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STATE OF CALIFORNIA
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COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON THE 2015 REVISED DRAFT REGULATIONS, CALIFORNIA CODE OF REGULATIONS, TITLE 20

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Marc D. Joseph
Rachael E. Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
mdjoseph@adamsbroadwell.com
rkoss@adamsbroadwell.com
Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY

California Unions for Reliable Energy ("CURE") submits these comments on the 2015 Revised Draft Regulations, California Code of Regulations, Title 20 ("Revised Draft Regulations"). The Revised Draft Regulations include some improvements to the Commission's initial proposed revisions to its regulations. However, there are some issues raised in our previous comments that still must be addressed. In addition, the Revised Draft Regulations contain new proposed revisions that raise new concerns.

As an initial matter, the general theme running through much of the Revised Draft Regulations is a movement away from some of the Commission's obligations as a certified regulatory program under the California Environmental Quality Act.[1] Certification of a regulatory program is a determination that the agency's program includes procedures for environmental review and public comment that are functionally equivalent to CEQA.[2] If a certified regulatory program no longer meets the criteria for certification, the Secretary of the Natural Resources Agency must withdraw certification from the noncompliant program.[3]

While CEQA excuses state regulatory programs meeting certain environmental standards from complying with *some* CEQA sections,[4] a certified regulatory program still must comply with the bulk of CEQA's procedural and substantive mandates,[5] including carrying out a process that *encourages* public participation. For example, a certified regulatory agency must solicit meaningful public input on its environmental review document.[6] But, as discussed below, several of the revisions in the Revised Draft Regulations appear to do just the opposite – they curtail meaningful public participation in the Commission's environmental review process.

§ 1211.7 Intervenors.

The Revised Draft Regulations contain a new § 1211.7, which among other things, allows the Commission to limit intervenor participation in Commission proceedings. Specifically, § 1211.7(c) permits the Commission to "impose reasonable conditions on an intervenor's participation, including but not limited to ordering intervenors with substantially similar interests to consolidate their

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[1] Pub. Resources Code § 21080.5.
[2] *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 135 Cal.App.4th 1392, 1422.
[3] Pub. Resources Code § 21080.5(e).
[4] Agencies with qualifying programs are excused from CEQA sections 21000 through 21154 and 21167. Sections 21100 through 21108 which relate to the EIR process for State agencies. Sections 21000 through 21154 relate to the EIR process for local agencies. Section 21167 provides statutes of limitations for challenging agency decisions on various CEQA grounds.
[5] Pub. Resources Code § 21080.5.
[6] Pub. Resources Code § 21080.5(d)(3)(B); *Mountain Lion Coalition Foundation v. Fish and Game Commission* (1989) 214 Cal.App.3d 1043, 1052.

participation or limiting an intervenor's participation to specific topics." § 1211.7(c) also eliminates language in § 1207 of the Commission's existing regulations which provides that intervenors "shall have all the rights and duties of a party under these regulations."

As written, § 1211.7 allows the Commission to *preemptively* cut off a party's rights without justification. § 1211.7 runs the risk of disfavored parties being excluded from the Commission's siting process. Rather than allow the Commission to preemptively cut off a party's full engagement, § 1211.7 should be revised to allow the Commission to take action to limit an intervenor's participation *if and when* an offensive activity (i.e. an action that is outside of proper activity) occurs.

§ 1212 Rights of Parties, Record and Basis for Decision.

The Revised Draft Regulations amend § 1212 to eliminate from the hearing record public comments filed with the Commission which are not accepted by the Commission at a hearing. § 1212(a)(1) defines the "hearing record" as "all of the information upon which the commission may consider in reaching a decision" and "shall contain all documents, materials, oral statements, testimony and public comments accepted by the committee or commission at a hearing…" § 1212(c) provides that the basis for and contents of a Commission decision "may" include public comments if the comments are given at a hearing and "there is an opportunity for questioning of the commenter" (among other requirements).

§ 1212 effectively eliminates the ability of a member of the public who is not a party to submit written comments into the "hearing record" on which the Commission bases its decision. Moreover, the combined effect of Revised Draft Regulations §§ 1211.7 and 1212 on public participation is far too limiting. While § 1211.7 of the Proposed Draft Regulations allows the Commission to preemptively reduce parties' participation in Commission proceedings without justification, § 1212 essentially says that the Commission will not consider public comments as a basis for its decisions. Consequently, there is little room left for meaningful public participation.

§ 1212 is flatly inconsistent with CEQA and the Bagley-Keene Act. First, § 1212 is inconsistent with CEQA because public participation is an essential part of the CEQA process. The California Supreme Court has repeatedly emphasized the importance of the public's role in the CEQA process. The Court stated that members of the public hold a "privileged position" in the CEQA process which reflects "a belief that citizens can make important contributions to environmental protection and…notions of democratic decision-making…"[7] Thus, "[e]ach public agency should include provisions in its CEQA procedures for wide public

[7] *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936.

involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities."[8] § 1212 would allow the Commission to exclude a member of the public from submitting written comments into the hearing record. This section cannot be reconciled with CEQA.

Second, § 1212 is inconsistent with CEQA because to seek judicial review of agency actions for alleged violations of CEQA, aggrieved parties must first exhaust their administrative remedies by either orally or in writing presenting their specific objections to the agency prior to the close of the record.[9] In a CEQA action, the Court is limited to determining whether an agency's "act or decision is supported by substantial evidence in light of the whole record."[10] This "substantial evidence standard" applies to judicial review of an agency's conclusions, findings and determinations, the scope of the environmental analysis, the amount or type of information contained in the environmental analysis, the methodology used to assess impacts and the reliability or accuracy of the data supporting the agency's conclusions.[11] The Court gives substantial deference to an agency's determinations and a challenger bears the burden of proving the contrary.[12] Judicial review is limited to the evidence in the record of the agency proceedings.[13] Thus, a challenger's oral and written objections to an agency's action or decision *must* be included in the record.

Finally, § 1212 is inconsistent with the purpose of the Bagley-Keene Act,[14] which protects the rights of citizens to participate in State government deliberations. The Act implements Article I, §3(b) of the California Constitution, which declares that "the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Because § 1212 severely curtails public participation, it is inconsistent with the Act.

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[8] CEQA Guidelines § 15201.
[9] Pub. Resources Code § 21177; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117-1121; *Bakersfield Citizens for Land Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200-1201.
[10] Pub. Resources Code § 21168.
[11] *North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.App.4th 614; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884; *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984; *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889; *National Parks Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341.
[12] *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 723; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497; *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.
[13] Code of Civ. Proc. § 1094.5; *Sierra Club v. California Coastal Commission* (2005) 35 Cal.4th 839; *Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal.App.4th 357, 367.
[14] Govt. Code §§ 11120 et seq.

§ 1212 is inconsistent with CEQA and the Bagley-Keene Act. § 1212 should be revised to provide that the "hearing record" will automatically include all public comments filed prior to the close of the "hearing record." Further, § 1212 should be revised to provide that the Commission's decisions must be based on the whole record, including public comments submitted prior to the close of the record, as required by CEQA.[15] Failure to make this change would result in the Commission's process no longer being a CEQA functional equivalent process.

We understand that the Commission is trying to clarify what is and what is not proper material on which to base its decision. However, the method proposed in the current draft of the regulations would have the consequence, which we presume is unintended, of making the Commission's siting process conflict with CEQA.

§ 1234 Jurisdictional Determinations.

We previously commented that the proposed new § 1234, which provides a process to seek a Commission determination as to whether a proposed activity falls under the Commission's jurisdiction, leaves no room for public participation. Rather, § 1234 contemplates participation only by the Commission and the person seeking the jurisdictional determination. Unfortunately, the Revised Draft Regulations continue to exclude the public from jurisdictional determinations.

We reiterate that public participation in jurisdictional determinations has been, and should continue to be, an important part of Commission policy and practice. In fact, it was through public participation that the criteria in what is now § 2003 of the Commission's regulations were established, including 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.

§ 1234 should be revised to (1) provide for public notice of jurisdictional determination requests filed with the Commission and (2) to allow any interested person – not just "the person seeking the jurisdictional determination" -- to appeal the Executive Director's jurisdictional determination.

§ 1742 Staff Assessment.

- **§ 1742(b)**

§ 1742(b) of the Revised Draft Regulations states that "Staff's preliminary environmental assessment shall be subject to at least a 30 day public comment period or such other time as required by the presiding member." The language in §

[15] Pub. Resources Code § 21168; Code of Civil Proc. § 1094.5.

1742(b) should be revised to make clear that the presiding member cannot reduce the comment period to less than 30 days. We recommend that the sentence read:

> Staff's preliminary environmental assessment shall be subject to at least a 30 day public comment period or such ~~other~~ additional time as required by the presiding member

or simply:

> Staff's preliminary environmental assessment shall be subject to at least a 30 day public comment period ~~or such other time as required by the presiding member~~.

- **§ 1742(d)**

§ 1742(d) states that if a project does not comply with all applicable federal, state, regional and local laws, ordinances, regulations and standards, "the staff assessment shall provide a description of all staff communications with the agencies responsible for enforcing the laws, ordinances, regulations and standards, for which there is noncompliance, in an attempt to remove the noncompliance." It is not clear what is meant by the phrase "in an attempt to remove the noncompliance." The meaning of this phrase should be clarified. In addition, *all* staff communication with agencies responsible for enforcing LORS – not just communication in the case of noncompliance -- should be included in the record. Consider, for example, an instance when an agency responsible for enforcing LORS mistakenly concludes that a project complies with LORS. All parties and the public should have the opportunity to scrutinize that determination. Thus, § 1742(d) should be revised to require that a description of *all* staff communications with agencies responsible for enforcing LORS be included in the record.

- **Purpose and Rationale/Necessity**

According to the Revised Draft Regulations, the "purpose and rationale" for § 1742 is to establish a clear process that "parallels the DEIR-FEIR process." The "necessity" for the changes is to provide "clarity as to the comment and response process and what documents other jurisdictions can use for their CEQA process."

As we explained in our previous comments, under the Commission's CEQA certified regulatory program, a Preliminary/Final Staff Assessment is not equivalent to a Draft/Final EIR. A Staff Assessment is a report that presents the results of staff's environmental assessments of a proposed project, which is offered as evidence at hearings.[16] A Staff Assessment is not approved, adopted or certified by the Commission. Rather, the Commission certifies a project when it adopts a

[16] 20 Cal. Code Regs. § 1748

Final Decision that contains the requisite CEQA findings.[17] The Commission's Final Decision is the only document that a responsible agency may rely on when it approves a project.[18] A mere staff report, no matter how capable the staff, is not a certification by the agency that the document complies with CEQA. Only the Commission itself in a voting meeting can make that certification. Thus, a Final Decision approved by the Commission is the CEQA-equivalent to a Final EIR. The Revised Draft Regulations should be modified accordingly.

§ 1745.5 Presiding Member's Proposed Decision; Comment Period; Basis, Contents, Hearing.

Draft § 1745.5(d) states:

> Any governmental agency may adopt all or any part of a proposed commission decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.

According to the Revised Draft Regulations, § 1745.5(d) clarifies that the PMPD or final decision can be used by other agencies for "their CEQA needs."

We explained in our previous comments that 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*.[19] Under the Commission's CEQA certified regulatory program, a PMPD is not equivalent to a final EIR certified by a lead agency. Rather, a PMPD is one Commissioner's opinion which may be revised and which is not approved, adopted or certified by the Commission. The Commission certifies the environmental analysis when it adopts a Final Decision that contains the requisite CEQA findings.[20] Thus, it is the Commission's Final Decision and associated findings adopted by the full Commission to certify the environmental analysis that will satisfy the responsible agency's obligations under CEQA.

To comply with CEQA, § 1745.5(d) should be revised to state:

> Any governmental agency may adopt all or any part of a ~~proposed~~ commission ~~decision, or~~ final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility

[17] *Id.* § 1755.
[18] 14 Cal. Code Regs. § 15096(f).
[19] *Id.*
[20] *Id.* § 1755.

of the other agency to ensure that any such document meets the CEQA obligations of that agency.

It may be that the actual goal for this revised regulation is to inform other agencies who are *not* acting as responsible agencies but are instead acting as lead agencies for an approval that is related to the project under review that they may utilize the work of the Commission when doing their own, independent analysis. If so, the regulation should be redrafted to make this clear.

Thank you for the opportunity to provide comments on the Revised Draft Regulations.

Respectfully submitted,

_____/s/_____
Rachael E. Koss
ADAMS BROADWELL JOSEPH & CARDOZO

Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY