commission (BSC). The adopting agency must submit to the BSC a written analysis of the building standards that justifies approval to the BSC according to specified criteria.² The BSC may approve the standard, return the standard to the adopting agency with recommendations for amendment, or reject the standard.³

The BSC may reject or return proposed building standards if it finds that the adopting agency's factual determinations were arbitrary and capricious, or that the determinations were substantially unsupported by the evidence considered by the adopting agency. If the Commission fails to act within 120 days after receiving an agency's adopted standards, the standards are deemed approved without further review.

2. The Proposed Amendment to Section 10-105 Overlaps and Duplicates Other Standards and State Law.

Subdivision (b) of proposed Section 10-105 adds provisions which are nearly identical to, and are therefore duplicative of, state law.⁴ Public Resources Code § 25402.1(g)(5) provides as follows:

(5) No construction of any state building shall commence until the Department of General Services or the state agency that otherwise has jurisdiction over the

¹ See Health and Safety Code §§ 18930, subd. (a), 18931; Govt. Code, § 11346 et seq.

² Health and Safety Code § 18930

³ Health and Safety Code § 18931

⁴ See Health & Safety Code § 18930 (a)(1)

property reviews the plans for the proposed building and certifies that the plans satisfy the minimum standards established pursuant to subdivision (a) or (b) of Chapter 2.8 (commencing with Section 15814.30) of Part 10b of Division 3 of Title 2 of the Government Code, Section 25402, and this section which are applicable to the building.

Proposed subdivision (b) of Section 10-105 is shown below. The differences between the statute above and the proposed CEC regulation are shown as underlined text:

No construction of any state building, or any other building subject to enforcement by a state agency, shall commence until the Department of General Services or the state agency that otherwise has jurisdiction over the property reviews the plans for the proposed building and certifies to the Commission's Executive Director that the plans conform to the requirements of Part 6 and the information described in Section 10-103(a)2 and 10-103(a)3 has been submitted to the state agency. Each state agency shall designate the person in the agency who shall be responsible for enforcement of the requirements of Part 6 and shall notify the Commission's Executive Director. The Commission's Executive Director shall annually update a list of persons responsible for enforcement of the requirements of Part 6.

For the most part, this language duplicates existing state law outlining the responsibilities of DGS to review building plans for conformity to the state Energy Building Code. These duplicative provisions are unnecessary.

To remaining provisions of proposed Section 10-105(b) purport to require DGS to report to the executive Director of the CEC. The CEC cites no provisions of the State Constitution or law that would support the notion that an agent of an independent state commission has supervisory jurisdiction over a state department, let alone a control agency such as DGS.

Thus, DGS contends that subdivision (b) of proposed Section 10-105 is invalid as a matter of law and should be deleted in its entirety from the final regulations.

3. Section 10-105 of the Regulations Would Have Significant Fiscal Impact on State Agencies Enforcing the Title 24 Energy Building Code

Existing law states that construction of any state building shall not begin until DGS reviews the plans for the proposed building and certifies that the plans conform to the requirements of the California Energy Building Code.⁵

Section 10-105 of the proposed regulations would extend the plan review requirement, adding "any other building subject to enforcement by a state agency". This language would add significant costs to DGS, its Division of State Architect (DSA), and other state agencies with Title 24 regulatory enforcement jurisdiction.

⁵ Public Resources Code § 25402.1(g)(5)

Currently, DSA is required by law to enforce structural safety, fire and life safety building code requirements and conduct access compliance plan reviews. The law provides DGS and DSA the authority to charge applicants a fee sufficient to cover the cost of providing the plan review and field oversight services.

DSA has no statutory authority to charge a fee to conduct Title 24 Part 6 Energy plan reviews, as CEC has proposed in the draft regulations.

The CEC failed to address this fiscal impact in documents related to Docket 07-BSTD-1.

4. Existing Law Requires CEC to Enforce the Energy Building Code, not DGS

Section 10-105 of the proposed regulations requires DGS to certify to the Executive Director of the CEC that the plans conform to the Energy Building Code, and that all of the information and documentation required by the CEC elsewhere in the Energy Building Code has also been submitted to DGS.

Furthermore, the proposed regulation requires DGS and other state agencies to designate the person in the agency who shall be responsible for enforcement of the requirements of the Energy Building Code, and requires DGS to so notify the Energy Commission's Executive Director. The regulation also specifies that the CEC Executive Director shall annually update a list of persons responsible for enforcement of the Energy Building Code.

Public Resources Code § 25402.1(g) provides among other things that the Energy Building Code "shall be enforced by the building department of every city, county, or city and county."

Moreover, subdivision (g)(2) of Section 25402.1 expressly provides that, "[w]here there is no local building department, the [Energy] commission shall enforce" the Energy Building Code.

Thus, no statutory authority exists for CEC to adopt the provisions of Section 10-105 of the proposed regulations as drafted in the 45-day language. The provisions of Section 10-105 directly contradict state law and therefore cannot be adopted.

5. Relief Sought

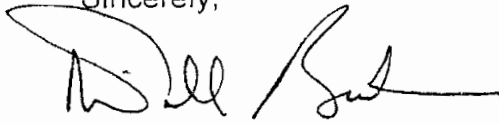
In light of the foregoing, DGS requests that Section 10-105 be deleted from the proposed regulations. Thank you for your consideration of these comments and for including them in the docket.

I appreciate your interest in the comments of DGS concerning the Energy Building Code, and I look forward to your anticipated cooperation in this matter.

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Please contact Kathy Hicks at 916-327-8540 concerning this matter should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Will Bush', with a large, sweeping initial 'W' and a long, horizontal flourish at the end.

WILL BUSH
Director

cc: California Building Standards Commission
Department of Finance
California Department of Corrections and Rehabilitation