

State of California
AIR RESOURCES BOARD

PROPOSED AMENDMENTS TO THE QUORUM DEFINITION
California Code of Regulations, Title 17, Section 60003

STAFF REPORT: INITIAL STATEMENT OF REASONS

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I. INTRODUCTION AND BACKGROUND

This proposed regulatory amendment updates the quorum definition in California Code of Regulations, title 17, section 60003 to harmonize with the January 1, 2017 amendments to Health of Safety Code section 39510, which added two members of the Legislature as nonvoting ex officio members of the Air Resource Board (ARB or Board).

Section 60003 was promulgated in 1978 and provides, in its entirety:

§ 60003. Quorum.

The presence of a majority of the total appointed members of the state board shall constitute a quorum, and formal decisions shall be by vote of a majority of the quorum. No formal decision on any item shall be made in the absence of a quorum.

The meaning of this language was unambiguous prior to the addition of the nonvoting members because the Board had only voting members prior to 2017. The minimum quorum needed to vote on formal decisions was calculated by counting a simple majority (half plus one) of the total number of members.

Section 60003 also provides that formal decisions be made by vote of the majority of the quorum. For example, in 2016, the Board consisted of 14 voting members, therefore the quorum was 8 members and a majority of the quorum was 5, meaning at least 5 “yes” votes were needed to formally adopt a measure.

Beginning January 1, 2017, the Board was enlarged to 16 total members, 14 of which are voting members as before and 2 of which are nonvoting ex officio members. Health and Safety Code section 39510 governs the composition of the Board and provides for the number of members, the appointment process, the qualification criteria and the terms of office. Subdivision (a) provides for the existence of the 14 voting members:

The State Air Resources Board is continued in existence in the California Environmental Protection Agency. The state board shall consist of 14 voting members.

Section 39510 was amended by Assembly Bill (AB) 197 (Stats. 2016, ch. 250) effective January 1, 2017. Although the totality of the changes made by AB 197 are beyond the scope of this document, we note the one change that has led to the need for this amendment. Namely, subdivision (i) was added to section 39510 to provide:

In addition to subdivision (a), two Members of the Legislature shall serve as ex officio, nonvoting members of the state board. One member shall be appointed by the Senate Committee on Rules. One member shall be appointed by the Speaker of the Assembly.

The ex officio positions are currently occupied by Senator Ricardo Lara and Assemblymember Eduardo Garcia.

For the reasons discussed in more detail in Section II., ARB is proposing to update its quorum definition to explicitly provide what is now implied in the regulatory language, i.e., *voting* members only count toward the quorum. This update would eliminate an interpretation of the definition that would count ex officio members toward the quorum. As explained below, such an interpretation would not harmonize with the requirement in section 60003 that formal decisions be made *by vote*, and with the statutory provision which established that the two new positions on the Board are *nonvoting*.

We are also updating the reference citations for section 60003 by deleting inapplicable and outdated citations, and adding Health and Safety Code section 39510, as that is the specific statutory provision interpreted in section 60003.

II. THE PROBLEM ADDRESSED AND THE BENEFITS OF THE PROPOSAL

As mentioned above, the current quorum definition dates back to 1978 and implicitly assumes that all members have voting rights. The definition sufficed as long as all Board members were voting members, which had been the case until January 1, 2017 when the AB 197 amendments took effect. As the Board's membership changed with the addition of the two nonvoting positions, the existing quorum definition became susceptible to different interpretations.

An isolated reading of the quorum definition without the larger statutory and regulatory context may lead to the interpretation that the ex officio count toward the quorum. Such an interpretation would enlarge the quorum from 8 to 9, since 9 is the majority of a total membership of 16 including ex officio members. The amendment would eliminate this potential interpretation of the quorum provision and avoid absurd consequences, as explained below.

Counting nonvoting members in the quorum under the existing definition would give rise to inconsistent voting scenarios and undermine the reliability of the Board's decision making process. Specifically, a quorum based on the total statutory membership, including ex officio, would be 9 members and the minimum number of votes needed to approve a measure would be at least 5. This quorum of 9 may include the 2 nonvoting members on occasion, depending on attendance. In a scenario where the quorum of 9 includes 2 nonvoting members, the 5 affirmative votes needed for formal action would need to be generated by only 7 members, because the ex officio members in the quorum cannot vote. Five votes out of seven is the equivalent of a 71% majority vote. This effect is not contemplated by the regulation which requires only a simple majority vote, and is unsupported by the statute which provides only that the ex officio members are *nonvoting* (Cal. Code Regs., tit. 17, § 60003; Health & Saf. Code, § 39510 subd. (i)).

Additionally, counting nonvoting members in the quorum under the existing definition generates tension within the provisions of the same section. The same regulation that

defines quorum as a majority of the total statutory membership of the Board also requires the Board to make formal decisions only *by vote*, and nonvoting members cannot possibly fulfill that requirement. (Cal. Code Regs. tit. 17, § 60003).

Furthermore, including the ex officio members in the quorum would unrealistically extend to them attendance and participation expectations that are not supported by the language of the statute. Health and Safety Code section 39510 subdivision (i) provides that the two members of the Legislature serving ex officio on the Board are *nonvoting*. To require from ex officio members the same rigorous participation in ARB's decision making process as expected of the voting members would not be in harmony with the statute.

For all these reasons, the proposed amendment is needed to clarify that voting members only count toward the quorum. In addition to this clarifying amendment, we are also updating the reference citations for section 60003 by deleting inapplicable and outdated citations, and adding Health and Safety Code section 39510, as that is the specific statutory provision interpreted in section 60003.

III. THE SPECIFIC PURPOSE AND RATIONALE FOR EACH AMENDMENT

We are amending California Code of Regulations, title 17, section 60003 to read as follows (additions are underlined, deletions are in strikeout font):

§ 60003. Quorum.

The presence of a majority of the total appointed voting members of the state board shall constitute a quorum, and formal decisions shall be by vote of a majority of the quorum. No formal decision on any item shall be made in the absence of a quorum.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code.
Reference: Section 39510, Health and Safety Code. ~~FTC v. Flothill Products, 389 U.S. 179, 183 (1967); Vita-Pharmacals v. Board of Pharmacy, 110 Cal.App.2d 826 (1952); Robert's Rules of Order.~~

For the reasons discussed in detail in Section II. above, we are adding the word "voting" to clarify that only voting members count toward the quorum. This amendment would maintain the status quo for the 14 voting members of the Board. It would not impact the voting rights of the 2 ex officio members, because Health and Safety Code section 39510 subdivision (i) provides that ex officio members are nonvoting members. This change would avoid an interpretation of the current quorum definition that would be inconsistent with the statute and the existing regulatory scheme, as discussed above.

In the same section, we are also updating the reference citations for section 60003 by deleting inapplicable and outdated citations, and by adding Health and Safety Code section 39510, as that is the specific statutory provision interpreted in section 60003.

IV. ENVIRONMENTAL ANALYSIS

A. Introduction

This section provides the basis for ARB's determination that the proposed amendment is exempt from the requirements of the California Environmental Quality Act (CEQA). A brief explanation of this determination is provided in section B below. ARB's regulatory program, which involves the adoption, approval, amendment, or repeal of standards, rules, regulations, or plans for the protection and enhancement of the State's ambient air quality, has been certified by the California Secretary for Natural Resources under Public Resources Code section 21080.5 of CEQA (Cal. Code Reg., tit. 14, § 15251, subd. (d)). Public agencies with certified regulatory programs are exempt from certain CEQA requirements, including but not limited to, preparing environmental impact reports, negative declarations, and initial studies. ARB, as a lead agency, prepares a substitute environmental document (referred to as an "Environmental Analysis" or "EA") as part of the Staff Report prepared for a proposed action to comply with CEQA (Cal. Code Regs., §§ 60000-60008). If the amendment is finalized, a Notice of Exemption will be filed with the Office of the Secretary for the Natural Resources Agency and the State Clearinghouse for public inspection.

B. Analysis

ARB has determined that the proposed amendment is exempt from CEQA under the "general rule" or "common sense" exemption, California Code of Regulations, title 14, section 15061(b)(3). The common sense exemption states a project is exempt from CEQA if "the activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA."

The proposed regulation is an administrative update to the quorum definition, in order to bring the definition into alignment with the statutory amendment that added two nonvoting positions to the Board, effective January 1, 2017. The regulation concerns only the Board's internal procedure for establishing a quorum for voting on formal decisions, and it has no potential for material impact on any regulated entity or the environment.

Based on ARB's review it can be seen with certainty that there is no possibility that the proposed amendment may result in a significant adverse impact on the environment; therefore, this activity is exempt from CEQA.

V. ENVIRONMENTAL JUSTICE

State law defines environmental justice as the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. (Gov. Code § 65040.12, subd. (c)). ARB is committed to making environmental justice an integral part of its activities.

The proposed regulation is an administrative update to the quorum definition, in order to bring the definition into alignment with the statutory amendment that added two nonvoting positions to the Board effective January 1, 2017. The regulation concerns only the Board's internal procedure for establishing a quorum for voting on formal decisions, and it has no potential to impact disadvantaged communities, or environmental justice policies and topics.

VI. ECONOMIC IMPACT ASSESSMENT

Government Code sections 11346.2(b)(2) and 11346.3(b) require the preparation of an economic impact assessment for a non-major regulation, while Government Code sections 11346.2(b)(2) and 11346.3(c) require the preparation of a standard regulatory impact analysis for a major regulation (as defined by Department of Finance regulations).

The changes proposed here are administrative updates that impact the Board's voting procedure only, therefore they are not expected to have an economic impact on any person or entity. The regulation is not expected to have a significantly adverse impact on any California businesses, including small businesses. The regulation has no fiscal impact on State agencies.

The regulation is not expected to create or eliminate any jobs within the state. The regulation is not expected to impact the creation of new businesses or the elimination of existing businesses within the state, or the expansion of businesses currently doing business within the state.

The benefits of this regulation, as discussed in Section II above, would be to clarify the regulatory language, thereby improving the Board's voting process and ARB's overall administrative efficiency. Therefore, the regulation is not expected to impact or to benefit the health and welfare of California residents, worker safety, and the state's environment.

VII. EVALUATION OF REGULATORY ALTERNATIVES

Government Code section 11346.2, subdivision (b)(4) requires ARB to consider and evaluate reasonable alternatives to the proposed regulatory action and provide reasons for rejecting those alternatives. The only alternative identified is to do nothing, which would lead a potential interpretation of California Code of Regulations, title 17, section

60003 that would count ex officio toward the quorum resulting in absurd consequences as discussed in Section II.

No other alternative proposed was found to be less burdensome and equally effective in achieving the purposes of the regulation in a manner than ensures full compliance with the authorizing law.

Small Business Alternative

Government Code section 11346.2(b)(4)(B) requires a description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives. ARB has not identified any reasonable alternatives that would lessen any adverse impact on small business. Because the changes proposed here are administrative updates that impact the Board's voting procedure only, the regulation has no economic impact on small businesses.

Performance Standards in Place of Prescriptive Standards

Government Code section 11346.2(b)(4)(A) requires that when ARB proposes a regulation that would mandate the use of specific technologies or equipment, or prescribe specific actions or procedures, it must consider performance standards as an alternative. In addition, Government Code section 11346.2(b)(1) requires that when a proposed regulation would mandate the use of specific technologies or equipment, ARB include in the ISOR a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

Because the changes proposed here are administrative updates that impact the Board's voting procedure only, they are not mandating a performance or prescriptive standard and do not impact the public at large.

VIII. NO DUPLICATION OF FEDERAL REGULATIONS

Government Code section 11346.2(b)(6) requires ARB to describe its efforts to avoid unnecessary duplication or conflicts with federal regulations that address the same issues.

This is a clarifying change governing the Board's voting procedure, and does not duplicated any federal regulation.

Appendix A: Proposed Regulation Order

Amend 17 California Code of Regulations section 60003 to read as follows:

§ 60003. Quorum.

The presence of a majority of the total appointed voting members of the state board shall constitute a quorum, and formal decisions shall be by vote of a majority of the quorum. No formal decision on any item shall be made in the absence of a quorum.

Note: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Section 39510, Health and Safety Code. ~~FTC v. Flothill Products, 389 U.S. 179, 183 (1967); Vita Pharmaceuticals v. Board of Pharmacy, 110 Cal.App.2d 826 (1952); Robert's Rules of Order.~~