DOCKETED

Docket Number:	15-OII-01
Project Title:	Siting Compliance Process Review and Improvement Proceeding
TN #:	215761
Document Title:	Independent Energy Producers Association Comments: Comments of the Independent Energy Producers Association
Description:	N/A
Filer:	System
Organization:	Independent Energy Producers Association
Submitter Role:	Public
Submission Date:	2/3/2017 3:44:44 PM
Docketed Date:	2/3/2017

Comment Received From: Independent Energy Producers Association
Submitted On: 2/3/2017
Docket Number: 15-OII-01

Comments of the Independent Energy Producers Association

Additional submitted attachment is included below.

ELLISON SCHNEIDER HARRIS & DONLAN LLP

ATTORNEYS AT LAW

2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 447-2166
http://www.eslawfirm.com

February 3, 2017

Commissioner Karen Douglas
Commissioner Janea Scott
California Energy Commission
1516 Ninth Street
Sacramento, California 95814-5512

Re: Comments of the Independent Energy Producers Association
Proposed Changes to the Energy Commission's Siting Compliance Process and Procedure Docket (15-OII-01)

Dear Commissioners Douglas and Scott:

On behalf of the Independent Energy Producers Association ("IEP"), we submit these comments on the *Proposed Changes to the Energy Commission's Siting Compliance Process and Procedure*. (TN#: 215268.) IEP once thanks the Committee and Staff for their hard work to date. We also acknowledge and appreciate that many of IEP's major concerns have been addressed through this iterative process.

In that same cooperative spirit, we also observe that IEP has compromised on a number of the suggested language changes submitted in its prior comments. IEP continues to believe its proposals would improve the revised Regulations.[1] The following remaining issues are of most concern to IEP because, as described below, they implicate due process, fairness, equal protection and vested rights.

I. Section 1708(b): Fees for "Processing" Amendments Should Be Narrowly Tailored to Reflect the New Statutory Language.

As stated in IEP's previous comments on the draft regulations, we recommend that section 1708(b) of the proposed regulations be more narrowly tailored to match the intent of the Legislature in enacting the new fee for processing amendment. With this new enactment, there are now three fees imposed through the Budget Trailer Bill process for facilities:

1) **Application for Certification Fee**: paid one time at the filing of the Application for Certification, up to $822,115 in 2016, per Public Resources Code ("PRC") section 25806(a);

[1] TN#: 206911, December 9, 2015.

2) **Annual Compliance Fee**: paid annually for the life of the project, $27,404 in 2016, per PRC section 25806(b); and

3) **Amendment Processing Fee (New)**: this new fee to be paid for the processing of an amendment, up to $822,115 in 2016, per PRC section 25806(e).

At the most fundamental level, IEP remains concerned that the proposed language for section 1708(b) converts the one-time Amendment Processing Fee into a second, extraordinarily high Annual Compliance Fee.

There is no basis in law for imposing a second Compliance Fee. The statutory language for the Amendment Processing Fee is unambiguous. The new Amendment Processing Fee is for the ***processing*** of an amendment, not to cover compliance monitoring costs:

> 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 * * * seven hundred fifty thousand dollars ($750,000), adjusted annually pursuant to subdivision (c) [to $822,115 in 2016].[2]

The plain language provides that the Amendment Processing Fee covers the ***processing*** of the amendment, not post-approval compliance monitoring costs.

The new Regulations should be narrowly tailored to reflect and not expand the statutory language. However, the draft language to implement this new law is overly broad and effectively creates a second Annual Compliance Fee, contrary to law.

As proposed, the Amendment Processing Fee language sweeps in costs for Delegate CBO activities and undefined "associated expenses" through "the completion of construction on the amendment, if applicable." Moreover, the language does not provide for cost containment safeguards, and does not inform project owners processing an amendment to know what costs might be considered "associated expenses", the rates or fee schedules for those expenses, and a method to challenge excessive fees.

[2] PRC § 25806(e); emphasis added. IEP continues to believe that the new Amendment Processing Fee should have been $750,000 in its first year and not immediately "adjusted" to $822,115. The language of this section says that the $750,000 should be "adjusted annually pursuant to subdivision (c)." Subdivision (c) provides the index of the adjustment; it does not require that the fee be immediately indexed to match the Application for Certification Fee dollar-for-dollar.

The language of section 1708(b) must be revised to ensure that the Amendment Processing Fee is used to process amendments and not for post-approval compliance activities. IEP offers the following revisions to ensure that the language reflects the intent of the Legislature as follows:

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

These revisions are required to ensure that the Amendment Processing Fee does not become a second, illegal Annual Compliance Fee.

II. Section 1769(a)(2)(A): Staff Should Have the Authority to Approve Activities that Are Subject to CEQA Statutory and Categorical Exemptions Without Any Further Process or Expenses.

IEP appreciates the efforts to streamline the post-Certification approval process reflected in the draft Regulations in section 1769(a)(2). The language recognizes that there are some "changes" that are so minor that no further agency review is required by the California Environmental Quality Act ("CEQA"). In addition to the proposed language, the Commission should process a requested change without delay or expense if the proposed change is statutorily or categorically exempt from CEQA.

The CEQA Guidelines contain both Statutory Exemptions (14 CCR § 15260 *et seq*.) and Categorical Exemptions (14 CCR § 15300 *et seq*.). These are activities that are, by definition, exempted from CEQA review. There are many Statutory Exemptions, some of which are absolute. Ministerial projects are statutorily exempt. Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor are likewise statutorily exempt.[3] Another Statutory Exemption applies to the "installation of new pipeline or maintenance, repair, restoration, removal, or demolition of an existing pipeline as set

[3] 14 CCR § 15269.

forth in section 21080.21 of the Public Resources Code, as long as the project does not exceed one mile in length."[4] The Legislature has declared that these categories of projects are exempt and will not be subject to CEQA review.

Similarly, there are also approximately 30 classes of Categorical Exemptions. These are projects that the Secretary of Resources has determined do not usually have a significant effect on the environment. For example, the first Categorical Exemption applies to "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination."[5] The second category exempts "replacement or reconstruction of existing structures and facilities."[6]

The Commission should revise its procedures for reviewing project changes, so that clearly exempt activities can be processed and approved quickly. Moreover, use of and citation to Statutory and Categorical CEQA exemptions in Staff's approvals will both (1) strengthen the Staff's determinations and (2) provide a clear basis for approval which deters challenges without merit. In short, citation to and reliance on the available CEQA exemptions improves transparency and results in more defensible decisions.

To improve the decision making processes, IEP supports an express incorporation by reference of the CEQA Guidelines for Statutory Exemptions (14 CCR §15260 et seq.) and Categorical Exemptions (14 CCR §15300 et seq.). Proposed section 1769(a)(2)(A) should be further amended to incorporate CEQA's Statutory and Categorical Exemptions as follows:

> (A) **Staff may approve the change where staff determines the change is either ministerial or subject to one or more CEQA Statutory Exemptions (14 CCR §15260 *et seq*.) or Categorical Exemptions (14 CCR §15300 *et seq*.).**
>
> **In addition,** Staff may **also** approve the change **not subject to a Statutory or Categorical Exemption** where staff determines:
>
> (i) that there is no possibility that the change may have a significant effect on the environment;
> (ii) that the change would not cause the project to fail to comply with any applicable laws, ordinances, regulations, or standards; and
> (iii) that the change will not require a change to, or deletion of, a condition of certification adopted by the commission in the final decision or subsequent amendments.

[4] 14 CCR § 15282(k)
[5] 14 CCR § 15301.
[6] 14 CCR § 15302.

Other agencies, such as CalTrans, regularly use such CEQA exemptions in their approvals.[7] The State Water Resources Control Board, which also has a Certified Regulatory Program like the CEC, uses the exemptions as well.[8] The Warren-Alquist Act does not limit in any way the Commission's ability to rely on Statutory and Categorical Exemptions. If a change is exempt from CEQA, either because the approval is a ministerial action or because the proposed change is categorically or statutorily exempt, the change should not be subject to environmental review by the Commission. IEP's proposed language accomplishes these important improvements to the Commission's processes.

III. Section 1769(a)(2)(B): Changes to Conform the CEC Certification to the Approvals of the Local Air District Should Be Made in the Same Manner as Staff Approved Changes Without Any Further Process or Expenses.

The existing Regulations require a project owner to pay a $5,000 fee and wait months for approval to conform the CEC's Certification to changes made to the local Air District's approvals. The proposed revisions to section 1769(a)(2)(B) related to approval of changes are a vast improvement over the existing Regulations, but need further refinement to be effective to avoid undue delay and expense.

The proposed Regulations should be further revised to provide that simply incorporating into the CEC Certification changes to the Air District's approvals should be accomplished automatically without delay or expense. This can be easily accomplished by revising the proposed Regulations as follows:

> (B) Staff, in consultation with the air pollution control district where the project is located, may approve any change to a condition of certification regarding air quality, provided~~:(i)~~ that the criteria in subsections (a)(2)(A)(i) and (ii) are met~~; and (ii) that no daily, quarterly, annual or other emission limit will be increased as a result of the change~~.

For over thirty years, the CEC and the Air Districts have worked cooperatively to review power plant projects. The review process is governed by the March 8, 1979 *Approved ARB-CEC Joint Policy Statement Of Compliance With Air Quality Laws By New Power Plants* ("CEC-ARB Joint Policy Statement"). For example, the Commission AFC decision is required to include findings and conclusions in conformity with air quality requirements:

---

[7] See the discussion on CalTrans' use of CEQA exemptions at: http://www.dot.ca.gov/ser/vol1/sec5/ch34ce/chap34.htm

[8] See Southern California Edison Company's application to the State Water Resources Control Board: "Project is to conduct concrete repair and other maintenance of the Bishop Intake No. 4 reservoir dam structures to maintain their integrity and to extend the service life of the dam." Class 1 Categorical Exemption, section 15301 (Existing Facilities). Available at http://www.swrcb.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/bishop_intake_no4/bi_noe.pdf

> C. Decision: The Commission AFC decision shall include findings and conclusions on conformity with air quality requirements based on the Determination of Compliance. If the Determination of Compliance concludes that the facility as proposed by the Applicant will comply with all applicable air quality requirements, the Commission ***shall*** include in its certification any and all conditions necessary to insure compliance. (Emphasis added.)

The directive in the CEC-ARB Joint Policy Statement is clear and mandatory: if the Determination of Compliance concludes that the facility complies with applicable requirements, the Commission shall incorporate the Air District's Determination, verbatim, into the Commission's Certification.

Air District approvals are made in compliance with all applicable laws, including CEQA. When an Air District approves a change to a permitted activity, it does so in compliance with all applicable laws. If applicable and not exempt, CEQA and California laws are satisfied during the Air District's approval, both by express citation to applicable law and by conforming to the District's own rules and regulations.

The Air Districts' rules and regulations are without exception promulgated consistent with required CEQA approvals, typically an EIR to support major rule changes. In simplest terms, there are no state law regulatory "gaps" to be filled by additional Staff review. And as a matter of policy and comity, the Commission should not review or second guess the approvals of the Air District's duly elected or duly appointed Boards. As to a matter of federal law, the Commission is preempted by the Air District as a federal delegatee under the Clean Air Act. Staff's further "review" of Air District approvals is not warranted given the extensive analysis already conducted by the Air District.

The procedures set forth in the Joint Policy Statement have withstood both the test of time and judicial scrutiny. Accordingly, compliance with the CEC-ARB Joint Policy Statement demonstrates compliance with all applicable substantive and procedural requirements. IEP's proposed revisions will confirm the draft Regulations to the law and the policy implemented by the Commission and Air Districts since 1979.

IV. Section 1769(a)(2)(B): Staff Approved Changes for Ministerial Actions, Statutorily and Categorially Exempt Actions and Conforming Changes to Air District Approvals Should Not Be Subject to the Amendment "Processing" Fee.

The new Amendment Processing Fee is intended to cover the expenses of detailed Staff review for a requested major amendment. In marked contrast, just as local agencies do not charge thousands of dollars for minor amendments, the Commission should not charge thousands of dollars to process minor changes. Equal treatment under the law can be ensured by adding the following language changes processed under § 1769(a)(2)(A) and § 1769(a)(2)(B): "Approvals processed under Subsections (A) and (B) of this section are not subject to fees set forth in Section 1708(b)."

V. Section 1769(a)(3): Commission Approval of Challenges to Minor Changes Should Be Expedited and Heard at the Next Business Meeting to Avoid Undue Delay.

The proposed Regulations provide that if any person challenges the Staff's determination approving a minor amendment, the challenge will be heard by the Full Commission at a Business Meeting. While well-intended and a major improvement over the existing regulations, without further safeguards, any challenge – even a challenge that clearly lacks any merit – could delay a minor change by more than a month, making the process even slower than theoretically possible today under existing regulations.

IEP continues to assert that approvals by the Staff should include the ability to approve a project without further appeal to the full Commission. Cities, counties, special districts, and other state-law governmental entities regularly allow for Staff-approval of ministerial, statutorily exempt and categorically exempt activities without further delay. As one example, a ministerial grading permit issued by a city or county building officer cannot be appealed to a planning commission or a city council. The activity is not subject to CEQA or any other applicable laws.

City and County building officials can provide a building permit "across the desk" without any further process. There is nothing in the Warren-Alquist Act (PRC 25000 et seq.) that deprives the Commission of these same authorities. Where projects are determined to be ministerial or exempt, project owners should be able to proceed without further meritless, vexatious appeals.

If, in the alternative, the Commission will not allow such Staff approvals of ministerial and exempt changes to proceed without Commission review, then there must be an expedited appeal process to the Commission. The Commission usually meets only once a month and not always at regular 30 day intervals due to unforeseen scheduling issues that force cancellation or delay of the monthly meeting. Moreover, there is a practice of requiring background materials well in advance of the 10 days accorded for publication of the Agenda for the next Business Meeting.

Under these circumstances, a comment on a Staff approval – even one lacking merit – may mean that a proposed change may not be able to be placed on the agenda for at least 30 days and maybe more than 60 days, depending on when the comment is received and when the next regularly scheduled Business Meeting is scheduled to occur.

To prevent undue delay, the new Regulations should expressly recognize the right of the Commission to add an item to the Agenda that came to the attention of the state body subsequent to the agenda being posted per Government Code section 11125.3(a)(2). Proposed section 1769(a)(3) should be amended as follows:

> (3) If staff determines that a change does not meet the criteria in subsection (a)(2), or if a person files an objection that complies with subsection (a)(2)(C), the petition shall be considered by the commission at ~~a~~**the next** noticed business meeting or hearing. **If necessary, the item shall be added to the agenda for the next noticed business meeting or hearing pursuant to Government**

> **Code section 11125.3(a)(2).** The commission shall issue an order approving, rejecting, or modifying the petition or assign the matter for further proceedings before the commission or an assigned committee or hearing officer. The commission**, assigned committee or hearing officer** may approve such change only if it can they make the following findings:

VI. Section 1769.1(b): Advance Review of Anticipated Project Changes Should Include a Staff Opinion, Not Just a Summary of the Meeting.

New section 1769.1, "Advance Review of Anticipated Project Changes", is a good faith effort to provide project owners with a "comfort letter" confirming that certain minor changes to not require the filing to a Petition to Amend the project's Certification. The processes in Subsection (a) are sufficiently clear and workable. However, project owners need some written confirmation that Staff agrees that some minor activities do not require the filing of a Petition. Accordingly, Subsection (b) should be revised as follows:

> (b) No later than 14 days after a meeting is held pursuant to subsection (a), staff shall prepare and file a summary of the meeting, including ~~any guidance or advice provided to the project owner~~ **Staff's opinion** as to whether the anticipated activities or changes that were the subject of the request require the filing of a petition to amend under section 1679.

A Staff opinion should provide the comfort that the Staff would not recommend initiation of a Complaint action against the project for undertaking the minor changes discussed at the section 1769.1 meeting.

VII. Section 1769.2: The Staff Initiated Amendment Process Proposed to Be Added Has the Potential to Trample on Vested Rights, Unless it is More Narrowly Tailored and Focused.

While IEP appreciates that newly proposed section 1769.2, "Staff Initiated Amendment," may add value, this provision also has the potential to trample on the Vested Rights of project owners if it is not substantially revised.

There is currently no "Staff Initiated" amendment process in the Commission's regulations precisely because of the Doctrine of Vested Rights – the right of a permitted lawful use to continue without additional regulatory burdens being imposed post-approval. Vested Rights provide certainty that businesses require to operate in California's unique and challenging business environment.

There are two separate lines of cases in California Law within the protections afforded through Vested Rights: (1) land use decisions where an initial right to develop vests after the expenditure of substantial resources in reliance on the lawfully issued permit; and (2) the right to continue lawful operations of a business. The first category is not applicable here.

The second category of Vested Rights focuses on decisions related to permits or other land use entitlements held by established businesses which have made substantial investments. Specifically, when an administrative decision involves the right to continue operating an established business "in which [the owner has] made a substantial investment," a ***fundamental vested right*** is implicated.[9] In short, Commission certified projects have a fundamental vested right in the continued operation of a facility.

In light of these fundamental Vested Rights, a proposal for a Staff Initiated Amendment process must be narrowly tailored or completely avoided. In the interests of such tailoring, IEP offers the following recommendations.

First, any amendment petition initiated to "clean up" an existing certification should be initiated by a written request from the project owner and jointly proposed by the Staff and the project owner. To eliminate any ambiguity as to the joint nature of the proposed changes, the section should be renamed "Staff **and Project Owner Jointly** Initiated Amendment". This change in concert with the proposed language changes below will ensure that the project owner is in agreement with the proposal to make changes, thus avoiding any issues related to Vested Rights. To ensure that project owners are supportive of initiating changes, we also suggest the introductory phase "Upon the project owner's written request…" in subsection (a).

Second, some of the language in subsection (a)(1) should be deleted to ensure protection of Vested Rights. For example, there can be legitimate disagreement as to whether "other legal requirements" necessitate changes, given the Doctrine of Vested Rights. Similarly, project owners should not be subject to Condition of Certification changes simply due to "changes to compliance protocols or methodologies," unless the project owner agrees that such changes are necessary and beneficial. Further, the requirement that a Condition be at least 10 years old might actually bar changes to newer conditions where the Staff and project owner agree that a Condition less than 10 years old is unwieldly or otherwise unnecessary.

Staff should not have a unilateral right to initiate an amendment or to otherwise pressure an unwilling project owner to make changes to a project. A truly joint process has potential for benefits. If section 1769.2 is to remain, it must be revised as follows:

> 1769.2. Staff **and Project Owner Jointly** Initiated Amendment.
> (a) **Upon the project owner's written request,** Staff **and the project owner** may **jointly** initiate an amendment to a final decision adopted under this chapter, provided that ~~the proposed amendment meets each of the following requirements:~~
>
> ~~(1)~~ the purpose of the proposed amendment is to update the decision to reconcile the conditions of certification with other ~~legal requirements or changes to compliance protocols or~~

[9] *Goat Hill Tavern v. City of Costa M*esa (1992) 6 Cal.App.4th 1519, 1529. As the court further explained, "Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled." (*Id.* at 1530-1531.)

~~methodologies,~~ **conditions** or to modify a condition that is moot**,** ~~or~~impossible, **unduly burdensome, or otherwise unnecessary to (1) avoid potentially significant effects and (2) remain in compliance with all applicable laws, ordinances, regulations, and standards**;

~~(2) the amendment pertains to a condition of certification that has been effective for at least ten years~~;

(b) An amendment **jointly** initiated by staff **and the project owner** shall include the information specified in section 1769(a)(1), and be accompanied by a summary of the amendment consistent with the requirements of section 1769(a)(2). The amendment shall otherwise be processed in a manner consistent with section 1769, provided that the amendment shall be considered by the commission consistent with the requirements of section 1769(a)(3). The amendment shall not be approved by the commission unless the ~~concurrence~~**agreement** of the project owner with the proposed amendment is reflected in the ~~record of the proceeding~~**joint proposal presented to the commission for approval**.

(c) An amendment initiated **jointly** by staff **and the project owner** pursuant to this section shall not be subject to section 25806(e) of the Public Resources Code.

These safeguards are necessary to protect Vested Rights. If they are not accepted, then Commission should in the alternative delete proposed section 1769.2 in its entirety.

CONCLUSION

IEP appreciates this opportunity to comment and looks forward to continuing to work cooperatively and productively with the Committee and the Staff.

ELLISON SCHNEIDER HARRIS & DONLAN LLP

Jeffery D. Harris
Samantha G. Neumyer
Attorneys for the Independent Energy Producers Association