

AB 1103 Rulemaking Workshop Presentation:

Legal Framework for the Regulations

Robin Mayer
Staff Counsel
California Energy Commission
rmayer@energy.state.ca.us
(916) 651-2921

Note: The following was presented orally at the Committee's workshop, on Aug. 13, 2009. Some revisions were added on Aug. 19, 2009.

Introduction (see contact information above)

Rulemaking Process

The Working Group has been discussing issues and drafting regulatory language since March. The Commission's Committee officially opened rulemaking on July 15, 2009. Right now we are at the **informal** stage of drafting and feedback, before proposed regulations are submitted to the Office of Administrative Law (OAL). Once that draft is submitted, the public has 45-days to comment. The Commission reviews those comments and may revise the draft regulations accordingly. The public has at least 15-days to comment on substantive revisions. The Commission then adopts and submits the regulations in their final form. The OAL does its own thorough review of the regulations before they are accepted and published, becoming law.

Our informal process has been complicated by AB 531, which is expected to pass but has not yet. We'll get to that in a few minutes.

General Power to Regulate

The Commission's general powers to regulate rest in Public Resources Code sections 25213 and 25218(e). Those sections grant authority to adopt rules and regulations to carry out the purposes of the Warren-Alquist Act, our enabling legislation, or to take any action, including adopting regulations, the Commission deems, quote, "reasonable and necessary," unquote, to carry out the provisions of the Act. In practice, this means we regulate to fulfill our statutory and policy goals, including and especially, energy efficiency.

AB 1103 Law

AB 1103

Public Resources Code section 25402.10 codified AB 1103. It requires utilities to maintain records of energy consumption data for all nonresidential buildings in a format compatible with the EPA's Portfolio Manager; release data to EPA upon authorization by the building owner; and that the owner or agent disclose "benchmarking data and ratings" for the most recent 12-month period to a prospective buyer, lessee of the entire building, or lender that would finance the entire building.

In addition to the plain language of the statute, policy statements, legislative analysis and text amendments help guide the Committee in forming the regulations, because those supply a record of the lawmakers' intent.

The preamble to AB 1103 declares it is the state's policy to promote "all feasible means of energy conservation." The Legislature also found that benchmarking for all nonresidential buildings in the state would allow owners to compare performance to similar buildings and to the building's own baseline, manage energy costs, as well as motivating owners to improve energy efficiency.

The Senate Floor Amendment of September 2007 limited methods for releasing data to ensure customer confidentiality, evidently in light of Pub. Util. section 394.4. More on that as we continue.

AB 531

In this legislative session, AB 531 would amend Pub. Res. section 25402.10. The bill was last amended on June 11, and the current text contains no exceptions regarding confidentiality. AB 531 simply relieves owners of the January 2010 deadline for compliance, and requires the Commission to schedule when benchmarking should begin.

Andrew Zingale of Assemblywoman Saldana's office expects AB 531 to be in the Governor's hands by September. There's no indication that the Governor would veto it, and there's no indication that the current text will change. At this point we are presuming it will become law.

E.O. S-20-04

As analysis for AB 531 notes, Governor Schwarzenegger encourages benchmarking of all commercial and public buildings through his Green Building Initiative and Executive Order S-20-04.

The Executive Order calls on the Commission to propose a benchmarking methodology to increase energy efficiency in private commercial buildings, increase building energy efficiency by 20% by 2015, as well as calling on commercial building owners to take “aggressive” action to cut electricity usage.

Other Relevant Statutes

Pub. Utilities Code § 394.4 requires that utilities keep specific customer information confidential unless the customer consents to release it.

Gov. Code § 6254.16 allows an exception for local agencies, including municipal utilities, to release customer information to other government agencies when necessary to carry out that agency’s official duties.

Proposed Draft Regulations

They will appear in Title 20, following the section on the Home Energy Rating System (HERS).

Proposed Sections 1680 and 1681 describe the purpose and scope of the regulations.

Proposed Section 1682 lists definitions that are needed to understand and carry out this set of regulations. I cannot emphasize this enough. A definition in the outer world is not the same as one in the regulation. If it is, we probably don’t need a regulation to define it. Definitions that I expect may change before the regulations are formally proposed include “Energy,” “Nonresidential Building,” “Entire Building” and “Utility Company.” That said, all of the definitions frame the regulations in significant ways and they aren’t over, as Yogi Berra might say, until they are final.

Proposed Section 1683(a) and (b) require owners to set up building efficiency accounts with the EPA and with the Commission at least 30 days before disclosure is required, according to both the building schedule proposed in section 1685, **and** an anticipated opportunity to sell, finance or lease the entire building. The 30 days is to provide ample time for utilities to comply (they specifically have 14 days to deliver data), for system mishaps, and generally to make sure

owners comply in time. Please note that when I say owners, that includes the owners' authorized agents.

Proposed subsection (c) requires utilities to release data on authorization by the owner, within 14 days. It allows a utility to verify the authorization before release.

And now we're at our biggest issue: the tenant problem left by the statutes. Without consent from each and every building tenant during the previous 12 months, IOU's are concerned they may run afoul of Pub. Util. section 394.4, as well as PUC rules, in releasing tenant data to the owner. Municipal utilities do not have this problem, as they are covered by Gov. Code 6254.16—those utilities are releasing data to other government agencies, that are carrying out their official duties.

Therefore proposed section 1683(c) requires utilities that are not public agencies, that is the IOU's, to release tenant account data under a nondisclosure agreement. Not everyone likes the NDA requirement, but I want to explain why I think it's useful and important to protect utilities **and** owners.

A preliminary argument is that IOU's can comply with (Pub. Res.) section 25402.10 without regard to (Pub. Util.) section 394.4, because 25402.10 is a newer and more specific statute. This argument of statutory construction is perfectly valid, but I can well understand why the IOUS are not comfortable with going forward on that theory alone.

A required NDA bolsters that argument with a guarantee that the use of the utility data is restricted to complying with section 25402.10. First, 25402.10 requires utilities to "preserve the confidentiality of the customer," which is exactly what an NDA does. Second, without an NDA, there is a potentially onerous burden of trying to collect signatures from every tenant in order to rate the entire building. For example, an owner may not be able to find a tenant who left 11 months ago, much less get the tenant's consent to release the data. Of course, an owner is free to get those consents, but those who can't get every tenant to sign off must nevertheless comply with section 25402.10, somehow. An NDA gives owners a way to rate the building in a reliable, tailored and efficient manner. Third, an NDA is a standard tool familiar to the business world. The regulation does not mandate a particular form so that each IOU can fashion its own agreement, though the guidance may suggest a model to ease that process.

Proposed section 1684 establishes specific time frames for disclosures. First, the owner can promote the rating at will and display an Energy Star label if the building qualifies. But the statute calls for release of benchmarking “data” along with the rating, so that buyers, etc. know

the energy characteristics of the building they are about to own. That raises a confidentiality concern, although strictly owners are not subject to Pub. Util. 394.4. In the proposed regulation, disclosures are paired with typical paperwork, at the time of a sales contract, lease, or loan application is presented. Some have commented that this is late in the process so data disclosures may shift earlier, or the regulation could make those points a deadline. These moments, however, are identifiable and practical for adding paperwork; more importantly, restricting the disclosure of tenant data to serious buyers helps preserve their confidentiality up to the point where the prospective buyer would learn tenant data anyway (e.g. by getting copies of the leases).

Proposed section 1685 establishes a schedule for implementing disclosures according to building size and type. Big buildings go first, with some refinements.

Now I’m going to turn over the floor to Martha Brook, who will explain the proposed California ratings system.