October 14, 2016

Priscilla Martinez-Velez
Division of Transportation Planning,
MS-32 California Department of Transportation
P.O. Box 942874
Sacramento, CA 94274-0001

RE: September 2016 Draft RTP Guidelines

Dear Ms. Martinez-Velez:

Thank you for providing the September 2016 Draft RTP Guidelines for review and public comment. Our August 2, 2016 letter commended the Commission for making clear distinctions between "hard" federal and state regulations contained in statute and "soft" recommendations that have no basis in statute. Unfortunately, we find the guidelines take a sizeable step in the wrong direction by significantly muddying this crucial distinction. In many cases, the guidelines no longer recognize the implementation role of the guidelines that follows the lead of the Legislature. The next draft of the guidelines must rectify this issue.

The guidelines, as a document should be developed in a manner that helps MPO practitioners understand federal and state requirements applicable to the development of the Regional Transportation Plan (RTP). Federal and state law identify the RTP as a document with a limited area of control and influence. With that in mind, the RTP guidelines should focus on the programmatic nature of the RTP and not provide guidance on the delivery of individual RTP projects nor reference statutes or guidelines without direct applicability to the RTP.

Where applicable, the guidelines should encourage state agencies to use state plans to inform their staff's participation in the individual MPO RTP development process during their regular consultation, partnering, and comment opportunities This approach recognizes the unique nature of implementing regional, state, and federal goals within each MPO region.

We are also aware of additional issues regarding the guidelines submitted by our member agencies. We look forward to working with the CTC to address the concerns raised in this letter as well as others submitted by our members.

I. Overarching Comments

Guidelines Overreach

A. The addition of "shalls" beyond state and federal statute – In many cases, the September 2016 guidelines outreach the CTC's authority by rising to the level of regulation rather than guidance. Under California law, "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to **implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure**.

   California Government Code Section 14520 explicitly states, *"The commission **shall advise and assist** the Secretary of Transportation and **the Legislature** in formulating and evaluating state policies and plans for transportation programs in the state."* The California Legislature, through Government Code Sections 14522 delegated only the authority to develop guidelines not regulation to the CTC. The authority to create regulation (requirements) remains with the legislature. Therefore, "shalls" beyond state and federal statutes must be removed from the guidelines.

B. The guidelines use of California Government Code Section 14522 in coordination with Executive Order B-30-15 to create requirements is overreach. Section 14522 authorizes the preparation of guidelines, not the creation of new mandates. Use of an Executive Order in combination with the language contained in Section 14522 does not elevate the authority to prescribe guidelines to the authority to create law. Mandatory requirements that rise to the level of law must be contained in statute. This issue was discussed in Legislative Counsel Opinion 1609054 (attached). We anticipate our members will provide additional comments on this issue.

C. The guidelines must make clear distinctions between "hard" federal and state regulations contained in statute and "soft" recommendations that have no basis in statute. Traditionally, the RTP Guidelines have distinguished between the former with the use of the word "shall" and the latter with the use of the word "should." This recognizes the implementation role of the Guidelines that follows the lead of the Legislature.

   There is an additional fiscal reasoning for this approach. RTPAs and MPOs must produce regional transportation plans that are "consistent with" the RTP Guidelines. See California Government Code Section 65080(d). Thus, the more that is included, the more costly these plans become. Table 1 of the Caltrans California Metropolitan Planning Organization Regional Transportation Plan Review Report cites the increasing complexity and cost associated with modern regional transportation plans by documenting the increased size of the documents and accompanying environmental review. Each one of these pages represents hundreds and even thousands of dollars in increased staff and

consultant time and other planning costs. Regional agencies have reached a limit. As a result, strict adherence to what is required by statute ("shall") must be maintained.

We provide specific language recommendations by section below.

II. Specific Comments

Chapter 1 – Introduction

1. Page 3 – First Paragraph, Last Sentence: Please revise the sentence to read "As fundamental building blocks of the State's transportation system, the RTP should integrate, to the extent applicable, goals for transportation, environmental quality, economic growth, and social equity."

2. Page 4 – Top of page, sentence beginning with, "In select cases…" Delete this entire sentence consistent with the RTP Guidelines Working Group Consensus reached October 7, 2016. This is an improper application of the referenced Government Code and Executive Order Sections. Executive Order B-30-15 states its authority as California Government Code Sections 8567 and 8571. California Government Code Section 8571 explicitly states: "*During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for* ***conduct of state business****, or the orders, rules, or regulations of any* ***state agency****…"* This section of the law contains no requirements for MPOs.

   We anticipate additional comments to be provided from our member agencies in this area.

3. Page 5 – Last full sentence: Please revise to read "As a result of federal and state legislation, as well as, executive orders, GHG emission reduction, transportation electrification, climate resilience, ~~have also become one of the key priorities in the statewide and regional planning process, in addition to~~ improving transportation mobility, addressing federal air quality criteria pollutants, and ensuring the statewide transportation system addresses the tribal, local, regional, and statewide mobility and economic needs are key priorities in the statewide and regional transportation planning process. This edit recognizes the bottoms up goal setting and, as appropriate and applicable, policy prioritization that happens as part of the MPO planning process.

4. Page 7 - Last sentence on the page: Consistency with the aspirational fiscally unconstrained CTP2040 may not be consistent with the federal and state fiscal constraint requirements in all regions of the state. We recommend the following language replace the sentence: "Therefore, ~~it is important that there is consistency between RTP and CTP as well as their respective guidelines, providing~~ integration of CTP and RTP goals (where applicable and consistent with federal and state fiscal constraint requirements) may provide greater mobility choices for travelers not only within their regions, but across the state."

Chapter 2 – Regional Transportation Plan Process

1. Section 2.2: Per the October 7, 2016 RTP Guidelines Workgroup Consensus, update this section to do the following:
    - Delete – Government Code Section 14522 and Executive Order B-30-15 do not create RTP requirements. Delete these references from the shall section of page 30.
    - Restructure – 1) Restructure the section to identify the statutory requirements applicable to the RTP first (AB32, SB 32, an SB375) and 2) under separate subheading, provide a narrative of other state legislation that clearly articulates the legislation creates no RTP requirement. This creates a clear distinction between what is required of the RTP and other state climate change legislation that contains no direct RTP requirement. We recommend the following language: "While [INSERT BILL NUMBER/EO] provides no statutory requirement for MPOs, state agencies should work with MPOs to…"
    - Edit Bullet 2 under SB375 – Update this bullet to reflect SB375 targets are set for 2020 and 2035.
    - Page 28, SB379 – Delete per the consensus of the Workgroup. This legislation is applicable to General Plan Updates and should be included in the applicable general plan guidelines.
    - Page 29 – Fourth Bullet on the Page: Please define natural infrastructure solutions

2. Page 31 - paragraph beginning with, "Improving": Update the first sentence of the paragraph to read, "Improving transportation infrastructure in ways that encourages walking and cycling is, ~~an~~ one effective… This edit recognizes transportation as one of many solutions to the poor health epidemic.

3. Page 31 - paragraph beginning with, "Improving", fourth line down: Update sentence to read, "For instance, health focused transportation plans can help reduce the ~~number~~ rate of injuries…"

4. Page 32 – bulleted list at the top of the page: Replace the list of bullets with a more generalized list consistent with the scope of an RTP (e.g. consult with public health officials in the development of the RTP, etc.). The existing bulleted list reflects topics that may be discussed in the CEQA analysis of an RTP rather than the RTP itself. The last bullet, "Identify specific mitigation measures that the MPO is taking to reduce health impacts from the transportation sector" presupposes the CEQA outcome and need for mitigation measures and should be deleted.

5. Page 35 - List of Planning Documents to Consult: Add Tribal Transportation Plans and Federal Lands Transportation Plans per consensus of the Working Group.

6. Page 40 – Top of Page: The RTP Guidelines should reflect a level of detail appropriate for a programmatic level document. References to project level development are inappropriate for this document and should be deleted.

7. Page 40 through 41 - Planning and Environmental Linkages Section: This section is specific to project development and should be removed. A discussion of the federal requirements to assess the environment in the RTP planning process should replace this section.

8. Page 43 – Bulleted List: Delete the third bullet at the top of the page. RTPs are a programmatic document. The identification of funding at the corridor level is not required.

9. Page 46 – Re-Adopting Existing RTPs – Update the reference to the FTIP in the fourth line of this section to RTP.

Chapter 3 – Regional Transportation Plan Analysis and Modeling

Although we continue to work through the modeling work group, we offer the following global comments.

1. Modeling Chapter Goes Beyond Requirements with No Recognition of Size or Cost.
2. The guidelines must recognize Federal and State requirements differ by MPO size and region.

Chapter 4 – RTP Consultation and Coordination

1. Page 93 – First paragraph, fifth line, sentence beginning with "The required planning processes": Update the list of interested parties to the list of interested parties contained in SB375.

2. Page 93 – Second sentence, fourth paragraph: Replace the word count with activity data.

3. Page 93 – Third sentence, fourth paragraph: The authority of RTPs to reduce transportation emissions is limited. As a result, the reference in this sentence is not clear. Recommend updating the sentence to read, "They also ~~develop methods to reduce transportation related~~ emissions assess transportation control measures that reduce transportation related criteria pollutant emissions." This edit focuses the discussion the on what is within the control of the MPO.

4. Section 4.2 Title VI & Environmental Considerations in the RTP – Section 4.2 added language concerning a number of executive orders and legislative actions related to

Title VI and Environmental Justice analysis. The section contains inaccuracies that should be corrected to clearly convey the language of federal requirements, as described in more detail below:

- Page 95 – First Paragraph: Environmental Justice language specifies low income or minority groups, and does not include the language shown in the final clause of this sentence. Correct to reflect federal EJ language:

  Existing federal regulations require MPOs to ensure that any planned regional transportation improvements do not have a disproportionately high and adverse impact on low income or ~~other under-represented~~ minority groups ~~and that minority and low-income populations receive equal benefits, on an equally timely basis, as other populations.~~

- Page 95 – Second Paragraph: The paragraph inaccurately references Title VI rather than EJ language; correction added.

  The clear objective of the Executive Order on EJ is to ensure that Federal agencies ~~promote and enforce nondiscrimination.~~ identify and address as appropriate, "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

- Remove language that seeks to interpret the use of the word "population." The words "population" and "community" are often used interchangeably in the executive orders and regulations.

  Furthermore, the Executive Order on EJ extends its protections not only to "minority populations" but also to "low-income populations. "~~The word, "populations" rather than the more specific word "communities," extends not only to the residents of a geographically contiguous neighborhood but also to "populations" composed of residents who do not live in the same neighborhood but are similarly-situated with respect to the benefits or burdens of a plan or project.~~

- Correct the source of the definition for "Minority Population" (Circular not Executive Order) and include the full version of the definition. Remove language that seeks to interpret "geographically dispersed" as it is not based in the language of the Circular.

  Thus, ~~the Executive Order on EJ~~ FTA Circular 4703.1 defines "Minority Population" to mean "any readily identifiable groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed/transient persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed transportation program, policy or activity." ~~This is especially relevant in the transportation context, as the "geographically dispersed" users of a particular portion of the transportation network who are "similarly affected" by an RTP investment or policy may comprise a minority population, a low-income population, or both.~~

- Page 95 – Principle of Environmental Justice: Remove description below as it seeks to interpret language differently from the principles, which are clearly stated in the FTA Circular as shown below:

  Principles of Environmental Justice
  There are three federally established guiding EJ principles, summarized in FTA Circular 4703.1, to consider throughout transportation planning, public outreach and participation efforts conducted in development of the RTP:
  - "To avoid, minimize, or mitigate disproportionately *high and adverse human health and environmental effects, including social and economic effects*, on minority populations and low-income populations.
  - To ensure the *full and fair participation* by all potentially affected communities in the transportation decision-making process.
  - To prevent the *denial of, reduction in, or significant delay in the receipt of benefits* by minority and low-income populations."

    ~~The first principle protects low-income populations and minority populations against bearing an *unfair share of the adverse impacts* of the RTP and its investments; the third principle ensures that they receive a *fair share of the benefits* of the RTP and its investments, and receive those~~
    ~~benefits in an equally timely manner; and the second principle ensures that they themselves have the "full and fair" opportunity, among other things, to define the needs that they prioritize, rather than have those needs defined for them by others.~~

- Page 96 – Sub recipients: Remove paragraph below. The first sentence is inaccurate in that, outside of requirements for compliance reports every three years, there are differing requirements for compliance with Title VI by different types of sub recipients of federal funds (states, MPOs, large transit agencies, small transit agencies, etc.) Further, the language as shown would impose new and costly requirements on a multitude of agencies, potentially including Caltrans, when project sponsors/sub recipients are already subject to requirements to conduct public participation efforts and detailed program and project analyses to comply with CEQA, NEPA, Title VI and other statutes.

  ~~**Title VI & Subrecipients of Federal Funds**~~
  ~~Subrecipients of federal funds are held to the same requirements as primary recipients, such as MPOs. As MPOs are developing the RTP/SCS and TIP, their sub recipients must also (a) implement an accountable, inclusive and transparent process that complies with the region's adopted Public Participation Plan; (b) conduct an appropriate Title VI and Environmental Justice analysis of alternatives before selecting that project or adopting that program of projects, with the participation of affected low-income and minority residents, and, with respect to a program of projects; and, (c) determine that it will provide a fair and equally timely share of benefits to low-income residents and residents of color, and will not impose on them an unfair share of its burdens.~~

5. Page 98 – Paragraph beginning with "Ideally, MPOs could": The RTP as a programmatic document does not identify/address tools for the delivery of individual transportation projects. This discussion may be better suited for the Caltrans Local Assistance Procedures Manual.

6. Page 104 – Consultation with Interested Parties: The bulleted list should be consistent with the list contained in the 23 U.S.C. Section 450.316(a). In addition, the section should be expanded to add a discussion of the state consultation component of RTP development as identified in SB375.

Chapter 5 – RTP Environmental Considerations

1. Page 115 - Last Sentence, Third Full Paragraph: Change the word address to assess in the following sentence. "Likewise, RTP CEQA Analysis and subsequent transportation project CEQA Analysis ~~address~~ assess all environmental issue areas identified in appendix G, Environmental Checklist Form of the CEQA Guidelines. This edit ensures the language is consistent with the intent of the CEQA Guidelines Appendix G checklist which is used to assess potential environmental effects.

2. Page 117 - Third Paragraph under NEPA section: Change the word MPO to implementing agency. RTPs are not subject to NEPA compliance.

3. Page 124 – Air Quality Impacts: First this section should make reference to the Clean Air Act. Second, the scope of the RTP is limited. The scope of the RTP planning process does not include the operations of non-road, marine, and freight rail equipment. As an example, the operation of marine transportation is overseen by the federal Maritime Administration (MARAD) through a separate planning process. In addition, the discussion of electrification, new technologies, alternative fuels, charging stations, and zero emissions technology seem inappropriately placed in this section. We recommend maintaining the first two sentences of the section and then refocusing the section to discuss the requirements of the Federal Clean Air Act.

Chapter 6 – Regional Transportation Plan Contents

~~1.~~ Page 136; A through J – The list should be moved to Chapter 7 performance metrics. There is general concern with the continued proliferation of expanding lists in the area of performance measurement. Flexibility is needed to allow MPOs to select performance measures that provide meaning to each regions policy makers and public participants through the RTP development process. In this vain, this section should be rewritten to read: "Although not required by law, MPOs should identify a set of indicators that will be used to assess the performance of the RTP." ~~including, but not limited to, all of the following:~~

   ~~a. A. Measures of mobility and traffic congestion;~~
   ~~b. Measures of impact on public health;~~

~~c. Measures of environmental quality such as air quality;~~
~~d. Measures and needs for road and bridge maintenance and rehabilitation;~~
~~e. Measures of means of travel;~~
~~f. Measures of safety reliability and security;~~
~~g. Measures of equity and accessibility;~~
~~h. Other sources of data and information may also be used, such as a regions own source/s of information and data;~~
~~i. Measures of the need for infrastructure supporting transportation electrification;~~
~~j. Measures of infrastructure supporting transportation electrification in disadvantaged communities.~~

~~In addition, the RTP should identify the criteria that the MPO used to select the transportation projects on the constrained and unconstrained project lists.~~

2. Page 146 - Under Requirements: Change the word MPOs shall monitor to Caltrans or the appropriate entity. MPOs do not monitor bridge conditions.

3. Page 153 - Bulleted list: Consider what is a statutory should and what may better be captured as a planning practice example.

4. Page 164 – This section should retain the language directly from government code section 65080(b)(2)(H) and (L). Specifically, the definition of programmed for funding contained in the second full paragraph.

5. Page 170 – Second Paragraph, Transportation Electrification: Section 44258 of the Health and Safety Code refers to the Charge Ahead California Initiative. An initiative that requires ARB, in consultation with the State Energy Resources Conservation and Development, district to develop the Air Quality Improvement Program funding plan to identify the projected funding needs to meet the goals. This section should be rewritten to describe how the responsible state agencies will work with MPOs during the RTP development process to identify funding needs to meet the goals of the Charge Ahead California Initiative. After that process is complete, funding must be provided through the Air Quality Improvement Program to meet the identified needs.

6. Page 171 – Safety Performance Measures: This section should be moved to chapter 7 Performance Measures.

7. Page 174 – Last paragraph on the page: "The financial element of the RTP should identify funding by corridor to implement projects…" The RTP is a plan level document that does not identify, and is not required to identify, corridor or project specific estimates of funding.

8. Page 178 – Second Paragraph, Visualization and Mapping: The discussion contained in this paragraph represents one of many approaches to using visualization techniques in

the RTP development process. This discussion should be move to appendix M to reflect it as a planning practice example.

9. Page 193 through 196 should be updated to be consistent with the recommended edits of chapter 2 page 26 through 28.
    a. Delete – Government Code Section 14522 and Executive Order B-30-15 do not create RTP requirements. Delete these references from the shall section of page 30. We anticipate our members will provide additional detailed comments in this area of the guidelines.
    b. Restructure – 1) Restructure the section to identify the statutory requirements applicable to the RTP first (AB32, SB 32, an SB375) and 2) under separate subheading, provide a narrative of other state legislation that clearly articulates the legislation creates no RTP requirement. This creates a clear distinction between what is required of the RTP and other state climate change legislation that contain no direct RTP requirements. The language contained on page 38 of the September draft guidelines is recommended. We recommend the following language: "While [INSERT BILL NUMBER] provides no statutory requirement for MPOs, state agencies should work with MPOs to…"

Chapter 7 – Performance Measures

General Comments

The RTP Guidelines will be updated before the federal government completes its rulemaking process on performance management. Chapter 7 should reflect the process which MPOs use in the development of performance measures and associated targets, rather than specific performance measures and targets. MPOs use a robust development process to ensure performance measures are meaningful for policy development in each MPO region. Performance based planning, works best, when that process is used to focus on a select set of performance measures/indicators that reflect regional goals.

We are happy to coordinate with you to provide language for inclusion in the revised chapter 7.

Specific Comments

1. Consistent with the consensus reached at the October 7th workgroup meeting, revise the chapter into three distinct sections.
    a. Section One: Federal Statutory Requirements – This section should clearly articulate the status of the federal process (e.g. several federal rule-making processes are incomplete).
    b. Section Two: State Statutory Requirements (SB 375 Only)
    c. Section Three (Other Areas/Planning Practice Examples)

2. Page 201 – Section 7.1, First Paragraph, fifth Line: The use of the term shall is inconsistent with the definition contained on page 3 of the guidelines. This sentence clearly indicates some, but not all areas within the bulleted list are required by state

and/or federal law. To maintain consistency with the guidelines, this section should be redrafted to reflect the outline contained in Chapter 7, comment 1 above.

3. The new chapter should also include reference to 23 U.S.C. Section 134(h)(3). "*Failure to consider factors. — The failure to consider any factor specified in paragraphs (1) and (2) shall not be reviewable by any court under this title or chapter 53 of title 49, subchapter II of chapter 5 of title 5, or chapter 7 of title 5 in any matter affecting a transportation plan, a TIP, a project or strategy, or the certification of a planning process*."

Appendix C – Regional Transportation Plan Checklist

1. Page 222 – Bullet 2, Title VI Checklist: The RTP Guidelines Checklist has traditionally been used as a tool to aid MPOs in determining if they have fulfilled federal and state requirements during the development of their RTPs. Bullet 2 seems to imply MPOs should fund the participation of local organizations that represent low-income and minority populations to enable their participation in the planning process. First, this represents an example planning practice that is not required by law. Second, page 2 of the referenced document (FHWA/FTA, Memorandum re: Implementing Title VI Requirements in Metropolitan and Statewide Planning (Oct. 7, 1999)) states, "This memorandum serves as clarification pending issuance of revised planning and environmental regulations. FTA has since issued Title VI Final Circular. The checklist must reflect the requirements as outlined in FTA Circular 4702.1B.

2. Page 222 - Bullets 3 through 5: These bullets appear to inappropriately meld the procedural certification requirements of MPOs with Federal Transit Administration funding recipients. Appendix A of FTA Circular provides a checklist that describes MPO Title VI certification requirements. This checklist describes the process in which MPOs are required to document Title VI compliance. Any additions to this checklist must be consistent with the Circular.

   In addition, FTA defines the purpose of Circular 4703.1 as, "*The purpose of this circular is to provide recipients of Federal transit Administration financial assistance with <u>guidance</u> in order to incorporate environmental justice into plans, projects, and activities that receive funding from FTA.*" FTA further documents the purpose and intent of the circular as guidance in the first full paragraph contained in section F: What is the Purpose of a Separate Circular on Environmental Justice? FTA states, "*The Circular is designed to provide a framework to assist you as you integrate principles of environmental justice into you transit decision-making process. The Circular contains <u>recommendations</u> for State DOTs, MPOs and transit providers…*" For these reasons, the bullets under Title VI and EJ should be updated to be consistent with federal requirements and not recommendations.

Appendix M – Examples of Planning Practices That Exceed Statutory Authority

1. Thank you for compiling the example planning practices in one location. We find this a useful tool for MPO practitioners.

2. Page 343, Section 6.16 Transportation Projects Exempt from SB 375 – Please remove the best practice identified under this section. Section 6.16 of the guidelines references an explicit transportation project exemption codified in law. The reference to Plan Bay Area, 2013 is improper.

Thank you for the opportunity to comment. We look forward to working with the CTC as the third version of the guidelines is developed.

Should you have questions regarding the content of this letter, please feel free to contact me. I can be reached by phone at (916) 557-1170 or by email at taylor@calcog.org.

Sincerely,

TANISHA TAYLOR
Director of Sustainability

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April 19, 2016

Honorable Jean Fuller
Room 305, State Capitol

CALIFORNIA GLOBAL WARMING SOLUTIONS ACT OF 2006: EXECUTIVE BRANCH AUTHORITY - #1609054

Dear Senator Fuller:

You asked three questions, separately stated and considered below, relating to the authority of the Governor and the State Air Resources Board in the context of implementing the California Global Warming Solutions Act of 2006.

Background: The California Global Warming Solutions Act of 2006

The California Global Warming Solutions Act of 2006[1] (the act) requires the State Air Resources Board (ARB) to determine the 1990 statewide greenhouse gas (GHG) emissions level and approve a statewide GHG emissions limit that is equivalent to that level (hereafter emissions limit), to be achieved by 2020. (§ 38550.) The act requires the ARB to adopt regulations in connection with that objective, which may include the establishment of a market-based compliance mechanism, applicable from January 1, 2012, to December 31, 2020, inclusive. (§§ 38562, subd. (c) & 38570.) Under this authority, the ARB adopted the "cap-and-trade" program. (§ 38570; Cal. Code Regs., tit. 17, § 95800 et seq.; ARB Internet Web site, Cap-and-Trade Program, at <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm> [last accessed Apr. 8, 2016].)[2]

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[1] Health & Saf. Code, div. 25.5 (§ 38500 et seq.). All further section references are to the Health and Safety Code, unless otherwise indicated.

[2] The cap-and-trade program limits the total amount of GHGs that covered entities are collectively allowed to emit and provides a trading mechanism for compliance instruments, including allowances. (ARB, Cap-and-Trade Regulation Instructional Guidance (2012) p. 1, at <http://www.arb.ca.gov/cc/capandtrade/guidance/chapter1.pdf> [last accessed April 4, 2016].) An allowance authorizes the emission of up to one ton of carbon dioxide equivalent during a

(continued...)

1. Does the act authorize the Governor or the ARB to establish a statewide GHG emissions limit that is below the state's 1990 level of emissions and that would be applicable after 2020?

To answer your first question, we must discuss the principles applicable to the Governor's authority to issue executive orders and the authority of an administrative agency such as the ARB to issue regulations. We then apply those principles to the question posed.

1.1 Executive orders generally

An executive order "is a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law." (63 Ops.Cal.Atty.Gen. 583 (1980).)

The validity of an executive order implicates the doctrine of separation of powers, which is provided for in article III, section 3 of the California Constitution, as follows:

> "SEC. 3. The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The primary purpose of the separation of powers doctrine is to prevent the accumulation of the fundamental powers of government in the hands of a single person or group. (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.) Thus, it "limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. [Citations.]" (*Ibid.*) The core functions of the Legislature include "passing laws, levying taxes, and making appropriations" and "'the determination and formulation of legislative policy.'" (*Id.* at p. 299; see also Cal. Const., art. IV, §§ 1, 8.) "This essential function embraces the far-reaching power to weigh competing interests and determine social policy. [Citations.]" (*People v. Bunn* (2002) 27 Cal.4th 1, 14-15.) In contrast, the core function of the executive branch is to faithfully execute the laws created by the Legislature (Cal. Const., art. V, § 1), and the Governor is not given legislative powers except those specifically enumerated in the California Constitution (Cal. Const., art. IV, § 10 [Governor may sign or veto a bill]; *Lukens v. Nye* (1909) 156 Cal. 498, 501).

Although the Governor generally may not exercise legislative powers, it has long been recognized that the Governor may issue executive orders. (See *Professional Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1013-1016 (*Professional Engineers*); 63 Ops.Cal.Atty.Gen. 583 (1980).) This authority derives from the constitutional provisions vesting the supreme executive power in the Governor and requiring the Governor to see that the law is faithfully executed. (Cal. Const., art. V, § 1.) Under this authority, the Governor

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(...continued)

specified year. (*Ibid.*) Covered entities are allocated some allowances at no cost, and are also able to purchase allowances from the ARB at auction, or from other covered entities. (*Ibid.*)

may issue executive orders to direct and guide subordinate executive officers in the enforcement of a particular law.

Courts have rejected the notion that there is "'a sharp demarcation between the operations of the three branches of government,'" and have stated that "'the substantial interrelatedness of the three branches' action is apparent and commonplace.'" (*Marine Forests Soc. v. California Coastal Com'n* (2005) 36 Cal.4th 1, 24-25.) Thus, it is well recognized that "[t]he Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect." (*First Indus. Loan Co. of Cal. v. Daugherty* (1945) 26 Cal.2d 545, 549; *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982.) It follows that the Governor may issue an executive order to direct and guide subordinate executive officials in effectuating their delegated rulemaking authority.

However, there is no statutory or constitutional authority for the Governor to undertake executive action that would have the effect of enacting, enlarging, or limiting legislation. (63 Ops.Cal.Atty.Gen. 583 (1980) ["the Governor may not invade the province of the Legislature"].) Two cases in particular illuminate this principle: *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579 (*Youngstown*) and *Professional Engineers, supra,* 50 Cal.4th 989.

Youngstown, a landmark federal case, contains the most authoritative treatment of the effect of an order of a chief executive such as the Governor. That case addressed an executive order issued by former President Harry S. Truman directing the Secretary of Commerce to take possession of and operate the country's privately-owned steel mills in order to prevent a work stoppage as a result of a labor dispute, in an attempt to avert a threat to national security. (*Youngstown, supra,* 343 U.S. at pp. 582-584.) The Supreme Court found that the order was unconstitutional because it was not authorized by a statute or constitutional provision, and because it amounted to an attempt to enact law, which is a power restricted to Congress. (*Id.* at pp. 585-589.) The court stated that "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." (*Id.* at p. 588.)[3]

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[3] Although no single opinion was endorsed by a majority of the justices in *Youngstown*, Justice Robert Jackson's concurring opinion has proven influential. That opinion described three practical situations that together provide a useful framework for evaluating the constitutionality of an executive order, as follows:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate....

(continued...)

In *Professional Engineers*, the California Supreme Court addressed an executive order that imposed mandatory unpaid furloughs on state employees. The court rejected the argument that the Governor's inherent powers authorized the executive order, stating that "any authority that the Governor or an executive branch entity ... is entitled to exercise in this area emanates from the Legislature's delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments." (*Professional Engineers, supra*, 50 Cal.4th at p. 1015.) The court concluded that statutory provisions pertaining to state employment did not authorize the executive branch to unilaterally impose mandatory furloughs. (*Id.* at pp. 1040-1041.)[4]

Youngstown and *Professional Engineers* establish that an executive order must have a basis in statute or in the Constitution; otherwise, it may invade the core legislative function of formulating public policy.[5] In this regard, it is well established that executive officials may not "vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*First Indus. Loan Co. of Cal. v. Daugherty, supra*, 26 Cal.2d at p. 550; *Knudsen Creamery Co. of Cal. v. Brock* (1951) 37 Cal.2d 485, 492-493.)

(...continued)

"2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility....

"3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter...." (*Youngstown, supra*, 343 U.S. at pp. 635-638; fns. omitted.)

The Supreme Court continues to use this framework in the context of assessing the validity of executive actions. (*Zivotofsky ex rel. Zivotofsky v. Kerry* (2015) 576 U.S. __ [135 S.Ct. 2076, 2083] ["In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from [*Youngstown*]"]; *Medellin v. Texas* (2008) 552 U.S. 491, 524; *Dames & Moore v. Regan* (1981) 453 U.S. 654, 669.)

[4] Nevertheless, the court upheld the executive order because it found that legislative revisions to the Budget Act that were enacted after the executive order was issued and that reduced appropriations for employee compensation "operated to ratify the use of the ... furlough program as a permissible means of achieving the reduction of state employee compensation mandated by the act." (*Id.* at p. 1000.)

[5] "[T]he Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation." (63 Ops.Cal.Atty.Gen. 583 (1980).)

Therefore, it is our opinion that the Governor may issue executive orders to direct and guide subordinate executive officers in the enforcement of a particular law, but such orders may not contravene or enlarge a statute.

1.2 Administrative agency rulemaking authority

Administrative agencies are typically creatures of statute that exist within the executive branch, and are thereby limited to exercising only those powers provided to them in statute. (*Carmel Valley Fire Protection Dist. v. State of California, supra,* 25 Cal.4th at pp. 299-300.) Thus, although the Legislature may statutorily delegate rulemaking authority to an administrative agency without offending the Constitution, administrative regulations must ultimately be consistent with the Legislature's delegation of authority. As one court has noted, "it is fundamental in our law that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or act beyond the powers given to it by the statute which is the source of its power ... ." (*Kerr's Catering Service v. Department of Indus. Relations* (1962) 57 Cal.2d 319, 329-330.) Similarly, state statutory law provides that "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

Thus, a court assessing the validity of a regulation will begin by determining whether the regulation conflicts with its enabling statute, exercising its independent judgment while giving weight to the agency's interpretation of the statute, depending on the situation. (*Our Children's Earth Foundation v. California Air Resources Board* (2015) 234 Cal.App.4th 870, 885-886, review den. June 10, 2015; *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-416.) The court will then address whether the regulation is reasonably necessary to effectuate the statute's purpose, applying a more deferential test by inquiring whether the action was arbitrary, capricious, or without reasonable or rational basis. (*Our Children's Earth Foundation v. California Air Resources Board, supra,* 234 Cal.App.4th at p. 886; *Western States Petroleum Assn. v. Board of Equalization, supra,* 57 Cal.4th at p. 415.)

With these principles in mind, we now turn to your question.

1.3 Analysis

Applying the principles discussed above regarding executive orders and administrative rulemaking, it is our view that any authority that the Governor or the ARB is entitled to exercise with respect to GHG reductions must emanate from a statutory enactment such as the act. As described above, the act requires the ARB to determine the 1990 statewide GHG emissions level and approve a statewide GHG emissions limit that is equivalent to that level, to be achieved by 2020. (§ 38550.) Your question requires us to determine whether the act provides authority for the Governor or the ARB to establish an emissions limit that is lower than that level and applicable after 2020.

We begin with the fundamental principle that when the language of a statute is clear, its plain meaning should be followed. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38.) Section 38505, subdivision (n) defines the emissions limit, in pertinent part, as "the maximum allowable level of statewide greenhouse gas emissions in 2020." Section 38550 requires the ARB, by January 1, 2008, to "determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020." Under the plain meaning of these provisions, the emissions limit must be equivalent to the statewide GHG emissions level in 1990, and is required to be achieved by 2020.

With regard to the applicability of the limit after 2020, section 38551 provides as follows:

> "38551. (a) The statewide greenhouse gas emissions limit shall remain in effect unless otherwise amended or repealed.
>
> "(b) It is the intent of the Legislature that the statewide greenhouse gas emissions limit continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases beyond 2020.
>
> "(c) The state board shall make recommendations to the Governor and the Legislature on how to continue reductions of greenhouse gas emissions beyond 2020."

Thus, section 38551, subdivision (a) requires the emissions limit to remain in effect unless otherwise amended or repealed, and subdivision (b) of that section expresses the Legislature's intent that the limit continue in existence beyond 2020. Section 38551, subdivision (c) requires the ARB to make recommendations on how to continue reductions beyond 2020.

An argument can be made that section 38551, subdivision (b) authorizes a statewide GHG emissions limit that is below 1990 levels and applicable after 2020 because that provision expresses legislative intent for the limit to "be used to maintain and *continue reductions* in emissions of greenhouse gases beyond 2020." (Emphasis added.) This language, however, must be read in context.[6] In addition to the requirement of section 38551, subdivision (a), described above, subdivision (c) of that section requires the ARB to make "recommendations" to the Governor and the Legislature on how to continue GHG emissions reductions. To "recommend" means to "advise."[7] Thus, we conclude that the plain language of section 38551, when its provisions are read in context, directs that the 2020 GHG emissions limit, a level set by the ARB that is the equivalent to the statewide GHG emissions level in 1990, remain in effect beyond 2020, and requires the ARB to advise the Legislature on

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[6] In construing statutory language, a court must consider the language in the context of the entire statute and the statutory scheme of which it is a part. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388.)

[7] Webster's 3d New Internat. Dict. (2002) p. 1897.

matters relating to the amendment or repeal of the emissions limit beyond 2020. This plain language, in our view, does not authorize the ARB or the Governor to set an emissions limit after 2020 that is lower than the GHG emissions level in 1990.

Although a court would likely resolve this question on the basis of the plain meaning of the act, principles of statutory construction offer additional support for this conclusion. Under the doctrine of *expressio unius est exclusio alterius*, the expression of one thing in a statute ordinarily implies the exclusion of other things. (*In re J.W.* (2002) 29 Cal.4th 200, 209; see also 2A Sutherland Statutes and Statutory Construction (7th ed. rev. 2014) § 47:23, pp. 406-426.) Applying that principle here, the Legislature's choice to define the emissions limit at a specific level implies an intent to exclude other levels.

Furthermore, the act does not articulate a standard for establishing a lower emissions limit after 2020. Thus, if the act authorized a lower emissions limit after 2020, it would implicate another rule that arises from the doctrine of separation of powers—the prohibition on impermissibly broad delegations of legislative power. "An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions. [Citations.]" (*People v. Wright* (1982) 30 Cal.3d 705, 712.) Although this prohibition "does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse[,] [citations]... [t]he Legislature must make the fundamental policy determinations ... ." (*Id.* at pp. 712-713.) We think the determination of a standard for the statewide GHG emissions limit is a fundamental policy decision that only the Legislature may make. Yet the argument that the act authorizes a lower emission limit after 2020 entails the consequence that the executive branch would have unfettered discretion in setting that limit. In that regard, if a law is open to two interpretations, one of which is unconstitutional and the other constitutional, a court will adopt the latter. (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 942.) Therefore, the presence of a specific emissions target to be achieved by 2020, along with the absence of any standard for lowering that target after that date, supports the conclusion that the act does not authorize a GHG emissions limit that is lower than the 1990 level and applicable beyond 2020.

Consequently, it is our opinion that the act does not authorize the Governor or the ARB to establish a greenhouse gas emissions limit that is below the 1990 level and that would be applicable after 2020.[8]

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[8] Section 38598 provides that the act does not limit the existing authority of a state entity to adopt and implement GHG emissions reduction measures. For purposes of this opinion, we do not address whether any other statutory enactment provides this authority.

2. Does the act authorize the Governor or the ARB to establish a system of market-based declining annual aggregate emissions limitations for sources or categories of sources of GHGs that would be applicable after 2020?

As stated above, the ARB adopted the cap-and-trade program as a market-based compliance mechanism to achieve required GHG reductions. (§ 38570; Cal. Code Regs., tit. 17, § 95800 et seq.; ARB Internet Web site, Cap-and-Trade Program, at <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm> [last accessed Apr. 8, 2016].) With respect to the duration of the ARB's authority to implement the cap-and-trade program, section 38562, subdivision (c) provides as follows:

> "In furtherance of achieving the statewide greenhouse gas emissions limit, by January 1, 2011, the state board may adopt a regulation that establishes a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions, *applicable from January 1, 2012, to December 31, 2020, inclusive*, that the state board determines will achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions, in the aggregate, from those sources or categories of sources." (Emphasis added.)

As can be seen, section 38562, subdivision (c) indicates that ARB's authority to adopt a regulation that establishes the cap-and-trade program is "applicable" only until December 31, 2020. Webster's dictionary defines "applicable" as "able to be applied or used in a particular situation." (Merriam-Webster Online Dict., at <http://www.merriam-webster.com/dictionary/applicable> [last accessed Apr. 7, 2016].) Under the plain language of this subdivision, therefore, the cap-and-trade program may not be applied or used beyond December 31, 2020. Thus, we conclude that section 38562, subdivision (c) plainly precludes the application of the cap-and-trade program beyond that date.

In support of this conclusion, section 38551, subdivision (c) requires ARB to "make recommendations to the Governor and the Legislature on how to continue reductions of greenhouse gas emissions beyond 2020." This provision is consistent with the understanding that the cap-and-trade program is not a statutorily authorized means of continuing reductions of GHGs beyond 2020.[9]

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[9] Further evidence of the Legislature's understanding in this regard is contained in the Assembly Committee on Natural Resources analysis of Assembly Bill No. 1288 (2015-2016 Reg. Sess.), as amended September 4, 2015 (AB 1288), which proposed to eliminate the sunset date contained in section 38562, subdivision (c). That analysis stated that "Currently, the cap and trade program developed by ARB only includes emissions reduction requirements through 2020." (Assem. Com. on Natural Resources, Analysis of AB 1288, as introduced Feb. 27, 2015, p. 2.) The provisions eliminating the sunset date were omitted from the chaptered version of the bill. (Stats. 2015, ch. 586.)

Therefore, it is our opinion that the act does not authorize the Governor or the ARB to establish a system of market-based declining annual aggregate emission limits for sources or categories of sources of GHG emissions that would be applicable after 2020.

3. May the ARB increase the fee authorized under section 38597 in order to achieve a statewide emissions limit that is below the 1990 level and that would be applicable after 2020?

Pursuant to its authority under the act, the ARB levies a charge commonly known as the "Cost of Implementation" (COI) fee. The COI fee is "collected annually from large sources of GHGs, including oil refineries, electricity power plants (including imported electricity), cement plants and other industrial sources. ... Funds collected are used to cover annual expenses for ARB and other State agencies to implement AB 32." (ARB Internet Web site, How is the Implementation of AB 32 Funded?, at <http://www.arb.ca.gov/cc/ab32/ab32.htm> [last accessed Mar. 24, 2016].)

Statutory authority to levy the COI fee is contained in section 38597, which reads as follows:

> "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division ... . The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, *for purposes of carrying out this division.*" (Emphasis added.)[10]

The ARB has adopted a regulation to effectuate this fee authority. Under this regulation, "The fees collected from the entities are to be expended by ARB only for the purposes of recovering the costs of carrying out the provisions of AB 32 and repaying the Debt." (Cal. Code Regs., tit. 17, § 95205, subd. (d).)[11]

As indicated above, section 38597 specifies that the COI fee is "for purposes of carrying out this division." The "division" is division 25.5 of the Health and Safety Code, which comprises the act. Consequently, under the plain language of section 38597, if the act does not authorize a statewide emissions limit that is below the 1990 level and that would be applicable after 2020, the COI fee may not be increased by the ARB to serve this purpose.

Consistent with our analysis of your first question, we think that the express denomination of a specific GHG emissions limit—a limit equivalent to the 1990 level, to be achieved by 2020—precludes regulatory action to achieve a more stringent emissions target

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[10] Government Code section 16428.95 establishes the Cost of Implementation Account within the Air Pollution Control Fund.

[11] The "Debt" refers to loans to ARB to implement the act for fiscal years 2007-2010, required to be paid back by the Legislature. (Cal. Code Regs., tit. 17, § 95202, subd. (a)(43).)

beyond that timeframe, including the imposition of a regulatory fee to that end. Such an increase of the COI fee would not be for the purpose of carrying out the act; instead, it would serve a purpose that is not authorized by the act and that involves the formulation of fundamental public policy. It follows that the ARB may not increase the COI fee for that purpose.

Therefore, it is our opinion that the ARB may not increase the fee authorized under section 38597 in order to achieve a statewide emissions limit that is below the 1990 level and that would be applicable after 2020.

Very truly yours,

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Legislative Counsel

~~By~~ For
Josh Tosney
Deputy Legislative Counsel

JDT:sjk