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150130 IEP Second Set of Comments on CEC Proposed Regulations

Additional submitted attachment is included below.

Comments
Of
The Independent Energy Producers Association
On The 2015 Revised Draft Regulations, Title 20, Sections 1000s, 1100s, 1200s And 1700s
Of The
California Energy Commission
14-OII-01

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Submitted on behalf of the
Independent Energy Producers Association

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The Independent Energy Producers Association submits these comments on the 2015 Revised Draft Regulations ("2015 Revised Draft") of the California Energy Commission ("CEC" or "Commission").[1] The Independent Energy Producers Association ("IEP") is California's oldest and leading nonprofit trade association, representing the interest of developers and operators of independent energy facilities and independent power marketers. IEP members collectively own and operate approximately one-third of California's installed generating capacity, much of which was licensed under the CEC's siting regulations.

IEP commented on the original draft of these regulations. We are pleased that the Commission has carefully considered our comments and has incorporated many of our recommendations into the 2015 Revised Draft. We believe that the 2015 Revised Draft is a substantial improvement over the original draft and that the overall effort is positive and beneficial.

However, we do have a few remaining substantive concerns. These concerns are described in Section I of these comments. We look forward to continuing to work with the Commission to resolve these issues in a manner that is beneficial to all stakeholders.

In addition, we have a few minor editorial questions or comments. These are set forth in Section II of these comments.

Finally, in Section III of these comments we address the effective date of the new regulations. We recommend that any revisions to the regulations become applicable to new notices of intent, applications for certification or petitions for modification that are filed on or after the effective date of the new regulations. In order to avoid any potential for confusion or delay of existing proceedings, we do not recommend that revised rules be made applicable to pending proceedings.

I. MAJOR COMMENTS AND CONCERNS.

In the following section we first set forth the proposed language of the 2015 Revised Draft, unedited, but we highlight in yellow the language of concern. We then provide "Comments" on the language set forth in the 2015 Revised Draft. In these Comments, in addition to describing our concerns, we then suggest language changes, shown in double

[1] California Energy Commission's 2014 Draft Regulations, Title 20 Sections 1000s, 1100s, 1200s, and 1700s (dated September 29, 2014), available at http://docketpublic.energy.ca.gov/PublicDocuments/14-OII-01/TN203129_20140930T132537_2014_Draft_Regulations_Title_20_Sections_1000s_1100s_1200s_and.pdf.

underline[2], where feasible, and deletions, in strikethrough text, where necessary to address our concerns, which are identified as "IEP Proposed Revisions."

A. § 1212. ~~Rules of Evidence.~~ Rights of Parties, Record and Basis for Decision

(a) **Rights of Parties.** Subject to the presiding member's authority to regulate a proceeding as prescribed in section 1210, and other rights identified in specific proceedings, each party shall have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence**.**

(b) **Record**. The "hearing record", in an adjudicatory proceeding, is all of the information upon which the commission may consider in reaching a decision. The hearing record shall contain:

(1) all documents, materials, oral statements, testimony and public comments accepted by the committee or commission at a hearing;

(2) any materials or facts officially noticed; and

(3) for siting cases, staff's Final Staff Assessment and any supplemental assessments.

except that parties may move to exclude information from consideration by the commission on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion, the information shall remain in the record but shall not be relied upon under subsection (c)(2). The record shall contain the presiding member's ruling. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency and adequacy of the record.

(c) **Basis for and Contents of Decisions.**

1) Decisions in adjudicative proceedings shall, be based on the evidence in the hearing record, explain the basis for the decision,

[2] We use double underlined text to distinguish IEP's proposed additions from the Staff's proposed text (since the Staff's proposed additions are shown in single underlined text).

and the explanation shall include but need not be limited to all legally-required findings of fact and conclusions of law.

2) Unless the information has been excluded under subsection (b), a finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to rely in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions. Upon notice to parties, the committee or commission may rely on public comment given at a hearing to support a finding if such comment asserts facts or reasonable assumptions predicated on facts and does not contain analysis that would require special training or skill not possessed by the commenter and there is opportunity for questioning of the commenter. The commission may give appropriate weight to information in the record as allowed by law.

3) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

Comments:

We have three concerns with this section.

First, regarding section 1212(b)(3), as we stated in our earlier comments, we believe that the rules should require that the Staff Assessment be received into evidence only if it is supported by a witness (or witnesses) who are prepared to testify under oath regarding the truth of the facts contained in the document. This requirement will encourage accountability and transparency. In one recent proceeding, a section of the Staff Assessment was unsponsored by Staff, and no Staff was available to testify as to the truth or accuracy of the contents of that section. That section of the Staff Assessment, while part of the administrative record, was not admitted into evidence but instead received as public comment. Allowing the Staff Assessment to be a de facto part of the evidentiary record risks introducing information into the record without allowing other parties to cross-examine witnesses or test the veracity of the analysis. Like any other "independent" party, Staff's testimony (the FSA) should be subject to the same processes of admission.

Second, section 1212(c)(2) is confusing. Section 1212(b)(3) provides that if a presiding member grants a motion to exclude evidence, such evidence "shall remain in the record, but not be relied upon under section (c)(2)." It is not clear why information that is excluded from the hearing record by express ruling should nonetheless "remain in the record". Section 1212(c)(2) further confuses the question by stating that "unless the information has been excluded under subsection (b), a finding may be based upon" such evidence. Thus, it is unclear whether information that is the subject of a sustained motion to exclude that evidence, but nonetheless

remains in the record, can be relied upon under section (c)(2) to support a Commission decision. This confusion can be most easily resolved by simply deleting the following sentences from section (b)(3): "If the presiding member grants such a motion, the information shall remain in the record but shall not be relied upon under subsection (c)(2). The record shall contain the presiding member's ruling."

Third, we continue to be concerned about how public comment will be considered under the revised section 1212(c)(2). The stated purpose of the revised rule is to set forth the circumstances under which public comment might be used to "potentially support a finding" by the Commission.

Under current practice, public comment is freely received into the record because such comment, standing alone, cannot be the basis of a finding. Members of the public may present their views without fear that they will be subject to cross-examination, discovery or rebuttal. However, if there is a possibility that such public comment could, standing alone, be the basis of a finding, other parties will be compelled to challenge such statements through cross-examination, discovery and rebuttal of the commenter. This could dramatically change the dynamic of the public comment process, will certainly extend the length of hearings and could, in the long run, discourage members of the public from coming forward to express their views.

The revised rule would put a number of conditions on the use of public comment, standing alone, to support a finding, for example:

(1) There must be notice to the parties. We presume that such notice would be provided to the parties at the time the public comment is offered, so that parties would have an opportunity to question the commenter.
(2) The revised rule would require that the commenter present facts or "reasonable assumptions predicated on facts". The term "reasonable assumptions predicated on facts," is part of the definition of "substantial evidence"
(3) The revised rule also would require that the comment does not contain analysis that would require special training or skill not possessed by the commenter. We agree with this condition.
(4) The revised rule would also require that there is opportunity for questioning of the commenter. We agree that there should be an opportunity for questioning by other parties, as well as the Committee, if this rule is adopted. In addition, in appropriate circumstances, there should be an opportunity for rebuttal to the comment by other parties.

Finally, in an adjudicative contest, the proper term of art is "received into evidence", rather than "accepted." Therefore, we suggest the following revisions to section 1212(b)(1).

IEP Proposed Revisions:

Based on the foregoing comments, this section should be revised as follows:

> § 1212. Rules of Evidence. Rights of Parties, Record and Basis for Decision

(a) Rights of Parties. Subject to the presiding member's authority to regulate a proceeding as prescribed in section 1210, and other rights identified in specific proceedings, each party shall have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence.

(b) Record. The "hearing record", in an adjudicatory proceeding, is all of the information upon which the commission may consider in reaching a decision. The hearing record shall contain:

(1) all documents, materials, oral statements, testimony and public comments received into evidence ~~accepted~~ by the committee or commission at a hearing; and

(2) any materials or facts officially noticed.~~; and(3) for siting cases, staff's Final Staff Assessment and any supplemental assessments.~~

~~except that p~~Parties may move to exclude information from consideration by the commission on the ground that it is not relevant, is duplicative of information already in the record, or on other grounds.~~another basis. If the presiding member grants such a motion, the information shall remain in the record but shall not be relied upon under subsection (c)(2). The record shall contain the presiding member's ruling.~~ While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency and adequacy of the record.

(c) Basis for and Contents of Decisions.

1) Decisions in adjudicative proceedings shall, be based on the evidence in the hearing record, explain the basis for the decision, and the explanation shall include but need not be limited to all legally-required findings of fact and conclusions of law.

2) ~~Unless the information has been excluded under subsection (b), a~~A finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to rely in the conduct of serious affairs. Such evidence does not include, among other things, speculation,

argument, conjecture, and unsupported conclusions or opinions. ~~Upon notice parties, t~~The commission~~ttee~~ ~~or~~ may rely on public comment~~given at a hearing~~, standing alone, to support a finding if the Committee provides notice of its intent to rely upon such comment at the time the comment is presented, ~~such comment asserts facts or reasonable assumptions predicated on facts and does not contain analysis that would require special training or skill not possessed by the commenter and there is~~ other parties are provided an opportunity to ~~for~~ question~~ing of~~ the commenter, and parties are given the opportunity to provide rebuttal evidence. The commission may give appropriate weight to information in the record as allowed by law.

3) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

B. § 1742. Review of Environmental Factors; Staff and Agency Assessment.

(a) The staff shall prepare a preliminary and final environmental assessment of the proposed site and related facilities. Staff's final assessment is the Energy Commission staff's independent report that describes and analyzes the significant environmental effects of a project and discusses ways to mitigate or avoid the effects. The assessment also evaluates the safety and reliability of a project. In developing staff's assessment, staff may rely on information submitted by parties, other public agencies, members of the public, experts in the field as well as any other information obtained through staff's independent research and investigation.

(b) Staff's preliminary environmental assessment shall be subject to at least a 30 day public comment period or such other time as required by the presiding member. After close of the comment period staff shall publish a final staff assessment which shall include responses to comments on significant environmental issues received during the comment period. The final staff assessment shall be filed according to a schedule set by the presiding member, if there is no applicable schedule, the final staff assessment shall be filed at least 14 days before the first evidentiary hearing on the subjects covered in the staff assessment.

(c) The staff shall review the information provided by the applicant, public agencies and other sources and assess the environmental and health effects of the applicant's proposal, the safety and reliability of

the proposal, the completeness of the applicant's proposed mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures.

(d) The staff assessment shall provide a description of all applicable federal, state, regional, and local laws, ordinances, regulations and standards and the project's compliance with them. In the case of noncompliance, the staff assessment shall provide a description of all staff communications with the agencies responsible for enforcing the laws, ordinances, regulations and standards, for which there is noncompliance, in an attempt to remove the noncompliance.

(e) The staff assessment shall indicate the staff's positions on the environmental issues affecting a decision on the applicant's proposal.

Comments:

The current rules allow for either the preparation of a single Staff Assessment or for the preparation of a Preliminary and Final Staff Assessment ("PSA" and "FSA", respectively) depending on the complexity of the proceeding. The revised rule would appear to require both a PSA and FSA in every case, and would lock in mandatory comment periods. These changes unnecessarily remove the Presiding Member's discretion by requiring, in every case, both a PSA and FSA.

We believe it is vital that the revised rules retain the flexibility and discretion of the Presiding Member to establish a schedule that corresponds to the size of the project, the complexity of the issues, and the extent of public interest or controversy. The existing section 1747 provides this flexibility. The elimination of section 1747 and the further elaboration in new section 1742 does not materially improve the regulations, but does limit the Presiding Member's discretion to set the best possible schedule for the proceeding.

We understand that the authors of the revised rule would like to ensure that there is a public comment period on the Staff Assessment, similar to the comment period on an environmental impact report ("EIR"). But this comment period can be provided in a number of ways. There could be a comment period on a PSA if one is published, or there could be a comment period on the FSA if no PSA is needed. The Committee should have the discretion to make this choice.

We also understand that the authors of the revised rule would like the Staff to have the role of responding to comments on the Staff Assessment. Again, there are many ways that this could be accomplished. If a PSA is published, then the Staff can certainly respond to the comments in the FSA. If only an FSA is published, Staff could respond to comments in their written testimony. Or if the proceeding is not complex and the comments are not extensive, the Committee is capable of responding to the comments in the PMPD.

The Commission's siting program is a certified regulatory program. As such, the CEC siting process does not have to mimic the traditional EIR process. A certified regulatory program is lawful even if it has no draft EIR and no final EIR. However, the final action (not any interim document) on the proposed activity must include the written responses of the issuing authority to significant environmental points raised during the evaluation process. While the Committee should retain the discretion to allow the Staff to assist in the preparation of these responses in appropriate cases, the revised rule should not mandate any specific procedure or timetable for doing so.

IEP Proposed Revisions:

Section 1747 should be restored and revised section 1742 should be deleted.

C. § ~~1749.~~ 1745.5. Presiding Member's Proposed Decision; ~~Distribution;~~ Comment Period; Basis, Contents, Hearing.

(a) ~~At the conclusion~~ After the end of the evidentiary hearings, the presiding member, in consultation with the other committee members shall prepare and file a proposed decision on the application. ~~based upon evidence presented in the hearings on the application. The proposed decision shall be published and within 15 days distributed to interested agencies, parties, and to any person who requests a copy. The presiding member shall publish notice of the availability of the proposed decision in a newspaper of general circulation in the county where the site is located.~~

~~(b) Any person may file written comments on the presiding member's proposed decision. The presiding member shall set a comment period of at least 30 days from the date of distribution.~~

(b) The presiding member's proposed decision shall:

(1) Be based on a consideration of the entire hearing record and contain:

(2) Environmental Factors:

(A) a description of potential significant environmental effects;

(B) an assessment of the feasibility of mitigation measures and a reasonable range of alternatives that could lessen or avoid the adverse effects; and

(C) if any significant effects are likely to remain even after the application of all feasible mitigation measures and alternatives,

whether the benefits of the project outweigh the unavoidable adverse effects;

(3) Laws Ordinances Regulations, and Standards:

(A) a description of all applicable federal laws, ordinances, regulations and standards and an assessment of the project's compliance with them;

(B) a description of all applicable state, regional, and local laws, ordinances, regulations and standards, the project's compliance with them, and, in the case of noncompliance, a proposed determination made pursuant to the requirements of section 25525 of the Public Resources Code:

(i) a description of all staff communications with the agencies responsible for enforcing the laws, ordinances, regulations and standards for which there is noncompliance, in an attempt to remove the noncompliance; and

(ii) if the noncompliance cannot be eliminated, the assessments shall discuss whether the proposed project is required for public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity; and

(C) to the extent not already covered under subdivisions (2) or (3), and for applications for certification, as defined in Public Resources Code section 25102, concerning sites in the Coastal Zones, San Francisco Bay Zones or the Suisun Marsh a discussion of the issues raised by the California Coastal Commission, if any, pursuant to section 30413(e) of the California Public Resources Code; or issues raised by the Bay Conservation and Development Commission, if any, pursuant to section 6630 of the Government Code:

(D) to the extent not already covered under subdivisions (2) or (3), and for sites in the Coastal Zones, San Francisco Bay Zones or Suisun Marsh for which a notice of intent as defined in Public Resources Code section 25113 has been filed:

(i) a discussion of provisions to meet the objectives of the California Coastal Act, as may be specified in the applicable report submitted by the California Coastal Commission under section 30413(d); or to meet the requirements of objectives of the Bay

Conservation and Development Act, as may be specified in the applicable report submitted by the Bay Conservation and Development Commission under section 66645 Government Code;

(ii) if the provisions described in paragraph (i) would result in greater adverse effect on the environment or would be infeasible, an explanation of why; and

(iii) a statement of whether the approval of the public agency having ownership or control of the land has been obtained, whether or not such approval is subject to preemption under Public Resources Code section 25500;

(4) with respect to controlling population density in areas surrounding the proposed facilities, an assessment:

(A) whether existing governmental land use restrictions are necessary and sufficient to guarantee the maintenance of population levels and land use development over the lifetime of the facilities that will ensure public health and safety;

(B) whether, in the case of a nuclear power plant, the area and population density criteria specified by the United States Nuclear Regulatory Commission for assuring public health and safety are sufficiently definitive for valid land use planning requirements; and

(C) whether the commission should require that the applicant acquire, by grant or contract, the right to prohibit development of privately owned lands in areas surrounding the facilities in order to control population densities and to protect public health and safety.

(5) for new sites proposed for location in the coastal zone or any other area with recreational, scenic, or historic value, proposed conditions relating to land that should be acquired, established, and maintained by the applicant for public use and access the commission shall make the findings required by Public Resources Code Section 25529;

(6) for new sites proposed for along the coast or shoreline of any major body of water, proposed conditions on the extent to which the proposed facilities should be set back from the coast or shoreline to permit reasonable public use and to protect scenic and aesthetic values, the commission shall make the findings required by Public Resources Code Section 25529

(7) for sites in state, regional, county or city parks; wilderness, scenic, or natural reserves; areas for wildlife protection, recreation or historic preservation; natural preservation areas in existence as of January 7, 1975; or estuaries in an essentially natural and undeveloped state: an analysis of whether the facilities will be consistent with the primary land use of the area, and of whether the approval of the public agency having ownership or control of the land has been obtained, whether or not such approval is subject to preemption under Public Resources Code section 25500.

(8) where a nuclear powered facility is proposed, an analysis of the factors in Public Resources Code sections 25524.1 and 25524.2;

(9) an analysis of the extent to which the applicant has complied with the
recommended minimum standards of efficiency adopted under Public Resources Code section 25402(d);

(10) if the application is for a facility to be located on a potential multiple facility site, as determined under of the Public Resources Code section 25516.5, an analysis of the factors listed in Public Resources Code section 25524.5.

(11) a discussion of any public benefits from the project, including, but not limited to, economic benefits, environmental benefits, and electricity reliability benefits;

(12) provisions for restoring the site as necessary to protect the environment, if the commission does not certify the project; and.

(13) A recommendation as to whether the proposed site and related facilities should be certified, and if so under what conditions; and

(14) Engineering Assessment;

(15) Reliability Assessment;

(16) Any other relevant matter identified by the presiding member.

(17) responses to all significant environmental points raised during the evidentiary hearing; and

(18) findings on each applicable fact, conclusions on each applicable legal determination, and an explanation of the connection between the evidence, the findings, the conclusions, and the determination to propose certification or non-certification

(c) Any person may file written comments on the presiding member's proposed decision. The presiding member shall set a comment period of at least 30 days from the date of distribution.

(d) Any governmental agency may adopt all or any part of a proposed commission decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.

Comments:

This section of the draft rules appears to compile all of the statutory components of a Presiding Member's Proposed Decision ("PMPD") in a single rule, by paraphrasing many of these requirements. It is really not necessary to do so, unless the Commission further intends the rule to clarify or interpret the statutory requirements. However, if the Commission desires a rule that simply complies with the statutory requirements, it is important that it do so accurately. Any unintended deviations from the statutory provisions could cause confusion in the future, if the Commission has to determine whether to apply the rule or the statute.

First, sections 1745.5(b)(2)(A)-(C) should be revised to accurately reflect the provisions of CEQA, including language from the CEQA Guidelines. Section 1745.5 should describe the factors that the Commission will take into account when determining whether an adverse environmental effect might be considered "acceptable" when balanced against all the potential benefits of a project. (See, 14 C.C.R. § 15093.)

Second, section 1745.5(b)(3)(B) should be revised to accurately reflect the provisions of Public Resources Code sections 25523(d)(1) and 25525 relating to consultations with local and state agencies regarding compliance with laws, ordinances, regulations, and standards, in addition to the information that may be relied upon by the presiding member to support an override finding.

Third, section 1745.5(b)(4) should be revised to clarify that the requirements in this subsection are applicable only to nuclear facilities. The requirement to discuss controlling population densities arises from Public Resources Code section 25528 and 25529, which are applicable to nuclear facilities only. Thus, section 1745.5(b)(4) should be revised accordingly to clarify that PMPD's for a nuclear facility only are subject to the requirements of proposed section 1745.5(b)(4).

Fourth, sections 1745.5(b)(5) and (6) reference "findings required by Public Resources Code section 25529" that must be included in the PMPD. However, Public Resources Code section 25529 does not contain any requirement that a decision by the Commission contain specific findings. Therefore, the references to Public Resources Code section 25529 should be deleted.

Fifth, section 1745.5(b)(18) provides that the PMPD will include "findings on each applicable fact, conclusions on each applicable legal determination." No explanation is provided

as to how facts or legal determinations will be deemed "applicable" enough to warrant inclusion in the PMPD. In short, this proposed addition should be deleted.

Sixth, section 1745.5(d) states that "a proposed commission decision" may be adopted by any governmental agency for any CEQA analysis that the agency is required to conduct. It is not clear whether "a proposed commission decision" is distinct from the presiding member's proposed decision discussed in proposed section 1745.5. Thus, this section should be clarified.

Seventh, section 1745.5 has several capitalized terms, such as Coastal Zones, San Francisco Bay Zones, Engineering Assessment, and Reliability Assessment. These terms should either be provided definitions in section 1709 or deleted.

Eighth, we are not aware of any statutory requirements that each proposed decision make a "reliability assessment" and an "engineering assessment". Such findings may be required in specific cases for an NOI, a proposed nuclear facility or for an override, but these are not general requirements and therefore should be deleted.

IEP Proposed Revisions:

In addition to the recommended deletions discussed above, IEP recommends the following changes to proposed section 1745.5:

- Sections 1745.5(b)(2)(A)-(C)

  (2) Environmental Factors:
  (A) a description of potential significant environmental effects;
  (B) an assessment of the feasibility of mitigation measures and a reasonable range of alternatives that could lessen or avoid the adverse effects; and
  (C) if a project which will result in the occurrence of significant effects which are identified in the presiding member's proposed decision but are not avoided or substantially lessened, the decision shall state in writing the specific reasons to support its action and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record, and will discuss the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of the proposed project which outweigh the unavoidable adverse environmental effects. ~~any significant effects are likely to remain even after the application of all feasible mitigation measures and alternatives, whether the benefits of the project outweigh the unavoidable adverse effects;~~

- Section 1745.5(b)(3)(B)

  (B) a description of all applicable state, regional, and local laws, ordinances, regulations and standards, and the project's compliance with them.~~, and, in the case of noncompliance, a proposed~~

~~determination made pursuant to the requirements of section 25525 of the Public Resources Code:~~

(i) If the commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application, a description of all ~~staff~~ commission communications with the agencies responsible for enforcing the laws, ordinances, regulations and standards for which there is noncompliance~~, in an attempt to remove the noncompliance; and~~ attempting to correct or eliminate the noncompliance.

(ii) if the noncompliance cannot be eliminated, the ~~assessments~~proposed decision shall discuss whether the proposed project is required for public convenience and necessity and whether there are ~~not~~ more prudent and feasible means of achieving such public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

(iii) If the noncompliance cannot be corrected or eliminated, the proposed decision shall satisfy the commission's obligation to inform the state, local, or regional governmental agency if it makes the findings required by Public Resources Code section 25525.

- Section 1745.5(b)(4)

(4) in the case of a nuclear power plant, with respect to controlling population density in areas surrounding the proposed facilities, an assessment:

(A) whether existing governmental land use restrictions are necessary and sufficient to guarantee the maintenance of population levels and land use development over the lifetime of the facilities that will ensure public health and safety;

(B) whether, ~~in the case of a nuclear power plant,~~ the area and population density criteria specified by the United States Nuclear Regulatory Commission for assuring public health and safety are sufficiently definitive for valid land use planning requirements; and

(C) whether the commission should require that the applicant acquire, by grant or contract, the right to prohibit development of privately owned lands in areas surrounding the facilities in order to control population densities and to protect public health and safety.

- Section 1745.5(d)

(d) Any governmental agency may adopt all or any part of a presiding member's proposed ~~commission~~ decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.

II. EDITORIAL COMMENTS.

A. § 1202(a). Right of Any Person to Comment.

(a) Any person present ~~and so desiring~~ shall be given an opportunity to make oral comments on the subject matter of any event in any ~~a~~ proceeding…

Comments:

The purpose of the added language is not clear. Is this intended to expand or limit the right to comment? We recommend that it be deleted.

B. § 1207.5 Staff Meetings; Purposes.

At any time, ~~after a notice or application is filed, the~~ staff may initiate ~~informal, voluntary~~ meetings with the applicant, other parties, interested agencies, stakeholders or the public on matters relevant to a proceeding ~~the notice or application~~. Such meetings may include workshops, site visits, or other information exchanges.

Comments:

It is not clear why the word "voluntary" has been stricken. Meetings with staff in a siting proceeding should be voluntary. We recommend that the term be retained.

In our comments on the first draft of the proposed rules we suggested that section §1207.5 be clarified to state that the ability of the Staff to conduct public meetings does not preclude the Staff from communicating with individual parties in a siting proceeding for any purpose, without the need for advance written notice.

IEP Proposed Revisions:

We suggest that section 1207.5 should read:

At any time, ~~after a notice or application is filed, the~~ staff may initiate ~~informal, voluntary~~ meetings with the applicant, other parties, interested agencies, stakeholders or the public on matters relevant to a proceeding ~~the notice or application~~. Such meetings may include workshops, site visits, or other information exchanges. This rule does not preclude the Staff from communicating with

individual parties in a siting proceeding for any purpose, without the need for advance written notice.

C. § 1208(b)(2). Filing of Documents

(b) A document will be accepted as of the day of its receipt by the Docket Unit or by the automated electronic filing or commenting system, except that:

(2) Documents filed after 5:00 p.m. on a business day, or at any time on a Saturday, Sunday or holiday, shall be deemed filed the next business day.

Comments/ IEP Proposed Revisions:

Consistent with the revision to section 1303, this section should read:

§ 1208. (b)(2) Documents filed after 5:00 p.m. on a business day, or at any time on a Saturday, Sunday, holiday or other day when the Commission is closed, shall be deemed filed the next business day.

D. § 1208 (c). Filing of Documents

§ 1208 (c) The responsibility to ensure that a document has been timely filed rests with the person, party, or entity that desires the document to be filed.

Comments:

The revised rules do not authorize the docket office to reject late filings. It is stated that "Dockets staff would not necessarily know when a particular document is supposed to be filed. Dockets obligation is to date and process documents. It would be up to the parties in a proceeding to object to late filings." However, the screening of filings for timeliness is a function performed by most court clerks and by the Docket Office for the California Public Utilities Commission. There is no obvious reason why the CEC Docket office could not perform a similar function, and maintain a simple calendar for each proceeding and reject untimely filings.

IEP Proposed Revisions:

§ 1208 (c) For notices, rulings and decisions, the responsibility to ensure that a document is timely filed rests with the Commission. For all other documents, ~~T~~the responsibility to ensure that a document is timely filed rests with the person or entity that desires the document to be filed.

E. § 1209 Notice of Public Events

(a) Unless otherwise required by law or directed by the presiding member, all public events in all proceedings shall be noticed at least 10 days before the event. Notice consists of sending the notice electronically to all persons on the appropriate
Energy Commission list-server and applicable proceeding's service list.

Comments:

As we noted in our previous comments, the term "public event" should be defined.

F. § 1209 Notice of Public Events

(b) In addition, when the presiding member, the public adviser, or the executive director believes that a significant number of members of an affected community lack internet access or are otherwise unlikely to be exposed to notice provided under subdivision (a), the presiding member may order other methods of notice to be used such as first class mail.

Comments:

Notices of public events will be issued either under the authority of the presiding member, the executive director or the staff. If the executive director believes that broader notice is required, they should be permitted to do so, without the need for an order by the presiding member.

IEP Proposed Revisions:

§ 1209 Notice of Public Events

(b) In addition, when the presiding member, the public adviser, or the executive director determines that a significant number of members of an affected community lack internet access or are otherwise unlikely to be exposed to notice provided under subdivision (a), they may request that additional ~~the presiding member may order other~~ methods of notice to be used such as first class mail.

G. § 1210. Adjudicative Procedures

Except as otherwise specified in these regulations or by other applicable law, in an adjudicative proceeding the presiding member may regulate the proceedings, and any parts thereof, in any manner that complies with the Administrative Adjudication Bill of Rights in section 11425.10 of the Government Code. For example, a

proceeding may include (1) formal hearings with features such as lay and expert witnesses providing oral and written testimony under oath, direct examination, cross examination and briefs. Such requirements shall not preclude unsworn oral or written comments from being offered in the proceeding; or (2) if noticed under Article 10 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code section 11445.30(a), the informal hearing procedures described in the Administrative Procedure Act (see Government Code section 11445.10 & following).

Comments:

The following revisions are intended to clarify this section, without changing its intent. We recommend that the reference to unsworn comments be deleted here, because if this rule is intended to apply to all adjudicatory procedures, there may be particular cases, such as complaint cases, where the presiding member may determine that unsworn testimony may not be received. On the other hand, in other types of adjudicatory proceedings, such as siting cases, it may be appropriate to receive unsworn comments and this is authorized elsewhere in the rules.

IEP Proposed Revisions:

§ 1210. Adjudicative Procedures

Except as otherwise specified in these regulations or by other applicable law, in an adjudicative proceeding the presiding member may regulate the proceedings, and any parts thereof, in any manner that complies with the Administrative Adjudication Bill of Rights in section 11425.10 of the Government Code. ~~For example, a~~ A proceeding or any portion thereof, may include (1) formal hearings with features such as lay and expert witnesses providing oral and written testimony under oath, direct examination, cross examination and briefs.~~. Such requirements shall not preclude unsworn oral or written comments from being offered in the proceeding;~~ or (2) if noticed under Article 10 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code section 11445.30(a), the informal hearing procedures described in the Administrative Procedure Act (see Government Code section 11445.10 & following).

H. § 1211.7. Intervenors.

1211.7(e) Any petitioner who has been denied leave to intervene or granted modified intervention by the presiding member, may appeal the decision to the full commission within ~~fifteen (15)~~ 10 days of the

denial. Failure to file a timely appeal will result in the presiding member's denial becoming the final action on the matter.

Comments:

This revision introduces the term "modified intervention", but the term is not defined. There is a simpler and easier way to allow appeals of rulings on petitions to intervene, as recommended in the language below.

IEP Proposed Revisions:

§ 1211.7. Intervenors.

~~Any petitioner who has been denied leave to intervene or granted modified intervention by the presiding member, may appeal the decision,~~Any ruling on a petition to intervene, may be appealed to the full commission within ~~fifteen (15)~~ 10 days of the ruling. Failure to file a timely appeal will result in the presiding member's ruling becoming final.

I. § 1231. Request for Investigation; Filing with the Commission

Any person may allege, in writing, a violation of a statute, regulation, order, program, or decision adopted, administered, or enforced by the commission. For a request to be acted on by the commission it must be filed, with the executive director, and include:

(a) the name, address, email and telephone number of the person filing the request;

(b) the name, address, email and telephone number of the person or entity allegedly violating the statute, regulation, order, program, or decision;

(c) a statement of the facts upon which the request is based and any evidence and witness statements demonstrating the existence of those facts;

(d) a statement indicating the statute, regulation, order, program, or decision that has been violated; and

(e) the names and addresses of any other individuals, entities, or organizations that are or are likely to have been affected by the violations.

(f) a statement indicating if you attempted to resolve the issue with the offending entity or provided it with any notice of the allegation

Comments:

The reference to "offending entity" in subsection (f) raises an inference that a party named in a request for an investigation has committed an offence. A more neutral term is appropriate. We suggest that subsection (f) be revised.

IEP Proposed Revisions:

> (f) ~~a statement indicating if you attempted to resolve the issue with the offending entity or provided it with any notice of the allegation~~ a statement indicating if the party requesting the investigation has attempted to resolve the issue with the party who is alleged to have committed the violation.

In addition, the rules should retain the requirement found in current section 1232 that a complaint be accompanied by a declaration under penalty of perjury. Given the potential harm to a project owner's reputation and the project's financing from meritless claims, the person requesting an investigation should, at a minimum, be required to declare under penalty of perjury that their allegations are true and accurate. A new subjection (g) should be added using the language from existing section 1232(b)(8):

> (g) a declaration under penalty of perjury by the complainant or petitioner attesting to the truth and accuracy of any factual allegations contained in the complaint or request for investigation. If any of the applicants are corporations or business associations, the declaration shall be dated, signed, and attested to by an officer thereof. Where a declaration is filed on behalf of a joint venture or proposed joint venture, all members of the joint venture or proposed joint venture shall date, sign, and attest to the declaration.

J. § 1232. Request for Investigation; Commission Response

> § 1232. Request for Investigation; Commission Response
>
> (a) The executive director, in consultation with the chief counsel, shall direct staff to perform an evaluation of the request. Within 30 days of filing a complete request, the executive director shall provide a written response identifying the action the executive director intends to take and the basis for that action. Such action may include:
>
> (1) dismissing the request for lack of jurisdiction or insufficient evidence;
>
> (2) initiating a complaint pursuant to section 1233 et seq.;

(3) conducting further investigation;

(4) sending a warning or cease and desist letter to the violator;

(5) proposing a settlement with a violator;

(6) referring the matter to the Attorney General's office;

(7) referring the matter to another federal, state or local agency with jurisdiction over the violation;

(8) correcting or modifying prior staff action; or

(9) taking other appropriate action, including rejecting the request for being incomplete.

(b) The written response of the executive director shall be filed and sent to the person or entity that submitted the request.

Comments:

As noted above, the rule should use neutral language to describe parties who are named in a request for investigation. Reference to "the violator" should be stricken in sections 4 and 5. For example, in those cases where a settlement is reached with the payment of a fine but without an admission of culpability, reference to the "violator" would be incorrect.

As we noted in our previous comments, in order to ensure the protection of the due process rights of a party against whom a request for investigation is directed, the rule should provide a party named in a request for investigation be given a copy of the request and be provided an opportunity to respond to the allegations in the request, before any action is taken. In addition, if a written response to a request for information is prepared, it should be provided both to the requesting party and the party who is the subject of the request. Finally, if a response to the request is prepared, it need not be "filed" or docketed, unless it is relevant to a pending proceeding.

IEP Proposed Revisions:

We recommend subsection (b) be revised and subsection (c) be added as follows:

(b) ~~The written response of the executive director shall be filed and sent to the person or entity that submitted the request.~~ Prior to taking any actions set forth in subsection (a) the Executive Director shall provide a copy of the request to any party that is the subject of the request and allow such party to provide the Executive Director with a response to the request. However, if disclosure of the identity of the requester will pose a risk to the person making the request, a

copy of the request with redacted identifying information may be provided. If in the Executive Director's discretion, there is a risk of identification even with redacting information, the Executive Director reserves the right to withhold furnishing a copy of the complaint to any party that is the subject of the request, but will provide notice of receipt of a request for investigation to the party that is the subject of the request.

(c) The written response of the executive director shall be sent to the person or entity that submitted the request and to any party who is the subject of the request.

K. § 1233.4 Complaint; Decision.

(c) The decision of the full Commission shall be a final decision. There is no right of reconsideration of a final decision. The decision shall include all findings, including findings regarding mitigating and aggravating factors.

Comments:

Reconsideration of a final decision is not a matter of right, unless it is expressly provided by statute or rule. Therefore, if reconsideration is not authorized, the rules can simply be silent on this issue. It is not necessary to state that there is no "right of reconsideration."

Because the rules reference the Administrative Adjudication Bill of Rights in section 1210, and because the APA references findings, the provision in 1233.4(c) regarding findings is redundant can be eliminated.

IEP Proposed Revisions:

(c) The decision of the Commission on a complaint is final. ~~The decision of the full Commission shall be a final decision. There is no right of reconsideration of a final decision. The decision shall include all findings, including findings regarding mitigating and aggravating factors.~~

L. § 1240 Renewables Portfolio Standard Enforcement.

(b) Complaints

(1) *** The executive director may file a complaint against a publically owned utility for failure to meet a Renewables Portfolio Standard requirement, or any regulation, order, or decision adopted by the commission pertaining to the Renewables Portfolio Standard for local publicly owned electric utilities.

Comments:

Typo. "Publically" should be "publicly".

M. § 1714 Distribution of Copies to Public Agencies; Request for Comments.

1714(d) ~~The executive director shall transmit a copy of the notice or application to any Native American government having an interest in matters relevant to the site and related facilities proposed in the notice or application provided the Native American government has a governing body recognized by the Secretary of the Interior of the United States or the Native American government has otherwise requested in writing to receive a copy of the notice or application.~~ No later than 14 days after a Notice of Intent, Application for Certification or Small Power Plant Exemption has been accepted as complete, the Energy Commission shall invite tribal governments, deemed culturally affiliated with a project area by the Native American Heritage Commission and federal land managing agencies, to participate in consultations with the Energy Commission.

Comments:

IEP supports the Energy Commission's attempt to incorporate the consultation process set forth in Assembly Bill 52 ("AB 52") for lead agencies in the proposed revision to section 1714. However, section 1714(d) requires additional revision to make clear the difference between providing copies of a notice or application for certification to those interested in receiving copies of such documents, and the formal notification and consultation process to which California Native American tribes that are traditionally and culturally affiliated with the geographic area of a project are entitled.

As currently drafted, section 1714(d) provides that the Energy Commission will "transmit a copy of a notice or application to any Native American government having an interest in matters relevant to the site and related facilities proposed in the notice or application provided the Native American government has a governing body recognized by the Secretary of the Interior of the United States or the Native American government has otherwise requested in writing to receive a copy of the notice or application." There is no reason to disturb this provision, and the Energy Commission should continue to transmit copies of the requested notice or application to interested Native American tribes.

However, the provision of copies of a notice or application for certification should be a process distinct from the consultation process set forth in Public Resources Code section 21080.3.1. Furthermore, rather than adopt the consultation process for California Native American tribes and lead agencies set forth in AB 52, the proposed revision to section 1714 of the Commission's regulation instead creates a separate consultation process that borrows elements from Public Resources Code section 21080.3.1, and leaves out key provisions.

Public Resources Code section 21080.3.1 provides that a lead agency shall begin consultations with a California Native American tribe if two requirements are met. First, the California Native American tribe must have requested, in writing, that the lead agency provide "formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe." The proposed revision to section 1714(d) omits the requirement that California Native American tribes actually request, in writing, formal notification of a proposed project. The proposed revision also omits the requirement that tribes be both "traditionally and culturally affiliated" with the geographic area where a project is proposed. Second, Public Resources Code section 21080.3.1 provides that the California Native American Tribe must respond, within 30 days of receipt of the formal notification, requesting such consultation. The proposed revision to section 1714(d) omits both the 30 day response requirement and the requirement that requests for consultation be provided in writing. These are important safeguards both for the lead agency and tribes to ensure that consultations are conducted appropriately.

IEP Proposed Revisions:

To address the concerns identified above, proposed section 1714(d) should be revised as follows:

> § 1741(d)(1): The executive director shall transmit a copy of the notice or application to: (1) any Native American government having an interest in matters relevant to the site and related facilities proposed in the notice or application provided the Native American government has a governing body recognized by the Secretary of the Interior of the United States or the Native American government has otherwise requested in writing to receive a copy of the notice or application and (2) any California Native American tribe, as defined in California Public Resources Code section 21073, that has requested in writing to be formally notified of projects in the geographic area in which the California Native American tribe is traditionally and culturally affiliated.
>
> (2) No later than 14 days after a Notice of Intent, Application for Certification or Small Power Plant Exemption has been accepted as complete, the Energy Commission shall invite California Native American tribes~~tribal governments~~, deemed traditionally and culturally affiliated with a project area by the Native American Heritage Commission~~ and federal land managing agencies~~, to participate in consultations with the Energy Commission if: (a) the California Native American tribe requested, in writing, notice of such projects and (b) responds, in writing, within 30 days of the Energy Commission's invitation, requesting to participate in consultations with the Energy Commission regarding the project."

III. APPLICABILITY OF THE REVISED REGULATIONS

After the revised regulations are adopted by the Commission and approved by the Office of Administrative Law, it is our understanding that the revised rules will become effective, pursuant to Government Code section 11343.4, on a quarterly basis following the filing of the revised regulations with the Secretary of State.

In order to avoid any possible confusion or delay regarding the applicability of the revised regulations to pending proceedings, we recommend that section 1701 of the rules expressly state that any revisions of the rules will be applicable to notices of intent, applications for certification and petitions for modification filed on or after the effective date of the new regulations.

We have not undertaken an exhaustive review of which revised regulations might cause confusion or delay if applied retroactively to a pending application proceeding. However, as an example of what might occur, we would not want to see a Proposed Decision prepared under the existing rules in a pending proceeding be withdrawn or delayed because it does contain all of the elements as set forth in revised section 1745.5. This type of confusion can be avoided, if the revised regulations are made applicable to applications, notices or petitions for modification filed after the effective date of the new rules.

We recommend that a new section 1701(g) be added to read:

§ 1701. Scope of Regulations…..

(g) Unless otherwise stated, any revision to Division 2, Title 20, shall be applicable to a notice of intent, application for certification or petition for modification filed on or after the effective date of the revised regulation.