RESOLUTION NO:

STATE OF CALIFORNIA

STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

RESOLUTION

WHEREAS staff proposes to amend section 1682(c) of Title 20 of the California Code of Regulations to delay until July 1, 2016 the application of the Nonresidential Building Energy Use Disclosure Program to buildings with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet, as reflected in the proposed Express Terms attached hereto as Exhibit A; and

WHEREAS staff proposes for the Commission to adopt the Finding of Emergency pursuant to Government Code section 11346.1, attached hereto as Exhibit B, that the proposed amendments to section 1682(c) of Title 20 of the California Code of Regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare; and

WHEREAS a *Notice of Consideration and Possible Adoption of Emergency Regulations to Amend Nonresidential Energy Use Disclosure Program Compliance Schedule in 20 California Code of Regulations Section 1682(c) and Finding of Emergency Pursuant to Government Code Section 11346.1* was posted and distributed to the appropriate listservs on July 3, 2014

NOW THEREFORE the Commission:

Adopts the proposed Express Terms, attached hereto as Exhibit A, and

Adopts the Finding of Emergency, attached hereto as Exhibit B.

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretary to the Commission does hereby certify that the foregoing is a full, true and correct copy of a Resolution duly and regularly adopted at a meeting of the California Energy Commission held on July 22, 2014.

AYE:
NAY:
ABSENT:
ABSTAIN:

_____
HARRIET KALLEMEYN
Secretariat

RESOLUTION NO.

Exhibit A

[Proposed] Express Terms for the Nonresidential Building Energy Use Disclosure Program

California Code of Regulations
Title 20. Public Utilities and Energy
Division 2. State Energy Resources Conservation and Development Commission
Chapter 4. Energy Conservation
Article 9. Nonresidential Building Benchmarking and Disclosure
Sections 1680-1684

July 22, 2014

Section 1680. Purpose

This article implements procedures, pursuant to Public Resources Code Section 25402.10, for disclosing energy use data and ENERGY STAR® Scores for nonresidential buildings in California.

Note: Authority cited: Sections 25213, 25218(e), 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Section 1681. Definitions

The following definitions apply to this article:

(a) "Building Owner" means a person possessing title to a nonresidential building, or an agent authorized to act on behalf of a person possessing title.

(b) "Data Verification Checklist" means a report generated by Portfolio Manager that summarizes a property's physical and operating characteristics.

(c) "Energy Provider" means an entity providing sources of energy other than electricity or natural gas that are recognized by Portfolio Manager.

(d) "ENERGY STAR® Score" means an energy efficiency measurement created by Portfolio Manager, represented on a scale from 1 to 100 and normalized for a building's characteristics, operations, and regional weather.

(e) "Energy Use Data" means a record of kilowatt hours, therms, or any other measure of energy recognized by Portfolio Manager.

(f) "Nonresidential Building" means a building of occupancy type A, B, E, I-1, I-2, M, R1, S, or Type U parking garages, as defined in the California Building Code, Title 24, Section 302 et seq. (2007).

(g) "Portfolio Manager" means the U.S. Environmental Protection Agency's ENERGY STAR® program online tool for managing building energy use data.

(h) "Prospective buyer" means a person who has submitted a written offer to purchase a building.

(i) "Prospective lessee" means a person who has submitted an application to lease an entire building.

(j) "Prospective lender" means a person who has received an owner's application to finance an entire building.

(k) "Utility" means an entity providing electricity or natural gas to a nonresidential building owner or tenant.

Note: Authority cited: Sections 25213, 25218 (e), 25402.10, Public Resources Code. Reference: Sections 25402.10, Public Resources Code.

Section 1682. Schedule of Implementation

A building owner shall comply with this article according to the following schedule:

(a) On and after July 1, 2013, for a building with total gross floor area measuring more than 50,000 square feet.

(b) On and after January 1, 2014, for a building with a total gross floor area measuring more than 10,000 square feet and up to 50,000 square feet.

(c) On and after July 1, ~~2014~~**2016**, for a building with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet.

Note: Authority cited: Sections 25213, 25218(e), 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Section 1683. Disclosure~~s~~

(a) A building owner shall disclose the Data Checklist for the building to:

(1) A prospective buyer of the building, no later than 24 hours prior to execution of the sales contract.

(2) A prospective lessee of the entire building, no later than 24 hours prior to execution of the lease.

(3) A prospective lender financing the entire building, no later than submittal of the loan application.

(b) Nothing in these regulations permits an owner to use tenant energy use data for purposes other than compliance with Public Resources Code, Section 25402.10.

(c) A building owner may supplement the above disclosure with forms from other sources, such as the ASTM International (formerly known as the American Society for Testing and Materials) checklist E2797-11 (2011), the Standard Practice for Building Energy Performance Assessment for a Building Involved in a Real Estate Transaction.

Note: Authority cited: Sections 25213, 25218(e), 25402.10, Public Resources Code. Reference: Section 25402.10, Public Resources Code.

Section 1684. Data Releases, Report

(a) At least 30 days before a disclosure is required by Section 1683, a building owner shall open an account or update an existing account for the same building on the EPA's ENERGY STAR® program Portfolio Manager website, and within the account:

(1) Provide the owner name and the owner e-mail address;
(2) Provide the building name, the building street address, city and ZIP code, and the year in which the building was constructed;
(3) Identify all sources of energy use data for the entire building, for at least the most recent 12 months;
(4) Provide space use characteristics as specified by Portfolio Manager for all space types in the entire building; and
(5) Request all utilities and energy providers serving the building to release energy use data for the entire building from at least the most recent 12 months for specified meters or accounts to the owner's Portfolio Manager Account; or, the owner may manually enter all energy use data for the entire building from at least the most recent 12 months to the owner's Portfolio Manager account.

(b) As soon as practicable and no later than 30 days after receiving a request under subdivision (a) of this section, a utility or energy provider shall upload all energy use data for the entire building from at least the most recent 12 months for the specified meters or accounts to the building owner's Portfolio Manager Account. If a building has a utility or energy provider account for which the owner is not the customer of record, the utility or energy provider shall aggregate or use other means to reasonably protect the confidentiality of the customer. A utility or energy provider may verify a request or ask for clarification before releasing data.

(c) After all utilities and energy providers serving a building have complied with subdivision (b) of this section, and before the disclosure~~s~~ required pursuant to Section 1683, the building owner shall generate the building's Data Verification Checklist from Portfolio Manager and electronically submit the Data Verification Checklist to the Energy Commission. The Data Verification Checklist shall expire 30 days after it is generated.

(d) In the event that the Energy Commission accesses the data submitted pursuant to subdivision (c) of this Section, the Energy Commission shall treat the data as confidential consistent with state and federal laws.

(e) If there is information missing from a disclosure, and if the owner has made a reasonable effort to ascertain the missing information, the owner may then use an approximation of the information, provided that the approximation is identified as such, is reasonable, is based on the best information available to the owner, and is not used for the purpose of circumventing or evading this article.

Note: Authority cited: Sections 25213, 25218(e), 25402.10, Public Resources Code. Reference: Sections 25216.5(d), 25320, 25402.10, Public Resources Code.

RESOLUTION NO.

Exhibit B

[PROPOSED]
FINDING EMERGENCY
FOR
PROPOSED REGULATIONS
TO AMEND THE COMPLIANCE SCHEDULE FOR THE
NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM
OF THE
CALIFORNIA ENERGY COMMISSION

Government Code Section 11346.1 mandates that any finding of emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subsection (a) of Section 11346.5, and a description of specific facts showing the need for immediate action.

FINDING OF EMERGENCY

The California Energy Commission (the Commission) finds that the changes proposed herein are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. Specifically, the Commission finds that changing the implementation date for owners and operators of nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet to comply with the requirements of the Nonresidential Building Energy Use Disclosure Program (the Program) is necessary to avoid potential market confusion, which could cause delays and drive up transaction costs in commercial real estate transactions. This change is intended to provide sufficient time to allow stakeholders, including utilities, to develop and implement best practices to accommodate the entrance of these smaller buildings into the compliance requirement, and also allow time for the Commission to consider developing and adopting regulations to promote compliance with the Program. The following information is evidence that an amendment to Title 20, Section 1682(c) of the Program is necessary for the immediate preservation of the general welfare of the public.

Currently, the Program applies to most nonresidential buildings that are at least 10,000 square feet. However, on July 1, 2014, the Program expands to also include nonresidential buildings that are at least 5,000 square feet and up to 10,000 square feet pursuant to the schedule set forth in Section 1682(c). The Commission proposes to delay implementation of Section 1682(c) by two years, until July 1, 2016.

Throughout May and June 2014, the Commission received information from stakeholders indicating that there are significant barriers to compliance with the Program. Some of the specific concerns raised are explained in more detail below.

The Commission is concerned that significantly expanding the scope of this program while these barriers are still in place would cause market confusion and hardship to the public and the stakeholders affected by these regulations.

To avoid these outcomes, the Commission proposes to delay the implementation schedule for owners of nonresidential buildings of 5,000 to 10,000 square feet from July 1, 2014 to July 1, 2016 (Title 20, Section 1682, subsection (c)). This will allow the Commission sufficient time to study, address, and resolve these barriers to implementation through the Informational Proceeding adopted on June 18, 2014, discussed further below.

Background and Justification

Several stakeholders have expressed concerns about significant barriers to compliance, in a number of verbal formats.

For example, there were technical difficulties in the roll-out of the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager platform and software. For much of the first six-months after the Program initially went into effect, the platform was unavailable, which impeded compliance with the program until January 1, 2014.
In addition, the practices of utilities and energy service providers in complying with the Program have been inconsistent. Some utilities require tenant consent before they will release the required information. This can lead to high transaction costs for building owners and operators when tenants are unwilling to sign releases or when it is difficult to locate the person who has authority to consent to the release. In addition, some smaller utilities have expressed concerns about their ability to process the information required to comply with the Program. These smaller utilities may lack the staff and resources to overcome current barriers to implementing the program.

Other stakeholders, including some utilities, have been actively developing best practices approaches to lower transaction costs and paving the way to compliance. The Commission believes that delaying expansion of the program to nonresidential buildings between 5,000 and up to 10,000 square feet by two years will provide time for these practices to be more fully implemented and to allow other utilities to develop and implement their own best practices. It will also allow time for the Commission to consider promulgating regulations that might lower the cost of compliance to utilities, and promote consistent practices across the state.

Specific concerns have also been raised about aspects of the regulations themselves. For example, some stakeholders have stated the regulations are ambiguous as to when disclosures are due, and that they could be read to require disclosure at the beginning of the real estate transaction, which in some cases may not be commercially practical. Others have argued the regulations inappropriately require disclosure of energy use and benchmarking data to the Commission.

Some stakeholders have also suggested that the Commissions' education and outreach efforts have been inadequate.

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 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

For example, the expansion in scope would increase the number of compliance requests received by utilities, impeding their ability to address barriers to compliance with the Program. It 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.

The Commission initiated an Order Instituting Informational proceeding (OII) on June 18, 2014, aimed at identifying and addressing these key barriers. Delaying the expansion of the Program until these barriers have been addressed will preserve the general welfare of the public by preventing the market confusion that will likely result from a premature expansion of the Program.

INSUFFICIENT TIME FOR NON-EMERGENCY RULEMAKING (Government Code Section 11346(b)(2))

The Commission did not learn about the barriers to compliance with the Program with sufficient time to amend the schedule set forth in Section 1682(c) of Title 20 through a non-emergency rulemaking before July 1, 2014, when the Program expanded to included non-residential buildings greater than 5,000 square feet up to 10,000 square feet.

Because of technical problems with the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager platform and software, the Program effectively launched on January 1, 2014. The Commission did not realize the extent of the barriers to compliance with the existing program until after the Program had been effective for a few months. From a review of the first few months of disclosure data, it became apparent that the required disclosures were not being made for the majority of transactions for which they were required by Public Resources Code Section 25402.10, according to the schedule adopted by the Commission in Section 1682 of Title 20 of the California Code of Regulations. Additionally, throughout May and June 2014, the Energy Commission received extensive information from stakeholders about barriers to compliance with the program. The Commission responded to these concerns by initiating an informational proceeding to gather information about barriers to compliance with the Program on June 18, 2014.

STATUTORY AUTHORITY AND REFERENCE (Government Code Section 11349.1, 11346.5(a)(2) and 1 California Code of Regulations 14)

The Commission proposes to adopt this modification to the Program under the authority granted by Public Resources Code Sections 25213, 25218(e), and 25402.10, the latter of which codifies the

mandates of AB 1103 (Chapter 533, Statutes of 2007) and AB 531 (Chapter 323, Statutes of 2009). The purpose of the Program is to implement, interpret, and make specific these provisions.

Authority:

- Public Resources Code Sections 25213, 25218(e), and 25402.10.

Reference:

- Public Resources Code Section 25402.10.

SPECIFIC LANGUAGE PROPOSED (Government Code Section 11346.1(a)(2)(A))

The Commission proposes to modify Title 20, Section 1682(c) to read as follows:

> A building owner shall comply with this article according to the following schedule:
>
> (c) On and after July 1, ~~**2014**~~ **2016**, for a building with a total gross floor area measuring at least 5,000 square feet and up to 10,000 square feet.

INFORMATIVE DIGEST (Government Code Section 11346.5(a)(3))

> **Public Resources Code Section 25402.10(a) --** On and after January 1, 2009, electric and gas utilities shall maintain records of the energy consumption data of all nonresidential buildings to which they provide service. This data shall be maintained, in a format compatible for uploading to the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager, for at least the most recent 12 months.
>
> **Public Resources Code Section 25402.10(b)** -- On and after January 1, 2009, upon the written authorization or secure electronic authorization of a nonresidential building owner or operator, an electric or gas utility shall upload all of the energy consumption data for the account specified for a building to the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager in a manner that preserves the confidentiality of the customer.
>
> **Public Resources Code Section 25402.10(c)** -- In carrying out this section, an electric or gas utility may use any method for providing the specified data in order to maximize efficiency and minimize overall program cost, and is encouraged to work with the United States Environmental Protection Agency and customers in developing reasonable reporting options.

Public Resources Code Section 25402.10(d)(1) -- Based on a schedule developed by the commission pursuant to paragraph (2), an owner or operator of a nonresidential building shall disclose the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager 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. If the data is delivered to a prospective buyer, lessee, or lender, a property owner, operator, or his or her agent is not required to provide additional information, and the information shall be deemed to be adequate to inform the prospective buyer, lessee, or lender regarding the United States Environmental Protection Agency's ENERGY STAR Portfolio Manager benchmarking data and ratings for the most recent 12-month period for the building that is being sold, leased, financed, or refinanced.

Public Resources Code Section 25402.10(d)(2) -- The commission shall establish a schedule by which an owner or operator is required to meet the requirements of this subdivision.

Public Resources Code Section 25402.10(e) -- Notwithstanding subdivision (d), this section does not increase or decrease the duties, if any, of a property owner, operator, or his or her broker or agent under this chapter or alter the duty of a seller, agent, or broker to disclose the existence of a material fact affecting the real property.

The California Energy Commission has passed regulations implementing Public Resources Code Section 25402.10, codified as the Nonresidential Building Energy Use Disclosure Program, California Code of Regulations, Title 20, Division 2, Chapter 4, Article 9, Sections 1680-1684.

Section 1680 defines the purpose of the program.

Section 1681 defines terms, including “building owner” (a person possessing title to a nonresidential building, or an agent authorize to act on behalf of a person possessing title) and “nonresidential building” (occupancy type A, B, E, I-1, I-2, M, R1, S, or Type U parking garages), among others.

Section 1682 provides a schedule of implementation.

Section 1683 specifies precisely which disclosures must be made, and prohibits use of energy data for any purpose other than compliance.

Section 1684 specifies the manner in which submissions should be made to the ENERGY STAR Portfolio Manager.

Summary of Effect

These proposed emergency regulations would delay from July 1, 2014 to July 1, 2016 the expansion of the Program to include buildings of at least 5,000 square feet and up to 10,000 square feet. This would provide suitable time for the Commission to work with stakeholders to identify and resolve significant barriers to compliance. Addressing these issues before dramatically expanding the Program avoids market confusion and protects the welfare of the public.

COMPARABLE FEDERAL STATUTE OR REGULATION (Government Code Section 11346.5(a)(3)(B))

The Commission has determined that there are not comparable federal regulations or statutes that address the specific provision found in Title 20, Section 1682(c) of the Nonresidential Building Energy Use Disclosure Program.

POLICY STATEMENT OVERVIEW: (Government Code Section 11346.5(a)(3)(C))

Public Resources Code Section 25402.10 and its implementing regulations set forth in 20 California Code of Regulations Sections 1680-1684, aim to increase building owner awareness of energy consumption and provide an opportunity for improvement of building energy efficiency, by requiring disclosure of certain nonresidential building energy use data. The more information that is available in the nonresidential building market, the more likely the costs of energy consumption will be factored into the valuations of nonresidential spaces, with a goal of increasing market demand for improved building energy efficiency. Energy efficient buildings benefit building owners, small and large businesses, the Californian economy as a whole, and the environment by reducing energy costs and avoiding the environmental impacts associated with energy production and consumption.

The Commission has recently learned that there are currently a wide range of substantial barriers to implementation and compliance. The Commission has initiated an informational proceeding to study, address, and overcome these barriers.

Based on available information and input from stakeholders, including various building owners and utilities, the Commission believes that it would be harmful and burdensome to the public interest to allow this program to significantly expand under the current implementation schedule. Failing to delay extension of the programs to nonresidential buildings greater than or equal to 5,000 square feet could disproportionately impact small building owners (including many small businesses) that may lack technical capacity to overcome existing barriers to implementation. Delaying implementation for two years will allow the Commission to investigate barriers to compliance, and if necessary to promulgate regulations to address them. It may also allow stakeholders, including utilities, time to develop, adopt, and implement best practices for compliance with the Program. The Commission believes the proposed two-year delay is appropriate to identify and address the issues.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS: (Government Code Section 11346.5(a)(3)(D))

This proposed emergency rulemaking is consistent and compatible with existing state regulations. This emergency rulemaking solely proposes to modify existing regulation by changing the date of compliance for nonresidential buildings greater than 5,000 square feet and less than 10,000 square feet from July 1, 2014 to July 1, 2016.

OTHER STATUTORY REQUIREMENTS:
(Government Code Section 11346.1(b); 1346.5(a)(4)

None.

RELIED ON DOCUMENTS:

Letter to the California Energy Commission from Randy Walsh dated June 18, 2014

Order Instituting Informational Proceeding for the Nonresidential Building Energy Use Disclosure Program (Order No. 1401618-9)

LOCAL MANDATE DETERMINATION: (Government Code Section 11346.5(a)(5))

The proposed emergency rulemaking would not impose an additional mandate on local agencies or school districts. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

FISCAL IMPACTS: (Government Code Section 11346.5(a)(6))

Costs or Savings for State Agencies: None. This proposed emergency rulemaking would only impact the Commission, which does not anticipate any budgetary impact from delaying implementation of this subsection by two years.

Costs to Any Local Agency or School District Requiring Reimbursement Pursuant to Section 17500 *et seq.*: None. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

Other Non-Discretionary Costs or Savings on Local Agencies: None. This emergency rulemaking would only delay expanding reporting requirements to include nonresidential buildings of at least 5,000 square feet and up to 10,000 square feet by two years. There will be no costs to any local agency as a result in this delay.

The existing regulations require local agencies that own government buildings to benchmark and disclose energy consumption data for their buildings if the entire building were to be sold, leased, or financed. The Commission's analysis from the rulemaking in which the existing regulations were adopted indicate that the financial events triggering AB 1103 benchmarking would be relatively rare for government buildings, and that the cost of compliance with the proposed regulations is low, so that the costs to local agencies from the existing program would be minimal. Additionally, costs of disclosure and benchmarking could be offset by energy cost savings if voluntary improvements in building energy efficiency are undertaken due to increased market value for energy efficiency in nonresidential buildings. These costs and benefits were fully analyzed in the original rulemaking. The delay in implementation would not result in any additional costs.

Cost or Savings in Federal Funding to the State: None. Federal funding to the State is not affected by this Program.