

DOCKETED

Docket Number:	15-OII-01
Project Title:	Siting Compliance Process Review and Improvement Proceeding
TN #:	215716
Document Title:	Stoel Rives LLP/Melissa A. Foster Comments: Pre-Rulemaking Comments on Staff's Draft Proposed Revisions to Energy Commission Regulations Re Amendments to Siting Decisions (California Code of Regulations, Title 20, Sections 1708, 1769, 1769.1 and 1769.2
Description:	N/A
Filer:	System
Organization:	Stoel Rives LLP/Melissa A. Foster
Submitter Role:	Public
Submission Date:	2/1/2017 10:37:53 AM
Docketed Date:	2/1/2017

Comment Received From: Stoel Rives LLP/Melissa A. Foster

Submitted On: 2/1/2017

Docket Number: 15-OII-01

Pre-Rulemaking Comments on Staff's Draft Proposed Revisions to Energy Commission Regulations Re Amendments to Siting Decisions (California Code of Regulations, Title 20, Sections 1708, 1769, 1769.1 and 1769.2)

Additional submitted attachment is included below.



500 Capitol Mall, Suite 1600
Sacramento, CA 95814
T. 916.447.0700
F. 916.447.4781
www.stoel.com

February 1, 2017

VIA ELECTRONIC FILING

The Honorable Karen Douglas, Siting Lead Commissioner
California Energy Commission
Docket No. 15-OII-01
1516 Ninth Street, MS-4
Sacramento, CA 95814

**Re: Pre-Rulemaking Comments on Staff's Draft Proposed Revisions to Energy Commission Regulations Pertaining to Amendments to Siting Decisions (California Code of Regulations, Title 20, §§ 1708, 1769, 1769.1, and 1769.2)
Docket No. 15-OII-01**

Dear Commissioner Douglas:

Stoel Rives LLP participated in the Pre-Rulemaking Workshop on Staff's Draft Proposed Revisions to the Commission's Siting Compliance Process and Procedure Regulations pertaining to Amendments to Siting Decisions (California Code of Regulations, Title 20, §§ 1708, 1769, 1769.1, and 1769.2) ("Draft Revisions"), Docket No. 15-OII-01, on January 23, 2017. Based on our review of the Draft Revisions and discussion during the January 23, 2017 Workshop, we provide the following comments.

We want to express our appreciation to Staff for the time and effort spent on the Draft Revisions and to the other participants of the January 23rd Workshop for their comments. We generally agree with the majority of the other stakeholders' comments. Below is a list of the items in the Draft Revisions that we believe require further revisions and/or clarification.

1708: We believe that the scope of "processing the petition to amend" as proposed by Staff in Section 1708(b) is broader than Public Resources Code section 25806 contemplates. We also want to ensure that the Draft Revisions to Section 1708 do not cause duplicative costs to be imposed on a project owner for Designated Chief Building Official ("CBO")-related work.

The Draft Revisions provide, in part:

(b) "Processing the petition to amend," as used in Public Resources Code section 25806(e), includes the activities of staff, staff subcontractors, staff counsel representing staff, and the commission-designated Delegate Chief Building Official, performed in the management, review, analysis, and preparation for and participation in hearings, workshops, and commission Business Meetings related

to the petition to amend, and associated expenses. These activities also include monitoring the implementation of the project owner's facility design changes, through the completion of construction on the amendment, if applicable, to ensure compliance with all conditions of certification and laws, ordinances, regulations and standards. The activities of commissioners and their advisors, and the activities of the commission hearing officers and other attorneys and commission staff advising the commissioners or the commission, are not considered part of processing the petition to amend.

Public Resources Code section 25806(e) provides, in part:

A person who submits to the commission a petition to amend an existing project that previously received certification shall submit with the petition a fee of five thousand dollars (\$5,000). The commission shall conduct a full accounting of the actual cost of processing the petition to amend, for which the project owner shall reimburse the commission if the costs exceed five thousand dollars (\$5,000). The total reimbursement and fees owed by a project owner for each petition to amend shall not exceed the amount of the maximum total filing fee for an application for certification as specified in subdivision (a) of seven hundred fifty thousand dollars (\$750,000), adjusted annually pursuant to subdivision (c). ***

(Pub. Resources Code § 25806(e) (emphasis added).) Thus, the scope of section 1708(b) proposed by Staff exceeds the simple *processing* of an amendment, and instead contemplates that the Project Owner is responsible for CBO and Staff costs incurred throughout implementation of the proposed changes *"through the completion of construction on the amendment."*

Based on the above, we propose the following revisions to 1708(e):

(b) "Processing the petition to amend," as used in Public Resources Code section 25806(e), includes the activities of staff, staff subcontractors, and staff counsel representing staff, ~~and the commission-designated Delegate Chief Building Official~~, performed in the management, review, analysis, and preparation for and participation in hearings, workshops, and commission Business Meetings related to the petition to amend, and associated expenses. ~~These activities also include monitoring the implementation of the project owner's facility design changes, through the completion of construction on the amendment, if applicable, to ensure compliance with all conditions of certification and laws, ordinances, regulations and standards.~~ The activities of commissioners and their advisors, and the activities of the commission hearing officers and other attorneys and commission staff advising the commissioners or the commission, are not considered part of processing the petition to amend.

In addition to the foregoing, we noted that the following minor proposed revisions should be incorporated into Section 1708:

(a) A project owner shall pay all fees specified in Public Resources Code section 25806. As necessary for calculating a fee, generating capacity shall be determined in the manner specified in section 2003(a). All fees paid are non-refundable, with the exception of the fee assessed pursuant to Public Resources Code section 25806(e).

1769: We appreciate Staff's proposed changes to section 1769, especially the new language proposed in section 1769(a)(2)(B). We have no substantive comments on the proposed revisions to section 1769 at this time, but would like to note that Staff should be consistent throughout the section and refer to "proposed change" rather than interchangeably referring to "proposed change," "change," or "changes" throughout the section.

1769.1: We understand the intent of this newly proposed section, but concerns remain about the practical application of Section 1769.1. Staff indicated at the January 23 Workshop that the intent of Section 1769.1 is to not preclude informal discussions with the Compliance Project Manager ("CPM") or Staff regarding possible project modifications, but nowhere in the regulation is this intent expressly mentioned. On its face, it is possible that this section could be construed to require a project owner to formally engage Staff in discussions regarding a potential project change, instead of allowing the project owner to pursue a formal or informal pre-filing path. The unintended consequence of appearing to require formal pre-filing discussions is that project owners may be reluctant to engage in exploratory and informational discussions with Staff.

1769.2: As discussed at the Workshop, we concur with the stakeholder comments that this section should require project owner concurrence before staff formally initiates an amendment. Obtaining such concurrence prior to initiation will ensure Staff and project owner resources are not spent on Staff initiated amendments that cannot be approved due to lack of project owner concurrence. This approach will also enable Staff to delete 1769.2(a)(2) (requirement that the Condition(s) being amended have been "effective for at least ten years").

In addition to the foregoing comments, we reiterate our previous comments submitted on November 12, 2015. (TN# 206594.) Specifically, we reiterate our past comment that Staff should specifically identify categories for modifications that do not require a petition to amend. (*Id.*) During the January 23 Workshop, Jeff Harris articulated a similar comment, noting that Staff should rely on categorical exemptions under CEQA to allow certain project amendments to proceed with the approval of the CPM without a formal petition to amend. We concur with Mr. Harris' comment and would support Staff's inclusion of a list of specific proposed changes that would be exempt from the modification request process currently set forth in Title 20, California Code of Regulations, section 1769(a).

The Honorable Karen Douglas, Siting Lead Commissioner
February 1, 2017
Page 4

Providing greater clarity on the issues identified above will allow for greater Staff and CPM flexibility to approve project changes where appropriate. In turn, this flexibility will shorten the time to process a petition, especially when a proposed change(s) is particularly minor in nature. To that end, we support a process that would allow the CPM to make determinations based on the type of project modification sought.

In closing, we thank you for the opportunity to provide these comments and look forward to Staff's publication of revised draft regulations. We intend to continue participating in any future workshops or proceedings related to these issues.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Melissa A. Foster".

Melissa A. Foster

A handwritten signature in blue ink, appearing to read "Kristen T. Castaños".

Kristen T. Castaños

MAF:jmw