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June 18, 2025

California Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Attention: CTU
staff@oal.ca.gov

Re: Petition for Office of Administrative Law Determination of Underground Rulemaking by California Air Resources Board

To Whom it May Concern:

Pursuant to Section 11340.5(b) of the California Government Code, Western States Trucking Association (“WSTA”) petitions the Office of Administrative Law (“OAL”) for a determination that the California Air Resources Board (“CARB”) has improperly adopted a regulation in violation of the California Administrative Procedure Act (“APA”) by entering into the Clean Truck Partnership (“CTP”). The CTP applies generally to all manufacturers of internal-combustion powered on-road heavy-duty trucks and engines and requires those companies to follow CARB regulations even when those regulations have no federal authorization. (See Gov. Code, §§ 11340.5, subd. (a); 11342.600.)

In order to provide OAL with some additional context for this petition, WSTA is the oldest independent trucking association in the nation, representing a diverse group of trucking companies engaged in in-state and interstate commerce. Our associate members include support services such as fuel, insurance and truck sales and maintenance. WSTA has participated in every major CARB regulatory program affecting trucking for more than 15 years and our members are directly impacted by the underground rulemakings described herein.

CARB, the Truck and Engine Manufacturers Association (“EMA”), and all manufacturers of internal-combustion powered on-road heavy-duty trucks and engines (“OEMs”) executed the CTP agreement in summer 2023.¹ The CTP requires the OEMs to comply with CARB’s Advanced Clean Trucks (“ACT”) and Heavy-Duty Omnibus (“Omnibus”) regulations even in certain circumstances where CARB lacks a preemption waiver from the U.S. Environmental Protection Agency (“EPA”). In doing so, the CTP creates new regulatory obligations for virtually an entire industry—including the requirement to follow regulations that are not authorized by federal law. It also purports to grant CARB new powers, such as the power to require new vehicle and engine certifications to meet requirements that do not have federal authorization.

Although the CTP stands in for CARB regulations, CARB did not comply with the APA in introducing this alternative regulatory regime. Thus, the CTP is an invalid underground regulation. (See *Vasquez v. Dep’t of Pesticide*

¹ See Clean Truck Partnership (2023), at <https://ww2.arb.ca.gov/news/carb-and-truck-and-engine-manufacturers-announce-unprecedented-partnership-meet-clean-air> (hereafter CTP).

Regul. (2021) 68 Cal.App.5th 672, 684 (2021) “[A]ny regulation not properly adopted under the APA is considered invalid”], quoting *Reily v. Superior Court* (2013) 57 Cal.App.4th 641, 649.) A determination by OAL regarding the legality of the CTP under the APA is of vital public interest and importance to all Californians, and it is necessary to ensure that stakeholders can publicly participate in the development of rulemaking that impacts heavy-duty truck and engine availability and prices in California.

I. Background: CARB’s Clean Truck Partnership

A. Rulemaking Background: CARB’s Waiver Authority and Underlying Regulations

Under Section 209(b) of the Clean Air Act (“CAA”), EPA has authority to issue a “waiver” to the state of California to adopt, and enforce, its own vehicle emissions standards that are at least as protective as the federal standards. (42 U.S.C. § 7543(b).) Once CARB has secured a waiver for emissions standards governing a particular vehicle or engine class, it can require related certification requirements as a “condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” (42 U.S.C. § 7543(a).) Section 177 of the CAA allows other states to adopt California’s regulations in lieu of federal standards under certain circumstances. (42 U.S.C. § 7507.)

The CTP supplants three underlying CARB regulations. First, in June 2021, OAL approved CARB’s ACT regulation, which includes a novel zero-emission vehicle requirement. ACT requires OEMs of medium-and heavy-duty vehicles to sell zero-emission vehicles as an increasing percentage of their annual sales from 2024 to 2035. (Cal. Code Regs. tit. 13, §§ 1963.1, 2016.) The regulation allows OEMs to comply with ACT by generating compliance credits and/or purchasing compliance credits. (Cal. Code Regs. tit. 13, § 1963.2.) OEMs are considered compliant when the credits they generate, purchase, or bank equal their deficits within a reporting year per vehicle class weight. (Cal. Code Regs. tit. 13, § 1963.3.) EPA granted a waiver request for the then-current version of CARB’s ACT regulation in April 2023.²

Second, OAL approved CARB’s complement to ACT, the Advanced Clean Fleets (“ACF”) regulation, in 2023. ACF requires certain heavy-duty fleets to both phase in the use of zero-emission vehicles beginning in 2025, and it requires high priority and federal fleets to purchase only zero-emission vehicles starting in 2035. (Cal. Code Regs. tit. 13, §§ 2015-2015.6.) Most saliently here, ACF requires OEMs to only sell zero-emission vehicles starting in 2036—in other words, it increases the ACT’s zero-emission sales percentage to a 100% zero-emission requirement from vehicle model year 2036 onwards. (Cal. Code Regs. tit. 13, § 2016.) Although CARB submitted a waiver request to EPA for its ACF regulation in July 2024, it withdrew its request in January 2025, one week prior to President Trump’s inauguration.³

² California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero Emission Power Train Certification; Waiver of Preemption; Notice of Decision, 88 Fed. Reg. 20688 (Apr. 6, 2023).

³ Withdrawal of California’s Request for a Waiver, Pursuant to Clean Air Act Section 209(b), and Request for Authorization, Pursuant to Clean Air Act Section 209(e)(2), for the Advanced Clean Fleets (ACF) Regulation (Jan. 13, 2025), Docket ID EPA-HQ-OAR-2023-0589.

Further, CARB stated in a federal court filing that it intends to propose repealing most provisions of its ACF regulations to settle a pending challenge to those rules.⁴

The third regulation that underlies the CTP is CARB's Omnibus regulation. The Omnibus regulation, approved by OAL in December 2021, mandates significant reductions in NOx and particulate matter emissions. (Cal. Code Regs. tit. 13, § 1956.8.) It also extends the useful life and warranty requirements for heavy-duty vehicles and engines. (Cal. Code Regs. tit. 13, § 2036.) EPA granted a waiver request for CARB's Omnibus regulation in January 2025.⁵

B. CARB Establishes Clean Truck Partnership

In the summer of 2023, CARB, EMA, and all manufacturers of internal-combustion powered on-road heavy-duty trucks and engines (Cummins, Daimler Truck North America, Ford, General Motors, Hino Motors, Isuzu Technical Center of America, Navistar, PACCAR, and Stellantis) executed the CTP. The CTP requires the OEMs to comply with CARB's ACT and Omnibus regulations, as well as the 100% zero-emission vehicle requirement of ACF, "irrespective of the outcome of any litigation challenging the waivers or authorizations for those regulations or of CARB's overall authority to implement those regulations." (CTP ¶ 2 ["The OEMs commit to meet, in California, the relevant provisions of the CARB regulations . . . irrespective of the outcome of any litigation challenging the waivers or authorizations for those regulations or of CARB's overall authority to implement those regulations."].) By generally and uniformly supplanting CARB's regulations even when those regulations have no preemption waiver from EPA, and creating new regulatory obligations for an industry, the CTP is an impermissible underground regulation.

The CTP does not attempt to hide its regulatory purpose: it was executed to "ensur[e] current and future CARB regulations affecting [heavy-duty on-highway] vehicles and engines will achieve significant reductions of air pollutants from such vehicles and engines." (CTP at 1.) The specific effect of the agreement is to force OEMs to comply with the Omnibus regulation as it existed in 2021 in the California Code of Regulations, including title 13, sections 2139.5, and 2169.1 through 2169.8,⁶ and the ACT regulation as it existed in 2021 in the California Code of Regulations, including title 13, sections 1963, and 1963.1 through 1963.5, even under certain circumstances where the regulations are preempted as a matter of federal law or CARB lacks "overall authority" for its regulations. (CTP App'x B at i-ii.) The CTP also requires OEMs to meet the 100% zero-emission vehicles sales requirement set forth in California Code of Regulations, title 13, section 2016, as it existed in 2023. (*Ibid.*)

The CTP also replaces regulatory enforcement mechanisms with the terms of the agreement. For example, regardless of CARB's federal legal authority, under the agreement CARB will still "maintain its certification program" and OEMs "will still be required to submit applications for certification including test data, certification documents, etc. to demonstrate compliance with the applicable California requirements." (CTP App'x B at i.) The CTP also provides that CARB will maintain its On-Board Diagnostic program requiring OEMs to meet the related CARB standards to be certified in California. (*Ibid.*) CARB also explicitly declined to commit to issuing "deemed to comply certifications" if OEMs obtained certifications from EPA—in other words, CARB established a regulatory regime wherein CARB will *not*

⁴ See Stipulation and Request to Hold Case in Abeyance Pending Outcome of Rulemaking, *California Trucking Association v. Steven S. Cliff* (N.D. Cal. Apr. 25, 2025, No. 2:23-cv-02333).

⁵ California State Motor Vehicle and Engine and Nonroad Engine Pollution Control Standards; The "Omnibus" Low NOx Regulation; Waiver of Preemption; Notice of Decision, 90 Fed. Reg. 643 (Jan. 6, 2025).

⁶ The Omnibus regulation, as it existed in December 2021, also included amendments to over 45 sections in title 13 and two sections in title 17.

follow federal law, even when only federal emissions regulations are validly adopted and enforceable. (*Ibid.*) Therefore, the CTP enacts CARB’s regulatory program—but it was not properly promulgated under the APA.

The regulatory nature of the CTP is troubling and is squarely within the type of agency action that requires proper APA procedures. If CARB had gone through the APA procedures, it would have had to publicly explain and justify the implementation of its stringent zero-emission vehicles policy in the face of federal preemption, and purchasers and fleet operators would have had the opportunity to comment on the issues the CTP will create.

For example, despite a CARB commitment to conclude an ACF repeal during 2026, currently WSTA members continue to be faced with regulation-driven requirements linking ZEVs to the purchase of CARB-certified internal combustion engines due to the fleet percentage requirements in ACT. (See Cal. Code Regs. tit. 13, §§ 1963.1, 2016.) CARB acknowledged this problem in its September 25, 2024 California Truck Availability Analysis.⁷ For example, in that report, CARB acknowledged—as it must—that “[e]ach manufacturer is limited on the number of legacy engines they can sell based on their total HD diesel engine production, also known as the legacy engine sales caps.” (Id. at pp. 2-3.) CARB further admitted that there are shortages across all manufacturers which “generally affects Class 4-8 diesel HD vehicles, with a prevalent impact on Class 6 and 7 vehicles (which typically use medium heavy-duty (MHD) engines).” (Id. at p. 3.)

Under the ACT, ACF, and Omnibus regulations, these shortages have impacted WSTA members, because they purchase vehicles from dealers and upfitters in a sector that does not currently have economically viable ZEV technology for applications like dump trucks and other construction trucking applications. As a result, those dealers and upfitters sell zero or very few ZEV vehicles to their consumer base, which in turn limits their ability to sell ICE chassis. In short, CARB has failed to consider the particular impacts of these rules on sectors of the industry where ZEVs simply are not currently feasible. Rather, CARB looked at the industry as a whole in an attempt to cover up the true impact on particular sectors.

CARB also failed to account for the practical reality that electrification—mandated by ACT—reduces the efficiency of WSTA’s members’ businesses by increasing the truck weight and correspondingly decreasing the load capacity. Compared to a diesel truck, researchers have estimated the battery and associated electronics on a short-haul battery electric truck add around 1,400 pounds, and around 5,300 pounds for a long-haul truck.⁸ Particularly for waste and recycling collection vehicles, to avoid exceeding the vehicle’s maximum loading weight or even the 80,000 pound federal limit on total gross vehicle weight (23 C.F.R. § 658.17(e)), this increased weight must be offset by a corresponding load hauling reduction. For these types of vehicles, which frequently carry between 20,000 and 30,000 pounds of waste, a reduction of up to 5,300 pounds could reduce the load by more than a quarter. This could lead to fleets having to increase the number of trucks needed to haul the same payloads, adding more trucks and more costs to an already overcrowded highway system.

The CTP operates as an underground regulation to enable CARB to continue enforcing these rules when CARB lacks permission to do so under federal law. This could exacerbate the negative effects on WSTA members by limiting their ability to buy the vehicles they need and want when they need and want them. It could significantly impact the ability of specialty truck upfitters or body builders to obtain CARB-compliant chassis to supply completed vehicles to the highly specialized vocational truck market in which WSTA members operate. And it could require WSTA’s members to

⁷ Letter from Steven S. Cliff, Executive Officer, CARB, to Liane M. Randolph, Chair, CARB, and CARB Board Members (Sept. 25, 2024), https://ww2.arb.ca.gov/sites/default/files/2024-09/240925_actmemo_ADA_0.pdf

⁸ Harvey et al., “Effects of Increased Weights of Alternative Fuel Trucks on Pavement and Bridges” (Nov. 2020), UC Davis Institute of Transportation Studies, DOI: 10.7922/G27M066V, <https://escholarship.org/uc/item/4z94w3xr>.

purchase more trucks to move the same amount of materials, to offset the lost capacity from the weight of batteries and associated electronics.

CARB may argue that it was permitted to use the CTP to entice OEMs to voluntarily commit to reducing emissions during a time when CARB does not have federal authority to enforce its regulations. But this argument does not redeem CARB's failure to follow California administrative law in promulgating the CTP. CARB cannot enact a separate regulatory scheme that is generally applicable to the class of heavy-duty on-road internal-combustion truck and engine manufacturers without following California procedures for the enactment of regulations. CARB evaded its responsibilities under the APA and created an underground regulation.

C. CARB Loses Federal Authorization for CTP Regulations

Congress recently invalidated CARB's preemption waivers and authorization for its ACT and Omnibus regulations. The Congressional Review Act ("CRA") enables Congress to enact joint resolutions invalidating new rules adopted by agencies. (5 U.S.C. §§ 801–808.) On February 19, 2025, the Trump Administration EPA submitted the waiver decisions for the ACT and Omnibus regulations to Congress as rules subject to the CRA. (See 5 U.S.C. §§ 551(4), 804(3).) On May 22, 2025, the Senate voted to pass joint resolutions previously passed by the House of Representatives to invalidate the ACT and Omnibus waiver decisions. (See H.J.Res. 87; H.J.Res. 88.) President Trump signed the joint resolutions on June 12, 2025.⁹

The ACT and Omnibus waivers now have no force or effect pursuant to the CRA. (See 5 U.S.C. § 801(b)(1).) Further, the ACT and Omnibus waivers cannot "be reissued in substantially the same form" unless authorized later by another legislative action by Congress, so a different federal presidential administration could not reissue the waivers in the future. (5 U.S.C. § 801(b)(2).) Therefore, CARB's ACT and Omnibus regulations are preempted under federal law, and CARB's recent actions indicate that CARB will now bring to bear the CTP's regulatory effects by requiring OEMs to "meet" the requirements of these regulations "irrespective . . . of CARB's overall authority to implement those regulations." (CTP ¶ 2.)¹⁰

D. CARB's Implementation and Enforcement of CTP

CARB has taken actions that demonstrate it will employ the CTP in the administration of California laws and regulations.

On May 23, 2025, CARB issued a Manufacturers Advisory Correspondence document styled as "Regulatory Guidance" in response to the Congressional resolutions of disapproval for its waivers.¹¹ In the guidance document, CARB takes the position that it will continue to certify engines and trucks pursuant to the ACT and Omnibus regulations for model year 2026 in part to "facilitate meeting the commitments of the [CTP]."¹² CARB's attempt to enforce its regulations under CTP in the absence of federal authorization demonstrates the regulatory nature of the CTP.

⁹ See Statement by the President, The White House (June 12, 2025), <https://www.whitehouse.gov/briefings-statements/2025/06/statement-by-the-president/>.

¹⁰ Indeed, one of the architects of the ACT rule, and a former Deputy Executive Director at CARB, was recently quoted in published media reports as stating that the "overall authority" clause of the CTP enables CARB to continue to enforce the CTP despite the recent Congressional action. (See <https://www.ccjdigital.com/regulations/emissions/article/15747422/clean-truck-partnership-legally-binding-or-voided#:~>).

¹¹ Manufacturers Advisory Correspondence ECCD-2025-3, CARB (May 23, 2025).

¹² *Id.* at 2.

CARB also attempted to fulfill some of its obligations under the CTP. For example, CARB amended the ACT and secured the required approval by OAL for its substantive amendments.¹³ However, CARB’s recent actions indicate that it may not try to fulfill all its obligations under the CTP. CARB relies on the ACF to implement a key provision in ACT—specifically, the 100% zero-emission vehicle mandate beginning in 2036¹⁴—but CARB lacks a waiver for ACF. Indeed, CARB withdrew its request to EPA for such a waiver, and it indicated in a recent federal court filing that it intends to propose to repeal most provisions of the ACF regulations.¹⁵ Thus, although CARB is clearly intent on enforcing the CTP as a regulation in the absence of federal authorization for its regulations, it has signaled that it does not intend to fulfill its own obligations under the CTP.

Even worse for the trucking industry is the fact that CARB has statutory authority to impose steep civil penalties of up to \$40,000 per violation. (See Health and Safety Code section 42402.2.) All that is required to trigger these penalties is a “violation of any . . . rule, regulation, or permit of the state board. . . .” Here, even though the regulations have no legal authority, CARB’s position is that the OEMs are still bound by the CTP to honor those regulations, and can back up that belief with the threat of steep fines.

II. The CTP is an Underground Regulation

A. Under California Law, CARB’s CTP is a “Regulation” Subject to the APA

The California APA “ensure[s] that those persons or entities whom a regulation will affect have a voice in its creation.” (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 (*Tidewater*).) The California Supreme Court has explained that “public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.” (*Id.* at 569.)

Accordingly, California law takes steps to ensure that agencies, including CARB, follow California APA processes. (See Gov. Code, §§ 11346.2, 11346.8.) California Government Code section 11340.5(a) states that a state agency shall not “issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation” and the procedures of the APA have been satisfied. Rules promulgated in violation of this provision are “underground regulations.” (See Cal. Code Regs. tit. 1, § 250.)

¹³ CARB adopted the following substantive amendments to the ACT regulation: a 3-year deficit makeup period (subject to a 30% cap); an allowance to sell 0.05 g NOx engines in MY 2026; an allowance to use NZEVs to make up 50% of deficits; a 100% ZEV sales mandate as of 2036; new criteria for determining when and where new truck sales are made; new labeling and reporting requirements to protect OEMs and dealers from liability for unintended “leakage” of legacy engines into California (or other opt-in states); and new allowances for the purchase of ACT credits. (Cal. Code Regs. tit. 13, §§ 1963.3, 1963.6, 2016.)

¹⁴ See Proposed Regulation Order App’x A-1, *Proposed Amendments to the Advanced Clean Trucks Regulation and the Zero-Emission Powertrain Certification Test Procedure* (Mar. 26, 2024), Section 1963.6, “2036 and Subsequent Model Year Requirements.” This implements the “100 percent medium- and heavy-duty ZEV requirements” by cross-referencing California Code of Regulations title 13, section 2016, which is part of ACF.

¹⁵ Letter from Steven S. Cliff, CARB to Jane Nishida, Acting Administrator, U.S. Environmental Protection Agency (Jan. 13, 2025) (formally withdrawing waiver request for ACF); Stipulation and Request to Hold Case in Abeyance Pending Outcome of Rulemaking, *California Trucking Association v. Steven S. Cliff*, (N.D. Cal. Apr. 25, 2025, No. 2:23-cv-02333).

Section 11342.600 of the Government Code defines “regulation” broadly: “. . . 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.”

The California Supreme Court has found that a “regulation” under the California APA “has two principal identifying characteristics.” (*Tidewater, supra*, 14 Cal.4th at p. 571.) “First, the agency must intend its rule to apply generally, rather than in a specific case.” (*Ibid.*) Second, the rule must “implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure.” (*Ibid.*)

“Whether the action of a state agency constitutes a regulation does not depend on the designation of the action, but rather on its effect and impact on the public. If the action is not only of local concern, but of statewide importance, it qualifies as a regulation despite the fact that it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.” (*Winzler & Kelly v. Dep’t of Indus. Rels.* (1981) 121 Cal. App. 3d 120, 127.) Here, the CTP has an “effect and impact on the public” on a statewide basis: it binds manufacturers to certain emission standards and zero-emission vehicles sales targets throughout the state, and it could impact the products that customers are able to purchase and increase prices. Accordingly, the CTP is a regulation.

1. The CTP is a Rule of “General Application”

The first identifying characteristic of a “regulation” as a rule of general application “reflects the distinction between the ‘adjudicatory determinations of an administrative agency [and the] . . . actions undertaken by such an agency in its legislative capacity.’” (*Vasquez v. Department of Pesticide Regulation* (2021) 68 Cal.App.5th 672, 689, quoting *Strumsky v. San Diego Cnty. Emps. Ret. Assn.* (1974) 11 Cal.3d 28, 34, fn.2.) Specific adjudicatory decisions—“the actual application of a . . . rule to a specific set of existing facts”—are unlikely to be regulations, but legislative actions—“the formulation of a rule to be applied to all future cases”—are regulatory. (*Strumsky, supra*, at p. 35, fn.2; *Vasquez, supra*, at p. 689.)

In *Tidewater*, the California Supreme Court distinguished between “the interpretation of a regulation in the context of a specific adjudication,” and “a blanket interpretation” that an agency “intend[s] to apply in . . . all cases of a particular class or kind,” indicating that the latter category is a “policy of general application and thus a regulation.” (*Tidewater, supra*, 14 Cal.4th at p. 573.)

Here, the CTP applies CARB’s preempted regulations with identical obligations to a significant industry segment—reaching all manufacturers of internal-combustion powered on-road heavy-duty trucks and engines. (See, e.g., CTP ¶ 2.) Further, the CTP alters substantive obligations and rights. It “clarif[ies] which authorities and regulations remain status quo in California”—a prospective legislative purpose. (CTP ¶ 1.)

The CTP is therefore a “legislative” or “quasi-legislative” exercise of state agency power subject to the California APA. (*Tidewater, supra*, 14 Cal.4th at p. 570, 574-575.) It is the type of “blanket interpretation” that California courts have found to be underground regulations, not a case-specific adjudication. The CTP does not involve a case-specific exercise of CARB’s discretion, and it does not involve an adjudicatory or permitting decision. For instance, in response to the Congressional resolutions of disapproval of its regulations, CARB takes the position that it will continue to certify vehicles and engines pursuant to the ACT and Omnibus regulations for model year 2026 for all OEMs in part to “facilitate meeting the commitments of the [CTP].”¹⁶ CARB chose to clarify that it intends to apply its regulations to all OEMs in a

¹⁶ Manufacturers Advisory Correspondence ECCD-2025-3, CARB (May 23, 2025).

guidance document rather than applying the CTP on a case-specific basis in the context of individual certification applications. It did so for an obvious reason: the CTP is an underground rulemaking.

Framing the CTP as a contract with private parties does not exempt the CTP from being a regulation of general applicability subject to the APA. Both California law and general principles of administrative law dictate that a government agency may not use an agreement with a regulated party to avoid the APA requirements associated with rulemaking. (*Vasquez, supra*, at p. 687; *Am. Hosp. Ass’n v. Bowen* (D.C. Circ. 1987) 834 F.2d 1037, 1053–54.)

Thus, the CTP is a generally applicable rule undertaken in CARB’s legislative capacity, not a case-specific adjudication contemplated by this exception to the California APA. CARB was required to comply with the same procedures that are required when promulgating legislative rules.

2. The CTP Implements CARB’s Statutory Authority

The second identifying characteristic of a rule is that it must implement, interpret, or make specific a law, or govern agency procedure. (*Tidewater, supra*, 14 Cal.4th at p. 571.) Here, the CTP implements CARB’s statutory authority in two ways.

First, it creates new regulatory obligations for an entire industry: the requirement for OEMs to comply with CARB’s ACT and Omnibus regulations. Although the regulations underlying the CTP went through the California APA process, the CTP—and specifically, CARB’s imposition of an obligation for OEMs to follow the regulations even without a preemption waiver or “overall authority to implement”—did not go through the APA process. (See CTP ¶ 2.) Binding OEMs to follow regulations in the absence of a preemption waiver or CARB authority to regulate is an implementation of CARB’s purported legal authority. Therefore, it is a regulation that must be subject to notice and comment.

Critically, the goal of the California APA is not only to allow the regulated industry to participate in rulemaking, but to allow public participation generally. (See *Tidewater, supra*, 14 Cal.4th at p. 569.) The public, including customers, dealers, and fleet operators who rely on the OEMs’ products for their own businesses, had no opportunity to participate in the establishment of this requirement. Allowing CARB to bypass downstream participants’ input by entering into a purported contract with regulated parties would be contrary to the California APA’s purpose of ensuring “public participation in the regulatory process” to provide “some security against bureaucratic tyranny.” (*Ibid.*)

Second, the CTP outlines new powers and responsibilities for CARB not contained in other laws or regulations. Specifically, it purports to “clarify which authorities and regulations remain status quo in California,” (CTP ¶ 1), including that “CARB will maintain its certification program,” (CTP App’x B). In this context, “status quo” indicates that CARB is establishing the contours of its regulatory power “regardless of the outcome of any litigation challenging the waivers/authorizations for those regulations, or CARB’s overall authority to implement those regulations.” (See CTP App’x B.)

But no state or federal law authorizes CARB to regulate in the absence of preemption waivers from EPA or “overall authority to implement” its regulations. Where an agreement entered into by a state board “contains provisions which are not contained in state or federal law” establishing the responsibilities of a state agency and dictating specific ways in which the agency will carry out its duties, the OAL has found that such an agreement is an underground regulation. (See 2008 OAL Determination No. 15, CTU2008-0108-01 at 7-8.) Such an agreement “implements and makes specific the law the [agency] administers.” (*Vasquez, supra*, 68 Cal.App.5th at p. 673.) Here, CARB’s definition of “status quo” “authorities and regulations” and its claim to have authority to certify new engines and vehicles, “regardless . . . of CARB’s overall authority” is a novel implementation of the agency’s regulatory power. The CTP lays out standards and requirements that

remain “status quo” in California and that the signatory OEMs must follow. It thus defines the applicable regulatory regime, making it a regulation.

The second *Tidewater* element is therefore satisfied, and the CTP is a “regulation” subject to the California APA.

B. CARB Did Not Follow APA Procedures to Promulgate the CTP

CARB did not follow the California APA procedures to promulgate the CTP. Specifically, CARB did not file a copy of the CTP with the Secretary of State of California, as required by section 11343 of the Government Code, nor did CARB follow the requirements to provide notice and an opportunity for public comment as required by OAL regulations. (Cal. Code Regs. tit. 1, §§ 5 (Submission of Notices for Publication), 44 (Public Availability of Changes to Regulations).) Furthermore, CARB’s failure to do so is not excused by an exception to the California APA, as the CTP does not satisfy any of the exemptions in section 11340.9 of the Government Code. As a result, the CTP constitutes an impermissible underground regulation in violation of Government Code section 11340.5(a).

C. No Statutory Exemption to the APA is Applicable to the CTP

CARB’s failure to follow APA procedures is not excused because the CTP does not satisfy any of the exceptions in section 11340.9 of the Government Code.

First, “[a] regulation that is directed to a specifically named person or to a group of persons *and does not apply generally throughout the state*” is exempted from the rule against underground regulations. (Gov. Code, § 11340.9(i) (*Italics added*).) Although the CTP is entered into between named OEMs and CARB, the CTP does not fall into this exemption because it applies generally throughout the state and covers an entire industry.

For this exception to apply, the regulation must (1) be directed at a specific target and (2) “not apply generally throughout the state.” (Gov. Code, § 11340.9(i).) The structure of this exception echoes California case law establishing that adjudicatory actions by agencies to address a specific factual scenario are not regulations, but rules intended to be applied prospectively across a category of cases are regulations. As discussed above, the general application aspect of the regulatory definition “reflects the distinction between the ‘adjudicatory determinations of an administrative agency [and the] . . . actions undertaken by such an agency in its legislative capacity.’” (*Vasquez, supra*, 68 Cal.App.5th at p. 689, quoting *Strumsky, supra*, 11 Cal.3d at 34, fn.2.) Specific adjudicatory decisions—“the actual application of a . . . rule to a specific set of existing facts”—are unlikely to be regulations, but legislative actions—“the formulation of a rule to be applied to all future cases”—are regulatory. (*Strumsky, supra*, 11 Cal.3d at 34, fn.2; *Vasquez, supra*, 68 Cal.App.5th at 689.) As a prospective legislative action that applies identical obligations to participants in an industry, the CTP is a rule of general applicability and is excluded from the California APA exception for regulations that specifically name parties and do not apply generally.

Additionally, if an agency action that covers all participants in an industry segment can be exempted from the California APA simply because it names the industry participants, this would create an exemption that could effectively nullify the APA requirement. California Civil Code section 3541 provides: “An interpretation which gives effect is preferred to one which makes void.” Accordingly, “all statutes must be reasonably and fairly interpreted so as to give them an efficient operation,” as a statute “should never be construed so strictly as to render it absurd or nugatory.” (*Walters v. Bank of America Nat. Trust & Savings Ass’n* (1937) 9 Cal.2d 46, 52; see also *Reuter v. Board of Sup’rs of San Mateo County* (1934) 220 Cal. 314, 321 [noting that absurd results should be rejected as they would not have been contemplated by the legislature].) Agencies would be able to make regulations without any procedure at all simply by naming regulated parties. Although this approach is not feasible in every industry, in highly regulated industries with

relatively few participants—as here, where the CTP reaches all manufacturers of internal-combustion powered heavy-duty on-road products—it would open a significant loophole to the APA’s requirements.

Second, the CTP does not “embod[y] the only legally tenable interpretation of a provision of law.” (Gov. Code, § 11340.9, subd. (f); see *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 336–37.) This exception applies only where the law “can reasonably be read only one way” such that the agency’s actions or decisions in applying the law are essentially ministerial or parrot the statute’s plain language. (*Morning Star Co.*, *supra*, 38 Cal.4th at 336–37, quoting 1989 Off. Admin. Law, Determination No. 15, Cal. Reg. Notice Register 89, No. 44–Z, pp. 3122, 3124.) Here, as described in Sec. II.A.2, *supra*, the CTP creates new regulatory obligations for an entire industry and outlines new powers and responsibilities for CARB not contained in other laws or regulations. Therefore, although CTP supplants existing regulatory requirements, it is not merely parroting existing law. Further, CARB’s interpretation of the CAA and its own regulatory authority is not the only interpretation CARB could apply, so this exception does not apply. (See *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 264.)

No other statutory exemption in section 11340.9 of the Government Code could be applicable.¹⁷ As a result, the CTP is not subject to a statutory exemption. It is an underground regulation in violation of Government Code section 11340.5(a).

III. A Determination on the Legality of the CTP is of Vital Public Interest

This petition presents an issue of critical public interest. By imposing obligations on OEMs to follow regulations even without a preemption waiver or authority to implement without going through the APA process, CARB is frustrating the policy goals of the APA: to provide for informed and reasoned policymaking.

The notice and comment requirements of the APA serve to further the APA’s goals of “bureaucratic responsiveness and public engagement in agency rulemaking.” (*Morning Star Co.*, *supra*, 38 Cal.4th 324, 333 (2006) [“One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law’s requirements so that they can conform their conduct accordingly [citation]”].) One purpose behind the APA’s public participation requirement is to protect against the natural agency instinct to overreach. (*Ibid.* [“Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny.”].)

In entering into the CTP without following the public participation requirements, CARB deprived the public of the engagement and transparency it is owed. The public, including customers, dealers, and fleet operators who rely on the OEMs’ products for their own businesses, had no opportunity to participate in the establishment of this requirement.

These drastic regulatory requirements, including the 100% zero-emission vehicle mandate beginning in 2036, will impact customers and fleet dealers in addition to manufacturers. Heavy-duty electric trucks are significantly more expensive than traditional powertrains (by a factor of 2 to 3) and have a substantially shorter range (150–330 miles compared to 1,200+ miles)¹⁸ Manufacturers are forced to sell vehicles that make no financial sense to customers and fleet

¹⁷ In addition, the CTP’s titling as an “Agreement” and other indicia that it purports to be a contract do not bring it within an exception to the California APA. “Whether the action of a state agency constitutes a regulation does not depend on the designation of the action, but rather on its effect and impact on the public.” (*Winzler & Kelly*, *supra*, 121 Cal.App.3d at 127.)

¹⁸ See American Trucking Ass’n, *A Heavy Dose of Reality for Electric-Truck Mandates* (Apr. 19, 2023), at <https://www.trucking.org/news-insights/heavy-dose-reality-electric-truck-mandates>.

dealers. Indeed, the regulatory requirements will significantly increase costs for customers and fleet dealers, and some of those costs would be passed along to their own customers, including California household consumers.

For these reasons, the CTP implicates issues of considerable public importance. The public interest will be served by the OAL holding CARB accountable for its underground regulation.

A handwritten signature in blue ink, appearing to read "Patrick Whalen". The signature is fluid and cursive, with the first name "Patrick" and last name "Whalen" clearly distinguishable.

Patrick Whalen
WSTA General Counsel