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Independent Energy Producers Association's Post-Workshop Comments

Additional submitted attachment is included below.

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

Re: Docket No. 15-OII-01: Post-Scoping Workshop Comments on Potential Changes to the Energy Commission's Siting Compliance Process and Procedure Regulations

Dear Commissioner Douglas:

On behalf of the Independent Energy Producers Association ("IEP")[1], we submit these comments in response to the *Request for Post-Scoping Workshop Comments on Potential Changes to the Energy Commission's Siting Compliance Process and Procedure Regulations*.[2]

Reforms are needed for the post-certification procedures for modifying projects licensed by the California Energy Commission ("Commission"). Section 1769 of the Commission's regulations provides a process for modifying the design, operation or performance of licensed projects. These procedures have been used for a wide variety of post-certification modifications – ranging from very major changes, such as the physical relocation of a project to another site, to very trivial changes, such as the installation of a canvas tent to cover equipment. As a guiding principle for this phase of the rulemaking, we submit that a "petition for modification" should not be required for every change in a project.

Below we set forth several recommendations regarding the needed reforms for post-certification modifications. We have also attached a proposed revision to Section 1769 that reflects these recommendations. (Attachment A).

- **Recommendation #1:** 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. Such changes should be approved by the Chief Building Official ("CBO").

[1] The Independent Energy Producers Association ("IEP") is California's oldest and leading nonprofit trade association representing the interest of developers and operators of independent energy facilities and independent power marketers. IEP members collectively own and operate approximately one-third of California's installed generating capacity, much of which was licensed under the CEC's siting regulations.
[2] http://docketpublic.energy.ca.gov/PublicDocuments/15-OII-01/TN206430_20151026T165310_Request_for_PostScoping_Workshop_Comments_on_Potential_Chamge4s.pdf

When an Application for Certification ("Application") is filed with the Commission, the Application includes a general site arrangement and a list of equipment. This arrangement is based on a preliminary engineering design. A guiding principle, rooted in CEQA and good public policy, is that "detailed design is performed after project approval."

After the project is licensed, and final engineering and detailed design are undertaken, the general site arrangement or the listed equipment may require minor adjustment. These changes may be due to practical considerations that occur, like a manufacturer release of upgraded versions of equipment, after the AFC filing and project approval. They may also be due to like-kind versions of equipment from different manufacturers becoming available.

If the project was subject to review by any local or state agency, these types of changes would be approved by the local building official. These changes would not require an amendment to the license, nor require further discretionary approval by the agency's governing board.

Similarly, we recommend that for minor post-certification changes to the general site arrangement or the listed equipment that the CBO be granted the authority to approve such changes without the need for a petition for modification.

- **Recommendation #2:** The Commission should clearly define changes that are so minor that the change may be approved by the Compliance Project Manager ("CPM") or the Executive Director's designee, without the need to file a petition for modification.

These changes, which we call "minor modifications", should include the following three types of minor modifications:

(1) <u>Changes that would not require a permit or approval from any local or state agency.</u>

We recommend that the Commission establish a process, similar to over-the-counter ministerial permit approvals that are granted by more than 400 cities and counties in California, which will give prompt ministerial approval to minor modifications. The guiding principle is that if the change is so small that it would require no local approval at all, the change should not be subject to a lengthy approval process by the Commission.

The Commission should streamline its review procedures (to be consistent with the local and state procedures it has pre-empted) and to give prompt clearance to the project to proceed with the proposed change. The types of changes typically exempt from any local approval include but are not limited to:

1. Like-kind repair and replacement;

2. Minor repairs and alterations;

3. Portable, prefabricated and accessory structures and equipment;

4. Platforms, walks, nonstructural slabs or paving and decks not more than thirty (30) inches above grade;

5. Temporary tents and awnings;

6. Tanks with less than 5,000 gallons of capacity;

7. Trenching or excavation relating to any of the above; and

8. Emergency repairs.

(2) <u>Changes which are so small that they would require a ministerial permit or approval from a local or state agency.</u>

Again, the guiding principle should be that if the change would require only ministerial review by a local or state agency, it should not be subject to a lengthy review process by the Commission. The Commission should establish a process, in lieu of a petition, to provide timely approval of changes that would require ministerial approval by a local or state agency. The Commission could establish a process similar to over-the-counter review by local planning and building departments.

(3) <u>Changes which are statutorily or categorically exempt from the California Environmental Quality Act ("CEQA").</u>

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. We recognize that there are exceptions to certain categorical exemptions, and that in some circumstances a certain categorical exemption should not apply because there is a reasonable possibility of a potentially significant impact due to unusual circumstances. However, this should be the exception, not the rule. The Commission should revise its procedures for reviewing project changes, so that clearly exempt activities without unusual circumstances can be processed and approved quickly. We also support an express reference to the CEQA Guidelines for Statutory Exemptions (14 CCR §15260 *et seq*.) and Categorical Exemptions (14 CCR §15300 *et seq.).*

- **Recommendation #3:** When there is a change to the conditions contained in a project's air permit, that change should be automatically incorporated into the Commission license, without the need for a petition for modification**.**

The *APPROVED ARB-CEC JOINT POLICY STATEMENT OF COMPLIANCE WITH AIR QUALITY LAWS BY NEW POWER PLANTS* adopted in 1979 provides that "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."[3]

Because it is mandatory for the Commission to include in its certification of a project any and all conditions necessary for compliance with a determination by a local air district, there is no need for a lengthy petition for modification process to incorporate such conditions into the Commission's certification. The Commission has no discretion to reject or revise these

[3] *Approved ARB-CEC Joint Policy Statement Of Compliance With Air Quality Laws By New Power Plants* at 7. (Link: http://www.energy.ca.gov/sitingcases//gateway/compliance/2009-07-03_Exhibit_1_Staff_Response_Recommendations.pdf).

conditions, therefore there is no need for lengthy review by the Commission Staff for a proposal to incorporate a modified or changed air district condition, nor is there a need for a discretionary vote by the full commission before the conditions become part of the project's certification.

We recommend that the rules be revised to provide that changes to the conditions contained in local air permit for a project be automatically incorporated into the Commission's license for a facility.

- **Recommendation #4:** There should be transparency in the process by which charges pursuant to Public Resources Code section 25806 are assessed and imposed.

It is our understanding that the Commission has notified all project owners that the Commission has begun to implement the provisions of newly enacted Public Resources Code section 25806. However, to our knowledge, the Commission has not announced the practices, policies or procedures that have been adopted to implement this program.

Because the statute imposes a new system of cost recovery for the Commission's administrative process, it raises many issues of first impression that will require serious review and resolution by the Commission. It is our understanding that many agencies that impose administrative fees have adopted regulations that provide specific guidance regarding how fees are applied. We request that the Commission convene a workshop for the Staff to describe how it has implemented this program and how it plans to implement the fee program in the future, and to allow parties to discuss with the Commission questions and concerns relating to this newly established fee program. Attachment B sets forth suggested questions that should be considered at this workshop and resolved prior to the assessment of any fees to a project owner.

CONCLUSION

IEP thanks the Commission for the opportunity to provide comments on potential changes to the Commission's siting compliance process and procedure regulations. IEP looks forward to further dialogue with the Commission and other stakeholders regarding the recommendations outlined above and proposed revisions to Section 1769 of the Commission's regulations.

Respectfully submitted,

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ATTACHMENT A

PROPOSED REVISIONS TO SECTION 1769 OF THE COMMISSION'S REGULATIONS

§ 1769.
Post Certification ~~Amendments and~~ Changes.

(a) Project Modifications Prior to Commercial Operation

(1) After the final decision is effective under section 1720.4 and prior to commercial operation, the project owner may request that the CBO approve modification is the design of the project, if the proposed modification (i) does not require a change in a condition of certification of the license, and (ii) if the change would not require a discretionary approval by the local agency in the absence of the Commission's jurisdiction.

(2) If the proposed modification requires a change in a condition of certification or would have required discretionary approval by the local agency, the project owner shall petition for the modification pursuant to Section1769(c).

(3) The project owner shall report any modifications requested and approved pursuant to Section 1769(a)(1) in the monthly construction report to the CPM.

(b) Minor Project Modifications after Commercial Operation

(1) After the final decision is effective under section 1720.4 and after commercial operation, the project owner may request that the CPM approve a minor modification in the design or operation of the project if the proposed modification (i) does not require a change in a condition of certification of the license, (ii) would not require a discretionary approval by a local or state agency in the absence of the Commission's jurisdiction, and (iii) does not require environmental review because it is either (a) a ministerial project, (b) statutorily exempt from CEQA (14 CCR §15260 *et seq.*), or (c) categorically exempt from CEQA (14 CCR §15300 *et seq.*).

(2) The project owner may request approval of a minor project modification by submitting a letter to the CPM. The letter shall describe the proposed modification and state the basis for processing the change as a minor modification.

(3) Within five business days of receipt of a request for approval of a minor modification, the CPM shall either approve, approve with modification or disapprove the request. A CPM may disapprove a request on the grounds that it does not meet the criteria of Section 1769(b). If the CPM disapproves the request because the request does not qualify for approval as a minor project modification, the project owner may file a petition for modification pursuant to Section 1769(c).

(4) For all requests for a minor modification, the following actions shall be noticed in the Compliance docket: (i) The request for minor modification, and (ii) the final determination on the request by the CPM. Changes that would not have required a permit or approval from any local or state agency in the absence of the Commission's jurisdiction shall be deemed to be minor modifications.

(5) Changes that would have required a permit or approval from a local or state agency in the absence of the Commissions jurisdiction, if the permit or approval would have been ministerial shall be deemed to be minor modifications, unless the CPM determines that there is a reasonable possibility that (i) the cumulative impact of successive activities of the same type in the same place, over time is significant, (ii) the activity will have a significant effect on the environment due to unusual circumstances, or (iii) the activity may cause a substantial adverse change in the significance of a historical resource.

(6) Changes which shall be deemed to be minor modifications shall include, but not be limited to the following activities:
1. Like-kind repair and replacement
2. Minor repairs and alterations
3. Portable, prefabricated and accessory structures and equipment
4. Platforms, walks, nonstructural slabs or paving and decks not more than thirty (30) inches above grade.
5. Temporary tents and awnings.
6. Tanks with less than 5,000 gallons of capacity.
7. Trenching or excavation relating to any of the above.
8. Emergency repairs.

(c) Petitions for Modification

(1) After the final decision is effective under section 1720.4, the applicant shall file with the commission a petition for any proposed major modifications ~~it proposes~~ to the project design or operation~~, or performance requirements~~. A major modification is defined as those modifications that do not constitute a minor modification as defined above. The petition must contain the following information:

(A) A complete description of the proposed modifications, including new language for any conditions that will be affected;

(B) A discussion of the necessity for the proposed modifications;

~~(C) If the modification is based on information that was known by the petitioner during the certification proceeding, an explanation why the issue was not raised at that time;~~

~~(D) If the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, an explanation of why the change should be permitted;~~

(C) An analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts;

(D) A discussion of the impact of the modification on the facility's ability to comply with applicable laws, ordinances, regulations, and standards;

(E) A discussion of how the modification affects the public; and

(F) A list of property owners potentially affected by the modification.~~; and~~

~~(G) A discussion of the potential effect on nearby property owners, the public and the parties in the application proceedings.~~

(2) Within 30 days after the applicant files a petition pursuant to Section 1769(c)~~(a)(1)~~ of this section, the staff shall review the petition and issue a report on the proposed change. ~~to determine the extent of the proposed modifications. Where staff determines that there is no possibility that the modifications 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 commission in the final decision or make changes that would cause the project not to comply with any applicable laws, ordinances, regulations, or standards, no commission approval is required and the staff shall file a statement that it has made such a determination with the commission docket and mail a copy of the statement to each commissioner and every person on the post-certification mailing list. Any person may file an objection to staff's~~

~~determination within 14 days of service on the grounds that the modification does not meet the criteria in this subsection.~~

~~(G) (3) If staff determines that a modification does not meet the criteria in subsection (a)(2), or if a person objects to a staff determination that a modification does meet the criteria in subsection (a)(2), the petition must be processed as a formal amendment to the decision and must be approved by the full commission at a noticed business meeting or hearing~~.

(3) The commission shall issue an order approving, rejecting, or modifying the petition at the scheduled hearing, unless it decides to assign the matter for further hearing before the full commission or an assigned committee or hearing officer. The commission may approve such modifications only if it can make the following findings:

(A) the findings specified in section 1755 (c), and (d), if applicable;

(B) that the project would remain in compliance with all applicable laws, ordinances, regulations, and standards, subject to the provisions of Public Resources Code section 25525; and

(C) that the change will be beneficial to the project owner or to the public~~, applicant, or intervenors.~~; and

~~(D) that there has been a substantial change in circumstances since the Commission certification justifying the change or that the change is based on information which was not known and could not have been known with the exercise of reasonable diligence prior to Commission certification.~~

(4) The staff shall compile and periodically publish a list of petitions filed under this section and their status.

(d) Changes in air quality conditions of certification.

After the final decision is effective under Section 1720.4, if the local air district makes any changes to the air permit for the project, the project owner shall submit a copy of such changes to the CPM within 5 business days of adoption of the changes by the Air District. Upon receipt of the changes in the air permit by the CPM, such changes shall become part of the conditions of certification in the project's license. The CPM shall docket the changes, under a category expressly designated as "Changes in the Conditions of Certification."

(e~~b~~) Change in Ownership or Operational Control

(1) A petition to transfer ownership or operational control of a facility shall contain the following information:

(A) a discussion of any significant changes in the operational relationship between the owner and operator;

(B) a statement identifying the party responsible for compliance with the commission's conditions of certification; and

(C) a statement verified by the new owner or operator in the same manner as provided in Section 1707 that the new owner or operator understands the conditions of certification and agrees to comply with those conditions.

(2) The commission may approve changes in ownership or operational control after fourteen days notice.

ATTACHMENT B

QUESTIONS REGARDING IMPLEMENTATION OF PUBLIC RESOURCES CODE SECTION 25806.

1. Retroactivity.

A recent Staff filing suggests that the Staff intends to apply Public Resources Code section 25806 to any petitions for modification pending as of June 24, 2015.[4] The rulemaking should consider whether it is appropriate to impose costs prior to the adoption of rules that would determine how such costs are assessed.

The legislation clearly applies to petitions filed after July 1 that are accompanied by a fee of $5,000. There is nothing in the legislation that suggests that the Legislature intended that the Commission should impose costs on petitions that were filed before the law was enacted or became effective. The statute says that a person who submits a petition shall also submit a filing fee of $5,000 and be subject to certain costs. The statute does not state that previously submitted petition, which were not subject to the filing fee, should also be subject to these costs. Under California law, the absence of any express provision directing retroactive application strongly supports prospective operation of the measure.

The United States Supreme Court stated, "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265, fn. omitted.) California follows the same prospectivity rules as the United States Supreme Court:

> The California Supreme Court has explained that "[t]he presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance." (Evangelatos v. Superior Court, supra, 44 Cal.3d at p. 1214.) The requirement of clear legislative intent of retroactivity "helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." (Landgraf v. USI Film Products, supra, 511 U.S. at p. 268.) Unless there is "an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (Evangelatos, supra, at p. 1209, italics added.) "'[A]

[4] http://docketpublic.energy.ca.gov/PublicDocuments/07-AFC-06C/TN205291_20150709T115601_ENERGY_COMMISSION_STAFF_RESPONSE_TO_INTERVENOR_MOTIONS.pdf

> statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " (Myers v. Philip Morris Companies, Inc., supra, 28 Cal.4th at p. 841, quoting INS v. St. Cyr (2001) 533 U.S. 289, 320-321, fn. 45.)

The proposed retroactive application of the statute to petitions for modification pending before the Commission on July 1, 2015 raises the following questions:

(1) The law says clearly that a person who submits a "petition to amend"[5] "shall submit with the petition a fee of five thousand dollars." Clearly, a person who filed a petition prior to July 1, 2015 was not required to submit the fee, because the law had not yet been enacted or was not yet in effect. Does the Commission intend to construe the statute so as to require all pending petitioners to submit the fee retroactively?

(2) The statute then requires, upon receipt of the petition and the fee, that the Commission conduct a full accounting of the actual cost of processing the petition to amend if the costs exceed five thousand dollars. If no $5,000 fee payment was made, how does the Commission intend to conduct a full accounting and levy an assessment against a fee that was not paid?

(3) The statute also sets caps on the total reimbursement. If the statute is applied to petitions filed after July 1, 2015, then the costs will clearly be calculated from the date of the filing of the petition. But if the Commission intends to apply the statute retroactively to pending petitions, how will the costs be calculated for the purpose of determining the cap?

2. Definition of Petition to Amend.

Public Resources Code section 25806 was amended to apply to "petitions to amend". Neither the statutes nor rules governing the Commission provide for a "petition to amend" a project or application. Therefore, to which types of petitions, if any, does the Statute apply?

(1) Petitions for Modification;
(2) Petitions for Staff Approved Modifications;
(3) Petitions for Staff Approved Modifications that are converted to regular Petitions;
(4) Petitions for Modification where the Commission directs a Project Owner to file a Petition;
(5) Requests for change in Verification language;
(6) Petitions to incorporate revisions in an air permit, where the act of incorporation of such changes by the Commission is ministerial; or
(7) Requests by a Project Owner that a Petition is not required.

[5] Neither the statutes nor rules governing the California Energy Commission provide for a "Petition to Amend" a project. Perhaps the authors of the legislation intended to refer to petitions for modification, but this is not clear.

3. Accounting of Costs.

Public Resources Code section 25806 was amended to require a "full accounting of the actual cost" of processing a petition, but the term "actual cost" is not defined, which raises the following questions:

(1) How will the Commission define actual costs?
(2) Will the costs include the time of staff, hearing officers and Commissioners?
(3) With respect to staff time, will the cost be the (a) salary, (b) salary and benefits, (c) salary benefits and overhead, or (d) some other measure?
(4) With respect to time by consultants, how will the actual costs be determined?
(5) With respect to staff time, will the Commission assess the direct costs, indirect costs or some other measure costs of "processing" the amendment? How will the Commission define these categories of costs? How does the Commission define the term "processing the amendment"?
(6) Will decisionmakers be required to account for their time in the same manner as Staff and consultants?
(7) Will time devoted by staff as an independent party in the proceeding also be assessed? Is such time included within the term "time processing the Amendment?"
(8) It has not been the common practice of salaried State employees to maintain time and billing records. What time keeping systems will be implemented to record staff time processing an amendment? In what increments will time be billed? What quality control systems will be implemented to ensure the accuracy and honesty of the time and expense reports?
(9) Because inefficient, wasteful and unnecessary processing of amendments can generate substantial revenues to the Commission, what measures will be implemented to ensure that the petitions are processed in a timely and efficient manner?
(10) Will the recording and accounting of costs be subject to audit or to independent third party review?
(11) Will the recording and accounting of costs be subject inspection by the party receiving the bill?
(12) Before filing an amendment, a project owner will need to consider whether the costs of processing the amendment may outweigh the savings or benefit of the amendment. Other agencies will provide a fee schedule or estimate of the costs to be applied to an application. Will the Commission provide a fee schedule or an estimate of costs?
(13) Which activities constitute "processing of the application" that are subject to reimbursement? Will any of the following activities be subject to reimbursement:
    i. Costs of research or investigation that is not required by law?
    ii. Costs of responding to public inquiries not relevant to the petition?
    iii. Costs of staff motions, rulings or determinations that are found to be without merit or without good cause?
    iv. Costs that are incurred due to the negligence or malfeasance of the agency?

v. Costs that are incurred by staff outside the scope of their authority or on matters outside the jurisdiction of the Commission?

4. Cost Containment and Quality Control.

What steps will the Commission take to ensure that the time, effort and costs are fair and proportional to the task at hand?

(1) Should the Commission consider a fixed fee schedule for certain types of applications?
(2) Should there be caps (other than $822,078) so as to ensure that the assessed costs are not punitive or disproportionate?
(3) Is it reasonable for the costs to exceed the costs that would have been incurred by a local agency, but for the jurisdiction of the Commission?
(4) Should an amendment be assessed costs by the Commission for environmental review, if the amendment is categorically exempt from environmental review under CEQA?[6]

5. Protecting Petitioners from Vexatious Litigants.

Public comment is an important part of the review of petitions. However, comments that are intentionally frivolous or purposefully vexations can substantially increase the time and cost of processing a petition.

(1) Project Owners already have to bear the costs of delay and their own staff and legal costs in responding to vexatious litigation. Will project owners now also have to bear the Commission's costs caused by the vexatious litigation by third parties?
(2) What steps will the Commission take to protect petitioners from bearing the costs that could be incurred due to purposefully frivolous or vexatious actions by third parties?[7]

In summary, there are many important questions that must be addressed before the Commission can implement Section 25806. We look forward to working with the Commission in this rulemaking proceeding to address and resolve these questions.

[6] Consider three examples – (1) the replacement of an injection nozzle inside a turbine building, (2) a pre-construction change in plant layout to move a water tank 7 feet from its initially proposed location, or (3) the addition of a safety ladder to the exterior of a tank. What is the reasonable cost of processing these petitions? At a local permitting level, each of these activities would not have required agency review, or if agency review was required, the review would have been ministerial – at most an across the counter "plan check". Involving 1 to 2 hours of Staff time. However, at the California Energy Commission, each of these actions required a petition for modification, months of staff review, hundreds of staff hours, and a vote of the full Commission at a noticed Business Meeting.

[7] Where a petition could be approved as a Staff approved modification, the Staff has interpreted the rules to provide that even the most trivial protest to the determination of staff approval will necessarily require that the petition be brought to vote at a full Commission meeting. For example, a petition to replace an injection nozzle inside a turbine building was protested on the grounds that the Staff did not perform an Environmental Justice analysis of the petition. While this is an important topic, it had absolutely nothing to do with the petition. Nevertheless, the Staff would not dismiss the protest and placed the petition for a vote before the Commission.