

# DICKERSON LAW, INC.

*A Professional Corporation*

Brett L. Dickerson  
[Brett@bdickersonlaw.com](mailto:Brett@bdickersonlaw.com)

Kimberly Sullivan Gray  
[Kimberly@bdickersonlaw.com](mailto:Kimberly@bdickersonlaw.com)

*Real Estate • Employment Law • Contract Disputes • Litigation • Estate Planning*

*Via First-Class Mail & Electronic Transmission*

April 21, 2015

Ms. Rachel MacDonald  
Standards Implementation Office  
California Energy Commission  
1516 Ninth Street, MS-26  
Sacramento, CA 95814

California Energy Commission

**DOCKETED**

12-HERS-01

TN # 75643

APR 21 2015

*Re: Conflicts of Interest in the HERS Rating System & OII*

Dear Ms. MacDonald:

My name is Brett Dickerson. I am an attorney with the law firm of Dickerson Law, Inc., located in Oakdale, CA. We are working with Dave Hegarty of DuctTesters concerning the issue of HERS Raters assuming an agency/business relationship with the contractors whose work they will inspect by assuming responsibility for procuring building permits on the contractor's behalf.

Please find included herewith copies of three letters which I sent to the CEC regarding this issue and one responsive letter from Mr. Ashuckian. I know that Mr. Hegarty has made his position clear on this issue. The correspondence I am including serves to clarify our collective position as to this matter.

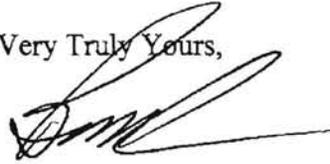
In short, we do not even see this as being a close call. The level of conflict involved in allowing raters to enter into this type of a relationship with contractors is enormous. The deleterious effect this will have on the credibility of the entire process cannot be overstated. Unfortunately, it is beginning to appear that the CEC's position as to Energy-Efficient construction may be less geared towards the integrity of the process as simply putting up numbers of how many homes have been permitted and "inspected" by HERS raters. My client does not view the process this cynically, nor does the majority of the industry participants.

It now appears that the matter has been assigned to the OII process, a procedure that appears to be as confusing as it is protracted. The cliché "Nero fiddled whilst Rome burned" inevitably comes to mind. A significant violation of the conflict of interest rules continues unabated while the CEC pursues the OII ("Order Instituting Information") followed by the OIR (Order Instituting Rulemaking (?)). Obviously, significant questions have been raised as the propriety of the first OII and what, if any of the information therefrom will be used. On a more fundamental level, it seems a bit incongruous that an OII and OIR would even be necessary.

There is *already a rule in place* that precludes the activities in question. If there is to be an OII, it should be to establish a rule that allows this conflict to exist, not vice versa. Until that time, the integrity of the process should be first and foremost in everyone's mind. Therefore, raters insinuating themselves into the permitting process should be stopped immediately until such time as the Commission, after receiving all information, can decide if they want the practice to continue.

Kindly insure that this e-mail and attachments are included in the OII process currently underway. If you have questions or require any additional information, please don't hesitate to call.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Brett L. Dickerson", written over a horizontal line.

BRETT L. DICKERSON

BLD:sis

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*Via First-Class Mail*

November 23, 2014

David Ashuckian, Deputy Director  
Efficiency and Renewable Division  
California Energy Commission  
1516 Ninth Street, MS-26  
Sacramento, CA 95814

*Re: Conflicts of Interest in the HERS Rating System*

Dear Mr. Ashuckian:

As you are aware, this office has been contacted by David Hegarty of Duct Testers, Inc. along with other members of the Hers Rating Industry. This letter is written in follow-up to our recent meeting at the CEC offices in Sacramento on October 22, 2014.

We have begun putting together a list of individuals who have knowledge of the incidents we brought to your attention, including but not limited to, the sale of material used in energy-efficient construction to contractors by Hers Raters. We have also initiated communications with the Provider informing them of this situation and asking them to initiate an investigation consistent with their own interpretation of CEC regulations and their procedures for addressing potential violations. We stand behind our position, as addressed in the meeting, that it should not fall upon the Raters to police the activities of the Providers, particular with the very real possibility of retaliation. It is axiomatic that the CEC, by virtue of Title 20, oversees the Providers and, inevitably, it must be the CEC who decides the propriety of the Provider's interpretation of the conflict rules. Given that the Provider has interpreted those rules as they have within their own publications and manuals, it falls to the CEC to either enforce those rules as interpreted by the Provider, or amend the rules so that the actions of the Providers are not in conflict with the Providers' own policies and procedures. Nonetheless, if it remains the CEC's position that the Raters must take the lead in this process, we will proceed as you have directed.

Additionally, we remain very interested in hearing where the CEC, particularly their legal department, has come down concerning the revelations of additional conflicts of interest raised at our meeting. Although we engaged in some rather spirited debate concerning the propriety of Raters procuring permits on behalf of their contractors, there seemed to be far more consensus regarding the sale of construction materials to the contractors. Based upon the subsequent internal discussions you intended to engage in on this issue, we would be very interested in hearing what position the CEC has taken as to this practice *vis-à-vis* your own prohibitions against conflicts of interest.

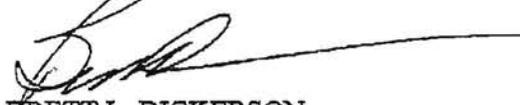
332 West F Street, Suite A  
Oakdale, CA 95361

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

Office: (209) 848-1860  
Fax: (209) 848-1807

Please contact the undersigned at your earliest convenience so that we can continue to move forward with this highly important matter.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Brett L. Dickerson", with a long horizontal line extending to the right.

BRETT L. DICKERSON

BLD:sls

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Kimberly Sullivan Gray  
[Kimberly@bdickersonlaw.com](mailto:Kimberly@bdickersonlaw.com)

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*Via First-Class Mail*

January 8, 2015

David Ashuckian, Deputy Director  
Efficiency and Renewable Division  
California Energy Commission  
1516 Ninth Street, MS-26  
Sacramento, CA 95814

*Re: Conflicts of Interest in the HERS Rating System*

Dear Mr. Ashuckian:

This letter is written in follow up to that sent to you on or about November 20, 2014, a copy of which is included for your review.

We are a bit disappointed by the absence of any response to our earlier letter, particularly as to our request for an indication of the CEC's position as to the issue of Raters selling energy-efficient construction materials to contractors. We were hopeful that our meeting represented affirmative steps towards a resolution of this matter. Unfortunately, all indications are that this matter will be allowed to languish until such time as industry members assume responsibility for dealing with it.

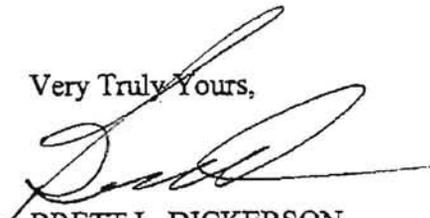
As discussed in our previous letter, there is no statutory, regulatory or common-law authority which requires Raters to police Providers. Nonetheless, as per your directions, we initiated communications with the affected Provider and formally requested that an investigation be initiated. Although we asked that we receive some manner of responsive communication within ten days of the date of the letter, it has now been over a month and we have heard nothing.

We cannot justify spending additional money in an effort to induce the Providers to take this issue on. For this reason, we again request that the CEC follow through on their statutory mandate to oversee the activities of both the Raters and Providers. These issues represent a conflict of interest under both the relevant regulations and the controlling policies of the Providers themselves. The Raters carrying out these activities are becoming emboldened at the indifference displayed by the governing agencies and have, understandably, accelerated their efforts. This is an unacceptable development on multiple levels, but nowhere more than in the negative effect it has on the credibility of the entire process.

Section 1231 hearings are an expensive and highly adversarial process. Multiple parties will need to be named as defendants and the time and expense borne everyone involved will be significant. Private sector businesses should not be required to assume a responsibility that falls squarely within the realm of the CEC's influence and control. Along this line, Dave Hegarty was recently instructed to have more of his communications to the CEC originate from this office. This would seem to increase the likelihood that a hearing will eventually be required to resolve this matter.

Kindly notify us of the CEC's intentions in this regarding at your earliest convenience. We appreciate from our meeting that the State may see this matter as more academic than anything else. Nonetheless, its impact on the Raters who follow the rules, along with the credibility of California's energy efficient construction program, is taking some serious hits. Something needs to be done, sooner rather than later.

Very Truly Yours,



BRETT L. DICKERSON

BLD:sls

**CALIFORNIA ENERGY COMMISSION**

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512  
www.energy.ca.gov



January 14, 2015

Brett L. Dickerson  
Dickerson Law, Inc.  
332 West F Street, Suite A  
Oakdale, CA 95361

**RE: CONFLICT OF INTEREST IN THE HOME ENERGY RATING SYSTEM (HERS)**

Dear Mr. Dickerson:

This letter is in response to your letters dated September 9, 2014, and November 23, 2014, and the meeting on October 22, 2014, with you, David Hegarty of Duct Testers, Inc., and Energy Commission staff and attorneys to discuss your concerns on conflict of interest issues.

**Issue #1: HERS Raters Pulling Permits for Building Contractors**

In your September 9, 2014, letter you, on behalf of Mr. Hegarty, raise concerns that HERS raters are procuring building permits on behalf of contractors for whom they will be performing energy-testing services. Your letter describes this as a conflict of interest under the HERS regulations (1673(j) of Title 20 of the California Code of Regulations).

Section 1673(j), sets out the HERS conflict of interest regulations, and states in pertinent part:

- (2) Providers and Raters shall be independent entities from the builder and from the subcontractor installer of energy efficiency improvements field verified or diagnostically tested.
- (3) Providers and Raters shall be independent entities from any firm or person that performs work on the home for a California Home Energy Audit or a California Whole - House Home Energy Rating.

**EXCEPTION to Section 1673(j) (3): California Whole - House Home Energy Raters, who are working as or for a Building Performance Contractor certified under an Energy Commission - approved Building Performance Contractor program as part of a Provider's Rating System as specified in Section 1674(e) of the regulations and in the HERS Technical Manual, shall not be required to be an independent entity from the person(s) or firm(s) performing the work on a home. This exception shall not apply to California Field Verification and Diagnostic**

Testing Raters performing field verification and diagnostic testing of newly constructed homes or alterations to existing homes to verify compliance with the requirements of Title 24, Part 6. In other words, the HERS conflict of interest regulations require raters and builders to be independent entities.

“Independent Entity” is defined in Section 1671 of the HERS regulations as follows:

Independent Entity means having no *financial interest* in, and *not advocating or recommending the use of any product or service as a means of gaining increased business with*, firms or persons specified in Section 1673(j). (Emphasis added.).

“Financial Interest” is defined in Section 1671 as follows:

Financial Interest means an ownership interest, debt agreement, or employer/employee relationship. Financial interest does not include ownership of less than five percent of the outstanding equity securities of a publicly traded corporation.

Commission staff and attorneys have analyzed your concerns and, based upon the facts presented in your letters and during the October 22, 2014 meeting, have found no evidence of a “financial interest” or of “advocating or recommending the use of a product or service as a means of gaining business with firms or persons specified in section 1673(j).” Consequently, we do not believe such an arrangement, as you have described, is sufficient to constitute a violation of section 1673(j) of Title 20.

We invite you to submit further facts for our consideration to demonstrate that when a rater who pulls building permits on behalf of a builder or subcontractor then performs the HERS testing, a financial interest exists, or that advocating for the service is done as a means of gaining increased business.

#### **Issue #2: HERS raters selling or recommending products**

In the meeting on October 22, 2014, and in your November 23, 2014 letter, you and Mr. Hegarty raised a separate concern about HERS raters selling construction materials to builders or contractors. At the meeting, you and Mr. Hegarty agreed to provide us evidence of specific instances in which this has occurred. On October 23, you carbon-copied me and Joan Walter on an email describing an example of one rater attempting to sell (what you describe as) a non-compliant product (Knauf Eco Seal) to builders.

Thank you for sharing this information with us. The Commission is examining whether raters selling materials to builders could create a conflict of interest under the HERS regulations. This question will be considered, along with other issues, in the upcoming

Mr. Brett L. Dickerson  
January 14, 2015  
Page 3

informational proceeding referenced below. We encourage you to provide additional examples of such instances or others that could compromise the integrity of HERS raters through that process.

**Order Instituting Informational Proceeding Order # 12-1114-6.**

In the near future, Commission staff will be working in an open and public process within the Order Instituting Informational (OII) Proceeding Order #12-1114-6, to review HERS issues including, but not limited to, conflicts of interest. Commission staff anticipates this effort to begin in the first quarter of 2015 and we invite you to participate in that process. All activities within the OII will be publicly noticed to the service list and open to public participation.

During the OII proceeding the opportunity to propose new or revised regulation language will also be explored. Any proposed changes to the HERS regulations will be addressed in a future HERS rulemaking, which is also an open public process. We encourage all interested parties to participate in the procedural activities.

If you have any further questions or would like any additional information, please contact Rachel MacDonald at (916) 654-4862 or via email at [Rachel.Macdonald@energy.ca.gov](mailto:Rachel.Macdonald@energy.ca.gov)

Sincerely,

A handwritten signature in black ink, appearing to read 'David Ashuckian', with a long horizontal flourish extending to the right.

David Ashuckian  
Deputy Director, Efficiency Division

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[Brett@bdickersonlaw.com](mailto:Brett@bdickersonlaw.com)

Kimberly Sullivan Gray  
[Kimberly@bdickersonlaw.com](mailto:Kimberly@bdickersonlaw.com)

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*Via First-Class Mail*

March 18, 2015

David Ashuckian, Deputy Director  
Efficiency and Renewable Division  
California Energy Commission  
1516 Ninth Street, MS-26  
Sacramento, CA 95814

Re: *Conflicts of Interest in the HERS Rating System*

Dear Mr. Ashuckian:

Thank you for your letter of January 14, 2015 in which you provide the CEC's position regarding the conflict of interests associated with HERS raters pulling permits on behalf of the contractors whose work they will be inspecting.

Not surprisingly, we are extremely disappointed in the position the CEC has taken. We see the language of both the code itself, and the policy manuals interpreting those codes, as being rather unequivocal; A HERS rater establishing an agency relationship with the general contractor whose work will be ultimately inspected represents a conflict of interest that is nothing short of egregious. As further evidence of where we believe the CEC should be on this issue, we provide the following excerpt taken directly from the 2013 Residential Compliance Manual:

"Example 2-7

**Question**

I heard that there are conflict-of-interest requirements that HERS raters must abide by when doing field verification and diagnostic testing. What are these requirements?

**Answer**

HERS raters are expected to be objective, independent, third parties when they are fulfilling their duties as field verifiers and diagnostic testers. In this role, they are serving as special inspectors for local enforcement agencies. By law, HERS raters must be independent entities from the builder or subcontractor installer of the energy efficiency features being tested and verified. They can have no financial interest in the installation of the improvements. HERS raters cannot be employees of the builder or subcontractor whose work they are verifying. Also, HERS raters cannot have a financial interest in the builder's or contractor's business, or advocate or recommend the use of any product or service that they are verifying."

Give this statement directly from a CEC document, the staff's position that the practice at issue does not represent an egregious conflict of interest is, I regret to say, nothing short of stunning.

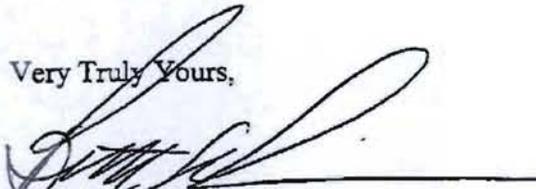
As an FYI, we have received no response from CalCERTS to our letter requesting an investigation as to either: 1) HERS raters selling sealant and sheet metal to their clients; or 2) HERS raters pulling permits on behalf of the contractors whose work they will inspect. As such, we must conclude that any further effort to induce CalCERTS to investigate these compelling issues will be unproductive. Because we continue to have serious concerns as to the effect this situation is having on the credibility of the HERS inspection process, we are left with no choice but to pursue a different course with the CEC in an effort to stave off a likely §1231 Hearing.

At the conclusion of the Masco hearing, we were asked to inform the Commission should a similar matter arise in the future. In honor of that request, we ask that you arrange a meeting with Commissioners Andrew McAllister and Karen Douglas. Commissioner McAllister oversees Title 20 compliance. Commissioner Douglas is an attorney and we believe she will be uniquely qualified to discuss issues relating to conflicts of interest. Both will be very capable of addressing this issue, particularly the negative impact attendant to having a HERS inspector establishing a Principal/Agent relationship with the contractor prior to inspecting that contractor's work.

Please contact us soon as reasonably possible with possible dates that Commissioner Douglas would be able to meet with us. Mr. Hegarty and I will do all we can to work around the Commissioner's schedule.

We look forward to hearing from you.

Very Truly Yours,



BRETT L. DICKERSON

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