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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<sup>1</sup> (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].)<sup>2</sup>

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

<sup>2</sup> 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

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**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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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.)<sup>3</sup>

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<sup>3</sup> 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....

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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.)<sup>4</sup>

*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.<sup>5</sup> 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.)

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"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.)

<sup>4</sup> 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.)

<sup>5</sup> "[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.<sup>6</sup> 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.”<sup>7</sup> 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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<sup>6</sup> 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.)

<sup>7</sup> 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.<sup>8</sup>

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<sup>8</sup> 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.<sup>9</sup>

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<sup>9</sup> 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.)<sup>10</sup>

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).)<sup>11</sup>

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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<sup>10</sup> Government Code section 16428.95 establishes the Cost of Implementation Account within the Air Pollution Control Fund.

<sup>11</sup> 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,

Diane F. Boyer-Vine  
Legislative Counsel



By ~~For~~  
Josh Tosney  
Deputy Legislative Counsel

JDT:sjk