

UPDATED INFORMATIVE DIGEST

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

This Updated Informative Digest is prepared pursuant to California Government Code section 11346.9(b).

Background:

As described in the DATE notice, these proposed regulatory amendments further describe and update the procedures set forth in California Code of Regulations, title 17, sections 60000 through 60007 that, in part, constitute CARB's "certified regulatory program" under Public Resources Code section 21080.5 (hereafter section 21080.5). The California Air Resources Board's (CARB or board) certified regulatory program is considered to be a California Environmental Quality Act (CEQA) equivalent process, which will be updated through this proposal to further describe CARB procedures for the preparation and adoption of environmental analyses regarding projects that may significantly affect the environment.

CARB's current certified regulatory program has not been amended since 1981, and it contains few specifics regarding CARB's environmental review process. In this rulemaking, CARB is proposing to update its certified regulatory program to more fully set forth its CEQA review procedures. Proposed changes include to further specify notice and comment requirements, exemptions, definitions, and the different procedures that will apply to different types of CARB environmental review. Such changes will bring greater efficiency, transparency, and certainty to CARB's planning and rulemaking processes by creating a more uniform and clear environmental review process. It will also improve alignment with current CEQA principles.

On May 3, 2019, CARB released its Notice of Public Availability of Modified Text, with proposed modified regulatory language developed in response to comments received since the Initial Statement of Reasons was released to the public on February 27, 2019. These modifications included minor alterations to the proposed regulatory language to provide additional clarity to the proposal. Staff presented these proposed regulatory amendments to the Board at its May 23, 2019, public hearing for consideration for adoption. At that hearing, the Board approved for adoption the modifications to the proposed regulation order, as contained in Attachment B to Resolution 19-13.

Sections Affected:

Staff proposed amendments to California Code of Regulations, title 17, sections 60000, 60002, 60003, 60004, 60005, 60006, and 60007.

Staff also proposed adoption of California Code of Regulations, title 17, sections 60004.1, 60004.2, 60004.3, and 60004.4.

Summary of Proposed Modifications Made Available With the Notice of Public Availability of Modified Text:

The following summary does not include all modifications to correct typographical or grammatical errors, changes in numbering or formatting, nor does it include all nonsubstantial revisions.

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 decisionmaking 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 more clear.
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 4 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 more clear.

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 decisionmaking 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 decisionmaking body itself, prepares the response to comment document. The decisionmaking body then

reviews the response to comment, along with other key documents, before taking action on the proposal.

In addition to the modifications described above, additional modifications correcting grammar, punctuation and spelling have been made throughout the proposed changes. These changes are nonsubstantial.

Comparable Federal Regulations:

During the process of developing the proposed regulatory actions, staff conducted a search for any similar Federal regulations on this topic and could not identify any comparable regulations.

An Evaluation of Inconsistency or Incompatibility with Existing State Regulations (Gov. Code, § 11346.5, subd. (a)(3)(D)):

During the process of developing the proposed regulatory actions, staff conducted a search for any similar regulations on this topic and concluded these regulations are neither inconsistent nor incompatible with existing state regulations.