Pillsbury
Winthrop
Shaw
Pittman LLP

50 Fremont Street
San Francisco, CA 94105
Tel 415.983.1000
Fax 415.983.1200

MAILING ADDRESS
P. O. Box 7880
San Francisco, CA 94120
www.pillsburylaw.com

September 14, 2007

Meredith Jane Klein
Phone: 415.983.1515
meredith.klein@pillsburylaw.com

Ms. Lori Andreoni
Clerk of the Board
Air Resources Board, State of California
P.O. Box 2815
1001 I Street
Sacramento, CA 95812

Re: <u>Comments on Agenda Item # 07-9-4 (September 27, 2007)</u>
Public Meeting to Consider Approval of the 2007 Air Quality Management Plan for Attaining the Federal 8-hour Ozone and PM2.5 Standards in the South Coast Air Basin and the Coachella Valley

Dear Lori:

As we discussed, I was unable to post our comments today electronically, because there is not yet a listserv set up on the ARB website for this agenda item. You told me you believe that the listserv for this item will be set up on Monday, September 17, 2007. We wish to submit our comments officially today, so I am sending you a hard copy; however, I will be submitting them on your web page as soon as it is possible to do so. If you have any questions, please do not hesitate to call me at 415.983.1515. Thank you very much.

Yours very truly,

Meredith Jane Klein
Senior Environmental Analyst

Attachment

cc: Michael R. Barr

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Pillsbury
Winthrop
Shaw
Pittman LLP

50 Fremont Street
San Francisco, CA 94105
Tel 415.983.1000
Fax 415.983.1200

MAILING ADDRESS
P. O. Box 7880
San Francisco, CA 94120
www.pillsburylaw.com

September 14, 2007

Michael R. Barr
Phone: 415.983.1151
michael.barr@pillsburylaw.com

VIA E-MAIL

Tom Cackette, Acting Executive Officer
California Air Resources Board
1001 I Street
Sacramento, CA 95812

September 27, 2007 Agenda Item # 07-9-4 (Public Meeting to Consider Approval of the 2007 Ozone and PM2.5 Air Quality Plan for the South Coast Basin): COMMENTS ON PROPOSED INCLUSION OF CLEAN AIR ACTION PLAN MEASURES IN STATE IMPLEMENTATION PLAN

Dear Mr. Cackette:

The Class I freight railroads operating in California (the Railroads) appreciate the opportunity to comment on the proposal to include the South Coast Air Quality Management District's (SCAQMD) 2007 Air Quality Management Plan (2007 AQMP) in the State Implementation Plan (SIP). The Railroads support the clean air goals of the 2007 AQMP and the California Air Resources Board's (CARB) proposed SIP measures, and are doing their fair share to achieve real and quantifiable emission reductions in the South Coast Air Basin and throughout the state.

As you know, the U.S. Environmental Protection Agency (USEPA) approved the NOx reductions from the 1998 railroad MOU as part of the California SIP after CARB developed an approvable NOx reduction control measure reflecting that MOU as part of its AQMP. CARB developed that measure carefully and consistently with the Health & Safety Code and the federal Clean Air Act, CARB and EPA regulations and guidance and well-justified policies. That approval has stood the test of time and that measure is on track to deliver the anticipated emission reductions in full and on time.

Unfortunately, the proposed 2007 AQMP before you now contains vague and legally unenforceable provisions incorporating the San Pedro Ports' Clean Air Action Plan (CAAP) measures. Compounding the problems of vagueness and unenforceability, Table 6-13 (formerly Table 6-12 in earlier drafts of the AQMP) assigns specific emission reductions to the CAAP measures—reductions that appear out of thin air without any supporting data. In addition, the 2007 AQMP proposes Measure MOB-03, entitled

"Backstop Measures for Indirect Sources of Emissions from Ports and Port-Related Facilities." This backstop measure is also extremely vague and unenforceable. CARB should not approve either the CAAP measures or the Backstop Measures as part of the current AQMP under the Health and Safety Code and the federal Clean Air Act, CARB and EPA regulations and guidance and well-justified air planning policies.

BACKGROUND

The CAAP was adopted by the Ports of Los Angeles and Long Beach in November 2006, and sets forth a series of ambitious goals for reducing emissions related to port operations. The Railroads support these goals, although there are many open questions concerning how they are to be achieved. The railroads have held several meetings with the ports' staff to discuss these issues, and further discussions are scheduled.

To understand why the CAAP cannot properly be incorporated into the SIP, one must first understand exactly what it is the CAAP seeks to achieve. For the railroads, two measures are identified, RL2 and RL3. As stated in the CAAP,

> "The goal of [RL2] is to secure an agreement (MOU) with the Class 1 railroads, and use other contractual mechanisms, to reduce emissions from their existing operations on Port properties that do not have a CEQA [California Environmental Quality Act] action pending in the next five years (i.e. new or redeveloped rail yard)." CAAP Technical Report, November 2006, p. 50.

The CAAP Technical Report describes in more detail the specific measures to be implemented:

> "**SPBP-RL2** – Existing Class 1 Railroad Operations. * * * This measure lays out stringent goals for switcher, helper, and long haul locomotives operating on Port properties. By 2011, all diesel-powered Class 1 switcher and helper locomotives entering Port facilities will be 90% controlled for PM and NOx, will use 15-minute idle restrictors, and after January 1, 2007, the use of ULSD [ultra low sulfur diesel] fuels. Starting in 2012 and fully implemented by 2014, the fleet average for Class 1 long haul locomotives calling at Port properties will be Tier III equivalent (Tier 2 equipped with DPF and SCR or new locomotives meeting Tier 3) PM and NOx and will use 15-minute idle restrictors. Class 1 long haul locomotives will operate on USLD while on Port properties by the end of 2007. Technologies to get to these levels of reductions will be validated through the

> Technology Advancement Program." CAAP Technical Report, November 2006, p. 50.

Similarly, RL3 proposes to use the permit review and CEQA processes to encourage emission reductions for new projects:

> "**SPBP-RL3** – New and Redeveloped Rail Yards. Rail facilities include many emission-producing activities, including the operation of switching and line-haul locomotives, idling of switching and line-haul locomotives, loading and unloading of railcars by CHE [cargo handling equipment], and HDVs [heavy duty vehicles] servicing the yards. New rail facilities, or modifications to existing rail facilities located on Port property, will incorporate the cleanest locomotive technologies, meet the requirements specified in SPBP-RL2; utilize 'clean' CHE and HDV, and utilize available 'green-container' transport systems. A list of these technologies will be provided for project proponents to consider in developing new facilities or redeveloping existing facilities, and the measures will be formalized in lease requirements." CAAP Technical Report, November 2006, p. 50.

Neither RL2 nor RL3, nor any of their implementing measures, is legally enforceable absent an agreement between the Railroads and the ports. Because the ports are not air quality regulatory agencies, and therefore have no legislative power to regulate mobile sources, the only tools available to them are voluntary agreements and permit conditions. Although a voluntary agreement or permit condition can be reflected in the SIP (as with the 1998 rail MOU), the agreement or permit condition must first exist in properly approvable form—that is, it must be real, quantifiable and enforceable before it can be incorporated into the SIP. The mere goal of reaching some such agreement is far too vague and unenforceable to qualify for inclusion in the SIP under federal and state law.

The 2007 AQMP, however, seeks to convert the CAAP's general goals into enforceable requirements by including RL2 and RL3 as 2007 AQMP measures to be added to the SIP. The relevant portion of the AQMP states:

> "Specifically, the Draft Final 2007 AQMP proposes locomotives go beyond the GMP [Goods Movement Plan] and achieves consistency with the CAAP by requiring all locomotives operating in the Basin to be Tier 3 equivalent by 2014. * * * The estimated emission reductions and final emissions targets needed from port-related sources to demonstrate attainment are shown in Table 6-13. The SCAQMD will continue to work with the Ports of Los Angeles and Long Beach

> to further refine these targets as new information becomes available and amend the AQMP as appropriate." 2007 AQMP at 6-28.

The 2007 AQMP then sets forth the following chart, which establishes specific emission reductions that will be achieved through implementation of all of the measures in the CAAP.

Chapter 6 Clean Air Act Requirements

TABLE 6-~~12~~13

Port Emissions Targets (tpd)*

		2002	2014	2023**
NOx	Baseline Inventory	117.6	117.4	136.5
	Emission Reductions		~~59.257.8~~	~~87.790.6~~
	Port Emissions Targets	117.6	~~58.259.6~~	~~48.845.9~~

		2002	2014	2023
SOx	Baseline Inventory	24.1	22.1	33.1
	Emission Reductions		20.0	29.5
	Port Emissions Targets	24.1	2.1	3.6

		2002	2014	2023
PM2.5	Baseline Inventory	6.5	5.4	6.3
	Emission Reductions		~~3.93.7~~	4.9
	Port Emissions Targets	6.5	~~1.51.7~~	1.4

* Port emissions estimated by assigning all ships, harbor craft, and port-related cargo handling equipment emissions to port inventory. Emissions from trucks and locomotives operating at the ports are based on the percentage of international goods movement compared to all goods movement (international plus domestic) emissions from CARB's GMP statewide estimate for trucks and locomotives.

** The 2023 ~~budgets~~ ~~targets~~ for NOx do not include the "black-box" reductions as part of the ozone attainment strategy. As more defined measures are developed in future plan revisions, the 2023 and future year budgets will be revised accordingly.

2007 AQMP at 6-29.

The source of these baselines and reduction targets is NOT set forth in the 2007 AQMP, and the numbers are highly questionable, as discussed below. The legal problems

presented by including any such targets or budget in the SIP are also discussed further below.

COMMENTS ON SIP INCLUSION

1. The CAAP measures for rail cannot be incorporated into the SIP because they are not legally enforceable as required by USEPA's SIP regulations.

California Health and Safety Code section 39602 specifically prohibits the inclusion in the SIP of any provision not necessary to meet the requirements of the Clean Air Act. One of the most fundamental Clean Air Act requirements for including a measure in the SIP is that the measure be legally enforceable. The enforceability requirement for SIPs was explained in the preamble to the SIP regulations:

> "All creditable emission reductions must be real, permanent, and enforceable." (General Preamble, 57 Fed. Reg. 13498, at 13509 (April 16, 1992) (emphasis added)).

The USEPA further explained the enforceability requirement as follows:

> "In general, for a SIP regulation to be enforceable, it must clearly spell out which sources or source types are subject to its requirements and what its requirements (work practices, emission limits, etc.) are. The regulation also needs to specify the time frames within which these requirements must be met, and must definitively state recordkeeping and monitoring requirements appropriate to the type of sources being regulated. The recordkeeping and monitoring requirements must be sufficient to allow determinations on a continuing basis whether sources are complying. An enforceable regulation must also contain test procedures in order to determine whether sources are in compliance." (*Id.* at 13502).

None of the criteria set forth in the regulation or described in the preamble is satisfied by the 2007 AQMP, which contains only the vaguest and most conclusory descriptions of the measures to be implemented for rail.

USEPA regulations adopted pursuant to the Clean Air Act set forth the basic requirements for SIP approvals:

> "§ 51.230 Requirements for all plans.
>
> "Each plan must show that the State has legal authority to carry out the plan, including authority to:
>
> * * *
>
> "(b) Enforce applicable laws, regulations, and standards, and seek injunctive relief.
>
> * * *
>
> "(d) Prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard.
>
> * * *
>
> "§ 51.231 Identification of legal authority.
>
> "(a) The provisions of law or regulation which the State determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations be submitted with the plan.
>
> "(b) The plan must show that the legal authorities specified in this subpart are available to the State at the time of submission of the plan."

The ports have none of the powers necessary to meet these requirements, nor do they even purport to have such powers.[1] Instead, the CAAP merely identifies the goal of achieving emission reductions through voluntary agreements to be negotiated in the future, or through specific permit conditions on future projects. Neither goal is sufficiently certain to be included as a SIP measure at this time.

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[1] "The State may authorize a local agency to carry out a plan, or portion thereof, within such local agency's jurisdiction if—(1) The plan demonstrates to the Administrator's satisfaction that the local agency has the legal authority necessary to implement the plan or portion of it . . . ." 40 CFR § 51.232(b). However, the State of California has provided no such authority to the ports.

USEPA has not hesitated to disapprove SIP provisions where the implementing agency lacked authority to enforce the measures. For example, USEPA disapproved certain aspects of California's architectural coatings rules because of "jurisdictional issues" and "enforceability problems." These jurisdictional and enforceability problems flowed from the fact that the California Air Resources Board (CARB) had "not been granted authority by the state Legislature under the California Health and Safety Code to regulate architectural coatings." 69 Fed.Reg. 52432 (August 26, 2004).

Similarly, USEPA has declined to include provisions in a federal implementation plan (FIP) where USEPA lacked authority to implement such measures. In disapproving hundreds of measures included in the 1989 AQMP for the South Coast Air Basin, USEPA cited its own "lack of regulatory authority" to enforce the measures, along with "unresolved concerns regarding economic and technical feasibility."[2]

In prior SIP reviews, CARB also has declined to adopt portions of the SCAQMD's AQMP where that portion failed to meet the requirements of the Clean Air Act. For example, in adopting the 1994 ozone implementation plan, CARB noted that certain vehicular control measures in the SCAQMD's 1994 AQMP would not be included in the SIP because such measures would be solely within CARB's purview. Other measures falling within the State Department of Pesticide Regulation were also not included in the SIP. 1994 California SIP, at IV-2 (November 15, 1994).

2. The 2007 AQMP itself recognizes that only legally enforceable measures can be included.

The enforceability requirement is also reflected in the 2007 AQMP itself. Page 7-4 sets forth the criteria that the SCAQMD supposedly applied in determining which measures to include in the AQMP, and specifically listed two criteria that are directly relevant here:

> "Enforceability - The ability to force polluters to comply with a control
>
> * * *

[2] USEPA also noted the uncertainties "regarding adverse air quality impacts (e.g., where the proposed control might decrease VOC emissions but increase NOx emissions)." 55 Fed.Reg. 36458, 36516 (September 5, 1990). Similar adverse consequences may flow from measures in the CAAP that could result in a modal shift of freight from rail to trucks. For a further discussion of the requirement for certainty and feasibility for SIP measures, see below.

> "Legal Authority - Ability of the District or other adopting agency to implement the measure or the likelihood that local governments and agencies will cooperate to approve a control measures"

The ports essentially admit that they lack the authority to "force" the railroads to comply with the measures in RL2 by stating that the goal of the measure is to reach a voluntary agreement. And as noted above, the ports, which are not air quality regulatory agencies, also lack the legislative authority to legally adopt these measures. Thus, not only does the 2007 AQMP's inclusion of the rail measures fall well short of federal requirements for inclusion in the SIP, it does not even meet the requirements of the AQMP itself.

3. The CAAP measures for rail cannot be incorporated into the SIP because they are too vague and uncertain.

In addition to being legally enforceable, measures included in the SIP must be shown to be effective. Section 51.112 of the federal regulations on SIP approvals describes this requirement:

> "The demonstration must include the following:
>
> "(1) A summary of the computations, assumptions, and judgments used to determine the degree of reduction of emissions (or reductions in the growth of emissions) that will result from the implementation of the control strategy.
>
> "(2) A presentation of emission levels expected to result from implementation of each measure of the control strategy.
>
> "(3) A presentation of the air quality levels expected to result from implementation of the overall control strategy presented either in tabular form or as an isopleth map showing expected maximum pollutant concentrations.
>
> "(4) A description of the dispersion models used to project air quality and to evaluate control strategies."

None of these requirements is met in the CAAP part of the 2007 AQMP, which simply offers reduction targets without support or justification. There are no summaries of the computations, assumptions or judgments upon which the reduction targets are based; there is no presentation of the emissions expected to result from each measure; and there is no description of dispersion models used to evaluate the controls. There is only a

vague and conclusory table summarizing the overall budget for reductions attributable to all CAAP measures—ships, cargo handling equipment, trucks, rail etc.

The port-wide reduction estimates do not appear to be reliable, although it is difficult to comment meaningfully since none of the information required by the SIP approval regulations described above was provided. The Railroads understand that the AQMP's estimates were derived from outdated inventories and estimates that have not been agreed to by any of the stakeholders, including the ports themselves. For example, the AQMP uses 2002 as a baseline year for its emissions "targets," but the ports have collected data for baseline year 2001, and have recently revised their estimates for the 2001 base year. In that regard, it is noteworthy that the ports released their 2005 Inventory of Air Emissions on September 6, 2007, several months after the 2007 AQMP (relying on 2002 base year estimates) was published. The 2005 Inventory contains emissions estimates that appear to bear little relationship to the estimates set forth in the AQMP.

The specific rail measures in the CAAP also appear to be based on a misunderstanding of the schedule for adoption and implementation of Tier 3 locomotive standards. It appears that the projections relating to this technology were derived from USEPA implementation dates set forth in the advance notice of proposed rulemaking published three years ago, on June 29, 2004 (69 Fed.Reg. 39275). USEPA, however, substantially revised its proposal and the implementation dates just five months ago in the proposed rule published on April 3, 2007 (72 Fed.Reg. 15937). The CAAP, published before USEPA's proposed rule, has not yet been revised to reflect the changes in USEPA's proposed rule.

Thus, when the CAAP, incorporated into the 2007 AQMP, says "Starting in 2012 and fully implemented by 2014, the fleet average for Class 1 long haul locomotives calling at Port properties will be Tier III equivalent," it is not clear what is meant by "Tier III." The goals relating to the use of Tier 3 locomotives therefore cannot be made part of the SIP because they have not been adopted by USEPA, and the accelerated implementation anticipated by the CAAP is not feasible or enforceable.

Further, the CAAP itself admits that reductions that might be achieved from RL2 or RL3 cannot be quantified. For RL2, the CAAP expressly states that "emissions reductions at this time are not quantifiable." CAAP Technical Report, November 2006, p.133. For RL3, the CAAP states: "Since the measure will affect new or modified rail facilities that have not been designed, estimating the level of emission reductions is not possible at this time." *Id.* At 137. The 2007 AQMP does not explain how the emissions targets in Table

6-13 of the CAAP were derived, given that the ports have admitted that the rail measures are not quantifiable.

The unsupported and conjectural nature of the emissions reduction targets in the 2007 AQMP is reinforced by the description of the "Backstop Measure for Indirect Sources of Emissions from Ports and Port-Related Facilities," MOB-03. That measure includes a chart in which all twenty-eight emissions estimates for the period 2002 to 2023 are marked "TBD" (To Be Determined). Similarly, the control cost is marked "TBD" as well. This remarkable lack of quantification underscores the fundamental and fatal flaw in the AQMP's port measures.

Other uncertainties abound. They include:

- Neither CARB nor the SCAQMD has established the "boundaries" of port-related emissions or a methodology to attribute goods movement and other emissions to the ports individually or together. Therefore, the specific measures included in the plan are of such uncertain geographic scope or effect as to be unapprovable.
- The port-related emissions in Table 6-13 are not supported, and are inconsistent with the latest inventory estimates. The AQMP's description of "port-related" sources also does not specify how goods movement emissions are apportioned to the two ports, let alone among the various facilities within the ports.
- The Railroads also agree with the Port of Long Beach that it is inappropriate that only the SCAQMD Executive Officer would determine interim triennial emission targets as backstop measure triggers. This "post hoc" determination is contrary to the provisions of the Health and Safety Code requiring stakeholder and public participation and an opportunity for comments in plan and rule development.

4. Control Measure MOB-03, "Backstop Measures for Indirect Source of Emissions from Ports and Port-Related Facilities" does not meet the requirements for inclusion of contingency measures in a SIP.

To be included in a SIP, a contingency measure must be specific and enforceable without further regulatory action. As stated in the preamble to the federal SIP rule:

> "States must show that their contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions such as public hearings or legislative review. In general, EPA will expect all actions needed to affect full implementation of the measures to occur within

> 60 days after EPA notifies the State of its failure." (General Preamble, 57 Fed. Reg. 13498, at 13512, April 16, 1992).

Control Measure MOB-03 cannot be "implemented with minimal further action." Indeed, the specific provisions of MOB-03, such as after-treatment for locomotives, internal engine modifications and retrofit or replacement of in-use equipment, are outside the SCAQMD's regulatory authority. *See AAR et al v. SCAQMD,* USDC, Central Dist. of California, April 30, 2007; *see also EMA v. SCAQMD,* U.S. Supreme Court, 541 U.S. 246, April 28, 2004.

Not only does the SCAQMD lack legal authority to implement MOB-03, the measure itself is fatally vague. For example, as noted above, MOB-03 contains twenty-eight emission reduction targets marked "TBD." Under these circumstances, MOB-03 cannot be included in the SIP.

5. The SIP cannot incorporate risk-reduction targets.

One of the measures incorporated into the 2007 AQMD from the CAAP is a requirement that new projects not increase air toxic risk by more than 10 in one million. This general goal for project permitting should not be incorporated as a SIP measure.

Clean Air Act section 110 requires that states submit implementation plans that provide for the "implementation, maintenance and enforcement" of the national ambient air quality standards. 42 USC §7410(a)(1). Nowhere in the Clean Air Act, or the regulations implementing its requirements, does the law allow (or require) risk-reduction targets for toxic air contaminants (as opposed to emissions reduction measures for criteria pollutants). USEPA has made it clear that air toxic risk reduction measures cannot be incorporated into the SIP. *See* 70 Fed.Reg. 58311 (October 6, 2005) (removing inadvertently included Idaho toxic air contaminant rules from the SIP).[3] Similarly, the risk standards in the CAAP are port-only policy goals; they were never intended to be incorporated into the AQMP, let alone the SIP. *See* letter from Dr. Robert Kanter, Port of Long Beach, to Dr. Barry Wallerstein, SCAQMD, dated March 30, 2007.

California Health and Safety Code section 39602 specifically prohibits the inclusion of any provision not necessary to meet the requirements of the Clean Air Act. Thus, not

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[3] Note also that SCAQMD Rule 1401, which specifies a maximum allowable cancer risk for new sources, is not part of the SIP.

only are the risk based goals of the CAAP inappropriate for inclusion in the SIP, under the Health and Safety Code, they cannot lawfully be included in the SIP.

6. Incorporating unrealistic, illusory emission reduction targets, based on infeasible control measures, risks serious adverse consequences for the State.

The USEPA and the federal courts have made it clear that, where a SIP includes an emissions budget, and that budget is not met, funding for state transportation projects may be denied due to a lack of conformity between the SIP and the transportation projects. Section 176(c) of the Clean Air Act provides:

> "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. * * * Conformity to an implementation plan means—
>
> > "(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
> >
> > "(B) that such activities will not—
> >
> > > "(i) cause or contribute to any new violation of any standard in any area;
> > > "(ii) increase the frequency or severity of any existing violation of any standard in any area; or
> > > "(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area."
>
> 42 U.S.C §7506(c).

By inserting emission reduction targets in the 2007 AQMP—targets that relate to transportation not just by ship or rail, but by trucks—it could be argued that the SCAQMD has in effect created a "budget" against which conformity for federal

transportation funding will be measured. Given the extraordinarily vague and unrealistic goals upon which the AQMP's reduction targets are based, such a conformity issue would almost certainly be raised at some point soon after any adoption into the SIP.

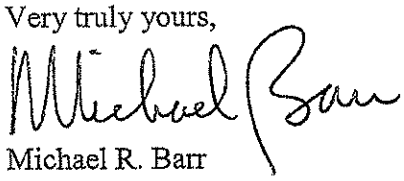
The consequences of including unrealistic and unsupported emission reduction targets in the SIP can be severe. The USEPA regulations provide that conformity can be found only when the emission reduction budget is "clearly identified and precisely quantified" and is "consistent with and clearly related to the emissions inventory." 40 CFR §93.118(e)(4)(iii), (v). The failure to meet these standards could require findings of nonconformity, which in turn could jeopardize federal funding of transportation projects.

The 2007 AQMP does not meet the standards set forth in the USEPA conformity regulations because the emission reduction targets set forth in Table 6-13 are not "clearly identified and precisely quantified" and also are not "consistent with and clearly related to the emissions inventory." Instead, they mix together all port-related sources—road and non-road—and establish baseless reduction targets that are not specific to any particular source type. By making it impossible to unravel the ports' emission reduction targets, the AQMP puts California transportation projects unnecessarily at risk.

CONCLUSION

The 2007 AQMP's provisions relating to the CAAP, in particular measures RL2 and RL3 of the CAAP, should not be incorporated into the SIP. These measures fail to meet the basic requirements of the Clean Air Act and the California Health and Safety Code for inclusion in the SIP—they are not legally enforceable; the emission reduction targets associated with them are not supported by emissions data; the specific measures are infeasible; and they include measures that are expressed in terms of risk reduction rather than any reduction in criteria pollutants.

Very truly yours,



Michael R. Barr

cc: Mary D. Nichols, Chair, ARB
Mike Scheible, Deputy Executive Officer, ARB
Lynn Terry, Deputy Executive Officer, ARB