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Docket Number:	18-SIT-02
Project Title:	Power Plant Compliance Enforcement Policy
TN #:	224207
Document Title:	Response to Comments – 51518 Workshop - Compliance Petition Screening Form (18-Sit-01) and Compliance Enforcement (18-Sit-02)
Description:	Response to Comments – 5/15/18 Workshop on Compliance Petition to Amend Screening Form (18-Sit-01) and Compliance Enforcement (18-Sit-02)
Filer:	Mary Dyas
Organization:	California Energy Commission
Submitter Role:	Commission Staff
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CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov



July 19, 2018

TO: Project Owners and Interested Parties

FROM: Christine Root, Compliance Office Manager

**SUBJECT: RESPONSE TO COMMENTS FROM MAY 15, 2018 WORKSHOP
COMPLIANCE PETITION TO AMEND SCREENING FORM (18-SIT-01)
AND COMPLIANCE ENFORCEMENT (18-SIT-02)**

The Energy Commission Siting, Transmission and Environmental Protection (STEP) Division Compliance Office held a workshop on May 15, 2018 to discuss the Compliance Petition to Amend Screening Form and Compliance Enforcement.

The Compliance Petition to Amend Screening Form was created to enable staff to streamline requests for project changes. Use of this form is voluntary. The screening form is available on <http://www.energy.ca.gov/siting/>.

The Energy Commission Compliance Office uses Compliance Advice Letters and Notices of Violation to help with power plant compliance enforcement.

Attached are staff's responses to both oral and written comments. Staff is also providing corrections to the April 10, 2018 Letter to Interested Parties (Attachment 1) and to the May 15, 2018 PowerPoint Presentation (Attachment 2).

If you have any questions or concerns, please contact Mary Dyas, Compliance Project Manager, at (916) 1-8891, or by fax to (916) 654-3882, or via e-mail at mary.dyas@energy.ca.gov.

Sincerely,

<< Signature on File >>

Christine Root
Compliance Office Manager
Siting, Transmission, & Environmental Protection
Division

Attachments

- Corrected April 10, 2018 Letter to Interested Parties
- Corrected May 15, 2018 PowerPoint Presentation
- Responses to Comments

Posted to:

- <http://www.energy.ca.gov/siting/>

**COMPLIANCE PETITION TO AMEND SCREENING FORM
(18-SIT-01)**

RESPONSE TO COMMENTS

COMPLIANCE PETITION TO AMEND SCREENING FORM (18-SIT-01)
MAY 15, 2018 WORKSHOP

Comments from:

- Jeff Harris, Ellison Schneider Harris & Donlan LLP
- Samantha Neumyer, Ellison Schneider Harris & Donlan LLP
- Scott Galati, DayZen LLC
- Melissa Foster, Stoel Rives
- David Alba, Member of the Public

Summary of Comments:

- What is the process?
- Will the information provided be docketed?
- Will the information provided be kept confidential?
- What is the timeline for a response?

Staff Response: *The Petition to Amend Screening Form is available on the Energy Commission webpage <http://www.energy.ca.gov/siting/> or a project owner may request a copy of the form from a Compliance Project Manager (CPM).*

The intended process is that the project owner would complete the form and submit it to the CPM. The form would then be reviewed by staff (including management to ensure consistency). After the document is reviewed, staff will determine if a Petition to Amend (PTA) is required. If a PTA is not required, staff will issue a formal letter, signed by the Compliance Office Manager, documenting this decision. The letter will also state if the proposed activity will require a Delegate Chief Building Official.

Most information provided to the Energy Commission is available to the public through a Public Information Act request¹. Currently there is no plan to docket this information. If in the future, a decision is made to docket the information, the form would be added to the Compliance Docketing Policy. If a project owner wants the information kept confidential, it would need to file a request through the Energy Commission's confidentiality process.

Staff anticipates that most requests will take one to two weeks to process, depending on the completeness of the responses. Review times for a Petition to Amend Screening

¹ Through the Energy Commission's confidentiality process, a project owner may file an Application for Confidentiality. Instructions on how to do this can be found at http://www.energy.ca.gov/commission/chief_counsel/documents/CEC13.pdf

COMPLIANCE PETITION TO AMEND SCREENING FORM (18-SIT-01)
MAY 15, 2018 WORKSHOP

Form will be similar to the review time of a PTA completeness check. If information is incomplete, or clarification is needed, additional information may be requested.

There is no guarantee that if a screening form is submitted, that a PTA will not be needed. This voluntary tool allows for open communication between the project owner and staff to avoid potential future adverse enforcement actions, and encourage plant owners to file a PTA when making changes to a power plant.

If facts change from what was submitted in the Petition to Amend Screening Form, the Energy Commission may conduct a second review the information submitted. This second review may result in staff determining that a PTA is now required.

**COMPLIANCE ENFORCEMENT
(18-SIT-02)**

RESPONSE TO COMMENTS

COMPLIANCE ENFORCEMENT (18-SIT-02)
MAY 15, 2018 WORKSHOP

Comments provided by:

- Jeff Harris, Ellison Schneider Harris & Donlan LLP
- Scott Galati, DayZen LLC
- Melissa Foster, Stoel Rives
- Stephen O’Kane, AES
- Jeff Malone, Middle River Power
- Dan Severson, Turlock Irrigation District

Summary of Comments Raising Legal Issues:

Staff’s use of Compliance Advice Letters and Notices of Violation (NOVs) to notify violators of the results of investigations and engage them in discussions to resolve issues of non-compliance violates the Public Resources Code, Title 20 of California Code of Regulations, the Administrative Procedures Act and dispute resolution provisions in Conditions of Certification.

Staff Response:

Staff disagrees with these comments. Compliance Advice Letters and NOVs do not impose penalties. Using these letters and notices to resolve violations informally by mutual agreement is an appropriate exercise of the Energy Commission’s authority.

Public Resources Code section 25532 requires the Energy Commission to “establish a monitoring system to assure that any facility certified under this division is operating in compliance with conditions adopted or established by the Energy Commission or specified in the written decision on the application.” Title 20, California Code of Regulations, section 1770 similarly provides that the Energy Commission “shall provide adequate monitoring of all conditions and measures set forth in the final decision required to mitigate potential impacts and to assure that the facility is operated in compliance with all applicable laws.” Section 1770(a)(1) requires that each facility’s compliance plan include, among other things, “procedures for settling disputes” that may arise.

The Energy Commission may administratively impose a civil penalty for, among other things, a “significant failure to comply with any terms or conditions of approval in its Final Decision.” (Pub. Resources Code, § 25534(a)(2).) Public Resources Code section 25534(b) provides that “[a]ny civil penalty shall be imposed in accordance with section 25534.1 and may not exceed seventy-five thousand dollars (\$75,000) per violation, except that the civil penalty may be increased by an amount not to exceed one

COMPLIANCE ENFORCEMENT (18-SIT-02)
MAY 15, 2018 WORKSHOP

thousand five hundred dollars (\$1,500) per day for each day in which the violation occurs or persists, but the total per day penalties may not exceed fifty thousand dollars (\$50,000).” Section 25534.1(e) lists factors to be taken into account in setting a penalty. They are broad enough to allow cooperation and self-reporting to be considered. Notices of Violation will also inform the project owner of the maximum penalty available under section 25534(b) for the subject violations.

The Executive Director of the Energy Commission may commence the formal administrative penalty process under Public Resources Code section 25534.1 and Title 20, California Code of Regulations, section 1233 without first seeking to resolve a matter informally. Nevertheless, this is not the sole option. Government Code section 11415.60 authorizes state agencies to resolve matters arising under their jurisdiction by settlement without conducting adjudicatory hearings.

In cases where the staff attempts, but is not able, to reach informal resolutions after the issuance of Compliance Advice Letters or NOVs, the Executive Director of the Energy Commission remains free to commence the formal administrative complaint process to impose penalties pursuant to Public Resources Code section 25534.1 and Title 20, California Code of Regulations, section 1233. In response to these comments, the Energy Commission’s April 10, 2018 letter to project owners and interested parties regarding power plant enforcement and the slides from the Energy Commission’s May 15, 2018 workshop have been amended to better reflect this. Corrected versions are attached.

These authorities support the staff’s use of Compliance Advice Letters, NOVs and attempts to resolve compliance matters informally by mutual agreement. These efforts do not constitute a regulation. (See Gov. Code, § 11342.600.)

Other Comments provided by:

- Greg Lamberg, W Power
- J. Manuel Bravo, Mojave Solar LLC
- Enrique Guillen, Mojave Solar LLC
- Jeff Harris, Ellison Schneider Harris & Donlan LLP
- Tim Sisk, NRG Energy
- Barbara McBride, Calpine Corporation
- David Alba, Member of the Public

COMPLIANCE ENFORCEMENT (18-SIT-02)
MAY 15, 2018 WORKSHOP

Summary of Other Comments:

- What is considered when determining the fine amount?
- How are multiple NOVs for the same situation from different agencies handled?
- Is the end result a settlement agreement?
- Where do settlement monies go?

Staff Response:

Public Resources Code section 25534(b) establishes the maximum penalties for violating the terms and conditions specified in the Commission's power plant siting decisions. Public Resources Code section 25534.1(e) lists the factors that the Commission shall consider in determining a penalty amount: "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." NOVs will list maximum penalties. The penalty factors will be weighed in the settlement process. These factors are broad enough to take other similar violations into account.

If a settlement is reached, a settlement agreement will be drafted and taken to the Commission for its approval at one of its publicly noticed business meetings. If a settlement agreement cannot be reached, the Executive Director of the Commission may commence the formal administrative complaint process to impose penalties pursuant to Public Resources Code section 25534.1 and Title 20, California Code of Regulations, section 1233. Either way, penalties are deposited in the General Fund. Public Resources Code section 25534.2.

This document is a summary, and is not intended as an exhaustive discussion of all relevant authority.

ATTACHMENT 1

Corrected April 10, 2018 Letter to Interested Parties

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov



April 10, 2018

TO: Project Owners and Interested Parties

FROM: Christine Root, Compliance Office Manager

SUBJECT: POWER PLANT COMPLIANCE PETITION TO AMEND SCREENING FORM and POWER PLANT COMPLIANCE ENFORCEMENT

The Energy Commission Siting, Transmission and Environmental Protection (STEP) Division Compliance Office will be holding a workshop on May 15, 2018 to discuss the following two topics:

1. Power Plant Compliance Petition to Amend Screening Form
2. Power Plant Compliance Enforcement

POWER PLANT COMPLIANCE PETITION TO AMEND SCREENING FORM

In an effort to create a more streamlined post-certification amendment process, California Energy Commission staff has created a voluntary Petition to Amend Screening Form.

Background

Pursuant to California Code of Regulations, title 20, section 1769, Post Certification Amendments and Changes, a project owner shall file a post-certification petition (petition) for “any modifications it proposes to the project design, operation, or performance requirements.”

Section 1769 states that where staff determines that there is no possibility that the proposed modifications to project design, operation, or performance may have a significant effect on the environment, and if the modifications will not result in a change or deletion of a condition adopted by the Energy Commission in the project’s final decision or make changes that would cause the project not to comply with any applicable laws, ordinances, regulations, or standards, no Commission approval of the petition is required and the petition may include a statement to this effect, which has come to be known as a Staff Approved Project Modification. If staff determines that a modification does not meet these criteria, or if a person objects to a staff determination that a modification does meet the criteria, the petition must be processed as a formal amendment to the decision and must be approved by the Commission (the appointed members of the Commission or a quorum of those members) at a noticed business meeting or hearing.

Proposed activities or project changes that are requested, may be considered “maintenance” or would not result in a change to the project’s design, operation, or performance requirements as described or listed in the project’s Final Commission Decision and any documents incorporated by reference (e.g., the Application for Certification, Final Staff Assessment, etc.).

To help us make the determination as to whether a proposed change would require a petition to be filed or not, the Energy Commission Compliance Office is requesting that the attached Petition Screening Form be filled out when considering post-certification changes at a project site. Completing this form is voluntary, but it will enable staff to streamline requests for changes by collecting as much upfront information as possible, to avoid back and forth email questions in order to make a determination.

If staff determines that no petition is required, a letter will be sent in response, stating staff’s determination. This form is strictly voluntary and is intended to enable us to streamline requests for changes at project sites by collecting specific information needed to determine if your project change requires a post-certification petition. This will be beneficial to the project owners by providing a screening tool to avoid submitting unnecessary petitions to amend and provide additional clarity on what factors staff takes into consideration when making these determinations. This process is not subject to the petition filing fee and will be used to improve communication between staff and power plant owners.

POWER PLANT COMPLIANCE ENFORCEMENT

Among the other tools at its disposal, the Energy Commission uses Compliance Advice Letters and Notices of Violation to help with power plant compliance enforcement. A description of both of these is provided below.

Compliance Advice Letters

A Compliance Advice Letter can be issued for a wide range of issues that may come up on a project and serves primarily as a formal communication tool between staff and project owners. The purpose of the Compliance Advice Letter is to educate power plant owners and to encourage corrective actions be taken. The Compliance Advice Letter maybe advisory or may ask that specific corrections be made at a facility.

For example, these letters may be used to provide a formal interpretation of a condition of certification when there is ambiguity in a condition’s language. A Compliance Advice Letter may also be issued when the Energy Commission determines that corrective action is needed at a project. In these circumstances, a Compliance Advice Letter gives the facility owner an opportunity to correct the identified violation and may avert the need for staff to issue a Notice of Violation.

The compliance advice letter may address a variety of issues including, but not limited to the following:

1. Provide staff interpretation of how to comply with a project's license;
2. Provide guidance on how to comply with unique circumstances at a facility not anticipated in the project license; and/or
3. Provide corrective action notification.

Notices of Violation

A Notice of Violation (NOV) is another enforcement tool that staff has to gain power plant compliance. When a project is issued an NOV, the project owner will be requested to attend a meeting with management to review the allegations against the project.

NOVs may be issued for non-conformance to the project's license or applicable laws, ordinances, regulations or standards (LORS). NOVs may ~~include a~~ identify an applicable fine and/or a change to a facilities license to ensure compliance in the future. All ~~NOVs and/or~~ Settlement Agreements that result from an NOV, will be heard at an Energy Commission Business Meeting.

The Warren-Alquist Act provides that the Energy Commission may administratively impose a civil penalty for a "significant failure to comply with any terms or conditions of approval in its Final Decision." (Public Resources Code § 25534, subd. (a)(2) and (b)). Section 25534(b) provides in relevant part that "[a]ny civil penalty shall be imposed in accordance with section 25534.1 and may not exceed seventy-five thousand dollars (\$75,000) per violation, except that the civil penalty may be increased by an amount not to exceed one thousand five hundred dollars (\$1,500) per day for each day in which the violation occurs or persists, but the total per day penalties may not exceed fifty thousand dollars (\$50,000)."

An NOV will state the maximum allowable fine for the specific violation(s) which are subject of the NOV. An NOV may address a variety of issues including, but not limited to, the following:

1. A violation of applicable conditions of certification.
2. A violation of applicable laws, ordinances, regulations and standards.
3. Failure to correct items addressed a Compliance Advice Letter.

Public and worker safety are the utmost priority of the Energy Commission. The Energy Commission is committed to ensuring that jurisdictional power plants are constructed and operated under safe working conditions and are complying with all applicable safety and health requirements pertaining to the project's conditions of certification and all applicable LORS.

WORKSHOP

The Energy Commission will be holding a workshop to discuss the proposed Compliance Petition to Amend Screening Form and Compliance Enforcement to obtain further input (see attached Notice of Staff Workshop).

COMMENTS

We invite you to provide written comments on the above noted topics. We ask that written comments on these two topics be provided by June 5, 2018. To use the Energy Commission's electronic commenting feature, go to the Energy Commission's Siting Transmission and Environmental Protection webpage at <http://www.energy.ca.gov/siting/>. Under the Special Siting Division Meetings and Workshops, Compliance Petition to Amend Screening Form and Compliance Enforcement, click on the "Submit e-Comment" link, and follow the instructions in the on-line form.

Please include the individual Docket number "**18-SIT-01 Power Plant Compliance Petition Screening Form**" or Docket number **18-SIT-02 Power Plant Compliance Enforcement** in the title of your comments. When receipt of your document is confirmed by the Energy Commission's Docket Unit, you will receive an e-mail notification with a link to your document.

Please be sure that comments for **18-SIT-01 Power Plant Compliance Petition Screening Form** and **18-SIT-02 Power Plant Compliance Enforcement** are filed separately in the correct docket.

Written comments may also be mailed or hand-delivered to:

California Energy Commission
Dockets Unit, MS-4
Docket No. **18-SIT-01 or 18-SIT-02**
1516 Ninth Street
Sacramento, CA 95814-5512

All comments and materials filed with and approved by the Dockets Unit will be added to the Docket Log and become publicly accessible on the Energy Commission's webpage.

We look forward to discussing these topics and hearing your comments at the workshop.

If you have any questions or concerns, please contact Mary Dyas, Compliance Project Manager, at (916) 1-8891, or by fax to (916) 654-3882, or via e-mail at mary.dyas@energy.ca.gov.

Sincerely,

Signature on file

Christine Root
Compliance Office Manager
Siting, Transmission, & Environmental Protection
Division

Attachments

- Petition Screening Form
- Workshop Notice

Sent to:

- Project Owners/Reps; hard copy and email
- PAO e-mail list

Posted to:

- <http://www.energy.ca.gov/siting/>

ATTACHMENT 2

Corrected May 15, 2018 PowerPoint Presentation



**Siting, Transmission and Environmental
Protection (STEP) Division / Compliance Office**

**Power Plant Compliance
Petition to Amend Screening Form
and
Power Plant Compliance Enforcement
Workshop**

California Energy Commission, Sacramento, CA
May 15, 2018



INTRODUCTION

The two topics being discussed are:

1. The Power Plant Compliance Petition to Amend Screening Form which will help streamline the amendment process; and
2. Power Plant Compliance Enforcement and the use of Compliance Advice Letters and Notices of Violation.

Comments on both topics are due June 5, 2018.

- Submit comments under each separate docket.
 - Compliance Petition to Amend Screening Form, Docket 18-SIT-01
 - Compliance Enforcement, Docket 18-SIT-02



Power Plant Compliance Petition to Amend Screening Form

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Power Plant Compliance Petition to Amend Screening Form

- Streamline post-certification amendment process.
- Available on-line at <http://www.energy.ca.gov/siting/>.
- Use of screening form is voluntary.
- Collecting up-front information.
- Use when considered "maintenance activity" or does not result in a change to the project's design, operation, or performance requirements.
- Determination notification from Compliance Office.

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CALIFORNIA ENERGY COMMISSION

CALIFORNIA ENERGY COMMISSION PETITION SCREENING FORM



PROJECT: DOCKET No.:
CONTACT: DATE:

1. Please describe the proposed project change.

2. Would the proposed project change cause a direct physical change or reasonably foreseeable indirect physical change to the site or equipment on site? If yes, please explain.

- a. Is the proposed project change to software? ☐ Yes ☐ No
b. Is there a change to method of operation or how the facility is being operated?

3. Please describe why the project change is needed (e.g., due to changes in regulation or operation and maintenance specifications, equipment or component failure)?

4. Would the proposed project change require a change to existing conditions of certification? ☐ Yes ☐ No
If yes, please list the conditions of certification affected.

5. Would the proposed project change result in a temporary or permanent non-conformance with existing LORS? ☐ Yes ☐ No
If yes, please list the applicable LORS and describe the non-conformance.

6. Would the proposed project change affect the project's design, operation, or performance requirements as described in the Final Commission Decision and any documents incorporated by reference (e.g. AFC, FSA, etc.)?
☐ Yes ☐ No.

7. Is there a change to the project description as listed in the Final Commission Decision? ☐ Yes ☐ No

8. Would the proposed project change have any significant adverse environmental or public health and safety impacts? ☐ Yes ☐ No

If so, how were the impacts determined and what mitigation measures are proposed?

9. Does the proposed project change affect the public, including nearby property owners and residents? ☐ Yes ☐ No
If so, how?

10. Are there any additional permits from other agencies required and proposed timing? ☐ Yes ☐ No

11. What is the proposed timing/schedule for demolition, construction, and commissioning?

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CALIFORNIA ENERGY COMMISSION

QUESTIONS?

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Power Plant Compliance Enforcement

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Power Plant Compliance Enforcement

To help with power plant compliance enforcement, the Energy Commission uses:

- Compliance Advice Letters, and
- Notices of Violation

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Power Plant Compliance Enforcement

Compliance Advice Letters

- A formal communication tool between staff and project owners.
- Purpose of Compliance Advice Letter
 - Educate power plant owners and encourage corrective actions be taken.
 - May be advisory or may ask that specific corrections be made at a facility.

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Power Plant Compliance Enforcement

Compliance Advice Letters - continued

- Gives project owner an opportunity to correct identified violation and may avert issuance of Notice of Violation.
- May address a variety of issues
 - Provide corrective action notification.
 - Provide staff interpretation of how to comply with a condition of certification.
 - Provide guidance on how to comply with unique circumstances not anticipated.

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Power Plant Compliance Enforcement

Notices of Violation (NOV)

- May be issued for non-conformance to the project's license or applicable laws, ordinances, regulations or standards.
- When an NOV is issued, the project owner will meet with management to review allegations.
- All ~~NOVs and/or~~ Settlement Agreements that result from an NOV, will be heard at an Energy Commission Business Meeting.

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Power Plant Compliance Enforcement

Notices of Violation (NOV) - continued

- An NOV may address a variety of issues including, but not limited to the following:
 - A violation of applicable conditions of certification.
 - A violation of applicable laws, ordinances, regulations and standards.
 - Failure to correct items addressed a Compliance Advice Letter.
- An NOV will state the maximum allowable fine for the specific violation(s) which are subject of the NOV.

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Power Plant Compliance Enforcement

Notices of Violation (NOV) - continued

- Warren-Alquist Act, Public Resources Code § 25534, subd. (a)(2) and (b) provides in relevant part that "[a]ny civil penalty shall be imposed in accordance with section 25534.1 and may not exceed seventy-five thousand dollars (\$75,000) per violation, except that the civil penalty may be increased by an amount not to exceed one thousand five hundred dollars (\$1,500) per day for each day in which the violation occurs or persists, but the total per day penalties may not exceed fifty thousand dollars (\$50,000).
- Warren-Alquist Act, Public Resources Code § 25534, subd. (e) provides the criteria for determining the amount of administrative civil penalties."

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QUESTIONS?

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1. The voluntary Petition Screening Form should exempt Project Owners from NOV. Otherwise participation will be limited.
2. Staff determination should be binding to some extent. Which may require a public review period.
3. Past staff determination should be searchable, so the same question is not asked twice.
4. How do Project Owners know the CEC isn't just going to say "Yes, you need to submit a petition to amend"?
5. How does the CEC intend to demonstrate it is applying the same standards across its different reviewers?
6. Will CEC be reviewing precedents in California and other state prior to implement this program or issuing individual determinations.
7. This program will probably be used for capital project planning, so a quick turnaround or guaranteed turnaround would be good.