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Additional submitted attachment is included below.

STATE OF CALIFORNIA
California Energy Commission

In the Matter of:	
2014 Revisions: Title 20 Commission Process and Procedure Regulations	Docket No. 14-OII-01

COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON THE PROPOSED REVISIONS TO THE COMMISSION'S PROCESS AND PROCEDURE REGULATIONS, CALIFORNIA CODE OF REGULATIONS, TITLE 20

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California Unions for Reliable Energy ("CURE") submits these comments on the Proposed Revisions to the Commission's Process and Procedure Regulations, California Code of Regulations, Title 20 ("Proposed Revisions"). We commend the Commission on its work towards improving its siting process of power plants. The Proposed Revisions are generally well done and are a substantial improvement over the existing regulations. CURE offers the following comments on a few areas of the Proposed Revisions.

§ 1234 Jurisdictional Determinations.

The Proposed Revisions include a new § 1234, which provides a process to seek a Commission determination as to whether a proposed activity falls under the Commission's jurisdiction.[1] The Commission's purpose for including the new section is to provide a process for jurisdictional determinations "which are unique and should not be included in the Claim and Complaint process" and to "allow the streamline assessments currently performed with a structured appeal option."[2]

CURE agrees that the existing regulations related to jurisdictional determinations are confusing and should be clarified. Language is needed in the regulations to provide a clear process for jurisdictional determinations that is separate from the complaint process. However, the process outlined in § 1234 leaves no room for public participation. Rather, § 1234 contemplates participation only by the Commission and the person seeking the jurisdictional determination.

Public participation in a jurisdictional determination has a long and worthwhile history. In 1986, in a proceeding involving a Signal Energy project, organized labor brought a challenge to the determination that the project was below 50 MW. A few years later, the criteria advocated by labor were formally incorporated into the regulations in what is now section 2003. These included the determination of generating capacity of an electric generating facility, the maximum gross rating of the plant's turbine generator(s) and the minimum auxiliary load.

The Commission should include a provision in § 1234 that provides for public notice of jurisdictional determination requests filed with the Commission. § 1234 should also be revised to allow any interested person – not just "the person seeking the jurisdictional determination"[3] -- to appeal the Executive Director's jurisdictional determination.

[1] California Energy Commission 2014 Draft Regulations, September 29, 2014, pp. 32-33.
[2] *Id*., p. 33.
[3] *Id*.

§ 1742 Staff Assessment.

- **§ 1742(c)**

The Proposed Revisions include a new § 1742(c), which provides that "[a]ny governmental agency may adopt all or any part of a Final Staff Assessment, proposed commission decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct."[4] The Commission's purpose for including the new section is to clarify "what documents other jurisdictions can use for their CEQA process."

As written, the Proposed Revisions § 1742(c) could be read to be inconsistent with the requirements of the California Environmental Quality Act.[5] Under CEQA, a responsible agency cannot approve a project until it has considered the project's environmental effects as described *in a certified final environmental impact report*.[6] Further, the responsible agency must use its independent judgment to respond to significant impacts that will result from the responsible agency's decision to approve an aspect of a project.[7]

Under the Commission's CEQA certified regulatory program, a Final Staff Assessment is not equivalent to a final EIR certified by a lead agency. A FSA is a report that presents the results of staff's environmental assessments of a proposed project, which is offered as evidence at hearings.[8] A FSA is not approved, adopted or certified by the Commission. Rather, the Commission certifies a project when it adopts a Final Decision that contains the requisite CEQA findings.[9] Thus, a responsible agency may only rely on a Commission's Final Decision when it approves a project.

To comply with CEQA, § 1742(c) should be modified to state:

> [a]ny governmental agency may adopt all or any part of a ~~Final Staff Assessment, proposed commission decision, or~~ final <u>commission</u> decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct.

In the alternative, language could be added to § 1742(c) to make clear that a staff assessment or proposed commission decision is not a certified EIR. In addition, § 1742(c) should make clear that if another agency incorporates into its CEQA review

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[4] *Id*., p. 60.
[5] Pub. Resources Code, § 21000 et seq.
[6] 14 Cal.Code Regs., § 15096(f).
[7] *Id*., § 15096(g)(1); Pub. Resources Code, § 21002.1(d).
[8] 20 Cal. Code Regs., § 1748
[9] *Id*., § 1755.

document any part of a Commission's environmental assessment, that other agency must exercise its independent judgment when approving a project.[10]

- **§ 1742(d)**

The Proposed Revisions include a new § 1742(d), which provides that, when preparing staff assessments, "the staff shall give deference to the analyses and conclusions in any agency assessment described in section 1743."[11] Section 1743 of the current regulations states that "staff shall consult with other agencies with special expertise or interest in safety and reliability matters." Thus, Proposed Revisions § 1742(d) means that staff should give deference to other agencies' assessments. § 1742(d) is inconsistent with CEQA, the Commission's existing regulations and the Warren-Alquist Act.

As lead agency under CEQA, the Commission must independently review and analyze a project's potential adverse environmental impacts and include its independent judgment in an environmental review document.[12] CEQA Guidelines specifically require a lead agency to subject information submitted by others to the lead agency's own review and analysis before using that information in an environmental review document.[13] Furthermore, when certifying an environmental review document, the lead agency must make a specific finding that the document reflects its independent judgment.[14]

Under the Commission's regulations, the Commission must conduct its own impact analysis to "ensure a complete assessment of significant environmental issues…"[15] Article 3 of the regulations repeatedly describes the Commission's obligation to independently analyze a project's significant impacts. The plain language of the regulations makes clear that it is not either the Commission or another agency that may analyze a project's significant impacts; both the Commission and any concerned agencies must conduct analyses.

Section 1742 of the Commission's regulations states "…the commission staff and all concerned environmental agencies shall review the application and assess whether the report's list of environmental impacts is complete and accurate…" and "the staff and concerned agencies shall submit the results of their assessments at hearings…" Section 1748 confirms that both the Commission and concerned

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[10] 14 Cal. Code Regs., § 15096(g)(1); Pub. Resources Code, § 21002.1(d).
[11] 2014 Draft Regulations, p. 60.
[12] Pub. Resources Code, § 21082.1(c); See *Plastic Pipe and Fittings Assn. v. California Building Standards Commission* (2004) 124 Cal.App.4th 1390 (appellate court upheld requirement of California Building Standards Commission to independently review the potential environmental impacts from the approval of PEX plastic potable water pipe).
[13] 14 Cal. Code Regs., § 15084(e).
[14] Pub. Resources Code, § 21082.1(c).
[15] 20 Cal. Code Regs., § 1742(c).

agencies must conduct their own analyses. It states, "[t]he applicant's environmental information and staff and agency assessments required by Section 1742 shall be presented" at hearings.

In addition, Commission regulations section 1742.5 provides that "staff shall review the information provided by the applicant and other sources and assess the environmental effects of the applicant's proposal…" Further, the regulations require staff to "present the results of its environmental assessments in a report…"[16] "The staff report shall indicate staff's positions on the environmental issues affecting a decision on the applicant's proposal."[17] Clearly, Commission regulations require staff to independently analyze a project's potential adverse environmental impacts and include its assessment in an environmental review document. Unless the Commission conducts an independent analysis of significant impacts pursuant to CEQA, the Commission cannot "ensure a complete assessment of significant environmental issues,"[18] its analysis will be inadequate and its decision will not be supported by substantial evidence in the Commission's record.

The Warren-Alquist Act also requires the Commission to independently analyze a project's potentially significant impacts. When approving a project, the Commission must find that the project conforms with any applicable laws, ordinances, regulations, or standards ("LORS").[19] "In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment..." and "[t]he basis for these findings shall be reduced to writing and submitted as part of the record…"[20] The Commission's determination as to whether a project complies with LORS includes consideration of the project's significant impacts.

The Warren-Alquist Act also contemplates the Commission's role as lead agency under CEQA to analyze a project's significant impacts and include its assessment in an environmental review document. The Warren-Alquist Act provides that "[t]he Commission shall be the lead agency as provided in Section 21165 for all projects that require certification pursuant to this chapter…"[21] Under Public Resources Code section 21165, "the determination of whether the project may have a significant effect on the environment shall be made by the lead agency, and that agency shall prepare, or cause to be prepared by contract, the environmental impact report for the project..."

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[16] *Id.*, § 1742.5(b).
[17] *Id.*, § 1742.5(c).
[18] 20 Cal. Code Regs., § 1742.
[19] Pub. Resources Code, §§ 25523(d)(1); 25525.
[20] *Id.,* § 25525.
[21] *Id.*, § 25519(c).

In sum, the Commission cannot defer to another agency's analysis of a project's environmental impacts. CEQA, Commission regulations and the Warren-Alquist Act each require the Commission to independently analyze potentially significant impacts.

§ 1745 Presiding Member's Proposed Decision; Distribution; Comment Period; Basis, Contents, Hearing.

The Proposed Revisions § 1745 modifies provisions for the Presiding Member's Proposed Decision ("PMPD"). § 1745(c) provides that "[i]f the PMPD contains significant new information, not included in the Final Staff Assessment subject to the comment period under section 1742(b), about a substantial adverse environmental effect," there shall be a 45-day comment period on the PMPD. Section 1745(c) should be revised to also provide a comment period on the PMPD when the PMPD reaches any different conclusions than the Final Staff Assessment.

§ 1211.5 Motions.

CURE has a technical comment on the Proposed Revisions new § 1211.5, which outlines procedural requirements for filing motions. § 1211.5 states that "responses to motions shall be filed within 14 days of the *filing and service* of the motions."[22] This section presents a procedural dilemma.

Once a motion is filed with the Commission, the Commission serves the motion on all parties on the proceeding service list. Suppose a motion is filed at 4:55 p.m. on Friday afternoon. It is likely that the motion would not be served until the following Monday. As a result, filing and service would not occur on the same day. This will cause confusion when it comes time to file responses to the motion, which must be done, under §1211.5, "within 14 days of the filing and service." Thus, CURE recommends that § 1211.5 be revised to state that "responses to motions shall be filed within 14 days of the *service* of the motions."

[22] Emphasis added.

Thank you for the opportunity to provide comments on the Proposed Revisions to the Commission's Process and Procedure Regulations.

Respectfully submitted,

_____/s/_____
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