WANGER JONES HELSLEY PC
ATTORNEYS

OLIVER W. WANGER
TIMOTHY JONES*
MICHAEL S. HELSLEY
PATRICK D. TOOLE
SCOTT D. LAIRD
JOHN P. KINSEY
KURT F. VOTE
TROY T. EWELL
JAY A. CHRISTOFFERSON
MARISA L. BALCH
PETER M. JONES**
STEVEN M. CRASS**
AMANDA G. HEBESHA***
JENA M. HARLOS****
MICAELA L. NEAL
REBECCA S. MADDOX
NICOLAS R. CARDELLA
ERIN T. HUNTINGTON
STEVEN K. VOTE
JENNIFER F. DELAROSA
ROCCO E. DICICCO
GIULIO A. SANCHEZ
CHRISTOPHER A. LISIESKI*****
BENJAMIN C. WEST
HUNTER C. CASTRO

* Also admitted in Washington
** Of Counsel
*** Of Counsel/Also admitted in Idaho
**** Also admitted in Wisconsin
***** Also admitted in Virginia

265 E. RIVER PARK CIRCLE, SUITE 310
FRESNO, CALIFORNIA 93720

MAILING ADDRESS
POST OFFICE BOX 28340
FRESNO, CALIFORNIA 93729

TELEPHONE
(559) 233-4800

FAX
(559) 233-9330

OFFICE ADMINISTRATOR
LYNN M. HOFFMAN

Writer's E-Mail Address:
jkinsey@wjhattorneys.com

Website:
www.wjhattorneys.com

April 15, 2019

VIA ELECTRONIC SUBMISSION

Clerk of the Board
CALIFORNIA AIR RESOURCES BOARD
1001 I Street
Sacramento, CA 95814

Re: Comments of John R. Lawson Rock & Oil, Inc. on the Proposed Amendments to CARB's Certified Regulatory Program

Dear Madam Clerk:

The following comments are submitted on behalf of John R. Lawson Rock & Oil, Inc. ("Lawson"). This letter includes Lawson's comments on the California Air Resources Board's ("CARB") February 12, 2019, Notice of Public Hearing to Consider Proposed Amendments to the CARB's Certified Regulatory Program in the California Code of Regulations, Title 17, Sections 60000-60007 ("Notice"). The proposed amendments to the Certified Regulatory Program are referred to herein as the "Amendments."

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COMMENTS ON THE PROPOSED AMENDMENTS

A. Modifications to Former Section 60005 (Section 60003 as Amended) Delete Provisions Required for Approval of a Certified Regulatory Program

The Amendments propose to delete the final sentence of Section 60005(b), which states: "The analysis shall address feasible mitigation measures and feasible alternatives to the proposed action which would substantially reduce any significant adverse impact identified." (Amendments, § 60005, subd. (b).) However, this language, or equivalent language, is required pursuant to Public Resources Code, Section 21080.5(d), which establishes the criteria for certification of a regulatory program. Section 21080.5(d) states that the "plan or other written documentation required by the regulatory program" must "[i]nclude[] a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity." Notably, while the Initial Statement of Reasons states that "the language setting forth the contents of the staff report has been moved to section 60004," and that the deletions to Section 60005 are needed "to avoid duplication," (Staff Report: Initial Statement of Reasons ["ISOR"] at 4), as amended Section 60004 does not appear to incorporate this language. (See Amendments, § 60004.) Therefore, it is unclear why CARB is proposing to delete this language. As such, the final sentence of Section 60005(b) should be retained to "harmonize the regulation to the statutory requirements." (Notice at 3.)

B. The Proposed Modifications to Section 60004 Are Contrary to CARB's Obligations Under CEQA

1. Subdivision (b)(2) Should be Revised to Clarify that the "Fair Argument" Standard Applies to CARB's Determinations Under CEQA

The proposed revisions to Section 60004(b)(2) state that "[i]f CARB determines that there is no substantial evidence that any aspect of the proposed project may cause a significant effect on the environment, CARB shall . . ." prepare an Environmental Analysis Finding No Impacts, rely upon a prior Impact Environmental Analysis or Environmental Analysis Finding No Impacts, or prepare a supplemental Environmental Analysis Finding No Impacts, depending on whether certain determinations can be made under the circumstances. (Amendments, § 60004, subd. (b)(2).)

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This provision should be revised for consistency with the "fair argument" standard. By failing to incorporate that standard, subdivision (b)(2) reduces transparency and risks thwarting full environmental review in favor of the adoption of a negative declaration, contrary to CARB's stated objectives for the Amendments.

The fair argument standard stems from the statutory mandate that an environmental impact report, or an equivalent document, be prepared for any project that "may have a significant effect on the environment," (Pub. Res. Code, § 21151), and reflects CEQA's strong presumption in favor of requiring full environmental analysis. (See *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of "B" St. v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) Under the test, if substantial evidence in the record supports a fair argument that the project may have a significant environmental affect, the lead agency must prepare an environmental impact report even if other substantial evidence before the agency indicates that the project will have no significant effect. (See *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Association for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; see also 14 C.C.R. ["CEQA Guidelines"] § 15064(f)(1) ["[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect."].)

The fair argument standard sets a "low threshold" for the preparation of an environmental impact report. (*Consolidated Irrig. Dist. v. City of Elma* (2012) 204 Cal.App.4th 187, 207; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. Ctiy of Berkeley* (2004) 122 Cal.App.4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310.) Additionally, it prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. (See *Rominger c. County of Colusa* (2014) 229 Cal.App.4th 690, 713; *Friends of "B" St., supra*, 122 Cal.App.4th at 1109.)

Because it does not incorporate the "fair argument" standard, subdivision (b)(2) could be read to impose a higher standard for the preparation of an environmental impact report, or functional equivalent document, than is permitted under CEQA, the CEQA Guidelines, and the applicable case law. It therefore could significantly reduce transparency, and risks thwarting full environmental review in favor of the adoption of a negative declaration, contrary to CARB's stated objectives for the Amendments. (See ISOR at 2, ["CARB's primary goals in proposing these amendments are to (1) align CARB's certified regulatory program with established CEQA principles, and (2) increase public transparency by more fully setting forth the requirements applicable to CARB environmental analyses."], 6 ["It is the policy of the state board to prepare

staff reports in a manner consistent with the environmental protection purposes of the state board's regulatory program, with the goals and policies of CEQA . . . and with all other applicable laws."].)

2. Subdivision (d) Should be Revised for Consistency with the Supreme Court's Ruling in *Berkeley Hillside Preservation v. City of Berkeley*

Subdivision (d) sets forth examples of activities "which generally do not meet the definition of a project, or that fall within exempt classes under CEQA," and for which no environmental analysis will generally be required. (Amendments, § 60004, subd. (d).)

Although the subdivision incorporates the exceptions to the exemptions set forth in Section 15300.2 of the CEQA Guidelines, additional language should be added "to harmonize CARB's procedures with established CEQA principles" and to "add greater specificity to CARB's environmental review process." (Notice at 3.) In particular, subdivision (d) should be revised to ensure consistency with the California Supreme Court's holding in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

CEQA Guidelines, § 15300.2(c) provides that "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." In *Berkeley Hillside*, the Supreme Court held that the exception applies "without evidence of an environmental effect" where it can be shown that "the project has some feature that distinguishes it from others in the exempt class, such as its size or location" ***or*** "with evidence that the project will have a significant environmental effect." (*Id.* at 1105.)

Accordingly, subdivision (d) should be revised by adding the following language to the end of the subdivision:

> In determining whether California Code of Regulations, title 14, section 15300.2, subdivision (c) applies, CARB shall determine whether the project has some feature that distinguishes it from others in the exempt class, such as size or location, and whether there is substantial evidence that the project will have a significant environmental effect.

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3. Subdivision (e) Should be Removed in its Entirety because it Authorizes *Post Hoc* Environmental Review, Impermissibly Delegates Decision-Making (and Environmental Review) Authority, and Piecemeals Environmental Analysis in Violation of CEQA

Subdivision (e) states that "[f]or projects subject to the rulemaking proceedings under the California Administrative Procedure Act (Government Code section 11340 et seq.), the state board may, after it approves of the project, delegate to the Executive Officer to carry out changes in the proposed regulatory language under Government Code section 11346.8(c), as well as any appropriate further environmental review associated with such changes, consistent with this section 60004." (Amendments, § 60004, subd. (e).)

Subdivision (e) is unlawful because it authorizes *post hoc* environmental review, improperly delegates decision-making authority to the Executive Officer, and piecemeals environmental analysis. It also fails to achieve CARB's objectives for the Amendments.

Post Hoc* Environmental Review**. As the Supreme Court explained in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 "[a] fundamental purpose of an EIR is to provide decision makers with information they can use in deciding ***whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken." (*Id.* at 394; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79; CEQA Guidelines, § 15004, subd. (a) ["***Before granting any approval*** of a project subject to CEQA, every lead agency . . . shall consider a final EIR . . . ."] [emphasis added].) Moreover, the timing requirement set forth in § 15004 of the CEQA Guidelines "applies to the environmental review documents prepared by [C]ARB . . . in lieu of an EIR." (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 716.)

By authorizing the Executive Officer to perform "further environmental review" associated with changes to the regulatory language pursuant to Government Code § 11346.8(c) "***after*** [the state board] approves of the project," subdivision (e) expressly authorizes *post hoc* environmental review in violation of CEQA. (Amendments, § 60004, subd. (e) [emphasis added].)

Improper Delegation. In *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 731, the court held that "CEQA is violated when the authority to approve or disapprove the project is separated from the responsibility to complete environmental review." As the court explained, "the separation of the approval function from the review and consideration of the environmental assessment is inconsistent with the purpose served by an environmental assessment as it insulates the person or group approving the project 'from public

awareness and the possible reaction to the individual members' environmental and economic values.'" (*Id.* [quoting *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779]; see also *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907 ["CEQA prescribes delegation."].) Moreover, "[t]his purpose of CEQA and the underlying policy applies with equal force whether the environmental review document is an EIR or documentation prepared under a certified regulatory program." (*Id.*)

Subdivision (e) improperly delegates to the Executive Officer the responsibility for completing the environmental review of a project already approved by the decision-making body, the state board. (See CEQA Guidelines, § 15356 ["decision-making body" means "any person or group of people within a public agency permitted by law to approve or disapprove the project at issue"].) Because the Executive Officer does not have authority to approve or disapprove the project, subdivision (e) separates "the responsibility to complete environmental review" from the "authority to approve or disapprove the project." (*POET*, *supra*, 218 Cal.App.4th at 731; cf. ISOR at 10 [stating that proposed amendments are "necessary to ensure that any delegations of authority are done in a manner consistent with the court decision in *POET*"].) Consequently, it impermissibly insulates the state board "from public awareness and the possible reaction to the individual members' environmental and economic values" in violation of CEQA. (*Kleist*, *supra*, 56 Cal.App.3d at 779.)

Piecemealing. "CEQA forbids 'piecemeal' review of the significant environmental impacts of a project." (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358; see also *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 277 [same].) Thus, the California Supreme Court has held that "an EIR must include an analysis of the environmental effects of future . . . action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future . . . action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights*, *supra*, 47 Cal.3d at 396.)

Government Code, Section 11346.8(c) authorizes changes to a proposed regulation made available to the public if the change is "(1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action." To the extent a change to the regulatory text is "sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action," (Govt. Code § 11346.8, subd. (c)), the change is "a reasonably foreseeable consequence of the initial project." (*Laurel Heights*, *supra*, 47 Cal.3d at 396.) Therefore, if the change is "likely [to] change the scope or nature of the initial project or its environmental effects," it must be analyzed in the final environmental analysis presented to the state board prior to project approval. (*Id.*) By authorizing the Executive Officer to make such changes and to perform "appropriate further environmental review associated with such changes" "***after*** [the state board]

approves of the project," subdivision (e) impermissibly piecemeals environmental review in violation of CEQA. (Amendments, § 60004, subd. (e).)

Although CARB is proposing subdivision (e) "to ensure that any delegations of authority are done in a manner consistent with the court decision in *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, pages 99-103,"[1] (ISOR at 10), it fails to achieve that purpose and instead authorizes *post hoc* environmental review, improper delegation of authority, and piecemeal environmental review. As such, it fails to achieve CARB's primary objective of "align[ing] CARB's certified regulatory program with established CEQA principles." (*Id.* at 2.) Accordingly, it should be removed from the Amendments in its entirety.

C. The Proposed Modifications to Section 60004.1 Are Contrary to CARB's Obligations Under CEQA

Subdivision (c) states that "[t]he state board shall approve the proposed Environmental Analysis Finding No Impacts only if it finds on the basis of the whole record, including the comments, that there is no substantial evidence that the proposed project would have a significant or potentially significant effect on the environment." (Amendments, § 60004.1, subd. (c).)

This provision should be revised for consistency with the "fair argument" standard, discussed above. (See *supra* at § B.1.) Because it does not incorporate the "fair argument" standard, subdivision (c) appears to impermissibly permit the state board to approve a project under a negative declaration even though an EIR is required. It therefore reduces transparency and risks thwarting full environmental review in favor of the adoption of a negative declaration, contrary to CARB's stated objectives for the Amendments. (See ISOR at 2, 6.) Accordingly, subdivision (c) should be amended as follows:

> The state board shall approve the proposed Environmental Analysis Finding No Impacts only if it finds on the basis of the whole record, including the comments, that there is no substantial evidence that <u>supports a fair argument that</u> the proposed project would have a significant or potentially significant effect on the environment.

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[1] The citation to pages 99-103 appears to by a typographical error and should be corrected.

D. The Proposed Modifications to Section 60004.2 Are Contrary to CARB's Obligations Under CEQA

1. Subdivision (a) Should be Revised to Require that Draft and Final Impact Environmental Analyses Discuss the No Project Alternative and the Environmentally-Superior Alternative.

Section 60004.2(a) sets forth the required contents for "Draft and Final Impact Environmental Analyses," stating that they "shall contain" the following:

> (1) A description of the project;
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> (2) A description of the applicable environmental and regulatory setting for the project;
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> (3) A discussion and consideration of environmental impacts and feasible mitigation measures which could minimize significant adverse impacts identified;
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> (4) A discussion of cumulative and growth-inducing impacts, and any mandatory findings of significance per California Code of Regulations, title 14, section 15065; and
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> (5) A discussion of a reasonable range of alternatives to the proposed project, which could feasibly attain most of the project objectives but could avoid or substantially lessen any of the identified significant impacts.

(Amendments, § 60004.2, subd. (a).)

An EIR's discussion of alternatives to the project must include a "no-project" alternative, along with an analysis of the impacts of that alternative. (CEQA Guidelines, § 15126.6, subd. (e)(1) ["The specific alternative of 'no project' ***shall*** also be evaluated along with its impact."] [emphasis added]; *Planning & Conserv. League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 917; *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.) The purpose of a discussion of the no-project alternative is "to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (*Id.*; see *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477.) The no-project alternative must be evaluated whether or not it is feasible. (See *Planning & Conserv. League*, *supra*, 83 Cal.App.4th at 917.) Subdivision (a), however, does not require discussion and analysis of a no-project alternative.

Additionally, an EIR should identify an "environmentally superior alternative" from among the range of alternatives selected. (CEQA Guidelines, § 15126.6, subd. (e)(2); see also *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305.) However, subdivision (a) does not require the identification of an environmentally superior alternative.

Because subdivision (a) does not require discussion of a no-project alternative or the selection of an environmentally superior alternative, it fails to achieve CARB's primary objective of "align[ing] CARB's certified regulatory program with established CEQA principles." (ISOR at 2.) Therefore, it should be revised by adding the following provisions:

> (6) A discussion of a no-project alternative; and
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> (7) A discussion regarding which of the alternatives considered is the environmentally superior alternative.

2. Subdivision (b) Should be Revised to Allow Public Comment on All Aspects of the Proposed Project Until the Close of the Public Hearing

Subdivision (b) states that "[p]ublic comment on a sufficiently-related change to proposed regulatory text as set forth in section 11346.8(c) of the California Government Code, or on a change to a plan previously released for public comment, shall be limited to the effect of that change only, and shall not address aspects of the regulatory text or plan as originally released for public comment." (Amendments, § 60004.2, subd. (b).)

"Public participation is an essential part of the CEQA process." (CEQA Guidelines, § 15201.) Therefore, the CEQA Guidelines direct each public agency to provide for extensive formal and informal public involvement so as "to receive and evaluate public reactions to environmental issues related to the agency's activities." (*Id.*; see *Berkeley Keep Jets Over the Bay Comm. V. Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344; *Rural Landowners Ass'n v. City Council* (1983) 143 Cal.App.3d 1013; *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813; *Cleary, supra*, 118 Cal.App.3d 348.) Thus, CEQA mandates that "[t]he lead agency shall consider comments it receives on a draft environmental impact report, proposed negative declaration, or proposed mitigated negative declaration if those comments are received within the public review period." (Pub. Res. Code, § 21091, subd. (d)(1).)

Relatedly, the law requires that, prior to bringing an action against an agency for noncompliance with CEQA, the alleged grounds of noncompliance must be "presented to the public agency orally or in writing by any person during the public comment period provided by

this division ***or prior to the close of the public hearing on the project*** before the issuance of the notice of determination." (*Id.* at § 21177, subd. (a) [emphasis added].) As the court explained in *California Clean Energy Committee v. City of San Jose* (2013) 220 Cal.App.4th 1325 "[u]nder [§] 21177, a plaintiff must allege noncompliance with CEQA ***at some point in the administrative review process*** before acquiring standing to litigate the case in the trial court." (*Id.* at 1342 n. 7 [emphasis added]; *Mounty Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 148 Cal.App.4th 184.) The purpose of this rule is "to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial view." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 794.) It is a recognition that the decisionmaking body "is entitled to learn the contentions of interested parties before litigation is instituted" and should "have . . . [an] opportunity to act and to render litigation unnecessary, if it [chooses] to do so." (*Id.*)

By narrowing the scope of public comment after a sufficiently-related change is proposed to exclude comments on the original proposal, subdivision (b) is inconsistent with Sections 21091 and 21177. It therefore creates regulatory ambiguity, reduces transparency, and fails to align CARB's regulatory program with statutory requirements and established CEQA principles, contrary to CARB's objectives. (See Notice at 3.) If a comment on the original proposal is submitted during the comment period for a sufficiently-related change, CARB will be put on notice of the basis for the alleged noncompliance, and the fact that the comment was not made earlier will not bar a later judicial challenge. Therefore, if CARB relies on this provision to disregard valid comments raising significant environmental issues, it will serve only to thwart CEQA's fundamental policy goal of full and fair environmental review.

The ISOR states that this amendment is "necessary to inform the public about the scope of public comment for the different phases of the rulemaking process, and to inform the public that comments must focus on the specific changes being circulated for public review" and "to align with established CEQA principles governing public comments and responses thereto." (ISOR at 14 [citing Govt. Code, §§ 11346.8, subd. (c), 11346.4, subd. (a)].) However, the authority cited simply does not support narrowing public comment in the manner CARB proposes. Neither Government Code, Section 11346.8 nor Section 11346.4, contain any language that could be read to authorize CARB's attempt to narrow the scope of public comment for sufficiently-related changes. On the contrary, Section 11346.8 expressly provides that "[t]he state agency ***shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation***." (Govt. Code, § 11346.8, subd. (a) [emphasis added].) Significantly, it also requires the agency to re-circulate "***full text***" of the revised proposal, not just the sufficiently-related changes. (*Id.* [emphasis added].) If the legislature intended public comment to be limited to the effect of the sufficiently-related change only, there would be no need to re-circulate the full text of the revised proposal. Instead, the legislature decided to require re-circulation of the entire proposal, with the changes clearly indicated. (*Id.*) This suggests the legislature did not intend for public comment to be restricted in the manner CARB proposes.

In light of the above, subdivision (b) should be revised as follows:

> Public comment on a sufficiently-related change to proposed regulatory text as set forth in section 11346.8(c) of the California Government Code, or on a change to a plan previously released for public comment, ~~shall be limited to the effect of that change only, and shall not~~ may address aspects of the regulatory text or plan as originally released for public comment.

3. Subdivision (c) Should be Revised to Include a Definition of the Term "Feasible" that Aligns with CEQA

Subdivision (c)(2)(B) states that "[t]he state board shall not decide to approve or carry out a project for which an Impact Environmental Analysis was prepared unless" *inter alia* "CARB has eliminated or substantially lessened all significant effects on the environment where feasible; and determined that no feasible alternatives or mitigation measures are available that would substantially lessen any remaining significant adverse effect that the activity may have on the environment, and that any remaining significant effects on the environment found to be unavoidable are acceptable due to overriding considerations." (Amendments, § 60004.2, subd. (c)(2)(B).)

CEQA defines "feasible" as meaning "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Res. Code, § 21061.1; CEQA Guidelines, § 15363 ["'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors."].) Although the concept of feasibility is central to the determination addressed by subdivision (c)(2)(B) the Amendments do not appear to define the term, or state that the term will be applied as defined in CEQA and the CEQA Guidelines. (See Amendments, § 60006 [deleting provision defining "feasible"].) Because they do not include a definition of the term "feasible," the Amendments reduce transparency and create regulatory ambiguity, contrary to CARB's stated objectives. (See Notice at 3.)

Accordingly, the Amendments should be revised to specifically define the term "feasible" as set forth in Public Resources Code § 21061.1 and § 15363 of the CEQA Guidelines.

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4. Subdivision (e) Should be Deleted Because it Authorizes *Post Hoc* Environmental Review, Impermissibly Delegates Decision-Making Authority, and Piecemeals Environmental Analysis in Violation of CEQA.

Subdivision (e) states that "[a]s specified in section 60004(e), for projects subject to the rulemaking proceedings under the California Administrative Procedure Act (Government Code, section 11340 et seq.), the state board may delegate to the Executive Officer to carry out changes in the regulatory language under Government Code section 11346.8(c), as well as any appropriate further environmental review, consistent with section 60004." (Amendments, § 60004.2, subd. (e).)

As explained in reference to Section 60004(e) of the Amendments, this provision authorizes *post hoc* environmental review, improper delegation of authority, and piecemeal environmental review. (See *supra* at § B.3.) In addition, it fails to achieve CARB's stated objectives for the Amendments. (*Id.*) As such, it should be removed in its entirety.

E. Section 60004.3(f) Should Be Removed in its Entirety Because it Authorizes *Post Hoc* Environmental Review, Impermissibly Delegates Decision-Making Authority, and Piecemeals Environmental Analysis in Violation of CEQA

Section 60004.3(f) states that "[a]s specified in 60004(e), for projects subject to the rulemaking proceeding sunder the Administrative Procedure Act (Government Code, section 11340 et seq.), the state board may, after it approves of the project pursuant to subsection (d) above, delegate to the Executive Officer to carry out changes in the proposed regulatory language under Government Code section 11346.8(c), as well as any appropriate further environmental review, consistent with section 60004." (Amendments, § 60004.3, subd. (f).)

As explained in reference to Section 60004(e) of the Amendments, this provision authorizes *post hoc* environmental review, improper delegation of authority, and piecemeal environmental review. (See *supra* at § B.3.) In addition, it fails to achieve CARB's stated objectives for the Amendments. (*Id.*) As such, it should be removed in its entirety.

F. Section 60004.4(e) Should Be Removed in its Entirety Because it Authorizes *Post Hoc* Environmental Review, Impermissibly Delegates Decision-Making Authority, and Environmental Analysis in Violation of CEQA

Section 60004.4(e) states that "[a]s specified in section 60004(e), for projects subject to the rulemaking proceedings under the California Administrative Procedure Act (Government

Code, section 11340 et seq.), the state board may delegate to the Executive Officer to carry out changes in regulatory language under Government Code section 11346.8(c), as well as any appropriate further environmental review, consistent with section 60004." (Amendments, § 60004.4, subd. (e).)

As explained in reference to Section 60004(e) of the Amendments, this provision authorizes *post hoc* environmental review, improper delegation of authority, and piecemeal environmental review. (See *supra* at § B.3.) In addition, it fails to achieve CARB's stated objectives for the Amendments. (*Id.*) As such, it should be removed in its entirety.

G. Section 60005(b) Should Be Revised to Ensure Consistency with Section 21167.6(e) of the Public Resources Code

Section 60005(b) states as follows:

> (b) Contents. For a rulemaking item, the rulemaking record as specified in section 11347.3 of the California Government Code will generally also constitute the CEQA Administrative record for that item under section 21167.6 of the California Public Resources Code. The administrative record for a non-rulemaking item shall generally include all documents relied upon by the state board in making its decision on the project. The administrative record shall include external studies and any internal communications that were actually relied upon for decision-making by the state board, information submitted to CARB, and any other information required by law to be considered by the state board in making its decision. However, notwithstanding the above, and to the extent consistent with section 21167.6 of the Public Resources Code, the administrative record need not include any documents that are privileged or otherwise not relied upon by the state board in making its decision on the project, including, without limitation, documents that:
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> (1) Would cause CARB to abrogate its attorney-client privileges or work product doctrine;
>
> (2) Are currently subject to the deliberative process privilege; or
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> (3) Constitute administrative drafts of environmental documents, working drafts or papers concerning environmental documents, draft staff reports, internal staff-

> level emails or similar correspondence, and other preliminary documents.

(Amendments, § 60005, subd. (b).)

As subdivision (b) is drafted, the documents required to be made part of the administrative record are far too narrow. Subdivision (b) fails to require the inclusion of many documents that must be included pursuant to Section 21167.6(e) of the Public Resources Code. Subdivision (b) therefore creates regulatory ambiguity, reduces transparency, and fails to harmonize the regulations with statutory requirements and established CEQA principles, contrary to CARB's objectives. (See Notice at 3; ISOR at [stating that amendments to § 60005 are "necessary to better inform the public of the applicable requirements pertaining to the administrative record, and [to] add[] specificity to CARB's regulation to increase its transparency"].)

Rulemaking Items. As to rulemaking items, subdivision (b)'s statement that the APA record will generally constitute the CEQA record is problematic. The required contents for the administrative record are much broader under CEQA than the APA. (Compare Govt. Code, § 11347.3, subd. (b) with Pub. Res. Code, § 21167.6, subd. (e).) Therefore, by stating that the APA record will generally also constitute the CEQA record, subdivision (b) creates regulatory ambiguity, reduces transparency, and risks creating a highly under-inclusive CEQA record, contrary to statutory requirements and CARB's objectives.

For instance, CEQA requires that the record include, *inter alia*¸ "[a]ll staff reports and related documents ***prepared*** by the respondent public agency ***with respect to its compliance*** with the substantive and procedural requirements of this division and ***with respect to the action on the project***." (Pub. Res. Code, § 21167.6, subd. (e)(2) [emphasis added].) The APA, in contrast, only requires "data and other factual information, technical, theoretical, and empirical studies or reports, if any, ***on which the agency is relying*** in the adoption, amendment, or repeal of a regulation. . ." (Govt. Code, § 11347.3, subd. (b)(7) [emphasis added].) Although both laws require the inclusion of staff reports, CEQA requires the inclusion of all staff reports "prepared by" the agency that concern its compliance with CEQA or its action on the project, while the APA only requires staff reports that the agency "rel[ied]" on in making its decision. Similarly, whereas the APA's catch-all provision requires "any other information, statement, report, or data that the ***agency is required by law to consider or prepare*** in connection with the adoption, amendment, or repeal of a regulation, (Govt. Code, § 11347.3, subd. (b)(11) [emphasis added]), CEQA's catch-all provision requires "[a]ny other written materials ***relevant*** to the respondent public agency's ***compliance with this division*** or to its ***decision on the merits*** of the project. . ." (Pub. Res. Code, § 21167.6, subd. (e)(10) [emphasis added].) Obviously, documents "relevant" to the agency's "decision on the merits" is a much larger universe than documents the agency "is required by law to consider or prepare" in connection with its decision.

Non-Rulemaking Items. Subdivision (b)'s requirements for non-rulemaking items are also problematic. Public Resources Code Section 21167.6(e) sets forth the requirements for the contents of the administrative record for CEQA actions, and these requirements are mandatory. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 64.) However, many of the items required by Section 21167.6(e) are not included in subdivision (b).

Subdivision (b) states that the record "shall generally include all documents ***relied upon*** by the state board in making its decision on the project." Yet, under Section 21167.6(e), the required contents of the record are not limited to documents "relied upon" by the decision-making body. Instead, Section 21167.6(e) requires that the record include, *inter alia*, records "prepared" by the respondent agency or "relevant to" its CEQA compliance or its decision on the project. (See Pub. Res. Code, § 21167.6, subds. (e)(2) ["All staff reports and related documents ***prepared*** by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project.], (3) ["All staff reports and related documents ***prepared*** by the respondent public agency and written testimony or documents submitted by any person ***relevant to*** any findings or statement of overriding considerations adopted by the respondent agency pursuant to this division."], (7) ["All written evidence or correspondence submitted to, ***or transferred from***, the respondent public agency with respect to compliance with this division or with respect to the project."], (8) ["Any proposed decisions or findings ***submitted*** to the decisionmaking body of the respondent public agency by its staff . . .], (10) ["Any other written materials ***relevant*** to the respondent public agency's compliance with this division or its decision on the merits of the project. . ."] [emphasis added].) By generally limiting the record to documents "relied upon" by the state board, subdivision (b) conflicts with the express requirements of Section 21167.6(e).

Subdivision (b) also states that the record shall include "external studies and any internal communications that were ***actually relied upon*** for decision-making by the state board." (Amendments, § 60005, subd. (b) [emphasis added].) Additionally, it expressly excludes "internal staff-level emails." (*Id.* at (b)(3).) But Section 21167.6(e) requires that the administrative record include, *inter alia*, "any . . . written materials ***relevant*** to the respondent public agency's compliance with this division or its decision on the merits of the project, including . . . ***all internal agency communications***, including staff notes and memoranda related to the project or to compliance with this division." (Pub. Res. Code, § 21167.6, subd. (e)(10) [emphasis added].) Because it limits the record's contents to "internal communications that were ***actually relied upon*** for the decision-making by the state board" and expressly excludes "internal staff-level emails," subdivision (b) is inconsistent with the express mandate of Section 21167.6(e).

In light of the above, subdivision (b) plainly violates the mandatory requirements of Section 21167.6(e) of the Public Resources Code. It also fails to achieve CARB's stated objectives for the Amendments, as it creates regulatory ambiguity, reduces transparency, and

fails to harmonize the regulations with statutory requirements and established CEQA principles. (See Notice at 3; ISOR at [stating that amendments to § 60005 are "necessary to better inform the public of the applicable requirements pertaining to the administrative record, and [to] add[] specificity to CARB's regulation to increase its transparency"].)

Accordingly, subdivision (b) should be revised as follows:

> (b) Contents. For a rulemaking item, the rulemaking record shall include all items ~~as~~ specified in section 11347.3 of the California Government Code ~~will generally also constitute the CEQA administrative record for that~~ and, if applicable, all items ~~under~~ specified in section 21167.6 of the California Public Resources Code. The administrative record for a non-rulemaking item shall consist of all items specified in section 21167.6 of the California Public Resources Code and will generally include all documents ~~relied upon by the state board in making its~~ relevant to the state board's decision on the project or to CARB's compliance with CEQA. The administrative record shall include external studies and any internal communications related to the project or to CARB's compliance with CEQA~~that were actually relied upon for decision-making by the state board~~, information submitted to CARB, and any other information required by law~~to be considered by the state board in making its decision~~. However, notwithstanding the above, and to the extent consistent with section 21167.6 of the Public Resources Code, the administrative record need not include any documents that are privileged~~, or otherwise not relied upon by the state board in making its decision on the project~~, including, without limitation, documents that:
>
> > (1) Would cause CARB to abrogate its attorney-client privileges or work product doctrine;
> >
> > (2) Are currently subject to the deliberative process privilege; or
> >
> > (3) Constitute administrative drafts of environmental documents, working drafts or papers concerning environmental documents, or draft staff reports~~, internal staff-level emails or similar correspondence, and other preliminary documents~~.

H. Section 60006's Definition of the Term "Feasible" Should Be Incorporated Elsewhere in the Regulations

The Amendments propose to delete Section 60006 in its entirety, which provides: "Any action or proposal for which significant adverse environmental impacts have been identified during the review process shall not be approved or adopted as proposed if there are feasible mitigation measures or feasible alternatives available which would substantially reduce such adverse impact. For purposes of this section, 'feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors, and consistent with the sate board's legislatively-mandated responsibilities and duties." (Amendments, § 60006.)

Although the substance of the first sentence of Section 60006 appears to have been incorporated into Section 60004.2(c)(2)(B), the Amendments do not retain the definition of the term "feasible." (See Amendments, § 60004.2, subd. (c).) By failing to include a definition of the term "feasible," the Amendments create regulatory ambiguity, reduce transparency, and fail to align CARB's regulatory program with statutory requirements and established CEQA principles, contrary to CARB's objectives. (See Notice at 3.) Section 60006's definition of the term "feasible" should therefore be incorporated elsewhere in the regulations.

I. Section 60007 Should Be Retained, or Section 60004.2(b) Should be Revised to Require that a Final Impact Environmental Analysis Include Responses to Comments

The Amendments propose to delete Section 60007 in its entirety. That section provides: "(a) If comments are received during the evaluation process which raise significant environmental issues associated with the proposed action, the staff shall summarize and respond to the comments either orally or in a supplemental written report. Prior to taking final action on any proposal for which significant environmental issues have been raised, the decision-maker shall approve a written response to each such issue. (b) Notice of the final action and the written response to significant environmental issues raised shall be filed with the Secretary of the Resources Agency for public inspection." (Amendments, § 60007.)

CEQA requires the lead agency to evaluate comments on the draft EIR and to prepare written responses for inclusion in the final EIR. (See Pub. Res. Code, § 21091, subd. (d); CEQA Guidelines, §§ 15088, subd. (a), 15132; see *Cleary*, *supra*, 118 Cal.App.3d 348.) The written responses must describe the disposition of any "significant environmental issue" raised by the commentators. (Pub. Res. Code, § 21091, subd. (d)(2)(B); CEQA Guidelines, §§ 15088, subd. (c), 15132, subd. (d), 15204, subd. (a).) As the court explained in *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889 "[t]he requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the

environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful." (*Id.* at 904; see *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 557 [comment and response process "produces a ***better*** EIR, by bringing to the attention of the public and decision-makers significant environmental points that might [otherwise] have been overlooked"]; *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 3 Cal.5th 497, 516–17 [responses to comments are an "integral part" of substantive analysis of environmental issues].) Moreover, in light of the crucial role the comment-and-response process plays in implementing CEQA's fundamental principles, CEQA mandates that a certified regulatory program must "[r]equire that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process." (Pub. Res. Code, § 21080.5, subd. (d)(2)(D).)

Although much of the substance of Section 60007 is incorporated into Section 60004.2(b), that provision does not retain the requirement that "[p]rior to taking final action on any proposal for which significant environmental issues have been raised, the decision-maker shall approve a written response to each [significant environmental] issue." (Amendments, § 60007; see Amendments, § 60004.2, subd. (b).) Rather, § 60004.2(b)(5) states that "CARB shall prepare a final Impact Environmental Analysis, which ***may*** include the responses to comments as provided in (b)(3)(E) above. . ." (emphasis added.)

The Amendments failure to ensure that the final environmental document approved by the state board includes responses to comments is highly problematic. CEQA requires the lead agency to respond to comments raising environmental issues. (See Pub. Res. Code, § 21091, subd. (d); CEQA Guidelines, § 15088, subd. (a).) And these responses must be incorporated into the final EIR, (CEQA Guidelines, § 15088, subd. (d)), which must be approved by the decision-making body prior to project approval. (*Id.* at §§ 15089, subd. (a), 15090, subd. (a)(2).) Because the Amendments do not require the final environmental document to include responses to comments, the Amendments violate statutory requirements, fail to align CARB's regulatory program with established CEQA principles, and reduce transparency, contrary to CARB's objectives. (See Notice at 3.) They also undermine public confidence in the environmental review process. (See *City of Long Beach, supra*, 176 Cal.App.4th at 904.)

Moreover, Public Resources Code Section 21080.5(d)(2)(D) states "[t]he rules and regulations adopted by the administering agency for the regulatory program" must "[r]equire that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process." By deleting Section 60007, and by not requiring the final environmental document to include responses to comments, the Amendments violate CEQA's requirements for certified regulatory programs. Accordingly, Section 60007 should be retained in its entirety, or alternatively, Section 60004.2(b) should be revised as follows:

> CARB shall prepare a final Impact Environmental Analysis, which ~~may~~ shall include the responses to comments as provided in (b)(3)(E) above . . .

J. The ISOR Fails to Comply with Government Code Section 11346.2(b)(4)

Section 11346.2(b)(4)(A) of the Government Code requires that the ISOR include "a description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." The ISOR considered several reasonable alternatives to the Amendments, including eliminating the certified regulatory program. (See ISOR at 25.) However, while the ISOR acknowledges that elimination of the certified regulatory program is a "reasonable alternative" to the regulation, its reasons for rejecting that alternative are conclusory at best. The ISOR states that elimination of the certified regulatory program would "fail to achieve the goals of the proposed regulatory action." (*Id.*) No further discussion or analysis is provided. (See *id.*)

CARB's objectives for the Amendments are to "bring greater efficiency, transparency, and certainty to CARB's planning and rulemaking processes by creating a more uniform and clear environmental review process," to "improve alignment with current CEQA principles," to "harmonize the regulation to the statutory requirements," "to eliminate regulatory ambiguity," and to "add greater specificity to CARB's environmental review process." (Notice at 3.) Elimination of CARB's certified regulatory program would achieve all of these objectives, and it would do so more effectively than the Amendments. It would better "improve alignment with current CEQA principles" and better "harmonize the regulation to the statutory requirements" because it would directly subject CARB to current CEQA principles and applicable statutory requirements, rather than creating an alternative regulatory scheme. It would "add greater specificity to CARB's environmental review process" by ensuring that CARB complies with all of CEQA's requirements for the preparation and adoption of environmental analyses. (*Id.*) And it would "bring greater efficiency, transparency, and certainty to CARB's planning and rulemaking processes by creating a more uniform and clear environmental review process," since it would ensure that the same rules apply to CARB as any other lead agency required to perform environmental review.

Accordingly, CARB should re-consider elimination of its certified regulatory program in light of its stated objectives for the Amendments, or it should better explain its reasons for declining to do so. (See *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 429 ["When the agency issues its final decision and statement of reasons, it must respond to the public comments and either change its proposal in response to the comments or explain why it has not."].)

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CONCLUSION

Based on the foregoing, CARB should revise the Amendments in accordance with the recommendations herein.

Respectfully submitted,

for John P. Kinsey
WANGER JONES HELSLEY PC
Attorneys for John R. Lawson Rock & Oil, Inc.