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May 20, 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") May 3, 2019, Notice of Public Availability of Modified Text regarding 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." The proposed modifications to the Amendments are referred to as the "Modifications."

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COMMENTS ON THE MODIFICATIONS TO THE PROPOSED AMENDMENTS

A. Section 60005(b) Should Be Revised to Ensure that the Contents of the Administrative Record for Rulemaking and Non-Rulemaking Items Comply with CEQA's Mandates

Section 60005(b) sets forth the required contents of the administrative record for rulemaking and non-rulemaking items. Subsection (b) states that for rulemaking items, the rulemaking record required under the APA "will generally also constitute the CEQA administrative record. . ." (Attachment A: Proposed 15-Day Modifications ["Modifications"] at 12.) For non-rulemaking items, in contrast, the administrative record "shall generally include all documents relied upon by the state board in making its decision on the project," including "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." (*Id.*) Finally, subsection (b) states that the administrative record for both rulemaking and non-rulemaking items "need not include any documents . . . not relied upon by the state board in making its decision on the project. . ." (*Id.*)

As explained in Lawson's previous comment letter, in its current form subsection (b) fails to require the inclusion of many documents that must be included in the administrative record pursuant to Section 21167.6(e) of the Public Resources Code. Subsection (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 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 of Public Hearing"] at 3; ISOR at 20 [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" and that amendments "shall be consistent with CEQA"].) Significantly, no changes were made to this provision in the modified text. (See Modifications at 12.)

As the Fifth District Court of Appeal explained in *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 910, the language of Section 21167.6 "is mandatory: The administrative record ***shall*** include the listed items." Additionally, it envisions a "very expansive" administrative record. (*Id.*) In the context of development projects, "Section 21167.6 'contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development.'" (*Id.* [quoting *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 64 disapproved on unrelated grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457]; see

also *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1 ["[Section 21167.6(e)] contemplates that the administrative record will include pretty much everything that ever came near a proposed development ***or*** to the agency's compliance with CEQA. . ."].) It follows that in the rulemaking context, the administrative record "will include pretty much everything that ever came near a proposed [rulemaking] or to the agency's compliance with CEQA in responding to that [rulemaking]." (*Id.*) Subsection (b), however, falls well short of creating the "very expansive" administrative record mandated by CEQA. (*Id.*)

Generally speaking, the administrative record under the APA must include "[a]ll data and other factual information . . . ***submitted*** to the agency" or "on which ***the agency is relying*** in the adoption, amendment, or repeal of a regulation" and "[a]ny other information . . . that the agency is ***required by law to consider or prepare*** in connection with the . . . regulation." (Govt. Code, § 11347.3(b) [emphasis added].) The APA also requires several discreet items to be included in the administrative record. (See *id.* at subd. (1)–(4), (5), (8), (9) , (10), (12).) However, the APA does not require internal agency communications, for instance, to be made part of the administrative record, since they are not "submitted" to the agency, the agency does not "rely[]" on them in making its decision, and the agency is not "required by law to consider or prepare them." (Govt. Code, § 11347.3(b).) Yet the law is clear that the administrative record under CEQA must include "'all internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA].'" (*Citizens for Ceres*, *supra*, 217 Cal.App.4th at 910 [quoting Pub. Res. Code, § 21167.6(e)(10)] [holding that "internal agency communications" must be included in CEQA administrative record unless privileged]; cf. Modifications at 12 [excluding "internal staff-level emails or similar correspondence" from administrative record for rulemaking and non-rulemaking items].)

Likewise, the APA does not require correspondence from the agency to its environmental consultant to be made part of the administrative record. But, again, such correspondence is clearly required to be made part of the administrative record under CEQA. As the *Ceres* Court explained, CEQA requires the "inclusion of all 'written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with [CEQA] or with respect to the project,'" and this "encompasses correspondence between [third parties] and [the] agency pertaining to the project." (*Citizens for Ceres*, *supra*, 217 Cal.App.4th at 910 [quoting Pub. Res. Code, § 21167.6(e)(7)]; see *Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) 207 Cal.Rptr.3d 334, 349–50 [affirming trial court's decision to augment CEQA administrative record to include an email exchange between environmental consultant and lead agency staff].) Consequently, the suggestion that the APA rulemaking record "will generally also constitute the CEQA administrative record" for rulemaking items grossly misstates the applicable law. (Modifications at 12.)

Moreover, even if the APA did require all of the same records that CEQA does—and it does not—the Amendments appear to authorize the exclusion of any records that were "not relied upon by the state board in making its decision on the project." (Modifications at 12

["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 . . . not relied upon by the state board in making its decision on the project*** . . ."] [emphasis added].) This limitation directly conflicts with the plain language of CEQA, (see Pub. Res. Code, § 21167.6(e)(10) [requiring "[a]ny [] written materials ***relevant*** to the respondent public agency's ***compliance with this division*** or to its ***decision on the merits*** of the project"] [emphasis added]), and the case law. (See *County of Orange*, *supra*, 113 Cal.App.4th at 6 [rejecting argument that record need not include documents not before the board when certifying an EIR because CEQA requires inclusion of all documents "relating to 'compliance' with CEQA"] [quoting Pub. Res. Code, § 21167.6(e)(2); *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498 [holding that audio recordings not relied upon by decision making body were required to be part of CEQA administrative record because they "constitute[d] 'other written materials relevant to' the agency's 'decision on the merits of the project'"] [quoting Pub. Res. Code, § 21167.6(e)(10)]; *Bay Area Clean Environment, Inc.*, *supra*, 217 Cal.App.4th at 349–50.) While the Amendments state that this limitation applies only "to the extent consistent with section 21167.6 of the Public Resources Code," the limitation is plainly inconsistent with Section 21167.6's broad requirements. It 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 of Public Hearing at 3; ISOR at 20.)

Accordingly, subdivision (b) should be revised as suggested in Lawson's previous comment letter. Alternatively, it should be amended in some fashion to ensure that all of the documents required under Section 21167.6 of the Public Resources Code are expressly mandated to be included in the administrative record for actions subject to CEQA. Additionally, it should be amended to clarify that records "not relied upon by the state board in making its decision on the project" may not, for that reason alone, be excluded from the administrative record prepared for CEQA actions.

B. Sections 60004(e), 60004.1(e), 60004.2(e), 60004.3(f), and 60004.4(e) Should Be Removed Because They Authorize Piecemeal Environmental Review, Improper Delegation of Decision Making Authority, and *Post Hoc* Environmental Review

Various changes were made to §§ 60004(e), 60004.1(e), 60004.2(e), 60004.3(f), and 60004.4(e) ("Delegation Provisions"). These provisions address CARB's purported authority to delegate to its Executive Officer authority to approve 15-day modifications and to perform further environmental review related to such modifications. According to the Notice, these changes were made to ensure consistency across the Delegation Provisions, and to "ensure that those subsections clearly reflect the Board's authority to delegate to the Executive Officer the authority to undertake any further or additional environmental review necessary in connection

with carrying out and approving 15-day regulatory changes to a rulemaking item previously considered by the Board, where the Board also delegates authority to approve or disapprove the proposed changes." (Notice at 2.) According to the Notice, "[t]his construct is consistent with the decision in *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681" because it "sets forth two distinct phases in rulemaking proceedings." (*Id.*) In light of this two-phase process, the Notice concludes, "there is no separation between the authority to approve or disapprove the project and the authority to undertake any associated environmental review."

Under CARB's proposed two-phase framework, the state board, in the first phase, "completes its environmental review in connection with a proposed regulation, including any required responses to environmental comments." (*Id.*) The state board then "considers both that regulation and the environmental review at a public hearing, and takes action to approve the proposed regulation." (*Id.*) At the same time, the state board commences the second phase by delegating authority to the Executive Officer "to undertake any further 15 day regulatory changes . . . (including authority to approve or reject those regulatory changes), as well as the authority to undertake any appropriate further environmental review in connection with those 15 day changes." (Notice at 3.)

This framework is inconsistent with established CEQA principles and the decision in *POET*. First, it impermissibly piecemeals environmental review. By authorizing two distinct phases of environmental review—one for the original regulatory proposal and one for any subsequent 15-day modifications—the Delegation Provisions effectively treat each phase as a separate "project," contrary to clearly established CEQA principles. Second, it improperly delegates decision making authority to the Executive Officer for the second phase of environmental review. By transferring decision making authority to the Executive Officer in the second phase, the Delegation Provisions impermissibly separate the responsibility for approving the "project" (i.e., the original proposal ***and*** any subsequent 15-day modifications) from the responsibility for completing environmental review, contrary to the holding in *POET*. Third, it authorizes *post hoc* environmental review by authorizing the Executive Officer to perform further environmental review after the "project" has been approved by the state board.

Piecemealing. The purpose of environmental review under CEQA is to "inform the public and its responsible officials of the environmental consequences of their decisions ***before*** they are made." (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1354.) In this way, CEQA "'protects not only the environment but also informed self-government.'" (*Id.* [quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564].) Consequently, "CEQA forbids 'piecemeal' review" of a project, (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358), which occurs when a lead agency "attempt[s] to avoid a full environmental review by splitting a project into several smaller projects which appear more innocuous than the total

planned project." (*East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 293 ["*East Sacramento*"].)

"'Project' means 'the whole of the action'" that otherwise qualifies as a "project" under CEQA. (*Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, 192 [quoting Guidelines, § 15378(a)]; see also Pub. Res. Code, § 21002.1(d) ["The lead agency shall be responsible for considering the effects . . . of ***all activities involved in a project***."] [emphasis added].) It "'does not mean each separate governmental approval.'" (*Id.* [quoting Guidelines, § 15378(c)].) Rather, the term "project" "is ***broadly construed*** and applied in order to ***maximize protection of the environment***." (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271 [emphasis added].) Consequently, "[c]ourts have considered separate activities as one CEQA project and required them to be reviewed together where, for example, the second activity is a ***reasonably foreseeable consequence*** of the first activity … or both activities are ***integral parts*** of the same project." (*Sierra Club v. W. Side Irr. Dist.* (2005) 128 Cal.App.4th 690, 698 [emphasis added]; see also *Tuolumne Cty. Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1229 ["*Tuolumne Cty.*"].) Moreover, CEQA requires the lead agency to perform its environmental review "at the earliest possible stage." (*Calif. Oak Found. v. Regents of Univ. of Calif.* (2010) 188 Cal.App.4th 227, 271 [quoting *City of Carmel-by-the-Sea v. Board of Supers.* (1986) 183 Cal.App.3d 229, 250].)

The Delegation Provisions are inconsistent with CEQA' prohibition against piecemeal environmental review of a project. By requiring that the state board review and approve the initial proposed project in the first phase, and then authorizing the Executive Officer to make changes to the project and to conduct further environmental review in the second phase, the Delegation Provisions' two-phase framework "attempt[s] to avoid a full environmental review by splitting [the] project into [two] smaller projects which appear more innocuous than the total planned project." (*East Sacramento*, *supra*, 5 Cal.App.5th at 293.) As explained in Lawson's previous comment letter, to the extent the Executive Officer makes a change to the regulatory text that 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." Similarly, because the 15-day modifications to the initial proposal would have no purpose but-for the initial proposal itself, the two activities are "integral part[s]" of each other and thus both are "within the scope of the same CEQA project." (*Tuolumne Cty.*, *supra*, 155 Cal.App.4th at 1229.) Consequently, the environmental impacts of both the initial proposal and any subsequent 15-day modifications must be analyzed ***before*** the project is approved by the state board. (*Laurel Heights*, *supra*, 47 Cal.3d at 396.)

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Improper Delegation. As the Notice acknowledges, delegation to the Executive Officer is improper if the Executive Officer "lack[s] the 'authority to approve or disapprove ***the project***.'" (Notice at 3 [quoting *POET, supra*, 56 Cal.App.3d at 727–31] [emphasis added].) This observation is consistent with the decision in *POET* in which the court held that:

> [T]he principle that prohibits the delegation of authority to a person or entity that is not a decisionmaking body includes a corollary proposition that CEQA is violated when the authority to approve or disapprove ***the project*** is separated from the responsibility to complete the environmental review. [Citations.] This conclusion is based on a fundamental policy of CEQA. For an environmental review document to serve CEQA's basic purpose of informing governmental decision makers about environmental issues, that document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove ***the project*** at issue. In other words, 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."

(*POET, supra*, 217 Cal.App.4th at 731 [quoting *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779] [emphasis added].)

As noted above, "'[p]roject' means 'the whole of the action'" that otherwise qualifies as a "project" under CEQA. (*Concerned McCloud Citizens, supra*, 147 Cal.App.4th at 192 [quoting Guidelines, § 15378(a)]; see also Pub. Res. Code, § 21002.1(d) ["The lead agency shall be responsible for considering the effects . . . of ***all activities involved in a project***."] [emphasis added].) It "'does not mean each separate governmental approval.'" (*Id.* [quoting Guidelines, § 15378(c)].) Rather, the term "project" "is ***broadly construed*** and applied in order to ***maximize protection of the environment***." (*Nelson, supra*, 190 Cal.App.4th at 271 [emphasis added].) Consequently, "[c]ourts have considered separate activities as one CEQA project and required them to be reviewed together where, for example, the second activity is a ***reasonably foreseeable consequence*** of the first activity … or both activities are ***integral parts*** of the same project." (*Sierra Club, supra*, 128 Cal.App.4th at 698; see also *Tuolumne Cty., supra*, 155 Cal.App.4th at 1229.) Moreover, CEQA requires the lead agency to perform its environmental review "at the earliest possible stage." (*Calif. Oak Found., supra*, 188 Cal.App.4th at 271 [quoting *City of Carmel-by-the-Sea, supra*, 183 Cal.App.3d at 250].)

The Amendments purport to delegate to the Executive Officer authority to approve or disapprove the ***15-day modifications*** to the proposed project, but they do not—and cannot—delegate to the Executive Officer authority to approve or disapprove ***the project***, since that decision will have already been made by the state board. Consequently, under the Delegation Provisions, "the authority to approve or disapprove ***the project*** is separated from the responsibility to complete the environmental review." (*POET*, *supra*, 217 Cal.App.4th at 731 [emphasis added].) As *POET* explained, "[f]or an environmental review document to serve CEQA's basic purpose of informing governmental decision makers about environmental issues, that document must be reviewed and considered ***by the same person or group of persons who make the decision to approve or disapprove the project at issue***." (*Id.* [emphasis added].) The Delegation Provisions do just the opposite. They authorize the state board to approve or disapprove the project at issue, but then delegate authority to a different person, the Executive Officer, to approve the 15-day modifications and any associated environmental review. This improperly "insulates the person or group approving the project"—i.e., the state board—"'from public awareness and the possible reaction" regarding the 15-day modifications and their environmental impacts, since those issues are reviewed and approved by the Executive Officer. (*Id.* [quoting *Kleist*, *supra*, 56 Cal.App.3d at 779].)

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," the Delegation Provisions expressly authorize *post hoc* environmental review in violation of CEQA. (Modifications, § 60004, subd. (e) [emphasis added].) As explained above, both the initial regulatory proposal and any subsequent 15-day modifications are part of the same "project" under CEQA. The two actions are "integral parts" of each other and the 15-day modifications are a "reasonably foreseeable consequence" of the original proposed regulations. (*Sierra Club*, *supra*, 128 Cal.App.4th at 698; *Tuolumne Cty.*, *supra*, 155 Cal.App.4th at 1229.) Therefore, authorizing the Executive Officer to perform "further environmental review" ***after*** the state board approves the project at issue constitutes impressible *post hoc* environmental review.

Although CARB is proposing the Delegation Provisions "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," (ISOR at 10), they fail to achieve that purpose and instead authorize piecemeal environmental review, improper delegation of decision making authority, and *post hoc* environmental review. As such, the Delegation Provisions fails to achieve CARB's primary objective of "align[ing] CARB's certified regulatory program with established CEQA principles." (*Id.* at 2.) Accordingly, the Delegation Provisions should be removed from the Amendments in their entirety. Alternatively, the Delegation Provisions should be revised so that they do not authorize piecemeal environmental review, improper delegation of decision making authority, or *post hoc* environmental review.

C. Sections 60004(b)(1) and (2) Should Be Revised to Explicitly Reference the "Fair Argument" Standard

Section 60004 sets forth the procedure by which CARB determines the form of its environmental document and whether the project is exempt from CEQA compliance. The Notice states that "a reference to subsection (f) of section 15064 has been added [to subsections (b)(1) and (b)(2)] in response to a comment that th[ese] section[s] could be clarified to note that [CEQA's] 'fair argument' standard applies to a [CARB] determination regarding whether an Environmental Impact Analysis must be prepared." (Notice at 2.) Subsection (b)(1) now states: "If CARB determines that there is substantial evidence (as set forth in California code of Regulations, section 15064, including subsection (f) of section 15064) that any aspect of the project, either individually or cumulatively, may have a significant effect on the environment, CABR shall . . ." (Modifications at 3.) Similarly, subsection (b)(2) now states: "If CARB determines that there is no substantial evidence (as set forth in California code of Regulations, section 15064, including subsection 15064(f)) that any aspect of the proposed project may cause a significant effect on the environment, CARB shall . . ." (*Id.*)

Although subsections (b)(1) and (b)(2) now explicitly cite the CEQA Guideline referencing the "fair argument" standard, that citation does little to promote transparency regarding the requirements applicable to CARB environmental analyses. (Cf. ISOR at 2 [stating that one of CARB's "primary goals" for the Amendments is to "increase public transparency by more fully setting forth the requirements applicable to CARB environmental analyses"].) Simply citing § 15064(f) does not make it clear that the agency is required to apply the fair argument standard in determining whether there are any significant environmental effects associated with a given project. Section 15064(f) contains seven subsections, only one of which refers to the fair argument standard. (See Guidelines, § 15064(f)(1).) Moreover, by their nature cross-references do not effectively promote clarity and transparency, since they require the reader to consult external sources. Therefore, CARB should revise these provisions to explicitly refer to the fair argument standard. Notably, such a change would be consistent with the revisions CARB made to § 60004.1(c), which now expressly incorporates the fair argument

standard. (See Modifications, § 60004.1(c) ["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 supports a fair argument*** that the proposed project would have a significant or potentially significant effect on the environment."] [emphasis added].)

Accordingly, subsections (b)(1) and (b)(2) should be revised as follows:

> (b)(1) If CARB determines that there is substantial evidence that supports a fair argument (as set forth in California code of Regulations, section 15064~~, including subsection (f) of section 15064~~) that any aspect of the project, either individually or cumulatively, may have a significant effect on the environment, CABR shall . . .
> . . . .
> (2) If CARB determines that there is no substantial evidence that supports a fair argument (as set forth in California code of Regulations, section 15064~~, including subsection 15064(f)~~) that any aspect of the proposed project may cause a significant effect on the environment, CARB shall . . .

D. Section 60004.2(b)(2) Should Be Revised to Permit Public Comment on the Project's CEQA Compliance If 15-Day Modifications Are Made to the Original Text

Section 60004(b) sets forth various rules regarding public comment on CARB's environmental documents. Section 60004.2(b)(2) 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." (Modifications, § 60004.2(b)(2).)

As explained in Lawson's previous comment letter, by narrowing the scope of public comment after a sufficiently-related change is proposed to exclude comments on the original proposal, subsection (b) is inconsistent with Sections 21091 and 21177 of CEQA. 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 of Public Hearing 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.

As the Fifth District Court of Appeal explained in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201, the public's role in the environmental review process does ***not*** end when the public comment period required under CEQA expires. Rather, "if a public hearing is conducted on project approval, then new environmental objections c[an] be made until close of this hearing." (*Id.*) Consequently, "[i]f the decision making body elects to certify the EIR without considering comments made at this public hearing, ***it does so at its own risk***. If a CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised at ***any point*** prior to close of the hearing on project approval." (*Id.* [emphasis added]; see also *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109; *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342.)

Accordingly, subsection (b)(2) 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.

E. Section 60004.2(a)(5) Should Be Revised to Expressly Require Discussion of a No-Project Alternative and Selection of an Environmentally Superior Alternative

Section 60004.2(a) sets forth the required contents for CARB's draft and final environmental impact analyses. The Notice states this section was revised to include "a cross-reference to section 15126.6 of the CEQA Guidelines, to clarify that the alternatives analysis principles in that section apply to alternatives analyses in CARB's Environmental Impact Analyses." (Notice at 3.) It now reads as follows: "(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, consistent with California Code of Regulations, title 14, section 15126.6." (Modifications at 7.)

As noted above, simply adding a cross-reference does little to promote transparency regarding the requirements applicable to CARB environmental analyses. (Cf. ISOR at 2 [stating that one of CARB's "primary goals" for the Amendments is to "increase public transparency by

more fully setting forth the requirements applicable to CARB environmental analyses"].) Simply citing § 15126.6 does not make it clear that the agency is required to evaluate a no-project alternative, or to select an environmentally superior alternative, in its environmental document. Because cross-references require the reader to consult external sources, they do not effectively promote clarity and transparency. Therefore, CARB should revise this provision to explicitly mandate discussion of a no-project alternative and the selection of an environmentally superior alternative, as proposed in Lawson's previous comment letter.

Alternatively, similar to the changes it made regarding application of the fair argument standard, (see Modifications, § 60004.1(c)), CARB could simply incorporate an express reference to the no-project alternative as follows:

> (5) A discussion of a reasonable range of alternatives to the proposed project, <u>including a no-project alternative,</u> which could feasibly attain most of the project objectives but could avoid or substantially lessen any of the identified significant impacts, consistent with California Code of Regulations, title 14, section 15126.6.

F. Section 60004(d) Should be Revised for Consistency with the Supreme Court's Ruling in *Berkeley Hillside Preservation v. City of Berkeley*

Section 60004(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. (Modifications, § 60004(d).) Although the subsection 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 of Public Hearing at 3.) Significantly, no changes were made to this provision in the modified text. (Modifications at 4–5.)

In particular, subsection (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 as proposed in Lawson's previous comment letter. Alternatively, it should be revised in some fashion to ensure consistency with the Supreme Court's holding in *Berkeley Hillside.*

G. Section 60004.2(c)(2)(B) Should Be Revised to Expressly Define the Term "Feasible"

Section 60004.2(c) addresses consideration and certification of a final environmental impact analysis as well as project approval. The Modifications revised Section 60004.2(c)(2)(B) to include a cross-reference to CEQA and the CEQA Guidelines for the definition of the term "feasible." However, as noted above, simply adding a cross-reference does little to promote transparency regarding the requirements applicable to CARB environmental analyses. (Cf. ISOR at 2 [stating that one of CARB's "primary goals" for the Amendments is to "increase public transparency by more fully setting forth the requirements applicable to CARB environmental analyses"].) Because cross-references require the reader to consult external sources, they do not effectively promote clarity and transparency. Therefore, CARB should expressly define the term "feasible" in accordance with referenced provisions of CEQA and the CEQA Guidelines.

H. Section 60004(a)(2) Should Be Revised for Consistency with the Change Made to Section 60004(a)(1)

Section 60004(a) sets forth definitions related to CARB's general environmental review provisions. The Notice states that CARB "made a minor change to the definition for 'CARB' to align with other statutory terminology that refers to CARB as the 'State Air Resources Board.'" (Notice at 2.) However, while subsection (a)(2) also refers to the "California Air Resources Board," this provision was not revised for conformity with the change to subsection (a)(2). Therefore, CARB should amend subsection (b)(2) for consistency with the terminology used in subsection (a)(1).)

CONCLUSION

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

Respectfully submitted,

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