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Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814



Electronic submittal via:

<http://www.arb.ca.gov/lispub/comm/bclist.php>

re: Comments on Proposed 2016 State Strategy for the State Implementation Plan

The California Trucking Association (“CTA”), on behalf of its over 1,500 member companies, appreciates this opportunity to comment on the Proposed 2016 State Strategy for the State Implementation Plan (the “Plan”).

CTA believes that the Plan is deficient and must be revised to more specifically address the following issues:

- I. Need for Framework for Understanding Commercialization Pathway**
- II. Principles for Developing Regulatory Approach**
- III. Key Areas of Concern for the Trucking Industry**
- IV. Economic and Cost-Benefit Analysis**
- V. Avoid Measures that would be Preempted by Federal Law**
- VI. The CEQA Analysis Must More Thoroughly Examine Impacts that the Agency Knows will Flow from a Decision Approving the Plan**

Each of these issue areas is discussed below.

I. Need for Framework for Understanding Commercialization Pathway and Developing Regulatory Approach

The CTA has long been a fuel-neutral organization. It has many members who are actively participating in the development, piloting and demonstration of alternative fuel and electric-drive vehicles and would like to see these technologies become fully commercialized and cost-competitive with traditional internal combustion engines and fuels. In fact, some member fleets have been working to bring electric-drive vehicles to market for more than five years. But if CARB intends to mandate specific technologies, such mandates must be non-discriminatory—they must not target specific fleet operators and they must apply to private and public fleets alike.

Accordingly, we would like to engage CARB in further discussion about better articulating the commercialization pathway for these vehicles. We do not believe that end-user purchase mandates are an appropriate pathway to true commercialization. Broadly, we

would ask CARB to consider the following points regarding commercialization of electric-drive capable vehicles:

- Continued focus on technology neutral emission standards for manufacturers to spur innovation, including manufacturer credits.
- Continued focus on determining the marginal cost of technology pathways and prioritizing the most cost-effective approaches.
- Technology approaches should, in the long-term, result in comparably priced product compared to a conventionally-powered vehicle.
- Because any significant fleet modification to electric-drive capable vehicles will require significant public funding support, it is critically important that the agencies either make it clear that funding availability is not affected by the adoption of end-user mandates or consider different implementation mechanisms that do not preclude the use of incentives.
- Avoid creating market incentives for delivery service users to select providers who are not subject to zero emission technology requirements. Such a market influence could be created if CARB requires only a subset of fleet operators to bear the costs and burdens of fleet modification while exempting other operators. Any requirements should be non-discriminatory. Similar burdens could be placed on fleet operators where CARB has not put adequate enforcement mechanisms in place to ensure a level playing field.
- Where there is a near-term differential in up-front cost, but savings on fuel and maintenance of vehicles, CARB should work with stakeholders to establish a reasonable return on investment period through assumptions solidly based on real-world operations.
- The useful life of the vehicle should be similar to existing vehicles and expectations about reasonable useful life prior to retrofit or retirement mandates should be similarly established.
- Cost of ownership should be comparable to existing commercial vehicles.
- Vehicles must be certified to meet all State and Federal requirements.
- Warranty and maintenance agreements must meet existing standards, including those commonly negotiated by private fleets as part of large purchase orders.

- Manufacturers should be required to demonstrate the necessary resources and financial stability to meet warranty terms and maintenance requirements (parts and service) throughout the useful life of the vehicle.
- The feasibility and cost of building required infrastructure in existing facilities to support new technology should be carefully evaluated, along with the timing of such installation investments if new technology is to be phased in over time. California's unique permitting and environmental processes, which can take years to complete, must also be factored into any phasing plan.

Similarly, the plan should better articulate the role it foresees both public and investor-owned utilities and the Public Utilities Commission playing in the development of fueling and charging infrastructure, developing rate structures conducive to broader electric drive deployment in the freight setting, and innovative approaches to defraying infrastructure costs borne by fleets.

Unlike large projects involving major freight corridor infrastructure investments and upgrading of heavy duty vehicle fleets, Last Mile delivery must be approached on a more localized scale, as duty cycle demands vary greatly dependent on the urban or rural character of the communities these fleets serve. It will also be critically important to consider operational requirements for Last Mile fleet operators, including ongoing maintenance of vehicles and infrastructure, variances in utility rate structures and employee training. Each of these considerations will require careful planning of the implementation schedule, a task that will be especially important and difficult in light of the rapidly changing market that Last Mile delivery serves. These issues are more fully addressed in our comments on the Economic Assessment and the references set forth below, which are incorporated as if fully set forth herein.¹

II. Principles for Developing Regulatory Approach

We also recommend that CARB consider the following principles in any regulatory effort it undertakes to implement the measures set forth in the Plan:

- In order to increase regulatory certainty for businesses making capital investments and reduce the potential for stranded assets, work closely with stakeholders to

¹ See CalStart Report at http://www.calstart.org/Libraries/Publications/Electric_Truck_Bus_Grid_Integration_Opportunities_Challenges_Recommendations.sflb.ashx ; CARB Technology Assessment at http://www.arb.ca.gov/msprog/tech/techreport/bev_tech_report.pdf ; CalETC Report at <http://www.caletc.com/wp-content/uploads/2016/01/California-Transportation-Electrification-Assessment-Phase-3-Part-A.pdf> ; CARB Mobile Source Economic Analysis at http://www.arb.ca.gov/planning/sip/2016sip/2016mobsrc_appA.pdf

better estimate the useful life of equipment and integrate this knowledge into the rulemaking process and related economic assessments.

- Harmonize requirements, to the greatest extent possible, with federal and state rules to promote greater regulatory certainty.
- Provide regulatory flexibility in implementation and scheduling to potentially increase the affordability of large compliance investments. Compliance schedules should consider the time required to secure financing.
- Reward early adopters of technology and facilities that go “above and beyond” requirements.
- Avoid regulations that discriminate amongst providers of the same service, for example by regulating only certain fleets.
- Avoid creating competitive imbalances through inadequate or discriminatory enforcement practices.

Adhering to these principles as it develops specific regulatory approaches will encourage investment in California.

III. Key Areas of Concern for the Trucking Industry

A. The Emission Benefits of the Proposed Last Mile Regulation are Not Enforceable and Cannot be Included in the Plan

The EPA has well-established criteria that require the regulations included in SIPs to be enforceable and surplus. Under the proposed Last Mile regulation, CARB would require the purchase and use of zero-emission Class 3-7 delivery trucks in California.

However, unlike the situation with light-duty vehicles, no existing CARB regulations or any proposed measure in the Plan would require any entity to produce and sell any zero-emission Class 3-7 delivery trucks in California. To the extent that there is no requirement for zero-emission Class 3-7 delivery trucks vehicles to be produced and made available for sale in California, CARB cannot reasonably demonstrate that it will be able to enforce the proposed regulation and ensure that claimed reductions in emissions actually occur. Clearly, even CARB cannot force a California company to buy and use a vehicle that doesn't exist. Therefore the proposed measure cannot be included in the SIP because U.S. EPA will have to reject it as unenforceable based on their long standing criteria for approval of SIP measures.

B. CARB has Improperly Analyzed the Emission Benefits and Costs of a California-Only Low-NOx Engine Standard

According to the Plan, in the absence of federal action, CARB will adopt a California-only low-NOx standard that would apply to new heavy-duty vehicles purchased in California beginning in 2023. However, also according to CARB, “without federal action to implement this emission standard, emission reductions would come mostly from Class 4-6 vehicles (as most Class 7 and 8 vehicles operating in California were originally purchased outside the State) as a result of California-only regulations.”

Although it is well known that the heavy-duty on-road travel, and therefore NOx emissions, is dominated by emissions from Class 7 and 8 vehicles, Table 1 of the EA claims that the California-only standard would yield 86% (24 tons per day/ 28 tons per day) of the NOx emission reductions that the federal standard would provide. CARB staff has not provided the documentation necessary to identify the error in their analysis, but the result is clearly incorrect. It is also important to note that to the extent CARB is taking credit for emission reductions from low-NOx engines under the proposed California-only measure, it cannot claim the same NOx reductions as benefits under the proposed Last Mile regulation.

A similar situation exists for the capital cost estimates that CARB has used for the California-only standard reported in Table 4 of the EA which indicate that same value \$1,500 per unit would apply to both the California-only and federal standard. Clearly, the much higher volumes required with a federal standard will lead to lower compliance costs than a California-only standard. Further, it is not clear that California sales volumes of engines used in Class 4 to 6 vehicles are sufficient to induce engine manufacturers to produce low-NOx engines just for the California or even the California and Section 177 state markets. Again, this error in CARB’s analysis must be corrected.

C. The Current Proposed Low Emission Diesel Requirement is Not Cost Effective and Must be Modified

Under this proposed measure CARB would require 50% of diesel fuel sold in California by 2030 to be low emission. In the Plan, CARB quantifies the 2031 benefit of this proposed measure as 8 tons per day of NOx. Table 7 of the EA indicates that the measure will increase the cost of diesel fuel by \$1.22 per gallon and that the total cost of the measure through 2031 will be \$6 billion. However, CARB also admits that the measure would “provide NOx benefits predominantly from legacy (pre-2010)” diesel vehicles, and Table 2 of the EA indicates that emission benefits were only assumed to result from use of the fuel in legacy vehicles.

Given that the purpose of the Plan is to reduce criteria pollutant emissions, CARB’s admission that the fuel will not result in emission reductions from the vast majority of

vehicles that will use the fuel, and CARB's incremental cost estimate of \$1.22 per gallon, it appears that CARB will not be able to demonstrate that it is cost-effective. Spending \$1.22 per gallon for a fuel that provides no reduction in criteria pollutant emissions is by definition not a cost effective approach to reducing criteria pollutant emissions.

If CARB includes this measure in the Plan it must indicate that it plans to require the use of low emission diesel fuel only in those legacy vehicles where it will actually lead to a reduction in emissions.

IV. Economic and Cost-Benefit Analysis

A. Competitiveness

The Governor's Executive Order B-32-15 emphasizes the need to accelerate California's transition to a more efficient and less polluting freight transport system. The objectives laid out in the Executive Order represent a continuation of the State's priorities on an array of transportation, environmental, energy, and economic goals and objectives. Key among these goals is:

Supporting economic competitiveness: The freight industry is a major economic engine for our State and supporting the competitiveness of the freight transport system will be key to the continuing prosperity of California.

Despite the key role that the freight industry plays in California's economy, many elements of the industry operate on razor thin margins and are highly susceptible to economic cycles. Requiring California's freight businesses to make significant investments or meet burdensome regulatory standards that are not imposed in the rest of the country puts the state at a *competitive* disadvantage that could ripple through our economy and may cause the skilled workforce our industry requires to seek opportunities elsewhere.

Another key requirement of Executive Order B-32-15 is of particular importance:

Completing economic analysis: Assessing the impacts of actions, including the distribution of potential costs and benefits on California businesses, consumers, and the economy with public input is a critical part of the regulatory development process. Full economic impact analyses are required for all regulatory actions adopted by the Office of Administrative law.

Since last summer's announcement of Governor Brown's Executive Order B-32-05, the trucking industry has supported the call for a balanced, holistic view of the development and deployment of zero and near-zero emission freight equipment with the dual

imperatives of reducing emissions *while increasing the economic competitiveness of the State's freight industry.*

And yet, nowhere in the Economic Analysis is competitiveness even mentioned.

Increasing the economic competitiveness of the freight industry begins—but does *not* end—with the costs of the measures. Appendix A to the Plan, however, is woefully inadequate in its analysis of the costs and economic impacts of the Plan's specific measures affecting our members. First, for some measures, such as the Last Mile proposal, the underlying bases for the cost projections are not provided. Second, the cost estimates for some measures have significant gaps; for example, most NOx reduction benefits are not calculated for 2023. Similarly, the annual O&M cost for the Last Mile measure is not calculated. These gaps in the economic analysis make decision-making about the viability of these measures premature. Miscalculating either the costs or the benefits in even relatively minor ways can lead to dramatic and unanticipated impacts on the freight sector potentially moving the goal posts further down the field.

By placing a high priority on understanding the impact of state actions on competitiveness, allocating the necessary resources to the implementing agencies and avoiding stranded assets, CARB can send a positive signal to the private sector that it is serious about attracting and retaining investment in the State's freight system.

B. Cost-Effectiveness

1. Failure to Assess the Cost Effectiveness of Proposed Control Measures

Section 43013 of the California Health and Safety Code requires that CARB consider the need for, as well as the technical feasibility and cost-effectiveness of air quality regulations. In order to estimate the cost effectiveness of a proposed measure one simply divides the total cost of the regulations (in dollars) by the total emission reductions (in either tons or pounds) expected to result when the measure implemented.

Although approval of the Plan does not in and of itself result in the adoption of the regulation, CARB says the proposed measures are intended to result in a “comprehensive transformation” to cleaner vehicles and fuels and what little cost information is provided in the EA clearly shows that this transformation will be hugely expensive. CARB should therefore, at a minimum, provide preliminary cost-effectiveness estimates in order to allow the public to comment on whether or not it is likely that CARB will be able to demonstrate that the proposed measures are in fact cost-effective when they are ultimately considered for adoption. In addition to publishing preliminary estimates, CARB should also provide a comparison of those estimates to values from past regulations and explain in light of that

comparison why it views the proposed measures as complying with the statutory cost-effectiveness requirement.

2. Failure to Provide The Basis for Cost and Emission Benefit Estimates

Section 39601.5 of California Health and Safety Code requires that CARB make available to the public all information described in Section 11346.2 of the California Government Code related to air emissions and economic impacts when it adopts regulations. Examples of the types of data and information that CARB is required to provide can be found on the CARB website.²

Although CARB approval of the Plan does not result in the adoption of a regulation, the Plan and EA provide insufficient information to allow the public and decisionmakers to understand how the agency plans to demonstrate the technical feasibility of the proposed measures and the basis and sources for the assumed cost of the proposed measures.

For example, as set forth in Table 2 of the EA, the basis for all of the emission benefit estimates associated with proposed control measures are completely unsupported “assumptions” made by CARB staff. Similarly, the basis for the incremental and operating cost estimates presented by CARB in Tables 3 through 6 of the EA are not stated and no details regarding how the estimates were developed are included in the EA, the Plan or the DEA. Clearly, CARB needs to provide much more detail in order for the public to effectively comment on the proposed measures in the Plan.

3. Failure to Fully Account for the Cost and Economic Impacts of the Plan

As shown in Tables 3 to 8 of the EA, CARB has considered only the costs that will be incurred through 2031 although it is admitted in the EA that “additional O&M and capital costs may be incurred after 2031, but those costs are not included in this analysis.” Thus, CARB has failed to fully account for the costs of the Plan or to analyze the full impacts of the Plan on the California economy.

4. Failure to Accurately Contextualize Cost and Economic Impact of the Plan

The Economic Analysis is also constrained in ways that are artificial and could lead to skewed decision-making. For example, the Economic Analysis states that:

The annual average cost after implementation is estimated at \$6 billion, which is less than 1 percent of projected California GDP in 2031. In the context of the California economy, the anticipated economic impacts of the

² See for example http://www.arb.ca.gov/msprog/clean_cars/clean_cars_ab1085/clean_cars_ab1085.htm and <http://www.arb.ca.gov/msprog/onrdiesel/background/2014/Materials.htm>

State SIP Strategy are small and are not expected to impose a noticeable impact on the California economy.

Measuring the impacts of the Plan against the overall California economy obscures the impacts of the specific measures on specific industries that are key components of that economy. A specific measure may affect only one block in the wall that is California's economy, and yet weakening that block may undermine the entire wall. The significant burdens that the proposed measures would impose on the freight movement sector, and the trucking industry in particular would, we believe, have a much larger impact on California's economy than the 1% anticipated in the Economic Analysis—an impact that would not only be “noticeable”—but significant.

Limiting the Economic Analysis to impacts in California also obscures the real costs that the freight industry must bear. Many of the freight-related measures in the Plan would require trucking companies to modify operations not only in California, but outside the state as well in order to maintain operational efficiencies. Those modifications come with costs that must be considered in the decision-making process.

CARB has examined only the impact of costs incurred between 2016 and 2031 and then only in terms of its impact relative to the total state GDP. Given that only a fraction of the total cost of the Plan is being considered and much of the California economy will be unaffected by the Plan, this approach fails to recognize that individual sectors such as trucking may experience substantial economic impacts. The EA fails to even consider much less analyze impacts on individual sectors.

Based on the information presented in Tables 4 and 7 of the EA, the proposed on-road heavy-duty measures and the proposed low emission diesel fuel requirement in the Plan would cost the trucking sector about \$12 billion by 2031, but the full cost of the plan would be far greater. In assessing economic impacts, CARB must look at the individual sectors affected by the Plan not the entire aggregated California economy

The limited scope of the Economic Analysis thus not only fails to address the economic *competitiveness* the Governor directed the state's agencies to enhance, it fails to provide even the most basic information regarding the true costs of the measures to the trucking industry.

V. Avoid Measures that would be Preempted by Federal Law

A. FAAAA

The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) expressly preempts any state “law, regulation, or other provision having the force and effect of law

related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U. S. C. §14501(c)(1). The statute provides only three specific exceptions to preemption: vehicle safety, intrastate transportation of household goods and tow trucks. None of those exceptions is relevant here.³ The preemption provisions of the federal law were adopted “[t]o ensure that the States would not undo federal deregulation with regulation of their own,” *Morales v. Trans World Airlines, Inc.* (1992) 504 U. S. 374 (referring to identical provisions of the Airline Deregulation Act).

One of the key questions confronting the courts in early decisions concerning the scope of federal preemption under the FAAAA was whether a particular regulation “related to” the price, route or service of a motor carrier. In the case of the Last Mile measure, the question would be whether a purchase mandate “relates to” price, route or service.

The United States Supreme Court has held that a state law is “related to” price, route or service if it “if it has a connection with or reference to” price, route or service. *See Morales supra* at (airfare advertising is “related to” price, route or service and state regulation is therefore preempted); *see also Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 97 (employee retirement plans are “related to” price, route or service and state regulation is therefore preempted); *American Airlines, Inc. v. Wolens* (1995) 513 U. S. 219 (frequent flyer programs are “related to” price, route or service and state regulation is therefore preempted).⁴

As explained by the United States Supreme Court in *American Trucking Associations v. Los Angeles* (2013) 569 U.S. 133, placard and parking requirements relate to a motor carrier’s price, route, or service. The only disputed question was whether those requirements had “the force and effect of law.” The Port claimed that they did not, because the “concession contract” imposing these requirements was “just [like] a private agreement,” made to advance the Port’s commercial and “proprietary interests.” That issue is not presented by the proposed SIP measures relating to trucking operations—those measures, if not preempted, would clearly have the force and effect of law, and CARB would not be acting in a proprietary capacity. And just as clearly, if placarding and parking requirements “relate to” a “price, route or service,” so too does the selection of truck technology, power source and attendant infrastructure.

The technology required by the Last Mile measure is admittedly new and immature. So much so that that prices, routes, and services would be more directly and significantly impacted than they are by more traditional regulations. The mandated use of new and

³ 49 U.S.C. §14501(c)(2).

⁴ The Supreme Court has also held that the statute does not preempt state laws whose relation to prices, routes, or services is “tenuous, remote, or peripheral.” *Dan’s City Used Cars Inc. v. Pelkey* (2013), 133 S. Ct. 1769, 1774. That line of cases is inapposite, as the laws at issue were of general application and did nothing to impede competition in the trucking industry.

immature technology would effectively require carriers to develop or subsidize the development of new technology that could meet the regulatory mandate and carrier needs, modify facilities to install infrastructure for charging or refueling the vehicles, modify connections to the electrical grid or seek a modification of the grid itself in order to have sufficient capacity to charge the vehicles, adjust operations to take into account delays associated with recharging or refueling zero emissions vehicles and reconfigure routes due to zero emissions vehicles having a shorter range of operation than gasoline or diesel powered vehicles.

As explained by the Supreme Court in striking down Maine’s law prohibiting unlicensed tobacco shipment, holding that such requirements had a direct “connection with” motor carrier services:

the provision has a “significant” and adverse “impact” in respect to the federal Act’s ability to achieve its pre-emption-related objectives. . . . Maine does not deny) that the law will require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer). And even were that not so, the law would freeze into place services that carriers might prefer to discontinue in the future. The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State’s direct substitution of its own governmental commands for “competitive market forces” in determining (to a significant degree) the services that motor carriers will provide.

Rowe v. New Hampshire Motor Transp. (2008) 552 U.S. 364, 372. The *Rowe* court went on to emphasize that:

the effect of the regulation is that carriers will have to offer . . . delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate. And that being so, “treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense.” *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U. S. 246, 255 (2004). If federal law pre-empts state efforts to regulate, and consequently to affect, the advertising about carrier rates and services at issue in *Morales*, it must pre-empt Maine’s efforts to regulate carrier delivery services themselves.

Each of the Supreme Court’s prior decisions finding preemption dealt with an area of regulation far more remotely related to price, route or service than the Last Mile measure. The Last Mile measure’s proposal to specify the specific fleet purchases, technology and power source for trucks is far more integral to and intrusive upon the price, route and

service of the trucking industry than those state laws the Supreme Court has specifically held to be preempted.

The choice of truck design, power source, and attendant infrastructure all fall squarely within the scope of federal preemption, particularly when such requirements are imposed on only a subset of truckers providing the same service. Notably, the proposed Last Mile measure targets only “certain fleets,” apparently excluding government and smaller fleets from regulation. Such discrimination would obviously have a direct impact on the “competitive market forces.” The FAAAA, as applied by the Supreme Court, preempts any such state law.

CTA therefore urges CARB to approach electrification by focusing on manufacturer standards, an approach specifically authorized by federal law and not subject to FAAAA preemption.

B. The Clean Air Act

The CAA would also preempt any purchase mandate. CAA section 209 (42 U.S. Code §7543) provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

The U.S. Supreme Court has held that a “command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics” is preempted by the CAA. *Engine Manufacturers Assn. v. South Coast AQMD* (2004) 541 U.S. 246.

CARB may, of course, seek a waiver of CAA preemption from the EPA. Such a waiver may be granted only if the proposed regulation is not arbitrary or capricious, is needed to meet compelling and extraordinary conditions and is consistent with EPA’s own authority to adopt such a regulation. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time. *See, e.g.* 76 Fed. Reg. 76184, 76186 (Oct. 31, 2011). In addition, the third criterion—consistency with EPA’s own authority to adopt engine emission standards—must be met.

See 42 U.S. Code § 7521.⁵ Each of these criteria presents real challenges that CARB must carefully address in any Last Mile measure.

Although the imposition of the Last Mile measure would require a waiver of CAA preemption, even if such a waiver were granted, it would not by itself be determinative of federal preemption. The waiver would then need to be reconciled with preemption under the FAAAA.

Where two federal laws are in conflict, the courts must determine whether they can be harmonized. In making that determination, the courts must consider a variety of factors, including whether the law would pose an undue burden on interstate commerce. If an apparent conflict exists between two federal laws, the courts must strive to harmonize the two laws, giving effect to both laws if possible. See *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133-34 (1974); *UnocalCorp. v. Kaabipour*, 177 F.3d 755, 769 (9th Cir. 1999). FAAAA's express preemption provision, and its underlying goal of avoiding a patchwork of state and local regulations that could interfere with interstate commerce, and the significant burdens that would be imposed on the trucking industry, all require that CARB structure any Last Mile measure in a manner that can be harmonized with FAAAA's goals.

VI. The CEQA Analysis Must More Thoroughly Examine Impacts that the Agency Knows will Flow from a Decision Approving the Plan

The Environmental Analysis prepared by CARB is so vague as to be completely uninformative. CEQA requires more. The Environmental Analysis must contain a "sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." This does not require "perfection" but rather a "good faith effort at full disclosure." CEQA Guidelines §§ 15151, 15152. The Environmental Analysis fails these tests.

Although CARB is exempt from the requirement to prepare formal CEQA documents, this does not mean the agency can simply gloss over the impacts of the project. CARB must instead prepare a "functionally equivalent document" that considers individual and cumulative impacts and addresses adverse activities and impacts associated with the proposed measures. An environmental document used as a substitute for an EIR must include alternatives to the proposed activity and mitigation measures to minimize significant adverse effects on the environment. *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422. See also *EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 611 ("As an 'abbreviated' EIR, the [FED] must contain sufficient information regarding the environmental effect of the . . . project to enable the evaluation of

⁵ In that regard, CARB should also keep in mind that EPA and NHTSA are already proposing uniform federal fuel efficiency and Phase II greenhouse gas standards for commercial vehicles. 80 Fed.Reg. 40137 (July 13, 2015).

the effect of the project on the environment, the feasibility of alternatives to the project, and the measures to minimize any significant adverse impact.”)

CARB’s programs are subject to the broad policy goals and substantive standards of CEQA. *Arcadia, supra*, at 1422.); *Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 943. Although CARB’s analysis of the Plan is programmatic, it must provide sufficient information to establish the basis for future environmental analyses and allow future project-specific environmental analysis to focus solely on the new effects or detailed environmental issues not previously considered. CEQA Guidelines §15152. “CEQA contemplates consideration of environmental consequences at the ‘earliest possible stage, even though more detailed environmental review may be necessary later.’” *EPIC v. Dep’t of Forestry* (2008) 44 Cal.4th 459, 503.

The approach taken in the Environmental Analysis is too cursory and can be summed up as follows:

- the Plan might increase the demand for electric vehicles, which in turn might require the construction of related facilities like manufacturing plants or charging stations or activities like the extraction of resources (lithium);
- these construction and mining activities may have environmental impacts, such as impacts to air quality, biological resources, noise, etc.;
- these activities will be permitted by other jurisdictions that might impose mitigation measures;
- however: because it is unknown whether the permitting agencies will impose these mitigation measures, the impact is significant and unavoidable.

Indeed, in each instance where the Environmental Analysis finds a potentially significant impact, it deems it significant and unavoidable based on this logic.

This analysis is extremely generic, vague and of little value to the public and decisionmakers. At the very least, the Environmental Analysis should provide greater detail on the nature of these likely future activities, such as the specific attributes and related impacts of vehicle or lithium battery manufacturing or the nature of lithium mining. CARB has sufficient information before it to know that these activities must occur in order for the measures in the Plan to be implemented, and it has sufficient information about the likely impacts of such activities to better inform the public and decisionmakers.

As it stands, the public and decisionmakers are only told that construction of fairly generic facilities may occur in the future and then normal construction related impacts are identified. The analysis should disclose the nature of electric vehicle and lithium manufacturing facilities and lithium mining and provide details on the specific types of impacts these activities can be expected to have. The cursory and ambiguous descriptions of both the “reasonably foreseeable compliance responses” and the environmental analysis of those responses do not provide meaningful information to enable decisionmakers to “intelligently take account of environmental consequences.”

The Environmental Analysis states that this is acceptable because it “conservatively assumes” impacts are significant and unavoidable. However, this is akin to the approach rejected by the Court of Appeal in *Berkeley Keep Jets Over v. Port Commissioners* (2001) 91 Cal. App. 4th 1344, 1370. In *Berkeley Keep Jets*, the Port argued that its failure to conduct a health risk assessment was excusable because the Port labeled impacts from toxic air contaminants as significant and unavoidable. The court rejected this:

This approach has the process exactly backward and allows the lead agency to travel the legally impermissible easy road to CEQA compliance. Before one brings about a potentially significant and irreversible change to the environment, an EIR must be prepared that sufficiently explores the significant environmental effects created by the project. The EIR's approach of simply labeling the effect “significant” without accompanying analysis of the project's impact ... is inadequate to meet the environmental assessment requirements of CEQA.

The Environmental Analysis takes this same approach. It generically identifies some potential impacts and then says it is unknown what will happen so “conservatively assumes” – or as *Berkeley Keep Jets* says “simply labels” – the impacts significant and unavoidable. This is not “conservative,” it is uninformative and does not meet CEQA's mandates.

While we understand CARB's position that the level of detail is “necessarily and appropriately general” because the Plan is itself programmatic, such generality cannot be an excuse for failure to examine impacts that the agency knows will flow from a decision approving the Plan. And even to the extent that CARB can justify cursory review at this stage of developing a strategy, it will not be true at the time the actual SIP measures are adopted. This approach of identifying only broad potential responses to compliance and a generic description of related environmental impacts will certainly not be appropriate once the actual regulations are on the table.

Chapter 2 contains a description of the anticipated compliance responses to the various measures discussed in the Plan. Chapter 4 then analyzes the environmental impacts of these responses. However, the Environmental Analysis does not identify all reasonably foreseeable compliance responses. Most significantly, and as outlined elsewhere in our letter, the Plan could have a significant adverse impact on competitiveness of California's freight industry. The Environmental Analysis appears to assume that California's existing multi-modal, highly complex freight system will continue to operate in essentially the same manner, but with cleaner equipment. That will not be the case. Given the competitive disadvantage resulting from the Plan, there may be significant shifts in the entire freight industry and the environmental effects of these changes need to be analyzed. It is reasonably foreseeable that trucking companies will need to install significant new infrastructure to accommodate electric vehicles and may need to relocate or reconfigure their facilities in order to do so. It is very possible that freight electric vehicles will necessitate an increase in the number of vehicles used for freight delivery due to inadequate range (mileage) capabilities, thereby increasing congestion upon California's roads. This negative impact to all vehicles could adversely affect freight transportation, and transportation within the state, in general. They may need to modify operations not only in California, but also outside the State. Some of the skilled workforce now in the trucking industry may move out of state. These shifts have their own environmental impacts, such as concentrating freight and related air, noise, traffic and other impacts in new areas and intensifying existing uses.

Many of these impacts are identified in the enclosures to this letter. Where, as here, these types of changes are known and foreseeable consequences, they must be analyzed now to fully inform decisionmakers of the rippling effects of the Plan.

VII. Conclusion

Thank you for the opportunity to comment on this plan.

CTA urges CARB to recraft its approach to the SIP measures for the trucking industry to avoid stranded assets and provide regulatory certainty by establishing a reasonable timeframe under which businesses can recoup their investments in CARB/EPA certified technology and infrastructure. Providing this certainty will give businesses the confidence to invest in the cleanest available technologies despite the State's multiple and at times conflicting environmental policy drivers. If CARB chooses not to take this more traditional and proven approach, it will need to carefully consider the preemptive effect of the FAAAA and to comply with CEQA in its evaluation of alternatives, environmental impacts and possible mitigation measures.

CTA also urges CARB to more thoroughly evaluate the costs and impacts on competitiveness that would result from adoption of the trucking measures, in particular the Last Mile measure. CARB should focus on developing better tools and modeling to assess the impact of its actions on the competitiveness of the businesses located within the State. To this end, CARB should convene stakeholders to work to identify an appropriate, quantifiable target for competitiveness and the necessary data, tools and model needed to assess the impact of future actions on competitiveness and track our progress towards achieving the target.

We look forward to working with CARB now and in future years on finalizing and implementing the Plan.

If you have any questions, please contact Chris Shimoda at cshimoda@caltrux.org or (916)373-3504.

Thank You,

Eric Sauer, Vice President of Policy and Government Relations

A handwritten signature in cursive script that reads "Eric Sauer".