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2018 TITLE 20 UPDATES TO SITING AND PROCEDURE REGULATIONS

Final Statement of Reasons

CALIFORNIA
ENERGY COMMISSION

Edmund G. Brown Jr., Governor

FINAL STATEMENT OF REASONS

PROPOSED AMENDMENTS TO California Code of Regulations, Title 20, Sections 1200s, 1700s, 1900s and 2300s

CALIFORNIA ENERGY COMMISSION Docket Number 17-OIR-02

October 9, 2018

INTRODUCTION

This document is the Final Statement of Reasons (FSOR) and Updated Informative Digest required by Government Code sections 11346.5(a)(19), 11346.9, and 11347.3(b)(2). The original proposed language and the final adopted language cover the Energy Commission's power plant licensing processes and general commission-wide procedures.

PROCEDURAL HISTORY OF THE RULEMAKING

On May 25, 2018, the Office of Administrative Law published a Notice of Proposed Action (NOPA) concerning the potential adoption of proposed amendments to the Energy Commission's siting and procedure regulations (Express Terms or 45-Day Language). The NOPA, Express Terms and Initial Statement of Reasons were also posted on the Energy Commission's website for docket number 17-OIR-02 on May 25, 2018. The NOPA set a hearing and adoption data for July 11, 2018.

On July 6, 2018, the Energy Commission published and posted on its website an amended Notice postponing the hearing and adoption date until August 1, 2018 and extending the comment period until July 20, 2018.

On August 1, 2018, after a hearing on the express terms and consideration of public comments, the Energy Commission adopted the amended language and a notice of exemption from the California Environmental Quality Act.

UPDATED INFORMATIVE DIGEST (Gov Code Section 11346.9(b))

In accordance with Government Code section 11346.9(b), the Informative Digest contained in the NOPA is incorporated by reference. There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the NOPA.

UPDATE TO THE INITIAL STATEMENT OF REASONS (Gov Code Section 11346.9(a)(1))

Government Code section 11346.9(a)(1) requires the FSOR to contain an update of the information contained in the Initial Statement of Reasons. No changes to the Initial Statement of Reasons are necessary which is hereby incorporated by reference.

MATERIALS RELIED UPON THAT WERE NOT AVAILABLE FOR PUBLIC REVIEW PRIOR TO THE CLOSE OF THE PUBLIC COMMENT PERIOD (Gov Code Section 11346.9(a)(1))

No materials were relied upon.

INCORPORATION BY REFERENCE OF MATERIAL FROM THE NOTICE OF PROPOSED ACTION (Gov Code Section 11346.9(d))

In accordance with Government Code section 11346.9(d), the Energy Commission determines that this FSOR can satisfy the following requirements by incorporating by reference various parts of the Notice of Proposed Action.

- Section 11346.9(a)(2). The Energy Commission has determined that regulations will not impose a mandate on state, local agencies, or school districts.

- Section 11346.9 (a)(5). The Small Business Impacts and Economic Impact on Business determinations from the Notice of Proposed Action are incorporated by reference. The Energy Commission has determined that the regulations have no adverse economic impact upon small businesses. Thus, alternatives to lessen any impact were not considered, and none were identified.

- Section 11346.9(c). The relationship to federal law discussion from the Notice of Proposed Action is incorporated by reference.

CONSIDERATION OF ALTERNATIVE PROPOSALS (Gov Code Section 11346.9(a)(4) and (5))

The Energy Commission determined that no alternative before it would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected persons than the adoption of the proposed regulations, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

INCORPORATION BY REFERENCE (1 CCR 20(C))

No documents were incorporated by reference for this rulemaking.

SUMMARY OF COMMENTS RECEIVED AND THE ENERGY COMMISSION'S RESPONSES (Gov Code Section 11346.9(a)(3))

Only one set of comments were received during the comment period between May 25, 2018 and July 20, 2018. Two comments were also received at the hearing on August 1, 2018.

All comments were reviewed, summarized and responded to in Attachment A. These responses explain the reasoning for rejecting the comment.

FINAL STATEMENT OF REASONS
ATTACHMENT A
RESPONSE TO COMMENTS

I. Written Comments received on Proposed Express Terms during 45-day comment period

One set of comments was received on the Proposed Express Terms from the Independent Energy Producers Association (IEP) on July 19, 2018. The substantive excerpts of these comments have been reproduced below, with citation omitted.

Comment 1:

> *IEP recommends clarifications to Section 1769(a)(3)(C). As proposed, Section 1769(a)(3)(C) would provide a process whereby a person could object to Staff approval of an [amendment].*[1] *IEP appreciates the requirement that an objection must be adequately supported, and the proposal that "Speculation, argument, conjecture, and unsupported conclusions or opinions are not sufficient to support an objection to staff approval." (See, Express Terms, p. 28). However, two items require clarification. Section 1769 should be clarified to outline the process by which Staff will make a determination that as to whether an objection is sufficiently supported, and how that determination will be conveyed to the objector and a project owner.*
>
> *Specifically, Section 1769 should be revised to state that upon receipt of an objection to a staff recommended approval, Staff should either (i) publish a notice stating that the project owner may proceed because the objection is based on speculation, argument, conjecture, or unsupported conclusions or opinions or (ii) publish a notice stating that the Staff has elected to submit the matter to the Commission. Otherwise, these procedural ambiguities have the potential to cause significant delays in the processing, approval, and implementation of needed project modifications. Of greater importance, the Commission's regulations should clearly provide that objections based on speculation, argument, conjecture, or unsupported conclusions or opinions cannot, and will not, be used as a basis to delay minor amendments not affecting the public, the environment, LORS compliance or implementation of project Conditions of Certification.*

In furtherance of this recommendation, IEP proposes the following revisions to section 1769(a)(3)(C) as amended:

> *(C) Staff shall file a statement summarizing its actions pursuant to subdivisions (a)(3)(A) or (B). Any person may file an objection to a staff action taken pursuant to subdivisions (a)(3)(A) or (B) within 14 days of the filing of staff's statement. Any such objection must make a showing supported by facts that the change does not meet the criteria in this subdivision. Speculation, argument, conjecture, and unsupported conclusions or opinions are not sufficient to support an objection to staff approval. Upon receipt of a timely*

[1] The comments referred to "staff approval of an objection," which from context appears to be a typographical error.

objection, Staff shall take one of the following actions: (i) publish a notice stating that the project owner may proceed because the objection is based on speculation, argument, conjecture, or unsupported conclusions or opinions; or (ii) publish a notice stating that the Staff has elected to submit the matter to the Commission pursuant to subdivision (a)(3)(D).

Response:

Pursuant to the existing regulation, staff may approve proposed changes to an Energy Commission certified project under certain limited circumstances, and any person may then file an objection on the basis that the proposed amendment does not meet the specified criteria. Once an objection is filed, the modification must be approved by the Energy Commission. (See Cal. Code Regs., tit. 20, § 1769(a)(2) & (3).)

The proposed section 1769(a)(3)(C) slightly expands the circumstances under which staff may approve project changes, to include changes to conditions of certification relating to air quality made in consultation with the local air district. The proposed regulations clarify that an objection to staff's approval of a proposed modification must explain the basis of its objection and provide factual support. However, as before, the filing of a facially valid objection to a proposed change means that the Energy Commission must consider the proposed change.

This comment proposes that the Energy Commission staff issue a separate determination and issue a separate notice when it receives an objection that does not meet the criteria of the proposed section 1769(a)(3)(C). Such a provision is unnecessary. A filing that does not include the information required by the proposed section 1769(a)(3)(C) is not an "objection" within the meaning of that subdivision requiring Energy Commission approval of the proposed change. One potential consequence of the commenter's suggestion is that it would make the validity of an objection to staff approval reviewable by the Energy Commission. The Energy Commission considered this approach, but concluded that once an objection meeting the specified criteria is raised, it is more expedient for the Energy Commission to simply consider the proposed change together with the objection rather than first consider the merits of the objection and subsequently consider the proposed change. For the foregoing reasons, the Energy Commission declined to make this proposed change.

Comment 2:

Second, and consistent with the directive that speculation, argument, conjecture, and unsupported conclusions or opinions should not result in unnecessary costs and delays, IEP again recommends that the Commission adopt a list of ministerial activities that a project owner can implement without the need for submission of a petition for modification. The Commission should clearly define categories of activities/changes that do not require a petition for modification, including, but not limited to changes prior to construction in the general site arrangement or equipment list in the original AFC.

IEP's proposed list of activities is set forth in Attachment A as new section 1769(a)(6). 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, and other agencies, such as CalTrans, regularly use such CEQA exemptions in their approvals. The State Water Resources Control Board, which also has a Certified Regulatory Program like the Commission, uses the exemptions as well. 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.

The Commission's Regulations should expressly list these activities as not requiring a petition to amend to provide a form of "safe harbor" for ministerial acts that do not implicate the design, operation, or performance of a project with the new section 1769(a)(6).

In furtherance of this recommendation, IEP Proposes the following subdivision (a)(6) be added to section 1769 as amended:

(6) A petition is not required for the ministerial activities, including, but 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 powerplant [and] any related facilities;
(C) The use of portable and prefabricated structures that would not require a building permit from the local land use authority but for the Commission's jurisdiction;
(D) Platforms, stairs, walkways, and non-structural concrete slabs and paving;
(E) Temporary tents, shade structures, awnings or similar facilities;
(F) Tanks of less than 5,000 gallons capacity;
(G) Emergency repairs;
(H) Trenching or excavations related to any of the above; and
(I) Any facilities, structure, or improvements that could have been approved by the CBO during the detailed design phase of construction of the thermal powerplant or related facilities;
(J) Activities that are subject to one or more CEQA Statutory Exemptions (14 CCR §15260 et seq.) or one or more CEQA Categorical Exemptions (14 CCR §15300 et seq.).

Response:

The comment proposes that the Energy Commission establish a list of activities that may be undertaken without filing a petition to amend. The assumption appears to be that if the approval of a certain facility change might be exempt from CEQA, no petition for amendment should be required to allow for that activity. This is incorrect for several reasons.

First, a petition to amend under the proposed section 1769 is only required for a change to the project design, operation, or performance requirements. Some of the activities the comment identifies would not necessarily require a change the design, operation, or performance requirements of a project, and therefore would not require a petition to amend to be undertaken. To the extent an activity would constitute such a change to a project as approved by the Energy Commission, it is important that the Energy Commission permit be updated to allow for the activity in question, even if that activity is exempt from CEQA.

Furthermore, conducting an environmental review is only one aspect of the Energy Commission's review of a proposed project. The Energy Commission must also determine a proposed project is consistent with all laws, ordinances, or regulations and standards (LORS), or affirmatively override any inconsistency with such LORS. (See Pub. Resources Code § 25525.) It is therefore important that the Energy Commission confirm that any proposed change to a project maintain consistency with all applicable LORS, or else override such change as necessary. An activity may be exempt from CEQA, but nevertheless be inconsistent with an applicable LORS.

The proposed section 1769 requires the petition to amend identify and discuss any applicable CEQA exemptions. (See proposed § 1769(a)(1)(I).) Staff is required to approve the petition if there is no possibility of an environmental impact or a CEQA exemption applies, provided the requirements of 1769(a)(3)(A)(i)&(ii) are met. Or, if Energy Commission review is required, the applicability of an exemption from CEQA to the proposed change would relieve the Energy Commission from any further obligation to comply with CEQA prior to approval.

For the foregoing reasons, the Energy Commission declined to adopt the suggested section 1769(a)(6).

Comment 3:

> *Public Resources Code section 25806(e) provides that following "a full accounting of the actual cost of processing the petition to amend", a project owner will reimburse the Commission for any costs exceeding five thousand dollars. As set forth in IEP's comments on February 3, 2017, and again on February 21, 2018, the Commission's regulations should be revised to provide for Commission adoption of a rate schedule on a yearly basis that clearly outlines the scope of services provided and the specific costs for activities related to the processing of petitions to amend. A yearly rate schedule will help provide transparency regarding the calculation of costs that are currently absent from the proposed amendments. In particular, there are a number of ambiguities arising from the proposed cost recovery language:*
>
> - *Can Staff use contractors and consultants to advocate for changes not requested in the Amendment at the project owner's expense? How will such costs be tracked separately from the costs to process the petition to amend submitted by a project owner?*
> - *How are the "hourly loaded rates" determined for Staff and Staff Counsel?*

- *How are the "hourly loaded rates" determined for subcontractors and consultants?*
- *If the activities of commissioners and their advisors are excluded from the definition of "processing the petition to amend", why are project owners responsible for the "labor and administrative expenses" associated with producing and distributing committee and commission documents?*

IEP has proposed revisions in Attachment A to address these open issues. IEP is also concerned that there is no mechanism for a project owner to challenge or appeal assessed costs. Such a mechanism will serve an important cost containment function, ensure efficient processing of a petition to amend, and provide a measure of protection to project owners against improperly assessed costs. Project owners should have the right to appeal items in the full accounting to the Executive Director, or his or her designee, and thereafter to the commission by motion appealing the decision of the executive director. IEP's proposed changes to revise Section 1708 to address these concerns are set forth in Attachment A.

In furtherance of these comments, IEP proposes the following changes to subdivisions (b) and (c) to section 1708:

1708. Costs and Application, Compliance, and Reimbursement Fees.

(b) "Processing the petition to amend," as used in Public Resources Code section 25806(e), includes the activities of staff, staff subcontractors, and legal counsel representing staff in the preparation of the staff assessment and in any proceeding on a petition through the adoption of the commission decision, as well as the labor and administrative expenses associated with the production ~~and distribution~~ of staff, ~~committee, and commission~~ documents. The activities of commissioners and their advisors, commission hearing officers, and other attorneys and commission staff advising commissioners or the commission, are not considered part of processing the petition to amend.

(c) "Actual Costs" for the activities described in subdivision (b) shall be calculated based on a rate schedule approved annually by the commission for the next fiscal year. The commission approved rate schedule shall set forth (1) the hourly ~~loaded~~ rates for staff, ~~including~~ subcontractors, ~~consultants~~ and legal counsel representing the staff, and ~~the hours worked to process a petition to amend~~ commission administrative staff and (2) the types of administrative activities that may be required for a petition to amend and associated costs for each listed activity. If requested by a project owner the commission shall provide a full accounting, including the following: the hours billed by staff, subcontractors, consultants and legal staff; the hourly rate associated with each; a detailed description of the work performed; and supporting documentation.

(1) Staff Analyses: "Actual Costs" include time and resources expended in analyzing the relief requested in the petition to amend.

(2) Staff Advocacy: "Actual Costs" do not include time and resources expended in opposing the relief requested in the petition to amend.

Response:

The proposed comment includes two substantive aspects:

1) regulations be amended to require the Energy Commission prepare a yearly rate schedule, setting forth (1) the hourly staff rates for all Energy Commission employees and (2) the types of activities that may be required for a petition to amend and the associated costs for each activity.

2) regulations exclude "staff advocacy" from actual costs, meaning that "time and resources expended in opposing the relief request in the petition to amend" would not be recoverable.

With respect to the first aspect, the proposed regulations conform to the requirements of Public Resources Code section 25806(e) that the Energy Commission collect fees for its actual costs, and allow project owners to request a full accounting of all such costs. However, it would not be practical to prepare a rate schedule that specifies rates for *all* employees and contractors that might work on a project, as well as for *any* possible activities that might be undertaken for the following year. The Energy Commission cannot know the subjects of petitions to change or amend for the following year, nor which employees and contractors might be available to work on those matters. Even if such a prediction were possible, it would be extremely burdensome to prepare and would serve no clear purpose.

With respect to the second aspect, the comment mischaracterizes staff's role in the process for reviewing petitions to amend. Staff's role is to assess the potential environmental impacts of proposed petitions, as well as the consistency of such changes with existing LORS. After preparing its assessment, staff participates in adjudicative hearings before the Energy Commission or the assigned Committee, in which it presents and defends its own assessment and may challenge contrary evidence presented by other parties.

It is understandable that in some instances, project owners might perceive staff as "opposing the relief requested" either in its assessment or in the adjudicative process, particularly where staff is recommending that the Energy Commission impose conditions upon a project that the project owner opposes, or has identified unmitigated environmental impacts or unavoidable LORS inconsistencies that the Energy Commission would need to override in order to approve the project. However, this is part of the Energy Commission's "processing of the petition to amend" for which actual costs shall be recovered pursuant to section 25806(e). Typically, amendments cover limited facility changes not requiring extensive analysis. Committees are not assigned to amendments and there are no evidentiary hearings. Most amendments do not have contested issues and can be approved as consent items by the Energy Commission. Currently, there are approximately 20 pending or potential petitions to amend and the anticipation is none will have an assigned Committee or require evidentiary hearings. Therefore, costs to process the petition to amend are generally limited to staff issuing notices of documents and drafting the environmental analysis.

For these reasons, the Energy Commission declined to adopt the suggested changes to the proposed section 1708(b) & (c).

Comment 4:

> *IEP remains concerned regarding the potential reliance on public comment as a basis to support a finding by the Commission, elevating one form of hearsay evidence at the expense of due process protections.*
>
> *IEP continues to be concerned that public comments not made under penalty of perjury can be relied upon by the Commission to support a finding and incorporates by reference all prior comments submitted on this matter. IEP has consistently and vigorously made these observations and requested changes in the language since the inception of this proceeding in 2015. Further, without dropping its opposition, IEP also provided language in 2018 aimed at softening proposed language allowing the Commission to rely on public comment to support a finding.*
>
> *IEP knows of no other agency at the federal, state or local level that allows for a finding to be made solely on the basis of public comment. The lack of any other authority is telling: governmental entities use public comment like the hearsay evidence that it is. Section 1212(c)(3) of the Commission's regulations provide[s] the appropriate mechanism by which public comment should be treated by the Commission: "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." (20 C.C.R. § 1212(c)(3). As a matter of sound public policy, IEP continues to recommend that Section 1212 be amended to remove public comment as a permissible basis upon which the Commission can support a finding as set forth in Attachment A.*

In furtherance of these comments, IEP proposes the following revision to subdivision (c)(4) of section 1212 as amended:

> *(4) Public comments and briefs filed by parties in an adjudicative proceeding, as prescribed in section 1208, may be considered by the committee or commission, but shall not be sufficient in themselves to support a finding. ~~The committee or commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given a reasonable opportunity, as ordered by the presiding member, to provide rebuttal evidence.~~*

Response:

The proposed section 1212(c)(4) addresses the Energy Commission's (or the assigned Committee's) use of public comments in adjudicative proceedings. In general, non-testimonial information such as public comment or briefing may be considered in weighing evidence, but

cannot be used in and of itself to support a finding. The one exception is that the Energy Commission, or its assigned Committee, may rely on a comment to support a finding if it provides notice to all parties that it intends to rely on that particular comment, and provides parties an opportunity to question the commenter and provide rebuttal evidence.

The comment objects to this process, characterizing it as "elevating one form of hearsay over other due process protections," and suggesting it is contrary to procedures followed by other agencies. Instead, the comment recommends the Energy Commission treat public comment like it treats all other hearsay.

Section 1212(c)(4) is essentially designed to provide the necessary protections to convert public comment into testimonial evidence. Before any public comment is relied upon by the Energy Commission or an assigned Committee, parties must be notified of the intent to rely upon such comment at the time the comment is presented, other parties must be provided an opportunity to question the commenter, and parties are given a reasonable opportunity to provide rebuttal evidence. This process is intended to meet the standards for admissibility of evidence in adjudicative proceedings held by administrative agencies set forth in Chapter 5 of the Administrative Procedures Act.:

> Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (Government Code § 11513(c).[2])

Furthermore, the comment mischaracterizes section 1212(c) as allowing for reliance on hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted.[3] However, commenters frequently provide information about which they have personal knowledge and the process in section 1212(c)(4) ensures the comment will be made at a hearing. Therefore, section 1212(c)(4) does not allow for reliance on hearsay. (If the public comment itself includes a hearsay statement of another person, it would be subject to the limitation in 1212(c)(3).)

The comment appears to object to the fact that public commenters are not required to take an oath or affirmation under penalty of perjury to speak truthfully. The Energy Commission considered incorporating this requirement into section 1212(c)(4), but declined to do so, in part because comments are frequently provided by officials of federal agencies who may be constrained from taking an oath in a state administrative proceeding. The Energy Commission does not believe the taking of formal oaths is essential to meeting the standard for admissibility of evidence set forth in Government Code section 11513(c).

Finally, it should be noted that the Energy Commission anticipates it will make infrequent use of the procedure set forth in Government Code section 1212(c)(4). There have only been a handful of occasions in the past several years where a comment offered concrete information not otherwise in the record. In such instances, however it would have been extremely helpful to have

[2] Siting hearings before the Energy Commission are conducted under Chapter 4.5 of the Administrative Procedure Act, but the Energy Commission believes this provision is nevertheless instructive.
[3] California Evidence Code section 1200

this process in place to test the reliability of the information provided in the public comment and allow it to be relied upon in the decision.

For the foregoing reasons, the Energy Commission declined to make the requested changes to the proposed section 1212(c)(4).

II. Oral comments received at August 1, 2018 hearing to adopt Proposed Express Terms:

Oral Comment of Samantha Neumyer on behalf of the Independent Energy Producers (IEP):

> *Good morning, Samantha Neumyer Ellison, Schneider, Harrison & Donlan on behalf of Independent Energy Producers. We'd like to thank CEC staff for their hard work in this proceeding, particularly Jared. We do agree that we think the proposed amendments reflect some careful consideration and collaboration with interested stakeholders. We did submit additional comments on the language, so we won't raise those again. We think additional clarity is needed relating to the cost for amendments to the petrol project certification. Notwithstanding these concerns, we do think that these amendments represent progress. We think it'll lead to greater clarity, particularly with processing petitions for modification. And we thank the Commission for its efforts.*

Response:

This comment largely expresses support for the proposed express terms. The reference to the need for "additional clarity . . . relating to the cost for amendments to the petrol project certification" is a transcription error as there is no such project. The essential component of the comment is similar to the filed written comments seeking greater details about cost determinations. Those and other issues raised by IEP in written comments are addressed above.

Oral Comment from Robert Sarvey:

> *Oh, you can hear me. Great. Okay. I've been having a lot of trouble in getting on the phone, so I wasn't sure you guys were going to get to me or not. I appreciate the work that the Commission did in supporting the passage of Public Resources Code 25806(e). Staff's proposal to amend Section 1708 is not consistent with the intent of Section 25806(e).*
>
> *Staff's proposed language for Section 1708 states that the activities of Commissioners, their advisers, Commission hearing officers and other attorneys, Commission staffs, advising Commissioners or the Commission are not considered part of the processing the Petition to Amend. Excluding the Commissioners and their staff's expenses from the cost of the Petition to Amend is contrary to the language of Public Resources Code 25806(e). Section 25806(e) requires the Commission shall conduct a full accounting of the actual cost of processing a Petition to Amend for which the project owner shall reimburse the Commission. There's no basis for excluding Commissioners and their staff's travel, meals and lodging expenses to attend hearings for the amendment in locations outside*

Sacramento. These costs are easily identified and can be substantial. There's no legal basis to require ratepayers to fund these costs when the Legislature has clearly stated the project proponent is responsible for the full actual cost of the amendment. Staff's proposed language is unacceptable as it shifts costs of amending licenses to ratepayers, an outcome that Public Resources Code 25806(e) was specifically passed to prevent.

In addition, staff's proposal to amend Section 1769(a) concerning a Commissioner-approved amendment should include a public review and comment period of 15 days of staff's analysis before the full Commission makes a determination on the amendment. This will provide the public participation requirement that CEQA imposes.

Thank you, Commissioners.

Response:

This comment raises two separate issues.

Issue 1

This comment objects that the proposed section 1708 excludes the activities of commissioners and their hearing officers, attorneys and advisors from the definition of "processing the petition to amend" in section 1708(b), meaning that costs are not recovered for such activities. The commenter argues that this inappropriately shifts costs from project proponents to ratepayers, and is contrary to Public Resources Code 25806(e).

In developing the draft language to set forth the scope of the term *processing the petition to amend*, staff carefully considered all the potential types of costs associated with amendments to ensure appropriate reimbursement consistent with the Public Resources Code section 25806(e).

The proposed section 1708 provides cost recovery for all aspects of Energy Commission staff's review and analysis of a proposed amendment to a licensed facility, and participation in hearings if necessary. This includes an assessment of potential environmental impacts, a review for consistency with laws, ordinances, regulations and standards, the time spent by staff participating in administrative hearings if such hearings are necessary, and administrative expenses associated with the preparation and distribution of documents. For most amendments, evidentiary hearings are not necessary and a committee is not assigned. In such instances, the foregoing represents substantially all of the activities undertaken by the Energy Commission in the processing of a petition to amend.

A comparably small number of amendments are more complex or contentious, and require the appointment of a committee to conduct evidentiary hearings in the context of an adjudicative proceeding. Currently out of approximately 20 current or potential petitions to amend, none are expected to require a Committee or evidentiary hearing. Providing a full accounting of the deliberative activities of decision-makers and their attorneys and advisors could compromise the confidentiality and integrity of the adjudicative process. Preserving the confidentiality of deliberations in the context of adjudicative proceedings is an important interest recognized by

California law. For example, Government Code section 11126(c)(3) allows for state bodies to meet in closed section to deliberate on adjudicative matters.

For these reasons, the regulations do not provide cost recovery for time spent by decision-makers in presiding over an amendment proceeding and in deliberation on a petition to amend, as well as for the time spent by hearing officers, attorneys and advisors in advising decision-makers. The proposed section 1708 does include the labor and administrative expenses associated with the production and distribution of Committee and Energy Commission documents as reimbursable costs.

For the foregoing reasons, the Energy Commission declined to make changes to the proposed section 1708(b) in response to this comment.

Issue 2

This comment suggests the proposed section 1769(a) should provide a 15-day comment period on amendments that are set for Energy Commission approval under section 1769(a)(4). The commenter states this is necessary to comply with the California Environmental Quality Act (CEQA). However, this is not the case.

Many amendments do not give rise to additional environmental impacts that would warrant the preparation of a subsequent or supplemental environmental impact report under the standards in CEQA Guidelines 15162 and 15163 (codified in Title 14 of the California Code of Regulations). In such instances, approval of the proposed amendment is the equivalent of an addendum to an Environmental Impact Report under CEQA Guideline 15164, for which there is no specific public notice requirement.

For those amendments that potentially entail additional environmental impacts beyond what was assessed during the original license, or otherwise require additional environmental analysis under the standard in CEQA Guidelines 15162 and 15163, public comment periods on environmental documents would be implemented consistent with the requirements of CEQA and the Energy Commission's CEQA equivalent certified regulatory program, which is typically 30 days. It is not necessary or desirable for the regulations to repeat the requirements of CEQA. Note also that the existing section 1769 does not specify the procedures for compliance with CEQA.

For the foregoing reasons, the Energy Commission declined to make the requested changes to the proposed section 1769(a)(4).