DOCKETED	
Docket Number:	18-SIT-02
Project Title:	Power Plant Compliance Enforcement Policy
TN #:	223632
Document Title:	Dan B. Severson Comments of Turlock Irrigation District re Power Plant Compliance Enforcement
Description:	N/A
Filer:	System
Organization:	Dan B. Severson
Submitter Role:	Public
Submission Date:	5/31/2018 4:37:44 PM
Docketed Date:	5/31/2018

Comment Received From: Dan B. Severson
Submitted On: 5/31/2018
Docket Number: 18-SIT-02

Comments of Turlock Irrigation District: Power Plant Compliance Enforcement (18-SIT-02)

Additional submitted attachment is included below.

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May 31, 2018

Ms. Christine Root
Compliance Office Manager
Siting, Transmission, & Environmental
Protection Division
California Energy Commission
Dockets Unit, MS-4
Docket Nos. 18-SIT-01 and 18-SIT-02
1516 Ninth Street
Sacramento, CA 95814-5512

RE: Comments of Turlock Irrigation District: Power Plant Compliance Petition to Amend Screening Form (18-SIT-01) and Power Plant Compliance Enforcement (18-SIT-02)

Dear Ms. Root:

The Turlock Irrigation District (the "District" or "TID") welcomes the opportunity to comment on the proposed Compliance Enforcement processes described in the letter to project owners and interested parties docketed by California Energy Commission ("Commission") Staff on April 11, 2018 (the "Compliance Process Letter," TN #: 223174).

TID was organized as the first Irrigation District in California on June 6, 1887 and is beginning its 131st year of operation. TID currently serves a retail electric customer base of just over 100,000 customers and provides irrigation water to over 5,800 growers and nearly 150,000 acres of farmland. Of the 11 communities that TID serves, 7 are classified as Disadvantaged Communities.

TID's mission is to provide stable, reliable, and affordable water and power to its customer owners, be good stewards of our resources, and provide a high level of customer satisfaction. TID is one of eight Balancing Authorities in California, tasked with balancing retail demand, generation, and wholesale purchases and sales while providing adequate reserve capacity to maintain reliability. To serve its customer owners, TID has a diverse portfolio of RPS eligible resources including wind, small hydro, geothermal, and solar. In addition to its diverse renewables portfolio, TID is the owner and operator of two Commission jurisdictional facilities, the Almond 2 Power Plant and the Walnut Energy Center.

As set forth below, while TID is generally supportive of the concept of the petition to amend the screening form, TID is concerned with the lack of specificity and procedural protections contained in Staff's proposed Compliance Enforcement process. Compliance Advice Letters and Notices of Violation ("NOVs") are not authorized by statute or regulation. There is no basis in statute to delegate the Commission's authority to hold hearings and impose monetary penalties to the Staff through any process, let alone through a Compliance Advice Letter or an NOV. These new compliance tools should be shelved, in favor of existing compliance processes.

The Petition Screening Form Should Include A List of Activities That Do Not Require An Amendment

The District understands that the proposed Power Plant Compliance Petition Screening Form has been created in "an effort to create a more streamlined post-certification amendment process…"[1] The District supports efforts to streamline what can be a very long, complex and expensive post-Certification Amendment process. The Form has some value in helping discern what activities require a post-Certification Amendment.

The District maintains that there are certain non-discretionary activities that are not "projects" under CEQA and thus do not require further environmental review. Accordingly, the District believes that the Form could benefit from adding instructions that explain that certain activities are recognized as exempt from CEQA and thus do not require an amendment.

The District recommends that the form add a paragraph that reads as follows:

> Certain activities are ministerial in nature and do not require an amendment. These activities, include, but are not limited to, the following: (A) Maintenance activities routinely performed in the electric generation industry; (B) Like-kind replacement or repair of component parts of the thermal power plant and related facilities; (C) Activities that are statutorily exempt from CEQA (14 CCR §15260 et seq.) or categorically exempt from CEQA (14 CCR §15300 et seq.); and (D) Emergency repairs.

The Form should be amended to notify project owners that If a proposed activity falls into one of these activities that are clearly exempt from CEQA, such activities do not require amendments.

Existing Law and Regulation Require Complaint Actions and Hearings Before a Full Commission Before Considering Potential Civil Penalties

The Commission Staff's Notice states that "Among the other tools at its disposal, the Energy Commission Compliance Office uses Compliance Advice Letters and Notices of Violation to help with power plant compliance enforcement." However, neither Compliance Advice Letters nor Notices of Violation are authorized by the Commission's statutes and regulations. Moreover, as discussed below, absent any materially false statements, the Commission may only impose civil penalties for "significant" failures to comply with the terms or conditions of approval and then only after filing a complaint, providing notice and holding at least one hearing before the full Commission.

[1] TN #: 223174, *Power Plant Compliance Petition to Amend Screening Form and Power Plant Complaint Enforcement & Notice of Staff Workshop*, p. 1.

Public Resources Code Section 25534 of the Warren-Alquist Act sets forth the Commission's authorities to impose civil penalties in a power plant setting and also provides some significant due process protections not afforded by either of the Commission's proposed new compliance "tools."

Public Resources Code Section 25534(b) provides for the imposition of civil penalties in two limited circumstances: (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant; and (2) Any ***significant failure*** to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision. (Emphasis added.) Thus, the imposition of civil penalties is applicable to only the most serious or "significant" failures to comply with the terms or conditions of approval. Staff's proposed policy does not contain these important limitations.

By using the term "significant," the Legislature mandated that the imposition of civil penalties be reserved for only the most serious noncompliance issues. In all other cases, the Commission and the project owners work together informally and cooperatively.

It is also important to note that civil penalties can only be imposed following at least one hearing in a complaint proceeding. That hearing is held before the full Commission (not a Committee), and a monetary penalty may be imposed only by a decision of the Commission. (Public Resources Code Sections 25534(b); Section 25534.1.)

Section 25534.1 provides for a rigorous due process hearing before the full Commission, initiated by the Commission's Executive Director. Consistent with the requirements of due process, the Executive Director's complaint must be served and must "inform the party so served that a hearing will be conducted within 60 days after the party has been served." (Section 25534.1(b).) The "hearing shall be before the commission," not via a Staff letter or NOV (*Id*.) Subsection (e) also sets forth criteria to be considered by the full Commission in setting any potential administrative civil penalties.[2]

This complaint and hearing process was crafted precisely to ensure that due process was afforded for significant potential noncompliance issues. There is no basis in statute to delegate the Commission's authority to impose monetary penalties to the Staff through any process, let alone through a Compliance Advice Letter or NOV.

Even if the enforcement mechanisms contemplated by the Compliance Process Letter were authorized by the Warren Alquist Act, the proposals ignore several key restrictions and due process protections required by statute. In particular, the Compliance Process Letter states that a NOV issued by Staff "may

[2] "In determining the amount of the administrative civil penalty, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require." (Section 25534.1(e).)

include a fine and/or a change to a facility[’s] license to ensure compliance in the future.” (Compliance Process Letter, p. 3.) The Warren Alquist Act clearly provides that such actions may only be taken by the Commission following certain important procedural requirements.[3] There is no basis in statute to delegate the Commission’s authority to impose monetary penalties to the Staff through any process, let alone through a Compliance Advice Letter or an NOV.

Conclusions

Rather than creating new compliance “tools” that are not authorized by existing law or regulation, the Commission should continue using the collaborative, dispute resolution provisions set forth in a facility’s license to resolve compliance issues. If there is a concern with a potentially serious instance of non-conformance, the Commission’s existing complaint process is more than adequate to resolve such issues, while preserving a project owner’s right to notice, opportunity to be heard, and hearing before the Commission.

As set forth above, the Commission Staff lacks the statutory authority to impose monetary penalties via Compliance Advice Letter, NOV or any other means. Moreover, the proposed new compliance mechanisms will most certainly have the effect of restricting open communications when the focus should be identifying issues and building consensus on how to make Commission certified projects safe, effective, and reliable.

The Power Plant Compliance Enforcement proceeding is a solution in search of a problem. The proposed compliance-related changes should be jettisoned in favor of the judicious use of the Commission’s existing, plenary compliance processes, developed consistent with and within the scope of the Commission’s legal authorities.

Thank you for your attention to this important matter.

Sincerely,

Dan B. Severson
Turlock Irrigation District
Regulatory Analyst

[3] Pub. Resources Code § 25534.