State of California
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response**

PUBLIC HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE CALIFORNIA AIR RESOURCES BOARD'S CERTIFIED REGULATORY PROGRAM IN THE CALIFORNIA CODE OF REGULATIONS, TITLE 17, SECTIONS 60000-60007

Public Hearing Date: May 23, 2019
Agenda Item No.: 19-5-1

I. GENERAL

This Final Statement of Reasons has been prepared pursuant to Government Code section 11346.9.

The Staff Report: Initial Statement of Reasons for Rulemaking (staff report), entitled "Public Hearing to Consider Proposed Amendments to the California Air Resources Board's Certified Regulatory Program In The California Code Of Regulations, Title 17, sections 60000-60007," released February 27, 2019, is hereby incorporated by reference herein. The staff report contained a description of the rationale for the proposed amendments. On February 27, 2019, all references relied upon and identified in the staff report were made available to the public.

In this rulemaking, the California Air Resources Board (CARB or Board) proposed amendments to more fully set forth the procedures CARB follows, to harmonize CARB's procedures with established CEQA principles where appropriate, to harmonize the regulation to the statutory requirements, to eliminate regulatory ambiguity, to add greater specificity to CARB's environmental review process, and to update reference citations. These changes will bring greater efficiency and public transparency to rulemakings by creating a more consistent, uniform, and clear environmental review process. The proposed amendments would align with Public Resource Code section 21080.5, which sets forth the certified regulatory program requirements.

On May 3, 2019, CARB staff released a Notice of Public Availability of Modified Text for these amendments, including minor alterations to the proposed regulatory language to provide additional clarity to the proposal and to address public comments received, where appropriate. The Notice of Public Availability of Modified Text and modifications to the proposed regulatory language to the were made available for public comment from May 3, 2019, through May 20, 2019, in advance of the Public Hearing. The Board adopted the proposed amendments and modifications to the proposed amendments at its May 23, 2019, Public Hearing.

A. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

The Board has determined that this regulatory action will not result in a mandate to any local agency or school district the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

B. CONSIDERATION OF ALTERNATIVES

For the reasons set forth in the Staff Report, in staff's comments and responses at the hearing, and in this FSOR, the Board determined that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed, or would be as effective and less burdensome to affected private persons, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law than the action taken by the Board. Neither CARB nor any public commenter identified any reasonable alternatives that would lessen any adverse impact on small business because the proposed changes are clarifications and updates pertaining to CARB's administrative procedures that have no potential for economic impact on small businesses. For the evaluation of reasonable alternatives considered, please see the staff report, chapter VIII.

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

A. MODIFICATIONS APPROVED AT THE BOARD HEARING AND PROVIDED FOR IN THE 15-DAY COMMENT PERIOD

1. In section 60003(a), CARB made a change to clarify that CARB's staff prepares and publishes staff reports. Note the distinction between CARB (the agency and its staff) and the state board (the decision-making body of CARB, commonly known as CARB's "Board"), as set forth in the definitions in section 60004(a).
2. In section 60003(b), CARB made a minor change to note that both the state board and CARB share the policy set forth in subsection (b). Previously that subsection only referred to the state board.
3. In section 60004(a)(1), 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". This subsection has also been modified to note that CARB's staff includes CARB's Executive Office (including the Executive Officer and his or her staff).
4. In section 60004(b)(1), a reference to subsection (f) of section 15064 has been added in response to a comment that this section could be clarified to note that the California Environmental Quality Act's (CEQA's) "fair argument" standard applies to a California Air Resources Board (CARB) determination regarding whether an Environmental Impact Analysis must be prepared. CARB believes the existing regulatory text was already clear as to the applicable legal standards,

including the “fair argument” standard, given the existing cross-reference to section 15064, subsection (f) of which sets forth the “fair argument” standard. However, CARB has added a specific reference to subsection (f) to make this even clearer.

5. In subsection 60004(b)(1)(A) (and in many other following sections), the term “Impact Environmental Analysis” has been changed to the term “Environmental Impact Analysis” at the suggestion of a commenter. This is simply a stylistic change that does not affect the substance of the regulation; it merely slightly changes the name of CARB’s Environmental Impact Report (EIR) equivalent CEQA document type.

6. In subsection 60004(b)(2), CARB has further clarified the legal standard for triggering EIR-equivalent review, as set forth in item 1 above. As noted above, CARB has added a reference to subsection (f) of section 15064 in response to a comment that this section 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. As noted above, CARB believes the existing regulatory text was already clear as to the applicable legal standards, including the “fair argument” standard, given the existing cross-reference to section 15064, subsection (f) of which sets forth the “fair argument” standard. However, CARB has added a specific reference to subsection (f) to make this even clearer.

7. In subsections 60004(e), 60004.1(e), 60004.2(e), 60004.3(f), and 60004.4(e), CARB made changes to ensure those subsections are consistent with each other. These changes also help 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. This construct is consistent with the decision in *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681. In that decision, the court held that CARB improperly delegated authority to undertake 15 day changes to the Executive Officer because the Board had not finalized its responses to environmental comments at the time it delegated its authority to the Executive Officer, and the Executive Officer lacked the “authority to approve or disapprove the project.” (*Id.* at 727-731.) By contrast, the proposed regulatory language sets forth two distinct phases in rulemaking proceedings. In the first phase, CARB completes its environmental review in connection with a proposed regulation, including any required responses to environmental comments. The Board considers both that regulation and the environmental review at a public hearing, and takes action to approve the proposed regulation. At the same time, it delegates the authority – in a second phase – to undertake any further 15 day regulatory changes to the Executive Officer (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. In this way, there is no separation between the authority to approve or disapprove the project and the authority to undertake any

associated environmental review. In considering potential 15 day changes, both of those functions would be delegated to the Executive Officer by CARB's Board.

Finally, note that some CARB rulemakings are undertaken in the first instance by the Executive Officer, rather than the Board. The provisions discussed here are not intended to affect those situations; rather, these provisions apply only to rulemakings considered in the first instance by the State Board.

8. In section 60004.1(c), CARB has added the words "that supports a fair argument" to more expressly recognize that the "fair argument" standard applies to a CARB determination regarding whether an Environmental Impact Analysis must be prepared. As noted above, CARB believes this was already clear in the existing language (which cross-references section 15064 of the CEQA Guidelines), but is adding this language at a request of a commenter.
9. In subsection 60004.2(a)(3), CARB has added the words "adverse or beneficial" to clarify that the discussion of environmental impacts in an Environmental Impact Analysis will cover both adverse and beneficial impacts.
10. In subsection 60004.2(a)(5), CARB has added 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. This change was requested by a commenter, and it clarifies CARB's original intent to align its CEQA procedures (including those regarding alternatives analysis) with traditional CEQA principles.
11. In section 60004.2(b)(3)(B), CARB has revised the language to reflect that CARB, rather than the state board, is generally the entity that prepares responses to environmental comments. Note the distinction between CARB (the agency and its staff) and the state board (the decision-making body of CARB, commonly known as CARB's "Board"), as set forth in the definitions in section 60004(a).
12. In section 60004.2(b)(5), CARB has corrected a cross-reference for subsection (b)(3)(E) to (b)(3)(D). Consistent with subsection (b)(3)(D), CARB has also added additional language to even more clearly state that CARB's written response to comment, where required, will be included in one of the forms set forth in subsection (b)(3)(D). That is, the response to comment will either be included as part of a Final Impact Environmental Analysis (or as an attachment thereto); in a revision to the draft Impact Environmental Impact Analysis; or in a separate response to comments document.
13. In section 60004.2(c)(2), CARB has made a minor change to note that CARB staff, rather than the decision-making body itself, prepares the response to comment document. The decision-making body then reviews the response to comment, along with other key documents, before taking action on the proposal.

B. NON-SUBSTANTIAL MODIFICATIONS

Subsequent to the 15-day public comment period mentioned above, staff identified the following additional non-substantive changes to the regulation:

> CARB amended section 60004(a)(2) to read ”state board” means the governing body of the California State Air Resources Board.” This is a nonsubstantial change to align with existing statutory language in Health and Safety Code section 39003 and elsewhere, and the regulatory language in section 60004(a)(1), as amended in the 15-day notice.

The above described modifications constitute non-substantial changes to the regulatory text because they more accurately reflect the numbering of a section and correct spelling and grammatical errors, but do not materially alter the requirements or conditions of the proposed rulemaking action.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

Written comments were received during the 45-day comment period in response to the May 23, 2019, Public Hearing notice, and written and oral comments were presented at the Board Hearing. Listed below are the organizations and individuals that provided comments during the 45-day comment period:

Comment Letter #	Commenter	Affiliation
1	Reeck, Donald (April 2, 2019)	None
2	Reeck, Donald (April 2, 2019)	None
3	Kinsey, John (April 15, 2019)	John R. Lawson Rock & Oil, Inc.
4	Quinn, William (April 15, 2019)	California Council for Environment and Economic Balance (CCEEB)

The following individual provided written comments on the 15-day changes:

Comment Letter #	Commenter	Affiliation
5	Kinsey, John (May 20, 2019)	John R. Lawson Rock & Oil, Inc.

The following individuals, listed in the order in which they spoke, provided oral testimony at the public hearing:

Commenter	Affiliation
Nicolas Cardella	John R. Lawson Rock & Oil, Inc.
Katherine Garcia	Sierra Club

Comment Letters #1 and #2 (Donald Reeck, April 2, 2019)

These comments address matters not relating to the proposed amendments, including questions about zero-emission vehicles, and vehicle charging station infrastructure. It appears these comments were intended for a separate CARB docket. No further response is necessary.

Comment Letter #3 (Lawson Rock & Oil, April 15, 2019)

Comment 3(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.)

> Agency Response to Comment 3(a): CARB disagrees with this comment. The content requirements of all staff reports have been moved to section 60004. That section provides that "the staff report shall be prepared in accordance with the requirements of Public Resources Code section 21080.5." (Proposed section 60004.) That statutory section includes requirements for, "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." (Pub. Res. Code § 21080.5(d)(3)(A).) To include these statutory requirements in section 60003, as well as in section 60004, would be duplicative and is unnecessary. Further, CARB did set out express requirements for each Environmental Analysis document type, including requirements for addressing mitigation measures (as appropriate; see sections 60004.1(a)(2), 60004.2(a)(3), and 60004.2(c)(2)(B)) and preparing alternatives analyses (section 60004.2(a)(5)). Finally, the Secretary for the Resources Agency has already reviewed CARB's proposed modifications, and did not determine that they would render CARB's regulatory program no longer certifiable. The expert agency with

jurisdiction over certified regulatory programs, therefore, disagrees with the commenter as well.

For these reasons, CARB declines to incorporate the suggested modifications in section 60003.

Comment 3(b). 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).)

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. City 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 v. 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."].)

> Agency Response to Comment 3(b): While the "fair argument" standard is generally-applicable CEQA law and need not be referenced in this rulemaking to apply, CARB has revised the proposed regulatory text to address this comment. Subsections (b)(1) and (b)(2) of section 60004 now expressly cross-reference subsection 15064(f) of the CEQA Guidelines, which sets forth the fair argument standard. A reference to the fair argument standard has also been added to proposed section 60004.1(c). No further edits are necessary.

Comment 3(c). 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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> Agency Response to Comment 3(c): The recommended additional text incorrectly characterizes the California Supreme Court's holding in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. An agency does not have a duty under this holding to make an express determination at the outset regarding the inapplicability of an exception, including the unusual circumstances exception, nor any determination about a potential project's features that may distinguish it from other projects in an exempt class. Instead, the party invoking an exception carries the burden of producing evidence to support that exception. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.) For the unusual circumstances exception, this could include evidence showing that the project has some feature that distinguishes it from others in the exempt class, such that there is a reasonable possibility of a significant environmental effect due to that unusual circumstance; or alternatively, evidence that a project *will* have a significant effect on the environment. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 [emphasis in original].) If presented with such evidence, CARB will determine, based on the entire record before it, whether there is an unusual circumstance that justifies removing the project from the exempt class—as is consistent with the Supreme Court's holding in *Berkeley Hillside*.
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> Legal issues with the commenter's suggestion aside, CARB does not agree that additional language is necessary to ensure consistency with legal precedent interpreting the unusual circumstances exception; the existing proposed regulatory language makes clear that all exceptions from section 15300.2 are potentially applicable to otherwise exempt CARB projects, just as they would be for any other project. For these reasons, CARB declines to incorporate the suggested modifications.

Comment 3(d):

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

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

established CEQA principles." (*Id*. at 2.) Accordingly, it should be removed from the Amendments in its entirety.

(John R. Lawson Rock & Oil, Inc. (April 15, 2019, Section C.3.))

Agency Response to Comment 3(d): CARB disagrees with this comment. The commenter's three related comments – alleging post-hoc environmental review, improper delegation, and piecemealing – reflect a fundamental misunderstanding of both the APA and the *POET* decision. As counsel of record in the *POET* case, the commenter is no doubt aware that that case concerned CARB's failure to have conducted an environmental analysis and response to comments raising environmental issues at the time the Board took action to approve the low-carbon fuel standards regulatory project, an approval that occurred at the APA public hearing occurring just after the 45-day comment period. The *POET* court held that the Executive Officer's later approval of the environmental analysis and response to comments was improper, fundamentally because the project approval and environmental approval occurred at different times. (*POET* at pp. 730-31.)

The regulatory proposal here does not present the same issue as in *POET.* This is because project approval would occur at the initial Board hearing (just after the 45-day APA comment period), and the Board would be approving the regulatory project at the same time it approves the environmental analysis and response to significant environmental issues raised. See the more detailed description of this process in Section II.A.7. of this FSOR and the discussion of the limited nature of subsequent environmental review in Response to Comment 3(g). The commenter has not identified any legal authority prohibiting CARB from delegating responsibility for developing and considering project modifications, and any necessary associated further/subsequent environmental review, to its Executive Officer. Doing so is plainly within the Board's authority. CEQA (and *POET*) also allow delegation so long as the delegation of authority to take action on a proposal is not split from the authority to conduct any required environmental review on that proposal. (See *POET, LLC v. State Air Res. Bd.* (5 Dist. 2013) 217 Cal. App. 4th 1214, at 728 and 730-731.)

Any subsequent/further environmental review following the initial project approval would not be "post hoc" or piecemealed; rather, it would be done in connection with a new revised proposal (often created in response to public input), and the associated environmental review would be done contemporaneously with that proposal, as contemplated by *POET.* (See *id.*) Furthermore, as explained in CARB's presentation at the May 23, 2019 Board meeting, such a scenario (involving subsequent environmental review due to subsequent 15-day modifications) is unlikely to arise. This is because, as a practical matter, the Administrative Procedure Act only allows 15-day changes that are closely related to the proposal as set forth in the 45-day day notice. This means that any 15-day changes cannot depart substantially from the project as proposed in the 45-day notice, and evaluated in the associated CEQA document. This requirement ensures that any 15-day changes do not result in a new separate piecemealed project. They simply involve

minor closely related revisions to a previously evaluated project, which is the regulation considered by the Board. In fact, most of CARB's 15-day changes are made at the request of public commenters during the public review period. 15-day changes are simply minor changes to a proposed regulation, and environmental impacts from a 15-day change have never been an issue in the past. To staff's knowledge, CARB has never undertaken a 15-day change that would result in new or substantially increased significant impacts, largely because the existing environmental analysis already covers any changes that would be "related" enough to be undertaken through 15-day changes.

As a practical matter, the commenter's argument, taken to its logical conclusion, would require all 15-day comments, and all purportedly environmental issues raised and responses thereto, to be returned to the Board for review and a second Board approval hearing, no matter how minor the regulatory changes (e.g. typos) or spurious the environmental issues raised (e.g. issues raised during the 45-day comment period and considered and rejected or overridden with finding and statement of overriding considerations and simply repeated by a commenter in a later 15-day comment period, as here.) This would essentially read out the limited 15-day process set forth in Government Code 11346.8 by essentially re-opening the original regulatory proposal each time a 15-day notice is issued, resulting in a potentially endless treadmill of responding to comments reaching back to the original proposal and bringing every minor modification back to the full CARB board for approval. This clearly is not the intent of the APA's 15-day change provision, and CARB cannot ignore the intent of that provision in harmonizing CARB's rulemaking and CEQA duties. The proposal allows – as has been CARB's practice since the *POET* decision – Executive Officer review of 15-day changes and any consequent environmental impacts to the degree necessary to determine that both the 15-day changes and those impacts remain within the scope of the Board's project approval, and to conduct any subsequent (and necessarily limited in scope) environmental analysis in the rare event it is needed.

With regard to the commenter's claims regarding project piecemealing, those claims, too, are misguided. The Executive Officer's action on 15-day changes is a modification to a previously reviewed project, not a new, separate "activity" giving rise to piecemealing concerns. As noted above, the scope and scale of 15-day changes is heavily constrained by the APA's requirement that such changes be "sufficiently related" to the original regulatory proposal. (Gov. Code § 11346.8(c).) As such, the Executive Officer's action involves considering whether further environmental review is appropriate. As noted above, in almost all (if not all) cases, the changes are so closely related to the original proposal that they are within the scope of the environmental analysis already prepared for the original proposal.

Finally, the Secretary for the Resources Agency has already reviewed CARB's proposed modifications, and did not determine that they would render CARB's

regulatory program no longer certifiable. The expert agency with jurisdiction over certified regulatory programs, therefore, disagrees with the commenter as well.

For these reasons, CARB declines to the commenter's suggestion to delete subdivision (e) of 60004.

See also Agency Response to Comment 3(g).

Comment 3(e).

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" standAard, 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.

<u>Agency Response to Comment 3(e):</u> See response to comment 3(b).

Comment 3(f).

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;
>
> (2) A description of the applicable environmental and regulatory setting for the project;
>
> (3) A discussion and consideration of environmental impacts and feasible mitigation measures which could minimize significant adverse impacts identified;
>
> (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
>
> (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 decision makers 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
>
> (7) A discussion regarding which of the alternatives considered is the environmentally superior alternative.

Agency Response to Comment 3(f): CARB agrees that CEQA's general principles regarding alternatives analysis should guide CARB's alternatives analyses in Environmental Impact Analysis level documents. Accordingly, CARB has added a cross-reference to CEQA Guidelines section 15126.6. This cross-reference addresses the commenter's concern, and it helps keep the regulatory text brief and consistent with the CEQA Guideline regarding alternatives. No further revisions are needed.

CARB disagrees with how the commenter has framed an agency's obligation regarding the "environmentally superior alternative". The commenter seems to read into CEQA a requirement that does not exist, and which would not make sense and would require unproductive discussion in CARB analyses even if it did exist. Neither the CEQA statute nor the Guidelines require an EIR to identify an environmentally superior alternative in all cases. CEQA references the "environmentally superior alternative" only in the context of projects for which the "no project" alternative is the environmentally superior alternative. Where that is the case, EIRs shall "also identify an environmentally superior alternative among the other alternatives." (CEQA Guidelines § 15126.6(e)(2).) Since CARB is an environmental protection agency, almost all of CARB's proposals will themselves constitute the "environmentally superior" alternative. The "no project" alternative would rarely, if ever, constitute the environmentally superior alternative. Therefore, in most cases, it is unnecessary and incorrect to identify a project *alternative* (distinct from the project itself) as "environmentally superior". No further changes are warranted.

Comment 3(g).

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]; *Mount 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 decision-making 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."

Agency Response to Comment 3(g):

The commenter seems to generally state that any public comments must unequivocally be allowed as timely until the close of the final public hearing. CARB disagrees. It is true that a primary purpose of CEQA is to facilitate good-faith public participation. However, CEQA also includes mechanisms that help protect against abusive comments and litigation by bad-faith commenters whose primary motivation is to hinder projects for reasons other than environmental protection. The commenter neglects to round out the body of law on this topic, so CARB does so in the following paragraphs.

CARB agrees that CEQA requires responses to comments which raise significant environmental issues and are received during the noticed comment period. However, CEQA does not require an agency to respond to late comments. (See *Residents Against Specific Plan 380 v. Cty. of Riverside* (2017) 9 Cal. App. 5th 941, 972; see also CEQA Guidelines § 15088(a) (providing that an agency must respond to comments "received during the noticed comment period," and "may respond to late comments").) Given that there is no legal duty to respond to late comments, the claimed inadequacy of responses to late comments cannot be a basis for challenging the legal inadequacy of an EIR. (See *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111.)

Many other provisions in CEQA also help guard against unproductive comments that are strategically filed late, or which are beyond the scope of the procedural step at issue. For example, when an EIR is recirculated, the CEQA Guidelines expressly provide that the lead agency need not respond to any comments which are not (1) received during the recirculation period and (2) relate to the chapters or portions that were recirculated. (See CEQA Guidelines § 15088.5, subsections (c) and (f)(2); see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 449.) Similarly, subsequent environmental review principles mandate that where an EIR has been certified for a project, that EIR is final and must be relied upon for subsequent approvals unless circumstances triggering subsequent environmental review exist. (See Public Resources Code § 21166.) Where subsequent environmental review is undertaken, the scope of public comments on that subsequent environmental review may reach only the subsequent environmental review – not the original environmental document. Case law is clear that the scope of the analysis is limited to only the incremental difference between the the original project and the modification prompting the subsequent environmental review. (See, e.g., *Friends of the College of San Mateo Gardens v San Mateo County Community College District* (2016) 1 Cal.5th 937, 949 (holding that "the event of a change in a project is not an occasion to revisit environmental concerns laid to rest in the original analysis"); see also *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1482 (rejecting the argument that the agency's environmental review of a project modification required the reconsideration of impacts already approved as part of the project's initial CEQA review). This is because the original environmental document, even if flawed, is legally deemed final and not subject to reconsideration or further judicial review. (See id.; see also *American Canyon Community United for Responsible Growth v. City of Am. Canyon* (2006) 145 Cal.App.4th 1062, 1073.) The CEQA Guidelines expressly state that "Information appearing after an approval does not require reopening of that approval." (CEQA Guidelines § 15162(c).)

From an APA perspective, as well, comments on 15 day changes must be limited to only the changes proposed in the 15 day text, and should not reach back to the initial 45 day regulatory text. (See Gov. Code § 11346.8(c), providing that "[a]ny written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9").)

The commenter states that "[b]y 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." Again, this is incorrect. As noted above, the APA plainly limits an agency's obligation to respond to 15 day comments to only those comments addressing the changes proposed in the 15 day notice. (See Gov. Code § 11346.8(c), providing that "[a]ny written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9").) CEQA also includes built-in protections against unproductive, repetitive comments that

improperly attempt to reach back to the original proposal, rather than addressing the modified proposal, as explained above. Both individually and taken together, these provisions and court decisions demonstrate that both CEQA and the APA were developed to balance the need for environmental analysis and public participation along with achieving finality and efficiency in public processes.

The commenter states that "the authority cited simply does not support narrowing public comment in the manner CARB proposes." The commenter claims the APA requires making available the "'full text' of the revised proposal, not just the sufficiently-related changes." Even if the commenter were correct on this point, it does not follow that releasing the complete regulatory text with 15-day modifications clearly indicated in any way means comment must be allowed on language that is not part of the 15-day changes. Read together with the provision that "[a]ny written comments received regarding the change must be responded to in the final statement of reasons" (Gov. Code § 11346.8(c)), the APA is clear that only comments regarding the 15 day changes are properly raised and require a response.

The commenter also states that "[i]f the legislature intended public comment to be limited to the effect of the sufficiently-related change only, there would be no need to recirculate the full text of the revised proposal." Again, the commenter misconstrues the provision regarding circulation of the revised regulatory text, and ignores the rest of the language in the very same subsection (Gov. Code § 11346.8(c)).

CARB therefore declines to make the requested change, as it would be inconsistent with established CEQA and APA practice, and would only serve to allow commenters to unduly delay CARB's proceedings without a corresponding benefit to public participation. As noted above, the public has always had, and will continue to have, ample opportunity to participate in CARB's rulemakings, fully consistent with established CEQA and APA practice. The commenter's desire for anyone to be able to lodge environmental comments for any purpose at any time before the final Board hearing is simply not required by law, and is contrary to the intent behind CEQA.

Finally, the commenter appears to claim that the APA somehow expands the scope of CARB's CEQA obligations. This is not the case, and the commenter provides no authority holding that the APA expands agencies' CEQA obligations. If the Legislature had intended to so modify the scope of a major statutory law, it would have done so expressly.

See also Agency Response to Comment 3(d).

Comment 3(h).

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.

> Agency Response to Comment 3(h): The regulatory language has been revised to incorporate CEQA's definition of "feasible", as requested by the commenter. See section 60004.2(c)(2)(B). That section cross-references CEQA Guidelines section 15364, which sets forth CEQA's definition of "feasible". Note that the commenter erroneously references CEQA Guidelines section 15363. That section does not pertain to the feasibility concept. Accordingly, CARB assumes the commenter's reference to section 15363 was intended to reference section 15364.

Comment 3(i).

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.

John R. Lawson Rock & Oil, Inc. (April 15, 2019, Section E.4.)

Agency Response to Comment 3(i): See Response to Comment 3(d).

Comment 3(j).

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.

John R. Lawson Rock & Oil, Inc. (April 15, 2019, Sections F. & G.)

Agency Response to Comment 3(j): See Response to Comment 3(d)

Comment 3(k).

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.

Agency Response to Comment 3(k): See Response to Comment 3(d).

Comment 3(l):

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:
>
> > (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, 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 decision-making 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 item~~s~~ ~~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~~.

(John R. Lawson Rock & Oil, Inc. (April 15, 2019, Section G.))

> Agency Response to Comment 3(l): CARB disagrees with this comment, and did not make any changes in response.
>
> Subdivision (b) properly interprets CARB's authorities and discretion under its Certified Regulatory Program to set forth the scope of the administrative record in both rulemaking and non-rulemaking settings. As an agency subject to both the APA and CEQA, CARB must balance and reconcile the sometimes-incongrouous requirements of both of these laws. CARB's ability to adopt a certified regulatory program (see Public Resources Code section 21080.5) helps CARB reconcile these requirements by tailoring the CEQA-related provisions to its specific needs and obligations.
>
> Contrary to the comment, Section 60005(b) creates no regulatory ambiguity by restating what is plainly true, i.e., what items will generally be included in a CEQA

administrative record, in a manner that also satisfies the APA's administrative record requirements. Section 60005(b) is also clearly consistent with CARB's objectives for this rulemaking to better inform the public and provide transparency, since CARB's existing CRP regulations provide no mention whatsoever regarding what the contents of the administrative record will be in any CEQA challenge and provide *no* guidance, including to this commenter.

The commenter essentially argues that *all* emails – and there can be tens if not hundreds of thousands of them for a given rulemaking or non-rulemaking CEQA project – that have a scintilla of connection to the proposed project (e.g. contain a key term somewhere within them) – are automatically part of the CEQA administrative record. We disagree that this is what CEQA requires, much less intends.

The primary goal of construing a statute is effectuating legislative intent. (*People v. Novoa* (2019) 34 Cal. App. 5th 564, 575.) Subsection (e)(10) of section 21167.7 (the administrative record provision at issue here) was signed into law in 1994. (SB 749, Thompson, Stats. 1994, ch. 1230.) The legislative intent documents do not contain any indication whatsoever that the Legislature intended to include in the administrative record documents upon which the decision maker did not rely, much less see. None of the legislative intent documents provide any indication that the Legislature intended in any way to include all e-mail communications in the administrative record.[2] Indeed, some of the legislative intent documents indicate that the intent of the bill adding subsection (e)(10) was to streamline the CEQA process, noting that "the author has introduced this measure because he believes that current law causes unnecessary delays in projects and redundant review," and that "[t]his measure is intended to eliminate frivolous litigation and unnecessary delays, and to avoid redundant and unnecessary review." (See Aug. 29, 1994, California Bill Analysis, Senate Floor, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Sen., 8/29/1994.) Since e-mail itself was not prevalent when this scope of record provision was adopted, and since the bill adding that provision

[2] See Aug. 29, 1994, California Bill Analysis, Senate Floor, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Sen., 8/29/1994; Aug. 25, 1994, California Bill Analysis, Assembly Floor, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 8/25/1994; Aug. 17, 1994, California Bill Analysis, Assembly Floor, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 8/17/1994; Aug. 10, 1994, California Bill Analysis, Assembly Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 8/10/1994; June 13, 1994, California Bill Analysis, Assembly Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 6/13/1994; Aug. 16, 1993, California Bill Analysis, Assembly Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 8/16/1993; July 12, 1993, California Bill Analysis, Assembly Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 7/12/1993; June 14, 1993, California Bill Analysis, Assembly Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Assem., 6/14/1993; Apr. 27, 1993, California Bill Analysis, Senate Floor, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Sen., 4/27/1993; Apr. 13, 1993, California Bill Analysis, Senate Committee, 1993-1994 Regular Session, Senate Bill 749, CA B. An., S.B. 749 Sen., 4/13/1993; 1993-1994, California Bill History, 1993-1994 Regular Session, Senate Bill 749, CA S. B. Hist., 1993-1994 S.B. 749.

was broadly intended to help streamline CEQA review, the Legislature could not have anticipated (and certainly could not have intended) such absurd results. As explained at the May 23, 2019 Board meeting, new section 60005(b) sets forth the documents which are actually considered and relied upon by the decision-making body. This aligns with the intent behind CEQA's administrative record related provisions, as observed by the court in *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal. App. 4th 885:

> "It is a fundamental CEQA precept that when assessing the adequacy of CEQA compliance, courts review the environmental documentation that actually was prepared and they assess the evidence that actually was utilized in preparation of the environmental documentation *and presented to or considered by the decision makers when the challenged determination was made*."

(*Id.* at 890 (emphasis added).)

As observed by at least one court, an overbroad interpretation like that offered by the commenter does nothing to further CEQA's informed decision-making and public disclosure purposes, and instead would result in considerable waste of agency and judicial resources. (See, e.g., *St. Vincent's Sch. for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal. App. 4th 989, 1019, (noting considerable waste of time and expense in petitioner's demand to include voluminous agency emails in administrative record).) Such a practice would also bog down the record before the court. Furthermore, it would add considerable delay to CEQA-related litigation due to the length of time needed to prepare the record. This would conflict with CEQA's provisions designed to expedite CEQA litigation, including CEQA's express intent that CEQA actions "be quickly heard and determined in the lower courts," and that CEQA actions shall be given preference over all other civil actions to ensure the case shall be "quickly heard and determined". (Pub. Resources Code § 21167.1(a) and (b).)

In the rulemaking context, the commenter's reference to and focus on "staff reports" in the CEQA vs. APA contexts is inapposite. This commenter is likely aware that "staff reports prepared by the agency" – the commenter's purportedly broader CEQA universe – is actually a very narrow category of documents that are always included in any CEQA administrative record. By contrast, the APA-record-driven categories (Government Code §11347.3(b)(7)) that the commenter claims are too narrow, actually cover the vast majority of studies, reports, references, etc. that comprise the bulk of any CARB rulemaking record, and that are therefore automatically included in Section 60005(b) as part of the CEQA administrative record. And contrary to the comment, Section 60005(b) includes both the APA "catch-all" record categories and the CEQA catch-all categories because it explicitly excludes certain documents only "…to the extent consistent with section 21167.6 of the Public Resources Code…," the very code section the comment claims CARB is under-including.

The commenter's claims regarding non-rulemaking items are essentially the same – though citing more purportedly omitted document types – and accordingly, CARB's response to those comments is the same as set forth above.

Comment 3(m).

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.

Agency Response to Comment 3(m): See response to comment 3(h), explaining that the proposed regulatory language has been revised to cross-reference CEQA's definition of "feasible." This definition need not be re-stated for every part of the regulation. CEQA's feasibility definition is a well-understood term of art, and is generally applicable CEQA law. Note that Public Resources Code section 21061.1, which also sets forth the same definition of "feasible" as the CEQA Guidelines, is outside Chapters 3 and 4 of Division 13 of the Public Resources Code, and is therefore applicable to agencies with certified regulatory programs. No further changes are needed.

Comment 3(n).

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 . . .
>
> Agency Response to Comment 3(n): The proposed amendments require CARB to provide a written response to all comments on environmental issues received during the noticed comment period, as required by the proposed amendments at section 60004.2(b)(3) that states, "CARB shall evaluate comments on environmental issues received during the noticed comment period and shall respond. . ." Section 60004.2(b)(5)'s use of "may" is simply an acknowledgement that not all final Environmental Impact Analyses will necessarily include a response to comments, either because no comments were received, or because CARB's response was included in some other document form (for example, as an attachment to the Final Environmental Impact Analysis, rather than as a chapter within it). The proposed amendments are clear that responses to environmental comments must be prepared for timely-filed comments that raise significant environmental issues. No further changes are necessary.
>
> The commenter also appears to suggest that the response to comment must be included in the Final Environmental Impact Analysis itself. This is not true, as CEQA guidelines state the response to comment may take the form of a revision to the draft EIR or may be a separate section in the final EIR. (14 CCR 15088, as applicable by Pub. Resources Code 21091.) Further, agencies with certified regulatory programs are only required to include written responses to significant environmental points raised during the comment period in the final action on the proposed activity. (Pub. Resources Code § 21080.5(d)(2)(D).)

Comment 3(o):

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."].)

> Agency Response to Comment 3(o): CARB disagrees with the statement that eliminating the certified regulatory program would meet the objectives of the proposed amendments, or that CARB failed to properly evaluate this as an alternative as required by Government Code section 11346.2(b)(4). As stated in the Initial Statement of Reasons, CARB has two primary goals in undertaking this rulemaking action, (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. (ISOR at 2.) Commenter correctly points out that eliminating the regulatory program would directly subject CARB to current CEQA principles and applicable statutory requirements without an additional regulatory scheme—and arguably could accomplish the first primary objective as outlined in the ISOR. However, the second primary goal of increasing public transparency by more fully setting forth the requirements applicable to CARB environmental analyses would not be accomplished by eliminating the certified regulatory program. Existing CEQA requirements are dispersed throughout statute, regulation, and subsequent judicial interpretation and construction. CARB's second primary goal of public transparency is accomplished by providing these requirements in an easy-to-access location within the Agency's own regulations, in a form that is tailored directly to CARB's processes, and in a way that helps align CARB's CEQA obligations with its APA obligations. This was the intent of the statement rejecting this alternative in the ISOR and remains true today. For these reasons, staff rejects the alternative of eliminating the existing certified regulatory program in its entirety.

Comment Letter 4 (California Council for Environmental and Economic Balance, April 15, 2019):

Comment 4(a):

Proposed Rule Section 60003(a) deletes the requirement to prepare a staff report "where the action contemplated may have a significant effect on the environment." Instead, the amended language provides that a staff report will be prepared only when a public hearing is required by law or when CARB voluntarily elects to prepare a staff report.

Proposed Rule Section 60003 also deletes the requirements to make staff reports available for public review and comment, and to distribute reports to government agencies with jurisdiction and to persons who have requested such reports. CEQA does not require a public hearing in every instance (CEQA Guidelines Section 15202(a), see also Proposed Rule Section 60004.2(b)(6)), but does require analysis of impacts and feasible mitigation or alternatives in every instance where an action may have significant environmental impacts. CEQA Section 21081, CEQA Guidelines Section 15064. CEQA Sections 21092, 21092.2 and 21092.5 also require circulation of staff reports containing environmental analyses for public review and comment, and distribution directly persons who requested copies and to commenting agencies, as provided in language deleted from Section 60003.

The Initial Statement of Reasons ("ISOR"), p. 5, clarifies that amended Section 60003(a) is intended to cover non-CEQA actions and "Other sections below set forth the public review and comment process for CEQA purposes." However, the intent to separate CEQA actions in Section 60004 from non-CEQA actions in 60003 is not reflected in the scope of amended Section 60004(b) which applies to a "staff report for a

proposed regulation or other state action for which a staff report is prepared under section 60003" (emphasis added). To clarify that CEQA and non-CEQA actions are treated separately, and CEQA documents must be prepared and subject to public review and comment process for all non-exempt actions subject to CEQA, proposed Section 60004 should be revised to replace "for which a staff report is prepared under section 60003" with "which may have a significant effect on the environment", i.e., to read: "A staff report for a proposed regulation, or other state action which may have a significant effect on the environment shall include an environmental analysis…."

> Agency Response to Comment 4(a): CARB agrees with the commenter that the appropriate level of CEQA analysis must be conducted for non-exempt projects proposed by CARB. CARB prepares staff reports in connection with all of its regulatory items and most of its non-regulatory items. The language cited by the commenter recognizes this fact. However, even if CARB does not prepare such a staff report, section 60004(b)(1) of the proposed regulatory text specifies that any activity which constitutes a CEQA "project" shall be accompanied by the appropriate level of environmental review documentation, tracking conventional CEQA principles. Therefore, CARB has left the regulatory text as originally proposed.

Comment 4(b):

Proposed Rule Sections 60004, 60004.1 and 60004.2 introduce the new term "Impact Environmental Analysis" to replace CARB's former term "Environmental Assessment." This terminology appears to have originally been intended to parallel the term "No Impact Environmental Analysis" in CARB's January 4, 2019 Discussion Draft of the Proposed Rule. The elimination of the confusing term "No Impact Environmental Analysis" and replacement with "Environmental Analysis Finding No Impacts" is a helpful clarification, as the former term incorrectly suggested that no impact analysis was performed and that no mitigation was required (i.e., that the action is exempt from CEQA) rather than that an analysis was performed and the result was a finding of no significant impact. However, in parallel with the Proposed Rule's "Environmental Analysis Finding No Impacts", the appropriate and grammatically sensible term when significant impacts do occur should be "Environmental Analysis" or "Environmental Impact Analysis", not the awkward "Impact Environmental Analysis."

> Agency Response to Comment 4(b): CARB agrees with the commenter that the recommended terminology change would improve the proposed regulatory text's clarity. CARB has made this revision.

Comment 4(c):

Proposed Rule Section 60004(d) enumerates other CARB actions purported to be categorically exempt from CEQA. Similarly, as Section 60004(d) correctly notes, these actions remain subject to CEQA if any of the exceptions to exemptions in CEQA Guidelines Section 15300.2 apply; e.g., for actions which cause significant cumulative

impacts, or have a reasonable possibility of causing significant impacts due to unusual circumstances. The incentives and disincentives created by ARB's grant and fee programs may have environmental consequences that trigger the exception to exemption. For example, grants for clean transportation projects or vehicle charging or fueling stations have the reasonably foreseeable – and intended – result of construction and operation of such facilities, together with any potentially significant environmental consequences.

> Agency Response to Comment 4(c): CARB agrees with the commenter that the exceptions to the categorical CEQA exemptions apply. CARB's regulatory text incorporates these exceptions by cross-referencing California Code of Regulations, Title 14, section 15300.2. (See proposed section 60004(d).) Those exceptions are generally-applicable CEQA law, as well. CARB notes that the circumstances described by the commenter (i.e., construction of vehicle charging and fueling facilities) do not necessarily trigger exceptions to the exemptions. CARB assumes the commenter included those statements simply to note that some level of construction activity may result, rather than to suggest that those circumstances would necessarily be disqualified from CEQA exemptions. Indeed, vehicle charger installation approvals around the state routinely and appropriately rely on categorical CEQA exemptions.

Comment 4(d):

Most of the content requirements for an Impact Environmental Analysis have been moved from Section 60003(b) to Section 60004.2(a). However, the inclusion of "beneficial environmental impacts associated with the proposed action" in current Section 60003(b) has been deleted. As recently amended, CEQA Guidelines Section 15124 expressly provides that an EIR may discuss project benefits.

Moreover, the ISOR, p. 6, states that CARB's intent in Section 60004(b)(1) is to require preparation of an environmental analysis document "if CARB determines there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect is adverse or beneficial…." (emphasis added). While not required by CEQA, which defines significant impacts as substantial adverse changes in the environment (CEQA Guidelines § 15382), CARB has discretion to elect a broader scope of analysis in its certified regulatory program as expressed in current Section 60 003(b). However, nothing in the Proposed Rule implements that intent; there is no mention of beneficial effects in the proposed language. Moreover, the only reference to beneficial effects is proposed to be deleted from Section 60003(b). The logical inference from the deletion is that CARB no longer intends to consider beneficial effects. If that is not the case, as the ISOR suggests, then the language in the current CARB regulations regarding beneficial impacts should be retained in Section 60004.2(a), consistent with amended CEQA Guidelines Section 15124.

Agency Response to Comment 4(d): CARB agrees with the commenter that beneficial impacts should be discussed in Environmental Impact Analyses. CARB has revised section 60004.2(a)(3) to add the words "adverse or beneficial" to clarify that the discussion of environmental impacts in an Environmental Impact Analysis will include beneficial impacts.

Note that while beneficial impacts will be considered and discussed, CEQA itself does not require analysis of beneficial impacts. (See Kostka & Zischke, Practice Under the California Environmental Quality Act (2018) at § 13.35.) As commenter notes, CEQA Guidelines section 15124 has been recently amended to address project benefits, but it states only that the statement of objectives in an EIR's project description "may discuss the project benefits." It does not state or suggest that EIRs (or EIR-equivalent documents) must, or even should, be prepared where a project has substantial beneficial impacts and no significant adverse impacts. Consistent with generally applicable CEQA law, CARB's reference to beneficial impacts in section 60004.2(a) is not intended to require preparation of an Environmental Impact Analysis for projects which would present only beneficial impacts and no significant adverse impacts. The reference to beneficial impacts in that section simply acknowledges CARB's existing practice of discussing beneficial impacts in its Environmental Impact Analysis level (EIR equivalent) documents.

The commenter notes some potential confusion regarding quoted language from page 6 of the ISOR. The ISOR provision at issue states in full:

> Subsection 60004(b)(1) identifies that if CARB determines there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect is adverse or beneficial, CARB shall do one of the following: prepare an Impact Environmental Analysis; rely on or tier from a prior environmental analysis, environmental impact report, negative declaration, or mitigated negative declaration; or prepare a supplemental environmental analysis.

(ISOR at 6.) That language traces the CEQA Guideline regarding Initial Studies (see CEQA Guidelines § 15063(b)(1).) Rather than stating intent to require an Environmental Impact Analysis due solely to beneficial impacts, that language instead explains that, consistent with generally established CEQA practice, CARB will not "net out" significant adverse impacts due to other beneficial impacts. In other words, if CARB concludes that the project would result in one or more significant and unavoidable adverse impacts, CARB will prepare an Environmental Impact Analysis, regardless of whether *the project's* overall effect is adverse or beneficial. For example, consider a proposed CARB regulation which would involve significant adverse impacts to geology and soils, and also substantial beneficial impacts from air pollution and greenhouse gas reductions. In that case, CARB would not conclude that no significant adverse impacts exist;

the geology and soils related adverse impact would remain (though the beneficial impacts would be relevant if a statement of overriding considerations is prepared).

Comment 4(e):

Proposed Rule Section 60004.2(b)(3) provides for CARB's evaluation and response to comments on a draft Impact Environmental Analysis. While written responses to late comments are not required, CARB must consider comments presented orally or in writing not only during the public comment period, but also prior to the close of the public hearing on the project. CEQA Section 21177(a).

Agency Response to Comment 4(e): CARB's proposed amendments include the requirement that CARB "shall consider the proposed Section 21177(a) states that a legal challenge may only be brought by the alleged grounds for noncompliance with CEQA were presented to the public agency during the noticed comment period or prior to the close of the public hearing on the project. This provision does not require agency consideration or response to such comments, however. Both on its own terms and when read in conjunction with other pertinent CEQA and APA provisions, CARB does not agree that this provision imposes duties on public agencies with regard to comments submitted outside of the noticed comment periods. See response to comment 3(g) for more discussion on this issue. No further changes are necessary.

Comments on the 15 Day Changes

Comment Letter 5 (Lawson Rock & Oil, May 20, 2019)

Comment 5(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." John R. Lawson Rock & Oil, Inc. (May 20 2019, Section A.)

Agency Response to Comment 5(a): CARB notes that this comment essentially reiterates Comment 3(l) made by this same commenter during the 45-day comment period. As such, because this comment is not directed at the limited modifications proposed for 15-day comment – it instead takes issue with the same 45-day language that the Board approved without agreeing with the commenter – the comment therefore arguably requires no further agency response. (See Response to Comment 3(g) regarding the limited scope of 15-day changes and comments.) Nonetheless, and without waiving objection to the relevancy of this comment, CARB responds as follows.

For the same reasons as in Comment and Response 3(l), CARB disagrees with this comment, and did not make any changes in response. The additional case the commenter cites here -- *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 – is not cited for anything not previously cited in the comment 3(l). And as the commenter acknowledges, this case takes an expansive view of the CEQA administrative record in the context of the more typical projects carried out by private developers rather than by public agencies (like CARB) entrusted with protecting the environment. Here, CARB, as a certified regulatory program has balanced its APA rulemaking responsibilities with its CEQA obligations. CARB proposed a common-sense procedure, then sought and obtained review by the Resources Agency (the expert State agency entrusted to interpret and administer CEQA). The Resources Agency did not determine that the amendments would render CARB's regulatory program no longer certifiable. And again, to the extent the commenter elevates all "relevant" documents for inclusion in the CEQA administrative record above all else, the proposed text allows for that reading to avoid any inconsistency with Public Resources Code section 21167.6. Thus no change was or is needed to the regulatory text.

Comment 5(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.)

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 decision-making 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 <u>the project</u> 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. John R. Lawson Rock & Oil, Inc. (May 20 2019, Section B.)

> Agency Response to Comment 5(b): CARB notes that this comment essentially reiterates Comment 3.d. made by this same commenter during the 45-day comment period. As such, because this comment is not directed at the limited modifications proposed for 15-day comment – it instead takes issue with the same 45-day language that the Board approved without agreeing with the commenter – the comment therefore requires no further agency response. Nonetheless, and without waiving objection to the relevancy of this comment, CARB responds as follows.
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> For the same reasons as in Comments and Responses 3.d., CARB disagrees with this comment, and did not make any changes in response.

Comment 5(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, CARB 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, CARB shall . .
>
> (b)(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 . . .
>
> Agency Response to Comment 5(c): CARB notes that this comment essentially reiterates Comment 3(b) made by this same commenter during the 45-day comment period. As such, because this comment is not directed at the limited modifications proposed for 15-day comment – it instead takes issue with the same 45-day language that the Board approved without agreeing with the commenter – the comment therefore arguably requires no further agency response. Nevertheless, see response to comment 3(b).

Comment 5(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.
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> Agency Response to Comment 5(d): CARB notes that this comment essentially reiterates Comment 3(g) made by this same commenter during the 45-day comment period. As such, because this comment is not directed at the limited modifications proposed for 15-day comment – it instead takes issue with the same 45-day language that the Board approved without agreeing with the commenter – the comment therefore arguably requires no further agency response. See also Agency Response to Comment 3(g) regarding the limited scope of 15-day changes and comments.

Comment 5(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.
>
> <u>Agency Response to Comment 5(e)</u>: CARB disagrees with the commenter's assertion that adding a cross-reference regarding CEQA's provisions governing alternatives analyses "does little to promote transparency regarding the requirements applicable to CARB environmental analyses." There are nearly countless ways the text of CARB's CRP could be expanded to include every provision of the CEQA statute, the Guidelines, and case law. Even if CARB accepted the commenter's invitation to do so, CEQA continues to evolve. The CEQA statute and CEQA Guidelines themselves frequently cross-reference existing provisions of law, rather than re-stating them in full. Doing so here has

the obvious benefit of helping keep CARB's regulatory text concise, while preserving clarity. No further changes are warranted.

Comment 5(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*.'

Agency Response to Comment 5(f): CARB notes that this comment essentially reiterates Comment 3(c) made by this same commenter during the 45-day comment period. As such, because this comment is not directed at the limited modifications proposed for 15-day comment – it instead takes issue with the same 45-day language that the Board approved without agreeing with the commenter – the comment therefore arguably requires no further agency response. (See also response to comment 3(g) regarding the limited scope of 15-day changes and comments.) Nevertheless, see Agency Response to Comment 3(c).

Comment 5(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.

> Agency Response to Comment 5(g): See responses to comments 3(h) and 3(m), explaining that the proposed regulatory language has been revised to cross-reference CEQA's definition of "feasible."

Comment 5(h):

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

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)(l).)

> Agency Response to Comment 5(h): This comment is ambiguous because the subsections cited for amendment in the comment's text do not match those in the heading. However, assuming the commenter's heading correctly and accurately states the commenter's position (which is reasonable, as section 60004(b)(2) does not contain the phrase "California Air Resources Board"), CARB thanks the commenter for bringing this to CARB's attention, and CARB will address this minor oversight in finalizing the rulemaking package. CARB will amend section 60004(a)(2) to read:
>
> > (2) "state board" means the governing body of the ~~California~~ State Air Resources Board."

This is a nonsubstantial change to align with existing statutory language in Health and Safety Code section 39003 and elsewhere, and the regulatory language in section 60004(a)(1), as amended in the 15-day notice.

Oral Testimony at May 23, 2019 Hearing

Nicolas Cardella, Wanger Jones & Helsley (representing Lawson Rock & Oil, Inc.)

Comment: The commenter thanked staff for their hard work on the amendments and for promoting clarity and transparency. The commenter also objected to the delegation related provisions, claiming they improperly piecemeal environmental review, improperly delegate decision-making authority, and authorize post-hoc environmental review. The commenter also claimed the amendments "prohibit the public to make environmental comments on 15 day modifications." (May 24, 2019 Board Hearing Transcript at 18, line 14.) The commenter claims that "under CEQA, you can comment on the environmental analysis up until the close of the public hearing on the 15-day modifications," and claims to have obtained a ruling in their favor on this precise issue. Finally, the commenter claims the amendments "falsely equivocate[] the requirements for the APA administrative record with the CEQA administrative record."

Agency Response: The commenter re-stated several arguments raised in previous comment letters submitted by the commenter's law firm. Regarding the claims pertaining to improper delegation, piecemealing, and post hoc environmental review, see Agency Response to Comment 3(d).

Regarding the claims that the amendments prohibit the public from submitting environmental comments on 15 day modifications, CARB notes that this statement is incorrect. The amendments do not prohibit the public from commenting on 15 day modifications. Rather, they properly clarify that the scope of public comment on 15 day modifications must be limited to the changes set forth in those amendments, rather than "reaching back" to the original proposal (which itself already underwent 45 days of public comment). This approach is in line with many other aspects of CEQA that guide the scope of public review and comment on modifications to an original project proposal. See Agency Responses to Comment 3(g) and 5(d).

The commenter further claims that "under CEQA, you can comment on the environmental analysis up until the close of the public hearing on the 15-day modifications," and claims to have obtained a ruling in their favor on this precise issue. This, too, is misleading at best. As noted above, various established provisions in CEQA recognize that public comment periods on changes to an original proposal can properly be limited to those changes. CEQA itself says nothing about comment on 15 day modifications specifically, and CARB has exercised its reasonable discretion in addressing how 15 day changes are treated under its CRP, in line with established CEQA principles limiting the scope of environmental review for modifications to an earlier, previously-reviewed proposal. Furthermore, the court ruling referenced by the commenter was not citable authority, and did not hold what

the commenter said it held. The commenter was referring to a May 15, 2019 superior court order regarding a demurrer in one of the lawsuits the commenter has brought against CARB. (See *John R. Lawson Rock & Oil Inc. v. California Air Resources Board et al.,* Fresno County Superior Court Case No. 19CECG00331, May 15, 2019 Order Overruling In Part, Sustaining In Part, Respondents' Demurrer.) In that order, the court held that because CARB decided to hold a hearing after the petitioner submitted their comments, those comments were validly submitted such that the petitioner had standing to bring the lawsuit at issue. That order was simply an order on demurrer, not a final court decision; it was issued by a superior court, which is not binding authority; and it was based not on any binding CEQA principle, but rather on the lack of clarity in CARB's existing CRP, which is subject to change via amendments to CARB's CRP. This very rulemaking action clarifies the issues litigated in that demurrer. This is an example of the lack of clarity in CARB's existing CRP regulations, which has led to unintended consequences – including the commenter's interpretation of CARB's existing CRP in that litigation.

Regarding the claim that the amendments "falsely equivocate[] the requirements for the APA administrative record with the CEQA administrative record," see Agency Response to Comment 3(l).

Katherine Garcia, Sierra Club California

Comment: The commenter expressed support for the amendments, noting that CARB's CRP has not been updated since 1981, and that CEQA law has evolved considerably since then. The commenter thanked CARB for working to create a more uniform and clear environmental review process, and recommended that the Board adopt the proposed amendments.

Agency Response: CARB staff thanks the commenter for her support.

IV. PEER REVIEW

Health and Safety Code Section 57004 sets forth requirements for peer review of identified portions of rulemakings proposed by entities within the California Environmental Protection Agency, including CARB. Specifically, the scientific basis or scientific portion of a proposed rule may be subject to this peer review process. Because the proposed amendments further specify and update CARB's administrative procedures only, the proposed amendments are not utilizing a scientific basis or scientific portion and do not impact the public at large.

V. NONDUPLICATION

As noted throughout the ISOR and the FSOR, CARB has made efforts to avoid duplicating provisions from the CEQA Guidelines in its Certified Regulatory Program, including by cross-referencing the CEQA Guidelines where appropriate. Therefore,

CARB's regulatory program avoids duplicating provisions in the CEQA statute and guidelines except in certain circumstances where duplication was necessary for clarity.