The California Wind Energy Association (“CalWEA”) appreciates this opportunity to provide written comments on the December 2006 Staff Draft Report, “Statewide Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development” (“Staff Draft”).

The Guidelines will be of critical importance to the future of wind energy in California, and we hope to have an open dialogue regarding our many concerns with this document. In its current form, the Guidelines would have wide-ranging and harmful impacts on the development of wind power, which is an essential element of meeting California’s long term economic, energy, and environmental needs.

CalWEA has participated actively, extensively and constructively in this process. Our participation has, and continues to, be informed by the experience of our members,¹ as well as our biological and legal consultants, Dr. James Newman of Pandion Systems and Annie Mudge of Cox Castle & Nicholson LLP.

We will be submitting our comments in two parts, as only three business days have passed since the workshop on the Staff Draft took place, allowing insufficient time to provide detailed written comments which are reflective of that discussion. This Part 1 addresses only CalWEA’s major overarching concerns with the Staff Draft. We hope to provide Part 2 of our comments by February 2.

¹ CalWEA members expressly endorsing these comments include these development companies: AES Wind Generation; Babcock & Brown LP; CalWind Resources, Inc.; Coram Energy Group, Ltd.; Clipper Windpower, Inc.; enXco; Eurus Energy America Corp.; Oak Creek Energy Systems, Inc.; San Gorgonio Farms, Inc.; UPC Wind Management, LLC; Whitewater Wind Energy, Inc., and Wintec Energy Ltd. Collectively, these companies account for about 80% of the California RPS wind energy contracts signed to date (in capacity). Most are actively engaged in California wind power developments and many own existing wind projects.
I. OVERALL COMMENTS

The Staff Draft fails to strike the right balance between promoting wind project siting that will protect the state’s bird and bat populations and promoting wind energy development. The stated purpose of the guidelines is to “offer a science-based reference” for local permitting authorities, with the goal of reducing bird and bat collisions with wind turbines by “describing information and methods needed to adequately identify, assess, avoid, minimize, mitigate, and monitor the impacts to birds and bats.” (Staff Draft, p.E-1.) However, the Staff Draft goes beyond the development of a “science-based reference.” It establishes policy, imposes on wind developers a costly and cumbersome new layer in the CEQA review and permitting processes, and encourages ongoing and open-ended costs. In doing so, the Staff Draft, if adopted in current form, would:

- raise project costs while not significantly contributing to the protection of bird and bat populations in California,
- threaten project financing and project timelines,
- reduce wind development activity in the state, particularly the sorts of projects – repowers, infill projects, and smaller projects -- that can be brought on line relatively quickly under current permitting processes,
- impose on wind projects a unique permitting framework not imposed on any other energy project in California, and
- elevate generally less than significant bird and bat impacts above other environmental impacts, including positive impacts such as reducing carbon emissions.

For these reasons, the Staff Draft would make it more difficult to meet the state’s Renewables Portfolio Standard goals and the greenhouse-gas-reduction targets established last year by Governor Schwarzenegger and the California Legislature in AB 32. At a time when the National Academy of Sciences warns that another decade of business-as-usual carbon emissions could trigger runaway climate change, the Staff Draft warrants substantial revision.

CalWEA cannot escape the conclusion that a major overhaul of the document is required to avert potentially major damage to the California wind industry and the state’s clean energy goals. We urge the Commission to set aside the June date it has established for adopting these guidelines to allow for necessary revisions. We believe that a Revised Staff Draft, along with another staff workshop with stakeholders, is in order before the document is brought before the Renewables Committee for approval. While the process should be delayed as long as is necessary to ensure that the adopted Guidelines will be sound, we believe that a three-month delay in the process, with final adoption in September, is minimally required.
II. SPECIFIC CONCERNS

A. The Staff Draft is At Odds with CEQA

At the June 9, 2006, Renewables Committee Hearing at which this process was launched, Commissioner Geesman stated, “we look at [the] local permitting agencies, principally counties ... as one of the principal clients of this effort. ... We don't envision these guidelines changing that jurisdictional role at all.” (Transcript, p. 55.) Unfortunately, the Staff Draft does not achieve the objectives reflected in Commissioner Geesman’s statement. Instead, it creates a structure that will cause permitting decisions that have to date been made by local agencies to be made by CDFG and others.

1. The Staff Draft would give de facto permitting authority to entities that do not have such authority under CEQA.

The Staff Draft proposes that every wind project in California consult extensively with, and in some cases obtain express permission to proceed from, a “Science Advisory Committee (on the local, regional and/or statewide level). The Staff Draft would vest in each such committee decision-making authority regarding the type and duration of pre- and post-permitting studies and the mitigation measures necessary for the CEQA lead agency to grant a permit. (See e.g., Staff Draft pages 11, 53, and 60.)

Even the slightest deviation from the recommendations of the SAC (which may suggest measures that go far beyond current local agency and industry permitting practice) will require extensive justification, creating delay, turmoil and expense. Thus, the SAC is not “advisory” at all. The SAC would include particular stakeholders as well as state and federal wildlife agencies, which at this time have no jurisdiction over the wind permitting process in California, and give these entities formal control over siting, analysis, mitigation and permitting decisions that are the local lead agency’s to make under CEQA. The Staff Draft thereby unnecessarily duplicates--and may conflict with--the already stringent requirements of CEQA, which requires the lead agency to consult with the California Department of Fish and Game and involves an extensive public process. More broadly, the Staff Draft is incongruent with provisions of the State Constitution and state law, which reserve permitting authority to local government entities.

All of this is aside from the many practical challenges that SACs would present.

2. The Staff Draft provides little guidance to lead agencies under CEQA.

Consistent with Commissioner Geesman’s above-quoted statement, the Executive Summary of the Staff Draft states that the Guidelines “offer a science-based reference for use by California counties, cities, and public utilities that permit wind energy projects.” (Staff Draft, p. E-1.) The statement is a contradiction to the rest of the document, however, because, on the one hand, it offers little guidance to lead agencies permitting a
wind energy project under CEQA and, on the other, it will tend to place into the hands of a unique group of people basic decisions about where wind projects should be sited, how much study is sufficient, whether there are cumulative impacts, and what kinds of mitigation should be imposed.

The lead agency’s job under CEQA is to determine whether a proposed project will have a biologically “significant” environmental impact and to require mitigation if feasible to address that impact. Both “significant” and “feasible” are defined in the Public Resources Code and under CEQA guidelines. Existing law does not, however, provide guidance to local entities regarding the studies that are necessary to support determinations of biological significance, nor does it provide guidance on types of mitigation measures that a local agency could, in its discretion, choose from if it finds that a wind project would have a significant impact on biological resources. These were the areas that CalWEA advised CEC staff to focus on in developing the guidelines.2

The Staff Draft does not provide helpful guidance to local agencies on these issues of direct relevance to their job under CEQA; the Staff Draft says as much later on in the document: “The objective of this document … is not to determine which bird and bat impacts are ‘significant’ under CEQA, but rather to provide information and guidance that can be useful in evaluating and determining the level of impacts.” (Staff Draft, p. 22, emphasis added.) While we local lead agencies should be the ones to determine significance, the Staff Draft will tend to push local agencies into making findings of significance for many impacts when they might not otherwise do so in order to gain the legal protection that such findings afford a permitting agency. That will result in more Environmental Impact Reports (EIRs) being prepared for wind projects and fewer mitigated negative declarations, unnecessarily adding to the cost and burden of permitting wind projects in California. The Draft also fails to point out that local agencies may still approve wind projects even if they have been determined to have significant and unavoidable impacts.

3. Lead agencies under CEQA are likely, nevertheless, to apply the document in the permitting process.

Even if the Commission were to remove from the Executive Summary the statement that the document is meant to provide guidance to lead agencies in implementing CEQA and add a clear statement that the document is not intended to do so, the Guidelines still carry a high risk of being used by lead agencies to make CEQA decisions during the permitting process.

The document tries unsuccessfully to meld state and federal wildlife protection laws -- which facially prohibit any mortality to certain birds and bats (not a realistic possibility for wind and most other land-use projects) and for which the threshold of tolerable impact for many is legally zero -- and CEQA permitting, which requires disclosure, evaluation, and mitigation of “significant impacts” but still allows a local agency to approve a project even if it will result in a significant and unavoidable impact.

2 See CalWEA’s June 16, 2006, comments in this docket
This marriage is not a successful one since CEQA and state and federal wildlife protection laws are not entirely compatible in this respect. Because of this incompatibility, the Staff Draft appears to try to create backdoor authority during the permitting process for agencies that do not have such authority now.

The extensive studies suggested by the Staff Draft may or may not be necessary to determine “significance” under CEQA, but they would become the default position for local agencies on all future wind projects. Instead of providing pragmatic guidelines about effort and duration of study, the Staff Draft appears to be requiring the nth degree of research and analysis. This extraordinary level of effort will likely be endorsed by the SACs and therefore difficult to deviate from by any project.

The Staff Draft appears to conflate CEQA and the wildlife laws as a kind of compromise for a few wind energy projects’ potential inability to comply to the letter with state and federal prohibition on the take of certain species. It turns the permitting process into an exercise of very extensive and expensive information gathering for what we suspect will be little actual reduction in bird and bat mortality than would occur under today’s existing CEQA process.

B. The Staff Draft Provides No Guidance on Scientific Studies

Not only does the Staff Draft improperly focus on determining undefined “impacts,” it does not provide any guidance about what studies should be conducted, in various circumstances, to determine whatever “impacts” the authors have in mind (which would not be considered significant under CEQA) and impacts deemed significant under CEQA. The different levels of study required for these different determinations should be explicitly recognized.

Chapter 3 contains a list of studies with very little discussion of the impact question that each is designed to address, the pros and cons of each approach, and when each type of study should (or should not) be conducted. Further, Chapter 3 presents a number of studies or techniques – such as daily bat carcass searches, ceilometry, moonwatching and radar – which have been shown to be ineffective, unnecessary, or inappropriate for application in some situations. Rather than providing any guidance on when particular scientific methods are appropriate, the Staff Draft could be read as policy regarding types of studies that could reasonably be conducted in all cases. Chapter 8 attempts to provide some practical guidance, but it is insufficient and subject to determinations by the SAC.

Finally, the document repeatedly references the discredited Smallwood and Thelander (2004) study, despite the fact that the California Energy Commission released, in mid-December, the results of its own independent review of the report by three well-qualified reviewers that confirmed major flaws that compromise the conclusions of the report.3 The CEC project manager for the reviews concluded that the Smallwood-

3 “Avian/Wind Statistical Peer Review Project” (Consultant Report), December 2006. (Available at http://www.energy.ca.gov/pier/final_project_reports/500-04-052.html)
Thelander report “should not be considered as the basis for developing siting requirements for future wind energy projects” – and yet staff cites it repeatedly in a report aimed at just that. This further calls into question staff’s commitment to creating science-based reference for wind project siting.

C. The Guidelines Will Not Be “Voluntary” In Practice

While the guidelines are repeatedly characterized by the CEC and others as “voluntary,” the “standard” approach that it advocates in Chapter 8 -- or more burdensome approaches that may be required by SACs based on other chapters of the report – will undoubtedly become the default approach of lead agencies regardless of their merit in specific cases. (Indeed, lead agencies are already picking up the Guidelines. One CalWEA member was told last week by a county project manager that they plan to use the Guidelines in the draft EIR.) These cases could include repowering at existing sites with low impacts, permitting a small project, expanding an existing project, or permitting a new project in an existing wind resource area where impacts are known to be low, such as the San Gorgonio Pass.

Lead agencies that wish to deviate from the standard approach, or the approach desired by an SAC or one of its members, will risk being sued by project opponents who will use the CEC document, and the authoritative weight that it carries, as evidence of insufficient study of potential environmental impacts under CEQA. Thus, if the Guidelines are not followed, the Guidelines could be used to open the door to litigation against wind projects. Agencies that are not deterred from deviating from the guidelines’ rigid requirements will nevertheless have to justify in detail any deviations, raising costs and imposing delays.
CONCLUSION

Again, these comments address only the major concerns of CalWEA’s members. We have many, many more detailed concerns which will be addressed in Part 2 of our comments.

We urge the Committee to get this process onto an appropriate course, and would welcome any opportunity to discuss these issues. In this unprecedented time of public policy challenges with respect to global warming, together we can ensure that California is on track to make the best choices for our economic and energy future.

Respectfully submitted,

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