CRPE

CENTER ON RACE, POVERTY & THE ENVIRONMENT

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Via electronic submittal

Chairman Mary Nichols
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments on Greenhouse Gas Cap and Trade Regulation

Dear Chairman Nichols and Members of the Board:

The Center on Race, Poverty & the Environment ("CRPE") submits these comments on behalf of the undersigned organizations in opposition to the proposed cap and trade regulation. CRPE is a non-profit environmental justice organization that has worked with low income and communities of color for over twenty years. Most of these communities already breathe some of the worst air in the Nation.[1] These communities already bear a disproportionate share of California's environmental and public health burdens. This proposed regulation violates the Legislature's mandate in AB 32 to avoid disproportionate impacts on low-income communities and communities of color in its quest to reduce greenhouse gas ("GHG") emissions and build upon California's tradition of environmental leadership both nationally and internationally. At best, this proposed regulation demonstrates ARB's failure to consider and address the current reality of environmental justice communities. At worst, this proposed regulation accepts and promotes this disparate and discriminatory treatment of the most vulnerable communities in our State.

As proposed, the cap and trade rulemaking fails to capitalize on the opportunity to create well-paying green jobs in California and fuel a green economic revolution. Instead, the Board is being asked to adopt a program that forgoes the economic and public health benefits from in-state reductions, favors out-of-state reductions from virtually unlimited offsets, and creates a vastly complicated and unproven mechanism that will more likely than not fail to deliver AB 32's ultimate goal of reducing GHG emissions in a thoughtful and equitable manner by 2020. Unfortunately, this challenge to ARB's implementation of AB 32 is not new to environmental justice communities.

[1] Bakersfield and Fresno are in the top 5 most polluted cities in the U.S. for both PM 2.5 and Ozone, Kern County is in the top 3 most polluted counties for PM2.5 and Ozone, other Valley cities and counties are in the top 10. American Lung Association State of the Air 2010. http://www.stateoftheair.org/

Environmental justice communities have been actively engaged in the administrative processes to implement AB 32 and, in the legal arena, to enforce its statutory mandates designed to ensure informed decision-making and equity.

The Board should not adopt the proposed cap and trade rule. ARB has not conducted a proper foundational analysis to justify this choice of a market mechanism, and ARB has not analyzed a reasonable range of alternatives in accordance with the California Environmental Quality Act ("CEQA").

I. ARB SHOULD NOT ADOPT THE CAP AND TRADE RULE UNTIL A PENDING LEGAL CHALLENGE TO THE SCOPING PLAN IS CONCLUDED.

On June 10, 2009, Petitioners Association of Irritated Residents, *et al*, represented by CRPE and Communities for a Better Environment ("CBE"), filed a Complaint for Declaratory and Injunctive Relief and Petition for a Writ of Mandate directing ARB to revise its Climate Change Scoping Plan to comply with Assembly Bill 32 ("AB 32") and CEQA.[2] On February 19, 2010, Petitioners filed their First Amended Complaint and Petition ("FAC").

Petitioners challenged the Scoping Plan because it inadequately sets up *the* overarching regulatory framework for AB 32's implementation. Further, the range of measures that the Scoping Plan has established dictates the parameters of the future options available to meet AB 32's goals. Petitioners raised a number of deficiencies in the Plan, and specifically raised four claims regarding ARB's inclusion of a cap and trade program: (1) ARB's failure to assess maximum technological feasibility and to develop a cost-effectiveness criteria with which to compare reduction measures to market mechanisms (FAC, First Cause of Action), (2) ARB's failure to analyze whether a cap and trade program could effectively facilitate the achievement of maximum feasible and cost-effective reductions of greenhouse gas emissions by 2020 (FAC, Second Cause of Action), (3) ARB's failure to consider the performance of cap and trade programs in other states, localities, and nations, including the northeastern states of the United States, Canada, and the European Union (FAC, Fourth Cause of Action), and (4) ARB's failure to adequately analyze alternatives to regional cap and trade (FAC, Eighth Cause of Action).

Because the Scoping Plan lacks the fundamental analysis required, not only will AB 32 fail, but each subsequent regulatory program that flows from this Plan, such as the cap and trade rule, will share these fundamental flaws. Thus, the Board should not adopt the cap and trade rule before the Court rules on Petitioners' claims, for which the hearing is scheduled for December 20, 2010.

II. THIS REGULATION LACKS THE FOUNDATIONAL ANALYSIS REQUIRED BY AB 32.

AB 32 requires that ARB not only identify measures, but also determine that these measures facilitate achievement of "*maximum* technologically feasible" reductions.[3] The identified measures must also be shown to be cost-effective.[4] The Scoping Plan then forms the basis of ARB's

[2] *Association of Irritated Residents v. California Air Resources Board*, No. CPF-09-509562 (San Francisco County Superior Court)

[3] Health and Safety (H&S) Code § 38561(a).

[4] *Id.*

regulations. But ARB failed to perform this analysis or even set forth criteria to determine "cost-effectiveness."[5] The Legislature intended the Scoping Plan to function as the foundation to any and all rules that flow from its implementation (like the cap and trade regulation), and this intent is unwavering.[6] Implementation of AB 32 requires, *inter alia*, the findings and process to demonstrate maximum technological feasibility and cost-effectiveness; without that, the development of any regulation is void and exceeds ARB's authority. This proposed regulation, therefore, lacks the foundation required by AB 32.

These foundational Scoping Plan requirements for achievement of "maximum technologically feasible and cost-effective reductions" continue into each individual rulemaking.[7] Instead of relying on the criteria that should have been created at the Scoping Plan level, ARB claims that the measure of the cap and trade rule's cost-effectiveness is the estimated allowance price.[8] This same rationale – called the "Cost of a Bundle of Strategies" approach at the Scoping Plan level – has also been challenged in the above-mentioned Petition, because it not only fails to meet the requirements of AB 32, but pricing a chosen measure is not the same as evaluating its cost-effectiveness.

Thus, the fundamental flaws identified and challenged in the pending Petition appear in this proposed regulation, in violation of AB 32. Not only are the requirements of AB 32 at the Scoping Plan level rendered meaningless, but ARB fails to address them in this rulemaking. This regulation lacks the substantive, legally-mandated foundation intended by the Legislature and will fail.

III. THE REGULATION FAILS TO MEET AB 32 CRITERIA FOR MARKET-BASED COMPLIANCE MECHANISMS.

The Legislature included specific protections for communities already burdened by air pollution, sought to prevent an increase in toxic exposure, and wanted to maximize benefits for California. Accordingly, the Legislature commanded the Board, before adopting a market-based compliance mechanism, to

> (1) consider the potential for direct, indirect and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely affected by air pollution;
>
> (2) design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants; and
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> (3) maximize additional environmental and economic benefits for California, as appropriate.[9]

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[5] *Id.;* H&S Code § 38561(d).

[6] H&S Code § 38561(a) - (h).

[7] H&S Code § 38562(a).

[8] California Air Resources Board, Staff Report: Initial Statement of Reasons (October 28, 2010) ("ISOR"), p. VIII-14.

[9] H&S Code § 38570(b).

The proposed cap and trade regulation violates the Legislature's unambiguous commands, threatens communities with more air pollution, and fails to seize the opportunity to benefit California both economically and environmentally. The Board, if it adopts this free market hypothesis, will forgo the opportunity to generate well-paying green jobs and stimulate a California-based clean energy economy.

A. The Regulation Does Not Sufficiently Address Impacts on Environmental Justice Communities.

Before adopting a market-based compliance mechanism, such as cap and trade, the Board must consider the potential emission impacts, including localized impacts, and the regulation must not disproportionately impact low-income communities.[10] The current regulation cannot show that it would meet the requirements of AB 32. As designed, the regulation cannot ensure that localized air pollution impacts will be avoided. Pollution trading creates environmentally unjust outcomes and does not work to reduce greenhouse gas emissions.

1. ARB has not adopted a method to identify environmental justice communities.

ARB has not adopted a methodology for identifying disproportionately impacted, low-income communities throughout the state. For the co-pollutant assessment, ARB chose 4 communities after consulting with the Environmental Justice Advisory Committee and other environmental stakeholders.[11] While we agree these communities are environmental justice communities that should be assessed, ARB can't stop there. Each environmental justice community is unique and ARB needs to have a method to identify and analyze these communities. Without a screening method, it is impossible for ARB to evaluate whether this regulation, or any other under AB 32, will have localized impacts in communities already adversely impacted by pollution. ARB needs a screening method to ensure a complete evaluation of the most vulnerable communities, the communities the Legislature sought to protect when it adopted Health & Safety Code § 38652(b)(1). A host of factors, such as race, linguistic isolation, and the number of polluting sources pre-existing in an area, along with income should be used to paint a more complete picture. The Board should adopt the mapping tool created by Manuel Pastor, James Sadd, and Rachel Morello-Frosch which was part of the ARB-funded project to develop methodological approaches to address environmental justice concerns[12] and apply the Environmental Justice Screening Method statewide before making decisions on market-based mechanisms, including this cap and trade regulation.

Additionally, the Board should not make a decision on this cap and trade regulation before a Health Impact Assessment (HIA) is completed. The staff report refers to the HIA being conducted by the California Department of Public Health but does not indicate when it will be completed.[13] According to the report, the HIA will evaluate potential health impacts, health disparities among

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[10] H&S Code § 38570(b)(1); 38562(b)(1) and (b)(2).

[11] ISOR, Appendix P: Co-Pollutant Emissions Assessment, p. P-8

[12] California Air Resources Board (2010): Air Pollution and Environmental Justice: Integrating Indicators of Cumulative Impact and Social-Economic Vulnerability into Regulatory Decision-Making. http://www.arb.ca.gov/research/apr/past/04-308.pdf.

[13] ISOR Appendix P, p. P-3

communities, and potential uses of any revenue generated by this proposed regulation.[14] This is all valuable information to have *before* the Board makes a decision on the cap and trade regulation. Waiting to examine "community health status, air pollution exposures, and vulnerable populations" as part of the "public decision-making process on the use of revenues generated by the program" is unacceptable and violates the mandates of AB 32.[15]

2. The regulation does not prevent localized or disproportionate impacts.

Because the cap and trade program offers emitters flexibility in how they reduce greenhouse gases to comply with the program, there is a substantial risk of undesirable side effects. ARB cannot anticipate where emissions reductions will occur. Because ARB cannot predict where emissions reductions and criteria pollutant co-benefits will occur, the regulation is not *designed to prevent* localized impacts. Nothing in the regulation actually prohibits an increase in criteria or toxic emissions.[16] Emitters could choose to adopt a measure that reduces GHGs but increases air pollution. Reliance on other, unspecified air pollution regulations to prevent increases in co-pollutants is inappropriate and speculative. AB 32 requires the Board to "design any market-based compliance mechanism *to prevent* any increase in the emissions of toxic air contaminants or criteria air pollutants."[17]

ARB admits that this threat is real. The staff report analysis states "the regulation affords entities flexibility to choose the most cost-effective strategies to reduce emissions, so the potential for some compliance actions to result in increased co-pollutant emissions at some facilities cannot be entirely discounted."[18] ARB will only monitor the situation and take steps as necessary to address increases in criteria pollutants and toxics as they occur. The report goes on to state that pre-existing mechanisms would address the increases, such as stationary source controls, permitting programs, and air monitoring for ozone, PM2.5, and toxics.[19] The report evidences that the cap and trade regulation is not a program designed to prevent increases - it is a program that freely acknowledges that increases are a real possibility but expects other regulations to deal with, and clean-up, cap and trade's mess. Not only does this violate the Legislature's clear command, but it is an unrealistic expectation. Many of the regulations and programs cap and trade relies on to deal with the increased pollutants are not currently meeting their attainment deadlines or were designed to reduce a specific amount of pollution that was calculated without the increased emissions from this program.[20] The

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[14] *Id*.

[15] *Id*.

[16] *See* ISOR Appendix P, p. P-42 ("While the cap-and-trade rule in aggregate is designed to reduce GHG emissions, on a local basis there could be the potential for both co-pollutant benefits, as well as dis-benefits.")

[17] H&S Code § 38570(b)(a)(2). (emphasis added).

[18] ISOR p. VII-3.

[19] *Id*.

[20] For example, just this past November the San Joaquin Valley failed to attain its deadline to meet the 1-hour ozone standard. *See, e.g.*, http://www.arb.ca.gov/aqmis2/display.php?param=OZONE&units=007&year=2010&mon=8&day=25&hours=midday&report=7DAY&statistic=DMAX1HR&o3area=&o3pa8=SJV&county_name=&latitude=&basin=&order=&ptype=aqd; http://www.arb.ca.gov/aqmis2/display.php?param=OZONE&units=007&year=2010&mon=9&day=4&hours=midday&report=7DAY&statistic=DMAX1HR&o3area=&o3pa8=SJV&county_name=&latitude=&basin=&order=&ptype=aqd; http://www.arb.ca.gov/aqmis2/display.php?param=OZONE&units=007&year=2010&mon=9&day=30&hours=midday&report=7DAY&statistic=DMAX1HR&o3area=&o3pa8=SJV&county_name=&latitude=&basin=&order=&ptype=aqd.

Board cannot expect these regulations to deal with the increased emissions from cap and trade. AB 32 does not allow the Board to adopt a market-based mechanism that may increase pollutants, and then provides no solution.

Under the proposed regulation, emitters could just as easily choose not to reduce any GHG emissions at all by simply buying credits and offsets. This would result in the equally disproportionate outcome that low income communities of color around the entities would see absolutely no direct or co-benefits from this cap and trade regulation. Industrial polluters in California are predominantly located and tend to cluster in low income neighborhoods and communities of color. A demographic analysis of the communities nearest industrial facilities in California reveals that people of color comprise 58% of the population living within one mile of a facility, and 62% of the population living between one to six miles from a facility. The area within six miles of a facility is densely populated, reaching over 5,000 people per square mile. The demography of populations over six miles away from a facility changes dramatically. People of color comprise only 46% of the population and the density drops to 125 people per square mile. Children of color comprise between 71-74% of children living within 6 miles of a facility and 57% of those living more than 6 miles away.[21] Allowing offsets and credits for these entities means these communities will see no benefits from this regulation. ARB should not allow trading, especially in overburdened communities. The unrestricted trading, reserve credits, and large percentage of offsets allowed in this regulation seriously threatens to further overburden such communities, in violation of AB 32.

B. The Regulation Does Not Deliver Emissions Reductions.

To meet the requirements of AB 32, this regulation must prevent any increase in the emissions of toxic air contaminants or criteria air pollutants.[22] Cap and trade models are not successful prophylactic measures and have proven to be ineffective tools for phasing out carbon use and pollution trading is an ineffective air quality policy with the arguable exception of the Acid Trading Program.[23] Due to over allocation of allowances, low carbon prices, fraudulent transactions and banking (which may result in short term reductions followed by a spike in emissions when banked credits are utilized), pollution trading programs do not significantly reduce air pollution.[24] AB 32 requires ARB to "*design"* the cap and trade program to *"prevent"* any increases and to prevent localized impacts. Even if specific facilities do not increase their emissions, and continue to emit business as usual, this does not maximize co-benefits or prevent localized impacts, and as explained above, relying on other regulations to reduce emissions is inappropriate.

Additionally, pollution trading often does not result in emissions reductions because of increased difficulty monitoring and enforcing emission reductions. Instead of relying on trading, ARB should focus on direct emission reductions - "a greenhouse gas emission reduction action made

[21] *See* Manuel Pastor, Rachel Morello-Frosch, James Sadd, and Justin Scoggins, *Minding the Climate Gap,* http://college.usc.edu/pere/documents/mindingthegap.pdf. Attached as Exhibit 1.

[22] H&S Code § 38570(b)(2).

[23] *See* Environmental Justice Advisory Committee (EJAC) Comments on Scoping Plan, pp. 20-24, at http://www.arb.ca.gov/cc/ejac/proposedplan-ejaccommentsfinaldec10.pdf.

[24] *See* Richard Toshiyuki Drury, *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 Duke Envtl. L. & Pol'y F. 231, 275 (1999).

by a greenhouse gas emission source at that source."[25] By requiring emissions reductions at the source, ARB will provide certainty that emissions reductions will occur and can determine where the reductions will occur. Thus ensuring that environmental justice communities will get an equitable share of the co-benefits of reducing greenhouse gas emissions. In addition, direct emission reduction measures can provide targeted co-benefits and ensure an appropriate level of GHG and co-pollutant reductions.

C. The Regulation Fails to Get Maximum Environmental and Economic Benefit for California.

In order for a market-based mechanism to meet the requirements of AB 32, it must maximize additional environmental and economic benefits for California.[26] With its weak "cap" and use of offsets, which virtually eliminate any requirement to reduce emissions within California, this regulation fails on both accounts.

If the Board adopts the cap and trade regulation, instead of direct emissions reductions, then the unbridled use of offsets from out-of-state will mean that the jobs and economic benefit resulting from those reductions will not benefit California. The Legislature surely did not intend that offsets from planting trees in Canada would be an appropriate market-based mechanism.

1. The "Cap" doesn't maximize environmental benefits.

This regulation not only fails to *maximize* environmental benefits, it fails to get *any* benefits at all in the first and fourth year. The proposed "cap" begins in 2012 at 165.8 million metric tons of carbon dioxide equivalent (MMTCO2e), the amount ARB estimates will be business as usual for the covered entities.[27] Absolutely no reductions will be required that year. Then the cap *increases* to 394.5 MMTCO2e in 2015 to include fuel suppliers at business as usual.[28] Again, another year without any reductions. The cap fails to meet the requirements of AB 32 to achieve the maximum technologically feasible reductions. It also makes it unlikely that reductions will occur before 2020 as compliance is pushed further out. By providing maximum flexibility early in the program, ARB's rule allows polluters to delay the harder, more costly choices until later in the program, thereby increasing the likelihood of leakage and industry pressure to postpone the compliance deadline beyond 2020, which ARB has succumbed to in the past.[29] In addition, the "cap" excludes agriculture, biofuels and bioenergy - significant sources of GHG emissions. Treating biofuels and bioenergy as zero emissions and excluding them from the cap is not supported by the best science nor ARB's own analysis and it violates AB 32's mandate to achieve the maximum reductions.[30]

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[25] H&S Code § 38505(e).

[26] H&S Code § 38570(b)(3).

[27] ISOR, p. II-3; Appendix E: Setting the Program Emissions Cap, p. E-6.

[28] *Id.*

[29] For example the Heavy Duty In-use Diesel Truck & Bus rule, set to be heard this month and the Regulation for Mobile Cargo Handling Equipment at Ports and Intermodal Railyards.

[30] See CARB, Carbon Intensity Lookup Table for Gasoline and Diesel, and their Fuel Substitutes, available at: http://www.arb.ca.gov/fuels/lcfs/121409lcfs_lutables.pdf, and Lifecycle Analysis - Fuel Pathways available at: http://www.arb.ca.gov/fuels/lcfs/workgroups/workgroups.htm#pathways; EDF, et. al, letter to ARB re: Recommendation to require fuel providers to hold allowances to cover the greenhouse gas emissions released as a consequence of the use of transportation biofuels. (December 7, 2010); Californians Against Waste, et al, letter to ARB re: Request to include bioenergy emissions under the cap and account for the greenhouse gas emissions

2. Offsets do not maximize environmental or economic benefits for California.

The regulation proposes to allow entities to use offsets for up to 8% of its compliance obligation - or to put it another way - nearly 100% of the entities required emissions reductions.[31] In addition, the regulation allows offsets outside of the regulated sectors and outside of California, and possibly the United States. In no way does this structure maximize environmental or economic benefits for California as required by AB 32.

This regulation is structured in such a way that an entity can comply without actually making any emissions reductions. A review of Figure E-3 in Appendix E of the staff report reveals that through 2016 the combined allowances and offsets would allow greater GHG emissions than the projected business as usual emissions of the covered entities without this regulation.[32] Clearly, this does not comply with the requirements of AB 32 to achieve the maximum reductions feasible and maximize the benefits for California.

The Scoping Plan failed to recommend any GHG measures for agricultural operations, and instead opted to allow the entire agricultural sector to escape regulation under AB 32. This leaves the only GHG reductions from agricultural sources to come from offsets.[33] In the before mentioned legal challenge, the Petitioners argue that ARB violated Health & Safety Code §§ 38651(a) and (b) when ARB failed to include cost effective measures – other than offsets – for agricultural sources in the Scoping Plan. [34] Since there are feasible and cost-effective pollution controls available, including methane reductions from manure digesters, the Scoping Plan should have recommended such measures rather than relying on only offsets.[35] Including the entire agricultural sector only in offsets violates Health & Safety Code § 38570(b)(3), which requires the ARB to "maximize additional environmental benefits . . . for California." An offset program that only rewards agricultural sources for those projects that qualify for offsets, while forgoing feasible and cost-effective reductions that do not qualify for offsets, violates section 38570(b)(3).[36]

Further, by allowing allowance trading and offsets out of state, ARB is allowing the new jobs that will be created by investment in green technology to be created in other states or countries, rather than in California. In this economy, squandering opportunities to create investments and jobs within California is unthinkable, irresponsible, and contrary to the mandates of AB 32. AB 32 offers the promise of a new green economy in California and requires any market-based mechanism to maximize economic benefits for California. For the Board to consider adopting this regulation with

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associated with biomass production and combustion (December 9, 2010).

[31] ISOR p. II-5.

[32] ISOR, Appendix E, p. E-10.

[33] Agricultural operations may only provide offsets if the offsetting activity complies with Health & Safety Code § 38652(d).

[34] *Association of Irritated Residents, No. CPF-09-509562.*

[35] *See* pp. ARB033781, ARB 017922 of the Administrative Record in *Association of Irritated Residents v. California Air Resources Board*, No. CPF-09-509562 (San Francisco County Superior Court).

[36] By proposing granting offsets for manure digesters, ARB actually contradicts itself. In the Scoping Plan, ARB declined to require manure digesters as a direct regulation yet now proposes an offset protocol by which ARB concludes that reductions are both feasible and real, permanent, quantifiable, verifiable, and enforceable. ARB now demonstrates that direct regulation covering manure digesters should be required as feasible.

these offset provisions is irresponsible to the millions of Californians who could benefit from the investments and jobs lost to other states.

Lastly, the offsets provisions directly violate AB 32's requirement that ARB "direct public and private investment toward the most disadvantaged communities in California."[37] Offsets from out-of-state plainly violate this mandate. Linking California's trading program to the Western Climate Initiative could also contravene AB 32's requirement that greenhouse gas emission reductions achieved are enforceable by ARB.[38] ARB has no authority to enforce the obligations of out-of-state entities.

IV. ARB'S ANALYSIS OF ALTERNATIVES TO THE PROPOSED REGULATION VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

AB 32 requires "the state board [to] adopt greenhouse gas emission limits and emission reduction measures by regulation," which triggers the CEQA requirement for an Environmental Impact Report (EIR).[39] As a certified regulatory program, ARB discussed possible impacts in the form of a Functional Equivalent Document (FED) in lieu of an Environmental Impact Report, pursuant to Public Resources Code § 21080.5.

A. ARB failed to adequately analyze project alternatives in the Functional Equivalent Document.

Under CEQA, ARB must examine a reasonable range of alternatives to the proposed project that feasibly meet most of the project's basic objectives while avoiding or substantially reducing the significant effects of the project.[40] The selection of alternatives should foster informed decisionmaking and public participation.[41] CEQA also makes clear that the purpose of the alternatives analysis is to focus on alternatives that are capable of "avoiding or significantly lessening any significant effects of the project, even if those alternatives would impede to some degree the attainment of the project objectives, or would be more costly."[42] In evaluating alternatives, the ARB must include "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project."[43]

For purposes of developing and evaluating the proposed project and alternatives, ARB derived the following objectives from AB 32:[44]

1. Achieve technologically feasible and cost-effective aggregate reductions
2. Distribute allowances equitably
3. Avoid disproportionate impacts
4. Credit early action

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[37] H&S Code § 38565.

[38] H&S Code § 38562(d)(1).

[39] H&S Code § 38562(a).

[40] 14 California Code of Regulations (CCR) § 15126.6(a).

[41] 14 CCR § 15126.6(a).

[42] 14 CCR § 15126.6(b).

[43] 14 CCR § 15126.6(d).

[44] Functional Equivalent Document ("FED") at 365.

5. Complement existing air standards
6. Be cost-effective
7. Consider a wide range of public benefits
8. Minimize administrative burden
9. Minimize leakage
10. Weigh relative emissions
11. Achieve real emission reductions
12. Achieve reductions over existing regulation
13. Complement direct measures
14. Consider emissions impacts
15. Prevent increases in other emissions
16. Maximize co-benefits
17. Avoid duplication

Additional project objectives included in the Scoping Plan:
18. Establish declining cap
19. Reduce fossil fuel use
20. Link with partners
21. Design enforceable, amendable program
22. Ensure emissions reductions

Having articulated these objectives (notably, without regard to their accuracy, and to the statutory requirements in AB 32), ARB then presented a cursory, circular and results-oriented description of five alternatives to the proposed plan. The five alternatives ARB identified were: (1) no project, (2) implement only additional source-specific command-and-control regulations; (3) carbon fee; (4) California cap and trade program linked with a Federal cap and trade program; and (5) alternatives to specific cap and trade program design features.

1. No Project.

This Alternative comprises the bulk of the alternatives analysis. The section generally describes sector by sector the business as usual impacts compared to the proposed cap- and-trade regulation.[45] ARB concludes that absent the proposed cap and trade regulation, the goal of AB32 will not be attained.

2. Implement Only Additional Source-Specific Command-And-Control Regulations.

This alternative purports to consider implementation of source-specific emission limits by regulation. However, in its Executive Summary, ARB demonstrates its preference for cap and trade above all other forms of controls with an unsubstantiated conclusion that direct regulations cannot provide the same assurances for reductions that a cap and trade program because of an uncertainty in

[45] *See e.g.*, FED at 371.

emissions reductions caused by the diverse nature of many industrial processes and a lack of data.[46] This conclusion is not only nonsensical to justify the inclusion of these same diverse and data-poor industrial processes in a cap and trade program (under which all reductions must be real, permanent, quantifiable, verifiable, and enforceable) but is unsubstantiated, based only on the excuse that ARB does not have the data to properly regulate these industries.

In its analysis ARB acknowledges that command-and-control regulations "can take several forms."[47] However, instead of performing a meaningful analysis of any of the forms possible ARB "assumed that only regulated emission limits would be implemented" on sources (as opposed to technology).[48] As such, ARB failed to identify and analyze the specific command-and-control regulations which would be appropriate here. Instead ARB summarily states that the specifics necessary to conduct such analyses "would depend on the information that is learned in the future during the regulatory development process."[49]

And yet, prior to initiating any "regulatory development process," ARB identifies five objectives with which source-specific emission limits would not be likely to achieve in Table 6-1 on "Comparative Likelihood That Alternatives Achieve Project Objectives."[50] Table 6-1 ranks on a scale of high, medium, and low the likelihood that each alterative considered would be likely to achieve each of the 22 objectives ARB identified. Here, each of the "no or low likelihood to achieve objective" ratings received by the source-specific command-and-control regulation alternative pertained to objectives that were either not applicable to source-specific command-and-control regulations or not analyzed.[51]

First, stated objective two is to distribute allowances equitably. Under a source-specific emissions limit program there are no allowances to distribute and thus the objective is inapplicable here. However, the underlying intent of the specified objective appears is to ensure equitable treatment of entities. In this case that purpose is served in that there is an equitable distribution of zero allowances.

Stated objective five is to complement existing air standards. While Table 6-1 rates source-specific emissions limits as low here, nowhere else in the FED is the issue addressed. In fact, the brief program description on page 388 discusses how this alternative would "likely focus primarily on the industrial sector because the transportation, electricity and natural gas sectors are already extensively addressed..."[52] Given this cursory analysis, it appears that source-specific regulations would in fact be designed to complement existing air standards.

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[46] ISOR at IV-3,4.

[47] FED at 378.

[48] FED at 387-388.

[49] FED at 388.

[50] FED at 395.

[51] *Id.*

[52] FED at 388.

Stated objective nine is to "minimize leakage." However, in the objectives section ARB specifically notes that "command-and-control regulations can be designed to minimize or avoid leakage."[53] No further explanation as to how leakage is caused, or could be minimize under this alternative, other than to say that administrative burdens may increase, is provided.

Stated objective 18 is to establish a declining cap. This objective is either inapplicable, as source-specific emission limits envision no cap to begin with, or it is fulfilled by analogy. The intent of the objective is to "cover 85% of the state's GHG emissions in furtherance of California's mandate to reduce GHG emissions to 1990 levels by 2020."[54] Since there is no "cap" in source-specific regulations, the objective of a "declining cap" is not applicable. However, the intent of the objective is to continually lower emission levels and this intent could be fulfilled through a source specific regulatory scheme. In fact, the U.S. EPA regularly writes mobile source emission regulations (source-specific command-and-control regulations) that increase in stringency over time.

Lastly, stated objective 20 is to link with other Western Climate Initiative ("WCI") partners to create a regional market system. While Table 6-1 concludes there is no or a low likelihood of achieving this objective, there is no elucidating discussion as to why it is not possible. Generally, command-and-control regulations do not envision a market system; however, no aspect of such a program precludes regulatory schemes from linking together partners in some way.

In failing to fully envision, consider, and describe how source-specific emission limits could operate in California, ARB has not included sufficient information on source-specific emission limits "to allow meaningful evaluation, analysis and comparison with the proposed project."[55]

ARB preemptively rejects this alternative as "challenging,"[56] but acknowledges that "the certainty about avoiding localized increases in emissions could be an environmental advantage of this alternative."[57] This is a key advantage for environmental justice communities, and does not allow ARB to so quickly dismiss it in favor of a cap and trade program.

3. Carbon Fee.

ARB describes implementation of a carbon fee as similar to cap and trade in that both programs place a price on GHG emissions, which thereby provides an incentive for businesses and individuals to reduce their emissions.[58] Similarities between the two programs, include "reporting, monitoring, verification of covered entities' GHG emissions."[59] ARB states that the main difference

[53] FED at 389.
[54] FED at 376.
[55] 14 CCR § 15126.6(d).
[56] *Id*.
[57] FED at 390.
[58] *Id*.
[59] ISOR at IV-5.

between the programs is that implementing a carbon fee "provides price certainty for the covered entities" but lacks emission certainty.[60]

ARB's analysis of a carbon fee is fundamentally flawed in again failing to envision and analyze how the program would actually work. Thus, it fails to meet CEQA's requirement for "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project."[61]

Instead of developing a real alternative, ARB focuses on elements of the proposed cap and trade program which have already been developed and then unfairly compares the developed proposal with the mere title "carbon fee" absent a more developed program which would allow for a more reasoned analysis. For example, ARB acknowledges that the efficiency of a carbon fee could be enhanced by pairing it with "complementary approaches, such as performance standards," yet it "assume[s] that only a carbon fee would be implemented."[62] Also, ARB states that to avoid passing costs on to consumers, a system of offsets could be used, but it fails to consider the alternative with such a system and instead criticizes a carbon fee as passing costs onto consumers. Additionally, ARB finds that the potential for leakage is increased with a carbon fee as opposed to a cap and trade system, but fails to consider how to tailor fee levels to market influences, while at the same time stating that it can be done.[63]

In ARB's "Comparative Likelihood That Alternatives Achieve Project Objectives," Table 6-1, four objectives are identified as having a "no or low likelihood to achieve objective."[64] Stated objective six, to be cost-effective, is identified as not likely to be achieved. Nowhere in ARB's discussion of a carbon fee is cost effectiveness directly discussed. In fact, ARB notes so many potential similarities between cap and trade and a carbon fee, without mention of the apparent cost ineffectiveness associated with a carbon fee that one can only speculate as to how cap and trade has a high likelihood of cost effectiveness while a carbon fee has a low likelihood of cost effectiveness.

ARB ranks implementation of a carbon fee as unlikely to minimize leakage, in stated objective nine.[65] However, ARB's incomplete analysis failed to consider a carbon fee program that provides opportunities to tailor the fee level to market influences, while at the same time acknowledging that such mechanisms are possible and that they could decrease the potential for leakage.[66] Without conducting an analysis that fully considers what the likely implementation of a carbon fee program would include, ARB's conclusion is preemptive and arbitrary.

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[60] *See e.g.* ISOR at IV-5.

[61] 14 CCR § 15126.6(d).

[62] FED at 391.

[63] FED at 392.

[64] FED at 395.

[65] *Id*.

[66] FED at 392.

ARB's stated objective 18 is to establish a declining cap.[67] This objective is either inapplicable, as this implementation of a carbon fee envisions no cap to begin with, or it is fulfilled by analogy. The intent of the objective is to "cover 85% of the state's GHG emissions in furtherance of California's mandate to reduce GHG emissions to 1990 levels by 2020."[68] Since there is no "cap" in this vision of a carbon fee, the objective of a "declining cap" is not applicable. However, the intent of the objective is to continually lower emission levels and this intent could be fulfilled through increasing the carbon fee.

Lastly, stated objective 20 is to link with other WCI partners to create a regional market system.[69] While Table 6-1 concludes there to be no or a low likelihood of achieving this objective, there is no elucidating discussion as to why is it not possible for WCI partners to also adopt a carbon fee.

In failing to fully envision, consider, and describe how a carbon fee could operate in California, ARB has failed to provide sufficient information allow a meaningful evaluation of a carbon fee.

4. California Cap and Trade Program Linked With A Federal Cap and Trade Program.

ARB discusses the possibility of linking the proposed California cap and trade program to a Federal cap and trade program in the alternatives analysis sections of both the Initial Statement of Reasons and the Functional Equivalent Document. However, linking a California cap and trade program to a non-existent Federal program is not an alternative at all. In fact, it is not an alternative for two reasons. First, an alternative must be an alternative to the proposed program. Here, the proposed program is cap and trade. The alternative discussed is the exact same cap and trade program but with a Federal partner. Ergo cap and trade is not an alternative program to cap and trade, regardless of what partnerships are formed. Secondly, an alternative that has "no prospect...in the near term," contains no detail whatsoever, has envisioned no mechanisms for implementation, enforcement, etc., is not a reasonable alternative.[70] Thus, any linkage between a California cap and trade program and a Federal cap and trade program ought to have been discussed as an alternative cap and trade design feature and not under the guise of a legitimate cap and trade program alternative.

5. Alternatives to Specific Cap and Trade Program Design Features.

ARB discusses five design features possibly applicable to the proposed cap and trade program. Conspicuously absent from the alternatives analysis is an alternative that geographically limits offsets.

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[67] FED at 395.

[68] FED at 376.

[69] FED at 395.

[70] ISOR at IV-6; 14 CCR § 15126.6(a).

B. ARB failed to adequately analyze a range of project alternatives in the Functional Equivalent Document.

ARB did not satisfy the CEQA requirement to examine a reasonable range of alternatives. Under CEQA, ARB must examine a reasonable range of alternatives to the proposed project that feasibly meet most of the project's basic objectives while avoiding or substantially reducing the significant effects of the project.[71] CEQA does not supply the number of alternatives that are necessary for a meaningful analysis to take place, but it makes clear that a rule of reason governs requiring the EIR document to set forth "those alternatives necessary to permit a reasoned choice."[72]

In the ISOR, ARB purports to analyze four alternatives. In reality only two alternatives are presented. The "no project" alternative is not a real option in this case given the statutory obligation provided in AB 32. Second, linking a California cap and trade program to a non-existent Federal cap and trade program is not a reasonable alternative for the reasons stated above (see section IV.A.). Lastly, presenting program design features which do not alter the program itself is not a project alternative. For these reasons, a mere two alternatives were considered in the FED.

Given the size and implication of a statewide cap and trade program, as well as the broad range of possible avenues to attain the achievement of AB32, the rule of reason dictates that a reasonable range of alternatives exceed two. Therefore, ARB has failed to satisfy CEQA's requirement to examine a range of reasonable alternatives to the project.[73]

V. THE ANALYSIS OF OFFSETS PRODUCED BY MANURE DIGESTERS VIOLATES CEQA.

The FED finds no impact on air quality and no cumulative impact on air quality from implementation of the Compliance Offset Protocol for Manure Digesters. The FED concedes that engines combusting digester gas emit criteria and toxic emissions.[74] However, the FED assumes that *all* offset generating projects would be subject to Clean Air Act requirements and local land use decisions that would fully mitigate the criteria and toxic emissions. The FED fails to demonstrate that to be the case, or to require air pollution controls as a condition of receiving offsets. For the same reason, the FED has failed to adequately analyze the emissions of criteria and toxic air pollutants from offsets produced at dairy digesters when there is no reasonable basis to conclude that all such projects would be reduced to a less than significant level (there is no substantial evidence supporting this assumption).

[71] 14 CCR § 15126.6(a).

[72] 14 CCR § 15126.6(f).

[73] 14 CCR § 15126.6(a).

[74] FED at 239-240.

VI. CONCLUSION

For the reasons set forth above, the Board should not adopt the proposed cap and trade regulation. Instead, the undersigned organizations are asking the Board to consider the impact of the Superior Court's ruling in the pending Scoping Plan challenge, to prepare a proper foundational analysis for whether cap and trade is the maximum feasible and cost-effective reduction, to adopt more appropriate direct regulations and market-based compliance mechanisms than a cap and trade rule, and meaningfully analyze a reasonable range of alternatives in accordance with CEQA.

The Board should seize this opportunity to set California on a path that protects vulnerable communities, fosters green jobs, and stimulates a path to a green economy for California.

Sincerely,

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Association of Irritated Residents

Penny Newman
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