Attachment 2 to WSPA Comments on ARB's Draft Community Air Protection Blueprint and Appendices

Comments on Appendix G - Draft Environmental Analysis Prepared for the Proposed Draft Community Air Protection Blueprint

I. The Draft EA Fails to Sufficiently Address CEQA Requirements Because It Does Not Evaluate Reasonably Foreseeable Environmental Impacts from Implementing the Blueprint.

The California Air Resources Board's ("ARB") Draft Environmental Analysis ("Draft EA") fails to fully and fairly disclose all reasonably foreseeable adverse environmental impacts associated with implementing the AB 617 Draft Community Air Protection Blueprint ("Blueprint") in violation of the California Environmental Quality Act ("CEQA") (Cal. Pub. Res. Code ("PRC") §§ 21000 et seq.). CEQA requires lead agencies to consider the significant environmental impacts of their actions, and to the extent feasible, mitigate those impacts to insignificant levels.

Under CEQA, before ARB adopts a regulatory program that will require installation of pollution control equipment or compliance with performance standards or treatment requirements, it must identify and analyze reasonably foreseeable environmental impacts of, mitigation measures for and alternatives to foreseeable methods of compliance with such standards. The environmental analysis must take into account a reasonable range of environmental, economic and technical factors, populations and geographic areas, and specific sites. *See* PRC §§ 21159, 21159.4. Even though the regulatory program envisioned by the Draft Blueprint is intended to benefit the environment, a full and fair evaluation of its potential to result in unintended adverse environmental side-effects is required. *POET LLC v. State Air Resources Board* (2012) 218 Cal.App.4th 681.

ARB has attempted to prepare the Draft EA as a high-level programmatic CEQA evaluation, which ARB notes will be followed by more detailed, project-level CEQA review of individual actions undertaken by ARB, the air districts, cities, counties and other agencies in order to implement the strategies outlined in the Blueprint. *See* Draft EA, pp. 3-4. The Draft EA claims that many of the impacts resulting from compliance are "speculative" and on that basis conservatively concludes that, at the program level of analysis, many anticipated adverse impacts must be considered "**potentially significant and unavoidable**." *See*, *e.g.*, Draft EA p. 36 (emphasis in original). ARB repeatedly asserts that such impacts must be considered potentially significant and unavoidable because implementation of the Draft EA's recommended mitigation measures for those impacts is under the jurisdiction of local decision makers, not ARB. *See* Draft EA, p. 35.

While such "tiered" environmental review is encouraged by CEQA, the tiering approach "does not excuse the lead agency from adequately analyzing reasonably foreseeable significant

environmental effects of the project and does not justify deferring such analysis to a later tier." 14 C.C.R. § 15152(b).

- "While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information is not satisfied by simply stating information will be provided in the future." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 (internal quotations omitted).

- Deferring CEQA analysis to a later tier is permitted only when the agency makes "*no commitment*" for the future at the first stage of the project, and there is an "understanding that additional detail will be forthcoming when specific second tier projects are under consideration." *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1172; *see also City of Hayward v. Board of Trustees of the California State University* (2015) 242 Cal.App.4th 833, 848-851.

- Conversely, CEQA analysis is required before an agency becomes "committed to a definite course of action." *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 139 (2008). The question is "whether, as a practical matter, the agency has *committed itself to the project as a whole or to any particular features*, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered*, including the alternative of not going forward with the project*." *POET*, 218 Cal.App.4th at 721-722 (*quoting Save Tara*, 45 Cal.4th at 138) (emphasis added).

II. ARB Improperly Piecemealed Environmental Review of the Blueprint by Declining to Analyze Impacts of Local Agencies Compliance Actions.

CEQA prohibits lead agencies from conducting "piecemeal" review of a project's significant environmental impacts. Agencies must consider "the whole of an action" (PRC § 15378) rather than "chopping up proposed projects into bite-sized pieces which, when taken individually, may have no significant adverse effect on the environment." *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223 (internal quotations omitted); *see also Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 277-278. California courts have held that lead agencies engage in improper piecemealing "when the reviewed project legally compels or *practically presumes* completion of another action." *Aptos Council*, 10 Cal.App.5th at 280 (emphasis added). To avoid improper piecemealing, a complete programmatic analysis must be prepared covering multiple related actions, rather than subsequently evaluating those for the first time as separate CEQA projects. *See City of Hayward*, 242 Cal.App.4th at 850 (program EIR for university master plan avoided piecemealing by studying cumulative traffic impacts on major intersections in the area).

In analyzing whether the two projects are improperly piecemealed in violation of CEQA. the test set out by the California Supreme Court is as follows: "… an EIR must include an analysis of the environmental effects of [the] … other action if: (1) *it is a reasonably foreseeable consequence*

of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project *or its environmental effects*." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (emphasis added). While the Blueprint commits to the development of Community Emission Reduction Plans by air districts, ARB claims that the only reasonably foreseeable compliance response this will lead to is "CARB staff providing a criteria document for the development of [these] programs." Draft EA, p. 26. ARB asserts that, because the Plans "are not known at this stage and will be developed later by local air districts," ARB is unable to analyze *any* anticipated impacts associated with the Plans. *Id*. However, in the Blueprint ARB states that the Plans will result in new rules and regulations for pollution control, incentives to promote accelerated equipment turnover to "cleaner technologies," and "engagement with local agencies on land use and transportation strategies. Blueprint, p. 15.

Here, compliance measures established by the local air districts and/or other local agencies to facilitate compliance with measures set forth in the Draft Blueprint are not only reasonably foreseeable, but will likely change the environmental impacts beyond those contemplated by Blueprint and its environmental analysis. ARB makes no attempt to discuss the adverse environmental impacts of these anticipated actions. CEQA forbids this type of "piecemealing" of a project's foreseeable significant environmental impacts. *See* 14 C.C.R. § 15378. At a minimum, ARB must consider the adverse environmental impacts of anticipated actions under CEQA or alternatively withdraw the blanket statement that the Plans will result in "…new rules and regulations for pollution control…".

III. ARB Fails to Analyze Reasonably Foreseeable Means of Compliance and Impacts From Its Commitments, Which Are Not Speculative.

The Draft EA does address the impacts of new ARB regulations that may be adopted as "statewide strategies" under the Blueprint, including potential new regulations on railyards, locomotives, drayage trucks, cargo handling equipment, commercial harbor craft, heavy-duty engines, etc., as listed in Draft EA Table 2-1. The reasonably foreseeable means of compliance with these ARB regulatory actions include the following (EA, p. 27):

> "… increased infrastructure for hydrogen refueling stations and electric charging stations; increased demand for lithium battery manufacturing and increased recycling, refurbishment, or disposal of lithium batteries; …. [increased] replacement rate [of] vehicles, equipment and engines… requiring that older models are sold outside of California, scrapped, disposed, or recycled; …. construction and operation of new manufacturing facilities, or, the modification of existing facilities to support zero and near-zero emission equipment and vehicles; … construction of new, or modification of existing, facilities to add on control equipment; changes to manufacturing processes; and the disposal of spent materials."

However, ARB does not assess all of the reasonably foreseeable means of compliance with the Blueprint. The Draft EA analyzes *only* reasonably foreseeable means of compliance with ARB's *own* proposed regulations in Draft EA Table 2-1, but declines to analyze the multitude of local

air district and local agency compliance measures that will be required to implement the Blueprint.

The Blueprint is not so limited. In adopting it, ARB is committing itself as a practical matter to a much larger outcome than just this list of its own new regulations. In the Blueprint, ARB commits to a plan of action that ***must*** be carried out, not only through new ARB regulations, but also through regulatory or approval actions by air districts, cities, counties and other agencies. For actions under the jurisdiction of other agencies, the EA states that those agencies will perform later project-level evaluation of those actions. However, under the Blueprint, the "no project alternative," which must always be considered under CEQA (*see* 14 C.C.R. § 15126.6(e)), will not be a permissible option for air districts when considering actions to implement the Blueprint. Even though some requirements of the Blueprint must be implemented or approved by other agencies, as the oversight agency ARB has "committed itself to the project as a whole or to any particular features, so as to effectively preclude . . . the alternative of not going forward with the project." *POET,* 218 Cal.App.4th at 721-722. Thus, because all locally adopted compliance measures required to carry out the Blueprint were excluded from programmatic review, ARB has improperly piecemealed the CEQA review of the unified Blueprint.

- For example, the Draft EA asserts that no physical environmental impacts could result from "incentive funding to support immediate emission reductions." *See* Draft EA, p. 27. However, the Blueprint (p. 3) states that those incentive investments will be used to "purchase cleaner vehicles and equipment, with a focus on advancing zero emission technologies within impacted communities." If that is the case, then the results of incentive funding would be similar to those of compliance with new ARB regulations as noted above: increased hydrogen and electric infrastructure and manufacturing facilities; lithium battery demand, recycling and disposal; vehicle scrapping, recycling or sale outside the state; facility modifications, etc., thereby adding to all of the potentially significant impacts attributed to those means of compliance throughout the Draft EA. Those impacts are already identified in the Draft EA only to the extent that they are a consequence of ARB's own regulations. As a result, the Draft EA substantially understates the magnitude of each impact by excluding the additional foreseeable consequences resulting from incentive funding, while at the same time claiming the benefits of incentivized vehicle and equipment turnover.

- The Blueprint also commits to development of Community Emission Reduction Programs by air districts. ARB incorrectly excluded from the Draft EA scope the impacts of air districts imposing foreseeable regulations that also would require cleaner vehicles and equipment, installation of new controls, etc. ARB claims that "it would be speculative for this EA to attempt to analyze the impacts of potential compliance responses associated with the later development of community emission reduction programs by local air districts." Draft EA, p. 26. However, ARB has stated that these strategies will require:

- New approaches to accelerate and focus direct reductions in emissions and air pollution exposure within the community to meet the emission reduction targets…

- New rules and regulations including an expedited schedule for retrofitting pollution controls on certain industrial sources, evaluation of more stringent control limits for other types of pollution sources, and consideration of indirect source rules and enforceable agreements; …

- Incentives to promote accelerated turnover to cleaner technologies; … [and]

- Engagement with local agencies on land use and transportation strategies such as setbacks, buffer zones, and alternative truck routing. *See* Blueprint, p. 15.

By adopting the Blueprint, ARB is committed as a practical matter to such programs that are also directly subject to review and approval by ARB. Thus, the environmental consequences associated with additional increased infrastructure and manufacturing facilities, lithium battery demand and recycling, vehicle scrapping or recycling, control equipment installation, etc., are additional foreseeable consequences of ARB's commitment.

Again, by addressing only the limited magnitude of impacts resulting from ARB's own new regulations, the Draft EA substantially understates the magnitude of each impact while claiming the benefits of the emission reduction programs.

Even if it was proper for ARB to limit the scope of the Draft EA impact analysis to those of its own regulations, and exclude the environmental consequences of using incentive funding, new air district regulations, and land use and transportation strategies, those additional actions are still reasonably foreseeable – indeed, they are intended and must occur, according to the Blueprint. As such, they should have been included in the cumulative impact analysis, as other reasonably foreseeable future actions that would contribute to cumulative environmental impacts together the ARB regulations under the Blueprint. At a minimum ARB should follow the requirements under CEQA and conduct such an evaluation or alternatively ARB could withdraw such actions and assumptions of future actions from the Blueprint.

IV. ARB Downplays Potential Adverse Environmental Impacts of Compliance Responses to the Blueprint.

Finally, for those selected compliance responses listed in the Draft EA as reasonably foreseeable, ARB fails to describe the full range of potential adverse impacts, or dismisses those impacts as insubstantial. ARB fails to consider the full extent of associated with a number of compliance measures, including but not limited to: (i) land use and transportation strategies; (ii) new and increased waste streams associated with equipment retrofitting and other technological changes; (iii) increased lead acid and lithium ion batteries; and (iv) increased demand of public services and fire protection.

Land Use and Transportation Strategies

- The Blueprint simply commits ARB to requiring the air districts to engage with local agencies such as cities, counties and transportation agencies. There is no substantive discussion of impacts from potential land use and transportation strategies to obtain community emission reductions. Instead, the Draft EA's land use section merely cross-references other sections of the Draft EA. *See* Draft EA, p. 64.

- The Draft EA also asserts that, for statewide action on land use and transportation strategies, ARB will only be compiling best practices guidance documents, and that preparing a document has no environmental impact. *See* Draft EA, p. 19. But the Blueprint is not limited to preparing documents. When reviewing and approving community emission reduction programs, ARB will require air districts to engage with local agencies on land use and transportation strategies. *See* Draft EA, p. 15. The Draft EA should consider whether such strategies may have significant environmental impacts, at least at a programmatic level, rather than categorically disregarding the consequences of ARB's commitment.

- For example, pursuant to Senate Bill 375 ("SB 375"), cities, counties and transportation agencies have developed Sustainable Communities Strategies ("SCSs") to encourage "smart" land use patterns, higher density transit-oriented development, and reduced vehicle-miles-traveled, in part by directing new development into priority areas where existing transportation infrastructure is located. In some cases, the SCSs may promote the same outcomes as the Blueprint's community emission reduction programs, such as increased transit use, which would be favored by both programs. In other cases, however, buffer zones and other land use and transportation strategies to reduce local community exposures may foreseeably lead to diverting development to cleaner "greenfield" areas – a potential benefit under AB 617 and the community emission reduction programs, but a form of disfavored "sprawl" growth under SB 375 and the SCSs. In particular, this outcome is an environmental risk in regions not well served by transit. These competing environmental considerations must be evaluated as a reasonably foreseeable consequence of ARB's commitment to the Blueprint, to avoid improperly piecemealing the environmental impacts following from adoption of the unified Blueprint into later separate CEQA reviews of local jurisdiction actions.

<u>Solid Waste and Hazardous Materials</u>

- The Draft EA does analyze some specific potentially significant impacts of ARB's new regulations under the Blueprint, including impacts associated with new waste streams, e.g., scrapping or recycling existing vehicles, equipment and engines. Generally, the Draft EA acknowledges that there "may be an increase in the amount of solid waste diverted to landfills as a result of increased fleet turnover; however, it would not be substantial enough to result in closure of an existing landfill or development of a new landfill as much of the vehicles and equipment would be recycled." *See* Draft EA, p. 81.

- However, there is no support or analysis provided for ARB's conclusory statement. Moreover, as presented in the Draft EA, that conclusion refers only the outcome of ARB regulations and excludes the addition to the waste stream and hazardous materials impacts associated with use of incentive funding and resulting from community emission reduction programs.

Lithium Batteries

- While ARB acknowledges that the Blueprint is likely to lead to increased demand for lead acid and lithium ion batteries (along with risks of igniting and increases in carbon-intensive mining for those materials), it largely ignores the adverse impacts this would have on hazardous materials management and the hazardous waste stream

- The Draft EA provides only the conclusory claim that "because lithium-batteries and hydrogen fuel cell systems are designed to reduce the potential for hazardous conditions associated with transport and use, and because regulations exist to ensure that lithium-ion batteries are disposed of appropriately, operational-related effects to hazards and hazardous materials associated with the proposed Draft Blueprint would be less than significant." Draft EA, p. 60.

- There is no analysis of the nature and potential magnitude of impacts to support the conclusion of less-than-significance. Again, as noted above, this conclusion is limited to impacts of ARB regulations, excluding the addition to the waste stream and hazardous materials impacts associated with use of incentive funding and resulting from community emission reduction programs.

Public Services/Fire Protection

- While it may be reasonable to find less than significant demand for residential fire protection from adding those few workers to the local population, the Draft EA ignores increased demand for fire protection associated with the manufacturing facilities, fueling and charging infrastructure, vehicles and equipment.

- Elsewhere, the Draft EA recognizes a degree of fire hazard associated with hydrogen and lithium batteries, but that facts missing from the analysis of public service impacts. *See* Draft EA, p. 59. The effect of increased fire hazard on the demand for fire protection services may or may not be significant; however, instead of making a significance determination, the Draft EA ignores it.

It follows that ARB's consideration of a reasonable range of alternatives which could reduce significant impacts of the Blueprint (*see* 14 C.C.R. § 15126.6) is also flawed by the same omissions and understatement of impacts discussed above.

***

Correcting the deficiencies discussed in these comments would require the addition of significant new information disclosing new or substantially more severe environmental impacts, thereby triggering recirculation under the CEQA Guidelines. *See* 14 C.C.R. § 15088.5. Accordingly, ARB must revise and recirculate the Draft EA for additional public disclosure and comment.