



February 4, 2019

Ms. Rebecca Fancher
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: Comments on Discussion Draft Proposed Amendments to CARB's CEQA Regulations (17 Cal. Code Regs. §§ 60000-60007)

Dear Ms. Fancher:

The California Chamber of Commerce (CalChamber) thank you for the opportunity to submit comments on the discussion draft of proposed amendments to 17 Cal. Code Regs. Sections 60000-60007 released by the California Air Resources Board (CARB) on January 4, 2019 (Discussion Draft), updating CARB's procedural regulations implementing the California Environmental Quality Act (CEQA). CalChamber is the largest broad-based business advocate to government in California. Membership represents one-quarter of the private sector jobs in California and includes firms of all sizes and companies from every industry within the state. Leveraging our front-line knowledge of laws and regulations, we provide products and services to help businesses comply with both federal and state law. CalChamber, a not-for-profit organization with roots dating to 1890, promotes international trade and investment in order to stimulate California's economy and create jobs.

Discussion Draft Section 60002 proposes to amend the CARB procedures for providing notice of meetings and hearings by providing that notices will be sent via electronic mail only, and only to those persons who have requested such notice in writing. In doing so, CARB's proposed amendment would eliminate newspaper publication of notices and eliminate notice directly to state and local government agencies with jurisdiction over CARB's proposed action. Public agencies would rely instead on the State Clearinghouse for circulation.

CARB's certified regulatory program provides a limited exemption from the requirements of CEQA Chapters 3 and 4, authorizing CARB to prepare its own form of substitute environmental documents in lieu of Environmental Impact Reports ("EIRs") and Negative Declarations. See CEQA Guidelines (14 Cal. Code Regs.) Sections 15250-15253. CARB still remains subject to the notice requirements contained in CEQA Chapter 2, Pub. Res. Code Sections 21092-21092.5. For notices of meetings or hearings to adopt plans, regulations or other actions subject to CEQA, CARB is required to provide public notice as required by CEQA Section 21092(b)(3), which requires that, in addition to notice to persons who request it, notice "shall also be given" by at least one of three methods, only one of which – newspaper publication – is applicable to CARB's statewide planning and regulatory actions. Accordingly, consistent with CEQA Chapter 2, newspaper publication should be retained in Section 60002.

Discussion Draft Section 60003 incorrectly deletes the requirements to make staff reports available for public review and comment, and to distribute reports to government agencies with jurisdiction and to persons who have requested such reports. Consistent with CEQA Sections 21092, 21092.2 and 21092.5, staff reports containing environmental analysis must be made available for public review and comment and distributed directly to persons who requested copies and to commenting agencies. Additionally, discussion Draft Section 60003 deletes the requirement to prepare a staff report "where the action contemplated may have a significant effect on the environment." The amended language provides that a staff report will be prepared *only when a public hearing is required by law*. However, amended Section 60004 clarifies that, for proposed regulations and other actions subject to CEQA, the staff report is the document which contains the

environmental analysis. Although CEQA does not require a public hearing in every instance, CEQA does require analysis of impacts and feasible mitigation or alternatives in every instance where an action may have significant environmental impacts. See CEQA Section 21081, CEQA Guidelines Section 15064. Accordingly, Section 60003 should provide that a staff report containing environmental analysis must be prepared for an action which may have significant environmental impacts irrespective of whether or not a public hearing is required or held.

After discussion with CalChamber members, we find that Discussion Draft Sections 60004, 60004.1 and 60004.2 introduce the new terms "Impact Environmental Analysis" and "No Impact Environmental Analysis" that could lead to much confusion in the regulated community. Although not the intent of the amendment, "No Impact Environmental Analysis" suggests, incorrectly, that no impact analysis was performed and that no mitigation is required when instead, an analysis was performed and the result was a finding of no potentially significant impact predicated on mitigation measures, equivalent to a Mitigated Negative Declaration. "Impact Environmental Analysis" is evidently intended to contrast with "No Impact Environmental Analysis" but awkwardly inverts the words "environmental impact" to "impact environmental," which has no meaning and is confusing to the regulated entities. CalChamber recommends CARB utilize the terms "Environmental Impact Report" and "Mitigated/Negative Declaration" because these terms have been in existence since the inception of CEQA and nothing in CEQA requires certified regulatory programs to avoid those words.

Discussion Draft Section 60004(a)(1)(C) provides for a "Supplemental Environmental Analysis" to a prior Impact Environmental Analysis when the prior analysis remains applicable and circumstances triggering supplemental review listed in CEQA Guidelines 15162 occur. The option of supplementing a prior "No Impact Environmental Analysis" should also be added to Section 60004(a)(1)(C) to be consistent with CEQA Guidelines Section 15162. CEQA Guidelines Section 15162(a) provides for supplementation of a prior Negative Declaration if the triggering circumstances occur.

Discussion Draft Section 60004(b) adds several CARB-specific items to CEQA Guidelines Section 15378, including Section 60004(b)(5): "Approval of planning documents that contain no commitment to a course of action *implemented by the state board* and do not have the potential to cause any significant environmental impact" (emphasis added). This is too narrow of a definition as to what constitutes a project under CEQA. If CARB's approval of a planning document contains a commitment to a course of action, CARB's approval is a "project" subject to CEQA, whether CARB or other entities will implement that course of action. As interpreted in a number of CEQA decisions, including *POET LLC v. State Air Resources Board*, 218 Cal.App.4th 681, 721-722, the relevant question is "whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project." Conversely, if CARB approves a planning document relying on the "not a project" CEQA exemption, air districts implementing the plan must be free to consider feasible mitigation and alternatives, including no action (the "no project" alternative). Accordingly, the limitation "implemented by the state board" should be deleted from Section 60004(b)(5).

Discussion Draft Section 60004(c) enumerates other CARB actions purported to be categorically exempt from CEQA. Similarly, as Section 60004(c) correctly notes, these actions remain subject to CEQA if any of the exceptions to exemptions in CEQA Guidelines Section 15300.2 apply

Discussion Draft Sections 60004.1(e), 60004.3(f) and 60004.3(f) delegate approval authority to the Executive Officer for changes to regulatory language if circumstances triggering supplemental CEQA review have not occurred. However, the proposed draft sections retain both approval and CEQA review authority for the Board where a Supplemental Environmental Analysis is necessary. These sections need to be clarified to provide that CEQA review based on a supplemental "No Impact Environmental Analysis" or Addendum is also delegated to the Executive Officer in these circumstances pursuant to *POET LLC v. State Air Resources Board*, cited above.

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Discussion Draft Section 60005(b) provides for exclusion from the administrative record of various documents which "preceded the documents circulated for public review or were not provided to the state board." CEQA requires that the record include all documents and materials described in CEQA Section 21167.6(e), in Chapter 6 of CEQA, to which CARB's certified regulatory program is subject. In particular, CEQA Section 21167.6(e)(10) expressly provides that that the record includes "all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division." Accordingly, Section 60005(b) should either include or cross-reference the record content items listed in CEQA Section 21167.6(e), and the exclusion of documents which "preceded the documents circulated for public review or were not provided to the state board" should be deleted.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam Regele', is positioned above the printed name.

Adam Regele
Policy Advocate

AR:mm