September 24, 2018

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

Re: Request for Public Input on Proposed Amendments to the Low-Emission Vehicle III Greenhouse Gas Emission Regulation

Dear California Air Resources Board ("CARB"):

We appreciate the opportunity to comment on the *Proposed Amendments to the Low-Emission Vehicle III Greenhouse Gas Emission Regulation*. This comment letter is submitted on behalf of the Natural Resources Defense Council and our more than three million members and supporters. We have fought for decades to clean up the transportation sector, halt climate change, and protect consumers. We have worked to further these goals in earlier CARB clean cars rulemakings, and are committed to working with CARB in the future to achieve these critical objectives.

In the Proposed Amendments, CARB staff recommend clarifying the meaning of 13 CCR § 1961.3(c), which provides:

> For the 2017 through 2025 model years, a manufacturer may elect to demonstrate compliance with [CARB regulations] by demonstrating compliance with the 2017 through 2025 MY National greenhouse gas program . . . .

Section 1961.3(c) is commonly referred to as the "deemed to comply" provision. The Proposed Amendments would confirm that this provision would not apply if EPA weakens the standards adopted by EPA in 2012.[1]. This would ensure that California continues to receive the benefits of its existing standards in the event EPA finalizes its proposal[2] to radically weaken federal standards. We strongly support the approach set forth in the Proposed Amendments, and offer the following comments.

[1] 77 Fed. Reg. 62,624 (Oct. 15, 2012). These standards reaffirmed after an extensive technical review and public comment on January 13, 2017. Final Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions

[2] 83 Fed. Reg. 42,986 (Aug. 24, 2018).

We agree with CARB's proposed conclusion that the "deemed to comply" provision was intended to apply only to the extent federal GHG emission standards remained substantially equivalent to California standards. There is ample evidence to confirm this understanding. For example, ARB Resolution 12-21 (May 22, 2012) states that "[i]t is appropriate to accept compliance with the 2017 through 2025 model year National Program . . . *provided that the greenhouse gas reductions set forth in U.S. EPA's December 1, 2011 Notice of Proposed Rulemaking for 2017 through 2025 model year passenger vehicles are maintained* . . . ."

Similarly, in the Initial Statement of Reasons supporting the "deemed to comply" provision, CARB explained:

> These proposed amendments do not replace California's own passenger motor vehicle greenhouse gas regulations. Rather, they provide an additional compliance option to manufacturers by allowing them to demonstrate compliance with California's regulations by demonstrating compliance with federal requirements. For any manufacturer that elects to pursue this compliance pathway, there would be no substantive difference between California requirements and the National Program. However, *in the event the National Greenhouse Gas program ceases to be in effect, that alternative compliance option would no longer be available* . . . .[3]

See also id. at 4–5 ("California committed to accept national program compliance for model years 2017 through 2025 *with the understanding that it would provide equivalent or better overall greenhouse gas reductions*" as compared to California's program).

This understanding is confirmed by considering the broader context against which the "deemed to comply" provision was adopted. Since 1967, California has been eligible to obtain a waiver from the Clean Air Act's preemption provision in order to establish its own emission standards. In creating this waiver regime, Congress intended "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 453 (D.C. Cir. 1998) (quoting H.R. Rep. No. 95–294, at 301–02 (1977)). Under this regime, CARB has repeatedly acted to establish emission standards that are significantly more stringent than those adopted at the federal level. In 2004, CARB adopted the nation's first GHG emission standards, five years before EPA first acted to regulate GHG emissions under the Clean Air Act. The regulations at

[3] *Initial Statement of Reasons for Rulemaking: Proposed Amendments to New Passenger Motor Vehicle Greenhouse Gas Emission Standards for Model Years 2017-2025 to Permit Compliance Based on Federal Greenhouse Gas Emission Standards* (Sept. 14, 2012) [hereinafter Initial Statement of Reasons], at 18.

issue here establish a stringent, and carefully considered, program for reducing GHG emissions, including during MY 2017–2025.

Against this backdrop, it would be unreasonable to construe the "deemed to comply" provision to apply in situations where federal GHG emission standards are materially weaker than current CARB standards. If construed in this manner, the "deemed to comply" provision would amount to an effective repeal of standards for model years 2017 through 2025, because these standards *would never apply*, even if—as may happen here—EPA effectively eliminated federal standards. The fact that CARB enacted a dual-compliance option, rather than repealing the GHG rule for the model years in question, indicates that CARB always intended for the rules to serve as a backstop in the event EPA enacted a fundamental change to the National Program. *See Initial Statement of Reasons* at 18 ("in the event the National Greenhouse Gas program ceases to be in effect, the ["deemed to comply"] option would no longer be available.").

The Alliance of Automobile Manufacturers ("Alliance") argued in a May 31, 2018 comment that the proposed clarification "would constitute a significant departure from the commitments made by ARB in July 2011." The Alliance comment offers several arguments in support of this conclusion, none of which are persuasive. First, it cites CARB's commitment letter, which states that "compliance with the GHG emissions standards adopted by EPA for those model years that are substantially as described in the July 2011 Notice of Intent, even if amended after 2012, shall be deemed compliance with the California GHG emission standards." This statement is fully consistent with CARB's other statements during this period. Although CARB indicates that the "deemed to comply" provision might continue to apply in the event EPA's standards were amended, it reiterated that this commitment was limited to cases where federal standards were "substantially as described" in the July 2011 Notice. In other words, CARB never contemplated that the "deemed to comply" provision would continue to apply if EPA's standards were amended to substantially reduce GHG emissions. The amendments EPA is currently considering —which would effectively dismantle the National Program—are not within the scope of CARB's commitment.

Second, the Alliance attempts to draw a contrast between the "deemed to comply" provision at issue here and the one CARB adopted with respect to EPA's 2012 to 2016 MY GHG standards. The latter refer to standards "as adopted by the U.S. Environmental Protection Agency on April 1, 2010," while the former refer to standards "as codified in 40 C.F.R. Part 86, Subpart S." The Alliance argues that CARB's failure to specify a particular date of adoption when referring to the 2017 to 2025 standards demonstrates that CARB intended to incorporate any modifications that might be made to these standards. This argument also misses the mark. The deem-to-comply provision should be evaluated based on the record as a whole[4] and, in

[4] Under California law, the question of whether an incorporation is static or dynamic should be determined based on the intent of the legislature or regulator. *In re Jovan B.*, 6 Cal. 4th

context, the provision clearly was not intended to dynamically incorporate any weakening of the federal standards. Such a reading contradicts numerous CARB statements and, most importantly, would negate the whole purpose of California obtaining a waiver.

Third, the Alliance discusses the back-and-forth between itself and CARB in the "deemed to comply" rulemaking. In its comment on the Initial Statement of Reasons, the Alliance stated that it viewed the "deemed to comply" provision as providing manufacturers with the "option to comply with the federal program will continue through 2025, whatever the final outcome of the mid-term evaluation."[5] The Alliance finds it notable that CARB "did not disagree" with its comment. It is not. CARB simply stated that the Alliance's comment was "outside the scope of this rulemaking and therefore require[d] no response." CARB's non-response to the Alliance does not detract from the agency's statements elsewhere in the rulemaking indicating that the option to comply with the federal program was contingent on the program delivering "equivalent or better overall greenhouse gas reductions" as compared to California's program

Because the "deemed to comply" provision was always intended and is properly interpreted and understood to apply only to federal emission standards that achieved emission reductions substantially equivalent to those achieved by the CARB standards, the Proposed Amendments constitute neither a substantive change to the regulations nor a revocation of CARB's prior commitments. While the amendment is not required, we support CARB's decision to finalize the proposed amendment in order to eliminate any possible confusion that may exist over the nature of the provision.

Should you wish to discuss matters further with NRDC, please do not hesitate to contact us through Irene Gutierrez (igutierrez@nrdc.org).

Sincerely,

Irene Gutierrez
Staff Attorney, Natural Resources Defense Council

801, 816 (1993) (nature of incorporation determined by legislative intent); *California Drive-in Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 292 (1943) (holding that courts should use the same interpretive tools when considering regulations as are used to interpret legislation).

[5] *Final Statement of Reasons: Amendments to New Passenger Motor Vehicle Greenhouse Gas Emission Standards for Model Years 2017-2025 to Permit Compliance Based on Federal Standards* (Dec. 2012), at 10–11.