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California Air Resources Board
Board Members
Richard Corey, Executive Officer
1001 "I" Street
P.O. Box 2815
Sacramento, CA 95812

Re: Proposed Update to Regulations Implementing the California Environmental Quality Act

Dear Board Members and Mr. Corey:

We represent The 200, an accomplished group of civil rights leaders from all regions of California. The 200 believes minority home ownership is the cornerstone for creating multi-generational economic security, helping students to go to college and seniors to remain independent. California has for decades adopted and implemented racially discriminatory government policies and practices that harm minority home ownership, and the anti-housing measures in CARB's 2017 Scoping Plan are the latest additions to this Hall of Shame.[1]

Minority homeownership rates have plummeted in California, and minority communities are also disproportionately harmed by California's acute poverty, homelessness and housing crises. We believe it is immoral, as well as illegal, for any agency of the state of California to increase housing costs, or make it easier to use litigation threats or file lawsuits that delay housing projects that are consistent with a

[1] The 200 filed comments to CARB objecting to the four anti-housing measures included in the 2017 Scoping Plan, and the failure of the 2017's environmental and economic analyses to disclose, analyze, or minimize the many significant adverse environmental and equity impacts of these anti-housing measures. (Attachment 1) The 200 filed a lawsuit against CARB, challenging these deficiencies as civil rights and statutory violations. (Attachment 2) CARB unsuccessfully attempted to dismiss most of The 200's lawsuit claims, remarkably asserting through its attorney that it was constitutional for CARB to engage in racially discriminatory housing discrimination in its written briefs and oral argument.

CARB-approved Sustainable Communities Strategies adopted pursuant to Senate Bill 375.

We also believe it is immoral, as well as illegal, for CARB to pursue regressive climate policies that place increasingly higher housing, transportation, and electricity cost burdens on minority families who are forced to drive ever greater distances to live in housing they can afford to buy or rent, and to deprive minority workers of production jobs that are gateways to the middle class and homeownership.

We further believe that CARB's regressive policies are antithetical to its statutory mandate to reduce greenhouse gas emissions (GHG), since California exports its working families to homes they can afford to buy in states with far higher per capita GHG emissions: more than doubling the GHG emissions from former Californians who move to Texas or Arizona for housing they can afford increases global GHG, and countries and states that acknowledge the need for racial equity and upward mobility will not follow the lead of a state that boasts the country's highest poverty and homelessness rates (and related highest housing prices).

CARB has many other, more effective options for reducing GHG; however, CARB has instead elected to burden hard working minority working families with the costs of its programs rather than support equal or more effective GHG reductions that spawn dissent among CARB's environmental advocacy supporters (e.g., forestry management practices to reduce wildfire risks and generate renewable energy from biomass) or increase cost burdens on aligned wealthy political donors (e.g., consumption based GHG costs imposed on imported luxury goods).

We have sued CARB over four anti-housing measures in the 2017 Scoping Plan that establish regressive, unlawful, and ineffective global GHG reduction practices. Climate change is not a license to trample civil rights that our members, and our communities, have fought to establish and must now defend.[2]

We write to inform CARB's Board and its staff of our deep moral disappointment, as well as formal legal objections, to CARB's latest effort to avoid its compliance obligations under the California Environmental Quality Act ("CEQA").

Specifically, CARB has proposed to amend its regulations for implementing CEQA to exempt CARB from complying with CEQA at all for any "government funding mechanism" not yet linked to a particular project, and for "approval of planning documents that contain no commitment to a course of action implemented by a state board." CARB further declines to do any rigorous or systematic environmental analysis at all of its discretionary actions unless CARB staff first determine that there is "substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment." (Proposed amendment adopting §

[2] Although members of The 200 strongly support the environment, the failure of environmental advocacy organizations and agencies to understand or reflect the diversity of our state has been well-documented and, as the most recent 2018 study of philanthropy notes, is getting worse not better. (See Attachment 3)

60004 to Title 17 of the Code of Federal Regulations, referred to herein as "Proposed CEQA Loopholes.")

Each of these provisions is unlawful on its face; each also demonstrates CARB's ongoing refusal to accept its own CEQA compliance obligations, consistent with a litany of costly and embarassing court decisions finding that CARB has – in some cases twice in a row regarding the same CARB action (!) – violated CEQA. Instead of learning its lesson from these repeated court losses, and joining alongside every other state, regional and local agency in California in actually complying with CEQA as required by the Legislature and demanded by the public, CARB has proposed unlawful new CEQA regulations to bypass its CEQA obligations entirely.

- <u>CARB, as a Certified Regulatory Program CEQA agency, must still comply with CEQA</u>. The California Supreme Court as well as numerous appellate courts have confirmed that state agencies that have been granted Certified Regulatory Program status to comply with CEQA must nevertheless comply with CEQA: such agencies may not bypass CEQA mandates, such as considering alternatives which avoid or lessen significant impacts to the environment as a whole (not just the environmental resource falling within the jurisdiction of that agency). As CARB well knows from its CEQA lawsuit losses, CARB must still comply with CEQA's policy goals and substantive standards. *See, e.g., POET, LLC v. State Air Resources Board* (2013); *see also, City of Arcadia v. State Water Resources Control Board* (2006)*; Environmental Protection Info. Center v. Johnson (*1985*); Californians for Native Salmon & Steelohead Association v. Dept of Forestry (*1990*); Sierra Club v. State Bd. Of Forestry (*1994*).*

- <u>CEQA Prohibits Concealing the Environmental Consequences of CARB's Discretionary Decisions by "Piecemealing" – CARB's Obligation is to Disclose and Analyze the Environmental Consequences of the "Whole" of Its Action Including the Reasonably Foreseeable Consequences Thereof</u>. When CARB proposes to undertake a discretionary activity, including but not limited to in this instance establishing a funding program or approving a plan or "planning document," CEQA requires that CARB consider the environmental consequences of "the whole of its action" including reasonably foreseeable implementation actions and consequences thereof, and prohibits "piecemealing" its action into subordinate components that could mislead the public, avoid required levels of transparency about the environmental consequences of its action, and shirk its obligation to adopt all feasible mitigation measures *or alternatives* to the proposed action that would lessen one or more significant adverse effects on the environment. CEQA broadly defines the agency's discretionary action as a "project" to enable maximum protection of the environment, and prohibit concealment of environmental considerations by "separately focusing on isolated parts." *See, e.g., Bozung v. LAFCO (1975), City of Sacramento v. State Water Resources Control Board (1992).* When CARB approves a funding

program, it is reasonably foreseeable that the projects meeting qualification criteria will be funded – and thus will have consequences. When CARB approves a plan or "planning document," it is reasonably foreseeable that this plan will be implemented – either directly upon CARB's approval (e.g., based on CARB's role as an expert agency in the CEQA process), or eventually (e.g., to the extent that later agency actions are needed such as implementing regulations or project approvals may – or may not – trigger the need for some level of additional CEQA review.) *See, e.g., Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1988).

- CARB's CEQA Compliance Obligations are Not Diminished by the Need for Future Implementing Actions by Public or Private Sector Parties. CEQA does not allow lead agencies to avoid CEQA by relying on future uncertainties, such as the specific later actions to be taken by other agencies or private sector parties. Instead, as noted by one expert commentator, "The principle that EIRs can and should make reasonable forecasts is well established in case law." (*Practice under the California Environmental Quality Act, Kostka & Zischke, §4.20, 12.9; corresponding caselaw citations omitted.)* CEQA demands that CARB forecast, disclose, assess, and impose feasible mitigation measures or alternatives to lessen the adverse environmental consequences of the "reasonably foreseeable" consequences of its discretionary actions.

The three referenced Proposed CEQA Loopholes all violate these fundamental CEQA requirements.

- Unlawful New CEQA "Gateway" Imposed to Avoid CEQA Compliance. The Proposed CEQA Loopholes direct CARB to avoid CEQA entirely once CARB staff first determines, based on an unknown source of "substantial evidence," that its activities would not cause a significant environmental impact. However, the Proposed CARB Loopholes allow CARB to entirely avoid doing any Initial Study, or other methodical assessment of all potential consequences of actions such as completing the questions set forth in the Appendix G of the state CEQA Guidelines, or otherwise creating the "substantial evidence" that the Proposed CEQA Loopholes assert is required to even trigger the CEQA process. Instead, the Proposed CEQA Loopholes require only that CARB staff provide a conclusory "explanation" of staff's conclusion regarding the absence of an impact. Proposed CEQA Loopholes, § 60004.1(a)(2). This turns the "common sense" exemption from CEQA – which the Proposed CEQA Loopholes separately grant to CARB – on its head, and is far outside the scope of any Legislative exemption from CEQA. Adding insult to injury, the Proposed CEQA Loopholes also allow CARB staff to avoid CEQA with this "No Impact" loophole even if staff conclude that CARB's action requires "mitigation measures" to avoid such impacts. Based on this extraordinary and unlawful new CEQA gating process, CARB staff can

simply skip the analysis and disclosure, add (or not) CEQA "mitigation measures," and avoid creating any public transparency – let alone "substantial evidence" – in support of its conclusions. There are over 100 environmental impacts that must now be analyzed under CEQA. There is zero protection to the public or the environment that CARB staff will comply with CEQA in this new CEQA Gating procedure. The new CEQA gating procedure also violates the "fair argument" provisions of CEQA, as CARB itself learned in one of its several CEQA court losses in *John R. Lawson Rock & Oil, Inc. v. State Air Resources Board* (2018). The CEQA statute, as well as more than 40 years of judicial decisions directs that CEQA be broadly construed to protect the environment, and require transparency and disclosure. CARB's climate decisions routinely fail to pass muster in CEQA lawsuits, as shown by nearly 10 years of climate CEQA lawsuit losses inflicted by CARB on the public and the environment, and on taxpayers (since CARB must pay its own attorneys' fees as well as the fees of prevailing party litigants).

- Unlawful Exclusion of Funding Programs from CEQA. CARB's Proposed CEQA Loophole creating a wholesale CEQA exemption for its funding programs because funding is not yet directed to a specific project is another classic example of unlawful CEQA piecemealing, since the funding program itself will establish the qualification criteria for desired projects or types of projects, and implementation of such funded projects are reasonably foreseeable. CARB has already and repeatedly lost this "reasonably foreseeable" issue in lawsuits, when for example it attempted to avoid its obligation to assess the reasonably foreseeable consequence that its action would increase NOx emissions in the two *POET* lawsuits on the unlawful grounds that CARB could not predict the precise future source or magnitude of increased NOx emissions. CARB lacks the legal authority to create or expand a CEQA exemption for its discretionary activities generally, including this proposed funding program loophole. When the Legislature has decided that a funding program is exempt from CEQA, it has enacted a statute to authorize this exemption. (*See, funding activities by California Department of Housing and Community Development for Affordable Housing Projects meeting specified statutory criteria, described in* CEQA Guideline § 15267.) Such Legislative exemptions from CEQA are rare, qualified, and explicit. CARB's Proposed CEQA Loophole meets none of these criteria, and is unlawful.

- Unlawful Exclusion of "Planning Documents" from CEQA. The final egregiously unlawful provision in the Proposed CEQA Loopholes is the wholesale exemption from CEQA for "planning documents." This phrase is at best ambiguous – are these limited to "studies" that inform a future plan, or does this extend to the approval of the plan itself? This ambiguous provision fails even the most basic of Administrative Procedure Act regulatory criteria for clarity. Beyond its ambiguity, however, CEQA unequivocally applies to the discretionary approval of

> "plans" that have reasonably foreseeable environmental consequences, as confirmed by scores of judicial decisions. Further, efforts by agency regulators to divide their activities between regulatory decisions that have no direct environmental consequences (since future physical activities will be undertaken in the future by third parties) have been uniformly rejected by courts in CEQA lawsuits: plans have reasonably foreseeable implementation consequences involving physical activities in the environment, which CEQA demands must be thoroughly disclosed, analyzed, and reduced to the extent feasible through mitigation measures or alternatives. Again, CARB need look no further than the voluminous EIRs prepared for regional Sustainable Communities Strategies to understand the scope and magnitude of CEQA evaluations that must be conducted for the challenged anti-housing and housing-related transportation measures included in the Scoping Plan. To the extent "planning documents" is intended to include a lawful subset of mere "studies" that are used to inform future agency discretionary decisions such as the approval of plans or regulations, then this proposed new regulation must include all elements required to qualify for the statutory exemption from CEQA, which extends only to "feasibility and planning studies for possible future actions which the agency, board or commission has not yet approved." (CEQA Guidelines, § 15262.) To correct this deficiency, at minimum this Proposed CEQA Loophole must be redrafted to expressly apply only to "planning <u>studies</u>" – and even then exclude such studies to the extent they are approved by the CARB board.

The 200 has filed a lawsuit alleging that four anti-housing measures in the 2017 Scoping Plan are violations of constitutional and statutory civil rights laws, as well as violations of other applicable statutes including but not limited to CEQA. If adopted, CARB's Proposed CEQA Loopholes would constitute further civil rights and statutory violations.

The 200's lawsuit describes the fact that the most frequent target of CEQA lawsuits filed statewide are housing projects, and of the challenged housing projects the most frequently targeted are new homes approved in existing communities. California's ugly history of redlining to exclude minorities from communities is also described, as is the disproportionate number of CEQA lawsuits filed to block housing in wealthier (and whiter) communities in locations that are consistent with CARB-approved Sustainable Communities Strategies that meet regional GHG reduction goals established under SB 375.

Abuse of CEQA lawsuits for non-environmental purposes by Not-In-My-Backyard (NIMBYs) opposed to "those people" – notably the minorities, millennials and students (MMS) in The 200 who are most harmed by California's housing crisis, by economic competitors, and by labor unions that Governor Brown described as "using CEQA to get PLAs [Project Labor Agreements]," is also well documented and now

includes two pending lawsuits alleging "greenmail" extortionate abuse of CEQA in violation of federal racketeering statutes.[3]

CARB's effort to avoid its own CEQA compliance obligations, while imposing more costs and litigation risks on housing that is critically needed by our communities, would be a further unlawful act by CARB in violation of the same suite of constitutional and statutory claims set forth in The 200's pending lawsuit against CARB. The Proposed CEQA Loopholes are not just unlawful, but another discriminatory and politically deaf echo of the CEQA exemptions granted by the Legislature to billionaire sports team owners. CARB is not the Legislature, cannot grant itself the Proposed CEQA Loopholes, and cannot in the name of climate change deprive Californians of their civil rights, or violate other laws including CEQA.

We urge the CARB Board and staff leaders to join with Legislators and other agencies to undertake your fair share of responsibility for solving our poverty, housing, homelessness crisis – a crisis that extends most deeply into our minority communities, and must include solutions for working families and not just the most wealthy and most poor among us.

We remain dismayed that CARB is "doubling down" on failed and discriminatory Scoping Plan mandates, such as forced reductions in Vehicle Miles Travelled (VMT), notwithstanding overwhelming evidence that VMT tracks population and jobs, that transit ridership (especially bus use) has continued to drop in California and nationally notwithstanding billions of dollars of public investment, and that California has made a huge commitment to low- and no-GHG transportation technologies. As The 200 recently explained to the California Transportation Commission and CARB at its December joint meeting, CARB's math on why VMT reductions are possible, let alone mandated, isn't disclosed – doesn't pencil – and isn't a remotely fair, possible, or effective climate strategy.[4]

In conclusion, the fact that the 2017 Scoping Plan is complex does not relieve CARB of its CEQA obligation to disclose, evaluate, and reduce through mitigation measures or alternatives, the "whole" of the Scoping Plan. With respect to the four anti-housing measures challenged in The 200 lawsuit, CARB staff admitted on the record that these measures were in fact omitted from the CEQA document for the Scoping Plan. Agencies that adopt complex plans must be prepared for and complete complex CEQA analyses, which CARB is well acquainted with based on its review of the CEQA documents prepared by regional MPOs for two rounds of Sustainable Communities Strategies that include the transportation and land use patterns for all major regions of the state.

We again request that CARB Board and leaders withdraw the four challenged anti-housing measures in the 2017 Scoping Plan (none of which result in quantified emission reductions required to meet CARB's statutory GHG reduction targets), and

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[3] Copies of the two RICO lawsuits are included for informational purposes. (Attachment 4 and 5)
[4] Please see The 200 letter to the joint CTC/CARB Board Meeting in November 2018. (Attachment 6)

prioritize less discriminatory, and more equitable and effective, GHG reduction strategies. Wasting further taxpayer resources by attempting to grant itself huge new CEQA compliance Loopholes, like arguing in court that it is constitutional for CARB to engage in racially discriminatory housing practices, is unlawful, and embarrassment, and a complete waste of CARB's (and taxpayers') resources.

Sincerely yours,

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CC: Ellen Peter, Chief Counsel
The 200 Leadership Council