



July 28, 2011

Via electronic submittal

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

Re: Comments regarding the Supplement to the AB 32 Scoping Plan Functional Equivalent Document

Dear Chairman Nichols and Members of the California Air Resources Board:

On behalf of the Center for Biological Diversity, I am submitting these comments regarding the Supplement to the AB 32 Scoping Plan Functional Equivalent Document (“Supplement”). The Center for Biological Diversity is a non-profit environmental organization with more than 300,000 members and activists.

The Center for Biological Diversity strongly supports AB 32, the California Global Warming Solutions Act; the substantial progress made by the California Air Resources Board (“ARB”) in implementing AB 32; and the tremendous amount of work ARB staff have put into developing the AB 32 reduction measures. We strongly support the vast majority of reduction measures identified in the Proposed Scoping Plan, and ARB’s plans to move forward with these measures.

We understand that the revised FED for the Scoping Plan is not intended to serve as the analysis for cap-and-trade, that this is a program-level FED and that each of the measures included in the Scoping Plan the Board ultimately adopts is required to undergo its own, more detailed environmental analysis. However, as the Supplement focuses primarily on the decision to adopt a cap-and trade program as part of the AB 32, these comments to the Supplement will largely address that issue.

Unfortunately, the Supplement represents a missed opportunity for ARB to address the concerns raised by public interest organizations in their challenge to the 2008 Scoping Plan and FED. Presumably, ARB believes that this document is sufficiently different from the 2008 FED to be satisfy the Superior court finding “that the analysis of the alternatives identified in the FED was not sufficient for informed decision-making and public review under CEQA (*Association of Irrigated Residents, et al. v. California Air Resources Board, et al.*, San Francisco Superior Court, Case Number CPF-09-509562, May 20, 2011).” Supplement at 2. Whether or not the trial court ruling was stayed, the ruling provided ARB with a needed opportunity to fully consider options for increasing air quality co-benefits for low-income communities at risk of exposure to high levels of air pollution and providing greater certainty that real and permanent emissions reductions would be achieved.

If that is what ARB intended in the Supplement, it is not the impression that the reader gets from that document. Reading the Supplement, it is easy to sympathize with those organizations that feel the decision to include a cap-and-trade program was a predetermined conclusion and that the analysis was largely fixed around that conclusion.

The Supplement contains substantial portions of text developed specifically for the FED for the cap-and-trade program, which the Supplement analyzes only as a complete package with all of its attendant provisions for cost-containment, leakage reduction, and offset program. Compare this to the analysis of Alternative 3 (Direct Regulation), which states... “The analysis below shows that direct regulation of these sectors may be technologically feasible, but substantial additional analysis would need to be done to ensure that the APA and AB 32 requirements could be met.” Supplement at 64. This seems to say that although Alternative 3 (Direct Regulation) may be able to achieve reductions similar to those achieved by Alternative 2 (Cap-and-Trade), ARB is further along in developing the cap-and-trade rule, and therefore Alternative 2 is more robust.

At the same time, there is no analysis of the benefits and drawbacks associated with the individual design elements that have been developed as part of the cap-and-trade rule since the 2008 Scoping Plans and FED. Cap-and-trade design elements are described in Supplement at 46 to 51. As a result, neither Alternative 2 (Cap-and-Trade) nor Alternative 5 (Combined Strategies) considers, for example, a cap-and-trade program without offsets mechanisms, or a cap-and-trade program coupled with direct regulation of oil refineries. In general, ARB considers a highly developed cap-and-trade program—with a hard emissions cap and provisions to reduce leakage and compliance costs—and compares that with other alternatives in which such provisions are conspicuously absent. This downplays the fact that similar measures could be included in other alternatives. Specifically, Alternative 5 (Combined Strategies) could include versions of an emissions cap and provisions to reduce leakage and compliance costs. As a result, the decision analyzed in the Supplement is not how best to achieve the reductions identified, but whether or not to include the proposed cap-and-trade program. As such, the range of alternatives analyzed in the Supplement fails to “represent enough of a variation to allow informed decisionmaking,” the document violates CEQA. *Mann v. Cmty. Redev. Agency* (1991) 233 CA3d 1143, 1151.

The Supplement represents a missed opportunity to consider options to minimize criteria pollutants and maximize public health benefits.

Perhaps most relevant to the public health issues raised in the challenge to the 2008 Scoping Plan and FED, the Supplement fails to include an analysis and explicit comparison of the capacity of the various alternatives to reduce air pollution levels in communities adjacent to and downwind from emitters. Even if ARB expects all alternatives to produce reductions in criteria pollutants in at-risk communities, the alternatives could vary widely in the timing and magnitude of those reductions. However, only two criteria used in the alternatives analysis seem germane to this issue, and neither appears to address the differences in potential reductions. Objective 7 is defined as “Avoid disproportionate impacts – to ensure, to the extent feasible, that activities undertaken to comply with the regulations do not disproportionately impact low-income communities (HSC section 38562, subd. (b)(2)).” Supplement at 5. Objective 18 is defined as “Prevent increases in other pollutant emissions – to design, to the extent feasible, any market-based compliance mechanism to prevent any increase in the emissions of criteria air pollutants or toxic air contaminants (TACs) (HSC section 38570, subd. (b)(2)).” Supplement at 6. The Supplement appears to consider this issue only as a question of whether air pollution would increase. Under CEQA, the Supplement must consider a range of reasonable alternatives that would feasibly attain most of the objectives of the project while avoiding or substantially lessening its significant impacts, and must compare the relative merits of these alternatives. CEQA Guidelines § 15126.6(a).

In fact, the Supplement finds that air quality impacts may indeed be significant, but then dismisses any further analysis or consideration of policy options by declaring these impacts unavoidable. “Although localized air quality impacts resulting from compliance responses by covered entities and the development of offset credits related to Alternative 2 are highly unlikely, they cannot be entirely ruled out...To address the possibility of unanticipated localized air impacts caused by the cap-and-trade program, ARB would incorporate an adaptive management program into the alternative...Even with these considerations, ARB has taken a conservative approach by concluding that the remote possibility of localized air impacts for Alternative 2 would be considered potentially significant and unavoidable under CEQA.” Supplement at 53.

Furthermore, the analysis of co-pollutants appears to be based not on a comparison among alternatives but a comparison of each alternative to the background levels. That is, the Supplement describes the air quality impacts of each alternative only in the context of reduction from the baseline on a statewide basis. “Air quality impacts of Alternative 2 would be mostly less than significant and would also include beneficial reduction of co-pollutant emissions on a statewide basis.” Supplement at 51. In such an analysis, the potentially substantial differences among alternatives is washed out in individual comparison to a baseline level of pollution that may be stable or increasing. “All the action alternatives would create at least some benefits related to reduced GHG emissions, reduced regional criteria co-pollutants and TACs, and energy demand, compared to existing conditions.”

The comparison of alternatives’ likelihood of achieving project objectives fails to set forth quantitative, comparative criteria.

In order to reject an alternative as infeasible, the analysis must set forth adequate quantitative, comparative data to enable the public and decision-makers to reach a rational conclusion. *See, e.g., Save Round Valley Alliance*, 157 Cal. App. 4th at 1461-62; *Uphold Our Heritage*, 147 Cal. App. 4th at 600. However, the Supplement provides no criteria for how the alternatives were rated for their likelihood to achieve each project objective. Table 2.8-1, Supplement at 112, assigns ratings of high, medium, and low to each objective, but provides no criteria for those ratings. For example, are these ratings qualitative, quantitative, based on comparison to the highest score achieved by any alternative for each objective? Alternative 5 (Combined Strategies) differs from Alternative 2 (Cap-and-Trade) in its rating for only one objective—“Avoid duplication – to ensure that electricity and natural gas providers are not required to meet duplicative or inconsistent regulatory requirements HSC sections 38501(g) and 38561(a),” a criterion that is defined in the Supplement but not discussed. Alternative 3 (Direct Regulation) is rated as less likely than Alternative 2 (Cap-and-Trade) to achieve the objective of “Link with partners – to link, where feasible, with other Western Climate Initiative (WCI) partner programs to create a regional market system” a criterion that makes no sense when applied to an alternative that does not rely on a market system.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Brian Nowicki". The signature is written in a cursive, flowing style.

Brian Nowicki
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