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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:	
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COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON PROPOSED AMENDMENTS TO TITLE 20 COMMISSION PROCESS AND PROCEDURE REGULATIONS

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During the 14-OII-01 proceeding, California Unions for Reliable Energy ("CURE") submitted three sets of comments and participated in the workshop regarding the proposed revisions to the Commission's Process and Procedure Regulations, California Code of Regulations, Title 20. The most recent Proposed Amendments to Title 20 Commission Process and Procedure Regulations ("Proposed Amendments") included in this rulemaking improve some of the Commission's initial proposed revisions to its regulations. However, there are some important issues raised in our previous comments that still must be addressed. In addition, the Proposed Amendments contain new proposed revisions that raise new concerns.

Before describing the specific proposed revisions that require attention before the Commission can adopt the Proposed Amendments, we must reiterate our concern that, generally, the Proposed Amendments undermine 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 certified regulatory programs from complying with certain CEQA sections,[4] it does not excuse a certified regulatory program from complying with most 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 Proposed Amendments stifle meaningful public participation in the Commission's environmental review process. Accordingly, if adopted as proposed, the Commission's site certification process would no longer qualify as a functional equivalent to CEQA, thus requiring the Commission to conduct a separate CEQA process.

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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.

Section 1211.7 Intervenors.

Section 1211.7 allows the Commission to limit intervenor participation in Commission proceedings. Specifically, section1211.7(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 participation or limiting an intervenor's participation to specific topics." Section 1211.7(e) contains a new revision (not included in the previous drafts of proposed revisions) which allows *any party* to appeal *any* ruling on a petition to intervene. In other words, a presiding member's *grant or denial* of intervention could be appealed. This is significant departure from longstanding Commission policy and procedure where *only a petitioner who has been denied intervention* can appeal the *denial.* The proposed revision will open the door for any party (i.e. a project applicant who, obviously, wants the fewest number of obstacles in the permitting process) to vigorously oppose intervention. The proposed revision would undoubtedly result in unnecessary use of the Commission's unlimited time and resources to deal with numerous appeals of decisions to grant intervention.

Section 1211.7 allows the Commission to preemptively cut off a party's rights without justification and allows any party to try to block intervention in a proceeding. Section 1211.7 runs the risk of disfavored parties being excluded from the Commission's siting process and creates an unnecessarily laborious intervention process. Section1211.7 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. Section 1211.7 should also be revised to include the language in the existing section1207 of the Commission's regulations, which provides that only a petitioner who has been denied intervention may appeal the denial.

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

Proposed Amendments in sections 1212(b)(1)(A) and (B) and 1212 (c)(2) only allow public comments to be included in the hearing record and relied on in a Commission decision if the comments are: (1) accepted by the Commission at a hearing; (2) the Commission provides notice of its intent to rely on the comments "at the time the comment is presented;" (3) parties have "an opportunity to question the commenter;" and (4) parties have an "opportunity to provide rebuttal evidence."

As we previously explained, the Proposed Amendments to section 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. Further, the combined effect of Proposed Amendments to sections 1211.7 and 1212 on public participation is far too limiting. While section 1211.7 allows any party to oppose a member of the public's intervention in a proceeding

and allows the Commission to preemptively reduce parties' participation in proceedings without justification, § 1212 essentially says that the Commission will not consider public comments as a basis for its decisions. As a result, 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 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.

§ 1212 is also 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

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

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.

The Commission cannot adopt Proposed Amendments § 1212 as written. § 1212 must 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.

§ 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 Proposed Amendments 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.[16]

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[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.
[15] Pub. Resources Code § 21168; Code of Civil Proc. § 1094.5.
[16] *See* Docket No. 86-C&I-7, Signal Energy Systems (key issue was the definition to be used for determining generating capacity and led to the Commission's adoption of what is now § 2003).

§ 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 provide comment on and appeal the Executive Director's jurisdictional determination.

§ 1742 Staff Assessment.

§ 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 efforts with the agencies responsible for enforcing the laws, ordinances, regulations and standards, for which there is noncompliance, in an attempt to correct or eliminate the noncompliance." As we previously commented, *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 (or "efforts" as it is now phrased in the Proposed Amendments) with agencies responsible for enforcing LORS be included in the record.

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

> Proposed Amendments § 1745.5(d) states:
>
> Any governmental agency may adopt all or any part of a proposed 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.

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.*[17] Under the Commission's CEQA certified regulatory program, a proposed decision is not equivalent to a final EIR certified by a lead agency. Rather, a proposed decision 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.[18] Thus, it is the Commission's Final Decision and associated

[17] *Id.*
[18] *Id.* § 1755.

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) must be revised to state:

> Any governmental agency may adopt all or any part of a ~~proposed 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.

As we previously stated, 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 Proposed Amendments.

Respectfully submitted,

_____/s/_____
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