DOCKETED

Docket Number:	15-OIR-01
Project Title:	2015 Updates: Title 20 Commission Process and Procedure and Siting Regulations
TN #:	205436
Document Title:	Comments on 15-Day Language for Proposed Amendments to CEC Siting Requlations
Description:	N/A
Filer:	Charissa Villanueva
Organization:	Adams Broadwell Joseph & Cardozo
Submitter Role:	Other Interested Person
Submission Date:	7/20/2015 3:09:06 PM
Docketed Date:	7/20/2015

STATE OF CALIFORNIA
California Energy Commission

In the Matter of:	
2014 Revisions: Title 20 Commission Process and Procedure Regulations	Docket No. 15-OIR-01

COMMENTS OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON THE EXPRESS TERMS 15-DAY LANGUAGE FOR PROPOSED AMENDMENTS TO TITLE 20 COMMISSION PROCESS AND PROCEDURE REGULATIONS

July 20, 2015

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 Express Terms 15-Day Language for the Proposed Amendments to Title 20 Commission Process and Procedure Regulations ("15-Day Language"). CURE submitted four sets of comments and participated in a workshop during the 14-OII-01 proceeding and this rulemaking. We thank Commission staff for addressing the majority of our concerns. We have remaining concerns about just two sections of the 15-Day Language.

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

The proposed sections 1212(b) and(c)(2) allow public comments to be included in the hearing record and relied on in a Commission decision *only if*: (1) the comments are offered or received into evidence 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." It appears that the intent of this language is to prohibit public comments from "automatically being part of the record" and to "clarify that only public comment accepted at a hearing could potentially support a finding…Written comments simply filed with the commission could not be used to support a finding."[1] We previously explained that the Commission cannot adopt sections 1212(b) and(c)(2) as written because they are inconsistent with both the policy and the letter of the California Environmental Quality Act.

Sections 1212(b) and (c)(2) undermine the Commission's obligations as a certified regulatory program under CEQA.[2] 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.[3] 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.[4] While CEQA excuses certified regulatory programs from complying with certain CEQA sections,[5] it does not excuse a certified regulatory program from complying with most of CEQA's procedural and substantive mandates,[6] including carrying out a process that encourages public participation. As described in our previous comments and below, sections 1212(b) and (c)(2) would do just the opposite

[1] *See* 2015 Revised Regulations, p. 23, "Changes from prior version," dated January 9, 2015.
[2] Pub. Resources Code § 21080.5.
[3] *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 135 Cal.App.4th 1392, 1422.
[4] Pub. Resources Code § 21080.5(e).
[5] 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.
[6] Pub. Resources Code § 21080.5.

- stifle meaningful public participation in the Commission's environmental review process. If the Commission adopts sections 1212(b) and (c)(2) as written, the Commission's process would no longer be a CEQA functional equivalent process and the Commission would have to conduct a separate CEQA process.

The CEQA Guidelines state that, "[p]ublic participation is an essential part of the CEQA process."[7] The California Supreme Court has repeatedly declared that the public plays a crucial rule in the CEQA process.[8] Sections 1212(b) and(c)(2) cannot be reconciled with CEQA policy favoring public participation because the sections place an undue burden on the public to meaningfully participate in the Commission's environmental review process. Sections 1212(b) and(c)(2) would force members of the public to attend a hearing to get oral and written comments into the record. Further, for the Commission to rely on public comments to support a finding in its decision, sections 1212(b) and(c)(2) would force members of the public to be cross-examined by the applicant, staff or any other party who wishes to do so. This is unreasonably burdensome on the public, will thwart public participation and is inconsistent with the strong public participation policy of CEQA.

Take, for example, a situation where a member of the public who lives in the area of a proposed project (and is a biologist), saw a protected species on the project site on several occasions. The biologist submits written comments to the Commission describing his or her knowledge, experience and sightings. Under the proposed sections 1212(b) and (c)(2), the comments could not be a part of the record or relied on by the Commission in its decision unless the biologist entered his or comments into the record at a hearing and the applicant, staff and any other parties to the proceeding had "an opportunity to question the commenter." Forcing a member of the public to travel (potentially hundreds of miles), and then be cross-examined by multiple attorneys, to get his or her comments into the record is completely unreasonable – it is a hurdle that most members of the public would not be willing to jump. The result would be a chilling effect on meaningful public participation in the Commission's environmental review process. Moreover, it would deprive the Commission of perhaps the best evidence of a potentially significant environmental impact.

Sections 1212(b) and (c)(2) are also inconsistent with CEQA because public comments would not automatically be a part of the hearing record. To seek judicial review of agency actions for alleged violations of CEQA, challengers must first exhaust their administrative remedies by presenting their specific objections to the

---

[7] 14 Cal. Code Regs., § 15201.

[8] See, e.g., *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936 (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…").

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] Sections 1212(b) and (c)(2) would force members of the public to attend a hearing to enter oral or written comments into the record. This is contrary to CEQA which requires the hearing record to include ***all*** public comments submitted to an agency orally or in writing prior to the close of the record.[12]

The Commission cannot adopt sections 1212(b) and (c)(2) as written. Section 1212(b) must be revised to provide that the "hearing record" will automatically include all oral or written public comments submitted prior to the close of the "hearing record." Section 1212(c)(2) 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.[13] Failure to make these changes would result in the Commission's process no longer being a CEQA functional equivalent process.

Section 1234 Jurisdictional Determinations.

We previously commented that the proposed new section 1234, which provides a process to seek a Commission determination as to whether a proposed activity falls under the Commission's jurisdiction, improperly excludes public participation. Therefore, we recommended that section 1234 be revised to provide for public notice of jurisdictional determination requests filed with the Commission and to allow any interested person – not just "the person seeking the jurisdictional determination" - to appeal the Executive Director's jurisdictional determination. While revising section 1234 is preferable, we note that section 1231 still provides an option for the public to participate.

---

[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] Pub. Resources Code §§ 21167.6, 21177.

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

Thank you for the opportunity to provide comments on the 15-Day Language.

Respectfully submitted,

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

Attorneys for the CALIFORNIA UNIONS FOR RELIABLE ENERGY